
(2011) 06 MAD CK 0100
In the Madras High Court
Case No : O.S.A. No. 310 of 2010

L. Mohanam Mudaliar

APPELLANT

Vs

Mohamed Idris, Syed Nasrulla Basha and Nasreen Begum

RESPONDENT

Date of Decision : 24-06-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 21(2)
Transfer of Property Act, 1882 — Section 69

Citation : (2011) 06 MAD CK 0100

Hon'ble Judges : P.R. Shivakumar, J;C. Nagappan, J

Bench : Division Bench

Advocate : S. Parthasarathy and M. Balasubramaniam, for the Appellant; Sheik Nainaa, for R1 and S. Narayanan, for R2, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Shivakumar, J.—Plaintiff in C.S. No. 434 of 2007 on the file of this Court in its ordinary original civil jurisdiction is the Appellant in the

Original Side Appeal. The suit had been filed for (1) a declaration declaring that the first Respondent had no redeemable right over the plaint

schedule properties, (2) a declaration declaring the Plaintiff (Appellant) to be the absolute owner of the plaint schedule property, (3) a decree

cancelling the ex-parte decree dated 14.06.2006 passed by the VII Assistant Judge, City Civil Court, Chennai in O.S. No. 9869/1990 as having

been obtained by misrepresentation and (4) a permanent injunction restraining the Defendants or anybody claiming through them in any manner

interfering with the Plaintiff's/Appellant's peaceful possession and enjoyment of the suit property.

2. Initially the suit was filed against Mohamed Idris, the first Respondent alone showing him to be the sole Defendant. Subsequently, as per order

dated 20.10.2008 made in A. No. 1347/2008, Respondents 2 and 3 were impleaded as Defendants 2 and 3. The suit was resisted by the first

Defendant by filing a written statement. After their impleadment Defendants 2 and 3 also filed written statement and thereafter the

Appellant/Plaintiff filed a reply statement. At the conclusion of the trial, the learned single judge of this Court dismissed the suit with costs by

judgment and decree dated 26.07.2010 and the said decree is impugned in this appeal.

3. The plaint averments in brief, are as follows:

i) The suit property bearing old door No. 13 and the present door No. 148, Portuguese Church Street in George Town, Chennai - 600 001

belonged to one Thayub Begum. During her life time, she mortgaged the said property by a registered simple Mortgage Deed dated 09.01.1970

bearing document No. 14/1970 in favour of one Indra Kanvar Bai Taleda for a sum of Rs. 9,000/-agreeing to repay the said amount with an

interest at the rate of 18% per annum. The parties to the Mortgage Deed mutually agreed for the sale of the mortgaged property by public auction

or by private negotiation under in case of default in repayment of the debt secured by the mortgagee. The mortgagor was unable to discharge the

mortgage debt and without discharging the debt she died intestate on 01.04.1978. Thereafter, the mortgagee Indra Kanvar Bai Taleda assigned

the mortgage in favour of T.M. Abdul Rahman under a Deed of Assignment dated 27.12.1984 registered as document No. 3543/1984 on the file

of Sub Registrar, Chennai-North. Meanwhile, the Income Tax department attached the rental income from the tenants of the suit property for the

recovery of the Income Tax dues of Thayub Begum (the original mortgagor). One Nasreen Begum, the adopted daughter of Thayub Begum,

unable to pay the income tax dues, took steps along with T.M. Abdul Rahman to bring the suit property for public auction through M/s. Murray &

Company. In view of the subsisting attachment of rents by the Income Tax department, there was no bidder to bid at the auction. Therefore, the

assignee-mortgagee entered into a private sale transaction with one Ziauddin on 07.01.1985 and the said Nasreen Begum also joined him as a

confirming party in executing the Sale Deed registered as document No. 68 of 1985 on the file of the Sub Registrar, Sowcarpet. The Purchaser

Ziauddin paid a portion of the sale consideration directly to the Income Tax department towards the tax dues and got the property released from

the attachment and paid the balance amount of sale consideration to the assignee of the mortgage, namely T.M. Abdul Rahman. Mohanam, the

Appellant/Plaintiff, thereafter purchased the property from Ziauddin under a registered Sale Deed dated 10.06.1988 registered as document No.

266/1988 on the file of the Sub Registrar, Sowcarpet, Chennai and spent huge amount for developing the suit property after such purchase.

ii) One Ayisha Begum, claiming to be the sister of Thayub Begum filed a pauper suit in O.P. No. 324 of 1986 in 1986 itself on the file of the City

Civil Court, Chennai against Ziauddin and T.M. Abdul Rahman for a declaration that the Sale Deed dated 07.01.1985, namely document No. 68

of 1985 registered on the file of Sub Registrar, Sowcarpet was null and void. During the pendency of the said suit, Ayisha Begum passed away

and Mohamed Idris, the first Defendant/first Respondent in the appeal was impleaded as the legal heir of Ayisha Begum. Subsequently, the same

came to be numbered as O.S. No. 9869 of 1990 on the file of the VII Assistant Judge, City Civil Court, Chennai on 07.11.1990. On 06.11.1991

the said suit was decreed ex-parte against Ziauddin and T.M. Abdul Rahman, the Defendants therein. Mohanam, the Appellant herein/Plaintiff was

not a party to the said suit and he was not aware of the same. After his purchase, the Plaintiff Mohanam came to know about the decree, when

service of summons was effected on him in a subsequent suit O.S. No. 9822/1992 filed by Mohamed Idris, the first Respondent herein/first

Defendant, on the file of the City Civil Court, Chennai for redemption of the mortgage executed under the deed dated 09.01.1970. Mohanam, the

Appellant herein/Plaintiff, was arrayed as the 4th Defendant in the said redemption suit,. Mohamed Idris, the first Respondent herein/first

Defendant did not have any locus standi to file the said suit for redemption of mortgage and he had filed the suit by falsely claiming to be the legal

heir of Thayub Begum. Subsequently, Mohanam, the Appellant herein/Plaintiff got himself impleaded as a Defendant in the earlier suit O.S. No.

9869/1990. In the latter suit O.S. No. 9322/1992, it had been stated that Thayub Begum was married to one Shaik Abdul Khader and that he

divorced her and left for Pakistan with all his children to be settled there permanently. From the said pleadings, the Appellant/Plaintiff came to

know that Thayub Begum had 2 sons and 2 daughters. As such the claim of Ayisha Begum to maintain the earlier suit, namely O.S. No.

9869/1990, in her capacity as sister of Thayub Begum could not be sustained. Being a stranger, she made an attempt to snatch away the suit

property by wrongly claiming to be the legal heir of Thayub Begum. Pending disposal of the said suit O.S. No. 9869/1990, Ayisha Begum died

and Mohamed Idris, the first Defendant was brought on record as her legal heir in the said suit.

iii) On 17.04.1997 the second suit O.S. No. 9822/1992 was dismissed for default subsequently the same was restored to file on 10.08.2004 by

an order passed in I.A. No. 16597/2002. As against the said order, a revision was filed in Civil Revision Petition No. 934/2004. In the said CRP

an order was passed on 23.06.2004 directing disposal of the earlier suit, namely O.S. No. 9869/1990 within a time frame. Issues were framed in

the said suit on 10.08.2004. Thereafter Mohamed Idris, the first Respondent herein/first Defendant insisted upon a joint trial of the suits O.S. Nos.

9869/1990 and 9822/1992. On the same day, the VIII Assistant Judge issued a test warrant for determination of the market value of the suit

property and accordingly the "Amin" of the City Civil Court filed a report valuing the suit property at Rs. 20.00 Lakhs. Mohanam, the Appellant

herein/ Plaintiff filed two applications on 21.09.2004 for the return of the plaint to be presented before proper court based on the valuation fixed

by the Amin of the court. But the said court rejected the said application on 22.09.2004 stating that the market value of the suit property had not

then been fixed by the court. Immediately after the rejection of the said petition, Mohamed Idris, the first Respondent herein/first Defendant filed

I.A. No. 1659 of 2004 praying for the leave of the court to withdraw the suit O.S. No. 9822/1992 with liberty to file a fresh suit on the very same

cause of action. The said petition was resisted. However, the learned VIII Asssitant Judge, City Civil Court, Chennai, passed an order on

08.11.2004 dismissing the said petition with an observation that no liberty was required for filing a fresh suit for the same relief after the disposal of

the other suit O.S. No. 9869/1990, which would constitute a different cause of action and thus, in effect granted the very same relief sought for.

Therefore, Mohanam, the Appellant herein/Plaintiff filed a petition in I.A (SR) No. 47183 of 2004 u/s 21(2) of CPC praying for determination of

pecuniary jurisdiction relating to the suit property as a preliminary issue. The learned VII Assistant Judge, City Civil Court, Chennai passed an

order in the said petition on 18.11.2004 to the effect that the same could be taken up after the disposal of I.A. No. 20239/2004, a petition filed

for reception of additional written statement in O.S. No. 9869/1990. The said IA No. 20239/2004 in O.S. No. 9869/1990 was allowed on

29.11.2004. But the application filed u/s 21(2) of CPC was not taken on file and on the other hand, the judge suo motu framed a preliminary issue

and closed the petition. Hence the Plaintiff filed a Civil Revision Petition in C.R.P. No. 64/2005 and got stay of all further proceedings in O.S. No.

9869 of 1990. On 12.04.2004 it was wrongly represented by the first Respondent herein/first Defendant that the Appellant herein/Plaintiff was

dragging on the matter and the learned single judge of this Court, relying on the said false representation, dismissed the CRP with exemplary cost

and also directed striking off of the defence of the Appellant herein/Plaintiff as a Defendant in O.S. No. 9869/1990. The Appellant herein/Plaintiff

filed a review petition in Review C.M.P. No. 84/2006. When the said review petition was ripe for admission, the learned single judge who passed

the order in the CRP retired and the said review petition was subsequently dismissed by this Court on 12.12.2006 with the observation that the

Appellant herein/Plaintiff ought to have filed an appeal instead of seeking review. A SLP filed by the Appellant herein/Plaintiff before the Supreme

Court in SLP (Civil) No. 1779/2007 was also dismissed by the Hon''ble Supreme Court on 02.05.2007 at the admission stage itself. The

Appellant herein/ Plaintiff, as a bonafide purchaser, has purchased the property for value and has also made enormous development by putting up

a building with ground + 3 floOrs.

iv) The first Respondent/first Defendant being a total stranger to the suit properties, had filed the above said suits O.S. Nos. 9869/1990 and

9822/1992 without having any locus standi, right or interest or authorisation or authority and procured a decree in O.S. No. 9869/1990 by

misrepresentation. Therefore, the Appellant herein/Plaintiff is entitled to a declaration that the ex-parte decree dated 14.06.2006 obtained in O.S.

No. 9869/1990 by the first Respondent/first Defendant is null and void and unenforceable. The Appellant''s/Plaintiff''s vendor purchased the suit

property under a sale deed dated 07.01.1985. Only thereafter the mother of the first Respondent/first Plaintiff, claiming to be the sister of Thayub

Begum filed the pauper OP to set aside the sale deed dated 07.01.1985. But the suit was numbered only in 1990. Before the numbering of the

suit, the Appellant/Plaintiff purchased the suit property from his vendor in 1988 itself and he was not aware of the pending litigation. Even assuming

that the first Defendant derived any redeemable right through her mother over the suit property, the first Defendant has no locus standi to seek to

set aside the sale deed executed in favour of the Appellant's/Plaintiff's vendor by the assignee/mortgagee along with the adopted daughter of

Thayub Begum, namely Nasreen Begum, who signed it as a confirming party. Further, the act on the part of the first Respondent/first Defendant

filing the suit O.S. No. 9822/1992 for redemption of mortgage and withdrawing the said suit after 14 years with liberty to file a fresh suit on the

same cause of action is nothing but gross abuse of process of law. Therefore, the Appellant/Plaintiff is entitled to the above said reliefs sought for in

the plaint.

3. The suit was resisted by the first Defendant by raising the following contentions in his written statement:

i) Mrs. Thayub Begum, the original owner of the suit property had rented out her house consisting of ground floor, first floor and second floor to

one Pukhraj Jain for a monthly rent of Rs. 3,000/-exclusive of electricity charges. After the death of Thayub Begum, the tenant stopped making

payment of rent to anybody and the said tenant Pukhraj Jain filed R.C.O.P. No. 699/1985 as if there was a dispute as to who was the land-lord.

The said R.C.O.P. was dismissed.

ii) Thayub Begum had executed a simple mortgage deed in favour of Indra Kanvar Bai Taleda for a sum of Rs. 9,000/-and paid interest on the

said amount till her death in 1978. One Abdul Rahman, in the pretext of redeeming the mortgage property, fraudulently sold the same for a sum of

Rs. 25,000/-to one Ziauddin on 07.01.1985. The said purchase by Ziauddin and the sale made by him to the Appellant herein/Plaintiff are

fraudulent. Hence the mother of Mohamed Idris, the first Respondent/first Defendant, filed a suit O.S. No. 9869/1990 on the file of the VII

Assistant Judge, City Civil Court, Chennai against Abdul Rahman, Ziauddin and

other tenants in respect of the suit properties. The Appellant herein/Plaintiff, who claims to have purchased the suit property from Ziauddin on 10.06.1998, got impleaded in the above suit seven years after his purchase and he was arrayed as the 6th Defendant. Except the Appellant herein/Plaintiff, who figured as the 6th defendant in the said suit, other defendant in O.S.No.9869/1990 remained ex-parte. Even the appellant herein/plaintiff, who figured as the 6th defendant in O.S. No. 9869/1990, later on failed to contest the suit and an ex-parte decree was passed against him. Under such circumstances, the first Respondent herein/first Defendant, being the lawful owner of the suit property, sold the same to Syed Nazrullah Basha and Nazreen Begum, the Respondents 2 and 3/Defendants 2 and 3, on 24.08.2007. The said sale is valid and binding on the Appellant herein/Plaintiff also. Since the Plaintiff's predecessor-in-title had no legal right to be conveyed under the sale deed executed in favour of the Appellant/Plaintiff, he has got no locus standi to file the suit C.S. No. 434 of 2007 and none of the reliefs sought for in the plaint can be granted. The above civil suit should be dismissed with exemplary costs.

4. Defendants 2 and 3 contested the suit by filing a written statement containing the following averments:

Thayub Begum was the owner of the suit property. After her death, as her only legal heir under Mohammedan Law, the first Respondent/first

Defendant became the owner of the suit property. Appellant's/Plaintiff's predecessor-in-title had no interest and had no right to execute a sale

deed in favour of the Appellant herein/Plaintiff. The alleged sale deed dated 10.06.1988 is not a true one and the same is void in law. The

Appellant herein/Plaintiff has no locus standi to file the suit based on the said sale deed and the present suit is a vexatious one. Respondents 2 and

3/Defendants 2 and 3 are the lawful owners of the suit property, having purchased it from the first Respondent/first Defendant. The first

Respondent herein/first Defendant had filed a suit against the Plaintiff in O.S. No. 9869/1990 on the file of the VII Assistant Judge, City Civil

Court, Chennai. The suit was decreed against the present Appellant/Plaintiff on 14.06.2006. Appellant herein/Plaintiff has not filed any appeal

against the judgment and decree passed in O.S. No. 9869/1990 on the file of the

VII Assistant Judge, City Civil Court, Chennai and the said

decree will operate as res judicata. Before the said ex-parte decree was passed on an application filed by the Appellant herein (6th Defendant in

the said suit), the court passed an order directing valuation of the suit for the relief of declaration at Rs. 2,00,000/-and payment of a deficit court

fee of Rs. 9,375/-as against the claim made by the Appellant herein that the suit ought to have been valued at Rs. 47,00,000/-as per his valuation

or at least at Rs. 20,00,000/-as per the value arrived at by the Amin. The said order was challenged by the Appellant herein before the higher

court by filing a civil revision petition in C.R.P. No. 54/2005. The same was dismissed by the High Court. As against the dismissal of the revision

petition, the Plaintiff preferred an SLPC.C. No. 1779/2009 on the file of the Supreme court and the same was also dismissed. In view of the

dismissal of the same, the present suit is not maintainable and it deserves dismissal. None of the prayers made in the plaint can be granted. The

Appellant/Plaintiff has not come to the court with clean hands. Therefore, the suit should be dismissed with exemplary cost of Defendants 2 and 3.

5. The Appellant/Plaintiff filed a reply statement containing the following averments:

The 2nd and 3rd Respondents/Defendants 2 and 3 having purchased the suit property pendente lite got impleaded as party Defendants in the suit

with incorrect details. The suit was filed by the Appellant herein/Plaintiff in April 2007. The first Respondent/first Defendant sold the suit property

to the Respondents 2 and 3/Defendants 2 and 3 on 24.08.2007 under a sale deed bearing document No. 881/2007. The said sale deed was a

fraudulent one as the same had been brought into effect after the receipt of the suit summons. The first Respondent/first Defendant was a stranger

to the suit property and he had no redeemable right over the suit property. However, he fraudulently obtained a decree from the City Civil Court,

Chennai in O.S. No. 9869/1990 on 14.06.2006. The validity of the said decree passed in the said suit is being challenged by the Plaintiff in C.S.

No. 434/2007 which is a comprehensive suit. For execution of the decree obtained in O.S. No. 9869/1990, the first Defendant had filed E.P. No.

2584/2007 seeking delivery of possession describing the Appellant/Plaintiff to be a tenant, with full knowledge that such an averment is false. In

suppression of pendency of the present suit and also the execution proceedings, a sham and nominal document was executed by the first

Defendant in favour of Respondents 2 and 3/Defendants 2 and 3 for a throw-away price of Rs. 12.00 Lakhs. An inspection of the property was

sought to be conducted by the Inspecting Officer, but the same was resisted by the Appellant/Plaintiff on the premise that he was in possession of

the suit property. The value of the land on the date of sale in favour of Respondents 2 and 3/Defendants 2 and 3 was Rs. 1,800/- per sq.ft. Even

the land value as per the guideline value fixed by the Registration Department comes to Rs. 15,12,000/-. The building was also valued at a lower

rate of Rs. 7,01,330/-. The Respondents 2 and 3/Defendants 2 and 3 paid a sum of Rs. 81,072/- by way of deficit stamp duty and got the

document numbered and registered despite the objections raised by the Appellant/Plaintiff. The first Respondent/first Defendant falsely declared as

if he delivered vacant possession of the suit property to the purchasers. He has also falsely declared that he paid all public outgoings in respect of

the suit properties. This Court had also granted interim injunction restraining the Defendants from proceeding with the execution petition. As such, a

false recital was incorporated in the sale deed as if possession was handed over to the purchasers, namely Respondents 2 and 3/Defendants 2 and

3. The first Respondent/first Defendant, who had no locus standi to file the suit O.S. No. 9869/1990 obtained a decree in the said suit by playing a

fraud upon the court and by misrepresentation. The husband, daughters and sons of Thayub Begum, the original owner/original mortgagor of the

suit property are alive. Therefore the first Defendant had got no right or authority to deal with the suit property. Even though the Appellant/Plaintiff

has valued the suit property at Rs. 47.00 Lakhs, on inspection, the Amin of the court fixed the value of the suit property at Rs. 20.00 Lacs as on

08.09.2004. But, in the sale deed executed in favour of Respondents 2 and 3/Defendants 2 and 3 in the year 2007, the sale consideration is

quoted as 12.00 Lakhs, which included the cost of the third floor construction also. The Appellant/Plaintiff has been advised to state that since the

said sale deed executed by the first Respondent/first Defendant in favour of the Respondents 2 and 3/Defendants 2 and 3 is sham and nominal

besides being hit by doctrine of lis pendens, he need not challenge the same. For all the reasons stated above, the claim of the Respondents 2 and

3/Defendants 2 and 3 through the first Defendant is liable to be rejected in its entirety.

6. Based on the above said pleadings, the following issues were framed:

1. Whether the 1st Defendant in the above suit is having redeemable right over the plaint schedule property?

2. Whether the Plaintiff is entitled to the relief of the declaration that he is the absolute owner of the suit property?

3. Whether the Plaintiff is entitled to the relief of cancellation of exparte decree dated 14.6.2006 passed in the suit in OS No. 9869/1990 by the

VII Assistant City Civil Judge, Chennai, since the same was obtained by alleged misrepresentation on the part of the 1st Defendant herein?

4. Whether the Plaintiff approached this Court with clean hands?

5. Whether the 1st Defendant has got title and right to convey the property in favour of the second and third Defendants?

6. Whether the Plaintiff is entitled to the relief of permanent injunction to protect his possession over the suit property?

7. Whether the subsequent sale effected by the 1st Defendant in favour of the Defendants 2 and 3 during pendency of the suit is hit by the doctrine

of "lis pendens" and therefore non-est in law?

8. Whether the suit is not within the time of limitation?

7. In the trial, the Appellant/Plaintiff figured as the sole witness (P.W.1) and marked 42 documents as Exs.P1 to P42, on his side. On the side of

the Respondents/Defendants, the Defendants 1 and 2 figured as D Ws.1 and 2 respectively and 10 documents were marked as Exs.D1 to D10.

At the conclusion of trial, the learned single judge considered the pleadings and evidence in the light of the points raised on both sides in the

arguments advanced by the counsel and upon such consideration, came to the conclusion that the Appellant/Plaintiff was not entitled to any of the

reliefs sought for in the plaint and dismissed the suit with cost by judgment and decree dated 26.07.2010.

8. Aggrieved by and challenging the same, the unsuccessful Plaintiff in the civil suit C.S. No. 434/2007 has filed the present Original Side Appeal

on the grounds set out in the Memorandum of Grounds of Original Side Appeal.

9. The points that arise for consideration in this appeal are:

i) Whether the Appellant/Plaintiff is entitled to the relief of cancellation of exparte decree dated 14.6.2006 passed in the suit in OS No. 9869/1990

by the VII Assistant City Civil Judge, Chennai, since the same was obtained by alleged misrepresentation on the part of the 1st Respondent/1st

Defendant herein?

ii) Whether the Appellant/Plaintiff is entitled to challenge the decree dated 14.06.2006 passed in O.S. No. 9869/1990 by the VII Assistant City

Civil Judge, Chennai, on any other vitiating factors, especially on the ground that denial of opportunity to cross-examine witnesses examined on the

side of the Plaintiff therein even though defence in the said suit had been struck off?

` iii) Whether the Appellant/Plaintiff is entitled to the relief of the declaration that he is the absolute owner of the suit property?

iv) Whether the Appellant/Plaintiff approached this Court with clean hands?

v) Whether the decree passed by the learned single judge in C.S. No. 434 of 2007 is liable to be interfered with and set aside?

vi) Whether the 1st Respondent/1st Defendant in the suit is having redeemable right over the plaint schedule property?

10. This Court heard the arguments advanced by Mr. S. Parthasarathy, learned senior counsel representing Mr. M. Balasubramaniam, learned

Counsel for the Appellant, by Mr. Sheik Nainaa, the learned Counsel for the first Respondent and by Mr. S. Narayanan, learned Counsel for the

Respondents 2 and 3. The materials available on record were also perused.

Point Nos. i to iii

11. The Plaintiff, who proved to be unsuccessful in the suit before the learned single judge of this Court, has come forward with the present appeal.

The suit was filed for the following reliefs:

1) Declaration that Mohamed Idris, the first Defendant (first Respondent) does not have a redeemable right over the suit property;

2) Declaration that Mohanam, the Plaintiff (Appellant) is the absolute owner of the suit property;

3) Cancellation of the decree dated 14.06.2006 passed in O.S. No. 9869 of 1990 on the file of the learned VII Assistant Judge, City Civil Court,

Chennai, as the same was obtained by misrepresentation; and

4) Permanent injunction not to disturb the Appellant's/Plaintiff's peaceful possession and enjoyment of the suit property.

12. The first and fourth reliefs depend upon the outcome of the second prayer. The second prayer, in turn, depends on the outcome of the third

prayer seeking cancellation of the decree passed in O.S. No. 9869 of 1990. Therefore, let us take up for discussion, the sustainability of the third prayer at the first instance.

13. Admittedly one Thayub Begum was the original owner of the suit property and she had let out the property to one Pukhraj Jain. At the time of

induction of said tenant, the property had a building with ground plus two floors. Subsequently, the third floor was also constructed. In respect of

the suit property, Thayub Begum had created a simple mortgage by executing Ex.P1 Mortgage deed dated 09.01.1970 in favour of Indra Kanvar

Bai Telada. The amount secured by the mortgage was Rs. 9000/-. It is also an admitted fact that the mortgagor, namely Thayub Begum, without

redeeming the mortgage, died on 01.04.1978. The mortgage deed Ex.P1 also contains a clause enabling the mortgagee to bring the property for

sale either in public action or by private negotiation in terms of Section 69 of the Transfer of Property Act for the realisation of the debt secured by

the mortgage, in case of failure on the part of the mortgagor to discharge the mortgage debt.

14. Section 69 of the Transfer of Property Act, 1882 prescribes the conditions for such a power of sale to be valid. It reads as follows:

69. Power of sale when valid

(1) A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section have power to sell or concur in selling the

mortgaged property or any part thereof, in default of payment of the mortgage-money, without the intervention of the court, in the following cases

and in no others, namely,

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Mohammedan or Buddhist or a member

of any other race, sect, tribe or class from time to time specified in this behalf by the State Government, in the Official Gazette;

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

the government;

(c) where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage-deed and the mortgaged

property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the towns of Calcutta, Madras, Bombay, or in

any other town or area which the State Government may, by notification in the Official Gazette, specify in this behalf.

(2) No such power shall be exercised unless and until (a) notice in writing requiring payment of the principal money has been served on the

mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months

after such service; or (b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after

becoming due.

(3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no

case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any

person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising

the power.

(4) The money which is received by the mortgagee, arising from the sale, after discharge of prior encumbrances, if any, to which the sale is not

made subject, or after payment into court u/s 57 of a sum to meet any prior encumbrance, shall, in the absence of a contract to the contrary, be

held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any

attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of

the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale

thereof.

(5) Nothing in this section or in Section 69A applies to powers conferred before the first day of July, 1882.

The power granted to the mortgagee under Ex.P1 mortgage deed squarely falls

within the ambit of Section 69(1)(c) of the Transfer of Property

Act, 1882 since the property situates within the town of Chennai, formerly known as Madras.

15. The original mortgagee Indra Kanvar Bai Taleda seems to have assigned the mortgage in favour of one Abdul Rahman under Ex.P4

Assignment Deed dated 07.01.1985 on receipt of a sum of Rs. 25,000/-from him as consideration for such assignment. The said assignee Abdul

Rahman, purporting to exercise the power of sale conferred u/s 69 of the Transfer of Property executed a sale deed under Ex.P5 dated

10.06.1988 in favour of one Ziauddin. One Ayisha Begum, the mother of the first Defendant Mohammed Idris, filed a suit in forma pauperis on the

file of the City Civil Court, Chennai for declaring Ex.P4 sale deed dated 07.01.1985 to be null and void and illegal. As the said suit was filed

without necessary Court fee and with a prayer for leave of the Court to file the same as an indigent person, the same was taken on file as O.P. No.

324 of 1986. Ayisha Begum died on 08.01.1987 during the pendency of the Pauper O.P leaving her son Mohammed Idris, the first

Respondent/first Defendant as her only legal heir. Subsequently, Mohammed Idris, the first Defendant came on record as legal representative of

Ayisha Begum in the said pauper O.P by virtue of an order dated 12.08.1988 made in I.A. No. 14292 of 1988. Subsequently, the O.P came to

be registered as O.S. No. 9869 of 1990. The said suit was originally filed against Ziauddin, Abdul Rahman and Pukhraj Jain. Subsequently, on the

death of Pukhraj Jain, his sons Sohanraj Jain and Dhanraj Jain were impleaded in the said suit as 4th and 5th Defendants therein. All Defendants

remained exparte and the learned VII Assistant Judge, City Civil Court decreed the suit by an exparte decree dated 06.11.1991 declaring the sale

deed dated 07.01.1985 (Ex.P4) to be null and void. Meanwhile the said Ziauddin, who figured as the first Defendant in the earlier suit, chose to

execute a sale deed under Ex.P5 on 10.06.1988 in favour of Mohanam, the Appellant herein/Plaintiff. All the Defendants in the former suit, namely

O.S. No. 9869 of 1990, remained exparte and did not contest the suit. Mohanam, the Appellant/Plaintiff herein, on the strength of his purchase

made under Ex.P5 in the year 1988, chose to get himself impleaded in the said earlier suit as the 6th Defendant by filing an application in I.A. No.

2173 of 1997 and thereafter, he alone happened to be the contesting Defendant. Based on the strength of the said exparte decree dated

06.11.1991, the first Defendant Mohammed Idris filed a suit in O.S. No. 9822 of 1992 on the file of the City Civil Court, Chennai for redemption

of mortgage, for recovery of possession and also for rendition of accounts, since by then possession of the property had been with Mohanam, the

Plaintiff herein. Only thereafter Mohanam got the ex-parte decree set aside and got impleaded as 6th Defendant in O.S. No. 9869/1990. In the

said suit O.S. No. 9822 of 1992, all other persons, who had been made as co-Defendants remained exparte and Mohanam, the Plaintiff herein

who figured as the fourth Defendant therein alone contested the suit. Since recovery of possession was also sought for, he raised a preliminary

objection as to the correctness of the valuation of the reliefs and payment of court fee and presented a petition praying for the return of the plaint

for presentation in proper Court on the premise that the City Civil Court did not have the pecuniary jurisdiction since the value of the property, as

per the test report of Amin, was Rs. 20.00 Lakhs. The said application was dismissed by the learned VII Assistant Judge, City Civil Court,

Chennai with the observation that a decision regarding the value of the suit had not been taken by the Court by then. However, based on the plea

made by the Plaintiff herein (4th Defendant in the said case) regarding valuation and payment of Court fee, the said Court framed an issue and

considered the same as a preliminary issue. By a judgment and decree regarding the preliminary issue, the said Court held that the relief of

redemption had been properly valued, but the relief of recovery of possession had been undervalued and the same had to be valued at Rs.

2,00,000/-, the consideration for which the property was purchased by Mohanam, the Plaintiff therein and directed payment of a sum of Rs.

9,375.50P as additional Court fee. Subsequent to the said order, the first Defendant herein, namely Mohammed Idris wanted to withdraw the suit

with liberty to file a fresh suit on the very same cause of action and for that purpose filed an application in I.A. No. 16591 of 2004. The learned

VII Assistant Judge, City Civil Court, Chennai after hearing, allowed the first Defendant herein to withdraw the suit holding that the party filing the

suit could withdraw the same at any time. The Court, after having a brief discussion of Order XXIII Rule 1 CPC, came to the conclusion that the

suit was filed based on the cause of action, namely exparte decree dated 06.11.1991 passed in O.S. No. 9869 of 1990 declaring the sale deed

dated 07.01.1985 (Ex.P4) to be null and void and the said cause of action was no longer subsisting since the said exparte decree had been

subsequently set aside and that in such circumstances, there won't be any question of seeking or granting leave to file a fresh suit on the basis of a

fresh cause of action that would arise after the disposal of O.S. No. 9869 of 1990. Making such a clear observation in the order, the said Court

permitted the first Defendant to withdraw the suit for redemption, namely O.S. No. 9822 of 1992. The said order was passed on 08.11.2004.

16. Thereafter, the Plaintiff herein preferred a revision before this Court in C.R.P (PD) No. 54 of 2005 challenging the decreetal order dated

13.12.2004 directing valuation of the suit for the relief of declaration at Rs. 2.00 lakhs and payment of a deficit Court fee of Rs. 9,375/-as against

the claim made by the Appellant herein/Plaintiff that the suit ought to have been valued at Rs. 47.00 Lakhs as per his valuation or at least at Rs.

20.00 Lakhs as per the value arrived at by the Amin. A learned Single Judge of this Court (Thiru. Justice T.V. Masilamani) after hearing the

arguments, dismissed the said civil revision petition with exemplary cost of Rs. 5,000/-by an order dated 12.04.2006. A further direction had been

incorporated in the said order directing payment of Rs. 2,500/-out of the total cost awarded therein to Mohammed Idris, the first Respondent/first

Defendant and the payment of the balance Rs. 2500/-to the Tamil Nadu Mediation and Conciliation Centre, High Court, Madras within four

weeks from the date of order. Prior to the disposal of the said civil revision petition, another Civil Revision Petition in CRP No. 934 of 2004 came

to be filed and the same was disposed of with a direction to dispose of the original suit O.S. No. 9869 of 1990 expeditiously, in any event not later

than 30.06.2004. Taking note of the said order, the learned Single Judge in the order dated 12.04.2006 made in C.R.P.(PD) No. 54/2005

extended the time for disposal of the suit and directed disposal of the suit on merits and in accordance with law on or before 29.09.2006. In the

very same order, it was also directed that the defence of Mohanam, the sixth Defendant in O.S. No. 9869/1990 (the Plaintiff herein) would be

struck off, if the direction regarding payment of cost was not complied with within four weeks from the date of order.

17. Admittedly, the said direction was not complied with. On the other hand, the Plaintiff herein chose to file an application in Review Application

No. 84 of 2006 for review of the said order. By the time the said review application was filed, the Judge who passed the order which was sought

to be reviewed, retired on superannuation and hence, by an order of the Hon''ble Chief Justice, it was listed before another Hon''ble Judge of this

Court and the same was dismissed on 12.12.2006 holding that an appeal should have been filed instead of preferring a review. Thereafter, the

Plaintiff herein preferred a SLP in S.L.P (C) No. 1779 of 2007 on the file of the Hon''ble Supreme Court and the same was dismissed on

02.03.2007 in the admission stage itself.

18. Meanwhile, after the disposal of the C.R.P (PD). No. 54 of 2005, the learned VII Assitant Judge, City Civil Court, Chennai, has proceeded

with the trial and an exparte decree was passed on 14.06.2006 in O.S. No. 9869 of 1990 declaring Ex.P4 -sale deed to be null and void and

directing recovery of possession. The Plaintiff herein has not preferred any appeal as against the said decree of the learned VII Assistant Judge,

City Civil Court, Chennai. On the other hand, he has chosen to file a fresh suit in C.S. No. 434 of 2007 on the file of this Court (High Court,

Madras) praying for the reliefs indicated supra, including the relief of cancellation of the exparte decree dated 14.06.2006 passed in O.S. No.

9869 of 1990 on the file of the VII Assistant Judge, City Civil Court, Chennai on the premise that it was obtained by misrepresentation.

19. In support of his contention, the learned senior counsel for the Appellant/ Plaintiff relied on the decision of the Hon''ble Supreme Court in

Hamza Haji Vs. State of Kerala and Another, , wherein it has been observed that a decision obtained by playing a fraud on Court is liable to be

set aside on the basic principle that the party who secured such a decision by fraud cannot be allowed to enjoy its fruits. The learned senior

counsel also relied on the observation of the Hon''ble Supreme Court in The State of Andhra Pradesh and Another Vs. T. Suryachandra Rao, to

the effect that the fraud vitiates every solemn Act and fraud and justice never dwell together. In A.V. Papayya Sastry and Others Vs. Government

of A.P. and Others, also, the Hon''ble Supreme Court has observed that fraud vitiates all judicial acts whether in rem or in personam and that a

judgment, decree or order obtained by fraud has to be treated as non est and nullity, whether by the Court of first instance or by the final Court

and that the same can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings. In North Eastern Railway

Administration, Gorakhpur Vs. Bhagwan Das (D) by Lrs., , the Hon"ble Supreme Court has again reiterated the point that a judgment or decree

obtained by fraud either in the first court or in the highest Court, is a nullity in the eye of law.

20. Per contra, the learned Counsel for the Respondent relied on the decision of the Hon"ble Supreme Court in Afsar Sheikh and Another Vs.

Soleman Bibi and Others, , wherein the Hon"ble Supreme Court has made the following observation:

While it is true that `undue influence`, `fraud`, `misrepresentation` are cognate vices and may, in part, overlap in some cases, they are in law

distinct categories, and are in view of Order 6, Rule 4, read with Order 6, Rule 2, of the Code of Civil Procedure, required to be separately

pleaded, with specificity, particularity and precision.

Relying on the said observation of the Hon"ble Supreme Court, a learned Single Judge of this Court in ""Senaithalaivar Mahajana Sangam

Charitable Trust, Vs.A.K. Loganathan reported in 2009 (3) CTC 264 has made the following observation:

Whenever a party to the litigation sets up a legal plea of undue influence, fraud, misrepresentation, coercion, such serious allegations should be

made precisely and specifically sans any ambiguity. Simple allegation of such vices without the required details will definitely doubt the very stand

of the party litigant. Firstly, the particulars regarding such serious vices in the pleadings will unfold an opportunity to the opponent litigant to come

out with his version with regard to such allegation. Secondly, such bald allegations sans particulars will pose a challenge to the very veracity of such

allegations.

21. The Appellant/Plaintiff has filed the suit seeking the reliefs set forth in the earlier part of the discussion, on the strength of the plea that the

decree dated 14.06.2006 passed in O.S. No. 9869/1990 on the file of the VII Assistant Judge, City Civil Court, Chennai was obtained by fraud

and misrepresentation. Though the learned senior counsel for the Appellant has

very much relied on the contention that any judgment, decree or order obtained by fraud is nullity and non est in the eye of law and is liable to be cancelled, it is pertinent to note that the pleading of the Appellant/Plaintiff in this regard is not so clear and unambiguous. In the body of the plaint, at one place he refers to "fraud" as the vitiating factor with which the decree was obtained, but in the prayer portion, the Appellant/Plaintiff has stated that the decree is liable to be cancelled on the premise that it was obtained by "misrepresentation". Of course, misrepresentation is an ingredient of fraud. But as rightly pointed out by the learned Counsel for the contesting Respondent, the Appellant/Plaintiff has not couched his plea in clear and unambiguous terms detailing the fraud played by the first Defendant in obtaining the decree against the Appellant herein/Plaintiff. However, a thorough scrutiny of the pleading and evidence and consideration of the submissions made by the learned senior counsel on behalf of the Appellant/Plaintiff will go to show that the contention of the Appellant is to the effect that the decree was obtained by virtue of the deliberate misrepresentation amounting to fraud made by the original Plaintiff in O.S. No. 9869 of 1990, namely Ayisha Begum that she was the legal heir of the original mortgagor Thayub Begum. It is the contention of the Appellant herein/Plaintiff that Ayisha Begum could not have become a legal heir of the original mortgagor Thayub Begum as the said Thayub Begum had been married to one Sheik Abdul Khadir and though she was divorced by her husband, she was survived by her four children (two sons and two daughters) and that hence Ayisha Begum, who claimed to be the sister of Thayub Begum could not have become the legal heir of the original mortgagor Thayub Begum. In short, the claim of Ayisha Begum to be the legal heir of Thayub Begum was claimed to be fraudulent, insofar as it was made with a clear knowledge that she could not have become a legal heir of Thayub Begum, while her children were alive.

22. In this regard, it is pertinent to note that neither Ayisha Begum nor her son Mohamed Idris suppressed any material fact. In fact, in paragraph 3

of the plaint in O.S. No. 9869 of 1990, a certified copy of which has been marked as Ex.P6, she had stated in clear terms that Thayub Begum @

Thayubunnissa was married to Sheik Abdul Khadir and two sons and two daughters were born to them; that the said Sheik Abdul Khadir

divorced Thayub Begum long ago and went abroad with his four children and that their whereabouts were not known for over the statutory period.

Besides making such clear averments, Ayisha Begum had also categorically stated that she and Thayub Begum were sisters; that they had three

brothers and other sisters and that all of them were no more. She had also given the name of their father as Mohamed Ghouse. She had also

furnished the names of her brothers and sisters. Besides making such averments, Ayisha Begum had stated that she was the ""only surviving legal

heir and legal representative of Thayub Begum in India"" at the time of filing of the suit and based on that averment alone, she pleaded for a decree

declaring the sale deed dated 07.01.1985 to be null and void.

23. In fact Mohammed Idris, the first Respondent/first Defendant filed another suit for redemption of mortgage as O.S. No. 9822 of 1992 on the

file of the same Court. A copy of the plaint in the said suit has been produced as Ex.P7. In paragraph 4 of the said plaint, he also had made clear

averments to the effect that Thayub Begum @ Thayabunnissa was married to Sheik Abdul Khadir and that he divorced her, left to Pakistan with all

his children and got settled along with his children in Pakistan over three decades back. It was the further averment made therein that Thayub

Begum died on 01.04.1979 leaving behind her sister Ayisha Begum as her ""sole surviving legal heir in India"" and on the death of Ayisha Begum on

08.01.1987, Mohammed Idris, the first Respondent herein/first Defendant became the sole legal heir of Ayisha Begum. Therefore, there is no

suppression of fact regarding the marital status of Thayub Begum and the relationship between Thayub Begum and Ayisha Begum and in turn

between Ayisha Begum and Mohammed Idris.

24. In fact, the Plaintiff in the present suit (Appellant) in paragraph 7 of the plaint, in support of his contention that Ayisha Begum, the original

Plaintiff in O.S. No. 9869 of 1990 claiming to be the sister of Thayub Begum could not maintain the suit as a legal heir/legal representative of

Thayub Begum, simply relied on the averments found in Paragraph 4 of the plaint in O.S. No. 9822 of 1992 to the effect that Thayub Begum was

married to Sheik Abdul Khadir, who divorced her and then left to Pakistan with all his children and permanently settled there. Making a claim,

correctly stating the facts, will not amount to a misrepresentation, much less a

fraud on the Court. There must be a statement which is not believed to be true by its maker or a statement which the maker knows to be false or else there should be a deliberate suppression of a fact when the circumstances warrant revelation of the fact. In this case, there is no suppression of fact and no incorrect or false statement is proved to have been made either by Ayisha Begum or by her son Mohammed Idris. Making a claim which may not be sustainable in law based on actual facts, is one thing which cannot be termed either misrepresentation or fraud and the same is to be distinguished from a claim based on a representation/statement of fact which the maker either believes to be false or does not believe to be true or based on a deliberate suppression of a fact with the knowledge that such a suppression will make the Court believe the existence of the fact opposite to the facts suppressed, in which case alone it will amount to fraud.

25. In the case on hand, we have already seen that there is no clear cut plea as to what was the representation which the maker knew to be false or did not believe to be true. There is no allegation in clear terms that any material fact had been suppressed to make the Court believe the existence of the opposite. Without there being a plea, a party cannot be permitted to adduce evidence. As pointed out supra, there is no clear cut plea as to what constituted a misrepresentation or playing a fraud on the Court to obtain the decree in O.S. No. 9869 of 1990. However, since there is a bald reference to the term "fraud" and "misrepresentation" in attacking the decree obtained in O.S. No. 9869 of 1990, the Appellant/Plaintiff was permitted to lead evidence. But except the interested testimony of the Appellant/Plaintiff himself as PW1, there is no evidence adduced through other disinterested witnesses touching the plea of alleged fraud and misrepresentation. Even in his evidence as PW1, the Appellant/Plaintiff was not able to say with certainty that Ayisha Begum was not the sister of Thayub Begum @ Thayabunnissa. As it was pointed out supra, the name of the father of Ayisha Begum and Thayub Begum @ Thayabunnissa and the names of their brothers and sisters had also been furnished by Ayisha Begum in her plaint. Though PW1, in his evidence, initially stated that Ayisha Begum was not the sister of Thayub Begum, later on, when his attention was drawn to the pleadings made in his written statement

in O.S. No. 9869 of 1990, he chose to give a new interpretation to the averment in the said written statement by stating that he only meant that Ayisha Begum was not the legal heir of Thayub Begum. Except the bald denial, that is also not so unambiguous, there is no concrete evidence to show that Ayisha begum was not the sister of Thayub Begum.

26. On the other hand, DW1 has given clear evidence in line with the averments made in the plaint in O.S. No. 9869 of 1990 and also the plaint in

O.S. No. 9822 of 1992 regarding the relationship between Thayub Begum and D.W.1's mother Ayisha Begum. In addition, though the second

Defendant who figured as DW2 has stated that he had no knowledge about the marriage of Thayub Begum with Sheik Abdul Khadir and the fact

that they had two sons and two daughters, he has categorically denied the suggestion that the first Defendant, son of Ayisha Begum is not the legal

heir of Thayub Begum.

27. It should be noticed that one Nasreen Begum had been added to Ex.P4 sale deed as a confirming party on the premise that she was the

fostered daughter of Thayub Begum. Ayisha Begum and Mohammed Idris, in their respective plaints, had made clear averments to the effect that

Nasreen Begum was not the adopted/fostered daughter of Thayub Begum and on the other hand, she was a stranger to the family. The said

Nasreen Begum, who is projected as an adopted /fostered daughter of Thayub Begum and who was made to sign the sale deed Ex.P4 as a

confirming party, has been made a party to the present suit, namely C.S. No. 434 of 2007 and has been arrayed as Defendant No. 3. But she did

not contest the suit and chose to remain exparte. She was not examined as a witness on the side of the Appellant herein/Plaintiff either. No one

having acquaintance with the original mortgagor Thayub Begum and her family circle has been examined on the side of the Appellant

herein/Plaintiff. Under such circumstances, the learned Single Judge, after going through the pleadings and evidence, came to a correct conclusion

that clear and unambiguous plea of fraud or misrepresentation had not been made and the Plaintiff failed to substantiate his case that there was any

fraud or misrepresentation by which the decree dated 14.06.2006 made in O.S. No. 9869 of 1990 was obtained. The said finding of the learned

Single Judge cannot be termed either defective or infirm. No case has been made

out in the appeal by the Appellant/Plaintiff for interference with the said finding of the learned Single Judge.

Point No. v.

28. A decree passed by a competent Court, though may be erroneous, cannot be challenged by a separate suit on the ground that any of the issues

therein had been decided wrongly or erroneously. The only exception is fraud or misrepresentation by which the decree was obtained. As pointed

out supra, the Hon''ble Supreme Court in A.V. Papayya Sastry and Others Vs. Government of A.P. and Others, has laid down the law in clear

terms that a judgment, decree or order obtained based on a misrepresentation made or fraud played upon the Court shall be null and void and shall

be non est in the eye of law and the same is liable to be set aside or cancelled even in a separate suit filed for the said purpose or in a collateral

proceedings. In this case, we have seen supra that the details of misrepresentation or fraud have not been set out by the Appellant/Plaintiff in his

pleadings and that even the projected misrepresentation or fraud has not been substantiated by reliable evidence. Under such circumstances, the

party who suffered such a judgment or decree or order cannot be allowed to multiply the proceedings by filing a separate suit for cancellation of or

setting aside such judgment, decree or order claiming the same to be wrong or erroneous. In such cases, the course open to the judgment debtor is

to challenge the decree in the very same proceedings either by filing an application to set aside the decree if it is an exparte decree or by filing a

review application to review the judgment based on which the decree was granted or file an appeal in the appellate forum or a revision before the

competent forum to entertain revision against such decree or order as the case may be. The Appellant/Plaintiff has not chosen to adopt any one of

the above said methods to challenge the exparte decree dated 14.06.2006 made in O.S. No. 9869 of 1990 by the VII Assistant Judge, City Civil

Court, Chennai. When a judgment, decree or order is challenged as one obtained by misrepresentation or by playing fraud on the Court and the

party thus challenging the decree by way a separate suit fails to substantiate such a case of misrepresentation or fraud, it cannot be allowed to

enlarge the scope of the subsequent suit by converting such a suit virtually into an appeal against the judgment or decree passed in another case by

challenging the decree on other grounds which ought to have been raised as plea of defence in the former suit or proceedings in which the impugned judgment, decree or order came to be passed.

29. In this case, though the Appellant/Plaintiff had chosen to make the plea of misrepresentation and fraud as the foundation for the present suit

seeking cancellation of the decree dated 14.06.2006 made in O.S. No. 9869 of 1990 on the file of the VII Assistant Judge, City Civil Court,

without substantiating the same by making necessary pleading with details of misrepresentation or fraud as contemplated under Order VI Rule 4

CPC and substantiating the same by reliable evidence, the Appellant/Plaintiff seems to have made an attempt to enlarge the scope of the suit by

making unnecessary and inadmissible pleadings, adducing evidence on such pleadings and putting forward arguments mainly on those points alone.

In an attempt to show that the decree dated 14.06.2006 passed in O.S. No. 9869 of 1990 is liable to be cancelled, the Appellant/Plaintiff has

contended that reasonable opportunity was not given to him by the said Court to prove the case of the decree holder therein to be false and that

the Court did pass the impugned judgment and decree without application of mind and forgetting the principle that even in cases tried *ex parte* or

where the defence of the opposite party is struck off, the Plaintiff is bound to prove his case by adducing evidence. In this regard, the learned

senior counsel for the Appellant/Plaintiff relied on the following observation made by the Hon"ble Supreme Court in Babbar Sewing Machine

Company Vs. Trilok Nath Mahajan,

25. It was further contended that the High Court was in error in observing that "in view of the clear language of Order XI, Rule 21 the Defendant

has no right to cross-examine the Plaintiff's witnesses. A perusal of Order XI, Rule 2 shows that where a defence is to be struck off in the

circumstances mentioned thereon, the order would be that the Defendant "be placed in the same position as if he has not defended." This indicates

that once the defence is struck off under Order XI, Rule 21, the position would be as if the Defendant had not defended and accordingly the suit

would proceed *ex parte*. In Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, it was held that if the Court proceeds *ex parte* against

the Defendant under O.IX R.6(a), the Defendant is still entitled to cross examine

the witnesses examined by the Plaintiff. If the Plaintiff makes out a prima facie case the Court may pass a decree for the Plaintiff. If the Plaintiff fails to make out a prime facie case, the Court may dismiss the Plaintiff's suit. Every judge dealing with an ex parte case has to take care that the Plaintiff's case is, at least, prime facie proved.

30. The learned senior counsel also referred to the observations made by the Supreme Court in *Modula India Vs. Kamakshya Singh Deo*, to the effect that when the defence of Defendant is struck off, he would be placed in a position equal to that of a Defendant who has not filed any written statement and as such he would not be entitled to lead any evidence of his own, but at the same time, would be entitled to cross examine the witnesses examined on the side of the Plaintiff for the limited purpose of showing the unreliability of such evidence or the failure to prove the case of the Plaintiff. It has also been observed therein that while such Defendant can be permitted to cross examine the witnesses of the Plaintiff, he cannot be permitted to traverse beyond the very limited objective of pointing out the falsity or weakness of the Plaintiff's case and that in any event such cross examination cannot be permitted to travel beyond the legitimate scope, so as to convert the cross examination itself virtually into a presentation of the defence plea either directly or indirectly in the form of suggestions put to the Plaintiff's side witnesses. The Hon'ble Supreme Court has made the following observations in this regard:

The right of the defence to cross examine the Plaintiff's witnesses can, therefore, be looked upon not as a part of its own strategy of defence but rather as a requirement without which the Plaintiff's evidence cannot be acted upon. Looked at from this point of view it should be possible to take the view that though the defence of the tenant has been struck out there is nothing in law to preclude him from demonstrating to the Court that the Plaintiff's witnesses are not speaking the truth or that the evidence put forward by the Plaintiff is not sufficient to fulfill the terms of the statute.

31. Relying on the said observations made by the Hon'ble Supreme Court in the above said cases, the learned senior counsel appearing for the Appellant has argued that when the defence of a Defendant is struck off, his right to cross examine the witnesses produced on the side of the Plaintiff, atleast for the limited purpose of showing that the witnesses are not

speaking the truth or that the case of Plaintiff is false or that the evidence tendered is not sufficient to prove the Plaintiff's case, cannot be denied. The learned senior counsel has submitted that the Appellant/Plaintiff who figured as the sixth Defendant in suit O.S. No. 9869/1990 was not given opportunity to cross examine the only witness examined on the side of the Plaintiff therein and on that ground alone, the exparte judgment and exparte decree passed in O.S. No. 9869 of 1990 are liable to be set aside. Even if it is assumed that the Appellant herein/Plaintiff can be allowed to contend in a separate suit on the ground that the denial of opportunity to cross-examine the witnesses examined on the side of the Plaintiff in O.S. No. 9869/1990 in the ex-parte trial conducted therein, the same has not been substantiated by reliable evidence. Similar arguments were advanced before the learned Single Judge. The learned Single Judge dealt with them elaborately and came to the conclusion that even such denial of opportunity was not substantiated by the Appellant/Plaintiff. The reason assigned are as follows:

i) The suit O.S. No. 9869 of 1990 was filed for the relief of cancellation of the sale deed dated 07.01.1985 executed by the assignee/mortgagee

Abdul Rahman in favour of Ziauddin, the vendor of the Appellant/Plaintiff and also for recovery of possession and rendition of accounts. The sale

was purported to be made in exercise of the power given under a clause in Ex.P1 Mortgage deed conferring such right of sale u/s 69 of the

Transfer of Property Act. The mortgage is a simple mortgage in which possession was not delivered to the mortgagee and it remained with the

mortgagor. The property had been rented out to one Pukhraj Jain. After the death of the original mortgagor Thayub Begum, the tenant was

uncertain about the person entitled to receive the rent, pursuant to which he filed a Rent Control Original Petition in R.C.O.P. No. 699 of 1985 on

the filed of the Rent Controller, namely X Judge, Court of Small Causes arraying Ziauddin and Ayisha Begum, mother of the first Defendant as

Respondents and seeking an order permitting him to deposit the rent into Court. The order passed in the said RCOP has been produced as Ex.P3,

from which it is obvious that the said petition was dismissed on 31.03.1996 for non-appearance. Till then neither the mortgagee nor his assignee

got possession of the subject matter of mortgage. Even in Ex.P4 sale deed dated

07.01.1985, there is nothing to show that possession was taken by Ziauddin, the purchaser under Ex.P4. Only after the execution of the said sale deed, since there was a dispute regarding the title to the property between Ziauddin and Ayisha Begum, the tenant Pukhraj Jain chose to file R.C.O.P. No. 699 of 1985 for deposit of rents and the same came to be dismissed on 31.03.1996. Ex.P4 sale deed itself contains a recital that the purchaser Ziauddin would be subrogated to the rights of the mortgagee and also the rights of the Income Tax Department.

ii) It is the case of the Appellant/Plaintiff that for the Income Tax dues of Thayub Begum, the property had been attached by the Income Tax Department and a distraint warrant had been issued to the tenants to pay the rents directly to the Income Tax Department and that the purchaser Ziauddin, after negotiation with the Income Tax Department, got the property released from attachment on making payment of a sum of Rs. 45,957/-towards full quit of the Income Tax dues of Thayub Begum. Of course, the said fact has not been disputed. Only thereafter, it seems Ziauddin, the purchaser under Ex.P4 occupied some of the portions and was collecting the rents from the tenants in respect of the portions occupied by the tenants. It is in Ex.P5 dated 10.06.1998 for the first time stated that possession was handed over to the Appellant/Plaintiff Mohanam. But before 10.06.1998, Pauper O.P. No. 324 of 1986, which was later on converted into original suit as O.S. No. 9869 of 1990 was filed. Therefore, it is quite obvious that the Appellant/Plaintiff made the purchase under Ex.P5 during the pendency of the pauper O.P and hence the sale is hit by the doctrine of lis pendens. As such the sale shall be subject to the result of the suit. Of course an exparte decree passed initially in the said suit O.S. No. 9869 of 1990 was set aside subsequently and the Appellant/Plaintiff herein was also impleaded as the sixth Defendant therein. The Appellant herein/Plaintiff, a party Defendant in the other suit, namely O.S. No. 9869/1990, could have defended the said suit in the normal course, but for his failure to comply with the direction regarding payment of cost awarded by this Court in C.R.P.(PD) No. 54 of 2005, which resulted in striking off of his defence in the said suit. The legal position of a case in which the defence of the opposite party is struck off has been well illustrated by the observations of the Hon''ble Supreme Court relied on

by the learned Counsel for the Appellant himself, which were referred to supra. A Defendant whose defence is struck off, is placed on par with a Defendant who did not file his plea of defence. The fact that a Defendant fails to file plea of defence within the time stipulated in the code or within the time extended by the court leading to the closure of the gates for such Defendant to put in his specific case of defence, does not mean that the case of the Plaintiff deserves to be accepted as proved and in such cases, an ex-parte trial recording ex-parte evidence shall be conducted. Even in such cases, if the Defendant appears at a later stage, he cannot be precluded from taking part in the proceedings from the stage at which he enters appearance. The CPC under Order IX Rule 7 provides for setting aside an order setting him ex-parte and allowing him to contest the case as if he had appeared on the date fixed for his hearing. Order IX Rule 6 enables the court to hear the suit ex-parte, if the Defendant does not appear on the date appointed for his appearance. Similarly Order VIII Rule 10 is the provision enabling the court to pronounce judgment against the Defendant when he fails to file written statement. It reads as follows:

10. Procedure when party fails to present written statement called for by court. - Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

iii) Though the term used is ""shall"", it has to be read as ""may"". Then only it shall be in conformity with the meaning of the rule which is to the effect that the court shall pronounce judgment against the Defendant who fails to file written statement or make such order in relation to the suit as it thinks fit. This will show that the court has a discretion either to pronounce judgment on the failure of the Defendant to file a written statement or to pass an order for holding ex-parte trial requiring the Plaintiff to prove all or any of the allegations made in the plaint. Though such a discretion to pronounce a judgment, merely based on the failure on the part of the Defendant to file a written statement, is vested with the court, the same has

been interpreted by the Supreme Court in Ramesh Chand Ardawatiya Vs. Anil Panjwani, . It reads as follows:

Even if the suit proceeds ex parte and in the absence of a written statement, unless the applicability of Order 8, Rule 10 is attracted and the Court

acts thereunder, the necessity of proof by the Plaintiff of his case to the satisfaction of the Court cannot be dispensed with. In the absence of denial

of plaint averments the burden of proof on the Plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the cause of action

would suffice and the Court would grant the Plaintiff such relief as to which he may in law be found entitled.

iv) In Balraj Taneja and Another Vs. Sunil Madan and Another, , the Hon''ble Supreme Court has held that the court is not to act blindly merely

because a written statement has not been filed by the Defendant traversing the facts set out by the Plaintiff in the plaint filed in the Court. In a case

where a written statement has not been filed by the Defendant, the Court should be a little cautious in proceeding under Order 8, Rule 10, CPC.

Before passing the judgment against the Defendant, it must consider whether a judgment could possibly be passed in favour of the Plaintiff without

requiring him to prove any fact mentioned in the plaint. It is a matter of Court''s satisfaction and, therefore only on being satisfied that there is no

fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the Defendant who has not filed

the written statement. If the plaint itself indicates that there are disputed questions of fact involved in the case, regarding which two different

versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the Plaintiff to prove the fact so as to

settle the factual controversy. Such a case would be covered by the expression ""the court may, in its discretion, require any such fact to be proved

or the expression ""may make such order in relation to the suit as it thinks fit"" used in Sub-rule (2) of Rule 5 of Order 8,.

v) Order VI Rule 5 provides for striking out of any plea. Order XI Rule 21 provides for dismissal of the suit or for the striking out of the defence in

case of failure to answer interrogatories as a punitive measure. By analogy, this Court in C.R.P.(PD) No. 54 of 2005 has passed an order directing

the Appellant herein, who was the revision Petitioner therein to make payment of a sum of Rs. 5,000/-as cost, out of which Rs. 2,500/-was to be

paid by the revision Petitioner to the Tamil Nadu Mediation and Conciliation Centre, High Court, Madras within a time specified in the order with a rider that in case of failure, his defence in the said suit would stand struck off. Admittedly, the Appellant herein/Plaintiff did not comply with the direction and consequently the defence plea of the Appellant herein in O.S. No. 9869/1990 stood struck off. The Appellant herein/Plaintiff did not prefer any appeal in the Supreme Court with the leave of the court against the said order. On the other hand, he preferred a review application before this Court in Review Application No. 84 of 2006 and the same was dismissed on 12.12.2006. As against the order of dismissal of the Review Application, the Appellant preferred an SLP and the same was dismissed by the Hon''ble Supreme Court by order dated 02.03.2007 in the admission stage itself. Even thereafter the Appellant did not come forward with any application seeking extension of time for the payment of the cost awarded to avoid the penal consequences of non-compliance with the direction regarding payment of cost. Instead of doing it, namely making payment of a paltry sum of Rs. 5,000/-as cost, which would have opened the way for him to contest the earlier suit based on his plea of defence taken in the written statement, he has chosen to file the present suit for the cancellation of the decree passed in the said suit, mainly on the ground of alleged fraud and misrepresentation. We have already seen that the Appellant herein/Plaintiff has not made out a case of fraud or misrepresentation played by the opposite side to obtain the decree. The Appellant herein/Plaintiff seems to have taken a collateral plea that the judgment of the trial court in O.S. No. 9869/1990 suffers from the vitiating factor, namely failure to give reasonable opportunity to the Appellant herein to take part in the proceedings and cross-examine the witnesses examined on the side of the opposite side, namely Plaintiff in O.S. No. 9869/1990.

vi) In the foregoing discussions we have seen that the position of a Defendant whose defence has been struck out shall be on par with the position of a Defendant who has failed to file his plea in the form of written statement. In such cases, if the court is satisfied that the Defendant was prevented by a reasonable cause from filing a written statement in time, then it can set aside the ex parte order and allow him to file a written

statement and thus restoring his position in the suit as if he had appeared on the date appointed for his hearing. In case the court comes to the

conclusion that he has not satisfied the court regarding the reasonable cause, then, though it may be only in minority number of cases, such

Defendant shall be precluded from filing written plea of defence. But at the same time, he cannot be prevented from taking part in the subsequent

proceedings. It has been held so in clear terms in Ramesh Chand Ardawatiya Vs. Anil Panjwani, . It has been held by the Supreme Court in the

said case that inspite of the fact that a Defendant is set exparte and the case stands posted for conducting exparte trial, such Defendant shall be

entitled to appear on the adjourned date and demonstrate as of right that the Plaintiff's case is unsustainable and that an application under Order

IX Rule 7 is required only if the Defendant wishes the proceedings to be relegated back to the stage of the proceedings from the date where from

they become ex parte so as to convert ex parte hearing into a bi-party proceedings. A case wherein the defence of the Defendant is struck off is

equivalent to a case wherein the Defendant shall not have the right to seek an order under Order IX Rule 7 to relegate the proceedings back to the

stage before his defence was struck off and to convert the proceedings from ex parte to bi-parte. Nevertheless, as held by the Apex Court, he is

entitled to appear as of right and participate in the subsequent proceedings. But, while recognising such a right to participate in the subsequent

proceedings, care must be taken to see that while making such participation in the proceedings including the exercise of the right to cross-examine

the witnesses examined on the side of the opposite party, his right to cross-examine shall be restricted to showing that the concerned witness is not

speaking the truth or that the testimony of the witness is not either supporting the case of the Plaintiff or is not enough to prove the case of the

Plaintiff. The cross-examination shall be limited to the testing of the veracity of the testimony of the witnesses and demonstrating the demeanour of

the witness. Apart from that such Defendant cannot be allowed to introduce his plea of defence, which has been struck off, in the guise of cross-

examination,. This position has been already pointed out and the authority on this point is Babbar Sewing Machine Company Vs. Trilok Nath

Mahajan, , which has been discussed supra. In this case though theoretically speaking there was possibility for the trial court in O.S. No.

9869/1990 to pronounce judgment under Order VIII Rule 10 in favour of the Plaintiff therein, the court had acted with caution and proceeded to

conduct an ex parte trial in which the Plaintiff therein was required to prove the facts pleaded in the plaint and after such ex parte trial only the court

pronounced a judgment in favour of the Plaintiff therein and passed a decree as prayed for.

vii) The grievance of the Appellant herein/Plaintiff that he was not allowed to cross-examine the witnesses examined on the side of the Plaintiff in

O.S. No. 9869/1990 also is not tenable. The learned single judge has dealt with the said contention and held that the Defendant, whose defence

had been struck off, did have a right to participate in the subsequent proceedings, but the Appellant herein/Plaintiff being the 6th Defendant in the

previous suit did not come forward to cross-examine the witness examined on the side of the Plaintiff therein, nor did he seek permission to cross-

examine such witnesses by filing any memorandum or petition; that on the other hand, he expressed his unwillingness and unpreparedness to take

part in the proceedings on the premise that a review petition was filed and that the trial court in O.S. No. 9869/1990, after noting the fact that no

order of stay had been granted and on the other hand, there was a direction by the High Court to complete the trial within a specified time, chose

to proceed with the ex parte trial and pronounce an ex parte judgment in favour of the Plaintiff therein (first Respondent herein) and against the

Appellant herein. Therefore, even the challenge made to the said judgment on the ground of failure to provide opportunity to defend by cross-

examining the witnesses examined on the opposite side also miserably fails.

31. A meek attempt was also made on the side of the Appellant herein/Plaintiff by contending that the judgment is a non-speaking judgment and it

simply says that on perusal of the evidence, the court was satisfied that the Plaintiff's case was proved and that hence the suit was decreed as

prayed for. Such a plea is also not available to be raised in a separate suit, thereby converting the separate suit into virtually an appeal against the

judgment in the other case. If at all the Appellant herein was aggrieved by the manner in which the judgment was pronounced and the decree was

passed in the former suit, he ought to have filed an appeal against the decree passed in the said suit. But the Appellant herein/Plaintiff has not

chosen to do so. Even an ex parte decree will constitute res judicata and bar a fresh suit. Therefore, the belated attempt made to challenge the

judgment and decree in the former suit by fixing a separate suit is neither maintainable nor sustainable.

32. The learned senior counsel for the Appellant made yet another attempt by putting forward an argument that since the Plaintiff in O.S. No.

9869/1990 withdrew the suit O.S. No. 9822/1992 which was filed for redemption of mortgage, the same would operate as res judicata for the

suit O.S. No. 9869/1990 as the right of redemption had been lost. In the foregoing discussions we have pointed out that the mortgage in question

is only a simple mortgage and possession was not delivered to the mortgagee; that even the assignee mortgagee did not get possession by virtue of

the mortgage and that even in Ex.P4 sale deed executed in favour of Ziauddin in exercise of the power given to the mortgagee u/s 69 of the

Transfer of Property Act, 1882, it has been simply stated that he was entitled to subrogate to the rights of the mortgagee and the Income Tax

authorities, who had attached the properties for Income Tax dues. Admittedly the attachment was raised and then only the property was sold. At

the time of execution of the said sale deed, the actual possession of the property was with the tenant and the tenant thereafter filed RCOP No.

699/1985 for deposit of rent as he was not certain as to who was entitled to collect the rent. It must be seen that before the dismissal of the said

RCOP for non-prosecution, the mother of the Respondent filed the pauper OP challenging the EX.P4 sale. If at all constructive possession or even

actual possession either in whole or in part of the property would have been obtained by the Appellant herein/Plaintiff, that would have been done

only during the pendency of the said pauper OP and such creation of rights during the pendency of the proceedings is subject to the result of the lis

as it is hit by the doctrine of lis pendens. That is the reason why the court which tried the suit No. 9869/1990 allowed the amendment of pleading

to incorporate additional prayers for recovery of possession, mandatory injunction for the removal of the 3rd floor portion and for mesne profits

and ultimately decreed the suit.

33. We are concerned only with the question whether the decree granted in O.S. No. 9869/1990 setting aside the sale under Ex.P4 and directing

recovery of possession, granting mandatory injunction and mesne profits was obtained by playing fraud on or making a misrepresentation to the court or whether the decree passed in the said suit suffers from any other vitiating factor based on which the decree can be set aside in a separate suit. The question has been answered in the negative in the foregoing discussions. Further elaboration on this aspect will amount to entering upon the discussion on the merits of the other case. Suffice to state that the suit filed in O.S. No. 9869/1990 was not for redemption of mortgage or foreclosure or for recovery of possession after redemption of mortgage. The same was only for setting aside the sale under Ex.P4 and for recovery of possession and other reliefs based on the developments made and rights acquired by the Appellant herein/Plaintiff during the pendency of the said suit. The simple mortgage cannot be unilaterally converted by the mortgagee into a usufructuary mortgage or mortgage with possession. Such a possession taken by the Appellant during the pendency of the suit is subject to the result of the suit. Therefore, the challenge made on the ground of res judicata and limitation also cannot stand the scrutiny of court. The learned single judge has elaborately dealt with all the aspects and arrived at a correct conclusion.

Point No. vi

34. The Appellant herein/Plaintiff in the suit has made a prayer seeking a declaration that the first Respondent herein/first Defendant had lost the right of redemption of the mortgage in respect of the plaint schedule properties. The said declaration was sought for on the ground that a valid sale had taken place in favour of Ziauddin under Ex.P5, a sale deed executed by the assignee-mortgagee in exercise of the power of the sale conferred u/s 69 of the Transfer of Property Act by a clause in the mortgage deed and from the said Ziauddin, the Appellant/Plaintiff purchased the same under Ex.P4. The above said prayer depends on the outcome of the other reliefs sought for in the plaint, namely a declaration that the Appellant/Plaintiff is the absolute owner of the suit property and whether the Appellant/Plaintiff is entitled to the relief of cancellation of the ex-parte decree dated 14.06.2006 passed in O.S. No. 9869/1990 by the VII Asst Judge, City Civil Court, Chennai setting aside the sale under Ex.P5 in favour of Ziauddin, the person from whom the Appellant/Plaintiff chose to

purchase. In the discussion relating to the above said issues, we have seen that the sale in favour of the Appellant/Plaintiff under Ex.P5 was effected pending a suit filed by Ayisha Begum, which was continued by the first Respondent/first Defendant Mohamed Idris after her death, namely O.S. No. 9869/1990 on the file of the VII Asst. Judge, City Civil Court, Chennai and hence the same was subject to the result of the lis that was pending in the said suit. We have also seen that the challenge made to the decree dated 14.06.2006 passed in O.S. No. 9869/1990 on the ground of fraud and misrepresentation has not been substantiated by the Appellant/Plaintiff; that the Appellant/Plaintiff is not entitled to the relief of cancellation of the said decree and that the said decree dated 14.06.2006 passed in O.S. No. 9869/1990 would operate as res judicata.

35. It has also been held that the mortgage is a simple mortgage and the same could not be unilaterally altered into an usufructuary mortgage or mortgage with possession. We have also seen that possession was not given either to the mortgagee or to the assignee or to the purchaser from the assignee or to the Appellant/Plaintiff by virtue of the mortgage. On the other hand, the immediate possession that was with the tenant continued as such, which led to the filing of a RCOP for deposit of the rent by the tenant as he was in a dilemma as to who was entitled to receive the rent and only pursuant to the dismissal of the said RCOP No. 699/1985, the Appellant/Plaintiff might have chosen to collect rent and take possession of some of the portions of the building and put up an additional construction in the third floor. The Appellant/Plaintiff, claiming to have subrogated to the rights of the mortgagee without seeking redemption of mortgage, recovery of mortgage money or foreclosure, cannot simply seek a declaration that the first Respondent herein/first Defendant is not having a redeemable right over the plaint schedule property.

36. Furthermore, the attempt to seek such a declaration against the first Respondent herein/first Defendant has been made also on the strength of the plea that the mother of the first Respondent/first Defendant and later on the first Respondent/first Defendant could not be claimed to be a legal heir of the original mortgagor Thayub Begum. We have already seen that based on the claim that Ayisha Begum was the legal heir and legal representative of the original mortgagor and after her death Mohamed Idris, the

first Respondent/first Defendant became the legal heir, the decree in O.S. No. 9869/1990 was obtained and the said decree would operate as res judicata for the present suit. Therefore, the attempt made to get such a declaration that the first Respondent/first Defendant does not have redeemable right over the plaint schedule property on the above said premise miserably fails. Even if a declaration that Mohamed Idris, namely the first Respondent/first Defendant does have a right to redeem over the suit property that will not nullify the decree passed in O.S. No. 9869/1990 and the same will be a relief on paper without any effect, since recovery of possession in the earlier suit had been granted on the ground that the first Respondent herein/first Defendant, who was the Plaintiff in O.S. No. 9869/1990, was entitled to recover possession since the possession of the Appellant herein/Plaintiff, who was the 6th Defendant in O.S. No. 9869/1990, could not be traced to the mortgage and the possession taken by the Appellant herein/Plaintiff during the pendency of the earlier suit was subject to the result of the said suit. Therefore, we are of the considered view that there is no defect or infirmity in the finding of the learned single judge that the Appellant herein/Plaintiff is not entitled to a declaration that the first Respondent herein/first Defendant does not have a redeemable right over the suit property.

Point No. iv

37. The Appellant/Plaintiff did not comply with the direction of this Court in C.R.P. (PD) No. 54/2005 regarding payment of cost. Even though the order directed striking off of the defence in case of default in payment of the cost, the Appellant/Plaintiff had not chosen to either pay or deposit a paltry sum of Rs. 5,000/- awarded as cost to avoid the consequences detrimental to his defence in the said suit. He has shown his adamantness in refusing to make payment and has chosen to multiply the litigation by filing a separate suit for setting aside the decree passed in O.S. No. 9869/1990 on the ground of alleged fraud and misrepresentation and also by making an attempt to convert the separate suit virtually into an appeal against the ex-parte decree passed in O.S. No. 9869/1990. The same would show that the Appellant/Plaintiff has not approached the court with clean hands.

38. For all the reasons stated above, this Court comes to the conclusion that

there is no defect or infirmity in the judgment of the learned single judge passed in C.S. No. 434 of 2007 and no case for the interference with the judgment and decree of the learned single judge has been made out. There is no merit in the appeal and the same deserves confirmation and no interference.

39. In the result, the Original Side Appeal is dismissed. However, there shall be no order as to costs.