

**(1991) 09 MAD CK 0007**

**Madras High Court**

**Case No:** O.S.A. No. 130 of 1983 and O.S.A. 324 of 1989

K. Mohanakrishnan

APPELLANT

Vs

Seetha Natarajan and 9 others

RESPONDENT

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**Date of Decision:** Sept. 25, 1991

**Acts Referred:**

- Transfer of Property Act, 1882 - Section 69, 69(3)

**Hon'ble Judges:** Mishra, J; Janarthanam, J

**Bench:** Division Bench

**Advocate:** Vedantham Srinivasan for M/s. S. Raghavan, R. Sankaranarayanan and M.K. Krishnakumar in O.S.A. 130/1983, for the Appellant; Vedantham Srinivasan for M/s. S. Raghavan, R. Sankaranarayanan and M.K. Krishnakumar in O.S.A. 324/1989 and Mr. R. Sundaravaradhan for P.B. Ramanujam in O.S.A.130/1983, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Mishra, J.

Plaintiff has appealed against the judgment of learned single Judge of this Court in C.S. No. 325 of 1975, dismissing his suit for

a declaration that the sale alleged to have been held on 30.6.1970 by the seventh defendant in the suit at the instance and under the instructions of

the first defendant is null and void, and not binding on the plaintiff and does not convey any title to the third defendant in the suit property, and that

the sale deed dated 16th August, 1971, is null and void and not binding on the plaintiff, and does not convey or transfer any right to the third

defendant in suit, as also for a direction to the defendants 1 to 3 in the suit to render a true and proper account of the income and expenses from

30.6.1970 till date of suit, for reconveyance of the property by defendants 1 and 2, for possession of the suit property and damages. The property bearing No. 2, Dr. Singaravelu Street, T. Nagar, Madras-17 (described in Schedule to the plaint) according to the plaintiff, originally stood in the name of late Kannammal, the mother of the plaintiff and defendants 4 and 5 and grandmother of the sixth defendant, having been purchased by the father of the plaintiff late Kannabiran Pillai, benami in the name of the mother of the plaintiff. During their lifetime, the mother executed a deed of simple mortgage in favour of one Dr. B.C. Raj for a sum of Rs. 40,000/- with interest at 12 per cent per annum with respect to the suit property.

Later, in or about November, 1968 since, according to the plaintiff, the mortgagee threatened to bring the suit property to auction sale, in exercise of the power of sale under S. 69 of the Transfer of Property Act, granted to him in the mortgage deed in his favour and since the second defendant in the suit (since dead and substituted by his legal heirs and representatives) offered to pay off the mortgage money due to Dr. Raj, a simple mortgage deed was executed by the mother in favour of the first defendant in the suit (daughter of the second defendant). In or about December, 1968, however, the first defendant obtained a deed of usufructuary mortgage from the plaintiff, his deceased brother K. Narayanaswami and the sixth defendant (since the plaintiff's mother had died, with respect to the very same property on condition inter alia that he would collect the rentals from the tenants in the premises and the Kalyana Mandapam which existed in the suit property, pay off the charges due to the Municipal and other Governmental authorities, etc., and "also pay for the monthly interest due to the 1st defendant in respect of her simple mortgage". The first defendant, according to the plaintiff, was a party to this arrangement by agreeing to collect the interest from the second defendant directly without looking to the plaintiff. This arrangement continued for quite some time. The second defendant, who was bound to pay the monthly interest due to the first defendant on account of her simple mortgage, however, defaulted. One of the conditions in the usufructuary mortgage in favour of the second defendant was that in case default was committed by him in complying with any of the terms and conditions of the usufructuary mortgage in

favour of the second defendant, the same would be cancelled and the second defendant would be bound to deliver back possession of the mortgaged property to the mortgagors; and notwithstanding, however, those conditions and the default committed by the second defendant, the first defendant, according to the plaintiff, without any demand as required under S. 69 of the Transfer of Property Act and without recourse to the second defendant, her own father and who alone, according to the plaintiff, was responsible for paying the interest to her from and out of the rental collected out of the property and from whom she had agreed to receive the interest as also payments of principal amount, attempted to bring the suit property to auction sale on or about 30th June, 1970, through the auctioneers Chandramani and Company, the seventh defendant in the suit.

The plaintiff then filed a suit O.S. No. 3018 of 1970 on the file of the City Civil Court, Madras, for a declaration that the first defendant was not entitled to bring the suit property to sale under S. 69 of the Transfer of Property Act and also for a consequential permanent injunction restraining the 1st defendant from so bringing the suit property to auction sale. The plaintiff impleaded the 2nd defendant as one of the defendants in the suit, and applied in I.A. 9454 of 1970 for an interim injunction to restrain defendants 1 and 2 in the suit from bringing the suit property to auction sale.

The Sixth Assistant City Civil Court Judge, however, ordered notice returnable by 4-7-1970. According to the plaintiff, he took notice to the auctioneer that day itself before the auction sale, but taking advantage of the fact that interim injunction was not granted, the 1st defendant, who was not at all at Madras at that time, acting through the 2nd defendant, purporting to exercise the power of sale under S. 69 of the Transfer of Property Act and under the mortgage deed, in active collusion with the 2nd defendant, went through the fraudulent sale which was solely aimed at knocking off the property worth more than 2 lakhs, for a very low price and it was fraudulently declared that the suit property had been sold for Rs. 60,000/-". The seventh defendant filed an affidavit in O.S.3018 of 1970 on 7-7-1970 stating that the property had been sold on 30.6.70 for Rs. 60,000/-. The plaintiff again approached the City Civil Court with a request in I.A.9611/70 for an injunction restraining the defendants 1 and 2

herein (defendants 1 and 2 in that suit) from executing a sale deed in favour of the alleged purchaser in furtherance of the auction sale of the

property alleged to have been held on 30-6-70. This time also the learned City Civil Judge only ordered notice to defendants 1 and 2. When the

said suit came up for final disposal, the defendants represented that the sale deed had already been executed. Ultimately, on 23-8-71, the plaintiff

withdrew the suit (O.S. 3018/70) with permission to file a suit for appropriate relief.

2. The main contest, however, has come from the 2nd defendant (now by his heirs and legal representatives), and the 3rd defendant, the auction

purchaser. The 1st defendant has adopted the written statement of 2nd defendant.

3. Many facts stated in the written statement filed on behalf of the 2nd defendant are not at variance with the statements of facts in the plaint that

the 1st defendant obtained a simple mortgage for a consideration of Rs. 44,000/- and that he himself obtained a usufructuary mortgage for a sum

of Rs. 14,000/-. His version, however, is that the suit property belonged exclusively to Kannammal, who executed a deed of first simple mortgage

along with her son K. Narayanaswami (since deceased) as surety in favour of Sakru Chand Sowcar on 21st August, 1952 for Rs. 7,900/- and

later Kannammal borrowed various amounts from Madras Purasawalkam Hindu Janopakara Saswatha Nidhi, and executed three mortgages over

the suit property on 12-6-1958 for Rs. 8,000/-, on 12-6-1958 for Rs. 4,000/- and on 5-10-1969 for Rs. 6,500/- respectively. She borrowed a

further sum of Rs. 5,000/- under another deed of mortgage, dt. 19-4-1965 from one Swaminatha Iyer, who advanced a further sum of Rs. 3,000/-

on promissory note, dt. 21-1-1966, and for the purpose of discharging the aforesaid mortgages and the debt covered by the promissory note and

for other purposes, she borrowed a further sum of Rs. 44,000/- from one Dr.G.B. Raj, and executed a Deed of Simple Mortgage on 14-9-1967

on the security of the suit property. Since Kannammal defaulted in the payment of the principal and interest payable to the mortgagee, Dr. G.B.

Raj, he brought the property to sale under S. 69 of the Transfer of Property Act. Kannammal filed the suit O.S.4358/68 on the file of the City Civil

Court, Madras praying for injunction restraining the mortgagee from bringing the property to sale to be held on 1-11-1968. At that time, in the

auction at the instance of the mortgagee, Dr. Raj, auction was held on 1-11-1968. The suit property was sold, and in the said auction, the 2nd

defendant was the purchaser. Kannammal died on 9-9-1968. The plaintiff and his deceased brother Narayanaswami came on record in the suit

O.S.4358 of 1968 on the file of the City Civil Court and applied for an injunction in that suit to restrain the mortgagee from executing the sale

deed. That application was dismissed. However, at the intervention of friends and mediators, the sale held on 1-11-1968 was not given effect to

and concluded, and instead, an agreement was entered into. As per the agreement, Dr. Raj, along with the deceased Narayanaswami and the

plaintiff agreed that the mortgage dt. 14-9-1967 should be assigned in favour of the 1st defendant (daughter of the 2nd defendant). Accordingly,

on 11-12-1968, a registered deed of assignment was executed by Dr. Raj in favour of the 1st defendant assigning the simple mortgage deed dt.

14-9-1967 in her favour On 11-12-1968, the plaintiff along with his deceased brother K. Narayanaswami and Parthasarathi, his son's son

executed a deed of usufructuary mortgage for a consideration of Rs. 14,000/-. The 2nd defendant was accordingly put in possession of the suit

property. As per the recital of the usufructuary mortgage, the 2nd defendant was empowered to realise the rental collection, pay all the municipal

and other public charges due and payable in respect of the suit property, incur necessary expenses for the upkeep and maintenance of property

and appropriate the balance towards the interest on the principal sum of Rs. 14,000/- secured under the Deed of Usufructuary mortgage dt. 11-

12-1968. Further, according to the 2nd defendant, it was also specifically agreed that the balance of realisation should be paid towards the interest

due and payable in respect of the 1st mortgage dated 14-9-1967 which was assigned in favour of the 1st defendant. Coming to the question of

maintenance of accounts, the 2nd defendant has said:

.....this defendant agreed as per the terms of the usufructuary mortgage to keep a true and proper account of all the income and expenditure

while he is in possession of the mortgage property.....

This defendant sent true copies of all the accounts to the plaintiff and the mortgagors Mohanakrishnan, Narayanasamy and Parthasarathy under

certificate of posting. Plaintiff went through the accounts given by the 2nd defendant and satisfied himself about the truth thereof and signed the accounts on 8-2-1969, 16-2-1969, 23-2-1969 and 1-3-1969. The statement of accounts for the period ending March, 1969 was sent to the plaintiff and the other mortgagors under certificate of posting to the plaintiff was not available that time. On 18th July, 1969, the plaintiff signed the statement of accounts upto 15th March, 1969. Similarly, plaintiff also in token of the correctness of the accounts signed the accounts for the period ending 23-3-1969, 31st March, 1969, 15-4-1969. Second defendant also sent the statement of accounts periodically to the plaintiff and other mortgagors on 2-6-1969, 23-6-1969, 26-7-1969, 3-9-1969, 5-11-1969 and 8-12-1969.

4. The defendant's case further is that on 3rd February, 1970, the 2nd defendant addressed a letter to the plaintiff and the mortgagors pointing out that it was not possible to work the Kalyana Mandapam with a probable income of Rs. 9,000/- as against the anticipated expenditure of Rs.

16,000/- in 1970 and suggesting the sale of the property by public auction. Along with that letter, the statement for December, 1969 and January,

1970 was sent. This was followed by another letter dt. 13th February, 1970, addressed to the mortgagors. In that letter, the mortgagors were

informed that a sum of Rs. 2,750/- was due towards interest for the period of five months at Rs. 550/- per mensem from 1-11-1969 to 31-3-

1970 in respect of the mortgage deed executed by the 2nd defendant besides the principal of Rs. 44,000/-. Reference was also made to the

amount payable to him in the sum of Rs. 14,875/- being the principal and interest due in respect of the usufructuary mortgage. Further details were

also given in that letter about the amount spent for the construction etc. The total amount due and payable by the mortgagors including the amount

payable to the 1st defendant was Rs. 83,338/-. On 14-3-1970, 20-4-1970, 2-6-1970 and 29-6-1970, the 2nd defendant sent accounts relating

to February 1970, March, 1970, April and May, 1970 and June, 1970 respectively. The plaintiff never questioned the truth or genuineness of the

accounts at any time. Giving further details as to the facts leading to the suit O.S.3018 of 1970 and the auction sale, the defendants have alleged

that it was incorrect to state the first defendant did not make any demand as required under S. 69 of the Transfer of Property Act. In fact,

Chandramani and Company had sent a notice of demand on the plaintiff and the other mortgagors, but when no response came from them, on 30th

June 1970 the seventh defendant conducted the auction in which the third defendant purchased the property for Rs. 60,000/- followed by the

execution of the sale deed on 16-8-1970 and registration on 16-8-1971.

5. The indisputable facts are:

(1) The first defendant is the daughter of the second defendant.

(2) The second defendant, before the simple mortgage in favour of the 1st defendant, had taken some sort of sale in an auction under S. 69 of the

Transfer of Property Act (according to his own version) conducted at the instance of Dr. Raj, which however, was transformed into a deed of

assignment of the simple mortgage which Dr. Raj held in favour of the first defendant on 11-12-1968.

(3) The second defendant entered in possession of the property on 11-2-1968 as usufructuary mortgagee on the condition that he would collect

rent from the tenants and income from the Kalyana Mantapam, etc., and pay the taxes etc., including interest on the simple mortgage of his

daughter, the first defendant according to him, only when there was surplus after the other expenses.

(4) The second defendant defaulted in payment of interest to the first defendant, according to him because there was no surplus available for

discharging the mortgage, and that he informed the plaintiff and the other mortgagors on various dates that they had failed to honour the

commitments under the simple mortgage in favour of the first defendant as well as under the usufructuary mortgage deed in his favour.

6. It is on the record that the third defendant participated in the alleged auction held on 30-6-1970, and it is said that an advance of Rs. 15,000/-

was paid by him towards the purchase money of Rs. 60,000/- but the sale deed was executed in the name of Thaiyanayaki Ammal Trust having its

office at No. 11/3, Bazulla Road Thiagarayanagar, Madras-17, represented by the trustee K.R. Viswanathan, of which trust the second defendant

was/is the founder trustee.

7. Sengottuvelan J., who tried the suit, has, however, said in his judgment at one place:

It is stated in the plaint that the sale on 30-6-1970 was conducted without enough publication which resulted in fetching low price for the property.

It is also contended that there was no sale on 30-6-1970 and that the defendants, 2 and 3 in collusion with the seventh defendant had fraudulently

brought about the sale. The first defendant who is entitled to bring the property to sale under S. 69 of the Transfer of Property Act entrusted the

proceeding for sale to the 7th defendant who are the recognised auctioneers. Ex. D-37 is a draft sale notice published by the auctioneers and

approved by the first defendant. Ex. D-38 is a letter approving the pamphlet and the advertisement by the first defendant. Ex. D-1 is the notice

published by the seventh defendant the auctioneer in respect of the auction conducted on 30-6-1970. The fact that the notice of auction was held

on 30-6-1970 is also borne out by the receipt for the payment of 25 per cent of the bid amount by the auction purchaser, the third defendant

which is marked as Ex. D-36 dated 30-6-1970.

At another place, the learned Single Judge, has said:

There is much force in the contention on the side of the plaintiff that the income in the subsequent years cannot in any way, go below the income

fetched during 1969. Since Ex. P-13 came into existence before the difference of opinion arose between the plaintiff and the second defendant and

contents of Ex. P-13 are of much evidentiary value. Hence, we can easily, assess the monthly income of the property at Rs. 1900/-. The annual

income amounts to Rs. 22,800/- and after deducting the tax and other expenses towards maintenance and after making an allowance for the

uncertainties of the income, we can safely come to the conclusion that the income from the suit property will be at least Rs. 6,000/- per annum. The

market value can easily be taken to be 20 years income which amounts to Rs. 1,20,000/-. Even if we take the building and the site separately the

site can be valued at Rs. 25,000/- per ground which amounts to Rs. 1,00,000/- and the superstructure can easily be valued at Rs. 20,000/- as on

30-6-1970, even after allowing depreciation. Hence on 30-6-1970, the building will be worth at least Rs. 1,20,000/- though not Rs. 2,75,000/- as



alleged by the plaintiff. Hence, the complaint of the plaintiff that proper value had not been fetched in the auction conducted on 30-8-1970 will have to be accepted.

At yet another place, the learned Single Judge has stated;

I have already found that the market value of the suit property on the date of sale, viz., 30-8-1970 is Rs. 1,20,000/-. If the auction was conducted

after wide publicity, there is no reason why the suit property should not have fetched a price of at least Rs. 1,20,000/- in the auction. Though

D.W.2, an employee of Chandramani & Co. the auctioneers had been examined as a witness, he is not able to produce any document relating to

the publication of the conduct sales. Not even the person who made the tom tom is examined. Under the circumstances, we have to conclude that

there is no evidence of publication of the sale and that proper market value had not been fetched in the auction conducted on 30-6-1970. In such a

case, under S.69(3) of the Transfer of Property Act, the mortgagor will be entitled to a decree for damages against the person exercising the

power. Hence, in this case, the difference between the market value and the amount fetched in the auction will have to be awarded as damages to

the mortgagors.

8. A rule which has received universal recognition and needs no reiteration, however, seems to have been over stretched by the mortgagee in the

sense that a mortgagee with a power of sale is 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, court will not

interfere even though the sale be very disadvantageous, unless indeed the price is so low as itself be evidence of fraud. This statement of law on the

subject in the early English decisions has been often repeated by the courts in India including the Supreme Court. In Pitchai Mohideen v. C.D.K.

Das & Sons AIR 1933 Madras 736 , the dictum approved by the Judicial Committee in Haddington Island Quarry Co Ltd., v. A.W. Huson 1911

A.C. 722 has been quoted, a dictum which was stated by Kay J. In Warner v. Jacob 1882 20 Ch.D. 220

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 is bona fide for that purpose

without corruption or collusion with the purchaser, the Court will not interfere, even though the sale is very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.

This view has been reiterated by a Bench of this Court in Chakrapani Naidu v. Gopal Mudaliar 1972 II M.L.J. 290. We do not propose to multiply decisions dealing with this dictum.

9. The finding recorded by the learned Judge about the value of the property is unassailable. The sale was knocked down at almost half of the expected selling price of the property as found by the learned single Judge. Had this happened in a proper sale conducted with full publicity, perhaps this in itself would not have been enough to doubt the bona fide of the mortgagee. The learned single Judge has also found that.

There is no evidence regarding the details of the publication of the auction.....under the circumstances, we have to conclude that there is no evidence of publication of the sale and that proper market value had not been fetched in the auction conducted on 30.6.1970.

True the mortgagee had handed over the auction to an auctioneer Company, Chandramani & Co. But then, who was the Purchaser? The third

defendant, Viswanathan? Nay, Thaiyanayali Ammal Trust, of which the second defendant is the founder trustee. And who the second defendant

is? The father of the first defendant, himself having a usufructuary mortgage and bound to fulfil a condition therein that interest would be paid to the

first defendant daughter, by him. We are tempted at this stage to refer to the evidence of the second defendant in the suit, examining himself as

D.W.1 [Extracts from deposition omitted Ed.]

XX XX XX

The above evidence shows that Viswanathan was a name lender for the second defendant. There is enough indication in the evidence afore-quoted that the second defendant deposited one-fourth of the bid amount.

10. Then, there is the story about the purchase by the Trust. We know from the record that the sale was effected on 30.6.1970. We are also told,

and so the records reveal, that the sale deed was executed on 16-2-1971 in the name of Thaiyanayaki Ammal Trust, that there was no such legal entity in existence until 1973. Evidence in this behalf is available in the deposition of the second defendant himself.[Extracts from deposition omitted Ed.]

X X X

The association of the first defendant Seetha Natarajan, with the second defendant is not far to seek. Viswanathan is only a name lender on behalf of a so-called trust which was non-existent on 30.6.1970, and if it had to take birth, since it took birth in the year 1973, it was only because the second defendant was the founder. The facts speak for themselves. The simple mortgage in the hands of the first defendant, which was used for the purpose of sale under S. 69 of the Transfer of Property Act, the usufructuary mortgage in the hands of the second defendant, the father of the first defendant, which facilitated the sale under S. 69 of the Act, the creation of a trust by the second defendant only to purchase on sale under S. 69 the property which he held under the usufructuary mortgage together show beyond doubt that it was in execution of a scheme in which the property belonging to the plaintiff mortgagor was sold at a grossly low value, not even enough to meet the claim of the first defendant upon the simple mortgage, not to speak of the additional amount with which the property had already been charged by the second defendant, that is to say, the usufructuary mortgage. Such a sale cannot be called bona fide. It was not a sale at a low valuation due to the negligence on the part of the mortgagee. There was no trust that the mortgagee was holding for the mortgagor, yet there has been a fiduciary relationship between them, and bona fide alone could justify such a sale. Courts in India do not ordinarily interfere with the right of the transferee at an auction sale under S. 69 of the Transfer of Property Act, the principle being that the transferee being a third party who is not at fault, even though there is some negligence or mistake committed by the mortgagee in conducting the sale; but when the purchaser or a transferee is none else than the mortgagee, Courts interfere. Here is a case in which the mortgagee ostensibly involved in the sale is the daughter of the second defendant; and the purchaser is a trust

founded by him. He has been in possession of the property from before the sale, and continued in possession even after the sale. That is what he has said in his evidence. It is difficult on such facts not to say, that if not exactly fitting in the Jacket of a case of the mortgagee being the purchaser himself, it is a case very near it.

11. We have given our anxious consideration to all such aspects, which would throw light upon the conduct of sale of the property at the instance

of the first defendant mortgagee. Our irresistible conclusion is that there is no escape from the conclusion that it is vitiated for the reason of mala

fide.

12. It is not necessary to say about the dispute relating to the accounts which the second defendant as usufructuary mortgagee was required to

render to the plaintiff. No fault can be found with the decree in this behalf, for, it is a condition under which he held the mortgage. The calculations

upon which he himself proceeded, and a good reason was assigned by the learned Single Judge in accepting the year previous to the disputed

period as the basis for working out the annual income, are sufficient material to hold that everything was not right in the accounts of the second

defendant. The trial court has done no mistake in this regard and rightly given a decree for rendition of accounts. In the result, O.S.A. No. 130 of

1983 filed on behalf of the plaintiff is allowed with costs throughout. The suit is decreed in full, and the sale alleged to have been held on 30th June,

1970, by the seventh defendant at the instance and under the instructions of the first defendant is declared null and void, and not binding on the

plaintiff. Accordingly, any conveyance by the first defendant to the third defendant, whether in his name or in the name Thayyanayaki Ammal Trust

stands annulled, and is not binding on the plaintiff. O.S.A.324 of 1989 is dismissed, but without costs.

These Appeals having been posted for clarification the court made the following order:

(The order of the Court was made by Mishra, J.)

The matter has been brought before us after the disposal of the appeals by our judgment dated 17.7.91 for a clarification whether the

appellant/plaintiff who sued as a pauper would be asked to pay the court fee. The trial court had dismissed the suit and since the estate fell in the

hands of the defendant, directed the defendant to pay court-fee. The said Judgment, however, has been set aside in the appeal and the sale deed

has been declared null and void. The estate however, has reverted to the plaintiff. We do not have, however any material before us to find out

whether the estate in respect of which the dispute had been raised is sufficient for the court fee. We do not also propose to examine this aspect.

We accordingly order that no court-fee shall be demanded from either party.