

(1972) 03 MAD CK 0010
In the Madras High Court

P.L. Chakrapani Naidu and T.K. Rajeswari Ammal and Another	APPELLANT
Vs	
T. Gopal Mudaliar and Others	RESPONDENT

Date of Decision : 27-03-1972

Acts Referred:

Transfer of Property Act, 1882 — Section 69

Citation : (1972) 85 LW 735 : (1972) 2 MLJ 390

Hon'ble Judges : K.S. Ramamurti, J

Bench : Division Bench

Judgement

K.S. Ramamurti, J.—These two appeals arise out of two suits which were heard and tried together and disposed of by a common judgment

by the City Civil Court, Madras, as the subject-matter in dispute and the points in controversy are the same and identical. The suit property

involved is door No. 78, Paper Mills Road, Perambur, and the main question in controversy relates to the truth, validity and the legality of the

auction sale said to have been held by the auctioneer on behalf of the mortgagee exercising powers u/s 69 of the Transfer of Property Act. The

Suit O.S. No. 2701 of 1959 has been filed by the three plaintiffs the mortgagors, impeaching the auction sale. The first defendant, Rajeswari

Ammal, is the assignee from the original mortgagee Lokambal, the second defendant Chandramani and Co., is the auctioneer, the third defendant

Chakrapani Naidu is the successful bidder and purchaser in the auction and the fourth defendant Natesa Mudaliar is a subsequent mortgagee. The

other suit, O.S. No. 992 of 1959 has been filed by the auction-purchaser to establish his rights and to recover possession of the property as the

mortgagors would not surrender possession of the property. The three mortgagors are the three contesting defendants in this suit. The learned City

Civil Judge accepted the contentions of the mortgagors and held that there was really no auction sale on 12th February, 1959. The result was that

O.S. No. 2701 of 1959 was decreed as prayed for and O.S. No. 992 of 1959, was dismissed. The auction-purchaser has preferred the Appeal

No. 737 of 1963, against the decision dismissing the suit O.S. No. 992 of 1969, and he has also preferred the Appeal No. 132 of 1965, against

the decision decreeing the mortgagors' suit, O.S. No. 2701 of 1959, aforesaid. For purposes of convenience, in the trial Court, the parties were

referred to according to their array in O.S. No. 2701 of 1959, (the suit by the mortgagors) and we are adopting the same course in these two

appeals. The point for decision lies in a very narrow compass, the only point arising for decision being a pure question of fact, whether any auction

was held as a fact on 12th February, 1959, and whether the third defendant became the highest and successful bidder. The trial of both the suits

has been very protracted and a lot of useless and irrelevant material had been let in the trial of both the suits. In the course of the appeal, we

noticed that the oral evidence is unnecessarily voluminous and the result was that the irrelevant portion of the evidence has clouded the relevant

portion of the evidence resulting in the learned Judge himself getting involved in a discussion of unnecessary details and irrelevant particulars.

2. The brief facts which led to this litigation may be stated : It is necessary to have a rough idea of the relationship between the parties which is set

out in the trees below:

The suit property, door No. 78, Paper Mills Road, Perambur, belonged to one Thiruvenkada and plaintiffs 1 to 3 were entitled to the same as

reversioners. The plaintiffs, the mortgagors, were obliged to take proceedings in O.S. No. 1443 of 1950 to establish their right to the suit property

as reversioners to the estate of Thiruvenkada against Meenakshi and they succeeded in obtaining a decree on 29th March, 1952. Between 1952

to 1956 there were further proceedings in which the mortgagors were obstructed from realising the fruits of the decree obtained by them in O.S.

No. 1443 of 1950 and it is only in the beginning of 1957 that the plaintiffs ultimately succeeded in their efforts in establishing their rights to the suit

property as reversioners of Thiruvenkada. There was of course pronounced enmity between the plaintiffs on the one side and Meenakshi (the

mother of the first * defendant) and Kannayya (the husband of the first defendant) on the other.

3. As early as 1948, the mortgagors had created a mortgage over the suit property and some agricultural lands in favour of one Lokambal under

Exhibit B-1 dated 6th December, 1948, for a sum of Rs. 2,500. Nothing was paid to Lokambal towards this mortgage and under Exhibit B-44 of

the year 1950, Lokambal, through her lawyer, issued a notice to the plaintiffs, the mortgagors, demanding payment of the amount. There was no

response to this notice. While matters stood thus, the first defendant Rajeswari obtained an assignment, from Lokambal, of the mortgage aforesaid,

under a deed of assignment, Exhibit B-2 dated 5th March, 1957. It is not in dispute that, shortly thereafter, the first defendant-assignee mortgagee

(also referred to as mortgagee in this judgment) issued a notice to the plaintiffs informing them of the assignment of the mortgage and also calling

upon the mortgagors to discharge the mortgage debt. The mortgagors sent a reply. Exhibit A-41, dated 4th April, 1957, but no payment was

made. In view of the fact that the mortgage was outstanding for over nine years, the first defendant pressed the mortgagors for discharging the

mortgage and took steps to sell the property by exercising the private right of sale u/s 69 of the Transfer of Property Act, and the second

defendant, Chandramani & Co. was constituted as the auctioneers to sell the property u/s 69 of the Transfer of Property Act. The auctioneers

issued a notice, Exhibit B-49 dated 1st October, 1957 to the mortgagors to the effect that the property was proposed to be sold in auction on 14th

November, 1957. The mortgagors filed the suit O.S. No. 2243 of 1957, to arrest the sale. On 16th April, 1968, the City Civil Judge held in the

aforesaid suit that the suit property alone (Madras property) should be sold and that too, only after scaling down the debt under the provisions of

the Madras Debt Relief Act. Immediately thereafter, the first defendant issued a notice to the plaintiffs on 9th June, 1958, to the effect that she was

prepared to receive the amount as scaled down and calling upon the plaintiffs to pay the same. Under Exhibit A-12 dated 25th June, 1958, the first

plaintiff created a mortgage in favour of the fourth defendant discharge the mortgage debt due to the first defendant, but the fourth defendant did

nothing in the matter. Under Exhibit A-10 dated 24th July, 1958, further notice was issued to the mortgagors demanding payment, but without any

effect. While matters stood thus, the auctioneers took steps to auction the property and Exhibit A-n is a notice issued by, the auctioneers which

shows that the auction was proposed to be held on 14th August, 1958. This time, again, the plaintiffs instituted a suit, O.S. No. 1442 of 1958, to

avert the sale, and they also filed a petition in I.A. No. 582 of 1958 for a temporary injunction restraining the auctioneers from selling the property.

But, even before that, the property had been sold to one Rangachari, a highest bidder, for Rs. 5,000. Nothing turns about that sale. In I.A. No.

582 of 1958, the learned City Civil Judge passed a conditional order directing the mortgagors to pay Rs. 1,500 before 13th September, 1958 and

as no payment was made, the petition I.A. No. 582 of 1958 aforesaid was dismissed. The first defendant sent another notice, Exhibit B-13 dated

30th October, 1958 to the mortgagors to the effect that the first defendant was prepared to receive the amount as scaled down and that if the

amount was not paid the property would be brought to sale. A perusal of Exhibit B-13 shows that the mortgagee has made her position perfectly

clear and that she was determined to bring the property to sale if the amount was not paid as demanded in Exhibit B-13. As no payment was

made, the next auction date was fixed to 4th December, 1958. and again, the mortgagors initiated proceedings to avert and prevent the sale. They

filed I.A. No. 889 of 1958 for an interim injunction and on 14th August, 1958, the City Civil Court passed an order directing small payments to be

made and giving six weeks' time to the mortgagors to make such small payments from 4th December, 1958. Even this indulgence yielded no result

and the mortgagee (first defendant) and the auctioneer (second defendant) were left with no option but to hold the auction for selling the property.

The auctioneer published notices for the proposed auction to be held on 12th February, 1959. He also printed handbills and circulated them. The

bill issued by "The Hindu" to the auctioneer shows an advertisement for the proposed auction to be held on 12th February, 1959 which was

published in "The Hindu" dated 9th February, 1959. Till 11th February, 1959, the mortgagors did not make any payment and they pursued the

obstructive tactics. On 12th February, 1959 the day fixed for the auction sale, they filed I.A. No. 165 of 1959 for stopping the sale and on the

opposition of the mortgagee the application was heard on its merits and immediately after lunch interval the Judge pronounced orders dismissing

I.A. No. 165 of 1959. The result was that the mortgagee and the auctioneer were free to hold the proposed auction on 12th February, 1959, at the announced time 4-30 P.M. The case of the defendants is that defendants 1 and 2 rushed Upto the premises in the car of the second defendant and the second defendant held the auction between 4.30 and 5 P.M., that there were several bidders and ultimately the highest bid of the third defendant for Rs. 5,000 was accepted. The further case of the defendants is that on that day, i.e., 12th February, 1959, the third defendant paid a sum of Rs. 1,250 representing 25 per cent, of the purchase price and also obtained the receipt from the auctioneer, Exhibit B-6 (Receipt. No. 369) for the payment of Rs. 1,250 and that on 24th February, 1959 the third defendant paid the balance of the amount, Rs. 3,750 to the second defendant and obtained the receipt, Exhibit B-46 (Receipt No. 377). It is also the case of the defendants that the plaintiffs were throughout present in the City Civil Court when I.A. No. 165 of 1959 was argued and immediately after it was dismissed, they too ran up to the premises and threatened and warned the intending purchasers who assembled there that no purchaser would get free title and that the purchaser must be prepared for a protracted litigation. It is the further case of defendants that at the time of the auction the plaintiffs distributed printed notices like Exhibit B-38 threatening and warning the purchasers not to purchase the property in the auction and also threatening the proposed purchasers that there was bound to be litigation concerning this property. It is also the case of the defendants that the plaintiffs created a scene, caused some disturbance, but despite all this, the second defendant held the auction and the third defendant purchased the property, being the successful bidder, having offered the highest bid of Rs. 5,000. So far as the plaintiffs are concerned, they do not appear to have moved in the matter till the 26th and it is on 26th February. 1959 their Counsel wrote the letter (Exhibit A-20) dated 26th February, 1959 and a cheque for a sum of Rs. 3,611. It is not in dispute that this letter and the cheque were returned by the Counsel for the first defendant on the ground that the property had been sold in auction and there was no question of the plaintiffs having any right to make payment as though the mortgage was still subsisting. The mortgagors would not join the first defendant in the execution of the registered deed of sale, Exhibit B-7, dated 16th March, X959 in favour of the third

defendant. After failing in his attempt to get possession of the property, the third defendant instituted the suit, O.S. No. 992 of 1959 on 16th April,

1959 to recover possession of the property. In their turn, as a counterblast to O.S. No. 992 of 1959, the mortgagors instituted the suit, O.S. No.

2701 of 1959 on 2nd November^ 1959.

4. The judgment of the City Civil Judge is needlessly lengthy. Considerable portion of the time of the Court appears to have been taken by the

parties to make out that the relationship between the mortgagors and the first defendant and her husband Kannayya was inimical and, because

Kannayya failed in the reversionary litigation instituted by the plaintiffs an assignment of the mortgage was obtained from Lokambal with a view to

do harm to the plaintiffs and by hook or crook to get at the suit property which had been declared to belong to the plaintiffs in O.S. No. 1443 of

1950. It may not be wrong to presume that Kannayya secured the assignment of the mortgage from Lokambal in a spirit of ill-will. But the plaintiffs

cannot make much out of the fact that the assignment was actuated by a bad motive. The fact remains that immediately after the assignment was

obtained from Lokambal the plaintiffs were informed about the assignment and Kannayya made no secret about it that he was keen about the

mortgages being discharged and that if the mortgage was not discharged within a short time the power of sale u/s 69, Transfer of Property Act,

would be exercised. We have already referred to the steps taken by the mortgagee (Rajeswari, the first defendant) in quick succession insisting

upon the plaintiffs discharging the mortgage debt. Side by side, the mortgagors have been taking one proceeding after another, again, in quick

succession to thwart and abort the attempts of the first defendant to bring the property to sale. Thus, it will be seen that nothing was done in secret

and the plaintiffs were given due and proper notice of every step taken by the first defendant. As already observed, a good deal of oral and

documentary evidence has been adduced by both sides to make out this environment of hostility between Kannayya on the one side and the

plaintiffs on the other at the time when the assignment was taken and the mortgagors were pressed to discharge the mortgage. The fact, however,

remains that for two years the mortgagors were dodging and evading payment and admittedly for nine full years the mortgagors had not paid a

single pie towards interest (vide : P.W. 1'S evidence at page 25 of the typed set). The learned Judge was fully alive to this obstructive attitude

pursued by the plaintiffs and he has made pointed reference to the same in paragraph 48 of his judgment:

The above statement of facts would thus disclose that while the first defendant, subsequent to the assignment in her favour, attempted to have the

property sold under the professed right of sale vested in her under the document and had the auction notified for five different days, she was foiled

on four such occasions by the plaintiffs resorting to Court and getting injunctions. But, both the suits filed by the plaintiffs were rendered necessary

by the first defendant attempting to bring the property to sale illegally. But, the last two sales were notified for the correct amount due by the

plaintiffs. It is no doubt true that the plaintiffs had been attempting their very best to see that this auction sale did not take place and that there was

nothing illegal in the first defendant taking an assignment of the mortgage from Lokambal or attempting to realise the amounts due under the

mortgage by selling the property, though, of course, she was entitled only to sell the property at Madras and for the amount as scaled down by the

Madras Act IV of 1938.

It is thus clear that, whatever may be the motive with which the assignment was obtained, the first defendant was undoubtedly entitled to exercise

the powers of private sale u/s 69 of the Transfer of Property Act. The only question is whether there was a sale on 12th February, 1969 and

whether the sale was conducted in a valid and proper manner in accordance with the provisions of Section 69 of the Transfer of Property Act. The

burden of proof of establishing that a sale actually took place on 12th February, 1959 is upon the the mortgagee and the auction-purchaser. But,

the burden of proving that the sale is invalid by reason of any infirmity or by reason of any fraud or collusion is, undoubtedly, on the mortgagors. As

we gather from the judgment, the three circumstances on the basis of which the trial judge mainly held that there was no sale and everything was

vitiating by fraud and collusion, are as follows:

1. The property is a valuable property worth about Rs. 12,000 to Rs. 13,000s. The property has been sold for a grossly inadequate price of Rs.

5,000 and that itself is evidence of fraud and collusion.

2. There is no proof that the third defendant had the means to pay the bid amount of Rs. 5,000.

3. The evidence of the auctioneer and the entries in his records, the day-books and the ledger, and the concerned receipts and the concerned

counter-foils indicate that there was really no sale on 12th February, 1959, but that later on, the auctioneer had made some entries so as to make it

appear that there was an auction sale on 12th February, 1959.

5. On the question of the alleged inadequacy of the price, the learned Judge has completely misdirected himself and he did not draw the proper

inference from a crucial circumstance, though he has adverted to the same in paragraph 44 of his judgment. The house is an old house over half a

century old, arid, at the time of the auction, the house was in a state of disrepair. All the doors and windows had been removed except the front

door and. the back door. The compound wall and the lavatory had fallen down. Even though the house was electrified, P.W. 2 had admitted that

there was no service connection. Kannayya has given evidence (vide page 54 of the printed record) in which he has stated that the suit house is a

dilapidated one without doors and windows, is built of clay and bricks, that the windows have no shutters and have been removed, and have been

blocked up with stones, and the latrine had fallen down and the doors of the latrine had been removed. We do not find any effective cross-

examination of this evidence, nor do we find P.W. 1 saying that the house was in a good condition. There is the further fact that there are tenants

residing there. It is familiar knowledge that, in view of the provisions of the Rent Control Act, it will be exceedingly difficult for the purchaser to

obtain physical possession of the property. This is an important circumstance which would undoubtedly weigh with the purchaser. The price a

house would fetch at a public auction would depend on whether the purchaser would get immediate vacant possession thereof or would have to

wait indefinitely till the-tenants are vacated by means of protracted eviction proceedings. When the house in the occupation of tenants is dilapidated

and the doors and windows; thereof have been removed, the condition of the house will considerably push down the price which it is likely to fetch

and that too, in a public auction. There was also the prospect of the purchaser having to face certain litigation from plaintiff's 1 to 3, who had lived

under the shadow of law Courts and would not hesitate to raise every kind of objection. The facts in this case amply demonstrate the tremendous risk which the purchaser was taking. The property was sold in 1959 and we are in the year 1972. thirteen years have elapsed--and the litigation is not over and nobody knows when the purchaser will be able to get possession of the property. Above all, there is the vital fact that as soon as the application for injunction was dismissed by the City Civil Court, after lunch on 12th February, 1959, the first plaintiff"" ran up to the premises at the time of the commencement of the auction, and there is also evidence that he created some disturbance. Not only that, printed notices, containing a serious note of warning and. threat had t een circulated on that day. We have perused the contents of Exhibit B-38 and we have no doubt that they must have frightened and scared away prospective purchasers. The only party who would be interested in circulating such notices as Exhibit B-38 are the plaintiffs, because the mortgagee was not interested in circulating such notices as her attitude on the 12th February, 1959 before the City Civil Court shows that she was very keen about the auction being held on that day. In the normal course, the plaintiffs alone would be interested in circulating such bit notices. We have no hesitation in accepting the evidence of Kannayya that it was the plaintiffs who circulated such notices and also created disturbances at the time of the auction of the property. The learned Judge has not given adequate consideration to this crucial aspect. These sabre-rattling tactice of the plaintiffs would necessarily have an impact upon the price which a willing purchaser would offer. There is, therefore, no point in evaluating the property in the abstract"" as though it was being sold under ideal conditions and upon a mutual contract of sale and purchase. That apart, we do not see how it lies in the mouth of the plaintiffs to make a complaint that the property has been sold for an inadequate price. We have not the slightest hesitation in holding that for all the reasons mentioned above, the price fetched cannot be said to be so inadequate as to raise any inference of fraud and collusion. We are also of the opinion that the background of the case does not admit of any theory of fraud and collusion, because even according to the plaintiffs, the thud defendant was present in the City Civil Court and as soon as the application for injunction was dismissed, he too went to the premises, where the auction was held under his very nose. Nothing h established to

show that the first defendant colluded with the third defendant and held the auction in a clandestine manner. Mere use of the words "fraud and collusion" means nothing and there must be positive proof that there was collusion between the first defendant and the third defendant. On the other hand, everything was done openly and nothing was done in secrecy. The first defendant had clearly manifested her intention that she was bent upon the auction being held on 12th February, 1959. Some argument was advanced that the mortgagee was actuated by a bad motive and that that would also afford some evidence of fraud and collusion. We see no substance in this contention. It is settled law that a mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale. Power of sale is given to the mortgagee for his own benefit, to enable the latter to realise his debt. The Court will not interfere merely to prevent its exercise contrary to the wishes or interests of the mortgagor, or even, if the mortgagee is seeking some collateral object and not merely the payment of his debt. The mortgagee is not a trustee for the mortgagor of his power of sale and the Court will not inquire into his motives for exercising it, so long as he acts with bona fides. (Vide the statement of the law in Fisher and Light wood's Law Mortgage (Eighth Edition, 1969, at page 310 and also the statement of the law in 27 Halsbury, at page 302 paragraph 567). We may first refer to the decision in Golson v. Williams (1948) 61 LT 71, in which It is observed that a mortgagee is not a trustee for the mortgagor of his power of sale, and the Court has nothing to do with the motives of the mortgagee in exercising it even though he (the mortgagee) is guilty of spite in so doing. In that decision it is observed that the mortgagee was the sole Judge for deciding when it is necessary for him to realise the security and he can do so without any hesitation after giving the requisite notice to the mortgagor. In the case of a private sale, the mortgagee must act fairly and with bona fides and reasonable care and try his best to secure the maximum price, but in the case of an auction sale there is no question of the mortgagee taking any particular care or taking special efforts to secure a good price, because so long as he does not interfere with the auction and entrust the sale of the property to an auctioneer and if there is a free auction, the mortgagor must take the risk of whatever price the property fetches in the auction. We may next refer to the decision in Belton v. Bass Ratcliffe and Gretton Ltd. (1922) 2 Ch. D. 449. The following

headnote in that decision brings out that in exercising the power of sale, the mortgagee can himself advance money to the purchaser to purchase the property on the security of the mortgaged property and that the fact that the mortgagee was actuated by bad motive, by itself, would not vitiate the sale:

B.J.B. mortgaged certain shares in a brewery company. The mortgagees, who had full power to sell the shares, were desirous in 1914 of giving an option to F.R.G. to purchase them at a future date, but were advised by their solicitors that this would not be within their powers. They then sold the shares to F.R.G. at a fair price, and advanced him the whole of the purchase money without interest, and gave him the right to call on them to repurchase the shares at the price he gave for them at any time before 1st May, 1917. The money so advanced was secured by a deposit of the share certificate and by a promissory note, which, on the face of it, was expressed, to be payable on demand. F.R.G. paid the mortgagees the purchase-money before 1st May, 1917. In 1920 he sold the shares at a price considerably in excess of what he had paid for them. B.J.B. then brought an action, alleging that the transaction was not a valid sale, and claiming that the shares or their proceeds were still subject to redemption:

Held, that the Court could not inquire into the motives of the mortgagees, and that the transaction was a valid exercise of their power of sale.

Reference may be made to the following observations of Russell, J. at pages 465 and 466:

At one time there was colour for the suggestion that the motive of the mortgagee in selling might be weighed as: an element in considering whether a mortgagee's power of sale had been or not validly exercised.

In *Robertson v. Norris* 1 Giff 421 Stuart, V.C. cited Lord Eldon as an authority in favour of the principle that the mortgagee is a trustee for the benefit of the mortgagor in the exercise of his power of sale, and added that if he used the power for any purpose other than to secure repayment of the mortgage, to effect other purposes of his own or to serve the purpose of other individuals, that would be a fraud on the exercise of his power, and the sale would be vitiated against the purchaser.

Sir George Jessel in the Court of Appeal would have none of this. The case is that of *Mask v. Eads* 22 Sol. I. 95, The Court consisted of Sir

George Jessel and Cotton and Lush, L. JJ. and held that there was no foundation for this proposition. Sir George Jessel said. "The mortgagee was not a trustee of the power of sale for the mortgagor, and if he was entitled to exercise the power, the Court could not look into his motives for so doing." If he had a right to sell on 1st June, and he then said "The mortgagor is a member of an old county family, and I don't wish to turn him out of his property, and will not" sell at present", and then on 1st July, he said. "I have had a quarrel with the mortgagor, and he has insulted me; I will show him no more mercy, but will sell him-up at once" - If all this was proved, the Court could not restrain the mortgagee from exercising his power of sale, except on the terms of payment of the mortgage debt." The Court could, not look at the mortgagee's motives for exercising his power Lord Eldon had never said anything of the kind which Vice-Chancellor Stuart supposed him to have said-The Vice-Chancellor was entirely mistaken, and must have been citing the judgments to which he referred from his recollection, without looking at the reports. Of course there were some limits to the powers of the mortgagee. He, like a pledgee, must conduct the sale properly, and must sell at a fair value, and he could not sell to himself. But he was not bound to abstain from selling because he was not in urgent want of his money, or because he had aspersions against the mortgagor.

I am unable accordingly to inquire into the motive of the defendants Bass, or to hold that the sale is vitiated because they desired to confer a benefit on the purchaser by selling to him upon terms which included a fair price.

In the instant case, the mortgagee is not guilty of any fraudulent conduct. If, a sufficient number of bidders were not forthcoming, if better offers were not forthcoming, it is all because of the obstructive tactics pursued by the mortgagors. How can the mortgagees expect bidders to assemble in large numbers when, in the morning of the 12th February, 1959, the mortgagors presented a petition for the adjournment of the sale, which was disposed of only after the lunch interval on the 12th and when, side by side, the mortgagors had been distributing pamphlets? The learned Judge has overlooked that the mortgagors brought upon themselves all the trouble. It is not the law that the mortgagee and the auctioneer should adjourn the sale merely because the property does not fetch a price, fair according to the

mortgagors, and there are not large number of bidders participating in the auction. The bidders" list, Exhibit A-43, shows that several persons participated and there were several bids and ultimately the property was knocked down in favour of the third defendant for the sum of Rs. 5,000, The learned Judge was, therefore, not right in so far as he was influenced by the fact that the relationship between the mortgagors and the mortgagee was not cordial and that the mortgagee was determined to have the auction held on 12th February, 1959.

6. On the second question about the means of the third defendant, we find it impossible to accept the reasoning of the learned Judge. The fact remains that the third defendant paid Rs. 1,250 at the time of the auction and Rs. 3,750 within fifteen days" time. There is no dispute that that money was paid by the third defendant. It is not the mortgagor"s concern how the third defendant found the money, and it is meaningless to speculate about his means when we have the solid fact that he did as a fact pay the sum of Rs. 5,000. The position may be different if the mortgagors had established that the entire sum of Rs. 5,000 was not merely furnished by the mortgagee but also the purchase in the name of the third defendant was only a benami purchase for the benefit of the mortgagee, in which case, the sale would be invalid because the mortgagee, exercising the power of sale, cannot herself purchase the property. But, for establishing that, the mortgagors should raise the necessary plea with full particulars in the plaint, have an issue settled on that question and substantiate the same in evidence. The pleading is very vague and does not contain any particulars whatever, and the plaintiffs have not established that it is the mortgagee who furnished the sum of Rs. 5,000. When Kannayya was examined, no such question was put to him, and P.W. 1, in his evidence, does not say that it is the mortgagee who furnished the consideration. Indeed, in cross-examination, P.W. 1 had admitted that he cannot give proof of the third defendant having purchased the property and giving it to the first defendant. Fraud and collusion cannot be proved by mere suspicion and there must be convincing, acceptable evidence that the first defendant maneuvered to have the property purchased in the name of the third defendant benami for the former and that the former furnished the entire consideration. As already observed, there is not even an

issue touching this aspect. That apart, the very fact that the third defendant was himself present in the City Civil Court on 12th February, 1959, shows that he was himself evincing interest in the matter of purchasing the property and was anxious to know the fate of the application filed by the mortgagors to avert the sale. After discussing the means of the third defendant in the end of paragraph 85, this is what the learned Judge says:

True, the Bank pass-book produced by D.W. 2 shows that two sums of Rs. 1,250 and Rs. 3,750 had been sent by him to the Bank on 14th

February, 1959 and 24th February, 1959- But, the real question is whose money it was. On the point, there is room to conclude that the third

defendant was not in a position to find/the amount for the purchase.

It must be noted that the learned Judge has not recorded a finding that the money was furnished by the first defendant mortgagee. Unless there is

clear evidence to that effect, the fact that the third defendant is not able to satisfactorily account how he got the money would not render the sale

invalid. Further, when the money has been paid to the auctioneer and deposited into the Bank, there is no point in speculating about the means of

the third defendant. Such a discussion leads no-where unless the mortgagors discharge the responsibility of establishing that the purchase by the

third defendant is a benami purchase for the benefit of the first defendant and the entire sum of Rs. 5^000-was found by the first defendant.

7. We are not inclined to agree with, the comments and criticisms of the learned Judge with regard to the records and daybooks and ledger filed

by the auctioneer on the question whether or not on 12th February, 1959 the sum of Rs. 1,250"" was paid by the third defendant. We have

carefully perused the day-books and the ledger and the receipts and counter foils. We find they have been maintained in the regular course of

business and the Judge has made much of some trivial corrections here and there. The receipts and the counter-foils do establish that Rs. 1,250

was paid to the second defendant by the third defendant on 12th February, 1959. At any rate, it is conclusively proved that Rs. 1,250 had been

put into the Bank on the 14th of February. It is obvious that the third defendant would have made the payment on the 12th and normally, the

money would be deposited by the auctioneer either the next day or the day

thereafter. We are not inclined to attach any importance to some correction of a mistake in the counterfoil of some other parts which has occurred inadvertently. The auctioneers are third parties and they are carrying on business as auctioneers for a considerable time. It has not been established that the auctioneers are taking sides with the first defendant to defraud the rights of the mortgagors. After all, the auctioneers would be getting two per cent, commission of the sale proceeds about Rs. 100 and we are not inclined to countenance the suggestion that, for that commission the auctioneers would have gone out of the way to make fraudulent or false entries in the account books or issue false receipts. The comments of the learned Judge that the moneys received on 12th February, 1959, are not entered in the account books in the same order in which receipts were issued is untenable, when the entries have been made on that day itself 12th February, 1959. It only shows that by some process of reasoning the Judge wants to reject the account books and the counterfoils of the auctioneers. The receipts bear numbers and after 12th February, 1959, several transactions have taken place on the 14th 17th etc. and receipts have been issued from time to time. There is no scope for any manipulation in the receipt-book or in the account books of the auctioneers. Some desperate theory was trotted out by the mortgagors that the money was not paid on 1st February, 1959, taking advantage of the fact that the money was put into the Bank by the auctioneers on the 14th, after an interval of one day, and the Judge has been carried away by this theory. The Judge has not noted that there is no motive for the auctioneers to act in any fraudulent manner. The comment of the learned Judge that the auctioneers filed the counterfoil receipt-book stitched and that itself revealed some suspicious conduct on the part of the auctioneers is wrong. The auctioneers are conducting auctions on behalf of their customers in general, and the auctioneers produced that portion of the counterfoil book with which the plaintiffs were concerned, stitching the receipts in respect of the transactions of other customers. The mortgagors cannot make any point out of this against the mortgagee. We have no hesitation in holding that the criticism and comments of the learned Judge about the auctioneers and their records, in paragraphs 64 to 68 of the judgment are wholly unjustified. At every stage, the learned Judge has been finding fault either with the

auctioneers or with the mortgagee. After the sum of Rs. 3,750 was paid on the 24th February, 1959, and getting to know that such a payment had been made, the plaintiffs cleverly, sent Rs. 3,611 to the mortgagee's Counsel towards the discharge of the mortgage as though the auction had not taken place. The cheque was returned with the endorsement that the auction had already been held, and the Judge makes much of the fact that the date of the auction and the dates when the moneys were paid had not been mentioned in the endorsement made by the Counsel for the first defendant. The Judge has overlooked that there is undisputed evidence that on the 24th Rs. 3,750 had been paid and the truth of that payment was not questioned.

8. There is one other crucial aspect which the learned Judge has overlooked. The first plaintiff has admitted that he was present in the premises at the time of the alleged auction, though the plaintiff would have it that there was no auction held and that defendants 1, 2 and 3 and few others talked something secretly and went away from the premises. According to the first plaintiff, he was standing at a place farther away from the place where the auctioneer was announcing the auction. P.W. 1 could not have witnessed what was actually happening. Even otherwise, the conduct of the plaintiffs in not writing to the auctioneers and the first defendant the very next day as to what happened according to him, on the 12th shows that the plaintiffs were fully aware that the auction had taken place and the third defendant had purchased. There is evidence (vide : page 79 of the printed papers) that at the time of the auction there were forty or fifty persons present. That again shows that nothing was done in secrecy. We cannot understand why the plaintiffs waited till the 26th February before instructing their lawyer to write to the lawyer of the first defendant; by that time the sum of Rs. 3,750 had been paid. This conduct of the plaintiffs betrays that they knew that there was a real auction at which the third defendant had purchased the property for Rs. 5,000. If there was any irregularity or if no auction at all was held and if there was any collusion between the first defendant and the third defendant in the matter of the auction, the plaintiffs would have at once sent a notice or a telegram to the first defendant and the second defendant even. It is meaningless to say that several people met together at the premises at 4.30 P.M. and dispersed

without the auction being held. This evidence is too artificial and incredible because the first defendant was determined to have the auction held on the 12th itself.

9. For all these reasons, both the appeals are allowed. The suit, O.S. No. 992 of 1959, is decreed and the suit, O.S. No. 2701 of 1959, is

dismissed. The plaintiff in O.S. No. 992 of 1959 will have his costs in the trial Court as well as in the appeal in A.S. No. 737 of 1963. The

appellants in A.S. No. 132 of 1965 will be only entitled to the Court-fee paid in the memorandum of appeal in this Court. There will be no

counsel's fee in A.S. No. 132 of 1965 either in this Court or in the trial Court in O.S. No. 2701 of 1959, where the parties will bear their own

costs. In other words, the plaintiff in O.S. No. 992 of 1959 will have his costs both in the trial Court and in the appeal in A.S. No. 737 of 1963,

as against the three defendants in O.S. No. 992 of 1959, who are also respondents in A.S. No. 737 of 1963. The trial Court will proceed with the

enquiry into the mesne profits in O.S. No. 992 of 1959 and complete the enquiry expeditiously.