

(1962) 06 MAD CK 0009
In the Madras High Court
Case No : Appeal No. 34 of 1959

P.S. Duraikannoo

APPELLANT

Vs

M. Saravana Chettiar and Another

RESPONDENT

Date of Decision : 26-06-1962

Acts Referred:

Contract Act, 1872 — Section 55
Specific Relief Act, 1877 — Section 12, 21
Transfer of Property Act, 1882 — Section 69

Citation : AIR 1963 Mad 468 : (1963) ILR (Mad) 376 : (1963) 76 LW 534 : (1963) 2 MLJ 399

Hon'ble Judges : S. Ramachandra Iyer, C.J.; Ramakrishnan, J

Bench : Division Bench

Advocate : T.T. Srinivasan and A.N. Rangaswami, for the Appellant; S. Venkatachala Sastri, S. Ramanatha Davey and R. Sundaravaradan, Amicus Curiae for 2nd Respondent, for the Respondent

Final Decision : Dismissed

Judgement

S. Ramachandra Iyer, C.J.—This is an appeal from the judgment and decree of the Fifth Assistant Judge, City Civil Court, Madras in O. S.

No. 1654 of 1957. The suit was instituted by the appellant for specific performance of a contract of sale of premises No. 41 Veda Vinayakar Koil

St., Purasawalkam, Madras. The facts which gave rise to the suit are these -

2. In the year 1954, the second respondent who was the owner of the suit property No. 41 Veda Vinayakar Koil Street (now known as

Perambur Barracks Road, Purasawalkam, Madras,) created an equitable mortgage over it for securing a sum of money advanced to him by the

first respondent, it is not disputed that the transaction conferred on the mortgagee a power to sell the mortgaged property. There was default in

payment of the mortgage amount as stipulated. The first respondent purporting to act under the power of sale, caused the suit property to be sold

by public auction through Messrs. Murray and Co., auctioneers. The relevant conditions of the sale are those contained in paragraphs 2, 3 and 6

of the proclamation which run as follows:

1. The highest bidder shall be the purchaser and in case of any dispute, the lot shall be immediately put up again at the last preceding undisputed

bidding and resold.

2. The purchaser shall pay into the hands of the auctioneers immediately after the lot is knocked down, a deposit of 25 per centum on the purchase

money and shall sign a copy of the conditions of sale acknowledging the purchase and shall pay the residue of the purchase money to the

auctioneers within 15 days from the date of purchase when the purchase is to be completed.

3. If the purchaser shall neglect or refuse to comply with the above conditions or any of them, the deposit money shall be forfeited to the

mortgagee and shall not be returnable, and auctioneers shall thereupon and without any notice to the purchaser, be at liberty to resell the property

either by public auction or private treaty and the deficiency, if any, arising from such resale together with all expenses attending the resale shall be

made good by the defaulting purchaser to the mortgagee in case of any advantage shall forfeit the same.

3. In the sale that was held on 4-6-1957, there were three bidders; among them was the appellant who bid for Rs. 15000, an amount slightly over

what was (toe under the mortgage. That being the highest bid, the appellant was declared by the auctioneer to be the purchaser. But the appellant

did not have sufficient funds with him to matte even the initial deposit of 25 per cent of the purchase price. He was able to pay on the spot only Rs.

1000. Later, however, he paid Rs. 2000 at his house, leaving a balance of Rs. 750 towards the initial deposit which was paid and accepted on the

following day. There was default in the payment of the remaining 75 per cent of the purchase money, but this we shall refer to again after setting out

certain events that took place before the due date for payment.

4. On the 7th of June 1957 the mortgagor's advocate issued notices to the mortgagee, the auctioneers and the purchaser complaining that the

property which was worth Rs. 30,000 was sold for half of its value, and that sufficient opportunity to bid was not even given to those that were present at the auction.

5. The mortgagee promptly denied the charges, but he expressed his willingness to cancel the sale if the mortgagor could bring an offer for Rs.

25,000 backed with 25 per cent advance. We cannot see how the mortgagee can override the rights of the appellant and make an offer of that

kind. Probably he was convinced that the auction sale did not fetch a proper price and that an opportunity should be given to the owner to bring

better offers. But there ensued further negotiations between the mortgagor and the mortgagee and strangely enough the appellant who was not

bound by them appears to have acquiesced in the same. The reason is obvious. He had not sufficient funds in his hands to pay up the 75 per cent

and he was content, at that time, to receive some money and give up his purchase. The attorney, who was acting for him, and who has been

examined as P. W. 3 in the case, wrote a letter to the auctioneers, a day after the time for payment of the balance had expired, stating-

Kindly let me know if there has been any further letter from the mortgagor, Mr. C.M. Nammalwar or his advocate Mr. T.K. Rajagopalan, in

answer to the mortgagee's letter dated 10th June and your letter of 17th June 1957.

The letter further called for the production of the title deeds for inspection and return. Two comments have to be made on the letter even at this

stage. It reveals a consciousness that the sale was a vulnerable one. It also attempts to cover up the purchaser's default by suggesting that the

delay was the result of the correspondence between the mortgagor and the mortgagee. The request for inspection of title deeds is obviously a

move to gain further time. Under the terms of the auction, the purchasers should have been satisfied about the title before they came to bid, and we

do not see what could really be done by an inspection after the sale.

6. But let us continue the narrative. On the 25th June 1957, the auctioneer was paid a sum of Rs. 2500 by the attorney acting on behalf of the

appellant. It is not clear under what authority the auctioneer received the amount after the expiry of the time particularly when the terms of the

auction contained stringent provisions in case of default. It must also be noticed

that what was received was only a part of the purchase money

due. P. W. 2, the clerk of the auctioneers, frankly admitted that he had no permission from the mortgagee to receive payment of price from the

appellant after the due date. Indeed he stated that there was no request even from the appellant or his attorney for an extension of time. But he

said-

By receiving the cash of Rs. 2500 we intended to extend the time for payment since we thought that the mortgagee would not have any objection.

We did not ask the mortgagee whether we could retain Rs. 2500 after the expiry of the 15 days time.

7. On this evidence, it is clear, and that is what the trial Judge has found, that there was no agreement on the part of the mortgagee to extend time

for the payment of the balance of the purchase money. There was thus a default on the part of the appellant.

8. The mortgagor then became active. He was able to secure a purchaser for the property for a sum of Rs. 20,000, Rs. 5000 more than what was

got at the auction sale. On the 28th June 1957, the mortgagor apprised P.W. 3, who was acting for the appellant about the fresh offer. The

appellant who has been found by the learned trial Judge to be merely a speculator, was prepared to concur in the sale giving up such rights as he

had if he were to be paid some money; but the negotiations, in that direction, did not fructify. Soon after the failure of the negotiations, the

mortgagor, by his notice, dated 3rd July 1957 informed the mortgagee that the appellant who had committed default was not entitled to obtain any

conveyance of the property. The mortgagee who asserted his right to complete the sale, appears to have agreed with that view.

9. The appellant who had not paid even within a period of 3 months the balance of Rs. 8750, due in respect of the purchase money, then started a

new case. By his notice to the mortgagee dated 5th July 1957, he claimed that there had been by mutual agreement a variation of the original

contract by which the mortgagee agreed to receive the balance of purchase money at the time of conveyance. That this case is false can admit of

very little doubt. Both the mortgagor and the mortgagee have said so in their reply notices.

10. It was on the basis of an agreed variation of the original contract that the

suit for specific performance out of which this appeal arises, was filed.

Both the mortgagor and the mortgagee resisted the suit, The learned trial Judge upheld the validity of the auction sale, holding, that the price

obtained therein was the best that could be got on that date. He was satisfied that the appellant had not the necessary funds with him to pay up the

balance of purchase money within the time stipulated; but he held that time should be considered in the circumstances as an unessential element in

the contract evidenced by the auction purchase, or at least was so regarded by the parties, and that the contract could not be regarded as broken

by nonpayment of the price. In the circumstances, however, he thought that the appellant would not be entitled to specific performance and granted

a decree for damages which he fixed at Rs. 500 payable by the mortgagor and the mortgagee. The auction purchaser has appealed but neither the

mortgagor nor the mortgagee has objected to the decree for damages.

11. For the appellant it is contended that once the Court came to the conclusion that time was not the essence of the contract, and there was no

default on his part, he should be given a decree for specific performance. It is however unnecessary to deal with this contention in the view we take

of the case.

12. We have already set out the essential terms of the auction sale. In our opinion, the conditions therein make it clear that time was of the essence

of the contract. Indeed, the proper view to take of the stipulation as to payment of both the initial deposit as well as the balance of the purchase

money hedged in with conditions as forfeiture and resale on default, is to consider them as going to the root of the matter of agreement, and form

and conditions of the sale. This view is supported by authority. In Pichai Moideen Rowthar Vs. Chathurbuja Das Kushal Das and Sons and

Others, , there was a public auction held by the mortgagee. Under the terms of the sale, the balance of the purchase money was payable within 15

days after sale, and failing compliance, the deposit was to be forfeited and the sale cancelled. The balance of the purchase money was not paid and

the mortgagee effected a private sale in favour of a third person. The auction-purchaser came forward with a claim for specific performance. It was

held that time was of the essence of the contract, and that on the default of the auction-purchaser in the matter of payment of the purchase money,

the mortgagee was entitled to sell the property.

13. The learned trial Judge realised that, on the terms of the contract as they stood, time was of essence, but he held that it ceased to be so by

reason of the acceptance of Rs. 2500 on 25th June 1957 by the auctioneer. As we pointed out earlier, the auctioneers had no authority from the

mortgagee, for whom they were acting, either to receive Rs. 2500 or to extend the time for payment of the purchase money. The mere fact that

the mortgagee was negotiating with the appellant in regard to the sale to a third party, or that as against the mortgagor he asserted his right under

the power vested in him to extend time cannot mean that in this case he ceased to regard time as the essence. On the first sale failing, he was

entitled to sell again, and this is what he attempted to do. The learned trial Judge himself has found that there has been no agreement between the

mortgagee and the auction-purchaser for postponement of payment of the balance of the purchase money. It must follow from this that the

appellant having failed to comply with the conditions of sale, there was default on his part and the suit is not maintainable.

14. Let us, however, assume that the auction-purchaser (auctioneer ?) had authority from the mortgagee to extend time for payment of the sale

price and he did extend it. Even so, we are of opinion, that the extension of time would not bind, the mortgagor in the circumstances of the case.

The reason for our conclusion is this. It is no doubt settled law that a mortgagee exercising the power of sale is not a trustee for the mortgagor as

he exercises the power for his own benefit. But he will undoubtedly be holding a fiduciary position in regard to any surplus that may remain after

the discharge of his claim. Acting as he does under a power to convey another man's property, he should act bona fide so as not to imperil the

interest of the other. For example, a mortgagee cannot stop the bid at the auction sale the moment he obtains a bid sufficient to cover his claim, but

should go further and obtain the highest bid if available. En Halsbury's Laws of England, Vol. XXVII, 3rd Edn. the law is stated thus at page 295 -

The power authorises the mortgagee, when the mortgage money has become due to sell, or to concur with any other person in selling, the

mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or private contract,

subject to such conditions of title as he thinks fit. The mortgagee exercising the power of sale has also power to vary any contract of sale, and to

buy in at an auction, and to rescind any contract of sale, and to re-sell, without being answerable for any loss occasioned thereof;

And again at page 302 it is stated-

A mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale; he has been so described, but this only means that he

must exercise the power in a prudent way, with a due regard to the interests of the mortgagor in the surplus sale moneys. He has his own interest to

consider as well as that of the mortgagor, and provided that he keeps within the terms of the power, exercises the power bona fide for the purpose

of realising the security, and takes reasonable precautions to secure a proper price, the Court will not interfere, nor will it inquire whether he was

actuated by any further motive. A mortgagee is entitled to sell at a price just sufficient to cover the amount due to him, provided the amount is fixed

with due regard to the value of the property. It is sufficient if the mortgagee complies with the terms of the power and acts in good faith, but good

faith requires that the property should not be dealt with recklessly; , . . .

15. From what is said above, it is obvious that a sale under a power vested in the mortgagee, while it may be conducted in such manner as he

might decide most conducive to his interests should be a bona fide one and he should take reasonable precaution to obtain the proper price for the

property. In short, it will be his duty to behave as a reasonable man would behave in the realisation of his own property so that the mortgagor may

obtain full value for his property; and in case there is surplus after discharging the mortgage debt, it (sic) to pay it to the mortgagor, as has been

stated in *Kennedy v. De Trafford*, (1896) 1 Ch 762, by Lindley, L. J.:

A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after

his own interests alone, and it is not right, or proper, or legal, for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the

mortgagor; that is all.

16. In the present case, the terms of the auction impose conditions laid down by the mortgagee himself for the sale of the property--conditions to

ensure prompt payment of the purchase price and also forfeiture of money in

case there was no prompt payment, Those conditions are for the benefit of the mortgagor as well as for the mortgagee. Having regard to the amplitude of the powers of a mortgagee in whom a power of sale is vested, he may no doubt have a power to extend time for payment by the purchaser or even enter into a fresh contract. But while doing so, he must act as a prudent man. If it appears that, to take advantage of a default by a purchaser, would result in a better price at a second sale of the property, he should not extend the time. An extension of time or variation of the contract of sale must be judged on the same touchstone of bonafides and prudence as the sale itself will be. In the present case, what are the circumstances? That the property did not fetch a proper price at the auction is evident. The mortgagee knew it. But, there having been no fraud or other invalidating circumstance, the mortgagor could not successfully challenge the sale. But an opportunity presented itself for annulling the sale by reason of the default of the purchaser, it was also evident that a fresh sale even by private treaty would fetch a better price. It was the duty of the mortgagee under the circumstances to consider whether he would be justified in extending the time to the appellant. What would he have done, had it been his own property? The mortgagee was under no legal obligation to extend the time; his own interests even did not demand it as the mortgagor was co-operating by bringing him a better offer. When under those circumstances the mortgagee decided to refuse to extend the time for payment he was doing what was fair and just and what any prudent man would have done. He was fair to the auction-purchaser also; he did not take advantage of the forfeiture clause contained in the terms of the auction notice.

17. The claim of the appellant for specific performance will, therefore, have to fail, in this view, he would not be entitled even to the relief by way of damages. But, unfortunately, neither the mortgagor nor the mortgagee has filed any memo of cross-objections or appeal to this Court against the decree for damages. We cannot, therefore, disturb that portion, of the decree. The appeal fails, and is dismissed with costs. Before concluding, we must express our obligations to Sri R. Sundaravaradan, who appeared "amicus curiae" on behalf of the mortgagor who was not represented by counsel, and presented his case with great ability.