IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

MONDAY, THE 3RD DAY OF AUGUST 2015/12TH SRAVANA, 1937

WP(C).No. 6083 of 2015 (I)

PETITIONER :

SALIM,S/O.ASANARU PILLAI, AGED 46 YEARS,
AJMI MANZIL, KAIRALINAGAR,
NO.141, KILIKPOLLOOR, KOLLAM.

BY ADV. SRI.K.S.MANU (PUNUKKONNOOR)

RESPONDENT(S):
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1. STATE BANK OF TRAVANCORE,
   STRESSED ASSETS RESOLUTION CENTRE, 2ND FLOOR,
   CHANDRASEKHARAN NAIR STADIUM, PALAYAM,
   VIKAS BHAVAN P.O., THIRUVANANTHAPURAM - 695 003,
   REPRESENTED BY ITS AUTHORISED OFFICER.

2. STATE BANK OF TRAVANCORE KESAVADASAPURAM BRANCH,
   KESAVADASAPURAM, THIRUVANANTHAPURAM,
   REPRESENTED BY ITS MANAGER.

R1 & R2 BY ADV. SRI.JAWAHAR JOSE

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 03-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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WP(C).No. 6083 of 2015 (I)

APPENDIX

PETITIONER(S)' EXHIBITS

P1- **TRUE CPY OF THE TITLE INVESTIGATION REPORT DATED 13.8.10**

P2- **TRUE COPY OF ORDER IN IA NO. 6392/14 IN OS NO.1125/24 DATED 4.11.14**

P3- **TRUE OCPY OF THE REPRESENTATION DTED 11.11.14**

P4- **TRUE COPY OF THE REPLY DATED 15.11.14**

P5- **TRUE COPY OF THE REPRESENTATION DATED 21.11.14**

P6- **TRUE OCPY OF THE LETTER DATED 25.11.14**

P7- **TRUE COPY OF THE REQUEST DATED 24.12.2014**

P8- **TRUE COPY OF HTE SALE NOTICE DATED 15.2.15**

P9- **TRUE COPY OFTHE ENCUMBRANCE CERTIFICATE DT 19.2.15**

RESPONDENT(S)' EXHIBITS

R1(A)- **COPY OF THE REGISTERED AGREEMENT EXECUTED BY THE OWNER OF SECURED ASSET (DR.PREMJITH.G.S) IN FAVOUR OF KERALA STATE FINANCIAL ENTERPRISES (KSFE)**

R1(B)- **COPY OF THE LETTER DATED 3/3/2015 STATE FINANCIAL ENTERPRISES (KSFE) INFORMING THAT THE CHITTY WAS CLOSED ON 16/11/20111**

R1(C)- **COPY OF THE PLAINT IN OS.NO.1125/2014 ON THE FILES OF THE PRINCIPAL MUNSIFFS COURT, NEYYATINKARA**

R1(D)- **COPY OF THE DECLARATION GIVEN BY DR.PREMJITH.G.S IN FAVOUR OF THE RESPONDENT BANK DATED 13/8/2010**

R1(E)- **COPY OF THE EQUITABLE MORTGAGE EXTENSION DEED DATED 24/12/2011**

/TRUE COPY/

P.A.TO JUDGE

sts

A. MUHAMED MUSTAQUE, J.

W.P.(C) No. 6083 of 2015

Dated this the 3rd day of August, 2015

J U D G M E N T

The petitioner, an auction purchaser from the bank under SARFAESI proceedings has approached this Court challenging forfeiture of the amount deposited by him.

2. The auction was held on 7.11.2014. The petitioner remitted 25% of the bid amount, i.e.Rs.22,50,500/-. The petitioner did not remit the balance amount within 15 days. The bank thereupon forfeited the amount. It is challenging the above action, the petitioner has approached this Court.

3. The issue in this case is revolved around Rule 9 (5) of the SARFAESI interest Enforcement Act,2002. Rule 9(5) provides as follows:

> "In default of payment within the period mentioned in sub-rule (4) the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold."

4. The case of the bank is that the petitioner ought to have deposited the balance amount of Rs. 67,51,500/- on or before 22.11.2014. Therefore, the petitioner having failed to the

deposit the amount in time, the bank is entitled to forfeit the amount in terms of Rule 9(5) of the SARFAESI Act.

5. The learned Counsel for the bank fairly conceded that the bank sold the property by subsequent auction on 31.7.2015 and recovered the entire amount due from the borrower. It is further submitted that the petitioner's amount has been kept in a separate account because of the pendency of the writ petition. The learned Counsel for the bank when raised a specific question as to the appropriation of the amount, submitted that in the event the entire amount could not be recovered from the borrower, the amount will be adjusted against the borrowers liability.

6. The learned Counsel for the petitioner would however submits that forfeiture is the nature of penalty and without any due process, such penal provision cannot be invoked.

7. It is to be noted that Rule (9) (5) is in pari materia of Rule 58 of II Schedule of Income Tax Act wherein it is provided as follows:

> "In default of payment within the period mentioned in the preceding rule, the deposit may, if the Tax Recovery Officer thinks fit, after defraying the expenses of the sale,

> be forfeited to the Government, and the property shall be resold, and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may subsequently be sold.

8. The appropriation by the State and appropriation by the bank has to be differentiated. The State holding the money as a public trustee, and it expends the money for public. However, the banking activity is purely a commercial activity, nowhere it provides that the bank can appropriate the money. Though as per the provisions the amount can be forfeited, however the manner in which money can be appropriated is totally absent in the provision. The provision is vague. Though the petitioner has not challenged the validity of the Rule, nevertheless, it is incumbent for the bank to that state the manner in which it has to be appropriated. **The Rose valley Real Estate and Construction Ltd v. United Commercial Bank and Another** [2008 KHC 7648] the Gouhati High Court held that provision is punitive in nature and not compensatory. Therefore, forfeiture would arise only when procedure is observed before forfeiture and stating reasons for forfeiture. Mere default would not entail the forfeiture of the amount. It

must be established that the auction purchaser has defaulted in making deposit of the amount. Mere non-payment of the amount within time cannot be treated as default unless it is attributable to him. Thus forfeiture without show cause to default purchaser is illegal.

9. In view of the fact that the property has been subsequently sold and the bank has recovered the entire amount, the retention of the amount would amount to unjust enrichment. Therefore, taking of over all facts and circumstances, this Court is of the view that forfeiture in such circumstances is illegal and unsustainable and the writ petition is allowed. The respondent bank is hereby directed to release the Rs.22,50,500/- within two weeks on the production of the copy of the judgment along with interest if any accrued.

The writ petition is disposed of as above.

Sd/-
A. MUHAMED MUSTAQUE,
JUDGE

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