



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 30.01.2019

Judgment Pronounced on : 29.07.2019

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

A.S.No.494 of 2011
and MP.No.1 of 2011
and Cros.Obj.No.29 of 2012

A.S.No.494 of 2011:

G.Kalki Rajan Appellant / 3rd Defendant

Vs

1.V.Sreenivasan (Deceased) ..1st Respondent/Plaintiff

2.The Executive Director
Thiru-vi-ka Nagar Benefit Fund Ltd.,
26, S.P.Koil North Street,
Thiru-vi-ka Nagar
Chennai - 600 082.

3.Murray & Co.,
Auctioneers
164, Thambu Chetty Street
Chennai - 600 001. ..Respondents 2 & 3/Defendants 1 & 2

4.K.Karunakar Rao

5.Umamaheswari

6.Bharathi ..Respondents 4 to 6/Defendants 4 to 6

7.S.V.Raman

8.Vijayalakshmi Nagarajan

9.Annapoorna Balasubramanian

10.Usha Jayaraman (Deceased)

11.S.V.Eshwaran ..Respondents 7 to 11/LRs of the Plaintiff

[Respondents 7 to 11 brought on record as Lrs of the deceased
1st respondent Vide Court order dated 27.09.2018 in
MP.No.1 of 2015 in AS.No.494 of 2011]

12.Jayaraman

13.Akshay Jayaraman

14.Anupama Jayaraman



[Respondents 12 to 14 brought on record as LR's of the deceased 10th respondent Vide Court order dated 27.09.2018 in CMP.No.2476 of 2017].

... Respondents 12 to 14/LR's of the 10th Respondent

WEB COPY

Cros.Obj.No.29 of 2012 :

1.K.Karunakar Rao
2.Umamaheswari
3.Bharathi

.... Cross Objectors/Defendants 4 to 6

Vs

1.G.Kalki Rajan ..1st Respondent /3rd Defendant

2.V.Sreenivasan ..2nd Respondent/Plaintiff

3.The Executive Director
Thiru-vi-ka Nagar Benefit Fund Ltd.,
26, S.P.Koil North Street,
Thiru-vi-ka Nagar
Chennai - 600 082.

4.Murray & Co.,
Auctioneers
164, Thambu Chetty Street
Chennai - 600 001.Respondents 3 & 4/Defendants 1 & 2

Prayer in A.S.No.494 of 2011:- Appeal find under Section 96 of CPC, against the decree and judgment dated 22.6.2011 on the file of the learned Additional District Judge, Fast Track Court No.1, Chennai, made in O.S.No.12561 of 2010.

Prayer in Cros.Obj.No.29 of 2012:- Cross Objection filed under Section 96 read with Order XLI Rule 22 of CPC, to set aside the findings in the decree and judgment dated 22.6.2011 on the file of the learned Additional District Judge, Fast Track Court No.1, Chennai, made in O.S.No.12561 of 2010.

In A.S.No.494 of 2011 :

For Appellant : Mr.K.Bijai Sundar
For Respondents : Mrs.Radha Gopalan
for Mr.V.Ravi for R7 & R9

In Cros.Obj.No.29 of 2012 :

For Cross Objectors : No appearance



JUDGMENT

1.1 This appeal is preferred by the 3rd defendant against the decree in O.S.No.12561 of 2010 by the Additional District Judge (FTC-I), Chennai. The suit was laid to declare that the auction-sale of a suit property by the first and second defendants under Sec.69 of the Transfer of Property Act (hereinafter the TP Act) is invalid. The suit was decreed. And, the appellant is the successful bidder in the said auction.

1.2 Pursuant to the impugned auction, a sale deed came to be executed in favour of defendants 3 to 6. However, in circumstances to be stated in due course, defendants 4 to 6 were impleaded midway through the trial of the suit.

1.3 The defendants 4 to 6 have preferred their cross objections supporting the appellant. However, none appeared for the cross objectors; but their interest in the appeal is identical to that of the 3rd defendant/appellant.

1.4 The suit was originally laid on the Original Side of this Court in C.S.No.399/1999, and later came to be transferred to the City Civil Court on 18.10.2010.

2. The facts are :

- The suit property belongs to Srinivasan, the plaintiff. On 24.01.1994, on the security of the suit property, the plaintiff obtained a loan of Rs.75,000/- from the first defendant, and executed a deed of simple mortgage in favour of the latter. The mortgage authorised the mortgagee to sell the property without the intervention of the Court as provided in Sec.69 of the TP Act. On the very next day, on 25.01.1994, the plaintiff obtained another loan of Rs.5.25 lakhs from the first defendant. This loan was not secured. Thereafter, on 25.01.1995, the plaintiff alleges that he had paid Rs.3.63 lakhs to the first defendant, with an instruction to adjust the said amount firstly towards the secured debt of Rs.75,000/- and then adjust the balance towards the unsecured debt of Rs.5.25 lakhs. Subsequently, the plaintiff was constrained to institute O.S.285/97 before the VIII Assistant City Civil Court, Chennai, for the redemption of the mortgage.
- During the pendency of the aforesaid redemption suit, the first defendant brought the suit property to sale by public auction on 03.09.1998 in terms of Sec.69 of the TP Act. This forced the plaintiff to prefer O.S.5326/1998 before the III Assistant City Civil Court, Chennai for permanent injunction, to restrain the first defendant from bringing the suit property to sale. In the said suit, he had also filed I.A.12614 of 1998, for an order of interim injunction



for the same purpose.

- After hearing both sides, the trial Court passed a final order in this I.A.12614/1998. Ext.D-4 is the copy of the Order and Ext.P-5 is the copy of the decretal Order. In its Ext.D-4 Order, the trial court had passed an Order of injunction, restraining the first defendant-mortgagee from auctioning the suit property, but on a condition that the plaintiff should deposit Rs.2,25,325/- on or before 17.03.1999 without prejudice to his case, and that in case of non-compliance with the condition, the injunction granted would be vacated automatically. On the point of plaintiff's allegation about repayment of Rs.3.63 lakhs on 25.01.1994 to the mortgagee, the Court had recorded that the plaintiff had not produced any material to establish the same.
- Aggrieved by the conditional order passed against him, the plaintiff preferred CMA.No.73/1998 before the IV Additional City Civil Court, with a prayer to stay the operation of the interim conditional order of injunction passed by the trial Court. The CMA was posted to 24.06.1999 and the petition for interim stay was posted to 07.06.1999.
- When matter stood thus, the first defendant/mortgagee through the agency of the second defendant advertised for the sale of the suit property on 10.05.1999. Therefore, plaintiff filed yet another suit in O.S.2643/1999 before the I Additional City Civil Court for permanent injunction along with an application for interim injunction. But no interim injunction was granted. The case was posted to 07.06.1999.
- Ignoring the pendency of these suits, the first defendant had gone ahead with the auction on 10.05.1999 through the services of the second defendant-auctioneer. The plaintiff believes that the third defendant was the successful bidder in the auction and that he had offered to buy the suit property for Rs.12 lakhs. Soon thereafter, the plaintiff issued telegraphic notice to all the defendants alleging that the sale alleged to have been held on 10.05.1999 was invalid on a host of grounds that would resonate through the rest of this judgement. This apart, no valid notice within the meaning of Sec.69 of the TP Act was served on the plaintiff. In particular it was alleged that, long prior to the auction, the plaintiff had notified the first defendant that all communications to the former must be addressed to his (plaintiff's) counsel's address at Mylapore, Chennai, but this instruction was ignored. This apart, the property would be worth around Rs.40.0 lakhs,



WEB COPY

but it was sold for a disproportionately lower price of Rs.12.0 lakhs. In fine, the plaintiff alleged that all the defendants had acted in tandem to cause wrongful loss to the plaintiff and had made wrongful gain for themselves out of the auction sale.

Hence, the suit was laid for declaring that the auction sale held on 10.05.1999 is illegal and void.

3.1 The first respondent company, against which the allegations impugning the auction sale was directed, has strategized not to contest the suit as it chose not to file any written statement. So did the second defendant who is responsible for the proper conduct of the auction sale. It is made known here that, the effect of the strategy of the first defendant to stay away from contesting the suit will echo at different places in the discussions to follow.

3.2 The appellant/auction purchaser contested the suit. He had pleaded that the plaintiff had borrowed in total Rs.6 lakhs, and that the entire loan was a secured debt. So far as the plaintiff's allegation that he had paid Rs.3.63 lakhs on 25.01.1995 was concerned, he would say that the said pleading was already rejected in the interim Order in I.A.No.12614/1998 in O.S.No.5326/1998 (Ext.D-4).

3.3 The plaintiff did not deposit the amount directed to be deposited in terms of Ext.D-4 Order, and it was informed to the first defendant Vide former's letter dated 09.04.1999. Due to non-compliance of the said condition, the interim injunction directed against auctioning the suit property stood vacated automatically, which would mean that there was no bar for the first and second defendants to auction the suit property now. It is true that plaintiff preferred CMA.No.73/1999, but no stay was granted by the Court.

3.4 After knowing that the property had been auctioned on 10.5.1999, the plaintiff had again brought yet another suit in O.S.No.2643/99. Here again he falsely reiterated that he had paid Rs.3.63 lakhs to the first defendant. The allegation of the plaintiff that the property would fetch Rs.40.65 lakh is wrong, whereas as per the guideline value then prevalent, it would fetch only Rs.18,24,112/-. The property was sold for a lower price because possession of the suit property was not with the first defendant and it was under the occupancy of a tenant of the plaintiff. Without possession, an immovable property would not fetch the market price.

3.5 The auction was in accordance with and in strict adherence to Sec.69 of the TP Act. On 27.5.1999, the first defendant had written to the plaintiff to execute and register



3.6 In the written statement filed by the defendants 5 and 6 and adopted by the fourth defendant, it was pleaded that these defendants were impleaded only Vide Order in A.No.4288/09 in C.S.399 of 1999 when the suit was still pending on the Original Side of this Court. The plaintiff has no cause of action against these defendants. As to the rest they supported the case of the appellant.

5.1 The dispute went for trial, and the trial Court had framed in all six issues. Of them, issues 1,2 and the additional issues 1 are critical. The first two issues are right on the point of plaintiff's entitlement for declaration and the injunction sought, and the first additional issue pertains to bar of limitation as concerning defendants 4 to 6. The third issue was if the third defendant was a bonafide purchaser.

5.3 After making a comparative analysis of Order XXI Rule 89 CPC as well as the provisions of SARFAESI Act with Sec.69 of the TP Act, the trial Court came up with the following findings:

- <https://hcservices.ecourts.gov.in/hcservices/>



WEB COPY

paragraph 14 of the Written statement of the third defendant, it is averred that the suit summons was received only after the sale was executed in his favour; Both (a) and (b) not only go to disclose that the intent of the defendants 2 and 3 was not merely to protect the third defendant as the purchaser of the suit property, but also to conceal the roles of defendants 4 to 6. And, to cap it, the evidence of D.W.2 discloses that defendants 4 to 6 are his close relatives. This would indicate that it was not impossible for them to know about the pending suit, yet they chose not to implead in the suit themselves. And, when they were sought to be impleaded by the plaintiff, they did not raise any objection on the point of limitation either.

- On the core issue involving the validity of the auction conducted, the trial Court suspected that the defendants 3 to rest have schemed, that the mortgagee holds the property as a trustee of the mortgagor, that it (mortgagee) had breached the trust expected of it, that the notice of auction to the plaintiff was not adequately served as it was not served at the (change of) address given by him, and given the fact that the third defendant is a close relative of D.W.2, he cannot be termed a bonafide purchaser. It then proceeded to hold that the auction sale was not in conformity with Sec.69 of the Transfer of Property Act.

6. Points for consideration in this appeal are:

1. Is the suit a *brutem fulmen* action?

2. Was the auction sale held on 10-05-1999 a fraud on statute?

3. Was the auction held in conformity with Sec.69 of the Transfer of Property Act?, And, if not, was it a mere irregularity?

4. Is the plaintiff entitled to sue only for damages?

5. Is the decree passed valid for contravening bar in Sec.446(1) of the Companies Act, 1956?

6. Were defendants 3 to 6 bonafide purchasers?

7. Submissions of Appellant's counsel:

- The present suit instituted for a declaration that the auction sale held was invalid, was laid in 1999. And the defendants 4 to 6, the co-purchasers along with the appellant, who share an identical interest in the suit property, were impleaded only on 22-04-2010. Article 58 of the Limitation Act prescribes that a suit for declaration



WEB COPY

Ext.D-6, and the post auction-notice in Ext. D-9 (informing the plaintiff of the auction held and about the highest bid) and Ext. D-10 (requiring the plaintiff to execute the sale deed), both dated 11-05-1999. In this context, the trial court has failed to note that the plaintiff has not produced the acknowledgment card for his Ext.P-8 letter dated 21-03-1997, (which he relies on to build a case that he had instructed the first defendant to address the latter's future correspondences to his counsel's address), to indicate that the first defendant indeed had received it.

- The trial court has also ignored the fact that public notice about the intended auction was given Vide newspaper publications in leading English and vernacular dailies as evidenced by Ext.D-16.
- Since the first defendant is a nidhi company and since the defendants 3 to 6, the purchasers of the auctioned property are alien to the company, the fact that they are related to one of its directors is not adequate to prove collusion.
- In all cases where an auction under Sec.69 of TP Act is alleged to have been afflicted by irregularities, the person damnified (here, the plaintiff is the one who claims to be so), is only entitled to institute an action for damages as provided in Sec.69(3) of the TP Act, and cannot maintain a suit for setting aside an auction. Reliance was placed on P.R.Govindaswami Naicker Vs Pukhraj Sowcar & another [AIR 1940 Madras 903 : (1940)52 LW 324] and N. Debora Indira Jaba Priya & others Vs Ibrahim Sha & Others [(2013) 1 CTC 61 : (2013)1 MLJ 187].

The submissions of the First Respondent/Plaintiff are:

8.1 When a property is sold in public auction, violation of mandatory procedure that affects the right or interest of the mortgagor is not a mere irregularity, but will be an illegality. And, when a wrongful loss is forced on the mortgagor, and a mortgagee derives a wrongful gain thereby, then such illegality would assume the character of fraud. In this case, while the word "fraud" though not is specifically pleaded in the plaint, yet the phrase 'wrongful loss and wrongful gain' that go to define fraud have been pleaded.



8.2 According to the third defendant, who enters the scene only after he became the successful bidder in the impugned auction, the first defendant had complied with the procedure contemplated in Sec.69 of the TP Act in all earnestness, and that it had authorised the second defendant to conduct the auction. That the auction however, was fraught with illegalities, and the grounds thereof are bullet-pointed as below:

- Knowing fully well that the plaintiff had filed O.S.2643/1999 to injunct the intended public auction, and that I.A. 12614/1998, filed for an order of interim injunction stood adjourned to 07-06-1999, the first defendant showed an undue, if not an unfair, hurry to sell the property. Earlier the plaintiff had preferred CMA.73/1998 against the conditional order of injunction against auction sale passed in I.A.12614/1998 in O.S.5326/1998, and moved an application for an order of interim stay, but the first defendant took time, and this matter also stood over to 07.06.1999. This rush to sell the property when there are suits for redemption and other subsequent suits for injunction are pending, reflects the fraudulent intent of the directors of the company to misuse the power under Sec.69 of the TP Act.
- No proper notice of the auction was served on the plaintiff. The plaintiff Vide his Ext.P-8 communication dated as early as on 21.03.1997, has addressed the first defendant that he would not be available at his address at Ranipet, and had intimated that the future correspondences of the first defendant be mailed to the address of his counsel at D'Sylva Road, Mylapore. Still, no notice was even attempted to be served at the address in terms of Ext.P-8. Not serving the notice of public auction strikes at the foundation of the claim of legality of the very auction, and necessarily the auction is void. Reliance was placed on the authority in Jagannath Vs Perumal Naidu [1955] 1 MLJ 114]
- No upset price was fixed based on an independent valuation. According to the second defendant/auctioneer, valuation was fixed at the time of auction based on the instructions given by a certain Harihareswara Rao, the then Managing Director of the first defendant company, as could be seen from Ext.D-11 communication dated 12.05.1999 from the second defendant-auctioneer to the Director of the first defendant. An auction, in which the mortgagor has a substantial interest to protect in terms of valuation of the property, the upset price was fixed at the instruction of the officer of the mortgagee. The auction thus stands vitiated. Reliance was placed on the ratio in Rakesh Kumar Goel Vs State of UP State Industrial Development



WEB COPY

Corporation Ltd., [2010]8 SCC 263] Rani Aloka Dudhoria Vs Goutam Dudhoria [(2009)13 SCC 569], Anil Kumar Srivartsa Vs State of UP [(2004)8 SCC 671] all of which are relied on in M/s.Hameed Enterprises Vs. The Registrar, IIT, Madras & others [(2014) 7 MLJ 840 : (2014)4 LW 903].

- Evidence on record establishes the fact that defendants 3 to 6 are closely related to D.W.2, the director of the first defendant. Indeed, the second defendant, the independent agency that conducted the auction, had not indicated in its correspondences in Ext-D10 and Ext.D-11, both dated immediately after the auction, that anyone, other than the third defendant had bid the auction along with him. Secondly, while the 3rd defendant alone had participated in the auction, in Ext.D-2 sale deed, the property was seen sold also to defendants 4 to 6 - to those who had not participated in the auction. There is no term in auction to sell the property sold in auction to nominees of the auction-purchaser. Nothing more is required to demonstrate that the purchasers of the suit property are but nominees of the director of the mortgagee, and where the purchaser in an auction under Sec.69 of the TP Act is a nominee of the mortgagee, the sale is ab initio void as held in V.P.Padmavathi Ammal & Others Vs P.S.Swaminatha Iyer & Others [AIR 1975 Mad 343 : 1975(2)MLJ 27].
- The second defendant had chosen not to participate in the trial to vindicate itself of the allegations made vis a vis the conduct of the auction, nor its proceedings concerning the conduct of the auction were produced.

8.3 The contention on brutem fulmen decree is fallacious. The 3rd defendant, had filed his written statement some nine years after the institution of the suit, but had chosen not to reveal his co-purchasers under Ext.D-2 sale deed in the written statement. Hence, defendants 4 to 6 came to be impleaded only subsequently, in the course of the trial of the suit. And, the prayer is not directed against the execution of Ext.D-2 sale deed, but it is founded on the legality of the auction procedure that preceded the Ext.D-2 sale deed.

8.4 In law, fraud in the conduct of the auction, and the irregularity in procedure adopted for auction cannot be fitted in the same slot. There is in demonstration a well thought-out design in organising the auction sale to inflict a wrongful loss to the plaintiff, and to gain wrongfully by the relatives of the directors of the first defendant company. It involved: 'Ignore the pendency of suits, give no notice of the intended auction to the mortgagor, fix no upset price for auction in the auction-notice on due valuation, let the director of the first



defendant fix it, and then let his man bid the auction and his men purchase the property'. Is anything more required to demonstrate fraud involved better? Reliance was placed on P.L. Chakrapan Naidu Vs T. Gopal Mudaliar [(1972(2) MLJ 390 : AIR 1973 Mad 8 : (1972) 85 LW 733 (DB), Dr. T. Vijayebndradas & another Vs M. Subramanian & Others [2006(3)CTC 702] The Egmore Benefit Society Vs K.Aburupammal & Others [AIR 1943 Mad 301 : 1943(1)MLJ 92 (DB)] K. Mohana Krishnan Vs Seetha Natarajan [1992(2)LW 592], Clara Mookerjea alias Smt. Mathuri Devi & another Vs Surendra Manilal Mehta & Others [AIR 1963 Mad 208] P.R.Govindaswami Naicker Vs Pukhraj Sowcvar & another [AIR 1940 Madras 903] (This authority even the 3rd defendant/appellant too had relied on to emphasis an opposite view), Mulraj Virji Vs Nainmal Pratapchand [AIR 1942 Bombay 46], Vallabhdas Mulji Vs Pranshankar Narbheshankar & Others [AIR 1929 Bombay 24].

Discussion:

Preliminary

9. Before opening the discussion, this court intends to record its disapproval to the strategy of the plaintiff in filing repeated suits substantially for the same purpose - to stall the auction. It had been done. And, may not be relevant for the current purpose. But his attitude borders on litigative mania which exemplifies the attitude of many that approach the legal system for redress. The plaintiff might have had a cause of action to prevent the auction, yet having filed a suit for redemption of mortgage, he should have worked out his interim-remedy in the same suit instead of multiplying litigations with successive suits for injunctions. Reckless are such strategies that disown the responsibility expected of the litigants. What a waste of scarce judicial time? Courts are public institutions, and it is imperative that all those who are associated with the Court-system - be it the litigant or the Bar, should approach it with a sense of belongingness, and with a discipline that they burden its axle justly and only to the extent required. It may be that the plaintiff might have been driven by desperation to save his property from going under the hammer, but that is no answer for ignoring his responsibility to the legal system. But is there anyone listening? It is quite possible that this observation may not even be read.

10. This judgement is multi-layered as the issues raised have different aspects: The appellant has raised issues of (i) maintainability and (ii) sustainability, whereas the plaintiff/first respondent has raised the issue of fraud, which the appellant resists, contending that even if the allegations of the plaintiff were true it might only amount to an irregularity within Sec.69(3) of the TP Act. The judgement will therefore deal with these aspects in the same order.



On Maintainability:

11. The arguments on the maintainability of the suit itself can be further sub-divided into:

(a) One founded on brutum fulmen doctrine founded on non-impleadment of defendants 4 to 6 within the period of limitation.

(b) D.W.2, the former director of the first-defendant company had deposed that the Official Liquidator was directed to take charge of the affairs of the first defendant. The Official Liquidator is therefore a necessary party for representing the first defendant company. Suit is bad for non-joinder of necessary party, as he was not impleaded.

A. On brutum fulmen decree?

12.1 Brutum fulmen is a Latin noun-phrase which means a 'meaningless thunderbolt, an empty threat', and in the context of law, an ineffective judgment or Order.

12.2 The argument here is built on the premise that, if Ext.D-2 sale in favour of defendants 3 to 6 is to be set aside, then all these purchasers should be before the Court, and in time, i.e. within the period of limitation within which the suit could be brought against all of them, since all the defendants 3 to 6 have equal, identical, yet independent interest in the suit property acquired under Ext.D-2. While the 3rd defendant was in the party array right from the moment the suit was laid, defendants 4 to 6 were brought on record only Vide Order of this Court in A.4388/2009 dated 22-04-2010, when the suit was pending before the Original Side of this Court.

12.3 As per Sec.21 of the Limitation Act read with Order I Rule 10(5) CPC, the suit commenced as against the newly impleaded defendants 4 to 6 only on 22-04-2010, the date of the Order, which is well beyond three years period prescribed for laying a suit for declaration. And, the Order directing their impleadment did not stipulate that it would date back to an earlier date in terms of the Proviso to Sec.21(1) of the Limitation Act either. This would imply that even if the suit were to be decreed against the 3rd defendant, inasmuch as the suit is barred against defendants 4 to 6, no effective decree could be passed. Hence, the Court should refrain from passing a decree which is futile in its content and ineffective in its operation. The authorities in Vijayasamy Thevar Vs Sasivarma Thevar & Others [ILR(1905)28 Madras 560 (DB)] and S.M.Amarchand Sowcar (died) & others Vs Tamil Nadu Electricity Board [(1999-1-LW 4310)] are relied on to fortify the contention.

13. In defense of this argument, the plaintiff contended that, till Ext.D-2 sale deed came on record, there was no knowing that



sale deed was executed in favour of the defendants 4 to 6. The appellant, however, denied it when his counsel argued that the tenant of the suit property (who claimed right under the plaintiff) had laid a suit even as early as in 2001 in O.S.1195/2001 against the plaintiff and defendants 3 to 6, and therefore it is inconceivable that the plaintiff would not have known even before the expiry of period of limitation, that defendants 4 to 6 were also parties to Ext.D-2 sale deed. Couple of authorities too are placed before this court in aid of this contention.

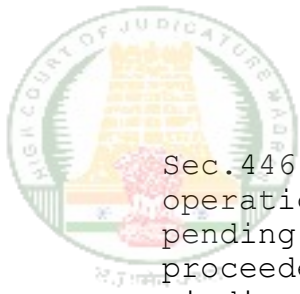
14. The appellant's contention appears to be a futile distraction as the fallacy it camouflages is visible. The suit is laid not for challenging Ext.D-2 sale deed, but the process by which Ext.D-2 sale deed came into being. It attacks not the culmination point when the sale deed came to be executed consequent to the auction, but the commencement point- the very auction itself. Therefore, in the context of the cause of action for the suit, the participation of defendants 3 to 6 might be required not to defend their title under Ext.D-2, but to defend the legality of the public auction. This defense that they offer is indivisible, and even if one among the defendants 3 to 6 sustain the legality of the auction, its advantage would benefit all. And, here there is no limitation operating for offering the defense. To conclude on this point, the argument on brutum fulmen decree fails.

(b) Is the Official Liquidator, a necessary Party:

15. Was the Official liquidator a necessary party to the suit? That depends on if the first defendant had any defense to offer to the suit. While the legality of the auction is in challenge, the first defendant preferred to remain silent and did not even file its written statement. Instead, it was left to defendants 3 to 6, all of who have arrived at the scene either from the date of auction or thereafter to defend the suit. Now, is there any logic in claiming the impleadment of the Official Liquidator as necessary party? Who is the one he is going to defend - a company that has not even filed the written statement for nine years? This Court holds that, given the context of the present suit, and given the indifference of the first-defendant-company in not defending the suit, the Official Liquidator is not a necessary party.

B. On Sustainability - Is the suit barred under Sec.446 of the Companies Act, 1956?

16. The issue on sustainability is founded on the argument that, once the first defendant had gone into liquidation, and winding up proceedings were underway, and the Official Liquidator was directed to take charge of the affairs of the first defendant-company Vide Orders of the Tribunal dated 05.08-2008, and as per



Sec.446 of the Companies Act, 1956, (that was then in operation), there is a statutory bar in proceeding with a pending suit thereafter, and the lower Court ought not to have proceeded with the suit. Sec.446(1) provides that, "when a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceedings shall be commenced, or if pending at the date of the winding up order, shall be proceeded with against the company, except by the leave of the Tribunal, and subject to such terms as the Tribunal may impose." Therefore, the suit ought not to have been proceeded with by the trial Court without the leave of the Tribunal, and hence the decree passed by the Court below is bad in law.

17. The response of the plaintiff is terse: Since the first defendant did not file the written statement and was set exparte, the bar under Sec.446 is not invited. The appellant's counsel however, did not waste a wink to inform the Court that in the decree of the trial court, the first defendant was not shown to have been set exparte.

18. It could not be ascertained from the records if the first defendant was set exparte, as this case was pending before the original side of this Court till 2010. However, at this distant day it is immaterial too. On a careful scrutiny, this Court is constrained to reject this argument. There are multiple reasons, and the preliminary ones are listed below:

First, though only D.W.2 has spoken about the appointment of the Official Liquidator, yet no order of the Court/Tribunal was produced. This court cannot act on a statement of a witness when the best evidence which the very Order would serve, is not made available. Courts are not guided by hypotheses.

Second, under Sec.454 of the Companies Act, 1956, when a winding up Order is made and the Official Liquidator is appointed, a verified statement inter alia of assets and liabilities of the Company has to be furnished to the liquidator by a director, or one who is in charge of the affairs of the company or responsible for the same. It is not known if a statement in terms of Sec.454 was furnished before the Liquidator, and even if it was disclosed, was it shown as one affecting the asset of the company or its liability?

19.1 Turning to Sec.446 of the Companies Act itself, the bar of the 'suit or other proceedings' that it declares, is a consequence that follows an order of winding up, or an appointment of a provisional official liquidator for the company. Sec.446 reads:



WEB COPY

446. Suits Stayed on Winding Up Order:

(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Tribunal and subject to such terms as the Tribunal may impose.

(2) Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of-

(a) any suit or proceeding by or against the company ;

(b) any claim made by or against the company (including claims by or against any of its branches in India) ;

(c) any application made under section 391 by or in respect of the company ;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company; whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) [***]

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.

19.2 What is instantly noticeable is that while Sec.446(1) bars proceeding with a pending suit, nowhere does it provide that the decree passed by a competent Civil Court contrary to the bar in Sec.446(1) is void. All that the provision stipulates is that, either a pending suit, or, other action should be either consolidated before the Tribunal, or can be proceeded with the leave of the Tribunal. There is a larger objective behind it. Where a company faces winding up, the attempt is to consolidate its assets and liabilities, pay off the liabilities out of the assets in the order of priority, and distribute the balance if any left, to the shareholders. The Tribunal is the forum that organises it, and the Official Liquidator is the statutory facilitator through who the Tribunal operates to carry out this purpose. Thus, the role an Official Liquidator needs to perform is well defined.



19.3 Therefore, notwithstanding an emphatic expression 'no suit or other proceedings' which the Parliamentary wisdom has thought it fit to employ, the contextual setting and the defined purpose behind it should not be lost sight of. To expatiate it, where a suit is laid by the company for protecting its assets, or for realising its debts, or where it faces a claim in an action against it, it can be stated that, such action affect the assets or liability of the company. If the contextual setting of Sec.446 (now Sec.279 and 280 of the Companies Act, 2013) is not ignored, then it emerges that, except those categories of suits or actions by or against the company which are likely to affect the asset or liability of the company by a decree to be passed in the very suit or other action, other categories of suits or action may not invite the bar under Sec.446 of the Companies Act. Similar views are expressed in Joshi Trading Co. (P) Ltd., Vs Essa Ismail Sait [(1980) 50 Com Cases 801 (Kerala)] and in Harbans Lal Sharma Vs Chemical Vessels Fabrications Pvt.Ltd., [(1989) 65 Com.Cases 506 (P & H)].

19.4 If the ongoing dispute is now considered in the backdrop of what is herein above stated, here is the first defendant - nidhi company, which by bringing the suit property to public auction, had already realised its debts in 1999. The issue involved in the present suit - the cause of action (which has arisen some 15 years prior to the appointment of the Official Liquidator) is not the one that affects the asset of the company, nor is it the one where even if a decree is passed it would impose a liability on the company. What is in question in the suit is whether the company had conducted itself lawfully when it had its mortgage-debt realised through an auction of the suit property in terms of Sec.69 of the TP Act. Therefore, not obtaining the leave of the Tribunal to prosecute the suit cannot vitiate the trial.

19.5 There is another angle to it. Sec.279(2) of the Companies Act, 2013, (which is same as Sec. 446(4) of the Companies Act, 1956) stipulates that provision of bar of suits etc., has no applicability to any appeal pending inter alia before a High Court. The argument now founded on Sec.446 is raised for the first time when the matter is now pending in first appeal before this Court, a situation contemplated in Sec.446(4) or more appropriately Sec.279(2) of the present Act. And, as a Court of first appeal, this Court is the final Court of facts, and it has the power, nay a duty, to re-appraise the evidence already available on record.

20. To conclude this point, the argument founded on Sec.446 of the Companies Act is misconceived, and it presents itself as a strategy born out of desperation.



Is the Public Auction vitiated by Fraud:

21.1 This is the core of the controversy. According to the appellant, the facts on which the plaintiff has laid the suit, assuming they are proved, at the best, might only constitute an irregularity within the meaning of Sec.69(3) of the TP Act, and not an illegality.

21.2 It has to be stated here that while the words 'fraud' or 'fraudulent' have not been seen specifically employed in the plaint, but the plaintiff has still pleaded that the first defendant, by the procedure adopted for auctioning the suit property, has made a wrongful gain out of a wrongful loss to the plaintiff. At any rate what is alleged by the plaintiff is not fraud simpliciter founded solely on any manipulation of facts, but a fraud on statute by which the first defendant had inflicted an injury on the plaintiff for deriving an undeserving gain.

22. This argument has two parts:

- (a) Ascertaining the proof of the facts which according to the plaintiff constituted fraud;
- (b) If the said facts are proved, ascertaining it, they lead to an inference of fraud and nullify the public auction, or if they constitute a mere irregularity within the meaning of Sec.69(3) of the TP Act.

A. On Proof of Facts:

23. The primary allegations by the plaintiff are:

- (a) That notice in terms of Sec.69 (2)(a) of the Transfer of Property Act was not served on the plaintiff.
- (b) That the upset price was not fixed in the notice of auction, nor was it published beforehand;
- (c) That the third defendant, the successful bidder in the auction as per Exts.D-9, D-10 and D-14, is a close relative of D.W.2; and,
- (d) That Ext.D-2 sale deed was executed not only in favour of the successful bidder but also in favour of three others namely defendants 4 to 6, and they were roped in after the auction. There is no proof that the 3rd defendant/appellant had valid authorisation to bid also on behalf of his co-purchasers.

Of these fundamental-four facts, factual finding is required only for (a) and (b), as D.W.2, Gurunarayana Rao, a former director of the first defendant, in his oral evidence has admitted that the 6th defendant is his wife, defendants 3 and 4 are his brothers-in-law and the 5th defendant is his sister-in-law. How far this admitted relationship referred to above, impacts the legality of the auction will be considered later.



24 Sec.69 of the T.P.Act reads:

Power of sale when valid -

(1) A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely: -

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist 37 or a member of any other race, sect, tribe or class from time to time specified in this behalf by the State Government in the Official Gazette;

(b) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgagee is the Government;

(c) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and] the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the towns of Calcutta Madras, Bombay, or in any other town or area which the State Government may, by notification in the Official Gazette, specify in this behalf.

(2) No such power shall be exercised unless and until -

(a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

(3) 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 authorize 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 unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(4) The money which is received by the mortgagee, arising from the sale, after discharge of prior encumbrances, if



WEB COPY

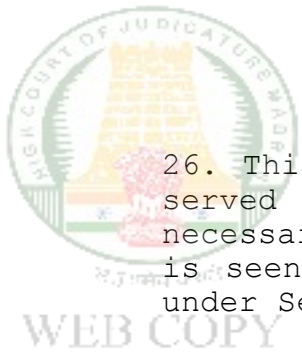
any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior encumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

(5) -----"

If notice under Sec.69(2) (a) was complied:

25.1 Sec 69(2) provides that "No such power", meaning thereby the power of the mortgagee to sell the mortgaged property without the intervention of the Court, "shall be exercised unless and until- (a) a notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of the several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service;..." This provision commencing with a firm 'No power', generally would invite an interpretation that notice under Sec.69(2) to the mortgagor is mandatory. However Sec.69 (3) of the TP Act expressly declares that failure to issue notice is not a ground to impugn an auction sale. When the legislation itself spells out the consequence of failure to perform that which it declares in mandatory terms, the legislative wisdom shall prevail.

25.2 On facts, the plaintiff contends that even as early as on 21.03.1997, he had written to the Chief Executive of the first defendant and mailed to him to the effect: "In spite of several repeated instructions, you are still sending communications for me to Ranipet address. As already instructed I am not staying at Ranipet. Since I will be moving about frequently out of Madras, I request you to send all communications for me (including Regd. Post) to "16, D'Sylva Road, Mylapore, Madras 600 004". But no notice in terms of Sec.69(2)(a) of the T.P. Act is seen issued by the mortgagee to the mortgagor. This fact was not refuted by the first defendant by its preference not to contest the suit with its written statement. The auction purchaser/appellant does not have any locus standi either to deny this fact, for issuing notice under Sec.69(2)(a) is a statutory precondition imposed on the mortgagee. On record, the nearest pre-auction correspondence available was Ext.D-6, dated 05.04.1999, a letter from the second defendant-auctioneer to the plaintiff, but it does not satisfy the requirements of Sec.69(2).



26. This Court holds that no notice under Sec.69(2)(a) was seen served on the plaintiff by the first defendant, and as its necessary fallout, it has to be held that the first defendant is seen faltering on step one towards auctioning the property under Sec.69 (1) of the TP Act.

Was the upset price properly fixed for auction:

27. According to the appellant, as per the Ext.D-14 guideline value of the property as on the date of auction was Rs.18,24,112 and the upset price was fixed at Rs.11.0 lakhs. However, as argued by the plaintiff, in Ext.D-11 correspondence between the second defendant-auctioneer and the director of the first defendant, dated 12-05-1999 (second day after the auction), the relevant portion reads: "The conditions of sale was read out and explained in detail to the participating bidders. As instructed by you, we commenced the auction with an opening bid of Rs.11,00,000/-." Ext.P-7 is the auction schedule published by the second defendant, and nowhere it mentions about the upset price.

28. In Anil Kumar Srivatsava case [(2004)8 SCC 671] relied on by this Court in M/s Hameed Enterprises Vs Registrar, IIT, Madras & others [(2014) 7 MLJ 840], the Hon'ble Supreme Court has signified the importance of the upset/reserve price. Paragraph 13 reads:

"13. Valuation is a question of fact. That Court is reluctant to interfere where valuation is based on relevant material. (See; Duncans Industries Ltd. vs. State of U.P. and others reported in (2000) 1 SCC 633). The difference between valuation and upset price has been explained in the case of B. Susila and another vs. Saraswathi Ammal and others (reported in (AIR 1970 Madras 357) in which it has been held that fixation of an upset price may be an indication of the probable price which the land may fetch from the point of view of intending bidders. However, notwithstanding the fixation of upset price and notwithstanding the fact that a bidder has offered an amount higher than the reserve / upset price, the sale is still open to challenge on the ground that the property has not fetched the proper price and that the sale be set aside. That the fixation of the reserve price does not affect the rights of the parties. Similarly, in the case Dr. A.U. Natarajan and another vs. Indian Bank, Madras reported in (AIR 1981 Madras 151) it has been held that the expressions 'value of a property' and 'upset price' are not synonymous but have different meanings. That the term 'upset price' means lowest selling price or reserve price. That unfortunately



WEB COPY

in many cases the word 'value' has been used with reference to upset price. That the sale has to commence at the higher price and in the absence of bidders, the price will have to be progressively brought down till it reaches the upset price. That the upset price is fixed to facilitate the conduct of the sale. The fixation of upset price does not preclude the claimant from adducing proof that the land is sold for a low price." (emphasis supplied)

In Rani Aloka Dudhoria Vs Goutam Dudhoria [(2009)13 SCC 569], again another relied on by this court in Hameed Enterprises case, the Hon'ble Supreme Court has held that fixing the upset price or base price or reserve price is mandatory in the context of Sec.6 of the Partition Act, 1894, where there is a statutory insistence for fixing the upset price before auctioning a property. The need for fixing the upset price, and its publicity before auction cannot be amplified more.

29. When the property was sold without any wide publication of justifiable or acceptable base price or upset price, then transparency in the auction is lost. Though a mortgagee is not an agent of the mortgagor that he should always aim at the best price for the property, he still may have to expend reasonable efforts to obtain a fair price. This, an auction with a pre-fixed and well published upset or reserve price, is more likely to obtain, which in turn will ensure the fairness and transparency of the procedure adopted.

30. This Court now holds that the auction was held on an arbitrary pricing, a price of mortgagee's choice. But, is it an irregularity within the meaning of Sec.69(3) of the TP Act, or an aspect of fraud on statute? That would be considered shortly.

B. Do the proved facts point to a fraud in the conduct of auction?

31. As seen earlier under Sec.69(3) of the TP Act, a failure to issue notice under Sec.69(2) does not render the auction invalid. Therefore, in itself it is an inadequate ground to set aside the sale. Similarly, an auction without an upset price may, as a stand-alone fact, amount to an irregularity if the mortgagee is shown to have made a fair attempt to ensure that the property fetched a reasonable price. However, the plaintiff picks them not as separate or independent facts, but makes them as part of his pack of allegations as constituting fraud.

32. In paragraph 30 above, this Court has held that the upset price is arbitrarily fixed. In considering the justness of whatever price was fixed as the upset price moments before the auction commenced, the following fact merits a reference: As



per Ext.D-14, the official Guideline Value statement, dated 03-6-1999 (obviously obtained some 23 days after the auction) the guideline value (and not any approximate market value) of the site was Rs.18.25 lakhs, and the upset price had been fixed at Rs.11.0 lakhs, after discounting the guideline value by 40.25%, solely because the property was stated to be in the occupancy of a tenant. If all the other aspects are kept a constant, rate of discount at 40.25% is a shockingly high percentage, and appears plainly unconscionable. And, the highest bid was for Rs.12.0 lakhs, barely a lakh more than the upset price fixed. This fact will have relevance in the context of the discussions to follow.

33. Now to the allegation of fraud. The gyrating element behind any fraud is deception. It seeks an undeserving gain for oneself out of another's injury, an injury not inflicted accidentally, but deliberately. It manufactures facts, manipulates circumstances, maneuvers legal procedures, yet masquerades with a face of the innocent till the victim is caught in the trap. The Court then would lift the veil of innocence beneath which are hidden the alleged acts of fraud, and scrutinize them, if they, when proved, preponderate a probability of a scheme for achieving a wrongful and undeserving gain out of an injury, pre-designed and inflicted on the rights of the victim. The Court looks at the larger picture that emerges, even if each of the fact that goes to construct it wears an apparent innocence, and evaluates the collective impact which the individual allegations make in combination.

34. Let basic facts be re-stated:

- (a) No notice under Sec.69(2) TP Act was issued to the mortgagor-plaintiff. But it is covered under Sec.69(3).
- (b) Auction had held without a pre-fixed upset price, and whatever upset price that was fixed on the date of auction had been arbitrarily fixed at the instruction of the director of the company. Still, it may, in a given case, fall within Sec.69(3) again.
- (c) The sole successful bidder, the appellant herein, is the brother-in-law of a director of the mortgagee-company.
- (d) The ultimate purchasers with whom the appellant had shared his success in the auction, the defendants 4 to 6, are the wife, brother-in-law and sister-in-law of the same director of the company.

Do they in combination indicate an undercurrent of fraud?

35.1 To appreciate it in the context of the present case, this Court now needs to travel a couple of years backwards, to 1997. The plaintiff contends that of his two loans, one alone was secured by Ext.D-3 mortgage. (Ext.D-3 however, shows that a further charge was created over the suit property to include the



second loan). But what is even more significant is that he claims that Rs.3.63 lakhs had been paid towards repayment of his loans. In the present suit the plaintiff had produced Ext.P-4, a copy of a letter dated 05-01-1995, (appears like a covering letter) wherein it is stated that he had entrusted about 30 fixed deposit receipts, all matured on 24-01-1995 and duly discharged, along with couple of cheques to the first defendant with a direction to adjust the same towards his mortgage-debts. The party competent to deny this allegation is the first defendant, but it did not file its written statement to dispute it. In the cross examination of P.W.1, the only question asked was if any receipt was obtained for delivering Ext.P-4 letter from the first defendant to which the witnesses has responded that he did not have the acknowledgment with him then. Not even a suggestion was made that the contents of Ext.P-4 were untrue.

- 35.2 Be that as it may, in Ext.D-2 sale deed it is recited that the plaintiff had paid a sum of Rs.3,81,900/- towards his debts due to the first defendant. It is not certain if this sum mentioned in Ext.D-2 sale deed was the same amount which the plaintiff has referred to, since the same mortgagee had denied when it resisted I.A.12614/1998 in O.S.5326/1998 in which Ext.D-4 came to be ordered. In Ext.D-4 Order, while narrating the counter-allegations of the mortgagee, the learned District Judge had recorded that the mortgagor had only paid Rs.1,99,354.15/- towards repayment of the mortgage-debt. And there is no case for anyone that the mortgagor/plaintiff had paid any amount to the mortgagee after Ext.D-4 Order. In this circumstance, the recital in Ext.D-2 sale deed that the plaintiff had paid about Rs. 3,81,900/- which is Rs.1.81 lakhs more than what is stated in Ext.D-4 raises few (unanswered or rather unanswerable) questions.

35.3 And, the plaintiff herein had filed a suit for redemption in O.S.285/1997 for redemption of the mortgage at least some two years prior to auction.

35.4. All these are at least suggestive or indicative of the fact that the plaintiff had raised a dispute on the mortgage-money payable and laid a suit for redemption. A bonafide dispute on the mortgage money payable and the probability of its truth were not decided by anyone as yet. It cannot be decided in this case either. And, given the scheme of Sec.69 TP Act, a disputed question on the mortgage-money payable cannot be unilaterally decided by the mortgagee, and it belongs to the realm of Courts. (Here it may have to be stated that in Ext.D-4 Order the Court has recorded that the plaintiff had not established that Rs.3.63 lakhs had been repaid but it makes little sense now when Ext.D-2 recites about Rs.3.81 lakhs had



been paid. Till it is clarified, this issue will be alive) While the suit for redemption of the mortgage was laid in 1997, the auction had taken place, irrespective of the circumstances attending it, only in May 1999.

WEB COPY

36.1 Ordinarily, when a mortgage is created, the mortgagor has a right to redeem his property on payment of the mortgage-money due. And where there is a default in payment of the mortgage money, the mortgagee will have a right to pay himself from and out of the mortgaged property. Beyond realising the amount due to him from and out of the sale proceeds of a mortgaged-property, no mortgagee of a simple mortgage, or an English mortgage or an Equitable mortgage, is entitled to have a larger interest in the mortgaged property. His right over the mortgaged security though is superior to that of the mortgagor, yet it is not absolute, but is limited by the extent of interest which the law confers on him. Sec.69(4) of the TP Act declares that the mortgagee is a trustee of the mortgagor for the balance money left after paying himself from the sale proceeds. This underscores the fact that mortgagee's interest in the mortgaged security cannot exceed his legitimate interest to pay himself out of the sale proceeds. In simple terms he cannot aim to own the mortgage property. Law frowns upon every conduct of the mortgagee that clogs the equity of redemption, but, clogs do the mortgagee generally create when they aim not at realising his debts, but at the property mortgaged (an interest that exceeds his superior right of sale).

36.2 Where the Court is the arbiter of a dispute between a mortgagor and the mortgagee, and if equity of redemption is extinguished by a decree directing foreclosure of right of redemption, or by the sale of the mortgaged property, there is in place a procedural fairness to ensure that all that was done was fairly done. In the context of Sec.69 of the TP Act, the mortgagee is clothed with the same power of sale, but, it should not be understood that he is spared of the duty to maintain procedural neutrality in auctioning the property, a duty which the Courts are otherwise entrusted with. The fact that the statute enables the mortgagee to wear two caps and requires him to play dual roles - one for realising its debts, and another for auctioning the property for realising it, imposes a greater responsibility on him than the one enjoined to the responsibilities of the Courts, for, the mortgagee then will be a judge in his own cause, with a lurking temptation to advance his interest at the expense of fairness expected of him. Therefore, what the statute removes from the procedural line from the scheme of Sec.69 is the need for the Court's intervention in sale of the mortgaged-property, but certainly not the fairness with which the power of sale needs to be exercised. But is fairness a criterion that a mortgagee with



the power of sale under Sec.69 cannot forsake?

Is fairness integral to the Power of sale under Sec.69

37.1 In the colonial days, Britain organised the legal system in this country exactly the same way it ran its commerce: To export its home-grown legal concepts to be received as import in this country that it ruled. Sec.69 of the TP Act was thus shipped from the English shores where it had its origin in Sec. 20 and 21 of the English Conveyancing Act, 1881, to join our legal system, when the Transfer of Property Act was enacted a year later in 1882.

37.2 But, it may have to be stated that the concept of powering the mortgagee contractually to sell the mortgaged property had been there in this country even before the advent of the Transfer of Property Act, and had been tested before the Courts a few times. In Vencatavarda Iyengar v. Venkata Lutchmmal & another [(1875) 23 W.R. (PC)] (the judgment was delivered on 19th November, 1874) their Lordships of the Privy Council had held that a clause that powers the mortgagee to sell the security would be a penalty and therefore, void. A few decades earlier in Bhowani Charan Mitter v. Joykissen Mitter, [(1847) 7 SD 429], the Sadr (or Sudder) Dewanny Adalut, (the Chief Civil Court of Justice of those days in Calcutta when the East India Company ruled the territory, which later came to be replaced by the Calcutta High Court in 1862) had held that such a sale can be fraught with fraud. To extract the words of the learned Judges:-

"This court has only to declare such a condition legal, and in the course of a short time not a mortgage-bond would be without it. The mortgagee would then sell the debtor's property to suit his own time, and in such manner with such publicity and formalities as he thought proper. Fraud, it is to be feared, would frequently accompany the transfers, and the property fall into the hands of the mortgagee, or some of his connections even (as in this case it is alleged the purchaser is the son-in-law of the mortgagee) at an inadequate price, leaving the lender at liberty still to pursue the borrower for the balance that may remain after the sale"

37.3 The English experience reveals that till the end of the 18th Century, a mortgagee could not realise his dues, except by resorting to proceedings before the Chancery Courts. An attempt was therefore made, to balance the interest of the mortgagee and that of the mortgagor legislatively, and it resulted in Lord Cranworth's Act, 1860. This was repealed by the English Conveyancing Act, 1881 and this in turn was replaced by the Law



of Property Act, 1925 where it took a new avatar in Secs. 101 and 103.

37.4 The power of the mortgagee to sell without the intervention of the Court has gone before the House of Commons and the judicial approach there shows that the Courts in England have always been anxious to reserve to themselves the power to decide, if the power of the mortgagee to bring a property to sale without reference to Courts was exercised bonafide and fairly. See, *Davey v. Durrant*, [(1857) 1 De Gex & Jones 535 = 44 E.R. 830] (Per Lord Justice Turner).

37.5 While understanding the nature of mortgagee's power of sale, one aspect that haunted judicial thinking was if the mortgagee is a trustee for sale of property. That now has been settled that he is not. This can be traced to an observation of George Jessel MR in *Nash v. Eads*, [(1880) 25 Sol. J. 95 and *Warner V. Jacob* (1882) 20 Ch.D. 220]. This view has been accepted by the courts in India too. See, *K. Mohanakrishnan v. Seetha Natarajan and 9 others*, [1991-2-LW 592 (DB)]. With the flow of time, the Courts, though have recognised the power of sale of a mortgagee, yet chose to show sensitivity to the interest of the mortgagor or persons claiming under him. In *Cuckmere Brick Co Ltd v. Mutual Finance Ltd*, [(1971) 2 All ER 633 at 643 and 647] it is held that where interests conflict, a mortgagee cannot act in a manner which sacrifices the interest of the mortgagor. Lord Justice Peter Gibson in *Raja v. Austin Gray (a firm)* [2002] EWCA civ. 1965] succinctly lays down the guidelines to be adopted by the court in such matters. The learned Judge held:

"55(3). A mortgagee, however, is subject to an equitable duty to act in good faith and to obtain the best price reasonably obtainable at the time he decides to sell. That duty is owed to those interested in the equity of redemption. They include the mortgagor, other mortgagees and a guarantor of the mortgage debt, but they do not include a tenant at will of the mortgaged property, nor, where the mortgagor is a trustee, a beneficiary of the trust."

It may now be of some interest to note the view of Lightman J in *Silven Properties Ltd V. Royal Bank of Scotland*, [(2003) EWCA Civ. 1409 : (2004) 4 All E.R 484]. He restated the basic proposition that a mortgagee is under no obligation to exercise his power of sale. To use the words of the learned judge: "He is entitled to remain totally passive", to mean that mortgagee



"13. A mortgagee has no duty at any time to exercise his powers as mortgagee to sell, to take possession or to appoint a receiver and preserve the security or its value or to realise his security. He is entitled to remain totally passive. If the mortgagee takes possession, he becomes the manager of the charged property: see *Kendle v. Melsom* [1998] 139 CLR 46 at 64 (High Court of Australia). He thereby assumes a duty to take reasonable care of the property secured: see *Downsview Nominees Ltd v. First City Corp* [1993] AC 295 ("*Downsview*") at 315A per Lord Templeman; and this requires him to be active in protecting and exploiting the security, maximising the return, but without taking undue risks: see *Palk v. Mortgage Services Funding Plc* [1993] Ch 330 at 338A per Nicholls V-C ("*Palk*").

19...When and if the mortgagee does exercise the power of sale, he comes under a duty in equity (and



WEB COPY

not tort) to the mortgagor (and all others interested in the equity of redemption) to take reasonable precautions to obtain "the fair" or "the true market" value of or the "proper price" for the mortgaged property at the date of the sale, and not (as the Claimants submitted) the date of the decision to sell. If the period of time between the dates of the decision to sell and of the sale is short, there may be no difference in value between the two dates and indeed in many (if not most cases) this may be readily assumed. But where there is a period of delay, the difference in date could prove significant. The mortgagee is not entitled to act in a way which unfairly prejudices the mortgagor by selling hastily at a knock-down price sufficient to pay off his debt: Palk at 337-8 per Nicholls V-C. He must take proper care whether by fairly and properly exposing the property to the market or otherwise to obtain the best price reasonably obtainable at the date of sale. The remedy for breach of this equitable duty is not common law damages, but an order that the mortgagee account to the mortgagor and all others interested in the equity of redemption, not just for what he actually received, but for what he should have received: see Standard Chartered at 1416 (B) (emphasis supplied)

It is a balancing act. It recognises the power of sale that is contractually vested in a mortgagee as superior, but it limits the same through the doctrine of fairness and bonafide that goes with it.

37.6 Having travelled across the English Channel to understand how the English have approached the law of their making, it must be recorded that this Court is alive to the difference of opinion between Denning LJ and that of Lightman J. In Standard Chartered Bank v. Walker [1982] 3 All ER 938, Denning J went so far as to observe that there might be some restriction on the mortgagee, such as not being able to elect to sell at the worst possible time. This view was not accepted by Lightman J in Silven Properties case. Respect that this Court owes and shows to the greatest of the English Judges of the modern times that Lord Denning is, yet it opts for the view of Lightman J.

37.7 It could now be derived that the English view, with its oscillation between fairness of action, and the unfettered contractual power of sale granted to a mortgagee has settled to



compromise both to add fairness and bonafide not as fetters but filters to the power of sale.

38. The need for fairness in action is therefore, not a virtue merely in public law, but it is integral to private law in equal measure. Anyone, who the statute has clothed with the power to affect the civil right of another, even if the same is private in character, as between them, it has to be exercised only fairly. The mortgagee who enjoys the power of sale under Sec.69 of the TP Act should therefore, act fairly, and must be shown to have acted fairly, and should demonstrate whenever required, that he had always acted fairly.

Return to discussion on Fraud:

39. The allegation of fraud, given the setting, is all about ascertaining, if the evidence on record, and the cogency of their relative placement to each other, preponderates a probability that Sec.69 of the TP Act has been manipulated by the mortgagee using his superior power of sale unfairly for gaining an undeserving personal advantage.

40. If this case is now approached, this Court cannot stop looking at the fact of non-issuance of notice under Sec.69(2) or failure to fix the upset price individually and scan them for their effect under Sec.69(3) of the TP Act, but has to bring in another critical fact for consideration: This is all about the relationship-factor which the appellant and defendants 4 to 6 share with D.W.2, the director of the first defendant-company. This makes the pack wholesome.

41. On the plane of fairness, let the constituent facts be sequentially arranged:

- A dispute seemingly raised about the actual mortgage money payable, and a suit for redemption had been filed. First defendant had exhibited a concern not for defending the suit, but for auctioning the suit property as per Sec.69 of the TP Act.
- Auction took place without notice to the plaintiff.
- Auction takes place with an arbitrarily fixed upset price which is about 40.25% less than even the guideline value of the property, that too only during the auction without any prior public notice, and as instructed by the director of the mortgagee.
- The brother-in-law of the director (D.W.2) bids and is declared as the successful bidder.
- Sale deed was executed in favour of appellant + three others (defendants 4 to 6) though there is nothing on record to hold that the appellant bid for them too. Of the three others one, the 6th defendant is the wife of the same



director.

To this may be added another fact: The first defendant did not contest the suit, and so did the second defendant-auctioneer. Nor the minutes/proceedings of the auction were produced.

WEB COPY

42. What just inference will any rational being with some conscience, who the law understands as the reasonable man, draw from the facts collated above? What the mortgagee did not tell the Court, but is still audible is: "I ignore issuing the statutory notice, I will not state the upset price in the public notice of auction because it is inconvenient to me, I instruct the auctioneer to commence the auction at the upset price I state, I require my brother-in-law to bid the auction, and having set up my brother-in-law and having completed the process of auction, I will now bring in my wife and other relatives to take the sale." There is therefore, in place a decipherable pattern to mortgagee's attitude to the sale of the mortgaged property which is not hard to decode. The auction is fixed. The mortgagee had aimed at the mortgaged property for the benefit of its director with brazen openness and shameless nonchalance. Where a mortgagee is seen to have aspired for the title to the property mortgaged, he will be considered to have strayed voluntarily and consciously into territories which a fair-mortgagee will fear to tread.

43.1 If the issue is approached from the non-compliance of serving notice as per Sec.69(2), or the failure to spare reasonable efforts or to show diligence in fixing the upset price, then each of them can be dismissed as one falling under Sec.69(3) of the TP Act. But if the same issue is approached from understanding who the successful bidder was, and who the auction purchasers were, and the procedural violations are appreciated backwards, then the design to misuse one's position as the director of the mortgagee-company emerges as the dominant factor influencing the course of auction. The fidelity to fairness that the mortgagee is expected to exhibit when he sells the mortgaged property sans court's intervention, cannot however, have a single view-point, but must stand the scrutiny from every angle of viewer's choice.

43.2 The judgement of the Division Bench of this Court in K. Mohanakrishnan Vs Seetha Natarajan & 9 others [1991-2-LW 592] is apposite in the context: Facts therein bear a striking resemblance to the present case. That was a case where property was brought to auction in exercise of powers under Sec.69 of the TP Act, and it was bid for half its market value, and the sale deed too was executed not in favour of the highest bidder but in favour of a Trust of which the second defendant was the Trustee. While holding that the auction-sale was malafide the Division Bench wrote:



WEB COPY

"9. A rule which has received universal recognition and needs no reiteration, however, seems to have been over stretched by the mortgagee in the sense that a mortgagee with a power of sale is 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 realise his mortgage debt. If he exercises it bonafide for that purpose, without corruption or collusion with the purchaser, court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as itself be evidence by fraud. This statement of law on the subject in the early English decisions has been often repeated by the courts in India including the Supreme Court. In Pitchai Mohideen v. C.D.K.Das & Sons, the dictum approved by the Judicial Committee in Haddington Island Quarry Co. Ltd., v. A.W.Huson has been quoted, a dictum which was stated by Kay J. In Warner v. Jacob

"A Mortgagee, is strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefits, to enable him the better to realise his mortgage debt. If he exercises it bonafide for that purpose without corruption or collusion with the purchaser, the Court will not interfere, even though the sale is very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud."

Is there not a patent manipulation of the procedures just to benefit the director of the first defendant-company, or his relatives? This is the procedure-part of carrying out the unfair intent. Does it not indicate that each of the innocent-looking procedural violation which may merit a place within the protective ambit of Sec.69(3) are but steps for translating the hidden theme into a reality? When the statutory procedure is manipulated in exercise of a statutory power to derive an unfair personal advantage, it amounts to fraud on statute. Here the first-defendant fails as fair, reasonably neutral, and as one who the statute trusted when it granted it the power of sale. The auction is a plain fraud on the statute. And it is held in P.R.Govindaswami Naicker Vs Pukhraj Sowcar & another [AIR 1940 Madras 903], that fraud is an exception to Sec.69(3) of the TP Act.

45. It is now required to be stated that Sec.69(3) of the TP Act is not a shield to hide the unfairness of a mortgagee who was seen to have developed an interest larger than its just right over the mortgaged property. Nor Sec.69(3) a 'Shikandi' (a la Mahabharata) on the front to keep away the Court from probing



into the allegations of fraud. Nor can Sec.69(3) be understood as a manipulative tool in the hands of some that believe in manipulation. Otherwise, there will be a premium on plain fraud on statute.

WEB COPY

46. The decision is to state the obvious: This Court holds that the procedural lapses in the conduct of the auction are not mere irregularities, but a fraud on the statute, and the auction sale is liable to be set aside and the conclusion of the trial Court deserves to be confirmed.

47.1 However, the justice in the cause is not yet completely done. The plaintiff had not made any payments to redeem the property, his claim of partial repayment, notwithstanding. As already indicated in paragraphs 35.2 and 35.4 above, there is ample ground to believe that the plaintiff might have paid Rs.3.63 lakhs, at least till such time the recital in Ext.D-2 sale deed is adequately explained. But it is not conclusively stated as yet. And, while Ext.D-2 sale deed states that the mortgage debt was Rs.12,45,111, the auction sale itself was for Rs.12.0 lakhs. (This implies first defendant company had lost Rs.45,111/-). At any rate, that which the plaintiff had to pay to the mortgagee had been paid by the purchasers of the property. It might be that, as held in K. Mohanakrishnan case [1991-2 LW 592] these purchasers of property (defendants 3 to 6) might be parties to the malafide auction, but Courts do not victimise litigants collaterally. On paper it is their money that has gone to pay off the mortgage debt which the plaintiff owes. Hence, they have to be reimbursed under Sec.69 of the Contract Act.

47.2 If substantial justice has to be done, then this Court should suitably mould the relief based on the merits of the case by exercising its power under Order XLI Rule 33 CPC, for the plaintiff ought not to benefit unfairly out of amounts provided by defendants 3 to 6. In Rameshwar Prasad And Others vs Shyam Beharilal Jagannath [AIR 1963 SC 1901: (1964) 3 SCR 549], the Hon'ble supreme Court has held:

"20. This rule is under the sub-heading 'judgment in appeal.' Rule 31 provides that the judgment of the Appellate Court shall be in writing and shall state inter alia the relief to which the appellant is entitled in case the decree appealed from is reversed or varied. Rule 32 provides as to what the judgment may direct and states that the judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or, if the parties to the appeal agree as to the form which the decree in



WEB COPY

appeal shall take, or as to the order to be made in appeal, the Appellate Court may pass a decree or make an order accordingly. The reversal or variation in the decree would, therefore, be in accordance with what the appellant had been found to be entitled. The decree therefore, is not to be reversed or varied with respect to such rights to which the appellant is not found entitled. Rule 33 really provides as to what the Appellate Court can find the appellant entitled to. It empowers the Appellate Court to pass any decree and make any order which ought to have been passed or made in the proceedings before it and thus could have reference only to the nature of the decree or Order in so far as it affects the rights of the appellant. It further empowers the Appellate Court to pass or make such further or other decree or Order as the case may require. The Court is thus given wide discretion to pass such decrees and Orders as the interest of justice demand. Such a power is to be exercised in exceptional cases when its non-exercise will lead to difficulties in the adjustment of rights of the various parties..."

In *Dhangir v. Madan Mohan* [AIR 1988 SC 54], the Apex Court held:

"...The Appellate Court could exercise the power under Rule 33 even if the Appeal is only against a part of the decree of the lower Court. The Appellate Court could exercise that power in favour of all or any of the respondents although such respondent may not have filed any Appeal or objection. The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The Appellate Court could pass any decree or order which ought to have been passed in the circumstances of the case. The words "as the case may be require" used in Rule 33, Order 41 have been put in wide terms to enable the Appellate Court to pass any order or decree to meet the ends of Justice. What then should be the constraint? We do not find many, we are giving any liberal interpretation. The rule itself is liberal enough. the only constraints that we could see may be these: That the parties before the lower Court should be there before the Appellate Court. The question raised must properly arise out of judgment of the lower Court. If these two requirements are there, the Appellate Court could consider any objection against any part of the judgment or decree of the lower Court. It is true that the power of the



WEB COPY

Appellate Court under Rule 33 is discretionary. But, it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The Court should not refuse to exercise that discretion on mere technicalities"

Therefore, this Court has decided to create a charge on the suit-property for a sum not exceeding Rs.12.0 lakhs in favour of defendants 3 to 6. This is because the exact mortgage amount payable by the plaintiff still remains to be ascertained.

46. In conclusion,

- A) The appeal is partially allowed and the decree of the Court below is modified to the extent of creating a charge over the suit property in favour of the defendants 3 to 6 for an amount not exceeding Rs.12.0 lakhs. Since this amount is yet to be determined, this has to be worked out only in a separate suit, if parties do not arrive at a consensus on it. As to the rest, the judgement and decree in O.S.No.12561 of 2010 on the file of Additional District Judge, Fast Track Court No.1, Chennai is hereby confirmed. Cross Objection dismissed since the decree herein passed takes care of the interest of the cross objectors. Consequently, connected miscellaneous petition is closed.
- B) The Registry is directed to communicate the charge created by this Court on the suit property for an amount not exceeding Rs.12.0 lakhs in favour of the defendants 3 to 6 to the concerned Sub Registry forthwith.
- C) To enable the Registry to intimate the concerned Sub Registry, and to preserve the status quo in the interregnum there will be an order of interim injunction restraining the plaintiff to alienate, or otherwise encumber the property for a period of three months.
- D) No costs.

-s/d-

Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

ds



To:

1.The Additional District Judge
Fast Track Court No.I
Chennai.

2.The Sub Assistant Registrar
Sub Registrar Office
Kodambakkam
Chennai 24.

+1 CC to Mr.K. Bijai Sundar, Advocate sr 64877.

+1 CC to Mr.V. Ravi, Advocate sr 64562.

A.S.No.494 of 2011
and Cros.Obj.No.29 of 2011

TM(CO)

SP(05/09/2019)