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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	***02.12.2022***
Delivered on	***07.02.2023***

CORAM

THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

Second Appeal Nos.131 & 434 of 2011

SA.No.131 of 2011

Super Sulphate
a firm rep. by its Partner
Jayasubramaniam,
no.3/232, Puthur Itteri Road,
Nethimedu, Salem. ... Appellant

Vs.

1.M/s.Nirmala Chemicals
a firm rep.by its Partner,
K.Nirmala,
No.396, Bazaar Street,
Salem-1.

2.The Tamilnadu Industrial
Investment Corporation Ltd,
rep. by its Regional Manager
K.M.B.Complex,
Omalur Main Road,
Salem.

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3.The Tamilnadu Industrial
Investment Corporation Ltd.,
Namakkal, rep. by its Branch Manager,
Second Floor, Bhuvaneswari Complex,
Dr.Sankaran Road, Namakkal. .. Respondents/defendants

SA.No.434 of 2011

1.The Tamilnadu Industrial
Investment Corporation Ltd,
rep. by its Regional Manager
having Office at
K.M.B.Complex,
Omalur Main Road,
Salem.

2.The Tamilnadu Industrial
Investment Corporation Ltd.,
Namakkal, rep. by its Branch Manager,
Second Floor, Bhuvaneswari Complex,
Dr.Sankaran Road, Namakkal. ..appellants

Vs.

1.M/s.Nirmala Chemicals
a firm rep.by its Partner,
K.Nirmala,
No.396, Bazaar Street,
Salem-1.

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2.Super Sulphate
a firm rep. by its Partner
Jayasubramaniam,
no.3/232, Puthur Itteri Road,
Nethimedu, Salem. .. Respondents/defendants

Prayer:- These second appeals have been filed under Section 100 C.P.C.,

(i) against the judgment and decree dated 13.10.2009 made in A.S.No.129 of 2008 on the file of the II Additional Subordinate Judge, Salem, in reversing the well considered judgment and decree dated 16.02.2005 made in O.S.No.129 of 2003 on the file of the learned Principal District Munsif, Salem(prayer in SA.No.131 of 2011).

(ii)against the judgment and decree dated 13.10.2009 made in A.S.No.129 of 2008 on the file of the II Additional Subordinate Judge, Salem, in reversing the well considered judgment and decree dated 16.02.2005 made in O.S.No.129 of 2003 on the file of the learned Principal District Munsif, Salem(prayer in SA.No.434 of 2011).

For Appellant : Mr.C.Jagadish in SA.No.131 of 2011 and Mr.K.V.Sundararajan in SA.No.434 of 2011

For Respondents : Mr.R.Singaravelan, Sr.counsel for M/s. M.Srividhya in both the appeals for R1.
Mr.Jagadish for R2 in SA.No.434 of 2011 and
Mr.K.V.Sundararajan, for RR2 &3 in SA.No.131 of 2011

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COMMON JUDGEMENT

Aggrieved against the judgement and decree dated 13.10.2009 passed by the II Additional Subordinate Judge in A.S.No.29 of 2008 reversing the judgment and decree dated 16.02.2005 passed in O.S.No.129 of 2003 by the learned Principal District Munsif, Salem, third defendant has filed S.A.No.131 of 2011 while the defendants 1 and 2 have filed S.A.No.434 of 2011.

2. For the sake of convenience, the parties are herein after referred to by the same nomenclature as referred to in the Original Suit.

3.Brief facts of the case of the plaintiff are as follows:

The plaintiff is a partnership firm and it is manufacturing Metalic Sulphur. It owns its factory constructed in an area of 1.41 acres of land in S.No. 107/2 and 107/7 in Athanoor Ayeepalayam. Rasipuram Taluk. The total worth of the machineries and buildings comes around a sum of

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Rs.75,00,000/-. The plaintiff has raised a loan of Rs.19.75 lakhs from the defendant. The plaintiff has received a notice dated 29.11.1966 stating that the factory premises are going to be auctioned on 10.12.1996. Aggrieved by the same, the plaintiff filed a suit in O.S.No.2110/1996 seeking injunction restraining the 1st defendant from proceeding with the sale. While the suit was pending, it appears that the auction was held on 15.2.2000 for a sum of Rs.10 lakhs and the sale was also confirmed in favour of the 3rd defendant by the Head Office of the 2nd defendant on 6.3.2001 and the possession was handed over on 7.7.2000, without following due procedure and effecting proper publication. According to the plaintiff, the defendants 1 and 2 have failed to give wide publicity for the sale. While so, the 2nd defendant again issued a notice on 16.3.2001 demanding payment of Rs.45,02,205.80. Once the property has been sold, there is no necessity warrant for issuing a fresh demand notice. Hence the plaintiff has come forward with a suit in O.S.No.129 of 2003, seeking for declaration that the sale held on 15.2.2000 is illegal and void and also for consequential permanent injunction, restraining the defendants from

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claiming any right under the void sale and for costs.

4. Resisting the suit, the 1st defendant filed a Written Statement, inter alia, contending that the sale and confirmation of the same in favour of the 3rd defendant was done by following due procedure as contemplated under law and there was no irregularity at all. The loan amount was proclaimed and the plaintiff unit was taken possession by the 2nd defendant Corporation on 19.6.1996 and thereafter, on 15.2.2000, the land, building and machinery were brought for re-auction by fixing the upset price as Rs.4 lakhs. This was intimated by a letter dated 8.2.2000 to the plaintiff. The highest bidder paid the amount of Rs.10 Lakh and taken the possession of the land, building and mechinery on 07.07.2000. Therefore, according to the 1st defendant, the sale was conducted in proper way by giving wide publicity in Daily Thanthi on 06.02.2000 and the information was also given to the plaintiff. The suit is not properly valued. With these averments, the 1st defendant sought for dismissal of the suit.

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5. A Written Statement was also filed by the 3rd defendant, stating that the sale in favour of the 3rd defendant was perfectly valid and legal and there was no irregularity at all since the defendants 1 and 2 have followed due procedure as contemplated in law and took possession of the suit property on 07.07.2000 after conducting the auction on 15.02.2000. This suit is vexatious one and the same is liable to be dismissed.

6. Based on the pleadings, the trial Court has framed the following issues, viz.,

1) Whether the plaintiff is entitled for declaration and consequential injunction as prayed for?
2) Whether the suit is maintainable?
3) To what relief?

7. To prove their respective cases, on behalf of the plaintiff, P.Ws.1 to P.W.3 were examined and Ex.A1 to A20 were marked and on behalf of the defendants, D.W.1 was examined and Exs.B1 to B34 were

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marked.

8. The trial Court, on evaluating both oral and documentary evidence adduced by the parties, vide judgement and decree dated 16.02.2005, dismissed the suit as not maintainable. As against the said judgement and decree, the unsuccessful plaintiff, who is the sole respondent in both the appeals before this Court, has preferred an appeal under Section 96 of CPC in A.S.No.129 of 2008.

9. The lower appellate Court, on consideration of the findings of the trial Court, vide judgment and decree dated 13.10.2009, allowed the appeal by granting the relief of declaration that the auction conducted on 15.02.2000 is void, illegal and non-est, however, as against the relief of permanent injunction sought for, the lower appellate Court has granted an alternative relief to the effect that the sale price for the machineries paid by the plaintiff, has to be adjusted towards the balance claim of the defendants, if any, in respect of the suit property.

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10. Aggrieved over the said judgement and decree, the plaintiff has not filed any appeal, but, on the other hand, defendants 1 and 2 have preferred the appeal in S.A.No.434 of 2011 while, the 3rd defendant has preferred the appeal in S.A.No.131 of 2011.

11.This Court admitted the Second Appeals on 18.08.2022 on the following substantial questions of law:

> (i) Whether the lower Appellate Court was right in holding that the civil court has got jurisdiction to set aside the statutory proceedings of the statutory authority under the State Financial Corporation Act, when there is no violation or detriment of statutory duty as contemplated under the Act established by the plaintiff to set aside the auction and the successful bid made by the appellant?
>
> (ii) Whether the lower Appellate Court was right in overlooking the decisions of the Apex Court and this Court in interfering with the act of the statutory authority under the Act, when it is

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repeatedly held that the jurisdiction of the Civil Court is ousted by the express provisions of the Act and the Courts have no authority to act as Appellate authority to review the orders of the statutory authority under the special enactment?

(iii) Is not the lower Appellate Court erred in law in decreeing the suit when the appellant and respondents 2 & 3 have established the suit, when the appellant and the respondents 2 & 3 have established both by documentary and oral evidence the proceedings of the respondents 2 and 3 do not vitiated under the Act and the plaintiff fails to establish any irregularity committed in the auction proceedings?

12. Learned counsel appearing for the appellant/TIIC in S.A.No.434 of 2011, would contend that the first Appellate Court has misunderstood the principles of Section 52 of the Transfer of Property Act, which clearly spells out that any dealing or transferring of property during the pendency of any suit, in which, the right to immovable property is directly and specifically in question and if such property is dealt with

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during the *lis*, then it will not affect the rights of any other party, who obtains decree or order at a later stage in the said suit.

13. In the present case, admittedly, the earlier suit namely, O.S.No.2110 of 1996 filed by the plaintiff was withdrawn. Hence, the learned counsel for the plaintiff would submit that the question of *lis pendens* will not be applicable for the auction sale conducted on 15.02.2000. The learned counsel further submitted that the first Appellate Court also misconstrued the documents filed by the appellant regarding the machineries and during the pendency of earlier suit, there were three auctions conducted on 06.11.1998, 26.11.1999 and 15.02.2000. The earlier suit in O.S.No.2110 of 1996 was filed, challenging the auction conducted on 10.12.1996, which suit later came to be withdrawn by the plaintiff vide judgment Ex.A15 dated 09.04.2001. The present suit came to be filed in the year 2003, challenging the auction conducted on 15.02.2000. Therefore, he contended that in the event of the sale being set aside, *lis pendens,* the auction sale would be null and void. Even,

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this would not apply to the present case for the reason that in the suit filed in O.S.No.2110 of 1996, the challenge was only against the auction which was scheduled to be held on 10.12.1996.

14. Further, on 10.12.1996, though auction sale was conducted, the property was not sold since there were no bidders. Therefore, he would contend that based on subsequent fresh cause of action alone, the plaintiff has again filed the suit, for declaration that the sale of suit property on 15.02.2000 is null and void and merely challenging the auction notice dated 10.12.1996 in the earlier suit itself would not prohibit the 1st appellant from conducting any auction for sale of the suit property.

15. Further, in the present case, after due advertisement alone, the auction was conducted on 06.11.1998 and while confirming the bid, an opportunity was given to the plaintiff to purchase the machinery and the plaintiff also had paid a sum of Rs.1,05,000/- and thereafter, the bid was confirmed. In the same manner, when the bid was confirmed in favour of

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the third party on 15.02.2000, the sale particulars were also given to purchase the property along with the machinery for the price offered by the highest bidder, however, the plaintiff had not come forward to pay the said bid price at Rs.10,00,000/-. In such circumstances, since the plaintiff had not utilised the same, the maximum bid amount of Rs.10,00,000/- was confirmed in favour of the 3rd appellant during the auction conducted on 15.02.2000. Therefore, there is no illegality or irregularity in this regard. As stated above, the question of *lis pendens* also does not arise. Though the first Appellate Court has rightly held that there is no procedural lapse, however, it has wrongly come to the conclusion by reversing the findings of the trial Court holding that the plaintiff is entitled for declaration as sought for while rejecting the plea for permanent injunction.

16. Further, the learned counsel contended that the defendants 1 & 2 are empowered to sell the properties both under Sections 29 and 31 of the State Financial Corporations Act, 1951. Even, in a catena of

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judgements, the Hon'ble Supreme Court has categorically held that once the borrower has no genuine intention to repay and adopts pretexts and ploys to avoid payment, the Financial Corporation is at their discretion to decide the proper course to be taken for recovering its dues and the the borrower cannot make the grievance that the Corporation was not acting fairly, even if requisite procedure has been followed and further, the Court cannot interfere with regard to the State Financial Corporation for auction of the properties either under Sections 29 or 31 of the State Financial Corporation Act. The Court below misconstrued that Section 52 of the Transfer of property Act will be applicable to the present case.

17. The learned counsel further submitted that the plaintiff has not sought for any consequential relief of recovery of possession and hence, he would submit that the suit is not maintainable. The first Appellate Court clearly found that possession was not with the plaintiff but with the 3rd defendant. In this regard, no separate appeal has been filed by the borrower/plaintiff, challenging the findings of the lower appellate Court,

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therefore, the finding has become final. Hence the suit for declaration without recovery of possession is bad and not sustainable under Section 34 of the Specific Relief Act, 1963. He further submitted that both the Courts below have held that paper publication has been effected and that there is no infirmity and foul play in conducting the auction and confirmation of the sale as alleged by the plaintiff. Therefore, there was no alleged illegality in conducting the auction and confirming the same. The said finding has not been challenged by the plaintiff. Having given its findings, the first appellate Court has wrongly granted the relief of declaration as an alternative relief. Therefore, with these contentions, the learned counsel prayed to allow the second appeal.

18. The learned counsel appearing for the appellant in S.A.No.131 of 2011, in addition to the submissions made by the counsel appearing for the appellant in S.A.No.434 of 2011, would submit that the trial Court has rightly dismissed the suit, however, the lower Appellate Court has erred in granting the relief of declaration alone, which was opposed to

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Section 34 of the Specific Relief Act 1963. The 3rd appellant being a successful bidder in the auction held on 15.02.2000, consequently, a sale deed was executed in his favour and as per Section 29(3) of the Act, the property is vested in auction purchaser with all rights over the said property as if the transfer has been made by the original owner of the property. The learned counsel has also contended that the relief for recovery of possession has not been sought for by the plaintiff and no Court fee under Section 25(a) of the Tamil Nadu Court Fee and Suits Valuation Act, 1955 has also been paid. The suit is simply valued for a sum of Rs.5000/- under Section 53 of the Act. The learned counsel also reiterated that the lower Appellate Court rejected the plea of the plaintiff regarding the wide paper publication and also foul play attributed against the defendants and held that there is no infirmity and irregularity in conducting the public auction, but it has wrongly granted the decree of declaration that the sale is void. Therefore, the first Appellate Court committed an error in the judgement and the same is liable to be set aside on the aspect of perversity.

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19. He further pointed out that when the lower appellate Court when rightly rejected the equitable relief of permanent injunction as prayed for by the plaintiff, it ought not to have allowed the appeal granting the relief of declaration in violation of Section 34 of the Specific Relief Act. He would further submit that the first Appellate Court has misconstrued the provision of Section 31 of the Act without considering the provision of Section 29 of the said Act. The learned counsel also contended that the plaintiff has not produced any document to substantiate the value of the property though he pleaded that the worth of the suit property was Rs.20,00,000/- per acre. With these contentions, the learned counsel appearing for the 3rd defendant/appellant sought for allowing the appeal and to set aside the judgment and decree passed by the lower appellate Court.

20. Mr.R.Singaravelan, learned Senior counsel, who is appearing for plaintiff would submit that defendants 1 and 2 had sanctioned a term

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loan of Rs.23.45 lakhs on 29.05.1990 and Rs.2.23 lakhs on 29.11.1992 to set up Zink Sulphate Manufacturing Unit in Rasipuram Taluk as evidenced under Ex.B8. According to the learned Senior counsel, the property was worth about Rs.75 lakhs in the year 1992, against which, the loan for a sum of Rs.25.68 lakhs was sanctioned. The learned Senior Counsel would contend that the property along with machinery was auctioned and confirmed for a sum of Rs.10 lakhs on 15.02.2000. If at all the said property is valued only for a sum of Rs.10 lakhs, the first defendant would not have granted the loan for a sum of Rs.25.68 lakhs. Therefore, he would contend that there is no fairness in confirming the auction sale for a low price at Rs.10 lakhs for the entire factory building and machinery along with the land of 1.14 acres that too situated on Salem to Namakkal Main Road at Athanoor.

21. The learned Senior counsel for the plaintiff further submitted that the present sale is hit by *lis-pendence* under Section 52 of the Transfer of Property Act. The suit in O.S.No.2110 of 1996 was filed on

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09.12.1986 to challenge the first auction scheduled to be conducted by the first defendant on 10.12.1996. When the said suit was pending, three auctions were conducted and in the 4th auction conducted on 15.02.2000, the entire machinery along with land and buildings were sold for a meagre sum of Rs.10 lakhs. Initially, the machinery alone was sold to the plaintiff during the auction for the land was conducted on 06.11.1998, later, without giving possession of the machinery, it was once again sold on 15.02.2000. Therefore, he contended that there is no fairness in the process adopted by the 1st defendant/Corporation in conducting the auction.

22. The learned Senior Counsel for the plaintiff further contended that in the present case, the property was auctioned under Section 29 of the Act, whereas, the property should have been sold by complying with the provisions under Sections 31 & 32 of the Act when the suit was pending challenging the first auction conducted by the Corporation, in all fairness requiring the first defendant to approach the Court to get the

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permission before auctioning the property in terms of Section 31, the first defendant supposed to have followed Section 31, instead of Section 29 and since he has not followed Sections 31 and 32, the first appellate Court has rightly come to the conclusion and granted declaratory relief as prayed for by the plaintiff, which requires no interference. He further submitted that without any wide publicity, but only after effecting the publication in Salem edition in vernacular language, the auction was conducted and had they conducted the auction by effecting wide publicity both in the English and Vernacular language throughout the State, they would have got better price than the sum of Rs.10 lakhs as offered by the third defendant.

23. Further, the learned Senior Counsel contended that having sold the machinery to the plaintiff in the auction conducted on 06.11.1998 without any offer for the same to the plaintiff, once again, it was sold on in the auction conducted on 15.02.2000. The appellant/TIIC lost its right over the machinery from February 1999 onwards and hence, it should not

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have decided to sell the same machinery to the third defendant for a sum of Rs.4 lakhs and also the land and buildings for Rs.6 lakhs. Though DW1 in his cross-examination, has stated that an opportunity was given to the plaintiff to take back the machinery, but he has not produced any documents to prove the same. Therefore, the learned Senior Counsel contended that everything was done by the 1st appellant/TIIC in favour of the third defendant and resale of the machinery in and out again under Section 21(2) of the State Financial Corporation Act 1951 was not property and that is why the first appellate Court has rightly come to the conclusion that the auction conducted on 15.02.2000 is void. Therefore, he prayed to dismiss the Second Appeals with costs.

24. In support of his submissions, the learned Senior counsel for the plaintiff has referred to the judgements rendered by the Hon'ble Supreme Court, viz., (1969) 3 SCC 537, (1995) 4 SCC 595, (2000) 6 SCC 69, (2002) 3 SCC 496, (2004) 7 SCC 166, AIR 2004 SC 3392, (2008) 2 MLJ 896, (2008) 5 SCC 176, (2008) 5 SCC 194, (2014) 5 SCC 651 and submitted that a duty is cast upon the State Financial Corporation

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to comply with Section 29 of the Act in the matter of conducting public auction, the criteria for public auction and effecting wide publication, etc. so as to fetch the best price for the suit property

25. The learned Senior counsel also relied upon the decisions reported in (1995) 4 SCC 156, (1998) 9 SCC 603, (1998) 2 LW 189, (1998) 3 LW 559 & (2009) 8 SCC 646 and submitted that unless and otherwise the jurisdiction of the civil Court is ousted specifically and expressively, it cannot be considered to be ousted and the suit filed by the plaintiff is very much available.

26. Heard Mr.C.Jagadish learned counsel for the appellant in S.A.No.131 of 2011 and for the second respondent in S.A.No.434 of 2011 and Mr.K.V.Sundararajan, learned counsel for the appellant in S.A.No.434 of 2011 and for the respondents 2 & 3 in SA.No.131 of 2011 and Mr.R.Singaravelan, learned Senior Counsel for Ms.M.Srividhya for the first respondent in both the Second Appeals.

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27. The Original Suit was filed by the plaintiff, seeking for declaration that the sale of the suit property on 15.02.2000 is void, illegal, non-est and for permanent injunction from restraining the first defendant from claiming any right over the suit property under the void sale. The defendants 1 and 2/State Financial Corporations, lent money to the plaintiff to set up Zink Sulfate Manufacturing Unit at Rasipuram Taluk. They had sanctioned term loan of a sum of Rs.23.45 lakhs on 29.05.1990 and also a sum of Rs.2.23 lakhs on 29.11.1992. Since there was a default in payment of loan, the entire loan was recalled by defendants 1 & 2. These are all the admitted facts.

28. Subsequently, since the plaintiff failed to repay the laon amount, the defendants 1 and 2 brought the property for auction under Section 29 of the Act on 10.12.1996. Aggrieved over the said auction, the suit in O.S.No.2110 of 1996 was filed on 09.12.1996, challenging the auction scheduled to be conducted on 10.12.1996. Later, the said suit came to be withdrawn on 09.11.2001 by the plaintiff. Since there was no

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bidders for the auction conducted on 10.12.1996, no auction was conducted on the said date. Subsequently, on 06.11.1998, the auction was conducted for the sale of machinery as well as for the land and buildings. However, an offer was received only for the machineries, for a sum of Rs.1,05,000/- from the plaintiff. Whenever the auction was conducted by the defendants/appellants, a request form used to be sent by the 1st defendant Corporation to the plaintiff, to participate in the auction tender. Even if he had not participated, with regard to confirmation of the highest bidder, a communication used to be sent to the borrower i.e., to the plaintiff and in the event if the borrower is willing to purchase the said property for the highest offer made by the third parties, the sale will be confirmed in favour of the borrower. In the present case, an offer was made on 11.01.1999 and thereafter, he has paid a sum of Rs.1,05,000/- and the same was acknowledged by the defendants 1 and 2 vide communication dated 03.02.1999.

29. The plaintiff had not raised any issues while sale of the

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machinery was made subsequent to the conduction of the second auction on 06.11.1998. He had not taken any stand as regards the conducting of the auction on 06.11.1998 is in violation of Section 52 of the Transfer of Property Act and also about the fairness of the first defendant to conduct the auction in accordance with the provisions under Sections 31 & 32 of the Act. The plaintiff was well aware of the fact that the cause of action for filing the earlier suit in O.S.No.2110 of 1996 was the auction scheduled to be held on 10.12.1996, however, on which date, no auction was conducted since no bidders came forward to participate in the auction and hence, relief sought for in the suit had become infructuous. Perhaps, this might be the reason the plaintiff had not challenged the auction conducted by the Corporation on 06.11.1998. This would give an independent cause of action for the plaintiff to file any suit and subsequently, third auction was conducted on 26.11.1999 for land and buildings and since no bidders were available, the said auction was not successful. However, since the plaintiff has not taken any steps to settle the entire dues payable to the defendants 1 and 2/Corporation, though the

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payment made towards machinery by the plaintiff, the first defendant retained the machinery. Though the plaintiff had not come forward to take back the possession of the machinery, the defendants had not produced anything about the request made by the plaintiff to take back the machinery. The first Appellate Court has come to the conclusion that DW1 had not produced any documents to show that they requested the plaintiff to take back the machinery. It is not necessary for the defendants to prove that they have sent a letter to take back the machinery and it is only the plaintiff, who has to prove that they have made a request to take back the machinery and the Corporation had not responded to the same. Even assuming that there is any refusal on behalf of the Corporation to return the machineries, the remedy available for the plaintiff is only to file a suit for appropriate relief. In the present case, after conducting the 2nd and 3rd auctions on 6.11.1998 and 26.11.1999, the defendants/Corporation conducted the 4th auction on 15.2.2000. The plaintiff had not chosen to take any steps to take back possession of the machinery. Under these circumstances only, the defendants/TIIC came

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forward to auction the machineries also, instead of keeping the same idle in the premises in order to adjust the loan amount. For this purpose, the defendants/TIIC had issued a tender document on 08.02.2000 to the plaintiff. Thereafter, an advertisement was issued and along with the tender document all the particulars were furnished including final report etc., and after confirmation of the bid of the highest bidder, a communication was also sent on 07.03.2000 to the plaintiff, which was marked as Ex.B13 to purchase the machinery as well as the land and buildings at the rate of Rs.10 lakhs which is the highest price offered by the bidder and since the plaintiff had not responded to that, the sale of the plant and machinery along with the land and buildings was confirmed in favour of the highest bidder, i.e. 3rd defendant. Even before the said auction, the plaintiff was well aware of the fact that the first defendant was going to sell the machinery along with the land and buildings. If at all, being aggrieved, the plaintiff ought to have purchased the same well in time to stall the proceedings. Having kept quiet for more than three years and at the fag end of the third year and after confirmation of the sale, the

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plaintiff woke up and filed the present suit, which shows the motive of the plaintiff is only to stall the process of auctioning the properties that too after confirmation of the sale and a decision was made to hand over the same to the auction purchaser i.e., 3rd defendant.

30. So far as reference made to Section 52 of the Transfer of Property Act with regard to the *lis pendens* transfer is concerned, it would be worthwhile to extract the provisions of Section 52 of the Transfer of Property Act, which is extracted hereinunder:

> "52. Transfer of -immoveable property pending suit relating thereto.-(1) If, during the pendency, in any court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government, of any suit or proceeding which is not collusive and in which any right to immoveable property is directly and specifically in question and the notice of the pendency of such suit or proceeding, containing the particulars specified in sub-section
>
> (2), is registered under section 18 of the Indian Registration Act, 1908, within a period of 90 days from the date

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> of institution of the suit or proceeding in the case of plaintiff or petitioner or from the date of the knowledge of the pendency thereof in the case of any other party, as the case may be, then, after the notice is so registered, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as the court may impose:
>
> Provided that during the aforementioned period of 90 days no party shall have any right to transfer or otherwise deal with the property so as to affect the rights of any other party to the suit or proceeding under any decree or order which may be made therein:

31. The above provision clearly spells out that any dealing or transfer of property during the pendency of any suit, in which the right to immovable property is directly or specifically in question and if such property is dealt with during the *lis*, then it will not affect the rights of any other party, who obtains a decree or order at a later stage in the said

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suit. Therefore, there is no prohibition for selling or transferring the property during the pendency of the suit, but only in the event the plaintiff is capable of getting a decree that the sale is null and void, it will not affect the right of the other party who obtained a decree or order at a later stage in the said suit.

32. In the present case, no decree was passed in the suit in O.S.No.2110 of 1996, filed by the plaintiff challenging the auction dated 10.12.1996 since it was was withdrawn on 09.11.2001 by the plaintiff. Therefore, the question of *lis pendens* does not arise for the reason that no auction was conducted as no bidders came forward and the prayer has virtually become infructuous immediately after the expiry of 10.12.1996. Therefore, since no auction was conducted on that day due to non-availability of the bidders, the auction conducted on 15.02.2000, which has to be construed as a separate cause of action and further, it is not the continuation of the auction scheduled to be conducted on 10.12.1996. On this aspect, the issue of *lis pendens* does not arise. The Court below

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granted the declaratory relief. However, it had rejected the prohibitory relief of permanent injunction in favour of the plaintiff. The present decree of declaration has been sought in terms of Section 34 of the Specific Relief Act. It would be worthwhile to extract the provisions of Section 34, as under:

> "34. Discretion of court as to declaration of status or right.—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.
>
> Explanation.—A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and whom, if in existence, he would be a trustee."

33. On a bare reading of the above Section, particularly, the

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proviso to the said Section, which made it clear that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. In the present case, the property was auctioned and possession was also handed over to the 3rd defendant and consequently, the title of the property was also transferred in favour of the 3rd defendant. While so, it is pertinent to note that the plaintiff has only sought for declaration to the effect that the sale of the suit property by way of auction conducted in the year 2000, i.e. on 15.2.2000 is void, illegal and non-est, but the fact remains is that by the time when the suit filed for declaration in the year 2003, the possession of the suit *vis-a-vis* title was transferred in favour of the 3rd defendant who was the successful bidder and despite well aware of this fact, the plaintiff has not sought for any consequential relief, claiming recovery of possession pursuant to the declaration. In fact, the relief of recovery of possession is important and vital factor for the plaintiff inasmuch as the possession was already handed over along with the transfer of title in favour of the 3rd defendant. Taking note of the same, the lower appellate Court clearly found that the

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possession was not with the plaintiff but it was with the 3rd defendant. But strangely, the plaintiff has not filed any separate appeal in respect of this finding of the lower appellate Court, hence, the same has become final. Therefore, I am of the view that the suit for declaration without seeking recovery of possession, is otiose and clearly hit by Section 34 of the Specific Relief Act.

34. In this regard, it would be worthwhile to mention the law laid down by the Hon'ble Apex Court in the judgement rendered in "***Meharchand Das Vs. Lal Babu Siddique and Others***" reported in (2007) 14 SCC 253, wherein, it has been held in paragraph nos.9 to 12 as follows:

> "9. Section 34of the Specific Relief Act, 1963 reads as under :
>
> "Discretion of Court as to declaration of status or right. - Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the

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plaintiff need not in such suit ask for any further relief
:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

"10. In this case, it stands admitted that the appellant was treated to be a tenant by the respondents. The suit property, according to the respondents, was a tenanted one. The possession of the appellant, therefore, was denied and disputed. It is furthermore admitted that the suit for eviction which was filed by him, was as noticed herein before dismissed by the Civil Court on 27.5.1977.

"11. The defendant-appellant, therefore, had been in possession of the suit property. In that view of the matter the plaintiff-respondents could seek for further relief other than for a decree of mere declaration of title.

"12. The High Court, in our opinion, committed a manifest error in not relying upon the decision of this Court in Vinay Krishna (supra). The said decision categorically lays down the law that if the plaintiff had been in possession, then a suit for mere declaration would be maintainable; the logical corollary whereof would be that if the plaintiff is not in possession, a suit for mere declaration would not be maintainable."

35. Therefore, when admittedly, the plaintiff was not in possession of the suit property, a suit for mere declaration with a prayer for recovery of possession, would not be maintainable.

36. A contention was raised on behalf of the plaintiff that the

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procedure adopted for auctioning the suit property by the defendants 1 and 2/Corporation under Section 29 of the Act was not proper and on the other hand, since already earlier suit was pending, they should have followed the procedure laid down under Sections 31 & 32 of the Act.

37. The Financial Corporation is empowered to bring the property of the defaulting borrower for sale without the intervention of the Court. Sections 29 and 31 confer two different rights on the Corporation which are independent of each other. Whereas, Section 29 provides for a limited remedy, Section 31 provides for a composite remedy to the Corporation to realize the dues both from the principal borrower as also from the guarantor. Section 32 of the Act provides for the procedure in respect of the proceedings before the District Judge on applications under Section 31. The Corporation is an independent autonomous statutory body having its own constitution and rules to abide by, and functions and obligations to discharge. Therefore, the Corporation can take its own decision to recover its dues either by adopting Section 29 by bringing the property for sale or

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Section 31 by approaching the Court seeking an order for the sale of the property mortgaged, without prejudice to the provisions of Section 29. There is no legal embargo cast upon the Corporation to follow Section 29 or 31 under the given circumstances. Therefore, Section 29 confers an extraordinary power upon the Corporation and therefore, the Corporation, can take its own decisions at its discretion to adopt either Section 29 or 31 of the Act.

38. However, so far as the view of this Court is concerned, when the auction was challenged and the said auction is *sub judice* before the Court of law, it would be appropriate for the Corporation to adopt Section 31 of the Act and approach the said Court, seeking appropriate orders for the sale of the property mortgaged by the borrower by way of public auction in order to recover its dues But in the present case, the plaintiff moved the Court by way of O.S.No.2110 of 1996, challenging the first auction which was scheduled to be conducted on 10.12.1996. Admittedly, on the said date, no auction was conducted due to non

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availability of the bidder. Therefore, virtually, there was nothing remains in the suit to be adjudicated in the suit since the prayer itself had virtually become infructuous. Later, the defendants 1 and 2/Corporation proposed to conduct fresh action and accordingly, conducted three more auctions, that too after serving notices to the plaintiff. But, none of the subsequent auctions were not challenged by the plaintiff which arose on different cause of actions. In such circumstances, it is for the Corporation to choose and conduct the auction either by following the procedure laid down under Section 29 of the Act or under Sections 31 & 32 of the Act. In the present case, the auction was conducted by following Section 29 of the Act. On facts, both the Courts below have rightly held that the procedure including giving wide publicity has been followed by the Corporation in the matter of conducting the auction and there was no illegality or irregularity. The Courts have also found that no foul play as alleged by the plaintiff had been adopted. On consideration of the entire materials placed before this Court *vis-a-vis* the findings of the Courts below, this Court also does not find any irregularity or infirmity on the

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aspect of conducting of auction by the defendants 1 and 2/Corporation.

39. The contention raised on behalf of the defendants as regards the jurisdiction of the civil Court to entertain the suit filed by the plaintiff is concerned, it is well settled that unless and otherwise the jurisdiction of the civil Court is expressly or specifically barred by statutory provisions, it cannot be construed or contended that the jurisdiction of the Civil Court is barred. When a person files a civil suit, he has right to argue the same in terms of the legal provisions and he has also got his right of appeal by way of first appeal and second appeal etc., and prohibition of such rights cannot be curtailed or taken away without any express provision contained in the statute. Such provision in the statute must be express or must be found out by necessary implication. No such express provision is there to bar the plaintiff to file the suit. Therefore, this Court is of the view that the Civil Court has jurisdiction to entertain the suit filed by the plaintiff.

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40. Admittedly, the plaintiff has not sought for recovery of possession of the property and it is not in dispute that the suit property was in possession of the 3rd defendant, the suit filed by the plaintiff for mere declaration without seeking recovery of possession, is bad and not sustainable under Section 34 of the Specific Relief Act, 1963. Hence, the findings of the lower appellate Court as regards the entitlement of the plaintiff to the declaratory relief, are liable to be set aside.

41. It is well settled law that in the matter of auction by the Corporation in exercise of the powers conferred on it under Section 29 of the Act, the scope of judicial review is very limited and confined to two circumstances, viz., a) where there is statutory violation on the part of the State Financial Corporation or b) where State Financial Corporation acts unfairly, i.e. unreasonably. In the present case, as already discussed supra, this Court held that there is absolutely no irregularity or infirmity in conducting the auction and confirming the sale in favour of the 3rd defendant by the defendants 1 and 2/Corporation, the lower appellate

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Court was not right in holding that the civil Court has got jurisdiction to set aside the statutory proceedings of the Corporation as this Court finds that there was absolutely no violation or detriment of statutory duty on the part of the Corporation and the plaintiff failed to establish any irregularity committed in the auction proceedings by the Corporation.

42. Accordingly, in the light of the above discussion, all the substantial questions of law are answered against the plaintiff.

43. As regards the Case laws referred to by the learned counsel for the parties, this Court feels that the case laws referred to by the parties may not be relevant as not applicable to the present facts of the case.

44. In the result, both the Second Appeals are allowed and the judgment and decree dated 13.10.2009 made in A.S.No.129 of 2008 on the file of the II Additional Subordinate Judge, Salem are set aside and consequently, the judgment and decree dated 16.02.2005 made in

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O.S.No.129 of 2003 on the file of the learned Principal District Munsif, Salem are restored. The parties shall bear their own costs throughout.

45. Since the plaintiff has paid a sum of Rs.1,05,000/- towards the sale of the machinery, the Corporation is directed to adjust the said sum of Rs.1,05,000/- towards the loan amount dues payable by the plaintiff. Further, the Corporation is also directed to adjust Rs.4 lakhs towards loan amount dues payable by the plaintiff to the Corporation, which was fetched during second auction sale for machinery.

07 .02.2023

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KRISHNAN RAMASAMY, J.

suk

To

1.The II Additional Subordinate Judge, Salem
2.The Principal District Munsif, Salem

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common judgment
in S.A.Nos.131 & 434 of 2011

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