

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 01.08.2019
JUDGMENT PRONOUNCED ON : 10.01.2020

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.Nos.1350 to 1352 of 2003

1.E.Krishnaiah
2.E.Jayaprakash
3.E.Mohankumar ... Appellants in all S.A/Respondents/Plaintiffs

...Versus...

1.B.Balakrishnaia Chetty
2.B.Murali
3.B.Sridhar
4.N.Sekar
5.N.Jothi
6.B.Kasthuriah
7.B.Hemamadhuri (Minor)
8.B.Aditya (Minor)
RR7 and 8 declared Major and R6
discharged from the guardianship
vide Order of Court dated 11.3.2014
made in C.M.P.Nos.84 to 86 of 2014
in S.A.No.1350 of 2003

... Respondents in S.A.No.1350 of
2003/Appellants/Defendants 3 to 10

1.The Muthialpet Benefit Fund Ltd.,
Rep.by its General Manager,
190, Thambu Chetty Street, Chennai

...1st Respondent in
S.A.No.1351/2003/Appellant/1st Defendant

2. Raj and Company

3. Balakrishnaiah Chetty
4. B.Murali
5. B.Sridhar
6. B.Sekar
7. B.Jothi
8. B.Kasthuriah
9. S.Hemamaduri
10. B.Adithya

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[RR9 and 10 declared Major and R8 discharged from their guardianship vide Order of Court dated 11.3.2014 made in C.M.P.Nos.84 to 86 of 2014 in S.A.No.1351 of 2003]

...Respondents 2 to 10 in S.A.No.1351 of 2003/
Respondents/Defendants 2 to 10.

Sri Raj and Company,
represented by its Proprietor

....Respondent in S.A.No.1352 of
2003/Appellant/2nd Defendant

PRAYER in S.A.No.1350 of 2003:This Second Appeal filed under Section 100 of C.P.C., against the judgment and decree in A.S.No.238 of 2002 dated 10.07.2003 on the file of the V Additional Judge, City Civil Court, Madras, reversing the judgment and decree made in O.S.No.7250 of 1999 dated 01.04.2002 on the file of the III Assistant Judge, City Civil Court, Madras.

PRAYER in S.A.No.1351 of 2003:This Second Appeal filed under Section 100 of C.P.C., against the judgment and decree in A.S.No.241 of 2002 dated 10.07.2003 on the file of the V Additional Judge, City Civil Court, Madras, reversing the judgment and decree made in O.S.No.7250 of 1999 dated 01.04.2002 on the file of the III Assistant Judge, City Civil Court, Madras.

PRAYER in S.A.No.1352 of 2003:-This Second Appeal filed under Section 100 of C.P.C., against the judgment and decree in A.S.No.75 of 2003 dated 10.07.2003 on the file of the V Additional Judge, City Civil Court, Madras, reversing the judgment and decree made in O.S.No.7250 of 1999 dated 01.04.2002 on the file of the III Assistant Judge, City Civil Court, Madras.

For Appellants:: Mr.R.Vignesh Kumar
For Mr.P.L.Narayanan in all S.As

For R1 to R8 :: Mrs.Chitra Sampath, Senior Counsel
For Mr.T.S.Baskaran in S.A.No.1350/2003

For R3 to R10 :: Mrs.Chitra Sampath, Senior Counsel
For Mr.T.S.Baskaran in S.A.No.1351/2003
(Others-No appearance)

J U D G M E N T

The plaintiffs are the appellants herein.

2. The plaintiffs filed suit in O.S.No.7250 of 1999 on the file of the learned III Assistant Judge, City Civil Court,

Chennai and after contest, the same was decreed and as there was three Appeal Suits in A.S.No. 238 of 2002, A.S.No.241/2002 and A.S.No.75/2003 which was allowed resulting in dismissal of the suit and hence, all these three Second Appeals preferred by the plaintiffs.

3. The brief facts of the appellants/plaintiffs are as follows:-

The appellants have filed the suit in O.S.No.7250 of 1999 on the file of III Assistant Judge, City Civil Court, Madras for the following reliefs:-

a) "for declaration declaring that the so called auction sale to have been conducted on 06.10.1999 at 5.00 P.M by the second defendant on behalf of first defendant is not valid in null and void and binding on the plaintiffs. Consequentially restraining the first defendant or any other person or persons or agents or anyone claiming under them from in any way execute any Sale Deed in respect of property bearing Door Nos.34 and 35, Anna Pillai Street, Chennai -3 in pursuant to the so called auction held on 06.10.99 at 5.00 P.M alleged to have been conducted by the second defendant".

4. Along with the plaint, the plaintiffs have also filed I.A.No.18079 of 1999 praying for an order of ad-interim injunction for restraining the defendants their men, agents, servants or anyone claiming under them from in anyway execute any sale deed to any person in respect of property bearing Door Nos.34 and 35, Anna Pillai Street, Madras-3 pending disposal of the suit.

5. After, the respondents had entered appearance, counter was filed. After an elaborate enquiry was conducted, subsequently the said I.A was allowed.

6. The respondents 1&2 herein against the said order passed in I.A had preferred C.M.A.No.181 of 2000 on the file of the IV Additional Judge, City Civil Court, Madras and passed a conditional order.

7. Aggrieved against the same, the plaintiffs preferred C.R.P.No.921 of 2001. This Court on 03.08.2001 was pleased to allow the said C.R.P in their favour and also directed the suit O.S.No.7250 of 1999 to be disposed of within three months. Thus, the suit was disposed of as stated supra.

8. Aggrieved against the Judgment and Decree passed in O.S.No.7250 of 1999 dated 01.04.2002. The respondents herein had

preferred A.S.No.238 of 2002, A.S.No.241 of 2002 and A.S.No.75 of 2003. Pending the appeal, there was no suspension of the operation of the Judgment and Decree. The learned Vth Additional Judge by Judgment and Decree dated 10.07.2003 has allowed the Appeal in favour of the respondents and thereby dismissed the suit. Aggrieved against the same, the plaintiffs have preferred in these present Second Appeals.

9. All these Second Appeals were admitted on 11.08.2003 and framed on the following very same Substantial Questions of Law in all three Second Appeals.

a) Whether the Court below has properly construed Section 69(2) of Transfer of Property Act?

b) Whether Ex.A1 can be construed as a proper notice as prescribed under Section 69 (2) of Transfer of Property Act?

c) Whether the alleged auction was conducted as per the proceedings laid down and terms and conditions of Ex.A2?

10. Heard the learned counsel for the plaintiffs made submissions in support of the Substantial Questions of Law and Judgment of the Trial Court and heard the learned Senior counsel Mrs.Chitra Sampath for the respondents/defendants who has made submissions in support of the judgment of the Lower Appellate Court.

11. After hearing the rival submissions and also perusing the oral and documentary evidence adduced before the Trial Court, it is seen that all these three Second Appeals are arising out of the Judgment and Decree dated 10.07.2003 passed in three Appeal Suits in A.S.No.238 of 2002, A.S.No.241 of 2002 and A.S.No.75 of 2003 by the learned V Additional Judge, City Civil Court, Madras, which were arising out the Judgment and Decree dated 01.04.2002 made in O.S.No.7250 of 1999, before the learned III Assistant Judge, City Civil Court, Madras that are filed by the appellants herein seeking relief of declaration to declare that the auction sale said to have been conducted by the second defendant on behalf of the first defendant/Muthialpet Benefit Fund Ltd., as null and void. The co-mortgagors arrayed as D3 to D6, while the successful auction purchaser and their legal heirs were arrayed as D7 to D10.

12. Before the Trial Court, the first plaintiff was examined as P.W.1 and his brother was examined as P.W.2 and the notice issued by the second defendant/auctioneer to the plaintiff was

marked as Ex.A1 and the terms and conditions of auction sale notice, published for auction on 06.10.1999, is marked as Ex.A2 and the other communications are also marked.

13. On behalf of the defendants, Sri Raj and Company-the 2nd defendant its Manager was examined as D.W.1 and the co-mortgagor namely Sridhar was examined as D.W.2. While, D.W.3 and D.W.4 witnesses are said to be participants in the auction conducted by the D.W.2.

14. During the course of the Trial, on behalf of the defendants, certified copies orders passed in C.S.No.717 of 1997 were marked as Exs.B1 to B3. The list of the participants was marked as Ex.B4 and the pre-bidding amount of Rs.5,000/- each made by the each of participants were marked as Exs.B5,B6,B7,B8 and B13.

15. To substantiate the plea that after the bidding was over, an information was given to the mortgagor, that communication letter was marked as Ex.B9 and one Padmavathi and one B.Jothi are said to be successful bidder, in connection to that intimation letters were marked as Exs.B14 & 15 and receipts for the amounts, which was paid by them, were marked as Exs.B10 and B11 that receipts are made for a sum of Rs.10,03,500/- and Rs.15,05,250/- respectively.

16. After completion of bidding, the letters sent by the co-mortgagor/D3 were marked as Exs.B16,17 and 18 and the draft Sale Deed given by D2 to D10's counsel was marked as Ex.B19. The letter dated 21.01.2002 sent by the Government of India, India Meteorological Department, regarding the rainfall recorded from 05.10.1999 to 07.10.1999 of Chennai (Nungambakkam) was marked as Ex.X1.

17. The learned counsel for the appellants has made submissions in support of the Substantial Questions of Law framed at the time of admission and his contentions are that:-

i) Whether public was conducted as per the terms and conditions contained in Ex.A2?

ii) Whether Ex.A1/notice was in accordance with Section 69(2) of the Transfer of Property Act?

Iii) Whether the conditions contemplated for bidding the property in auction has been complied with as enunciated by the Judgments of this Court?

18. The learned counsel for the appellants has relied upon the decisions of this Court in 2011(6)CTC 369 [P.Kumaran Vs.The Debts Recovery Appellate Tribunal and Others]; 2. AIR 1995 SC 2195 [Rao Mahmood Ahmed Khan Vs.Ranbir Singh and Others] 3. 2010 (3) CTC 372;(2010) 4 MLJ 641 [C.N.Paramasivam and others Vs.Sunrise Plaza and Others]

19. The learned counsel for the respondents has relied upon the decision in MANU/TN/1024/2013 [A.Arunagiri, M/s.Ramu and Co., A.Thayumanaguru and G.Anbazhagan Vs.The Egmore Benefit Society Ltd. and Others]

20. After going through the Substantial Questions of Law framed at the time of the admission and the factual matrix of the case and legal position on this point governing the facts-in-issue i.e., raised before the Trial Court, this Court is of the considered view that in the decision in Arunagiri and others Vs.Egmore Benefit Fund is applicable to the case-in-hand. In this said decision, it is held that:-

"35.28. From what was laid down very clearly in P.S.Duraikannoo, (a) it is apparent that the procedure prescribed by the statutory provisions in Order 21 Rule 84 or (b) the second schedule to the Income Tax or the SARFAESI Act, 2002 or (c) the State Financial Corporations Act, are not per se applicable to the sale by a mortgagee in exercise of the power conferred by the Deed of Mortgage, in accordance with Section 69 of the Transfer of Property Act.

35.32.(i) Under Order VI, Rule 4 of the Code of Civil Procedure, a party who pleads miss-representation, fraud, breach of trust, willful default, or undue influence, should give particulars with dates and items, if necessary in the pleading itself. In other words, there must be special pleadings, whenever fraud and collusion are alleged.

(ii) In P.L.Chakrapani Naidu v. T.Gopal Mudaliar (MANU/TN/0584/1972:1972 (2) MLJ 390), a Division Bench of this Court held that the mere use of the words fraud and collusion in the plaint meant nothing and that there must be positive proof of the same and that the burden of proving fraud and collusion was on the mortgagors. In fact, the Division Bench noted in that case that

sufficient number of bidders were not forthcoming because of the obstructive tactics adopted by the mortgagors.

(iii) While, following the said decision, another Division Bench held in *Shri Bhagwandas/B.Kishore V. K.G.Purushothaman & Others* (MANU/TN/1265/1996:1996(1) LW 372) that the burden is entirely upon the mortgagor to plead and prove fraud. Even if an inference of fraud can be made if the price for which the property is sold is so low, the burden of proof is still on the mortgagor.

(iv) The observations of the Division Bench in paragraph 25 of the decision in *Shri Bhagwandas* are as follows:-

But, the burden is on the mortgagor to plead and prove such fraud or the gross inadequacy of price from which an inference can be drawn by the Court of the fraud. In the absence of such proof, the Court cannot and will not interfere with the sale even if the sale price is lesser than the market value of the property or there was want of publicity or want of notice as required by the instrument or that many bidders had not participated in the auction.

35.33. From the decision of the Division Bench of this Court in *P.S.Duraikannoo*, it is clear that the acceptance of cheques towards payment of 25% of the sale consideration by the highest offeror and the belated payment of the balance of 75% of the consideration, could at the most be termed as an extension of time granted by the mortgagee to the highest bidder. But the law laid down by the Division Bench is that in a sale under Section 69, the mortgagee has the power to grant extension of time and even vary the terms of the contract. Therefore, the acceptance of payment of 25% by way of cheques and the belated payment of 75%, by themselves cannot be termed as fraudulent. (emphasis supplied)

.....In *V.Narasimhahariar V.Egmore Benefit Society* (MANU/TN/0093/1955:AIR 1955 Ma 135). In that case, the learned Judge listed the rights, duties and obligations of a mortgagee under

Section 69 in the form of certain do's and don'ts. They are as follows:-

(1) It is incumbent on the mortgagee exercising his power of sale to act in good faith:- 'Kennedy V.De Trafford', 1897 AC 180 (Z30). He must sell as a prudent owner, intending to sell his own property with reasonable conditions and if the state of the title justifies, to offer a marketable title. The power is to be regarded as a sacred thing, for it is only a security:- 'Jenkins v. Jones', (1860) 66 FR 43 (Z31);--'Chabildas Lalloobhai v. Dayal Mowji', MANU/MH/0134/1907:26 Bom 82 (Z32).

(2) The motives actuating a mortgagee in exercising his power of sale will not be considered by a Court:- 'Colson v. Williams', (1889) 58 LJ Ch.539 (Z33).

(3) He is not at liberty to look after his own interests alone and it is not right or proper or legal for him, either fraudulently or willfully or recklessly, to sacrifice the property of the mortgagor: (1897 AC 180 (Z30). The exercise of the power of sale shall not be oppressive or deprecatory;--'Dane v.Goldingham', (1873)8 Ch.App 902 (Z34).

(4) He must not sell after tender made to him of the mortgage-money and his costs, charges and expenses, though the latter be under protest.

(5) A mortgagee may sell under special circumstances of a stringent character, if not un-reasonably deprecatory:--'Falkner v. Equitable Reversionary society', (1858) 62 ER 138 (Z35). But the conditions however must be such as an owner will use in the sale of his own property and should not be deprecatory:--"MC Hugh v.Union Bank of Canada', (1913) 108 LT 273 (PC) (Can) (Z36).

(6) He must hold the balance of the sale proceeds in trust for the mortgagor and if there are subsequent encumbrances, in trust for them and ultimately for the mortgagors:--'Warner v.Jacob' (1882) 20 Ch D 220 (Z37);-'Abdul Bahman v. Noor Mahomed', 16 Bom 141 (Z38);-'Rajah Kishendutt Rajah v.Mumtaz All Khan', 5 Cal 198 (PC) (Z39).

(7) He must not buy himself or through his solicitors or agent, for such a sale would be vitiated even though there be no fraud or under

value;--"National Bank of Australasia v. United Hand-in-Hand and Bond of Hope Co.', (1879) 4 AC 391 (Z40);--"Downes v.Grazebrook', (1817) 36 ER 77 (Z41);-- 'Henderson v.Astwood', 1894 AC 158 (Z42).

(8) He must hold the sale strictly adhering to the conditions which give him the right to exercise his power;-- 'Devey v.Durrant', (1857) 44 ER 830 (Z43).

(9) He must not sell by private treaty if the mortgage deed allows him to sell by public auction only (....'Brouard v.Dumaresque', (1841) 3 Moo PC 457 (Z44)).

(10) He is not bound to advertise the sale. But he must give reasonable publicity. And though the mortgagee is not a trustee for the mortgagor he is something more than a perfunctory agent and must at least see that in sub serving his own interest he does not sacrifice the interest of those equally interested in the property. He must not do anything, which would scare away the bidders;---'Chabildas Lalloobhai v. Dayal Mowji', MANU/MH/0134/1907; 31 Bom 566 (PC) (Z45).

(11) He must use every exertion to sell the property at the best price for he is chargeable with the full value of the mortgaged property sold, if for want of due care and diligence it has been sold at an undervalue;---'Orme v.Wright', (1839) 3 Jur 972 (Z46): '(1879) 4 AC 391 (Z40)'.

(12) He must not sell before the mortgage money has become due;---'Jarup Tejaa & Co.V.Peerboy Adamji', MANU/MH/0241/1920: AIR 1921 Bom 421 (Z47).

(13) He must not sell without giving to the mortgagor a written notice for payment of the principal money and before default has been made for three months after service in payment.

(14) He must not sell unless some interest amounting to at least Rs.500 is in arrear and unpaid for three months after becoming due.

(15) His particulars of sale, even if inserted by his auctioneer, should give a correct description of the property.

(16) If he exercises the power bona fide 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: '(1882) 20 Ch D 220 (Z37)'..' Haddington Island Quarry Co.Ltd.v.Alden Wesley', MANU/PR/0043/1911:10 Mad LT 554 (PC) (Z48). (see Darashaw Vakil Commentaries on the Transfer of Property At (1938) for an exhaustive discussion of duties of mortgagees on sale PP, 632-641).

.....Two types of remedies that a mortgagor has in such cases, namely, the remedies available before sale and the remedies available after sale.

(i) a mortgagor can come to Court before sale with a prayer for injunction or stay of sale, if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings must clearly disclose a fraud or irregularity on the basis of which relief is sought [(Adams v.Scott) 1859 7 WR (Eng).213]

(ii) the mortgagor can also come to Court after the sale, seeking damages for unauthorized, improper or irregular sale. The power of sale given is for the benefits of the mortgagee and not for the benefits of the mortgagor. He has therefore a perfect right to hold the sale of the property in such manner as he thinks fit most conducive to his benefits. But the conditions of sale however must be such as the owner will use in the sale of his own property and should not be depreciatory. It is also necessary that the mortgagees must act bona fide in the conduct of the sale.

35.38. Therefore, the payment of 25% of the bid amount by way of cheques, did not vitiate the auction, in view of the leverage granted to a mortgagee, on whom, a power of sale is conferred by the deed of mortgage in terms of Section 69 of the Transfer of Property Act. I have already cited the decision of Ramasamy,J in V.Narasimhachariar and the decision of the Division Bench in P.S.Duraikannoo, which recognize the right of the mortgagee even to vary the terms of the contract. I have also discussed the decision of the Supreme Court in which the scope of the expression 'immediately' appearing in Order XXI Rule 84 was

expounded. The fact-scenario which compelled the mortgagee to accept cheques towards payment of 25% of the sale consideration, goes to show that the mortgagee (i) acted bona fide; (ii) acted as a prudent person would do; and (iii) acted in the interests of the society, which was answerable to thousands of depositors, without sacrificing the interests of the borrower."

21. With the above legal proposition in mind let us consider and analyse evidence on record touching upon the Substantial Questions of Law framed as mentioned above.

22. The plaintiff was examined as P.W.1 and the brother was examined as P.W.2. The plaintiffs 2&3 are the sons of P.W.1 doing joint business with the third defendant and out of the profits jointly earned. They jointly purchased the suit property and jointly mortgaged the suit property and borrowed Rs.6 lakhs for developing the business from the first respondent-Muthialpet Benefit Fund Limited.

23. It is further seen from the records that as there was a default in payment of the interest, and thus, following the terms of the mortgage-the first defendant-Muthialpet Benefit Fund Limited has taken steps to sell the suit property by public auction. In the meantime, the third defendant filed suit in C.S.No.717/1999 on the Original Side of the High Court for partition of the suit property. Pursuant to Ex.A1 served on the parties viz., mortgagor, stating the property was scheduled for public auction on 06.10.1999 at 5.00 P.M.

24. At this juncture, P.W.1 filed a petition before the High Court for a temporary Injunction restraining the mortgagee/the first defendant Muthialpet Benefit Fund Limited and his agent (D1 and D2 herein) from restraining them from proceeding with public auction in which, the High Court has not granted interim injunction has only ordered that any sale will be confirmed subjected to the orders of the Court.

25. At this juncture, it is averred by the plaintiffs/appellants that on the schedule date for public auction, there was a heavy rain in the city of Madras (as then it was called) and hence, the alleged public auction said to have been held on that day is only a bogus, make it believe story, and the successful bidder namely Jothi and Padmavathy Ammal were not present during the auction and 25% of the bid amount, as pre-bidding amount was not paid and also alleged certain irregularities in conducting of the public auction.

26. From the evidence of P.W.1 and Exhibits A1 to A3 coupled with the orders of the High Court in C.S.No.717/1997 marked as Exhibits B1 to B3, it is seen that the admission of the plaintiffs in the proceedings before High Court in O.A.No.625 of 1999 in O.S.No.717/1997 in which the injunction to restrain the auction sale was sought for and the Court ordered that the auction sale shall go on 06.10.1999. It was on the basis of admission of plaintiff that auction sale has been conducted and the plaintiff prayed for injunction restraining the execution of the sale deed concerning his half share.

27. The High Court directed the auction sale to take place on 06.10.1999 as notified. Confirmation of the auction sale alone was suspended, in and by order dated 29.10.1999 in O.A.No.625/1999 the plaintiffs were directed to deposit the sum of Rs.20,00,000/- on or before 03.11.1999, but the said conditional order was not complied with.

28. The plaintiffs while admitting the auction sale held on 06.10.1999 approached the High Court in Appln.No.3862 of 1999 in C.S.No.717 of 1997 for extension of time to deposit the sum of Rs.20,00,000/- and the said application was dismissed on 12.11.1999 and sale was also confirmed.

29. As seen from the order of the High Court in O.A.No.625 of 1999, it was observed by His Lordship Mr.Justice A.Ramamoorthi that it was submitted by the parties that the property was already sold and confirmation of the sale alone has been suspended by an order dated 06.10.1999. In the course of arguments in High Court, it was further represented that the property has been sold for Rs.40,14,000/-

30. Thus, this Court finds that the finding rendered by the Trial Court is contrary to the evidence available on record and on the other hand, this Court finds that the proceedings between the parties on the Original Side of this Court in C.S.No.717 of 1997 goes to show that the plaintiff had made successful attempt to prevent the conducting of the public auction and public auction was allowed to go on and the High Court has passed an order stay of confirmation of the sale alone. However on condition that the plaintiff has to deposit the amount since the conditional order was not complied with, the petition was dismissed on 12.01.1999 and further application filed in O.A.No.625/99 for extension of time was also rejected by the High Court.

31. It remains to be stated that even at the earliest point of time in the said proceedings, the conducting of the public auction was admitted by the P.W.1 by filing affidavit in the I.A before the High Court and sale consideration has been mentioned

as Rs.40,14,000/- and thus, this Court finds the factum of conduct of public auction and bid amount of Rs.40,14,000/- are submitted before the Original Side of High Court and no contention was raised with regard to irregularity.

32. Now in the present suit, it appears they are raising irregularity in conducting public auction only on after thought.

33. On evidence, I find that since the 25% of pre-deposit has also been duly paid by the successful bidder and the sale of the property in the public auction was immediately informed and intimated to the plaintiff and other co-owners and in the absence of any reply notice to the said fact, this Court is of the considered view that the allegations now levelled as if some certain irregularities have been conducted in confirming of public auction is only appears to be an after thought.

34. It is seen from Ex.B11 receipt issued for the payment of 25% of the sale price as pre-bidding amount was issued in the office of D.W.1 and the same cannot be disputed nor disbelieved merely because it was typed format and furthermore, in the cross-examination, the P.W.1 has admitted that the purchaser in the auction sale have paid the bid amount of Rs.40,14,000/- as per auction sale and on account of the such payment, the mortgage due including the share of the liability of the plaintiff got discharge and hence, this Court finds that the allegations levelled against the conduct of public auction on the point of non payment of pre-bid deposit of the bid amount falls to ground on appreciation of the documentary evidence finds that they are only an after thought invented for this purpose this appeal.

35. There was an arrears of interest exceed three months and the same was admitted by P.W.1 in the cross-examination that he has not paid the interest from 1993 onwards, thus, as per the terms and conditions of the mortgage/the first defendant is entitled to proceed under Section 69(2) of the Transfer of the Property Act.

36. In the cross-examination, P.W.1 has admitted of receiving the notice of auction of sale from the auctioneer and also found the hand bill in his house affixed and hence, this Court finds that there is a due service of notice before the auction. Furthermore, it is to be stated that the remedy available under Section 69 of the Transfer of Property in the event of any unauthorized improper or irregular exercise of the power by the mortgages, the remedy by way of damages against the person exercising the power alone is available.

37. In view of the admission of P.W.1 that Ex.A2 bill was affixed and left at his residence, the same was deemed to have been duly served.

38. At the risk of re-petition however for the sake of clarity, it is to be stated that though the appellant/plaintiff pleaded vehemently that no notice was served to the plaintiff prior to the auction. On perusal of Ex.A1, it is a notice sent by the second defendant calling upon the plaintiff to pay the mortgage amount and the second defendant has asked the plaintiff to pay the principal and the interest due under the mortgage. In the cross-examination plaintiff-P.W.1, admitted the receipt of Ex.A1 and hence merely because of non-mentioning of the amount that will not construed that there was no proper notice, 2nd defendant is acted as an agent of the first defendant/mortgagor had issued Ex.A1 and based upon the instructions of the first defendant, Ex.A1 was issued and it was duly served upon the mortgagor P.W.1 and hence, on the above factual background, this Court rejects the contention of the learned counsel for the appellant.

39. On perusal of Ex.B4 to B8, B9, B10 and B13 which clearly demonstrate that the auction was conducted on 06.10.1999.

40. Thus, this Court finds that both on facts and on law, the notice is duly served as required under Section 69(2) of the Transfer of the Property Act, in view of this specific admission by P.W.1 in the cross-examination and though there is a pleading that the auction amount is inadequate as stated supra, the same will not vitiate the auction sale.

41. The learned counsel for the appellant also raised a point touching upon the alleged conduct of public auction as schedule under Ex.A1. To support the stands that no auction could have been conducted in view of the heavy town pour and rain on the alleged date.

42. In this connection, the auction was scheduled on 06.10.1999. As per Ex.X1, the Meteorological Department Report shows that there was no rain after 4 P.M on 06.11.1999. D.W.1 to D.W.4 have stated in their evidence, there was no rain at the time of the auction. Furthermore, regarding the proceedings of the auction, the first defendant has also marked Ex.B4 to B10. D.W.2 and D.W.4 who had participated in the auction also have deposed about the depositing of Rs.5,000/- as a pre-bid deposit towards security deposit before bidding in the auction and the said amount paid by D.W.2 and D.W.4 were also marked as Exs.B5 to B8 and there were 5 bidders who took part in that auction.

43. It is a specific evidence of D.W.1 that since the successful bidder is the highest bidder and hence, he has returned the security deposit amount given by the un-successful bidder were returned and took the signature on the back of Exs.B5 to B8 and thus, this Court finds that in view of the documentary evidence of Ex.X1 and oral evidence of D.W.1, D.W.2 and D.W.4 coupled with a documentary evidence of Ex.B5 to B8 and thus, this Court finds that at the time of the conducting of the sale, public auction on 06.10.1999, there was no rain and there was a public bidder apart from the successful bidder. The other bidder also took participation and D.W.3 and P.W.4 are free to the participant in the public auction as evidence by their pre-deposit receipts Ex.B5 to B8 and after conclusion of the bidding, their pre-deposit bid amount was duly returned. As could be seen from the counter signature on the back side of the Exhibits and thus, this Court finds that the conducting of public auction and participation of more persons than the successful bidder and particulars furnished from the second defendant regarding the conducting of the public auction in a free manner has been duly demonstrated.

44. The last and final submissions made by the learned counsel for the appellant that the successful bidder namely the two ladies are not participated viz the Padmavathy and Jothi have not participated in public auction. However to the dismay on a combine reading of the oral evidence of D.W.1 coupled with Ex.B4, B13 the presence of the Padmavathy, the successful bidder and his husband fifth defendant were spoken by the two independent witnesses namely D.W.3 and D.W.4.

45. It is seen from the documentary evidence produced which is marked by D.W.1 that immediately after his completion of the public auction, the proceedings has been reduced into writing as could be seen from Ex.B4 and the signature of Padmavathy and Jothi were found therein. Besides, as per Ex.B13, both Padmavathy and Jothi have made pre-deposit of Rs.5,000/- and furthermore, even in the notice Ex.A4 dated 07.10.1999 issued by the defendant, the pre-bid amount made by the Padmavathy and Jothi has been duly informed to the plaintiff for which, there was no reply or denial by the plaintiff, also assumes significance. The presence of said Padmavathy was clearly spoken to by D.W.2, D.W.3 and D.W.4 and presence of the other persons in the auction have been spoken to by the independent witnesses- D.W.3 and D.W.4 and hence, I find that the contention raised by the appellant counsel that the seventh defendant Padmavathy and Eight defendant-Jothi were not present at the time of the public auction is found to be factual incorrect on the basis upon the documentary and oral evidence.

46. At this juncture, it is to be stated that it is a specific evidence of D.W.4 that the plaintiff was not at all present at the time of the auction and hence, this Court finds that the said plea was raised only for the purpose of this case and hence, this Court finds that the last plea as to the alleged irregularity in conducting of the public auction also fails in view of the overwhelming evidence available on record. Hence, this Court finds that the procedures contemplated under Section 69(2) of the Transfer of Property Act are duly complied with by the second defendant who is acted as an agent on behalf of the first defendant-Muthialpet Benefit Fund Limited and I find no irregularity in conducting of the public bidding. A similar finding recorded by the Lower Appellate Court, on a different reasoning as stated supra, he does not suffer from any illegality or irregularity warranting interference by this Court and hence, this Court finds that the alleged irregularity during the conducting of the public auction has raised by the plaintiff is not supported by any documentary evidence.

47. Yet another point is that merely because successful bidder has not entered the witness box, no adverse inference can be drawn, especially when the second defendant-D.W.2/Sridhar have deposed, when Jothi is a sister of the Sridhar and Padmavathy is his wife. On the contrary the defendant has demonstrated before the Court about the proper conducting of the public auction well within the procedures contemplated under Section 16(2) of the Transfer of the Property Act and hence, the Substantial Questions of Law 1&2 are answered in negation against the appellants.

48. Thus, from the oral evidence of D.W.1 and D.W.2 coupled with the documentary evidence of Exs.B1 to B8 and X1, this Court finds that the auction was held at 5.00 P.M on 06.10.1999, the bid was done in favour of Jothi and Padmavathy the highest bidders at Rs.40,14,000/-. Prior to the auction, the bidders have paid Rs.5,000/- as pre-bid, and necessary receipts were issued. Therefore, the balance of Rs.10,03,500/- was paid.

49. The balance of Rs.15,05,250/- each was paid by the two purchasers on 06.11.1999 by two separate cheques. The receipt of Rs.30,10,500/- was acknowledged by the second defendant-Padmavathy and third defendant-B.Jothi the auction purchasers have paid the entire sale price as per the auction sale and therefore they are entitled to have the sale deed executed in their favour by the first defendant. A draft sale deed has also been furnished. They have also obtained the income Tax Clearance Certificate.

50. The auction was conducted fairly and properly in the presence of the representatives of the first defendant and

several bidders have participated. The 3rd substantial question of law also answered in negation against the plaintiffs/appellants.

51. In the result, all the Second Appeals are dismissed. The judgment and decree of the First Appellate Court is confirmed. No costs.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1.The V Additional Judge, City Civil Court, Chennai.

2.The III Assistant Judge, City Civil Court, Chennai

Copy to
The Section officer
VR Section
High Court, Madras 104.

+3 CCS to Mr.P.L. Narayanan, Advocate sr 3121.

+3 Ccs to Mr.T.S. Baskaran, Advocate sr 2404.

S.A.Nos.1350 to 1352 of 2003

MP(CO)
SP(03/09/2020)

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