IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.04.2019

CORAM:

THE HONOURABLE Mr.JUSTICE M.M.SUNDRESH

and

THE HONOURABLE Mr.JUSTICE C.SARAVANAN

Review Application No.163 of 2018

1.R.Chandrasekar
2.C.Sheela ... Applicants/Appellants/Defendants 2 & 3

Vs.

1.B.Gopalakrishnamurthy
2.B.Prathaban
... Respondents 1 & 2/ Respondents 1 &2/ Plaintiffs

3.Oriental Benefit and Deposit Society Ltd.,
Rep by its President Mr.K.Krishnakumar
No.108, Audiyappa Naicken Street
Chennai – 600 079.

4.Sri Ganesh Auctioneers & Co.,
Rep by its Authorised Officer
No.5 C/2, Valluvar Street
Krishnamurthy Nagar
Chennai – 600 079.
... Respondents 3 & 4/ Respondents 3 & 4 / Defendants 1 & 4



**Prayer :** Review Petition filed under Order 47 Rule 1 r/w. Section 114 of CPC, praying to review the judgment and decree of the Division Bench dated 12.03.2018 made in A.S.No.848 of 2014 and MP.No.1 of 2014 and CMP.No.112889 of 2017 on the file of this Court.

For Applicants .. Mr.S.V.Jayaraman
Senior Counsel for Mr.G.Veerapathiran

For Respondents .. Mr.S.Sadasharam [RR1 & 2]
Mr.P.Paramjothi [R3]
R4 – Given Up

ORDER

(Order of the Court was made by M.M.SUNDRESH, J)

The defendants 2 and 3, who were unsuccessful in the suit, have filed an appeal in A.S.848 of 2014, and having lost in the appeal too, have filed this review application, seeking to review the judgment of the Division Bench dated 12.03.2018 in A.S.No.848 of 2014.

**2.** It may be relevant to re-state the crux of the facts averred in the plaint, which are as follows :

The plaintiffs, are in absolute possession and occupation of the suit property and had availed a loan from the first defendant, mortgaging the property as collateral security. Accordingly, mortgage deed had been entered into by the plaintiffs and the first defendant, wherein, besides the terms and conditions of the mortgagee deed, the mortgagee was empowered with the right to sell the property under Section 69 of Transfer of Property Act. However, the first defendant had brought the suit property to auction sale with the aid of defendants 2 and 4, and pursuant to it, the first defendant had executed a sale deed in favour of second defendant for a sum of Rs.5,00,000/-, on the pretext of the fake auction sale said to have taken place on 19.2.2005. But the auction sale was not brought to the knowledge of the plaintiffs either by the mortgagee or the auctioneer. Thereafter, vide sale deed dated 22.1.2007, the second defendant settled the property in favour of his wife, the third defendant.

**3.** The plaintiffs being the mortgagor of the property, alleging that the auction sale held on 19.2.2005 and consequential execution of sale deed dated 22.1.2007 are illegal, and contending that the first defendant in collusion with the defendants 2 and 4, had grabbed his property, filed a suit, seeking to set aside the registered sale deed dated 22.01.2007 and for a consequential injunction.

**4.** The trial Court on analysing the pleadings averred in the plaint and the written statement filed by the defendants, framed the issues in full, including the alleged fraud and collusion, and decreed the suit as prayed for. Following are the findings regarding the fraud said to have been committed by the mortgagee along with the other defendants:

> *"11. The cunning and collusive act of the 1st and 2nd defendant is evident from the execution of Ex.A3 receipt equivalent to receipt filed along with Ex.B1, Ex.A3 receipt has been prepared by the 1st defendant in the name of the plaintiffs and in which one of the Director of the 1st defendant and 2nd defendant have attested as witnesses. There is no document filed to show that the auction sale was conducted by the 4th defendant. If at all the property was sold in auction sale only the auctioneer company would issue certificate of confirmation of sale. But, in this case, the Director and the President of the 1st defendant alone issued the confirmation of sale. Ex.B3 auction sale notice was not at all authenticated by the 4th defendant. The public auction sale notice has*

*not been filed by the 2nd defendant If the property was sold on public auction by the auctioneers, they would put their signature with seal. But, there is no authenticated seal affixed on the auction bid receipt, Ex.B4. Therefore, it can be fabricated on the connivance of the 1st and 2nd defendants. The signatures of the bidders who were taken part in the auction have not been obtained. According to the second defendant, the auction sale was conducted at the office of the 4th defendant.*

*Therefore, as per the 2nd defendant's own document, the alleged auction was held at the suit schedule property only, but in his oral evidence he contradicted that the auction had taken place at the office of the 4th defendant and he was not able to state the address of the 4th defendant or whereabouts of the office of the 4th defendant and also the time of the auction held. Hence, these contradictions created great doubt and suspicion about the place of auction, manner of auction, time of auction held by the 1st and 4th defendants. In Ex.B4 is said to be officially issued by the 4th defendant, but there is no such authentication in Ex.B4 by D4. It is alleged by the 2nd defendant that on the date of alleged auction sale on 19.2.2005, he had paid a part sum of Rs.5000/- towards sale consideration. But the receipt issued for the said purpose was not attested by the 4th defendant auctioneer. But it was issued by one of the Director of the 1st defendant only. This would also create great doubt with regard to the alleged auction. Ex.B6 is the auction sale agreement allegedly executed by the second defendant in favour of the auction company and the 1st defendant. But the same also has not been attested by the auction company, 4th defendant. Even as per Ex.B6, the 2nd defendant had undertaken to pay the balance of sale consideration within 15 days. But, there is no document to hold that the 2nd defendant paid the balance of sale consideration within 15 days. Ex.B7 is the another document headed as confirmation letter issued by the 1st defendant. The conduction of auction by the 4th defendant has not been mentioned in Ex.B7. In Ex.B7 also the 2nd defendant has consented to pay the balance of sale consideration of Rs.15,10,000/- within a period of 15 days, but he has not paid. Even prior to the* *payment of lumpsum balance, the sale was confirmed by the 1st defendant through Ex.B7 by issuing confirmation letter. So, the 1st and 2nd defendants have played fraud in grabbing the suit schedule property. This also created much doubt in the case of the 2nd defendant."*

**5.** Challenging the judgment and decree passed by the trial Court, the defendants 2 and 3 have preferred an appeal in A.S.No.848 of 2014 before this Court. Concurring with the decision of the trial Court, the Division Bench of this Court had dismissed the appeal and not satisfied with the same, the appellants have filed the present review petition.

**6.** The learned Senior Counsel appearing for the applicants/appellants would submit that the evidences with respect to auction sale was not seen in right perspective. The respondents 1 & 2 /plaintiffs were aware of the sale and they have tacitly made submissions that the scope and ambit of Section 69 (iii) of the Transfer of Property Act, has not been considered. Thus, even in a case where the mortgagor was not put on notice, the title of the purchaser cannot be questioned and there is no specific plea with respect to the allegation of fraud and collusion. To buttress his submissions, the learned Senior Counsel has placed reliance on the decisions of this Court in ***Shri Bhagwanda/B.Kishore Vs.K.G.Purushothaman & Others*** [1996-1-L.W.372] and the judgment in A.S.No.195 of 2010 dated 19.11.2012 in ***N.Debora Indira Jaba Priya Vs. Ibrahim Sha & Others.***



**7.** The learned counsel appearing for the respondents 1&2/plaintiffs would submit that the scope of review is limited and there is no error apparent in the orders passed by this Court and the same cannot be substituted for rehearing. The issue before the Court was with respect to fraud and collusion on the part of the applicants/appellants and other defendants with regard to the suit property. As factual findings have been given by both the Courts, no interference is required and there is no need to apply the scope and ambit of Section 69 of the Transfer of Property Act.

**8.** As rightly submitted by the learned counsel for the respondents 1 & 2, a review cannot be a rehearing on a fresh cause of action, which was not considered before the trial Court or Appellate Court. A review petition cannot be entertained on a new set of facts and therefore, by re-providing the evidences, review cannot be allowed. The trial Court itself has given a specific finding, as recorded above, on the fraud and collusion among the defendants. The pleadings have to be seen as a sole purpose, to understand each others' case, to consider the rival submissions of both sides, and issues have to be framed on that. After contest, evidence was let in by both sides, arguments have been made, and upon hearing both sides and on analysing the issues, factual finding has been given by the trial Court, on the issue of fraudulent and collusive activity of the defendants. The same procedure was also followed by this Court, while dismissing the appeal.



**9.** In such circumstances, we are of the view that inasmuch as we are dealing with the case involving fraud and collusion, as held on facts, the review petition cannot be allowed.

**10.** Section 69 of the Transfer of Property Act speaks about the right of the purchaser. This provision does not exclude Section 69(2) . In fact, Section 69(2) prohibits the mortgagee from exercising the power, unless and until the mandate is complied with, such as notice in writing, requiring payment of principal amount to be served on the mortgagor, or any default has been made in making payment of principal amount or part thereof, etc., Sub Section 3 of Section 69 of the Transfer of Property Act, gives certain protection to the purchaser, whose title is not supposed to be impeached on the ground of procedural infirmity. Therefore, the said provision cannot be understood to mean that the mortgagee will have the licence to dispense with the notice and involve himself in a sale clandestinely in collusion with others. After all, fraud vitiates all solemn acts. Both the provisions are totally different. When we construe both provisions Section 69(2) and Section 69(3) of the Transfer of Property Act, forming part of the main provision of Section 69, both of them will have to be read together and not in conflict. Thus, we do not find any apparent conflict in Section 69(2) and Section 69(3) of the Transfer of Property Act, as contended by the learned Senior Counsel appearing for the review applicants/appellants.



**11.** Similarly, a mortgagee cannot be termed as a trustee. Once he cannot be termed as a trustee, his actions are obvious under the scrutiny of the Act. To put it differently, he has to comply with the provisions of the Act, as a mandate. In paragraph No.25 of ***Shri Bhagwanda/B.Kishore Vs. K.G.Purushothaman & Others case,*** the Division Bench has aptly culled out the scope and ambit of Section 69 of the Transfer of Property Act, which reads as under :

*"25. Thus, the settled position in law is that a mortgagee is not a trustee for the mortgagor and that the sale under Section 69 of the Transfer of Property Act cannot be attacked by the mortgagor except when there is fraud or collusion between the mortgagee and the purchaser. If the price for which the property is sold is so low as by itself will lead to an inference of fraud on the part of the mortgagee and the purchaser, the Court can interfere. But, the burden is on the mortgagor to plead and and prove such fraud or the gross inadequacy of price from which an inference can be drawn by the Court of the fraud. In the absence of such proof, the Court cannot and will not interfere with the sale even if the sale price is lesser than the market value of the property or there was want of publicity or want of notice as required by the instrument or that many bidders had not participated in the auction."*

**12.** Thus, either on facts or on the question of law, we do not find any merit in this review application and the accordingly, it is dismissed. No costs.

[M.M.S, J.] [C.S.N., J.]
02.04.2019

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Index : Yes/No
Internet : Yes/No

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