

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.01.2017

PRONOUNCED ON : 22.11.2019

CORAM :

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CS.No.1122 of 2007

R.Krishnamurthy .. plaintiff

V.

1.G.Kaliasundaram

2.K.Udayakumar

3.K.Madhavan

4.The Madras Purasawalkam Hindu Janopakara
Saswatha Nidhi or
The Permanent General Benefit Funds Ltd,
No.168, Vellala Street,
Purasawalkam,
Chennai- 600 084.

.. Defendants

PRAYER : Civil suit is filed under Order VII, Rule 1 of CPC
r/w. Order IV Rule 1 of OS Rules.

(a)directing the defendants 1 to 3 to deliver to the plaintiff
vacant possession of the property morefully set out and described in
the schedule hereunder on or before a date to be fixed by this Court
and in the event of the defendants 1 to 3 failing to hand over vacant
possession, to direct the officer of this Court to put the plaintiff in
vacant possession of the suit property.

(b)directing the defendants 1 to 3 to pay the plaintiff mesne profit at the rate of Rs.30,000/-p.m. on and from the date of suit till the date of actual delivery of possession of the property to the plaintiff.

(c)permanent injunction restraining the defendants 1 to 3 from creating any encumbrance, sale, mortgage, lease, sub lease etc., or to make any structural alterations in the building standing in the property more fully set out and described in the schedule hereunder (and)

(d)directing the defendants 1 to 3 to pay the plaintiff the cost of the suit.

For Plaintiff : Mr.G.Arul Murugan

For Defendants : Mr.P.M.Bakthavatsalam
for D1 to D3.
Mr.M.Devaraj for D4.

J U D G M E N T

The civil suit is filed by the plaintiff for delivery of vacant possession and permanent injunction.

2. The gist of the plaint filed by the plaintiff is as follows :-

The plaintiff submits that the property morefully set out in the suit schedule property originally belonged to the first defendant having been purchased by him under the sale deed dated

16.10.1979. The defendants 2 and 3 are the sons of the first defendant.

3. The defendants 1 to 3 borrowed loans from the 4th defendant, as security for which the suit property was mortgaged by defendants 1 to 3 in favour of the 4th defendant under two registered mortgage deeds dated 02.07.1996 and 17.06.1997 which have been registered as Doc.Nos.1875 of 1996 and 1430 of 1997 respectively on the file of Sub Registrar, Anna Nagar, Chennai. As the defendant 1 to 3 defaulted in repayment of loan, the 4th defendant who was conferred with the power of direct sale, as contemplated under Section 69 of Transfer of Property Act, issued a notice and brought the suit property for sale by way of public auction. After due public notice, the 4th defendant M/s.Alwin & Co conducted the auction sale on 02.12.2006. In the said auction, the plaintiff was the highest bidder for a total consideration of Rs.1,53,00,000/-. On the same day, the plaintiff paid a sum of Rs.38,25,000/- by way of cash and cheque. M/s.Alwin & Co vide letter dated 18.12.2006 informed the plaintiff that on 14.12.2006, the 4th defendant had accepted the plaintiff's bid and the sale in favour of the plaintiff was confirmed by the 4th defendant. The plaintiff was also informed that the defendants 1 to 3 have filed a suit for permanent injunction in OS.No.1440 of 2005 on the file of

the IV Assistant City Civil Court, Chennai, inspite of having given an opportunity the defendants 1 to 3 had not repaid their dues. The plaintiff paid the balance auction amount and thereafter, the 4th defendant executed a sale deed dated 28.03.2007 in favour of the plaintiff vide Doc.No.1257 of 2007 before the Sub Registrar, Anna Nagar, Chennai, thereby the plaintiff became the absolute and exclusive owner of the suit property. The plaintiff submits that taking advantage of the pending suit in OS.No.1440 of 2005, the defendants 1 to 3 are continuing to squat in the suit property, without having any right, title or interest. The plaintiff and the 4th defendant have made efforts calling upon the defendants 1 to 3 to vacate and deliver possession of the suit property have ended in futile.

4. The plaintiff submits that under due process and for more than adequate consideration having purchased the suit property is entitled to the possession of the suit property. The defendants 1 to 3 are in unlawful and illegal occupation of the suit property, the suit property is located in a prime locality will fetch not less than Rs.30,000/-p.m. as rent. As the defendants 1 to 3 are occupying the suit property by unlawful means, hence, they are liable to pay damages for their use and occupation of the suit property from the date of suit till delivery of possession. Further, the defendants

1 to 3 taking advantage of their illegal occupation may create mortgage over the suit property and also making structural changes in the building as such the defendants 1 to 3 have to be permanently restrained from occupation of the suit property. Hence, the suit by the plaintiff.

5. The gist of the written statement filed by the first defendant is as follows :-

The first defendant states that he is the absolute owner of the suit property and he does not know the plaintiff. After filing of the suit, the first defendant came to know that his own property has been sold out illegally to the plaintiff stealthily and surreptitiously. The 4th defendant and the plaintiff made hand in glove with each other for dispossession of suit property without issuing any legal and valid notices. The suit property was originally allotted to the 1st defendant by Tamil Nadu Housing Board on 16.10.1979. The sale deed was also executed in favour of the 1st defendant/Kalaisundaram, he was in absolute and uninterrupted possession of the suit property. The first defendant has borrowed loan amount of Rs.34,00,000/- from the fourth defendant by depositing the title in equitable mortgage at the rate of 21.6%p.a., if any default in principal payment 3% rate of interest is charged as penal interest. Thus the 4th defendant charged 24.6%p.a. for the

said borrowing. The interest is not only exorbitant but also usurious in nature and further it is against the guidelines of Reserve Bank of India. The first defendant regularly paid the monthly instalment to the 4th defendant without any default. The repayment of principal amount is not directly taken into principal instead the amount paid by 1st defendant was credited in interest account. The last payment was made on 15.03.2005 and the request for statement of accounts as on date was not mentioned in the plaint.

6. The first defendant submits that he is responsible for the principal sum of Rs.36.00lakhs and interest charged thereon. Whereas, the 4th defendant in order to gain more advantage by auctioning the property sold out for Rs.1,53,00,000/-. Due to escalation of prices and construction cost increases over the time, the 4th defendant is taking advantage deprived the rights of the first defendant by way of public auction through M/s.Alwin & Co., illegally without serving proper auction notices and opportunity to the 1st defendant. Further, the plaintiff and the first defendant were aware of the pending suit in City Civil Court filed during the year 2005 itself. Knowing fully well about the pending litigation before the Civil Court the sale deed was executed on 28.03.2007 to and in favour of the plaintiff with an intention to dispossess the property. Originally the property belongs to the first defendant and he did not

convey any right, title or interest thereon to the plaintiff. That being the actual position, the question of delivery and without vestige of title, right and interest, the possession of the suit property is null and void. Thus the 4th defendant has got more money by way of auction than the due amount, by way of illegal means, indirectly without due process of law and notification of the gazette.

7. The first defendant submits that if any amount is to be paid to the 4th defendant, the first defendant may arrange to sell the suit property by giving advertisement in Dailies newspaper to settled the dues to the 4th defendant. The 4th defendant arranged to derive more and great profit in order to undermine the suit property clandestinely. The 4th defendant gained profit to put its hand into another man pocket. The act of 4th defendant bringing their suit property for public auction is unwarranted, unjust and illegal. The purchase of suit property by the plaintiff is null and void, claiming right in the suit property by exercising the power are unauthorised, improper and irregular. No opportunity and no notice have been given by the 4th defendant before executing the sale deed in favour of the plaintiff. Hence, the first defendant prays for dismissal of the suit.

8. The gist of the written statement filed by the fourth defendant is as follows :-

The 4th defendant states that the first defendant is the owner of the suit property. The defendants 1 to 3 sought for loan for a total sum of Rs.34lakhs and executed an equitable mortgage on deposit of title deeds. The loan amounts were received by the defendants 1 to 3 under loan A/c.Nos.EH1039, EN0531, EF0007, ES0320 during 1996 and 1997. The defendants 1 to 3 agreed to pay interest at 21.6%p.a. The defendants 1 to 3 agreed to complete the loan in 100months for loan A/c.No.1039, 90months for EN0531, 50 months for EF0007 and 60months for ES0320. Further, the defendants 1 to 3 agreed to pay monthly a sum of Rs.95,385/- as repayment on all the above four loan accounts and agreed to pay default interest on the arrears of interest payable every month.

9. The 4th defendant submits that the defendants 1 to 3 committed chronic default in repayment of monthly interest, therefore, the property was proposed for auction on 08.03.2005. The defendants filed OS.No.1440 of 2005 on the file of the City Civil Court, Chennai and obtained interim injunction in IA.No.5246 of 2005, after hearing the interim injunction was vacated. The mortgaged property was proposed for auction on 02.12.2006, the defendants 1 to 3 filed another interim injunction application in

IA.No.21244 of 2006, the trial Court granted interim injunction on condition to pay a sum of Rs.1lakh before the auction date. The defendants 1 to 3 have not complied with the condition. As a result, the auction was conducted for the mortgage dues as per the covenants of registered mortgage deed as per the provisions of Section 69 of Transfer of Property Act on 02.12.2006. The plaintiff was the highest bidder for Rs.1,53,00,000/- and the plaintiff paid 1/4 value of Rs.38,25,000/- to the auctioneer on the same day. The defendants 1 to 3 witnessed the auction proceedings and the details were intimated to the mortgagors immediately. Further, the defendants 1 to 3 have filed petition in IA.No.22150 of 2006 for interim injunction restraining the auctioneer or the 4th defendant from confirming the auction. The defendants 1 to 3 were informed about the payments by the auction purchaser and the defendants 1 to 3 were asked to execute the sale deed in favour of the plaintiff, since, the defendants 1 to 3 failed to execute the sale deed, the 4th defendant executed the sale deed in favour of the plaintiff on 28.03.2007 vide Doc.No.1257 of 2007. After the auction proceedings dated 02.12.2006, the suit in OS.No.1440 of 2005 filed by the defendants 1 to 3 has become infructuous and the same is dismissed by the trial Court on 26.11.2007. The defendants 1 to 3 have not challenged the said order dated 26.11.2007 made in OS.No.1440 of 2005.

10. The 4th defendant/Nidhi is in existence for more than 125 years, the amount advanced as loan to the defendants 1 to 3 is nothing but public money, delay in recovering the loan amount would affect the public at large. Hence, the 4th defendant also prays for dismissal of the suit.

11. Based on the pleadings and documents filed by both parties and submission made by both the Counsel the following issues have been framed by this Court on 13.07.2010 :-

1. Whether the plaintiff is entitled for the recovery of possession of the suit property from the defendants 1 to 3?

2. Whether the sale deed executed by the 4th defendant in favour of the plaintiff pursuant to the auction conducted by its agent M/s.Alwin & Company is in any manner affected by the alleged suit in OS.No.1440 of 2000 on the file of the IV Assistant Civil Court, Which is no longer pending?

3. Whether the plaintiff is entitled to the relief of mesne profits calculated at Rs.30,000/- p.m. in view of the unlawful enjoyment of the suit property by the defendants 1 to 3?

4. Whether the plaintiff is entitled for the costs of this suit?

5. To what reliefs is the plaintiff entitled to?

12. After framing of issues, during trial, on the side of the plaintiff Mr.R.Krishnamurthy was examined as PW1 and marked Exs.P1 to P7. On the side of the defendants, first defendant filed proof affidavit and no oral and documentary evidence was produced.

13. Heard the rival submissions made on both sides and perused the materials available on record.

14. The learned counsel for the plaintiffs would submit that the suit schedule property originally belonged to the first defendant having been purchased by him under the sale deed dated 16.10.1979. The defendants 2 and 3 are the sons of the first defendant. The defendants 1 to 3 borrowed loans from the 4th defendant, as security for which the suit property was mortgaged by defendants 1 to 3 in favour of the 4th defendant under two registered mortgage deeds dated 02.07.1996 and 17.06.1997 which have been registered as Doc.Nos.1875 of 1996 and 1430 of 1997 respectively on the file of Sub Registrar, Anna Nagar, Chennai.

As the defendant 1 to 3 defaulted in repayment of loan, the 4th defendant who was conferred with the power of direct sale, as contemplated under Section 69 of Transfer of Property Act, issued a notice and brought the suit property for sale by way of public auction. After due public notice, the 4th defendant M/s.Alwin & Co conducted the auction sale on 02.12.2006. In the said auction, the plaintiff was the highest bidder for a total consideration of Rs.1,53,00,000/-. On the same day, the plaintiff paid a sum of Rs.38,25,000/- by way of cash and cheque. M/s.Alwin & Co vide letter dated 18.12.2006 informed the plaintiff that on 14.12.2006, the 4th defendant had accepted the plaintiff's bid and the sale in favour of the plaintiff was confirmed by the 4th defendant. The plaintiff paid the balance auction amount and thereafter, the 4th defendant executed a sale deed dated 28.03.2007 in favour of the plaintiff vide Doc.No.1257 of 2007 before the Sub Registrar, Anna Nagar, Chennai, thereby the plaintiff became the absolute and exclusive owner of the suit property. The plaintiff submits that taking advantage of the pending suit in OS.No.1440 of 2005, the defendants 1 to 3 are continued to be in possession without having any right, title or interest. The defendants 1 to 3 are in unlawful and illegal occupation of the suit property, the suit property is located in a prime locality will fetch not less than Rs.30,000/-p.m. as rent. Hence, the learned counsel prays for decreeing the suit.

15. The learned counsel for the first defendant would submit that the first defendant is the absolute owner of the suit property. The suit property was originally allotted to the 1st defendant by Tamil Nadu Housing Board on 16.10.1979. The sale deed was also executed in favour of the 1st defendant/Kalaisundaram, he was in absolute and uninterrupted possession of the suit property. The first defendant has borrowed loan amount of Rs.34,00,000/- from the fourth defendant by depositing the title in equitable mortgage. The 4th defendant in order to gain more advantage by auctioning the property sold out for Rs.1,53,00,000/-. Due to escalation of prices and construction cost increases over the time, the 4th defendant is taking advantage deprived the rights of the first defendant by way of public auction through M/s.Alwin & Co., illegally without serving proper auction notices and opportunity to the 1st defendant. Originally the property belongs to the first defendant and he did not convey any right, title or interest thereon to the plaintiff. That being the actual position, the question of delivery and without vestige of title, right and interest, the possession of the suit property is null and void. If any amount is to be paid to the 4th defendant, the first defendant may arrange to sell the suit property by giving advertisement in Daily newspaper to settle the dues to the 4th defendant. The 4th defendant arranged to derive more and great profit in order to undermine the suit property clandestinely. The

purchase of suit property by the plaintiff is null and void, claiming right in the suit property by exercising the power are unauthorised, improper and irregular. No opportunity and no notice have been given by the 4th defendant before executing the sale deed in favour of the plaintiff. Hence, the learned counsel prays for dismissal of the suit.

16. The learned counsel for the 4th defendant would submit that first defendant is the owner of the suit property. The defendants 1 to 3 sought for loan for a total sum of Rs.34lakhs and executed an equitable mortgage on deposit of title deeds. The defendants 1 to 3 committed chronic default in repayment of monthly interest, therefore, the property was proposed for auction on 08.03.2005. The defendants filed OS.No.1440 of 2005 on the file of the City Civil Court, Chennai and obtained interim injunction in IA.No.5246 of 2005, after hearing the interim injunction was vacated. The mortgaged property was proposed for auction on 02.12.2006, the defendants 1 to 3 filed another interim injunction application in IA.No.21244 of 2006, the trial Court granted interim injunction on condition to pay a sum of Rs.1lakh before the auction date. The defendants 1 to 3 have not complied with the condition. As a result, the auction was conducted as per the covenants of registered mortgage deed, as per the provisions of Section 69 of

Transfer of Property Act on 02.12.2006. The defendants 1 to 3 were informed about the payments made by the auction purchaser and the defendants 1 to 3 were asked to execute the sale deed in favour of the plaintiff, since, the defendants 1 to 3 failed to execute the sale deed, the 4th defendant executed the sale deed in favour of the plaintiff on 28.03.2007 vide Doc.No.1257 of 2007. After the auction proceedings dated 02.12.2006, the suit in OS.No.1440 of 2005 filed by the defendants 1 to 3 has become infructuous and the same is dismissed by the trial Court on 26.11.2007. The defendants 1 to 3 have not challenged the said order dated 26.11.2007 made in OS.No.1440 of 2005. Further, the learned counsel submits that the 4th defendant/Nidhi is in existence for more than 125 years, the amount advanced as loan to the defendants 1 to 3 is nothing but public money, delay in recovering the loan amount would affect the public at large. Hence, the learned counsel prays for dismissal of the suit. सत्यमेव जयते

ISSUE No. 1

17. Admittedly the suit property belongs to the first defendant, the first defendant purchased the property in the year 1979, Ex.P1 is the sale deed in favour of the first defendant. The defendants 2 and 3 are the sons of first defendant. The defendants 1 to 3 are in possession and enjoyment of the property, they

borrowed a sum of Rs.34,00,000/- from the 4th defendant and executed an equitable mortgage on 02.07.1996, the said mortgage deed were marked as Ex.P2 and Ex.P3. It is clear that the suit property belong to defendants 1 to 3, they mortgaged the property by borrowing money from 4th defendant. Ex.P4/Encumbrance certificate also reveals that the suit property has been mortgaged in favour of the 4th defendant. Since, the defendants 1 to 3 not repaid the amount from 2006, therefore, the mortgagee under Section 69 of the Transfer of Property Act brought the mortgaged property under public auction and notice was also issued to the defendants 1 to 3 and public notice was also issued regarding the auction. The plaintiff and other persons participated in the public auction held on 02.12.2006. The defendants 1 to 3 have actively participated in the auction, among all the participants the plaintiff is the highest bidder for the sale consideration of Rs.1,53,00,000/- and 25% of the sale amount was paid on the same day. Subsequently, the balance amount was also deposited by the plaintiff as per the prescribed conditions. The sale was confirmed in favour of the plaintiff, the 4th defendant also executed the sale deed in favour of the plaintiff on 28.03.2007, the said certified copy of the sale deed was also marked as Ex.P5. Ex.P6 is the encumbrance certificate reflecting the sale deed executed by the 4th defendant in favour of the plaintiff.

Even the copy of the paper publication dated 30.11.2006 in the

daily The Hindu for public auction was also marked as Ex.P7.

18. On a perusal of the entire oral and documentary evidence, the plaintiff has filed the proof affidavit reiterating the averments made in the plaint, during the cross examination nothing was spoken in favour of the defendants 1 to 3. The first defendants filed the proof affidavit and no document was marked. On reading of the oral and documentary evidence since mortgagor had not repaid the loan amount, the property was brought on sale in the due process of law i.e., public auction under Section 69 of Transfer of Property Act. The plaintiff participated in the public auction and being the highest bidder the auction was confirmed in his favour. The mortgagee also executed a registered sale deed in favour of the plaintiff. Therefore, as per the sale deed, the plaintiff has become the owner of the property. Under the said circumstances, this Court finds that the plaintiff is entitled for recovery of possession from the defendants 1 to 3. Hence, this issue is answered in favour of the plaintiff.

ISSUE No.2

19. As already stated, the suit property originally belong to defendants 1 to 3, they borrowed money from the 4th defendant and

executed two mortgage deeds dated 02.07.1996 and 17.06.1997 respectively. Since, they have not repaid the money the mortgaged property was brought on public auction, for which notice was also published in the Hindu newspaper dated 30.11.2006. The plaintiff participated in the public auction, since, the plaintiff being the highest bidder, the auction was confirmed and he paid the entire money and sale deed was also executed in favour of the plaintiff. The defendants 1 to 3 were fully aware of the public auction conducted by the 4th defendant. During the pendency of the auction proceedings, the defendants 1 to 3 have filed the suit in OS.No.1440 of 2000 on the file of the IV Assistant City Civil Court, Chennai. Once, the auction proceeding details were intimated to the mortgagors, immediately the defendants 1 to 3 have filed application in IA.No.22150 of 2006 in OS.No.1440 of 2000 for interim injunction restraining the auctioneer or the 4th defendant from confirming the auction. The defendants 1 to 3 were informed about the payments made by the auction purchaser and asked to execute the sale deed in favour of the plaintiff, since the defendants 1 to 3 failed to execute the sale deed, the 4th defendant executed the sale deed dated 28.03.2007 vide Doc.No.1257 of 2007 in favour of the plaintiff. Thereafter, the suit in OS.No.1440 of 2005 has become infructuous and the same is dismissed by the trial Court on 26.11.2007. The defendants 1 to 3 have not challenged the said

order dated 26.11.2007. Since, the suit was dismissed and auction proceedings was also conducted by the agents, auction was confirmed and sale deed was also executed in favour of the plaintiff who is the highest bidder, hence the issue is answered accordingly in favour of the plaintiff.

ISSUE No.3

20. As far as mesne profits are concern, the plaintiff participated in the public auction and paid the entire sale consideration of Rs.1,53,00,000/- after receipt of the same, the 4th defendant executed the sale deed in favour of the plaintiff on 28.03.2007. From 28.03.2007 onwards the title passed on to the plaintiff, the plaintiff is the owner of the property and he is entitle for the recovery of possession and mesne profits. Admittedly, the defendants 1 to 3 are in possession of the suit property and defaulted in payment of mortgage loans, the property was also brought for public auction and the defendants 1 to 3 have lost their rights to redeem the suit property. As per Clause 8 of the Mortgage deed and Section 69 of the Transfer of Property Act brought the mortgaged property on sale. The plaintiff is the successful bidder and paid the entire sale consideration, thereafter the sale deed was executed in favour of the plaintiff. Therefore, from 28.03.2007 the

plaintiff is the owner of the property, the defendants 1 to 3 have lost their right on the mortgaged property. Since, the property is located in the prime locality, the plaintiff is liable to collect a sum of Rs.25,000/-p.m. towards mesne profit from the defendants 1 to 3, from the sale deed dated 28.03.2007 executed in favour of the plaintiff i.e., from 01.04.2007 till vacating the suit property or surrendering the possession to the plaintiff, This issue is also answered in favour of the plaintiff.

21. As discussed above, in the public auction the plaintiff was the highest bidder and paid the entire sale consideration, thereafter the sale deed was executed in favour of the plaintiff on 28.03.2007. Till date the defendants 1 to 3 are in possession of the suit property, therefore, the plaintiff was constrained to file the suit for recovery of possession and for mesne profit.

22. In the result, the plaintiff is entitled for recovery of possession of the suit property from the defendants 1 to 3, the defendants 1 to 3 are directed to vacate and surrender the possession of the suit property to the plaintiff within a period of three months from today. The plaintiff is entitled to get mesne profits from the defendants 1 to 3. The defendants 1 to 3 are directed to pay a sum of Rs.25,000/-p.m. towards mesne profits to

the plaintiff w.e.f. 01.04.2007. The defendants 1 to 3 are directed to pay the cost of the suit to the plaintiff.

22.11.2019.

Index : Yes/No
Internet : Yes/No
tsh

List of Witness examined on the side of the plaintiff

Mr.R.Krishnamurthy - PW1

List of documents marked on the side of the plaintiff

SL. No	Exhibits	DESCRIPTION OF DOCUMENTS	DATED
1.	P1	Certified copy of the sale deed.	16.10.1979
2.	P2	Certified copy of the mortgage deed.	02.07.1996
3.	P3	Certified copy of the mortgage deed.	17.06.1997
4.	P4	Encumbrance certificate.	20.12.2006
5.	P5	Certified copy of the sale deed.	28.03.2007
6.	P6	Encumbrance certificate.	11.12.2007
7.	P7	Copy of the paper publication in the Hindu.	30.11.2006

List of Witness examined on the side of the defendants

List of documents marked on the side of the defendants

**22.11.2019.
(P.V.J.)**

P. VELMURUGAN, J.

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Pre Delivery Judgment in

CS.No1122 of 2007

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