courtkutchehry.com

Company : CourtKutchehry
Website : www.courtkutchehry.com
Printed For :
Date : 13/09/2026

(1933) 03 MAD CK 0025

In the Madras High Court

Pichai Moideen Rowthar — APPELLANT

Vs

Chathurbuja Das Kushal Das and Sons and Others — RESPONDENT

Date of Decision : 15-03-1933

Acts Referred:
Specific Relief Act, 1877 — Section 22(2)

Citation : AIR 1933 Mad 736 : 145 Ind. Cas. 1023 : (1933) 38 LW 507 : (1933) 65 MLJ 491

Hon'ble Judges : Ramesam, J;Cornish, J

Bench : Full Bench

Judgement

Ramesam, J.—This appeal arises out of a suit for specific performance. Plaintiff is the appellant before us. The facts out of which the suit

arises are as follows. The suit property which consists of four-fifths share in Mudikandam Village in Trichinopoly District belonged to the family of

T. Sadasiva Tawker and others who were carrying on business in Madras under the name and style of T.R. Tawker & Sons. On 11th April, 1924,

the property was mortgaged by the owners to the 1st defendant (who is the firm of Chathurbuja Das Kushal Das & Sons carrying on business in

Mint Street, Madras) under Ex. VI. Under this document the mortgagees have got a power of sale without the intervention of Court. T.R. Tawker

& Sons having failed in their business they were adjudicated insolvents and their properties are vested in the Official Assignee of Madras, who is

the 5th defendant in the case. The 2nd defendant is Kissen Das Girdar Das, a partner and the authorised agent of the 1st defendant firm. He went

to Trichinopoly in May, 1927 and got a notice published proclaiming the sale, by public auction, of this and other properties. One property (not the

subject of this suit) was to be sold on the 7th May at 5 p.m. in Veedivadangam

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/pichai-moideen-rowthar-appellant-...

and on the 8th May the suit property was to be sold in

Mudikandam Village (Ex. B). It would appear that, at the last moment, i.e., after the sale of the first property was actually effected at

Veedivadangam, the persons who were conducting the auction, i.e., the 2nd defendant and his legal adviser Mr. P.S. Krishnamurthi Aiyar,

Advocate of Trichinopoly, changed their mind and informed the persons who were present there that the sale of Mudikandam would be effected in

the house of the Advocate at Trichinopoly itself on the 8th May. A messenger was also despatched to Mudikandam to inform the possible

intending purchasers accordingly. On the 8th May the auction was held in the house of Mr. Krishnamurthi Aiyar and four persons made the initial

deposit of Rs. 100 required under the conditions of sale, viz., (1) Pichai Moideen Rowthar (plaintiff in the present suit), (2) another Muhammadan

gentleman, (3) Palaniandi Pillai (who is the 3rd defendant in the suit), and (4) Sundaram Aiyar (a clerk of Mr. Krishnamurthi Aiyar). The bids

began with Rs. 4,000. Up to Rs. 7,000 all the four depositors took part in the bids. Afterwards the present plaintiff and Palaniandi Pillai were the

only bidders. The bids went up to Rs. 12,550, the last bid being that of Palaniandi Pillai and the sale was knocked down in his favour (vide Ex. B-

1). Under the conditions of sale the successful bidder should deposit 25 per cent, of the purchase money immediately after deducting the deposit of

Rs. 100 and the balance of the purchase money should be paid on the 15th day after the sale. In default, the deposit shall be forfeited, the sale shall

stand cancelled and a fresh auction shall be held and the defaulting purchaser shall be liable for any deficiency that may arise on the re-sale. The

evidence shows that the successful bidder (the 3rd defendant) instead of paying 25 per cent, of the purchase money paid Rs. 300 in addition to the

deposit and ""expressed inability to pay the balance at that late hour of the night and promised to pay it before 10 A.M. on the 9th"". He executed an

agreement to that effect along with one Ratnam Pillai. What exactly happened on the 9th and 10th is the subject of some difference between the

parties. All that we know is that the balance amount was not paid and on the 10th May Mr. Krishnamurthi Aiyar sent a registered letter (Ex. F) to

the 3rd defendant in which he mentions the facts as above stated and says that

at 9 A.M. on the 10th May 3rd defendant pleaded his inability to pay and set up

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/pichai-moideen-rowthar-appellant-…

false and frivolous excuses. My client apprehends that you are

acting at the instigation of the ryots of Mudikandam and that you were acting fraudulently in bidding in competition at the sale without evidently

having the means of conforming to the conditions of sale. My client attempted to effect a re-sale and had after great trouble and persuasion to settle

a private sale to S. Pichai Moideen for a price of Rs. 9,000.

2. He also says in this notice that the 3rd defendant''s contract stands cancelled and he has forfeited the sum of Rs. 400. Pichai Moideen referred

to in this letter is the plaintiff. This letter refers to an agreement to effect a private sale in favour of the plaintiff. This agreement is contained in Exs.

C and C-1. Ex. C-1 is a Varthamanam executed by the plaintiff in favour of the 1st defendant under which Rs. 2,250 was paid in advance, the

balance of the purchase money, viz., Rs. 6,750, was to be paid within 30 days and he was to have a sale deed engrossed on a proper stamp

paper at his own expense. The vendors are to put him in possession of the property. There was a suit in respect of the suit village pending in the

Subordinate Judge''s Court of Trichinopoly (O.S. No. 101 of 1925). The vendors themselves were to conduct that litigation. Ex. C is the

counterpart and it contains similar terms. These documents were attested by Mr. Krishnamurthi Aiyar (the abovementioned Advocate), the local

agent of the Official Assignee of Madras, and a clerk of Tawker & Sons. In addition Ex. C was also attested by a clerk of the 1st defendant.

Meanwhile two Vakils of Trichinopoly (Messrs. Kuppusami Aiyar and Avadhani) sent registered notices, on the same day to the 1st defendant.

These notices are Exs. O and VIII. They are copies and are identical in terms. One was sent to the 1st defendant directly (Ex. VIII) and the other

though addressed inside to the 1st defendant was sent to Mr. Krishnamurthi Aiyar. The 2nd defendant received Ex. VIII on the 13th May, but Ex.

O was received by the Advocate on the 18th he having been temporarily absent. The registered notices - Ex. F on the one hand and Exs. O and

VIII on the other - crossed each other. Mr. Krishnamurthi Aiyar replied to Ex. O on the 23rd, (Ex. Q) and this was replied to by the 3rd

defendant''s Vakil (Ex. U, dated 27th May). According to the version of the 3rd defendant he went on the 9th May to Mr. Krishnamurthi Aiyar

with money and put some questions about the title to the property but was not

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/pichai-moideen-rowthar-appellant-…

able to get satisfactory replies. On the 10th May he again went with

the money and repeated his questions relating to the title to the property but got no satisfaction. The 3rd defendant therefore asserts that he is

entitled to a sale deed for Rs. 12,550 and for damages, and that the sale settled in favour of the plaintiff for Rs. 9,000 is not binding on him.

Meanwhile the Official Assignee of Madras sent Ex. D, dated 16th May, 1927, to the plaintiff approving of the sale arranged in his favour. On the

same date he also sent Ex. I confirming the auction sale for Rs. 12,550 in favour of the 3rd defendant. These letters"" must have been drafted

mechanically for if he had applied his mind to the matter the Official Assignee could not have approved of both the sales or it may be that while

knowing that only one of them can ultimately fructify he intended to ratify that which will finally come off. Anyhow he had no objection to the sale in

favour of the plaintiff. On the 17th May the 1st defendant addressed Ex. O(1) to Mr. Krishnamurthi Aiyar enclosing the Official Assignee''s letters

mentioned above. Meanwhile the 2nd defendant left Trichinopoly for Madras and from Madras he proceeded to Ahmedabad in the Bombay

Presidency. This fact was intimated by the 1st defendant firm to Mr. Krishnamurthi Aiyar by Ex. R-1. One Dr. A. Mathuram (who was in charge

of a dispensary in Trichinopoly) is the owner of the neighbouring village Thulukkampatti and it would seem he was also anxious to purchase

Mudikandam. He sent his agent to Mudikandam for bidding at the auction as originally advertised on the 8th but when the agent found that there

was no auction there he went to Trichinopoly. According to Mr. Krishnamurthi Aiyar the agent was actually present at the sale but he did not bid.

According to the defendants'' version by the time he went to the spot the sale had been completed and he accordingly returned to his master.

Anyhow Dr. Mathuram was not one of the bidders at the sale. He seems to have sent a registered notice at about this time contending that there

ought to have been a second auction and that as there was no second auction the sale in favour of the plaintiff would be void. This notice is Ex. R-

2. It was received by the 1st defendant at Madras and sent along with Ex. R-1 to Mr. Krishnamurthi Aiyar. The 2nd defendant then writes Ex. S

on the 28th May from Ahmedabad in which he acknowledges Mr. Krishnamurthi Aiyar''s letter of the 22nd and Dr. Mathuram''s notice and

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/pichai-moideen-rowthar-appellant-…

suggests that the whole matter may be postponed till his arrival. The plaintiff purchased a stamp paper for the intended sale deed on the 18th May

(Ex. G-1) and submitted a draft on the 30th May (Ex. G). On the 8th June the 1st defendant firm addressed Ex. T to Mr. Krishnamurthi Aiyar in

which it was observed that the delay in the execution of the sale deed was due to the absence of the 2nd defendant in Bombay and it was hoped

that the plaintiff would have no objection to the execution of the document before the end of the month. Mr. Krishnamurthi Aiyar was requested to

inform the plaintiff that the delay was due to this unavoidable circumstance. The 2nd defendant wires from Bombay on the 9th June (Ex. T-1)

saying that he was detained on urgent work. Ex. H is a letter addressed by the 1st defendant from Madras to the plaintiff in which he was assured

that the matter would be positively finished by the 20th instant. Ex. H-1 is a letter of the 10th June from the plaintiff to the 1st defendant asking that

the transaction may be completed without any delay. The 2nd defendant wires from Bombay on the 11th June (Ex. H-2) requesting Mr.

Krishnamurthi Aiyar to obtain an extension from the plaintiff till the 25th instant. Ex. T-2 is a telegram of the 19th June to Mr. Krishnamurthi Aiyar

informing that the 2nd defendant had arrived in Madras and would be leaving for Trichinppoly the next day, i.e., 20th. So far, the conduct of all the

parties is as if they were all very anxious to finish the intended sale in favour of the plaintiff. On the 20th June the 2nd defendant writes Ex. VII to

Mr. Krishnamurthi Aiyar in which he says he arrived that morning from Bombay which somewhat contradicts Ex. T-2. He then observes ""that the

Official Assignee considers that the price of Rs. 9,000 is too low and that a fresh sale is desirable. His attestation to the conveyance cannot be

secured."" This is the first indication of a desire on the part of the 1st and 2nd defendants to resile from the agreement in favour of the plaintiff and

the Official Assignee''s unwillingness to attest the conveyance is mentioned as the excuse. What exactly happened after this up to the 23rd June we

do not know. On the 23rd June the 2nd defendant executes a sale deed (Ex. L=Ex. IX) in favour of the 3rd defendant for Rs. 12,550 thus

resuscitating the auction bid of the 8th May which was cancelled by Ex. F. On the same day the 3rd defendant executes a sale deed (Ex. L-1=Ex.

X) in favour of Dr. Mathuram for Rs. 12,900. On the same day the 2nd defendant acting in the name of the 1st defendant firm informs the plaintiff

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/pichai-moideen-rowthar-appellant-…

that they are unable to complete the sale in his favour and ""they would not be duly discharging their duties as mortgagees exercising a power of sale

if they complete the transaction for Rs. 9,000"" and offer to return the advance amount paid by the plaintiff with interest. This letter is Ex. III. They

also obtained an indemnity bond from Dr. Mathuram (Ex. K=Ex. XI, dated 24th June). Thus the contract in favour of the plaintiff was broken and

the present suit was filed by the plaintiff on the 4th July, 1927. for specific performance of the contract. Dr. Mathuram was made the 4th defendant

in the case.

3. The 1st defendant filed a written statement (which was adopted by the 2nd defendant) in which they pleaded (1) that the plaintiff''s conduct in

inducing the 2nd defendant to agree to sell the property for Rs. 9,000 within two days of the auction by private sale was fraudulent; (2) as he did

this with full notice of the contract in favour of the 3rd defendant he was not entitled to specific performance; (3) the agreement to sell in favour of

the plaintiff was subject to the condition that if the 3rd defendant should perform his contract the plaintiff''s agreement should stand cancelled; (4)

the plaintiff did not pay the balance of the purchase money within the stipulated time; (5) the draft conveyance submitted by the plaintiff included

other properties which could not be sold; and (6) the plaintiff is not entitled to damages as he fraudulently induced the 2nd defendant to exercise

the power of sale. The 3rd defendant repeated his pleas which were contained in the notices Ex. VIII, O and U, issued on his behalf by Messrs.

Kuppuswami Aiyar and Avadhani, viz., that he was ready with his money but the amount was not accepted, that his sale could not be cancelled

and that time was not of the essence of the contract. It says nothing about the questions put by the 3rd defendant to Mr. Krishrnmurthi Aiyar and

his not having received satisfactory replies. He also pleaded that the agreement between the plaintiff and the 1st defendant was subject to the

condition that it should stand cancelled if the sale in his favour was completed. The written statement of Dr. Mathuram is the same as that of the

3rd defendant. It is unnecessary to make any reference to the written statement of the 5th defendant, the Official Assignee.

4. A number of issues were framed (28) rather out of proportion to the simple nature of the suit. The Subordinate Judge found on the first issue

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/pichai-moideen-rowthar-appellant-…

that the contract in favour of the plaintiff was a valid and bona fide transaction brought about in the best interests of both the parties though it was

for Rs. 9,000, a sum lower than Rs. 12,550, for which it was knocked down in the auction. He found the second and third issues in favour of the

plaintiff. On the 4th issue he found that the agreement to sell in favour of the plaintiff was not induced by fraud. On the fifth issue he found that the

agreement in favour of the plaintiff was not subject to any condition that it should stand cancelled if the 3rd defendant''s contract was completed.

On the sixth issue he found that the plaintiff was always ready and willing to perform his contract. On the seventh issue he found that it was

specifically enforceable. He found the 8th issue also in favour of the plaintiff. On the 10th issue he found that the plaintiff was entitled to damages in

the alternative. On the 11th issue he found that the mortgagees were not trustees for the mortgagors. The 12th issue is the same as the fourth issue.

The 13th, 14th, 15th and 19th issues he found for the plaintiff. On the 20th issue he found that Ex. D was binding on the 3rd and 4th defendants.

On the 22nd issue he found that the auction sale in favour of the 3rd defendant was cancelled by Ex. F. On the 18th issue he found that the plaintiff

must be deemed to have taken undue advantage of the situation in which the 2nd defendant was placed and dictated his own terms. He therefore

held that the plaintiff was not entitled to specific performance. He finally gave a decree for damages to the extent of Rs. 3,550 being the difference

between the amount of the plaintiff''s contract and Rs. 12,550. He also directed a refund of the advance money paid by the plaintiff with interest.

The plaintiff files this appeal.

5. On the 18th issue I am unable to agree with the finding of the Subordinate Judge that the plaintiff took any unfair advantage of the situation in

which the 2nd defendant found himself. It is true that the amount for which the property was agreed to be sold to the plaintiff is much less than the

figure up to which the bids at the auction proceeded. But this may be merely due to auction fever. We find there were only two bidders, viz., the

plaintiff who was obviously very anxious to purchase the property and the 3rd defendant who as I will presently show was merely a speculator,

and who was bidding merely with a view to make some profit out of the transaction. It is contended by the learned Advocate for the respondents

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/pichai-moideen-rowthar-appellant-…

that Dr. Mathuram''s evidence as D. W. 4 shows that he instructed his agent to bid up to Rs. 15,000, If he really was so instructed it is rather

surprising that he did not bid up to that amount. The suggestion for the respondents is that he went there too late for the bidding. But this is

contradicted by the plaintiff and by Mr. Krishnamurthi Aiyar both of whom say that Dr. Mathuram''s agent was present. Dr. Mathuram''s agent

himself has not given evidence. The truth probably is that though Dr. Mathuram was willing to purchase the property even for such a large amount

as Rs. 15,000 because this village abuts another village of his own it may be he gave instructions to his agent not to bid against the 3rd defendant

because he knew that the 3rd defendant could not raise the necessary fund for carrying out the terms of the contract without borrowing somewhere

and he expected to find an opportunity of finishing the sale on more favourable terms. It was suggested in one portion of the case by the plaintiff

that the 3rd defendant himself was at the time of the auction really acting on behalf of Dr. Mathuram or at any rate that he was in league with him

{vide paragraph 14 of the Subordinate Judge''s judgment). But I am not able to accept this suggestion. I do not see any reason why a man of the

position of Dr. Mathuram while sending his own agent to bid at the auction should also have added a second string to his bow in the shape of the

3rd defendant and if they were really in league why the transaction did not fructify. It seems to me that the 3rd defendant was bidding on his own

account. Though he had no money of his own probably he thought that Dr. Mathuram would be willing to pay something more to him and in that

way he expected to make some profit. He thought that he could get the necessary 25 per cent, either from Dr. Mathuram himself or from some

other person as a loan. No doubt in this expectation he ultimately failed. Dr. Mathuram certainly would not lend him because he hoped to obtain

the village on easier terms. The 3rd defendant has given evidence that he took money on the 9th and 10th. Mr. Krishnamurthi Aiyar swears that he

did not come with any money. Even if the matter rests merely on the evidence of P. W. 2 Krishnamurthi Aiyar on the one hand and that of the 3rd

defendant on the other I would have no hesitation in accepting Mr. Krishnamurthi Aiyar''s evidence and rejecting that of the 3rd defendant. But we

have got a statement of Dr. Mathuram in Ex. R-2. In this letter he says ''As however the said Palaniandi Pillai failed to deposit 25 per cent, of the

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/pichai-moideen-rowthar-appellant-…

purchase money it appears that the suit properties were sold privately and without any notice again''. If as a matter of fact the 3rd defendant took

money with him such a statement would not have been made by the 4th defendant in Ex. R-2 for the 4th defendant was by that time probably

acting in league with the 3rd defendant or at any rate he was interested in attacking the validity of the agreement with the plaintiff. That validity

depends upon whether the contract in favour, of the 3rd defendant was properly cancelled or not. If the 3rd defendant did carry money with him

on the 9th and 10th and committed no default Mr. Krishnamurthi Aiyar would not be justified in cancelling the sale by Ex. F but if he did not take

money then the cancellation would be valid. It is inconceivable therefore that the 4th defendant would make a statement of this kind in Ex. R-2

which would not serve his purpose. I have therefore no hesitation in holding that the 3rd defendant was not ready with his money either because

nobody would oblige him or for some other reason and the sale in his favour was properly cancelled. Dr. Mathuram then found at the last moment

that the agreement for sale was executed in favour of the plaintiff and he was anxious to somehow circumvent it. Finally on the 23rd June the 2nd

defendant, the 3rd defendant and the 4th defendant must have agreed to resuscitate the old auction bid and to effect the sale for Rs. 12,550

followed by a second sale-deed for Rs. 12,900 the difference of Rs. 350 being the 3rd defendant''s profit in the matter. Thus we see that though

Dr. Mathuram might be willing to pay a high price in the last resort, somehow he did not instruct his agent to bid for a large amount at the sale on

the 8th May. Now we must remember that Mr. Krishnamurthi Aiyar is a Vakil of 20 years standing and knows the condition of affairs in

Trichinopoly and it is clear from Ex. F that they were all very apprehensive whether they would secure a bargain even for Rs. 9,000. Ex. F refers

to ""after great trouble and persuasion"". We are not therefore justified in thinking that the sale in favour of the plaintiff for Rs. 9,000 was a

transaction entered into in haste and without care merely because in the events that turned out there was a purchaser willing to purchase the

property for Rs. 12,900. That gentleman somehow kept himself in the back ground and there is not the smallest doubt that the 1st defendant firm

and their local legal advisor Mr. Krishnamurthi Aiyar were apprehensive whether they would get a bargain for Rs. 9,000.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/pichai-moideen-rowthar-appellant-…

6. Mr. Varadachariar the learned Advocate for the respondents at one stage suggested that Mr. Krishnamurthi Aiyar was colluding with the

plaintiff and brought about an improper sale to the detriment of the 1st defendant firm. But in other parts of his argument he said it was not

necessary for him to go so far and he would content himself with showing that Mr. Krishnamurthi Aiyar was mistaken and under his mistaken

advice the 2nd defendant acted in a hurry. If the 1st and the 2nd defendants had since discovered that Mr. Krishnamurthi Aiyar was not

discharging his duties as their honest legal advisor or acted under a mistake they would have raised the point in their written statements but there is

not the faintest indication about it in their written statements. All that we have got in the written statement is

that the plaintiff''s conduct in taking unfair advantage of the situtation in which the 2nd defendant was placed and inducing him to sell the property

for Rs. 9,000 was fraudulent.

7. The evidence shows that the plaintiff and the 2nd defendant did not even meet. The agreement was settled between the plaintiff and Mr.

Krishnamurthi Aiyar. I think there is nothing in the evidence to support the suggestion of misrepresentation by Mr. Krishnamurthi Aryar to his

clients whether honest or otherwise. In my opinion all the parties thought at the time that Rs. 9,000 was all that they could get and if so a mortgagee

with a power of sale is justified in entering into such a transaction.

8. The position of a mortgagee with a power of sale was described in Haddington Island Quarry Co., Ltd. v. Huson (1911) A.C. 722. The

Judicial Committee quote with approval the dictum of Kay, J. in Warner v. Jacob (1882) 81 L.J. (Ch.) 462 S.C. , Kay, J. said:

a mortgagee is, strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realise

his mortgage debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere, even

though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.

9. Now in my opinion all the evidence in the case shows that the price is certainly not so low as in itself to be evidence of fraud and that there is

absolutely no evidence of collusion or corruption either on the part of the 1st

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/pichai-moideen-rowthar-appellant-…

defendant or on the part of Mr. Krishnamurthi Aiyar. There is nothing

in the case to show that any unfair advantage was taken by the plaintiff of the situation in which the 2nd defendant found himself. When it was

pointed out to him that he bid at the auction up to Rs. 12,500 the plaintiff must have said that he had to do so as against the 3rd defendant''s bids

but now that there was not the competition of the 3rd defendant he was not prepared to pay more than Rs. 8,000. Ultimately the bargain was

settled at Rs. 9,000. The decision in Kennedy v. De Trafford (1897) A.C. 180 also shows that the only requirement is that the mortgagee should

act in good faith. Mr. Varadachariar the learned Advocate for the respondents referred to National Bank of Australia v. United Hand-in-Hand and

Band of Hope Co. (1879) A.C. 391. But that was a case where the mortgagee himself purchased the property in execution of the decree obtained

collusively between the mortgagor and the Directors. He also relied on Chabildas Dallubhai v. Dayal Mowji (1907) ILR 31 Bom. 556 (P.C.)

where there were some negotiations for a compromise and the bidders had thereupon left. The compromise failed and the old bidding was taken

and the sale was knocked down in favour of the last bidder. It was rightly held that the sale was not one which ought to be upheld. I do not think

these cases will help the respondents. In my opinion the 1st defendant firm through their authorised agent the 2nd defendant acted entirely bona

fide in entering into the agreement on the 10th May, with the plaintiff for selling the property for Rs. 9,000. Neither their conduct nor the conduct of

Krisbnamurthi Aiyar can be questioned. That being so, unless some good reasons can be given for not giving specific performance it ought to be

decreed. Respondents relied on Section 22, Clause (2) of the Specific Relief Act but obviously the term ""hardship on the defendant"" in this section

is used in the sense of some collateral hardship and not merely the diminution of the purchase money. The illustrations which are all based on

English law clearly show this and the term hardship is used in the same sense as it is used in English law (vide Fry on Specific Performance Chapter

VI). The inadequacy of consideration is separately discussed in Chapter VII and as already stated it is not clear that any inadequacy in this case

has been established. Reference has been made to Section 28(b) of the Specific Relief Act but I have already shown that the evidence does not

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/pichai-moideen-rowthar-appellant-…

disclose that the consent of the 2nd defendant was obtained by misrepresentation or undue influence of the other party to the contract or of any

other person. So this section does not help the respondents. In my opinion it is very desirable that persons in the position of the 1st defendant firm

should carry out their contracts and should not be allowed lightly by Courts to break their given word on the ground of mere technical pleas or

imaginary hardship. In my opinion there are no adequate grounds for refusing specific performance.

10. At one time it was suggested by Mr. Varadachariar that this is not a contract in which time was of the essence of the contract. He relied on 20

CWN 744 (Privy Council) . Whatever resemblance there may be in the terms of this and the terms of that contract there are certainly important

differences. That was a private contract whereas the case before us is a case of auction. The time allowed in that case for the completion was two

months and apparently such a long time was allowed in that case for investigation of title. There is neither investigation of title nor any long interval

in the case before us. But apart from these circumstances it is certain that even if time was not of the essence of the contract in the beginning it was

made so afterwards. In the present case a further agreement was executed on the 8th May, by the 3rd defendant and Ratnam according to which

they took some further time. This document was handed over finally to the 4th defendant and has not been produced in the case. It is said by 3rd

defendant that it was destroyed. We presume that if produced its terms would go against the defendants. At least by the second arrangement if not

from the beginning time was certainly of the essence of the contract. So this argument will not avail the defendants.

11. I would therefore allow the appeal and give the plaintiff''s suit a decree for specific performance and possession (in substitute for the damages

decreed by the Court below) with costs throughout. All the defendants will be liable for costs in the Court below. In appeal the 4th defendant only

will be liable for costs.

Cornish, J.

12. I agree that the appeal should be allowed. It has been proved by the evidence of P.W. 2, the Vakil Krishnamurthy, which the Subordinate

Judge was entitled to believe, that when Palaniyandi on the evening of the 8th

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/pichai-moideen-rowthar-appellant-…

May, after the property had been knocked down to his bid, was

unable to furnish the 25 per cent, deposit required by the sale conditions, the mortgagee-vendors gave him an extension of time till 10 O''clock next

morning; it being agreed that if the money was not then paid the contract should be cancelled. This agreement was reduced to writing and executed

by Palaniyandi and one Rathnam. It has not been produced. There is evidence that it has been destroyed. P.W. 2 says it was handed over to Dr.

Mathuram at the time of the sale deed subsequently executed in his favour by Palaniyandi. Mathuram says he never saw it. Palaniyandi says that

Rathnam tore it up as unnecessary after the execution of the sale deed in favour of Palaniyandi. I think it very probable that Palaniyandi is speaking

truth, and that the document has been destroyed. But the evidence of its contents is sufficiently proved to enable us to hold that it was expressly

agreed between the 2nd defendant-mortgagee and Palaniyandi that he was to pay the 25 per cent, deposit before 10 A.M. on the 9th and that the

contract was to be cancelled if he did not. Section 55 of the Contract Act provides that if a party to the contract has failed to do a certain thing

which he has promised to do before a specified time, the contract is voidable at the option of the promisee if the intention of the parties was that

time was of the essence of the contract. Their Lordships in lavished 20 CWN 744 (Privy Council) , have stated that Section 55 lays down no

principle different to those which obtain under English law as regards contracts for the sale of land. But in order that time shall be regarded as

essential the intention must be clearly expressed in the agreement. In the case above cited their Lordships say:

The language will have this effect if it plainly excludes the notion that these time limits were merely of secondary importance in the bargain, and that

to disregard them would be to disregard nothing that lay at its foundation.

13. I think that the terms of the agreement which have been deposed to, and the circumstances in which it was made, leave no doubt that the

stipulation that payment should be made before 10 A.M. on the 9th went to the very root of the agreement, and that the parties intended that if

payment was not made within that time limit the contract of sale was to be cancelled. The defendant-mortgagees acted entirely within their rights in

giving notice (Exhibit F) of cancellation to Palaniyandi, on his failure to make the

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/pichai-moideen-rowthar-appellant-…

deposit within the stipulated time, and from that moment the

contract to sell the land to him was at an end.

14. The only question is whether there are any grounds why the Court should decline to enforce the defendant-mortgagees'' contract to sell the

land to plaintiff. The only ground that they raise in their pleadings by way of defence to his claim to specific performance is that plaintiff fraudulently

and speculatively induced the 2nd defendant to sell for Rs. 9,000 with full notice of the contract in favour of Palaniyandi. The answer to this

allegation is to be found in the letter Ex. F already referred to. It was written by the Vakil Krishnamurthy on the instructions of 2nd defendant, and

2nd defendant has said that its statements are correct. In this letter Palaniyandi was told that 2nd defendant suspected him of dishonestly running up

the bids at the auction without any intention of purchasing the property and that 2nd defendant ""had after great trouble and persuasion to settle a

private sale to S. Pichai Moideen (the plaintiff) for a price of Rs. 9,000"". So that what the 2nd defendant was putting forward at the time of the sale

was that only after great trouble and persuasion had he been able to induce the plaintiff to offer Rs. 9,000. There is not the faintest indication in this

letter that it was the 2nd defendant whose will was overborne by the inducements of the plaintiff. The 2nd defendant says that he did not see the

plaintiff personally, but that Krishnamurthy acted for him and after some negotiation Krishnamurthy came and told him that he had settled for Rs.

9,000. Obviously the 2nd defendant was content to accept this price, and he executed Ex. C to plaintiff in which it is recited,

Hence in consideration of the fact that the price might go down if there were any further delay in effecting a sale of the lands in the said village we

have agreed to take the aforesaid price.

15. Krishnamurthy''s evidence is that after Palaniyandi''s backsliding 2nd defendant was anxious to sell by private treaty, and at his request the

witness sent for plaintiff, the next highest bidder at the auction. Accordingly, the plaintiff was sent for. The witness proceeds:

2nd defendant then asked him to accept the property for Rs. 12,500 according to his bid at the sale. He (i.e., plaintiff) refused to take it for any

thing over Rs. 8,000. 2nd defendant wanted at least Rs. 10,000. And as a middle course he finally accepted Rs. 9,000. (Plaintiff) also agreed to

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/pichai-moideen-rowthar-appellant-…

pay that amount. There was an agreement and counter-agreement to that effect. Exs. C and C-1. Plaintiff at once paid 25 per cent, of the agreed

price to 2nd defendant. Then 2nd defendant asked me to prepare a notice (Ex. F) to the effect that 3rd defendant''s (Palaniyandi) sale was

cancelled and that a sale for Rs. 9,000 had been concluded.

16. The Subordinate Judge has rightly held that the defendants'' contract with plaintiff was not induced by any fraud on his part. But he appears to

have thought, by his reference to Section 28, Specific Relief Act, that specific performance could not be decreed because the difference between

Rs. 9,000 which the plaintiff agreed to pay on the 10th and Rs. 12,500 which he bid at the auction on the 8th is evidence of undue advantage

taken by the plaintiff. I think that Section 28 has no application. The section relates to contracts that cannot be enforced because they are invalid

on account of fraud, undue advantage, misrepresentation, etc. The contract here has been found to be a valid contract, and plaintiff has been given

damages for its breach. The appropriate section is therefore Section 22, which provides that:

the Court may properly exercise a discretion not to decree specific performance where the circumstances under which the contract is made are

such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff''s part.

17. The test is, did the plaintiff in the particular circumstances take an improper advantage of his position or the difficulties of the defendant: Davis

v. Maung Shwe Go (1911) L.R. 38 IndAp 155 : ILR 38 Cal. 805 : 21 M.L.J. 1127 . The portions of the documentary and oral evidence which I

have set out satisfy me that there was no unfairness in dealing on the part of the plaintiff. He and 2nd defendant stood on terms of equality in the

negotiations for the re-sale, and 2nd defendant had his legal adviser at his side. It is clear that 2nd defendant had made up his mind that Palaniyandi

had run up the bidding with the object of frustrating the auction sale, and that in the circumstances a private sale was expedient. The plaintiff was

entitled to make the best bargain he could and there were no competitors to force up the price. Be it admitted that plaintiff got the property much

below its value. But, as is observed in Fry on Specific Performance, page 213,

to make a contract for an insufficient consideration incapable of enforcement by

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/pichai-moideen-rowthar-appellant-…

the purchaser would be practically to prevent a man from selling

his property at less than its value...however desirous he might be to sell it for the price actually obtained...and however unwilling or unable the

purchaser might be to purchase at its full value.

18. In my judgment the bargain was perfectly fair, and plaintiff is entitled to enforce it against the defendants.

19. It has also been contended that the Court would be justified in refusing specific performance under Clause II of Section 22 on the ground of

hardship. The hardship suggested is the possible liability of the defendant-mortgagees to the mortgagors for breach of duty in selling the property

for less than its value. But in as much as the Official Assignee of Madras, representing the mortgagors, has consented to the sale to the plaintiff I

think there is no substance in the suggestion or in the contention founded on it.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/pichai-moideen-rowthar-appellant-…