

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

WEDNESDAY, THE 18TH DAY OF MAY 2022 / 28TH VAISAKHA, 1944

WP(C) NO. 27485 OF 2021

PETITIONER:

E.K.RAJAN,
S/O.KRISHNANKUTTY,
ENCHAKKAL HOUSE,
KOLAZHI P.O.,
THRISSUR-680 010.

BY ADV N.SASI

RESPONDENT:

THE AUTHORIZED OFFICER,
CANARA BANK, ARM BRANCH,
2ND FLOOR, CANARA BANK BUILDING,
CHITTOOR ROAD, ERNAKULAM,
KOCHI-682 016.

BY ADVS.

SRI.SAJU N.A.

SMT.G.LEKHA

ADV.P.J.FLONY

SMT.S.AMBILY

UMA.G.KRISHNAN

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
31.03.2022, THE COURT ON 18.05.2022 DELIVERED THE FOLLOWING:

"C . R . "

BECHU KURIAN THOMAS, J.

W.P.(C) No.27485 of 2021

Dated this the 18th day of May, 2022

JUDGMENT

Petitioner challenges a sale notice issued under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the Act').

2. Petitioner is conducting a business establishment by name M/s Scientific Alfa. He had availed a cash credit facility of Rs.3,00,00,000/- in the year 2015 from the respondent and a security interest was created over his property of 6.57 Ares and a residential building. Due to default in repayment, the loan account was declared as NPA and a notice under section 13(2) of the Act was issued on 23.01.2018. Subsequently, possession of the property was taken over under section 13(4) of the Act on 01.09.2018. According to the petitioner, without considering the genuine attempts

of the petitioner to clear the loan, the respondent proceeded to initiate steps under the Act and published a notice of sale dated 19.11.2021 in the Mathrubhumi daily proposing to auction the property on 08.12.2021. Petitioner further contended that the sale notice was not issued to the petitioner till the date of filing of this writ petition and instead, petitioner requested the respondent for permission to sell the property to a third party under a private treaty as per his letter dated 27.11.2021, which was acknowledged by the respondent on 29.11.2021. Since the bank did not respond to the request of the petitioner, and in the meantime, they were attempting to proceed with the sale of the property, this writ petition was preferred.

3. A counter affidavit has been filed by the respondent stating that a credit facility was granted to the petitioner in the year 2015 to the extent of Rs.3 Crores and two properties were mortgaged with the bank consisting of 6.67 Ares of land in Kolazhi Village along with two buildings and another 2.92 Ares in Thrissur Village consisting of one building. It was further pleaded by the respondent that the demand notice, and other notices issued to the petitioner, were in compliance with the law and that there was never any attempt on the

part of the petitioner to settle the dues. Respondent further contended that petitioner has been attempting to take advantage of the pandemic, disregarding the fact that the loan account of the petitioner was declared as an NPA as early as on 01.12.2017. It was also pointed out that the respondent had filed O.A. No.8 of 2021 before the Debts Recovery Tribunal-II, Ernakulam and that neither the writ petitioner nor the guarantors had appeared even after service of notice. Respondent further pleaded that till date petitioner had never raised any objection against the measures taken by the bank and as on 30.11.2020 an amount of Rs.5,55,14,934/- was liable to be recovered from the petitioner, as claimed in the original application and that it was in such circumstances that the proceedings under section 14 of the Act were initiated. Respondent also averred that when the Advocate Commissioner issued notice for taking possession of the property, the son of the petitioner filed W.P.(C) No.20187 of 2021, which was dismissed by this Court on 26.10.2021. Respondent also pleaded that the allegation of the petitioner that he had not received the sale notice was incorrect, since service was completed on 23.11.2021 and this being the second attempt to sell the property, all procedures were carried out in

accordance with law.

4. It was further averred that the alleged private treaty is only an imagination of the petitioner and that no genuine proposal was produced to show the bonafides of such a statement. Respondent also pleaded that petitioner failed to comply with the direction of this Court to deposit 25% of the reserve price before the date of sale and that the sale scheduled on 08.12.2021 took place and the property of 6.57 Ares along with two residential buildings situated at Kolazhy Village in Thrissur District was auctioned for an amount of Rs.1,06,25,000/-. However, the sale has not been confirmed due to the direction of this Court. According to the respondent bank, an amount of more than Rs.6 Crores is due from the petitioner and that the sale is required to be confirmed to recover the liability due from the petitioner.

5. The respondent further pleaded that the notice of sale dated 17-11-2021 was published in two dailies and the same was affixed on the property also. The respondent also denied the contention of the petitioner that the sale notice was not received by him till the date of filing of the writ petition since as per Ext.R(d), the notice was served on the petitioner on 23-11-2021. The respondent thus sought

for dismissal of the writ petition.

6. I have heard the arguments of Sri.N.Sasi, the learned counsel for the petitioner and Sri. N.A.Saju, the learned counsel for the respondent.

7. Sri N.Sasi, the learned counsel for the petitioner vehemently contended that though the petitioner could not comply with the direction of this Court dated 02-12-2021, the sale held on 08-12-2021 was contrary to law, as, even going by the records produced by the respondent, the notice of sale was served on the petitioner only on 23-11-2021. The statutory requirement of 15 days is therefore not complied with and hence, according to the learned counsel, the sale is liable to be set aside.

8. Sri. Saju N.A., the learned counsel for the respondent on the other hand contended that the sale of the secured asset was carried out in accordance with law on 08-12-2021 and the 15 day notice period was also satisfied in the instant case. He further submitted that the petitioner had misled this Court by pleading that notice was not served on him while Ext.R(d) clearly showed that notice was served on the petitioner on 23-11-2021. It was further argued that the notice was published in two newspaper dailies on 19-11-2021 and

was also affixed on the property, thereby deeming valid service of notice. The learned counsel for respondent further submitted that the petitioner had not come with clean hands and in fact had been hoodwinking the respondent for the last several years under the guise of settling the entire liability and that the discretionary remedy under Article 226 ought not to be exercised in favour of the petitioner. The learned counsel also contended that the sanctity of the auction held on 08-12-2021 will be defeated if this Court interfered with the sale and that it was after several attempts that a sale could finally fructify. The learned counsel also relied upon the decision in **S. Karthik & Others v. N. Subhash Chand Jain and Others** (AIR 2021 SC 4559).

9. At the time this writ petition was filed, the Debts Recovery Tribunal, Ernakulam, was not functioning and hence the challenge against the notice of sale was entertained by this Court. Persons aggrieved by the proceedings initiated for enforcement of security interest had no forum to approach, and it was in such circumstances that this Court entertained this writ petition. (See the decision in **Annam Steels (P) Ltd. (M/s) and Others v. M/s Canara Bank Ltd. and Another** [2022 (1) KHC 536]).

10. It is relevant to mention at this juncture that on the date of admission, this Court proceeded to direct the petitioner to deposit an amount of Rs.1,08,00,000/- on or before 5 PM on 6-12-2021 as a measure of testing the bonafides of the claim of the petitioner that he is ready to bring a purchaser under a private treaty, if offered. It was further directed that, notwithstanding the above direction to deposit, the bank was permitted to accept bids, if any, for the auction. On 07-12-2021, this Court directed that the respondent shall be free to proceed with the sale, however, confirmation of the sale was directed to be made only after obtaining further orders from this Court.

11. As submitted by the learned counsel for the respondent, pursuant to the orders of this Court, the auction sale took place on 08-12-2021 but the same has not been confirmed, in deference to the directions of this Court.

12. The sole point to be considered is whether the notice of sale is legally valid or not. If the notice is valid, necessarily the sale is liable to be confirmed, especially since petitioner failed to satisfy the test of bonafides offered to him.

13. In order to appreciate the alleged invalidity of the notice of sale, it is necessary to refer to Rule 9 of Security Interest

(Enforcement) Rules 2002, (for short the Rules) which deals with the time of sale, issue of sale certificate and delivery of possession etc.

Rule 9(1) reads as follows:

R.9(1). *Time of sale, issue of sale certificate and delivery of possession etc.* *No sale of immovable property under these rules, in first instance shall take place before the expiry of 30 days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) of rule 8 or notice of sale has been served to the borrower:*

Provided further that if sale of immovable property by any one of the methods specified by sub-rule (5) of rule 8 fails and sale is required to be conducted again, the authorised officer shall serve, affix and publish notice of sale of not less than 15 days to the borrower, for any subsequent sale.

14. The above extracted statutory provision was brought in by means of substitution with effect from 4-11-2016. The statutory provision as it existed prior to the aforementioned substitution was interpreted by the Supreme Court in **Mathew Varghese v. M.Amritha Kumar and Others** [(2014) 5 SCC 610] and held that “*In other words, once the sale does not take place pursuant to a notice issued under Rules 8 and 9, read along with S.13(8) for which the entire blame cannot be thrown on the borrower, it is imperative that for effecting the sale, the procedure prescribed above will have to be followed afresh, as the notice issued*

earlier would lapse. In that respect, the only other provision to be noted is sub-rule (8) of R.8 as per which sale by any method other than public auction or public tender can be on such terms as may be settled between the parties in writing. As far as sub-rule (8) is concerned, the parties referred to can only relate to the secured creditor and the borrower. It is, therefore, imperative that for the sale to be effected under S.13(8), the procedure prescribed under R.8 read along with 9(1) has to be necessarily followed.”

15. While rendering the judgement in **Mathew Varghese case**, the provisions of section 13(8) of the Act gave power to the borrower to redeem the property till the last minute before the sale takes place. It is after noticing the aforesaid statutory right that the Supreme Court held that there must be 30 days' clear notice before the sale takes place. However, in 2016 an amendment was brought to section 13(8) of the Act and the right to redeem the property was made available only till the date of publication of notice for public auction (see the decision of this Court in **Sree Gokulam Chit and Finance Co. Pvt. Ltd. v. Emil and Eric Hospitality Services and Others** (2021 (6) KLT 673). The said amendment was brought into force by Act 44 of 2016 with effect from 01-09-2016. In spite of the aforesaid amendment having been brought into effect from the date as aforementioned, Rule 9 of the Rules, when amended with effect

from 04-11-2016, still stipulated that there must be a 30 days clear notice for the sale at the first instance and also a notice of not less than 15 days for subsequent sales. The intention is clear that the notice of 30 days in the first instance and the notice of 15 days for subsequent sales cannot be tampered with.

16. In the instant case on a perusal of Ext.R(d) acknowledgement card, it can be assimilated that the notice of sale was served on the petitioner only on 23-11-2021. The sale that took place on 08-12-2021 was thus on the 15th day of service of notice. The statutory requirement of 15 days clear notice or “notice of not less than 15 days” is not seen to be satisfied. The situation would be different if the delay in service of notice was on account of the petitioner’s default or that petitioner evaded the service of notice till 23-11-2021. There is no pleading in the counter affidavit of the respondent that the petitioner had evaded service of notice till 23-11-2021. It is also not pleaded by the respondent that notice was issued to the petitioner sufficiently early to satisfy the statutory requirement of 15 days’ clear notice.

17. A reading of the proviso to Rule 9(1) of the Rules makes it explicit that the authorised officer must serve, affix and publish the

notice of sale of not less than 15 days to the borrower, for any subsequent sale. The word 'serve' relates to personal service of notice, affixture relates to the notice being affixed on the property and the publication relates to the publication of notice in the newspaper dailies. The conjunction 'and' employed in the proviso also indicate the mandatory nature of all three methods of notice. Further, in spite of the amendment to section 13(8) of the Act, the proviso to Rule 9(1) mandates the three methods of serve, affix and publish the notice to be carried out, with 15 days clear notice. In the instant case, there is a failure on the part of the respondent to serve notice of not less than 15 days upon the petitioner. Therefore the notice of sale is bad in law. Ext.P3 and the consequent sale are therefore liable to be set aside.

18. The decision in **S. Karthik & Others v. N. Subhash Chand Jain and Others** (AIR 2021 SC 4559) is clearly distinguishable in law as well as on facts. In the said decision, the Supreme Court was considering a case of sale that took place in 2012 in which the proviso to Rule 9(1) was not in existence. As the law then stood, the notice of sale required only 30 days notice and there was no reference to such a notice period for any subsequent sales. Further,

factually, the borrower, in that case, had managed to delay the conduct of sale by methods solely attributable to the borrower. It was in such circumstances, that the Court held that there was no necessity to provide 30 days' notice for the second sale. In the instant case, the proviso to Rule 9(1) of the Rules incorporated in 2016 mandates notice of not less than 15 days to be served on the borrower for subsequent sales. Thus the said decision is inapplicable to the facts of the present case.

19. Though the learned counsel for the respondent had contended that the petitioner had failed to deposit the amount equivalent to 25% of the reserve price on or before 5 PM on 06-12-2021, as directed in the order dated 02-12-2021, I am of the view that the failure to deposit the said amount cannot be held against the petitioner in the peculiar nature of the circumstances that has arisen in the instant case. The aforementioned direction was only to test the bonafides of the petitioner. Even though petitioner failed to prove his bonafides regarding the offer of a private treaty, since the very edifice on which the sale was held is faulty, as found in the preceding discussion, petitioner's failure to prove his bonafides of the offer of a private treaty cannot be held against him.

20. In view of the above, this Court is of the considered view that the notice of sale having not been served in accordance with law, the same is liable to be quashed. Accordingly, I set aside Ext.P3 notice of sale and allow this writ petition.

sd/-

BECHU KURIAN THOMAS
JUDGE

vps

APPENDIX OF WP(C) 27485/2021

PETITIONER'S/S' EXHIBITS

- EXHIBIT P1** TRUE COPY OF THE DEMAND NOTICE DATED 23.01.2018 ISSUED BY THE RESPONDENT.
- EXHIBIT P2** TRUE COPY OF THE POSSESSION NOTICE DATED 01.09.2018 ISSUED BY THE RESPONDENT.
- EXHIBIT P3** TRUE COPY OF THE SALE NOTICE PUBLISHED IN MATHRUBHUMI DAILY DATED 19.11.2021.
- EXHIBIT P4** TRUE COPY OF THE LETTER DATED 27.11.2021 FOR PRIVATE TREATY ISSUED BY THE PETITIONER TO THE RESPONDENT.

RESPONDENT'S/S' EXHIBITS

- EXHIBIT R(a)** TRUE COPY OF THE WRIT PETITION NO.20187/2021 DATED 23/09/2021
- EXHIBIT R(b)** TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE RESPONDENT IN WRIT PETITION NO.20187/2021 DATED 12/10/2021
- EXHIBIT R(c)** TRUE COPY OF THE JUDGMENT IN WRIT PETITION NO.20187/2021 DATED 26/10/2021
- EXHIBIT R(d)** TRUE COPY OF ACKNOWLEDGEMENT CARD EVIDENCING THE COMPLETION OF SERVICE ON 23/11/2021 UPON THE PETITIONER
- EXHIBIT R(e)** TRUE COPY OF THE PUBLICATION OF SALE NOTICE DATED 17/11/2021 IN NEWS PAPER
- EXHIBIT R(f)** TRUE COPY OF PHOTOGRAPH SHOWING AFFIXTURE OF SALE NOTICE DATED 17/11/2021
- EXHIBIT R(g)** TRUE COPY OF THE VALUATION FOR THE PROPERTY DATED 28.07.2021