IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.8.2017 & PRONOUNCED ON : 11/8/2017

CORAM :

THE HONOURABLE MR.JUSTICE NOOTY.RAMAMOHANA RAO
AND
THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

ORIGINAL SIDE APPEAL NOS.76 AND 77 OF 2017 & CMP.NO.5387 OF 2017

M.Dhanalakshmi ...Appellant in OSA.Nos.76 &77/2017/ Defendant in C.S.590/2002 plaintiff Tr.C.S.No.933 of 2002

Vs

1.Vasundhara ...Sole Respt.in OSA.No.76/2017 & R2 in OSA.No.77 of 2017/ Plaintiff C.S.590 of 2002 & 2nd Defendant Tr.C.S.933 of 2002

2.Park Town Benefit Fund Ltd.,
Kodambakkam Branch,
Kodambakkam, Chennai-24.

3.M/s.Vamana Auctioneers,
Periamet, Chennai-3. ...R1 & R3 in OSA.No.77/2017/ Defendant 1 & 3 in Tr.C.S.No.933 of 2002

APPEALS under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent against the common judgment and decree dated 22.9.2016 made in C.S.No.590 and Tr.C.S.No.933 of 2002.

C.S.No.590 of 2002:-Civil Suit praying this Hon'ble Court to pass a Judgment and decree in favour of the plaintiff.

a) Directing the defendant to vacate and deliver vacant possession of the schedule 'B' property, to the plaintiff.

b) for permanent injunction restraining the defendant or her men or servants or agents or any one acting on her behalf from in any way interfering with the plaintiff's peaceful possession and enjoyment of the schedule 'A' property.

c)directing the defendant to pay a sum of Rs.75,000/- towards damager for wrongful use and occupation of the suit schedule 'B' property.

d) directing the defendant to pay the future damage for wrongful use and occupation of schedule 'B' property at Rs.25,000/- p.m. from this date till the date of handing over date till the date of handing over of possession of same to the plaintiff.

e) for costs of this suit.

Tr.C.S.No.933 of 2002:- Plaint filed under Order IV rule 1 CPC r/w section 26 cpc praying for a Judgment and decree against the defendants for the following.

a) to declare that the auction sale held on 28.03.2002 by the third defendant in respect of the property bearing door No.3, Balaji Avenue 1st Street, Thirumalai Pillai Road, T.Nagar, Chennai-17 confirmed by the first defendant in favour of the second defendant in respect of the said property which is morefully described in the schedule here under in null and void.

b) to grant permanant injunction restraining the first defendant or their men, agent, servants, subordinate or anyone under or through them from executing sale deed in respect of property bearing door No.3, Balaji Avenue 1st street, Thirumalai Pillai Road, T.Nagar, Chennai-17 morefully described the schedule hereunder.

c) to direct the defendants to pay the costs of the suit.

For Appellant in both OSAs : Mr.R.Thiagarajan
For Respondent-1 in OSA.No.
76 of 2017 &
for R2 OSA 77/17 : Mr.S.R.Rajagopal

COMMON JUDGMENT

NOOTY.RAMAMOHANA RAO,J

Both these original side appeals are directed against the common judgment rendered by the learned Single Judge on 22.9.2016 in C.S.Nos.590 of 2002 and Tr.C.S.No.933 of 2002. The learned Single Judge decreed C.S. No.590 of 2002 as prayed for and dismissed Tr.C.S.No.933 of 2002.

2. The appellant herein instituted O.S.No.2216 of 2002 on the file of the City Civil Court, Chennai praying for a decree

and judgment to be passed in the following terms :

"i). To declare that the auction sale held on 28.3.2002 by the third defendant is null and void in respect of the property bearing door No.3, Balaji Avenue 1st Street, Thirumalai Pillai Road, T.Nagar, Chennai-600017 confirmed by the first defendant in favour of the second defendant in respect of the said property which is more fully described in the schedule hereunder;

ii). To grant permanent injunction restraining the first defendant or their men, agents, servants, subordinates or anyone under or through them from executing sale deed in respect of the property bearing door No.3, Balaji Avenue 1st Street, Thirumalai Pillai Road, T.Nagar, Chennai-17 more fully described in the schedule hereunder;

iii). to direct the defendants to pay the costs of this suit;

iv) to pass such further or other order or orders as to this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice".

3. To the said suit, the appellant has impleaded

(i) Park Town Benefit Fund Limited, Kodambakkam Branch;

(ii) M/s.V.Vasanta (instead of describing her as Vasundhara); and

(iii) M/s.Vamana Auctioneers,

as defendants.

4. Whereas one Smt.Vasundhara instituted C.S.No.590 of 2002 on the file of the Original Side of this Court impleading Smt.Dhanalakshmi - the appellant herein and the plaintiff in O.S.No.2216 of 2002 on the file of the City Civil Court, Chennai as the sole defendant. C.S.No.590 of 2002 prayed for the following reliefs :

"a. directing the defendant to vacate and deliver vacant possession of the schedule B property to the plaintiff;

b. for permanent injunction restraining the defendant or her men or servants or agents or any one acting on her behalf from in any way interfering with the plaintiff's peaceful possession and enjoyment of the schedule A property;

c. directing the defendant to pay a sum of Rs.75,000/- towards damages for wrongful use and occupation of the suit schedule B property;

d. directing the defendant to pay the future damages for wrongful use and occupation of schedule B property at Rs.25,000/- p.m. from this date till the date of handing over of possession of same to the plaintiff; and

e. for costs of the suit.".

5. O.S.No.2216 of 2002 on the file of the City Civil Court, Chennai has been transferred to this Court to be tried along with C.S.No.590 of 2002 in view of the common and inter-connected issues arising in both the suits and that is how it is renumbered as Tr.C.S.No.933 of 2002.

6. On 22.9.2011, the following issues have been settled in C.S.No.590 of 2002 :

"1. Whether the plaintiff has acquired a valid title under sale deed dated 16.5.2002 bearing document No.1117/2002 on the file of the Sub-Registrar, T.Nagar, pursuant to the acceptance of the highest bid made by him in the auction held on 28.3.2002 at the instance of the mortgages M/s.Park Town Benefit Fund Limited. ?

2. Whether the defendant has trespassed into the suit B schedule property as alleged in the plaint?

3. Whether the plaintiff is entitled to a decree against the defendant to vacate and deliver vacant possession of the plaint B schedule property?

4. Whether the plaintiff is entitled to the relief of permanent injunction from in any way interfering with the plaintiff's peaceful possession and enjoyment of the plaint A schedule property ?

5. Whether the plaintiff is entitled to recover a sum of Rs.75,000/- towards damages for use and occupation till the date of filing of the suit ?

6. Whether the plaintiff is entitled to future damages for use and occupation at the rate of Rs.25,000/- per month ? and

7. To what other relief the plaintiff is entitled? "

7. On the same date, the following issues have been settled in Tr.C.S. No.933 of 2002 :

"1. Whether the plaintiff was the highest bidder in the auction held on

28.3.2002 ?

2. Whether the auctioneer has improperly rejected the highest bid of the plaintiff and accepted a lower bid made by the 2nd defendant and whether the auction sale is liable to be set aside ?

3. Whether the plaintiff is entitled to a declaration that the auction sale held on 28.3.2002 by the 3rd defendant in respect of the suit property, which was confirmed by the first defendant in favour of the second defendant, is null and void ?

4. Whether the plaintiff is entitled to a permanent injunction against the first defendant not to execute a sale deed in respect of the suit property ? and

5. To what other relief, the plaintiff is entitled ?"

8. In view of the relief prayed for in Tr.C.S.No.933 of 2002 and in case the same is granted, the claim made by Smt.Vasundhara in C.S.No.590 of 2002 may not survive for serious consideration. It is, therefore, only appropriate that the claim in Tr.C.S.No.933 of 2002, from out of which, O.S.A.No.77 of 2017 arises, is considered in detail first.

9. Smt.M.Dhanalakshmi - the plaintiff in Tr.C.S.No.933 of 2002 was examined as P.W.1 and she also got marked Ex.P.1 to Ex.P.12. Smt.Vasundhara - the plaintiff in C.S.No.590 of 2002 was examined as R.W.1 and she got marked Ex.D1 to Ex.D4.

10. The plaintiff in Tr.C.S.No.933 of 2002 has set up her case as follows:

She is one of the bidders in the auction sale, which was held on 28.3.2002, for the suit schedule property at door No.3, Balaji Avenue 1st Street, Thirumalai Pillai Road, T.Nagar, Chennai-17. As per the conditions of sale published in the auction sale notice, she deposited a sum of Rs.5,000/- as auction deposit for the suit property [bearing door No.3, Balaji Avenue 1st Street, Thirumalai Pillai Road, T.Nagar, Chennai-17], fully described in the schedule appended to the plaint when the said property was put up for auction sale by the first defendant benefit fund to realize the debt due to it. The third respondent namely M/s.Vamana Auctioneers conducted the auction of the said property on 28.3.2002 at 11.45 AM and the appellant herein and the second defendant - plaintiff in C.S.No.590 of 2002 hotly and vigorously contested the auction. The appellant has emerged as the highest bidder, as she offered Rs.47 lakhs and the second defendant - plaintiff in C.S.No.590 of 2002, who is a co-owner's wife of the property in question, offered a sum of Rs.45 lakhs only. The first defendant in Tr.C.S.No.933 of 2002, overlooking the plaintiff's bid amount at Rs.47 lakhs, declared the second defendant - plaintiff in C.S.No.590 of 2002 as a successful bidder and hence, the auction sale is illegal, immoral and unlawful and that in spite of the plaintiff's protest, the first defendant confirmed the bid of the second defendant and the auction came to an end thus.

11. The appellant would further urge that the auction sale held on 28.3.2002 is opposed to all principles of justice and law and the first and second defendants, with a view to defeat the interests of the appellant and ignoring the highest bid offered by the appellant, played a huge fraud and irregularity in conducting the auction sale. One K.V.Kandasamy also participated in the above auction by depositing a sum of Rs.5,000/- and also witnessed the appellant's offer of Rs.47 lakhs. The said K.V.Kandasamy also questioned the illegality and collusion of defendants 1 and 2. However, the defendants have not bothered in any manner. Therefore, the plaintiff issued a legal notice bringing out that the auction sale held on 28.3.2002 is illegal and void and hence, left with no other alternative, she instituted the civil suit.

12. It will be further appropriate to notice that the documents filed along with the plaint under Order VII Rule 14(1) of the Civil Procedure Code included :

(i) publication in the newspaper Dinathanthi about the auction;
(ii) the auction sale notice;
(iii) the receipt issued by the third defendant;
(iv) the receipt issued by the third defendant;
(v) affidavit of K.V.Kandasamy;
(vi) legal notice sent by the plaintiff on 28.3.2002; and
(vii) the acknowledgment thereof.

13. It is significant to note that two receipts said to have been passed on by the third defendant in the suit have been noted in the list of documents to be presented along with the plaint. But however, when we examine Ex.P.1 to Ex.P.12, we do not find the two receipts said to have been issued by the third defendant mentioned in the plaint in Tr.C.S.No.933 of 2002 finding a place amongst those 12 documents.

14. Ex.P.1 is a copy of registered sale document bearing No.1975 dated 11.7.1968 for tracing the title to the property in the hands of the original owner Smt.Kalyani Iyer. Ex.P.2 and Ex.P.3 are registered mortgage deeds bearing doc. No.50 of 1994 dated 13.1.1994 and doc.No. 2568 of 1995 dated 29.11.1995 executed by the original owner in favour of the first defendant Benefit Fund. Ex.P.4 is a telephone registration slip cum receipt furnished by the BSNL on 01.6.2001. Ex.P.5 is a letter addressed by the plaintiff to Chennai Telephones on 25.6.2001. Ex.P.6 comprises of a series of 12 promissory notes said to have been executed by Sri.C.Srinivasan on 10.12.2001. Ex.P.7 is a bimonthly bill furnished by Chennai Telephones dated 10.12.2001 for the months of October and November 2001. Ex.P.8 is again a

series of 12 cheques drawn by the proprietor of Kalyani Outdoor Unit. Ex.P.9 is a registered sale deed bearing doc.No.1117 of 2002 dated 16.5.2002. Ex.P.10 and Ex.P.11 are the receipts dated 09.7.2002 with regard to doc.Nos. 1495 and 1496 of 2002. Doc.Nos.1495 and 1496 of 2002 are copies of the two mortgage deeds executed by Smt.Kalyani Iyer, which are marked as Ex.P.2 and Ex.P.3. Ex.P.12 is the encumbrance certificate dated 09.9.2005. Those two receipts said to have been enclosed and filed along with the plaint in O.S.No.2216 of 2002 (Tr.C.S.No.933 of 2002) are not exhibited before the Court. Similarly, the affidavit said to have been given by Sri.K.V.Kandasamy and said to have been filed along with the said suit, has also not been exhibited.

15. The first defendant in O.S.No.2216 of 2002 filed the written statement. In paragraph 3 of the written statement, the first defendant admitted that the suit property was auctioned on 28.3.2002 and that the plaintiff deposited a sum of Rs.5,000/- to participate in the said auction. However, the next statement reads as under :

> "But, it is false to allege that the plaintiff and the second defendant had hotly contested the auction. The fact is that the plaintiff and one Thiru.Kandaswamy, who had also deposited Rs.5,000/- for the purpose, did not at all raise their voice nor did they participated in the auction. On this sole ground, the entire suit is liable to be dismissed with compensatory costs. This defendant denies the allegation that the plaintiff offered a sum of Rs.47 lakhs as her bid."

16. In paragraph 4 of the same written statement, the first defendant has averred as under :

> "Here it is to be pointed out that the property belonged to Tmt.Kalyani Iyer and others, who mortgaged the property and since there was huge dues, the property was brought to auction sale. When the mortgagors have left a very huge amount as due, there is no point in settling the property for a lesser price viz. for Rs.45 lakh if really the plaintiff offered Rs.47 lakh. Also, the third defendant is entitled for commission based on the auction price and there is no necessity for the third defendant to confirm the auction for a lesser price."

17. In paragraph 5 of the same written statement, the first

defendant urged as under :

> "No kind of collusion had taken place. The said K.V.Kandasamy, though made a deposit of Rs.5,000/- had not participated in the auction. There is no question of any illegality being questioned, since the auction was conducted in the proper and legal manner and the auction was confirmed in favour of the highest bidder viz. legally known method.".

18. The second defendant to the transferred suit, who is the plaintiff in C.S.No.590 of 2002, had taken a specific plea in paragraph 2 of her written statement that she is a bona fide purchaser of the suit schedule property for value, as she was the highest bidder in the auction conducted by the first defendant through the third defendant on 28.3.2002. She made the following assertion in the written statement :

> "Hence, her title to this property has become absolute, on the execution and registration of the sale deed dated 16.5.2002 (Reg.No.1117 of 2002, SRO, T.Nagar) in her favour by the first defendant.
>
> Plaintiff has no locus standi to question the validity of this sale."

19. Without prejudice the above plea urged by the second defendant in O.S.No.2216 of 2002 (Tr.C.S.No.933 of 2002), she also made a specific averment that the appellant did not bid for a sum of Rs.47 lakhs in the auction sale in question.

20. The third defendant, in its written statement, specifically asserted in paragraph 5 that apart from giving wide publicity to the auction sale and apart from getting the notice published in the popular daily newspaper 'Dinathanthi', printed hand bills have been widely circulated and the notice of auction was also sent through registered post with acknowledgment due on 05.3.2002 to the mortgagors and the same was returned by the Postal Department subsequently.

21. In paragraph 7 of the written statement of the third defendant, it was asserted that the plaintiff along with three others deposited a sum of Rs.5,000/- as earnest money with the third defendant firm prior to the auction and deposit receipts were issued by the said defendant properly to the plaintiff and the other deposit participants namely Mrs.Vasundhara and two others, K.V.Kandaswamy and N.Dhanalakshmi - the appellant

herein. It was also asserted that the plaintiff/appellant and K.V.Kandasamy have not participated in the public auction and they had not offered their bids in the auction and only three others participated. M/s.Vasundhara and two others were declared as highest bidders for Rs.45 lakhs. It was also asserted that the earnest money deposited at Rs.5,000/- was returned to the unsuccessful bidders including the appellant herein.

22. In paragraph 8 of the said written statement, the third defendant also asserted that under the instructions of the first defendant, they sent a letter dated 29.3.2002 to the mortgagors informing the auction sale and the bid amount and also requested them to settle the mortgage dues within 15 days from the date of auction, failing which, the same will be confirmed in favour of the highest bidder. The notice dated 29.3.2002 was sent through registered post with acknowledgment due, but the same was returned by the Postal Department.

23. In the face of these pleadings, the important fact that is to be ascertained is as to whether or not the appellant has participated in the auction sale held on 28.3.2002 and as to whether she really did offer her bid of Rs.47 lakhs.

24. Before proceeding further, it will be absolutely appropriate to bear in mind the principles touching upon the question as to when the sale of immovable property, brought in execution of a decree, can be set aside. In a classic enunciation of the principles on the subject, Justice Koka Subba Rao (as the learned Chief Justice then was), speaking for a Three Judge Bench of the Supreme Court in the case of Dhirendra Nath Gorai and Subai Vs. Sudhir Chandra Ghosh [reported in AIR 1964 SC 1300], has brought out the relevant principle, which is as under :

> "If a sale is held without complying with the said conditions, what is the remedy open to a party affected thereby to get the sale set aside? Order XXI Rule 90 of the Code in terms provides for the remedy. It says that a person whose interests are affected by the sale may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it or on the ground of failure to issue notice to him as required by Rule 22 of the Order. As the non-compliance with the said condition is a material irregularity in publishing or conducting the sale the court under the first proviso to Order XXI Rule 90 of the Code cannot set

> aside the sale unless it is satisfied that the applicant had sustained substantial injury by reason of such irregularity. That apart, under the second proviso to the said rule, no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person, who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up unless objection was made by him at the time of drawing up of the proclamation in respect of the defect relied upon. Shortly stated, the non-compliance with the provisions of Section 35 of the Act is a defect or a irregularity in publishing or conducting the sale. A party who received the notice of the proclamation but did not attend at the drawing up of the proclamation or did not object to the said defect cannot maintain an application under Order XXI Rule 90 of the Code of Civil Procedure. Even if he could, the sale cannot be set aside unless by reason of the said defect or irregularity he had sustained substantial injury."

(Emphasis is brought out now)

25. It is also relevant to notice the provisions contained in Section 69(3) of the Transfer of Property Act, which reads as under :

> "When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power."

26. From Dhirendra Nath Gorai, the principle that emerges is that sale of immovable properties effected in execution of a decree, cannot be set aside for the reason that there was defect or irregularity in conducting the sale, but such sale shall also result in substantial injury to the person complaining of such sale. Similarly, the principle behind Sub-Section (3) of Section 69 of the Transfer of Property Act was that the title of the purchaser shall not be impeached on the grounds that due notice was not served or given to the mortgagor or that the power to

bring the mortgaged property to sale has been improperly or irregularly exercised by the mortgagee.

27. Though, in the instant case, sale was brought about, exercising the right available to the mortgagee, without the intervention of court, we consider it wholly appropriate to bear these principles in mind while analyzing the evidence on record.

28. In lieu of chief examination, the appellant/plaintiff filed a common proof affidavit, a copy of which is placed at page No.1 of additional typed set of papers Vol.2. In paragraph 2 of the said affidavit, the appellant admitted that the suit property originally belonged to Tmt.Kalyani Iyer, who had mortgaged the property in favour of the first defendant and availed two loans, one for Rs.10 lakhs on 17.1.1994 and another for Rs.18 lakhs on 11.12.1995 respectively and executed two registered mortgages Ex.P.2 and Ex.P.3, in favour of the first defendant bearing doc.Nos.50 of 1994 and 2568 of 1995 respectively in the office of the Sub-Registrar, T.Nagar, Chennai. In paragraph 3, she asserted that Smt.Kalyani Iyer passed away on 06.4.2000 and the property was brought to sale by the first defendant exercising the power under Section 69 of the Transfer of Property Act through the third defendant - auctioneer on 28.3.2002. It was also asserted that she gave an offer for Rs.47 lakhs, that there was total chaos and confusion and that the sale was not property concluded, as the third defendant auctioneer abruptly left the premises despite the fact that the appellant offered Rs.47 lakhs free from all all encumbrances.

29. In paragraph 5 of the said proof affidavit, the appellant asserted emphatically that she was the highest bidder in the auction held on 28.3.2002 and that the first defendant, overlooking her highest offer of Rs.47 lakhs, declared the second defendant - plaintiff in C.S.No.590 of 2002 as the successful bidder. The next sentence in paragraph 5 of the proof affidavit reads as under :

> "Even though I protested and contested the auction process, Park Town Benefit Fund Limited, for reasons best known to it, confirmed Vasunthara's bid and auction sale came to an abrupt end."

30. In paragraph 6 of the said proof affidavit, it was asserted that the auctioneer did not take cognizance of the protest made by her as well as the said K.V.Kandasamy and few others, who were at the place of auction. Immediately on questioning the fraudulent manner, in which, the auction was

conducted and on challenge by me and the said K.V.Kandasamy, the entire auction process was abruptly stopped.

31. In paragraph 9 of the same affidavit, it was asserted as under :

> "I further submit that Mr.R.Vivekanandan, Chairman of M/s.Park Town Benefit Fund Limited colluded with Vasunthara, brought about the auction proceedings in a surreptitious and fraudulent manner and ignoring the highest offer made by me for purchase of the property, subject to my rights to seek for set off of Rs.9 lakhs payable to me by the legal heirs of late Smt. Kalyani Iyer pursuant to the usufructuary mortgage created in my favour. "

32. The appellant asserted that her offer at the auction sale, thus, was subject to her right to seek for set off of Rs.9 lakhs payable to her by the legal heirs of late Smt.Kalyani Iyer, pursuant to the usufructuary mortgage created by them in her favour. In paragraph 16 of the same affidavit, it was further asserted as follows :

> "The auctioneer promised to look into the offer made by me and took the original for perusal, but did not return the same and as such, if the auction papers are produced before court, truth will come to surface."

33. When the appellant was cross examined on 19.12.2013, she made the following assertion :

> "Mrs.Vasundhara cheated us and even she took away the receipt for payment of Rs.5,000/-".

34. Again, when the cross examination of the appellant was continued on the next hearing date namely 06.2.2014, she improved the above said statement by deposing as under :

> "I took return of Rs.5,000/- that I had paid to participate in the auction. Witness adds : I was informed that the auction was canceled and hence, the money was returned and the original receipt was taken back by the auctioneer".

35. Again, during the course of cross examination, she made the following statement :

> "I do not know the number of persons

who participated in the auction. I am only aware that myself and my uncle, K.V.Kandhasamy and Vasundhara participated in it. It is correct to state that K.V.Kandasamy also got back Rs.5,000/- and returned the original receipt to the auctioneer."

36. Thus, contradictory statements of fact emerge from her deposition with regard to the receipt furnished for the caution money deposit (Rs.5,000/-) made by her for participation in the auction. One version is that the auctioneer took away the receipt. The second is that Vasundhara - defendant No.2 took away the receipt. The third is that she took return of Rs.5,000/- paid by her. Unless the receipt is returned, the auctioneer would not have returned the caution money deposited to participate in the auction.

37. Thus, the appellant has not explained, in the face of returning the receipt and receiving back the auction caution money deposit, as to how she intended to enclose the two receipts to the plaint at the time of its filing. Ex.P.10 and Ex.P.11 two receipts are the ones obtained in September 2005, for securing copies of Ex.P.2 and Ex.P.3, while the suit is filed some time during April 2002. Hence, they are out of contemplation as at the time of filing the suit. Obviously, the two receipts talked of in the plaint are the ones obtained by her and her uncle K.V.Kandasamy, who paid Rs.5,000/- each towards caution money deposit for participating in the auction. Whereas she admitted that both of them have taken refund of the caution money deposited by them. Far from possessing any such receipt, the appellant admitted returning the caution deposit receipt obtained for participation in the auction sale, for securing the refund of Rs.5,000/- deposited as caution money. Hence, she is not clear about the facts, but is speculating. For instance, to the written statement filed by the appellant in C.S.No.590 of 2002, on 27.2.2006, she has listed Receipt No.133 issued by M/s.Vamana Auctioneers on 28.3.2002 as one of the accompanying documents. The truth of the matter is no such Receipt No.133 was exhibited.

38. There is also no proof produced by her that she gave an offer for Rs.47 lakhs. All the defendants in one voice have denied her offering Rs.47 lakhs at the auction. The first defendant went one step forward and said if really there was an offer for Rs.47 lakhs at the auction, it could have been accepted as the debt burden of the first defendant would get reduced further. Above all, the third defendant would not have ignored any such offer, because they get commission proportionately higher than the offer of Rs.45 lakhs would have

fetched them. Hence, burden lies on her to prove the said fact. However, far from discharging the onus, she improved the case by suggesting that she gave the offer for Rs.47 lakhs subject to her right to recover Rs.9 lakhs, by way of set off, payable by the legal heirs of Smt.Kalyani Iyer pursuant to the usufructuary mortgage created in her favour. If the appellant has not been able to establish that she gave a clear or clean offer for Rs.47 lakhs, no question would arise for consideration as to whether there is any infirmity or illegality in accepting the offer made by Smt.Vasundhara – the second defendant in Tr.C.S.No.933 of 2002 and the plaintiff in C.S.No.590 of 2002. In as much as the appellant admitted that Smt.Vasundhara participated in the auction and gave a bid for Rs.45 lakhs and if the appellant is not in a position to establish that she gave a clear offer of Rs.47 lakhs for purchase of the suit schedule property in the auction sale and in the absence of any other bid over and above Rs.45 lakhs offered by Smt.Vasundhara, the acceptance of the bid of Smt.Vasundhara for Rs.45 lakhs does not become improper or illegal. If there is no other bid over Rs.45 lakhs and in view of the case of the plaintiff itself being that Smt.Vasundhara has offered a bid over Rs.45 lakhs, it becomes clear that the offer of Smt.Vasundhara is the highest bid and accepting it would not be improper or illegal. It will be interesting to notice that the plaintiff/appellant, in her cross examination on 20.6.2014, has said this to a question put to her. The question and her answer read as under :

> "Q : In your previous cross examination, you had stated that you had filed proof for quoting Rs.47 lakhs for purchase of the property. Have you filed any proof ?
>
> A : I have not filed any proof. I have stated that I will file, if necessary."

The fact remains that she has not filed any such proof even subsequently.

39. As was noticed supra, the appellant made a conditional offer of seeking set off of Rs.9 lakhs allegedly payable to her by the legal heirs of Smt.Kalyani Iyer. The conditional offer like that can never be considered as a clear/clean offer because the first defendant is interested in securing as much money as is possible from the sale of the suit schedule property, so that the liability of the original mortgagor to the first defendant would get reduced to that extent. Therefore, the first defendant would only be interested in receiving as much money as is possible, so that proportionately the debt of the original mortgagor gets reduced. By accepting the conditional offer, as allegedly made by the appellant, the first defendant could only realize a sum of Rs.38 lakhs (47-9 = 38) whereas the offer in question made by Smt.Vasundhara is for Rs.45 lakhs. Hence,

accepting such a clear offer for Rs.45 lakhs cannot amount to any impropriety or illegality and it will not amount to any fraud even as alleged by the appellant. In the absence of any material evidence, which can be relied upon, to come to a conclusion that the appellant made a clean offer of Rs.47 lakhs, no element of fraud on the part of defendants 1 and 3 would arise in accepting the bid for Rs.45 lakhs and further, the collusion between defendants 1 and 2 or defendants 1 and 3 on one hand and the second defendant on the other, as alleged by the plaintiff/ appellant would not also arise. Accepting the best bid at the auction sale does not amount to collusion, particularly, in the absence of any other discrediting factors. Further, the plaintiff/ appellant has not pleaded or proved as to what substantial injury has been suffered by her. When no substantial injury was caused to the plaintiff/ appellant, the auction sale is not liable to be interdicted.

40. Though she pleaded that confusion and chaos prevailed on 28.3.2002 halfway through the auction proceedings, no evidence describing the nature of chaos has been put forward. She obviously raised this plea as a 'safety valve' and did not bother to lead any evidence worth the credence. She did not pursue it to logical end.

41. There is another difficulty in the way of the appellant. The sale deed was executed in favour of the highest bidder Smt.Vasundhara on 16.5.2002. As per the provisions contained in Section 69(3) of the Transfer of Property Act, the title, which was, thus, passed on to Smt.Vasundhara on the suit schedule property, cannot be impeached, much less by a third party. What cannot be impeached by the mortgagor, cannot be so done by a third party. Therefore, the bar contained in Section 69(3) of the said Act is squarely attracted to the case on hand. So far, the legal representatives of Smt.Kalyani Iyer have not impeached the auction sale.

42. In this context, Mr.R.Thiagarajan, learned counsel for the appellant has laid so much stress on the fact that the first defendant has not put the legal representatives of the mortgagors on notice before exercising its right of sale of the mortgaged property. Whereas the first defendant and the third defendant, as a matter of fact, asserted in their respective written statements that notice has been issued prior to exercising the right of sale as also immediately after the sale. But however, notices have been returned and delivered by the Postal Authorities. Even assuming that there is an irregularity committed by the first defendant in not serving the notice, both before exercising the right of sale and also after the sale, it is the original mortgagor's right to redeem the property mortgaged, that gets impaired and impacted. That might provide a

cause of action for the mortgagor or her legal representatives to impeach the conduct of the first defendant/mortgagee or even the sale. But, it does not help the cause of the appellant and improve her case.

43. According to the learned counsel for the appellant, Smt.Kalyani Iyer died just prior to the auction being held on 28.3.2002. Hence, if there is anyone, who can be legitimately said to be aggrieved of the failure of the first defendant to put the mortgagor on notice, it is the legal representatives of the original mortgagor Smt.Kalyani Iyer, who can seek to exercise the right of redemption of the mortgaged property, but not the plaintiff/appellant.

44. The concept of 'once a mortgage, it is always a mortgage', is a recognition of the right of redemption available to the mortgagor at any time by repaying the debt due to the mortgagee. But however, the right of redemption comes to an end upon the sale being confirmed and the sale deed being executed transferring the right, title and interest in favour of the purchaser in auction. Clearly, the plaintiff/appellant, being a third party, has no concern with regard to the right of redemption available to the original mortgagor or the legal representatives of the original mortgagor. A third party cannot seek to avail of such a right.

45. Great emphasis has been laid by Mr.R.Thiagarajan, learned counsel for the appellant that the balance amount required to be paid by the purchaser has not been paid in accordance with the terms and conditions stipulated in the auction notice and hence, confirming the auction sale in favour of Smt.Vasundhara is an irregularity.

46. This contention tacitly recognizes that Vasundhara's bid of Rs.45 lakhs is the highest and hence, she ought to have paid the balance money to the first defendant in terms of and in accordance with the conditions, subject to which, the auction was conducted. Smt.Vasundhara has claimed that the appropriate Authority of the Income Tax Department has granted permission for the sale of the immovable property in terms of Section 269UL (1) of the Income Tax Act, 1961 on 15.5.2002 and hence, without obtaining the clearance from the Income Tax Department, the auction sale could not have proceeded further. The very next day, she paid the balance sale consideration and the sale transaction was completed on 16.5.2002.

47. Whether or not, Smt.Vasundhara has complied with the terms and conditions of the auction sale strictly and faithfully and whether she has been successfully prevented from complying

with them because of delayed clearance from the Income Tax Department for such a sale, are all factors, which can, at best, fall into the broad description of irregularities of sale, in contra distinction to irregularities of conducting the auction sale. The post events of the auction sale, even if they are fraught with irregularities, the position that emerges is that the plaintiff/appellant, being a third party, who has not made a better offer than the offer made by Smt.Vasundhara, has no right of any manner to call in question such irregularities. The property that is sought to be sold is not belonging to any public agency or authority, for the auction sale to have the trappings of any largess or benefit under the Public Law Domain. The sale is that of the property belonging to a private party, undertaken for realization of a debt due by the mortgagor. The remedy is lying in Private Law Domain, but not in Public Law Domain. The right of redemption having not been exercised, before the sale is confirmed and the sale deed is executed on 16.5.2002, by the original mortgagor or her legal representatives, the plaintiff/appellant lacks necessary locus to call them in question. The bar of challenge contained under Section 69(3) of the Transfer of Property Act gets attracted.

48. Above all, no injury, much less, a substantial injury has been suffered by the plaintiff/appellant by any of the infirmities either in the conducting of auction sale or subsequently resulting in execution of the sale deed and transfer of title and interest in suit schedule property in favour of Smt.Vasundhara.

49. Further, the appellant claimed that a usufructuary mortgage was created in her favour by the legal heirs of Smt. Kalyani Iyer. Firstly, no such plea has been set up in the plaint filed in O.S.No.2216 of 2002, which stood transferred to this Court and renumbered as Tr.C.S.No. 933 of 2002. Only in the written statement filed in C.S.No.590 of 2002, to which suit, she is the sole defendant, she took such a plea. In support of the theory of usufructuary mortgage created in her favour, she relied on Ex.P.6 and Ex.P.8. It is her case that Ex.P.6 series of promissory notes have been executed in her favour on 10.12.2001 by one of the legal heirs of original owner Smt.Kalyani Iyer. It is also her case that Ex.P.8 series of cheques are issued to her as part of repayment schedule and it is her case, thus, that she has become a usufructuary mortgagee. In other words, her status, as a mortgagee on 10.12.2001, being latter to the two mortgages created by the original owner Smt.Kalyani Iyer on 13.1.1994 and 29.11.1995 i.e. Ex.P.2 and Ex.P.3, the appellant becomes a puisne mortgagee and the right of a puisne mortgagee is to redeem the first mortgage. Whereas no such effort has ever been made for redeeming the two mortgages created earlier in point of time by the original owner.

50. The appellant admitted that she has come to know of the previous mortgages created by Smt.Kalyani Iyer only from the auction notice, which was published in the daily newspaper Dinathanthi on 26.3.2002. If she had participated in the auction sale on 28.3.2002 and come to know that the same was sought to be illegally confirmed in favour of Smt.Vasundhara, she ought to have taken steps to redeem the prior mortgage created by the original owner and then pursue her legal rights in the suit schedule property, as a subsequent mortgagee, which she has not done.

51. When we examine Ex.P.6 and Ex.P.8 series, the following infirmities emerge :

Ex.P.6 comprises of 12 promissory notes. They are executed by one Sri.C.Vasan (C.Srinivasan) on 10.12.2001. A printed format was used for the said purpose. The amount promised to be paid is Rs.75,000/- uniformly in all these promissory notes, to the plaintiff/appellant. The rate of interest is kept blank. No witness signature is found, though the form has provided for two witnesses to sign it. Thus, the plaintiff/appellant pleaded to have lent Rs.9 lakhs to one of the legal heirs of the original owner, Smt.Kalyani Iyer (Rs.75,000/- X 12 = Rs.9,00,000/-). If at all, a person is lending Rs.9 lakhs to another person on one particular day, i.e in the instant case, 10.12.2001, the person lending the money would not take a dozen promissory notes, but would obtain one single promissory note. The plaintiff/appellant has not explained as to the reason why she obtained 12 promissory notes, each covering Rs.75,000/-. She has also not explained why money was lent without interest being charged. She has also further failed to show as to why no one witnessed this transaction and not signed all those 12 promissory notes. Nor did she explain her sources to lend that much of money.

52. It is only appropriate to notice the following from her deposition :

> "Ex.P.6 series was given by C.Srinivasan stating that I can receive the said sum every month and then I can vacate the house but he never gave the money and so I did not vacate. Mr.C.Srinivasan (a) C.Vasan has written the promissory notes, Ex.P.6 series. All the promissory notes of Ex.P.6 series are dated 10.12.2001. I came into possession of the suit property even prior to 10.12.2001. No witnesses have signed in any of the promissory notes of Ex.P.6 series. It is correct to state that in the 12th promissory note of Ex.P.6 series the word 'M.D.' has been written and scored off.

Q : Have you filed any proof to show that you had the sum of Rs.9 lakhs with you to pay on 10.12.2001 ?

A : I had paid in small, small amounts earlier and the said amount was due and hence he wrote and gave these promissory notes.

Q : You have not answered my previous question. I repeat have you filed any proof to show that you had the sum of Rs.9 lakhs with you to pay on 10.12.2001 ?

A. My father, my uncle, my brother or my sister might have given the sum of Rs.9 lakhs on 10.12.2001.

It is correct to state that I did not give the entire sum of Rs.9 lakhs on 10.12.2001 to C.Srinivasan.".

53. From the above deposition, the plaintiff/appellant is not very clear as to whether she lent the money or her relatives lent the said money. If money was lent by several persons including the appellant on several occasions, but not at one single occasion, why Ex.P.6 series of promissory notes brought on 10.12.2001 remained unexplained. The cover up attempted did not fit in properly, we must observe. If she is in possession of the property prior to 10.12.2001, she has to explain as to in what capacity and status, she came into possession of the suit schedule property. Let us see her statement made on 06.2.2014 during cross examination :

"I do not remember as to when I came in possession of the suit property. I have been in possession of the property even before the auction. I do not know the date, month or year on which I came into possession of the suit property. I had taken the suit property on lease. The suit property was leased out to me by one Srinivasan, who signs as C.Vasan, who is one of the sons of late Kalyani Iyer. I do not know the monthly rent of the suit property. There is no monthly rent for the house. I had paid a lumpsum amount when I took the property on lease.".

54. It is, thus, clear that the appellant is not very sure as to on what ground she can impeach the right, title and interest of Smt.Vasundhara - the second defendant - plaintiff in C.S.No.590 of 2002 in the suit schedule property. She is also not very sure as to on what valid ground, she can resist the claim for her eviction from the suit premises prayed for in

C.S.No.590 of 2002. At one breadth, she maintains that she was a lessee and as she paid lumpsum amount, she was inducted into possession of the property. Thus, at the next breadth, she is seeking to assert her possession as a mortgagee. Neither of the facts are proved by her. For having not taken any steps required under law by the appellant for impeaching the title of the second defendant in Tr.C.S.No.933 of 2002, the learned Single Judge, in our opinion, is right in dismissing Tr.C.S.No.933 of 2002.

55. Let us also now look at Ex.P.8 series, which comprises of 12 cheques said to have been delivered by Sri.Srinivasan to the plaintiff/ appellant. All the 12 cheques were drawn uniformly in a sum of Rs.75,000/-. They were drawn on Account Bearing No.2209 Chidatripet Branch of Canara Bank, Chennai, for and on behalf of Kalyani Outdoor Unit by its proprietor. The following tabulated statement would disclose the cheque number and the date, on which, it is said to have been drawn and delivered to the appellant :

S.No.	Cheque No.	Date
1	600451	21.12.2002
2	600452	21.1.2002
3	600453	21.2.2002
4	600454	21.3.2002
5	600455	21.4.2002
6	600456	21.5.2002
7	600457	21.6.2002
8	600458	21.7.2002
9	600459	21.8.2002
10	600460	21.9.2002
11	600461	21.10.2002
12	600462	21.11.2002

56. Thus, from the above statement, it is clear that cheques have been drawn in the descending order commencing from cheque No.600452, which was drawn on 21.1.2002, while cheque No.600462 was drawn on 21.11.2002. Whereas cheque No.600451 was said to have been drawn on 21.12.2002. If the cheques were truly drawn on different dates, the order of bearing their date would have commenced with cheque No.600451, but not with cheque No.600452.

57. After all, if cheque No.600451 is drawn on 21.12.2002, the next leaf bearing No.600452 would not have been drawn almost one year ahead on 21.1.2002. Normally, no customer of a bank account would be drawing the cheques in any reverse order. The

bank will be normally verifying at the time of clearing the cheques, about their authenticity and therefore, the cheques would always be drawn in the descending order of their numbers, but not in the ascending order. Out of 12 cheques said to have been drawn by Sri.Srinivasan, 11 of them are drawn in the descending order and the first cheque bearing No.600451 is drawn for the last, 12th monthly instalment payable on 21.12.2002. Therefore, the transaction of lending money to one of the legal heirs of the original mortgagor Smt.Kalyani Iyer does not inspire confidence and similarly, the cheques drawn from out of a bank account maintained by Kalyani Outdoor Unit by its proprietor C.Vasan also does not inspire confidence in our mind as part of redemption schedule.

58. Several judgments have been relied upon by the learned counsel for the appellant. We have not adverted to all of them, firstly to lessen the burden and further, they are all based upon the principles brought in the case of Warner Vs. Jacob [reported in 20 Ch.D. 220 : 30 W.R. 721] wherein it has been held thus :

> "The result seems to be that a mortgagee is, strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his mortgage debt, if he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud."

59. In the case of Vallabdas Mulji Vs. Pranshankar Narbheshankar [reported in AIR 1929 Bombay 24], it has been held as follows :

> "The main question in the suit is whether the purchase by Dayashankar Devshankar in the first instance, and subsequently by Pranehankar, is a benami purchase on behalf of one or more of the mortgagees? The plaintiff's case rests on the law, for which there is a clear authority in England that, where a mortgagee puts up the mortgaged property for sale under a power given him by his mortgage deed, he cannot sell it to himself, either alone or with others, nor to a trustee for himself: (cf. Halsbury's Law of England, Vol. XXI, Article 458, at p. 257).

....

For the other side it is argued that the alleged benami sale would at most only be voidable and not void, and that consequently the plaintiff's suit is barred as he has not brought a suit to set aside the sale within the proper period of limitation. It has been held by a Full Bench of this Court in Naraaagownda v. Chawagounda (1918) I.L.R. 42 Bom. 638 that if an instrument is entirely void or inoperative, then Article 91 of the Indian Limitation Act does not apply to the case. There certainly is very strong authority for saying that a sale of the kind this one is alleged to be is an entire nullity and needs no such setting aside. To take only two authorities, that are important as being those of the Privy Council, I may refer to National Bank of Australasia v. United Hand-in-Hand and Band of Hope Company (1879) 4 App. Cas. 391, 404 and Henderson v. Astwood [1894] A.C. 150."

60. In the case of The Egmore Benefit Society Vs. K.Aburupammal [reported in AIR 1943 Mad. 301], the following principle emerges :

"The sale in favour of the plaintiffs must be held to be invalid. A mortgagee exercising a power of sale under Section 69 of the Transfer of Property Act cannot purchase the property himself. This is such a well-established proposition that it cannot be disputed. But what is argued on behalf of the plaintiffs is that there is a contract in the mortgage deed authorising the mortgagee to make the purchase, if he happens to be the highest bidder at the sale. The law as understood with reference to Section 69 of the Transfer of Property Act is that the mortgagee cannot purchase the property and the Act does not save contracts between the parties to the contrary. To allow such a contract would be to negative altogether the provision based on public policy that the equity of redemption should not be destroyed except by a decree of Court or in any manner known to law."

61. The Privy Council, in the case of Rajah Mimtaz Ali Khan [reported in ILR (1880) Cal. 198], held with reference to a sale under Section 69 of the Transfer of Property Act thus :

> "The effect of a sale under a power of sale is to destroy the equity of redemption in the land and to constitute the mortgagee exercising the power a trustee of the surplus proceeds after satisfying his own charge, first for the subsequent incumbrances, and ultimately for the mortgagor. The estate, if purchased by a stranger passes into his hands free of all the incumbrances.".

62. Those principles will not have any application or bearing to the present fact situation. Firstly because, the purchaser is not the mortgagee, but is only alleged to be the daughter-in-law of the original mortgagor Smt.Kalyani Iyer. Secondly, the legal heirs of Smt.Kalyani Iyer have not objected either to the exercise of power of sale by the mortgagee or for the sale of the mortgaged property. Nor did they raise any objection in the second defendant in Tr.C.S.No.933 of 2002 in emerging as the best bidder and then buying the property. We are also not dealing with all those citations, as the plaintiff/ appellant had failed to establish the fact that she made a clean offer for Rs.47 lakhs for the property. If she had really made a clean offer for Rs.47 lakhs, there would have been no hesitation on the part of the first defendant to accept the same. The third defendant would not have failed to act on any such offer either, because the third defendant gets a commission on the basis of the offers secured for the sale undertaken or for the reason that higher the sale price, higher would be his quantum of commission. Therefore, the third defendant would not have failed to bring it to the notice of the first defendant, if there was any higher offer than the offer of Rs.45 lakhs made by Smt.Vasundhara. Thus, looked at from all perspectives, the plaintiff/ appellant failed to establish that she made an offer of Rs.47 lakhs. In that view of the matter, the question of examining the irregularities vitiating the exercise of auction sale at the hands of the plaintiff/appellant would not arise.

63. In view of our finding that the appellant/plaintiff in Tr.C.S.No.933 of 2002 has failed to establish that she has offered bid for Rs.47 lakhs for purchase of the suit schedule property at the auction held on 28.3.2002, the question of any material irregularity vitiating any such sale does not arise. For the failure to establish substantial injury suffered by the plaintiff/ appellant also, the suit fails. Hence, Tr.C.S.No.933 of 2002 deserves to be dismissed. We, therefore, confirm and approve the judgment and decree drawn in Tr.C.S.No.933 of 2002

on 22.9.2016 by the learned Single Judge.

64. In view of acquisition of title by the plaintiff in C.S.590 of 2002 - second defendant in Tr.C.S.No.933 of 2002 over the suit property on 16.5.2002 and failure of the appellant - plaintiff in Tr.C.No.933 of 2002 to establish the usufructuary mortgage said to have been created in her favour by one of the legal heirs of the deceased original owner Smt.Kalyani Iyer or her status as a lessee, the suit in C.S.No.590 of 2002 deserves to be decreed. Accordingly, we affirm the judgment and decree drawn in C.S.No.590 of 2002 on 22.9.2016 by the learned Single Judge.

65. Cost should follow the event.

66. Therefore, we see no merit in these appeals and they, accordingly, stand dismissed with costs. Consequently, the above CMP is also dismissed.

SCHEDULE-A

All that piece and parcel of land admeasuring one ground and 1590 Sq.ft.together with superstructure thereon admeasuring about 3,700 Sq.ft.bearing Old Door No.3, New Door No.5, Balaji Avenue 1st Street, T.Nagar, Chennai-17 bearing plot NO.15, in the layout No.8/64 comprised in S.No.4741/1, present T.S.No.8205/1 south west Taluk, T.Nagar village, Block No.107 and bounded on the

North by:T.S.No.6823,33' Scheme Road,
East by: Plot No.16, T.S.No.8205/1,
South by: plot No.6, T.S.No.8205/1,
West by: Plot No.14, T.S.No.8205/1,

SCHEDULE-B

A portion of the schedule a property marked 'Red' in the enclosed plan with the built up area of 2,000 Sq.ft.or thereabouts.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

RS

To

The Sub Assistant Registrar
Original Side,
High Court, Madras-104.

+4cc to Mr.R.thiagarajan, Advocate Sr. 58413
+2 cc Mr.S.R.Rajagopal Advocate sr58415 58416 dt 16/11/2017

COMMON JUDGMENT IN
OSA.Nos.76 & 77 of 2017 &
and CMP.No.5387 of 2017

SV(CO)
VR(30/10/2017)