A.Arunagiri vs The Egmore Benefit Society Ltd on 27 June, 2013

Author: V.Ramasubramanian

Bench: V.Ramasubramanian

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.6.2013

CORAM:

THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN

C.S.Nos.339 of 1999, 995 of 1999 and 551 of 2001
and
Tr.C.S.Nos.2 and 3 of 2003

A.Arunagiri .. Plaintiff in CS 339/1999

M/s.Ramu & Co.,
Represented by its Partner, B.Sudha,
91, C.P.Ramasamy Road,
Alwarpet, .. Plaintiff in CS 995/99 & 551/
Chennai-18. D3 in CS 339/99

A.Thayumanaguru .. Plaintiff in Tr.CS 2/03

G.Anbazhagan .. Plaintiff in Tr.CS 3/03

Vs.

The Egmore Benefit Society Ltd.,
No.13, Flowers Road, .. D1 in CS 339/99, 551/01,
Chennai-600 084. Tr.CS 2&3/03 / D2 in CS 995/9

N.M.R. Investments Pvt. Ltd.,

Flat No.A1, Rams Apartments,
No.3, 8th Street, Gopalapuram, .. D1 in CS 995/99 /D3 in CS 551
Chennai-600 086. & Tr.CS 2&3/2003

Sri Raj & Co.,
No.14, II Floor,
Sunkurama Chetty Street, .. D2 in CS 339/99 & 551/01 &
Chennai-1. D3 in CS 995/99

M/s.Ramu & Co.,
91, C.P.Ramasamy Road, .. D3 in CS 339/99 / D2 in Tr.CS
Alwarpet, Chennai-18. 2 & 3/03 & Plaintiff in CS 99

Sri K.Balasikhamani .. D4 in CS 339/99

B.Sudha .. D5 in CS 339/99

N.Amaravathi .. D6 in CS 339/99

M.K.Ayyanar .. D7 in CS 339/99

A.Muthulingam .. D8 in CS 339/99

Mrs.B.Gurubagiam .. D9 in CS 339/99

Ms.B.Anandhi .. D10 in CS 339/99

Smt.Ramu Ammal .. D11 in CS 339/99

For Plaintiffs : Mr.S.V.Jayaraman, S.C.
For Mr.S.Jayakumar

Mr.N.Jothi
For Mr.S.Jayakumar

Mr.D.Selvam

For Defendants : Mr.M.K.Kabir, S.C.
For Mr.G.Krishnakumar

Mr.R.Krishnaswamy, S.C.
For Mr.K.Harishankar

C O M M O N J U D G M E N T

C.S.No.339 of 1999 is a suit filed by an individual for redemption of a simple mortgage dated 31.7.1995 created by a partnership firm by name M/s.Ramu & Co., which is the third defendant in the suit, in favour of the Egmore Benefit Society Ltd., which is the first defendant in the suit and for various other reliefs.

2. C.S.No.995 of 1999 is a suit filed by the mortgagor, which is a partnership firm by name M/s.Ramu & Co., seeking a declaration that there was no concluded contract of sale between the mortgagee viz., the Egmore Benefit Society Ltd., which is the second defendant in the suit and the auction purchaser, who is the first defendant in the suit.

3. C.S.No.551 of 2001 is a suit filed by the partnership firm (mortgagor) for redemption of simple mortgage dated 31.7.1995 created by the plaintiff firm in favour of the first defendant viz., the Egmore Benefit Society Ltd., and for other reliefs.

4. Tr.C.S.No.2 of 2003 and Tr.C.S.No.3 of 2003 are suits filed by the erstwhile partners of the mortgagor firm, for declaration that the mortgage created by the partnership firm viz., Ramu & Co., in favour of the Egmore Benefit Society Ltd., is null and void and for a consequential declaration that the auction sale conducted by the mortgagee on 13.12.1999 also is null and void.

5. In effect, there are actually two suits for redemption of mortgage, one filed by an individual who ceased to be a partner of the mortgagor firm and another filed by the mortgagor firm itself. There is one suit by the mortgagor firm for declaring the auction sale already held, to be null and void. The other two suits are by the erstwhile partners of the firm (mortgagor), seeking a declaration that the very creation of the mortgage by the firm, was null and void.

6. Since two suits are by the borrower partnership firm and the other 3 suits are by the erstwhile partners of the firm, seeking various reliefs that actually revolve around the creation of a mortgage and the sale of the mortgaged property by the mortgagee, all the 5 suits were grouped together for joint trial, one set of issues was framed in common for all the 5 suits, evidence was let in common and hence, all the 5 suits are disposed of together by a common judgment.

7. The first three suits C.S.Nos.339 & 995 of 1999 and 551 of 2001 fall under one category and the other two suits Tr.C.S.Nos.2 and 3 of 2003 fall under a different category. However, I shall extract the pleadings and the reliefs sought in each of the five suits separately, before plunging into the discussion in common.

Pleadings in C.S.No.339 of 1999:

8. The averments contained in the plaint in C.S.No.339 of 1999 in brief, are as follows:-

> (a) The plaintiff and defendants 4 to 8 in C.S.No.339 of 1999 were running a partnership firm under the name and style of M/s.Ramu & Co., having Registered

Office at No.91, C.P.Ramasamy Road, Alwarpet, Chennai-18. The partnership firm is arrayed as the third defendant in the suit. The partnership firm borrowed an amount of Rs.25 lakhs from the first defendant viz., the Egmore Benefit Society Ltd., and the first defendant granted the loan. On 31.7.1995, the fourth defendant, acting as the Power Agent on behalf of the third defendant firm (borrower) executed a deed of simple mortgage in favour of the first defendant, mortgaging the property of an extent of about 39 grounds at Door No.91, C.P.Ramasamy Road, Alwarpet, Chennai-18.

(b) The partnership firm also borrowed a further amount of Rs.4,75,00,000/- from the first defendant. A loan agreement to the said effect was executed by the fourth defendant on 01.8.1995.

(c) The loan amounts were repayable with interest at 24% p.a., within a period of one year. But, the amount was not repaid.

(d) On 12.7.1997, the first defendant issued a lawyer's notice, demanding a sum of Rs.6,34,46,170/-, allegedly due both on the simple mortgage loan and under the second loan agreement.

(e) The notice also indicated that if the borrowers failed to repay the money, the first defendant would exercise the power conferred by the deed of simple mortgage to bring the property to sale by public auction.P

(f) On 14.8.1997, an auction notice was issued by the first defendant (mortgagee) through the second defendant, who are registered auctioneers.

(g) Immediately the third firm (borrower) filed a suit through the fifth defendant in O.S.No.6201 of 1997 on the file of the City Civil Court, Chennai, seeking a declaration that some of the sub-clauses of clause-7 of the deed of simple mortgage dated 31.7.1995 were null and void and also for a permanent injunction to restrain the mortgagee and the auctioneer (defendants 1 and 2) from bringing the property to sale. Along with the suit, an application for temporary injunction was also made in I.A.No.16406 of 1997 to stall the auction.

(h) On 03.9.1997, the City Civil Court granted an injunction restraining the defendants 1 and 2 from auctioning the property subject to the condition that the firm should deposit Rs.7 lakhs. The condition was complied with and the interim order was extended from time to time.

(i) Challenging the extension of the interim order of injunction from time to time, the first defendant (mortgagee) filed a civil revision petition in CRP No.1999 of 1998 on the file of this Court. In the civil revision petition, this Court granted an interim suspension of the order of injunction. When the firm filed a vacate stay petition in the

civil revision petition, this Court passed an order on 30.01.1999, directing the firm to deposit a sum of Rs.8.40 crores, on or before 30.4.1999, with a condition that the stay of auction will stand vacated if the condition was not complied with.

(j) The borrower firm filed an application for extension of time. But it was dismissed by this Court on 30.4.1999. The same was confirmed by the Supreme Court on 13.5.1999.

(k) The third defendant firm filed a second suit in O.S.No.7480 of 1997 on the file of the City Civil Court, Chennai, for a declaration that the Power of Attorney allegedly executed on 01.8.1995 was null and void.

(l) On 10.5.1999, the defendants 1 and 2 issued another public notice, fixing the date of auction as 31.5.1999.

(m) The said auction was fixed on the basis of an undertaking given by the fourth defendant before this Court in CRP No.1999 of 1998. The undertaking was given by the fourth defendant, fifth defendant and defendants 9 to 11, on the basis of a Deed of Admission-cum-Retirement, dated 01.4.1998, by which the plaintiff and the defendants 6 to 8 retired from the firm and defendants 9 to 11 were inducted in their place.

(n) Since the undertaking recorded on 30.01.1999 before this Court in CRP No.1999 of 1998 was violated, the property was brought to sale by the auction notice dated 10.5.1999.

(o) The undertaking given by the erstwhile Managing Partner and the newly inducted Partners was contrary to Sections 19(2)(c) and (e) as well as Section 23 of the Indian Contract Act and the provisions of Order XXIII, Rule 3, CPC and Section 69 of the Transfer of Property Act.

(q) The property brought to sale is worth more than Rs.50 crores and the amount due on the simple mortgage is only Rs.40,43,127.32. The plaintiff is prepared to pay the said amount of the redemption of the simple mortgage. The plaintiff reserves his right under Order II, Rule 2, CPC, to redeem the equitable mortgage at a later date.

(r) In the light of the above averments, the plaintiff A.Arunagiri, who was one of the partners and who allegedly retired under the Deed of Admission-cum-Retirement dated 01.4.1998 has sought the following reliefs in C.S.No.339 of 1999:-

"(i) To pass an order of redemption of the simple mortgage dated 31.7.1995 executed by the partnership firm M/s.Ramu & Co., (the third defendant) in favour of the Egmore Benefit Society Ltd., (first defendant herein) for a sum of Rs.25.00 lakhs.

(ii) To declare the Admission-cum-Retirement Deed of partnership dated 1.4.1998 is null and void.

(iii) To declare the affidavit of undertaking filed in CRP No.1999 of 1998 by the fourth and fifth defendants along with the defendants Nos.9, 10 and 11 and the consent order passed on 30.1.1999 in CRP No.1999 of 1998 based on the above undertaking are not binding on the plaintiff.

(iv) To declare that the Egmore Benefit Society Ltd., Madras-600 084, the first defendant herein, has no right of alienation by private sale invoking Section 69 of the Transfer of Property Act in respect of the loan covered under the equitable mortgage deed dated 1.8.1995 except of recovery of the dues by regular suit in accordance with law.

(v) To grant decree for permanent injunction restraining the defendants 1 and 2, their men or agents from in any manner bringing the suit schedule property for sale in public auction pursuant to the auction notice dated 10.5.1999 published in the Daily Thanthi and The Hindu news papers on 31.5.1999 or at any time in future by any other means and pass such further or other orders.

(vi) Direct the defendants herein to pay the costs of this suit.

(vii) Grant such other relief or reliefs as this Hon'ble Court may deem fit and proper in the circumstances of this case and thus render justice."

9. The mortgagee Egmore Benefit Society Limited has filed a written statement in C.S.No.339 of 1999. The averments contained therein can be summarised as follows:-

(a) At the request of the third defendant firm and its partners, the first defendant sanctioned a loan of Rs.5 crores to the third defendant. In the loan agreement dated 01.8.1995, the borrower agreed to execute a demand promissory note, to execute a deed of simple mortgage for Rs.25 lakhs with power of sale without the intervention of the Court and to create an equitable mortgage by deposit of title deeds in respect of the balance loan amount of Rs.4,75,00,000/-.

(b) Under the loan agreement, the firm also agreed to execute an irrevocable power of attorney in favour of the first defendant enabling them to sell the mortgaged property for the realisation of the dues, in respect of the loan of Rs.4,75,00,000/-.

(c) Under Clause 18 of the loan agreement dated 01.8.1995, the third defendant agreed to redeem the simple mortgage for Rs.25 lakhs only after satisfaction in full of all the amounts due and outstanding under the equitable mortgage. Under Clause 17, the first defendant had the right to appropriate all monies paid by the third defendant in the order of priorities to be decided at the sole discretion of the first defendant.

(d) Under the loan agreement, it was also agreed that while the loan amount of Rs.25 lakhs secured by the registered mortgage was to be repaid on or before 31.7.1996, the amount due under the equitable mortgage was repayable on demand.

(e) In accordance with the terms of the loan agreement, the third defendant executed a deed of simple mortgage dated 31.7.1995 and six demand promissory notes dated 20.7.1995, 01.8.1995, 18.4.1996, 20.4.1996, 16.5.1996 and 05.6.1996, apart from an irrevocable power of attorney dated 01.8.1995.

(f) The third defendant also deposited on 01.8.1995 at the Office of the first defendant, all title deeds of the suit schedule property with the intention to create equitable mortgage by deposit of title deeds.

(g) The third defendant availed the loan amount of Rs.5 crores, but defaulted in payment of the principal as well as interest. Therefore, a legal notice dated 12.7.1997 was issued, calling upon the third defendant to pay an amount of Rs.6,34,46,170/- due as on 30.6.1997 together with future interest.

(h) To the said notice, all the partners of the firm, including the plaintiff, sent a reply on 30.7.1997, undertaking to clear the dues and requesting the first defendant to give time. But, they did not make any payment. Therefore, the first defendant engaged an auctioneer, who is the second defendant, to sell the property and the second defendant issued a letter dated 14.8.1997, informing the third defendant of the proposed legal action.

(i) Thereafter the third defendant issued a letter dated 22.8.1997, proposing to cancel and revoke the power of attorney dated 01.8.1995 executed by the third defendant, authorising the first defendant to sell the mortgaged property. The first defendant issued a reply on 02.9.1997 pointing out that the power was coupled with interest and that it could not be revoked unilaterally.

(j) After the exchange of these notices, the third defendant filed a suit on 01.9.1997 in O.S.No.6201 of 1997 on the file of the VI Assistant Judge, City Civil Court, Chennai, for a declaration that sub-clauses (ii) and (iii) of clause 7 of the mortgage deed was null and void and opposed to public policy.

(k) In the suit, the third defendant obtained an interim order of injunction in I.A.No.16406 of 1997 on 03.9.1997, restraining the defendants 1 and 2 from proceeding with the auction.

(l) After obtaining the injunction, the third defendant issued another letter dated 18.10.1997, taking a contradictory stand to the effect that no power of attorney was executed. This letter was also suitably replied to by the first defendant.

(m) Thereafter the third defendant filed a fresh suit in O.S.No.7480 of 1997 on the file of the VI Assistant Judge, City Civil Court, Chennai, for declaration that the power of attorney was null and void and for a consequential injunction.

(n) Since the application for injunction in I.A.No.16406 of 1997 in O.S.No.6201 of 1997 was getting postponed from time to time with the third defendant moving applications for reopening arguments and for amending the plaint and also due to certain unpleasant events that happened, the first defendant moved a civil revision petition in CRP No.1999 of 1998 on the file of this Court under Article 227 of the Constitution.

(o) On 30.7.1998, this Court ordered notice of motion in the civil revision petition and granted the stay of further proceedings in the suit and also summoned the records from the City Civil Court, as there were allegations of tampering of records.

(p) In the civil revision petition, the first defendant agreed reluctantly to waive 25% of over due interest, on condition that the third defendant paid the entire amount on or before 30.4.1999.

(q) The third defendant agreed to and undertook to pay Rs.8,39,72,328.60 with interest at 24.50% p.a., from 01.2.1999 till the realisation, on or before 30.4.1999.

(r) There was also a default clause to the effect that if the third defendant defaulted in payment, the first defendant would not only be entitled to proceed with the auction sale, but also with the waiver of over due interest would go.

(s) The third defendant filed an affidavit of undertaking on 30.01.1999 to the said effect. It was sworn to by defendants 4, 5 and 9 to 11. On the basis of the said undertaking, this Court disposed of the civil revision petition.

(t) When the affidavit of undertaking was filed, the first defendant pointed out that at the time of availing of the loan, the defendants 9 to 11 were not partners and that only the plaintiff and defendants 4 to 8 were the partners.

(u) But the third defendant agreed at that time to produce the evidence of reconstitution of the partnership. On the basis of the said assurance, the civil revision petition was disposed of, recording the affidavit of undertaking.

(v) After filing an affidavit of undertaking and securing an order, the third defendant filed a special leave petition in SLP(Civil) No.6491 of 1999 on the file of the Supreme Court. But they withdrew the same on 27.4.1999.

(w) After withdrawing the Special Leave Petition, the third defendant filed an application in CMP No.7283 of 1999 in CRP No.1999 of 1998 praying for extension of

time by six months to discharge the entire debts.

(x) That application was dismissed on 30.4.1999. As against the rejection of the application for extension of time, the third defendant filed another special leave petition in SLP (Civil) No.7036 of 1999. But it was dismissed by the Supreme Court on 13.5.1999.

(y) In view of the above, the default clause came into force and the first defendant took steps to bring the property to sale. At that time, the third defendant sent Rs.25 lakhs by way of a demand draft, claiming as though it was in full quits of the simple mortgage loan. But the first defendant refused to accept the same and issued a notice fixing the date of auction as 31.5.1999. It was at that time that the third defendant and its partners had set up the plaintiff to institute the above suit, to circumvent the affidavit of undertaking given to this Court in CRP No.1999 of 1998.

(z) The clauses 17 and 18 contained in the mortgage deed are legally valid and they are not contrary to the public policy. Section 61 of the Transfer of Property Act, enables the parties to incorporate any condition, to be complied with, before seeking the redemption of a simple mortgage.

(aa) The power of attorney executed on 01.8.1995, by the fourth defendant, who was the authorised representative of the third defendant, was validly executed. It is false to say that the signatures of the fourth defendant were obtained on blank stamp papers or pre-dated stamp papers.

(ab) The power of attorney was irrevocable in view of Section 202 of the Contract Act, 1872, in as much as it was coupled with interest. Therefore, the cancellation and revocation is illegal and non-est. (ac) As regards the power of attorney, the plaintiff has made contradictory statements. First, he had claimed in O.S.No.7480 of 1997 that the same was executed under threat and undue influence. But, now, he has taken a different stand.

(ad) The first defendant has the right to appropriate all amounts paid by the third defendant, towards the loan that was secured by the equitable mortgage.

(ae) The plaintiff is not entitled to seek appropriation of the payments, in contravention of the clauses contained in the agreement.

(af) The allegation of collusion between the first defendant and the fourth defendant, to retire the plaintiff and defendants 6 to 8 from the partnership, is cooked up for the purpose of this case. On the contrary, the plaintiff and the defendants 3 to 11 have colluded to defraud the first defendant and to deceive this Court by filing an affidavit of undertaking in CRP No.1999 of 1998.

(ag) The allegation that the reconstitution of the firm had taken place without the knowledge and consent of the plaintiff, is totally false.

(ah) The plaintiff as well as defendants 4 to 8 are all residing in the very same address, even as per the letter dated 23.3.1998.

(ai) Even as per the long and short cause title, all the defendants 4 to 11 were residing at the very same address even on the date of the suit. Therefore, the present suit is actually collusive.

(aj) Moreover, in the application for extension of time in CMP No.7283 of 1999 in CRP No.1999 of 1998, the third defendant pleaded and produced an agreement dated 28.01.1999 entered into with a foreign investment company. This agreement was relied upon by the plaintiff himself in support of the application for injunction O.A.No.317 of 1999. Moreover, that agreement contains the signature of the ninth defendant, confirming thereby that the reconstitution was true and valid.

(ak) Order XXIII, Rule 3-A of CPC bars a suit to set aside a decree on the ground that the compromise forming the basis for the decree was not lawful. Therefore, the relief sought in the suit is contrary to law.

(al) The claim that the suit property is worth more than Rs.50 crores is incorrect.

(am) The plaintiff has no independent right to sue in his personal capacity for the redemption of the mortgaged property. An individual partner, even if he continues to be a partner, has no right, except to a share in the profits.

(an) Since the firm itself had already instituted two suits, in O.S.Nos. 6201 and 7480 of 1997 on the file of the City Civil Court on the same cause of action, without seeking redemption and without obtaining leave under Order II, Rule 2, CPC, the above suit is liable to be dismissed.

(ao) In any case, the plaintiff had intentionally omitted to include the portion of the loan secured by equitable mortgage. Therefore, he has forfeited the right to seek the relief in the present suit.

(ap) The order dated 30.01.1999 in CRP No.1999 of 1998 had attained finality. Therefore, the plaintiff cannot seek to reopen the very same issue and re-agitate the same.

10. The other defendants did not file any written statement in C.S.No.339 of 1999.

Pleadings in C.S.No.995 of 1999:

11. The averments contained in the plaint in C.S.No.995 of 1999 in brief, are as follows:-

(a) The plaintiff is the absolute owner of the land with superstructures located at No.91, C.P.Ramasamy Road, Alwarpet, Chennai-18, measuring an extent of about 39 grounds.

(b) On 31.7.1995, the plaintiff executed a registered deed of simple mortgage in favour of the second defendant viz., the Egmore Benefit Society Ltd., mortgaging the said property described in the schedule, in favour of the second defendant for a loan of Rs.25 lakhs.

(c) On 01.8.1995, the plaintiff also executed an equitable mortgage by way of a Memorandum of deposit of title deeds in respect of the very same property in favour of the second defendant for a sum of Rs.4.75 crores borrowed by them.

(d) On 14.8.1997, the second defendant issued a notice through the third defendant, an auctioneer, threatening to sell the property in public auction, for the default committed in repayment of the loan.

(e) Upon receipt of the notice, the plaintiff filed a suit in O.S.No.6201 of 1997 on the file of the City Civil Court, along with an application in I.A.No.16406 of 1997, seeking an interim injunction.

(f) An interim injunction was granted by the City Civil Court on condition that the plaintiff deposits Rs.7 lakhs. The conditional order was complied with.

(g) But the interim order passed by the City Civil Court was taken up by way of revision by the second defendant on the file of this Court in CRP No.1999 of 1998.

(h) On 30.01.1999, the civil revision petition was disposed of on the basis of an affidavit of undertaking executed by some partners of the plaintiff to the effect that an amount of Rs.8.40 crores would be paid on or before 30.4.1999, failing which the second defendant would be entitled to sell the property.

(i) As on date, the plaintiff had paid a sum of Rs.4.69 crores leaving a balance of Rs.31 lakhs on the principal. But the second defendant claimed a sum of Rs.7 crores.

(j) The plaintiff was not able to fulfil its obligation in terms of the order dated 30.01.1999 made in CRP No.1999 of 1998. Therefore, the defendants 2 and 3 issued a notice for public auction, to be held on 31.5.1999.

(k) Immediately, one of the partners of the plaintiff by name A.Arunagiri, moved this Court by way of a suit in C.S.No.339 of 1999, challenging the affidavit of undertaking as well as the order passed on 30.01.1999 in CRP No.1999 of 1998. Along with the

suit, the said A.Arunagiri moved an application for injunction in O.A.No.317 of 1999. On 25.5.1999, this Court granted stay of the auction proposed to be held on 31.5.1999, on condition that the plaintiff A.Arunagiri (in C.S.No.339 of 1999) paid a sum of Rs.3 crores, on or before 30.5.1999.

(l) But, in subsequent proceedings, the injunction was vacated and A.Arunagiri filed an appeal in O.S.A.No.237 of 1999. The appeal was dismissed on 29.11.1999 and A.Arunagiri filed SLP(Civil) No.18593 of 1999.

(m) Immediately after the dismissal of the original side appeal on 29.11.1999, the second and third defendants published an auction notice in a Vernacular Daily on 03.12.1999 and an English Daily on 04.12.1999, fixing the date of auction as 13.12.1999.

(n) Since there was no prohibitory order from any Court, the defendants 2 and 3 proceeded with the auction sale on 13.12.1999. 11 persons participated in the auction. Out of them, only 5 persons bid in the auction.

(o) Though reputed builders were present, rowdy elements and political personalities prevented them from bidding in the auction. Ultimately, the sale was knocked down for a sum of Rs.9 crores by the first defendant, despite the fact that the guideline value of the property was Rs.19.50 crores.

(p) Though the highest bidder was required to deposit 25% of the bid amount on the spot, the representative of the first defendant handed over two cheques, one for Rs.1.50 crores and another for Rs.74 lakhs.

(q) These two amounts together with the cash deposit of Rs.1 lakh made before the commencement of the auction, totalled to Rs.2.25 crores.

(r) The auction sale held on 13.12.1999 is illegal and liable to be set aside for various reasons viz., (a) genuine bidders were prevented from participating and the advertisements did not contain the upset price or reserve price or estimate price.

(s) The successful bidder did not deposit 25% of the purchase money on the spot, he gave two cheques which constitute only future payment.

(t) There is no concluded contract between the defendants 1 and 2 on 13.12.1999.

(u) The presence of the Chairman of the second defendant-Society by name Mr.V.R.Venkatachalam and the presence of another member of the Board of Directors by name N.Meenakshi Sundaram, influenced the course of conduct of auction.

(v) The first defendant company itself came into existence only on 30.7.1998 with an authorised capital of Rs.1 lakh and a paid-up capital of Rs.2,000/-, indicating thereby that it was only a shell company, which probably had the financial backing of the Chairman of the second defendant-Society.

12. In the light of the above averments, the plaintiff firm sought the relief of a declaration that there is no concluded contract of sale between the defendants 1 and 2 with respect to the suit property, based upon the public auction held on 13.12.1999 under the auspices of the third defendant.

13. After 2 years of the institution of the suit, the plaintiff got the plaint amended by taking out an application in A.No.5796 of 2001. The additional pleadings introduced by way of amendment, are mostly legal submissions, in support of the contention that clause 17 of the deed of mortgage constituted a clog on a redemption and that clause 18 does not empower the mortgagee to sell the property by public auction. The plaintiff also raised an additional contention by way of amendment to the effect that the memorandum of deposit of title deeds would not empower the mortgagee to sell the property and that the power of sale without intervention of Court, can be confined only to the loan amount of Rs.25 lakhs. The plaintiff also assailed the order passed in the civil revision petition on 30.01.1999 as contrary to statutory provisions of Section 69 of the Transfer of Property Act and Section 23 of the Contract Act. The plaintiff further contended that the order passed in the civil revision petition on 30.01.1999 would not conform to the definition of the word "decree". Additionally, the plaintiff claimed in the amended plaint that the former Chairman of the second defendant-Society Mr.N.P.V.Ramasamy Udaiyar took a bribe of Rs.10 lakhs for sanctioning the loan amount of Rs.5 crores. The plaintiff claimed that out of the said illegal gratification money, a sum of Rs.5 lakhs was received by N.P.V.Ramasamy Udaiyar in cash and that the balance of Rs.5 lakhs was paid by way of cheque to the wife of Mr.Ramasamy Udaiyar, on 12.8.1995. The plaintiff claimed that, by a letter dated 11.10.2000, they brought this factum of receipt of illegal gratification to the notice of the second defendant. In response, it was claimed by Mrs.R.Kamalam that the amount received by her was for some other transaction.

14. The second defendant filed a written statement contending as follows:-

(a) The plaintiff is not a registered partnership firm ands hence there is a bar for the institution of the suit, as per Section 69(2) of the Indian Partnership Act, 1932 read with Order XXX, Rules 1 and 2 CPC.

(b) On 16.6.1995, the plaintiff firm represented by six of its partners by name K.Balasikhamani, A.Arunagiri, N.Amaravathi, M.K.Ayyanar, A.Muthulingam and B.Sudha, sought a loan of Rs.5 crores, on the mortgage of the suit schedule property.

(c) The loan was sanctioned and an agreement was entered into on 01.8.1995 between the plaintiff and the second defendant.

(d) At the request of the plaintiff and its partners, the second defendant sanctioned a loan of Rs.5 crores to the third defendant. In the loan agreement dated 01.8.1995, the

borrower agreed to execute a demand promissory note, to execute a deed of simple mortgage for Rs.25 lakhs with power of sale without the intervention of the Court and to create an equitable mortgage by deposit of title deeds in respect of the balance loan amount of Rs.4,75,00,000/-.

(e) Under the loan agreement, the firm also agreed to execute an irrevocable power of attorney in favour of the second defendant enabling them to sell the mortgaged property for the realisation of the dues, in respect of the loan of Rs.4,75,00,000/-.

(f) Under Clause 18 of the loan agreement dated 01.8.1995, the plaintiff agreed to redeem the simple mortgage for Rs.25 lakhs only after satisfaction in full of all the amounts due and outstanding under the equitable mortgage. Under Clause 17, the second defendant had the right to appropriate all monies paid by the plaintiff in the order of priorities to be decided at the sole discretion of the second defendant.

(g) Under the loan agreement, it was also agreed that while the loan amount of Rs.25 lakhs secured by the registered mortgage was to be repaid on or before 31.7.1996, the amount due under the equitable mortgage was repayable on demand.

(h) In accordance with the terms of the loan agreement, the plaintiff executed a deed of simple mortgage dated 31.7.1995 and 6 demand promissory notes dated 20.7.1995, 1.8.1995, 18.4.1996, 20.4.1996, 16.5.1996 and 05.6.1996 apart from an irrevocable power of attorney dated 01.8.1995.

(i) The plaintiff also deposited on 01.8.1995 at the Office of the second defendant, all title deeds of the suit schedule property with the intention to create equitable mortgage by deposit of title deeds.

(j) The plaintiff availed the loan amount of Rs.5 crores, but defaulted in payment of the principal as well as interest. Therefore, a legal notice dated 12.7.1997 was issued, calling upon the plaintiff to pay an amount of Rs.6,34,46,170/- due as on 30.6.1997 together with future interest.

(k) To the said notice, all the partners of the firm, including the plaintiff, sent a reply on 30.7.1997, undertaking to clear the dues and requesting the second defendant to give time. But they did not make any payment. Therefore, the second defendant engaged an auctioneer, who is the third defendant, to sell the property and the third defendant issued a letter dated 14.8.1997, informing the third defendant of the proposed legal action.

(l) Thereafter the third defendant issued a letter dated 22.8.1997, proposing to cancel and revoke the power of attorney dated 31.7.1995 executed by the third defendant, authorising the first defendant to sell the mortgaged property. The first defendant issued a reply on 02.9.1997 pointing out that the power was coupled with interest and

that it could not be revoked unilaterally.

(m) After the exchange of these notices, the third defendant filed a suit on 01.9.1997 in O.S.No.6201 of 1997 on the file of the VI Assistant Judge, City Civil Court, Chennai, for a declaration that sub-clauses (ii) and (iii) of clause 7 of the mortgage deed was null and void and opposed to public policy.

(n) In the suit, the third defendant obtained an interim order of injunction in I.A.No.16406 of 1997 on 03.9.199, restraining the defendants 1 and 2 from proceeding with the auction.

(o) After obtaining the injunction, the third defendant issued another letter dated 18.10.1997, taking a contradictory stand to the effect that no power of attorney was executed. This letter was also suitably replied to by the first defendant.

(p) Thereafter the third defendant filed a fresh suit in O.S.No.7480 of 1997 on the file of the VI Assistant Judge, City Civil Court, Chennai, for declaration that the power of attorney was null and void and for a consequential injunction.

(q) Since the application for injunction in I.A.No.16406 of 1997 in O.S.No.6201 of 1997 was getting postponed from time to time with the third defendant moving applications for reopening arguments and for amending the plaint and also due to certain unpleasant events that happened, the first defendant moved a civil revision petition in CRP No.1999 of 1998 on the file of this Court under Article 227 of the Constitution.

(r) On 30.7.1998, this Court ordered notice of motion in the civil revision petition and granted the stay of further proceedings in the suit and also summoned the records from the City Civil Court, as there were allegations of tampering of records.

(s) In the civil revision petition, the first defendant agreed reluctantly to waive 25% of over due interest, on condition that the third defendant paid the entire amount on or before 30.4.1999.

(t) The third defendant agreed to and undertook to pay Rs.8,39,72,328.60 with interest at 24.50% p.a., from 01.2.1999 till the realisation, on or before 30.4.1999.

(u) There was also a default clause to the effect that if the third defendant defaulted in payment, the first defendant would not only be entitled to proceed with the auction sale, but also that the waiver of over due interest would go.

(v) The third defendant filed an affidavit of undertaking on 30.01.1999 to the said effect. It was sworn to by defendants 4, 5 and 9 to 11. On the basis of the said undertaking, this Court disposed of the civil revision petition.

(w) When the affidavit of undertaking was filed, the first defendant pointed out that at the time of availing of the loan, the defendants 9 to 11 were not partners and that only the plaintiff and defendants 4 to 8 were the partners.

(x) But the third defendant agreed at that time to produce the evidence of reconstitution of the partnership. On the basis of the said assurance, the civil revision petition was disposed of, recording the affidavit of undertaking.

(y) After filing an affidavit of undertaking and securing an order, the third defendant filed a special leave petition in SLP(Civil) No.6491 of 1999 on the file of the Supreme Court. But they withdrew the same on 27.4.1999.

(z) After withdrawing the special leave petition, the third defendant filed an application in CMP No.7283 of 1999 in CRP No.1999 of 1998 praying for extension of time by six months to discharge the entire debts.

(aa) That application was dismissed on 30.4.1999. As against the rejection of the application for extension of time, the third defendant filed another special leave petition in SLP (Civil) No.7036 of 1999. But it was dismissed by the Supreme Court on 13.5.1999.

(ab) In view of the above, the default clause came into force and the first defendant took steps to bring the property to sale. At that time, the third defendant sent Rs.25 lakhs by way of a demand draft, claiming as though it was in full quits of the simple mortgage loan. But the first defendant refused to accept the same and issued a notice fixing the date of auction as 31.5.1999.

(ac) Thereafter, one A.Arunagiri filed a suit in C.S.No.339 of 1999, questioning the very affidavit of undertaking filed by the plaintiff in the civil revision petition. Along with a suit, the said A.Arunagiri moved an application in O.A.No.317 of 1999 for an injunction.

(ad) On 25.5.1999, a conditional order of interim injunction was granted. But, the injunction was vacated on 25.10.1999.

(ae) Challenging the same, A.Arunagiri filed an appeal in O.S.A. No. 237 of 1999. In the appeal, A.Arunagiri filed an affidavit of undertaking on 17.11.1999 to repay the dues. But he committed a breach of the same and hence he was directed to pay Rs.1 lakh to the High Court Legal Services Authority for atonement of his unpardonable conduct in filing a false affidavit. Eventually, the appeal was dismissed on 29.11.1999.

(af) The special leave petition filed by A.Arunagiri in SLP(Civil) No. 18593 of 1999 was also dismissed as withdrawn on 27.3.2000. In the meantime, after the dismissal of the original side appeal filed by A.Arunagiri, an auction was conducted on

13.12.1999 and the sixth defendant became the successful bidder for Rs.9 crores. They deposited Rs.2.25 crores as per the terms and conditions of the auction.

(ag) Thereafter, the plaintiff firm came up with the above suit, seeking a declaration that there was no concluded contract pursuant to the auction. Along with the suit, the plaintiff moved an application for injunction in O.A. No.812 of 1999. In that application, an interim order to maintain status-quo was granted on 23.12.1999. But the same was vacated on 28.7.2000.

(ah) As against the vacation of the interim order of status-quo, the plaintiff filed an appeal in O.S.A.No.196 of 2000. The appeal was dismissed on 29.9.2000. The plaintiff filed a review application in R.A.No.113 of 2000. But the same was also dismissed on 7.12.2000.

(ai) The special leave petitions filed by the plaintiff in SLP(Civil) Nos.1711 and 1712 of 2001 were also dismissed by the Supreme Court on 12.5.2001.

(aj) Thereafter the plaintiff instituted yet another suit in C.S.No.551 of 2001, seeking redemption of the simple mortgage of Rs.25,00,000/-.

(ak) The prayer made in this suit C.S.No.995 of 1999 cannot be granted in view of the specific bar under Section 69(3) of the Transfer of Property Act, 1882.

(al) The loan agreement including clauses 17 and 18 are perfectly valid and not opposed to public policy or the provisions of the Contract Act. The plaintiff cannot approbate and reprobate after obtaining a loan and executing an agreement. It was the plaintiff who requested the second defendant to have two different documents, one by way of registered deed of simple mortgage and another by way of mortgage by deposit of title deeds, only with a view to save stamp duty.

(am) There is no prohibition in law for the second defendant to incorporate all conditions in the contract. Section 61 of the Transfer of Property Act, enables the second defendant to have such a contract. This does not amount to a violation of Section 17(1)(c) of the Registration Act.

(an) The allegations made against the former Chairman N.P.V. Ramasamy Udaiyar and his wife R.Kamalam are frivolous. They are also not made parties to the suit.

(ao) The order passed in CRP No.1999 of 1998 has the effect of final adjudication in both the suits O.S.Nos.6201 and 7480 of 1997. Therefore, the successive suits are barred by law. The second and third defendants, after ascertaining the guideline value, fixed the upset price at Rs.19 crores at the rate of Rs.50 lakhs per ground for 39 grounds. Therefore, the bid actually started from the said amount of Rs.19 crores. But there was no response. Therefore, the rate was reduced to Rs.25 lakhs per ground.

Even then there were no offers. Therefore, the rate was gradually reduced and eventually, it touched Rs.10 lakhs per ground. But there were no offers and hence it was decided to invite offers from the participants. One of the participants made an offer of Rs.7,80,00,000/-. Thereafter, the bidding started and the first defendant made the highest bid of Rs.9 crores. Hence, he was declared as the successful bidder.

(ap) After the construction of flyover bridge in C.P.Ramasamy Iyer Road, the entrance to the suit property and the road width got drastically reduced. Consequently, the total extent of construction permissible by the relevant Development Control Rules, has come down very heavily. Hence, the value of the property came down. The value came down also on account of the slump in the real estate market at that time. In any case, the guideline valuation is not to be taken as a perfect substitute for the market price.

(aq) The defendants 2 and 3 have given wide publicity, by issuing notices in the Hindu and Daily Thanthi, both of which have wide circulation. The advertisements were issued in All India Editions of those newspapers and pamphlets were also issued and there were 11 participants. Some of the participants did not quit on account of the track record of the litigious conduct of the plaintiff and its partners. One of the builders present at the time of the auction, had advanced money to the plaintiff to comply with the conditional order imposed by this Court in O.A.No.317 of 1999 in C.S.No.339 of 1999. The other allegations regarding the presence of rowdy elements and the allegations with regard to Mr.V.R.Venkatachalam are denied.

(ar) The cheques issued by the first defendant for Rs.2.24 crores were honoured on presentation and hence the first defendant had complied with the conditions. There is no prescription that 25% of the bid amount had to be paid only in cash. Therefore, the suit is without substance.

Pleadings in C.S.No.551 of 2001:

15. This suit is filed by the mortgagor-partnership firm praying for a redemption of the simple mortgage dated 31.7.1995 for a sum of Rs.25 lakhs. The averments contained in the plaint can be summarised as follows:-

(a) On 16.6.1995, the plaintiff firm represented by its then Managing Partner K.Balasikhamani, made an application, on the strength of a power of attorney given by the other partners, to the first defendant-Society for sanction of a loan of Rs.5 crores for business purposes.

(b) The then Chairman/President of the first defendant-Society late N.P.V.Ramasamy Udaiyar, who was known to the Managing Partner of the firm, agreed to sanction the loan. The first defendant split up the loan into two components, one for a sum of Rs.25 lakhs to be secured by simple mortgage and another for a sum of Rs.4.75 crores

secured by an equitable mortgage by deposit of title deeds.

(c) On 31.7.1995, the deed of simple mortgage for Rs.25 lakhs was executed by the Managing Partner of the plaintiff, mortgaging the property at old Door No.91, New No.8, C.P.Ramasamy Road, Alwarpet, Chennai-18, measuring an extent of 39 grounds. The mortgage deed was registered on 04.8.1995 with the Office of the Sub Registrar.

(d) The interest stipulated was 24% per annum compounded on monthly basis and the plaintiff agreed, in view of the dire need of funds for its business purposes, though the rate of interest was 5.

(e) On 01.8.1995, a memorandum of deposit of title deeds was executed by the plaintiff in favour of the first defendant-Society, evidencing the deposit of title deeds for the loan amount of Rs.4.75 crores. Promissory notes were also executed by the plaintiff and the interest was prescribed as 24% simple interest.

(f) The plaintiff also executed a power of attorney dated 01.8.1995 in favour of the first defendant, authorising them to sell the mortgaged property. But it was unregistered.

(g) On the same day viz., 01.8.1995, a loan agreement was also entered into, setting out the terms for the grant of a loan of Rs.5 crores. Though this agreement contained 20 clauses, clause 8 of the deed of simple mortgage dated 31.7.1995 alone empowered the mortgagee to sell the mortgaged property by public or private auction without the intervention of the Court.

(h) On 12.7.1997, the first defendant issued a demand notice claiming as though the simple mortgage dated 31.7.1995 was in respect of the whole loan amount of Rs.5 crores. This was followed by an auction notice dated 14.8.1997.

(i) The plaintiff filed a suit in O.S.No.6201 of 1997 on the file of the City Civil Court for a declaration that the terms of the simple mortgage deed were illegal and null and void. In the interlocutory application in I.A.No.16406 of 1997, the Court granted a conditional order of injunction on 03.9.1997 and the plaintiff complied with the condition.

(j) The plaintiff subsequently filed an application for amendment of the plaint to include a prayer for declaration that clause 18 of the loan agreement was illegal and opposed to public policy. The amendment application was allowed.

(k) In the meantime, the plaintiff cancelled the power of attorney executed by them on 01.8.1995 in favour of the first defendant and followed it up by a suit in O.S.No.7480 of 1997, seeking to declare the power of attorney as null and void.

(l) The first defendant filed a civil revision petition in CRP No.1999 of 1998 under Article 227 of the Constitution, against the interim orders passed in the suit. In the civil revision petition, an interim suspension of the order of injunction was granted.

(m) Though the plaintiff wanted to argue the case on merits, they were discouraged from arguing the case on merits, due to the persuasion of the Senior Counsel for the first defendant and the pressure brought to on the counsel for the plaintiff in the guise of a compromise. Thereafter, a settlement was thrust upon the plaintiff by compulsion of circumstances and consequently, the plaintiff filed an affidavit of undertaking on 30.01.1999, agreeing to settle the entire dues under both mortgages on or before 30.4.1999, failing which the first defendant would be permitted to sell the property. At that time, some of the original partners, who were parties to the loan transaction, had retired and some partners had come in. Out of ignorance of law and circumventing to the pressure under the threat of caution, such an affidavit of undertaking was filed.

(n) Since the plaintiff was unable to pay the amount by the due date viz., 30.4.1999, they filed an application in CMP No.7283 of 1999 for extension of time. But it was rejected on 30.4.1999. A special leave petition filed against the said order was also dismissed.

(o) Immediately after the order dated 30.4.1999, the plaintiff tendered the amount due under the simple mortgage together with interest, on 03.5.1999. But it was refused by the first defendant by a letter dated 05.5.1999.

(p) Thereafter, the first and second defendants published an auction notice dated 10.5.1999. But it was stalled by a suit filed by one of the ex-partners of the plaintiff by name A.Arunagiri. In this suit, C.S.No.339 of 1999, filed by A.Arunagiri, he remitted a sum of Rs.3 crores, pursuant to an order passed at the interrogatory stage. However, the application for injunction was subsequently dismissed. A.Arunagiri filed an appeal in O.S.A.No.237 of 1999. But it was dismissed by the Division Bench on 29.11.1999. The special leave petition filed by A.Arunagiri was subsequently withdrawn.

(q) Thereafter, a fresh auction notice was issued on 04.12.1999 and an auction was conducted on 13.12.1999. The third defendant which was promoted as a company only one year ago with a paid up share capital of Rs.2,000/-, was declared to be the successful bidder for Rs.9 crores. The letters sent to the third defendant to their registered address on 11.6.2001 returned unclaimed.

(r) The suit property measuring 39 grounds located in the heart of the City, is worth Rs.19.50 crores as per the guideline value.

(s) The plaintiff filed a suit in C.S.No.995 of 1999 for a decree to declare that there is no concluded contract of sale between the auction purchaser and the mortgagee. Pending suit, the plaintiff sought an injunction in O.A.No.812 of 1999. But it was dismissed. The first defendant filed an application in A.No.144 of 2000 for rejection of plaint, but the same was also dismissed.

(t) The plaintiff filed an appeal in O.S.A.No.196 of 2000 against the dismissal of the application for injunction in O.A.No.812 of 1999. But the appeal as well as the review filed in Review Application No.113 of 2000 were dismissed by the Division Bench.

(u) The special leave petitions filed by the plaintiff in SLP(Civil) Nos. 1711 and 1712 of 2001 were dismissed by the Supreme Court by an order dated 12.5.2001. But the dismissal of the special leave petitions was only on the ground that the Supreme Court was not inclined to interfere with an interlocutory order.

(v) The first defendant-Society is authorised to do banking business only among its shareholders and hence the grant of loan by the first defendant to the plaintiff firm is ultra vires the powers of the first defendant. The plaintiff is a partnership firm which can never be a shareholder of a Company, as per Section 41 (2) of the Companies Act, 1956.

(w) The loan documents were executed by the plaintiff and not by its partners in the individual capacity. Clause 3 of the registered deed of simple mortgage contains a blank with regard to the shareholding of the firm and a firm cannot be a shareholder. Therefore, the entire loan transaction is liable to be declared as invalid.

(x) The plaintiff paid an illegal gratification of Rs.5 lakhs in cash to the then Chairman/President of the first defendant-Society and another sum of Rs.5 lakhs by way of cheque to his wife R.Kamalam. Therefore, the loan was split into two components contrary to the Memorandum of Articles of Association of the first defendant.

(y) Even if the loan is validly given, the interest charged is hit by the provisions of the Usurious Loans Act, 1918.

(z) The first defendant is not entitled to bring the property to auction sale on the basis of invalid documents. The sale cannot also be on the basis of the order dated 30.01.1999 in CRP 1999 of 1998, as the said order would not amount to a decree within the meaning of Section 2(2) of the Code of Civil Procedure. The order passed in the civil revision petition would not extinguish the right of the plaintiff to redeem the simple mortgage.

(aa) The power of sale without intervention of Court under Section 69 is available only in respect of a simple registered mortgage and it is not available in other cases.

Therefore, the loan amount of Rs.4.75 crores cannot be recovered by sale without intervention of Court. The parties cannot contract out of the statutory provisions.

(ab) The order passed on compromise, cannot go against the statutory provisions. A compromise hit by Section 23 of the Contract Act and Order XXIII, Rule 3 of the Code, cannot be recorded in a Court.

(ac) The affidavit of undertaking filed on 30.01.1999 is violative of Section 69 of the Transfer of Property Act.

(ad) Clauses 17 and 18 of the loan agreement dated 01.8.1995 are ex facie illegal, as they amount to a clog on redemption of simple mortgage. The unregistered loan agreement dated 01.8.1995 adversely affecting the right of redemption guaranteed under Section 61 of the Transfer of Property Act, is inadmissible in evidence. Therefore, it is liable to be declared as invalid.

(ae) Since the plaintiff tendered the principal amount of Rs.25 lakhs due under the simple mortgage, on 03.5.1999 itself and since the first defendant refused to accept the same, the first defendant is not entitled to any interest after the date of the tender viz., 03.5.1999 as per Section 84 of the Transfer of Property Act.

(af) Since the right of redemption is not extinguished legally so far, the plaintiff is entitled to redemption. The plaintiff therefore tendered to the first defendant on 09.6.2001, the principal amount of Rs.25 lakhs and interest amount of Rs.24,14,583/-, calculated up to 03.5.1999 by way of a Pay Order, for redemption. But the same was also refused by the first defendant. In view of the said refusal, the plaintiff has come up with the suit for redemption.

(ag) In any case, as per condition No.5 of the auction notice dated 03.12.1999, the purchaser is liable to pay the balance of purchase money (70%) within 15 days from the date of acceptance of the bid. But the auction purchaser viz., the third defendant has not paid the balance amount of Rs.6.75 crores. Therefore, the auction sale is liable to be set aside.

(ah) The defendants 1 and 3 appear to have submitted an application under Section 269-UC of the Income Tax Act, for the grant of a No Objection Certificate. Since the amount fetched in the auction is less than 50% of the guideline value, the Central Government may in all probability purchased the property.

(ai) On the basis of the above averments, the plaintiff prayed for the following reliefs:-

"(i) To pass an order of redemption of the simple mortgage dated 31.7.1995 executed by the plaintiff firm M/s.Ramu & Co., in favour of the Egmore Benefit Society Ltd.,

(first defendant herein) for a sum of Rs.25.00 lakhs.

(ii) That an Account may be taken of the amount due to the first defendant for principal and interest due on the simple registered mortgage dated 31.7.1995 executed by plaintiff and in favour of the first defendant.

(iii) Upon payment of the said sum by the plaintiff, the first defendant be directed to deliver to the plaintiff the mortgage instrument viz., Simple Registered Mortgage dated 31.7.1995 registered as Doc.No.1987/1995 in the Sub Registrar Office, Mylapore and all related documents in his possession and to executed and register an acknowledgement in writing to the effect that the interest created by the simple registered mortgage dated 31.7.1995 has been extinguished.

(iv) For a declaration to declare that the unregistered loan agreement dated 1.8.1995 executed between plaintiff and first defendant is void ab initio, invalid and non-enforceable.

(v) For a declaration to declare that the consent order dated 30.1.1999 passed by this Hon'ble Court in CRP No.1999 of 1998 based on an affidavit of undertaking dated 30.1.1999 filed by some partners of the plaintiff firm is non-est in law.

(vi) To direct the defendants to pay the costs of this suit and

(vii) Pass such other or further orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice."

16. As in the case of other suits, the first defendant has filed a written statement even in this suit C.S.No.551 of 2001, containing exactly the same averments as in the written statements filed in the first two suits. The averments contained in the written statement are not repeated, as it would only be a repetition of the averments contained in the previous suits. But apart from the same contentions as raised in the written statements in the first two suits, the defendant has also contended (i) that the provisions of the Usurious Loans Act, 1918 have no application to the transactions of Nidhi Companies; (ii) that the first defendant is a Nidhi Company and hence they are entitled to charge the interest stipulated in the contract; (iii) that there is a bar for the institution of the above suit, in view of the provisions of Order XXIII, Rule 3-A read with Order II, Rule 2 and Section 141 CPC; and (iv) that the plaintiff and its erstwhile partners prevented the first defendant from collecting the balance of sale consideration (75%) by continuously litigating and hence the plaintiff cannot now take advantage of the non-payment of 75% of the sale consideration by the auction purchaser.

Pleadings in Tr.C.S.Nos.2 and 3 of 2003:

17. Both these suits are filed for identical reliefs by persons similarly placed and on the same cause of action. Therefore, I choose to record the pleadings in both these suits in common.

18. The averments contained in the plaint in both these suits proceed on the following lines:-

(a) The second defendant firm viz., M/s.Ramu & Co., was a partnership firm that originally had 12 partners.

(b) The plaint 'A' schedule property measuring about 39 grounds at old Door No.91, New No.8, C.P.Ramasamy Road, Alwarpet, Chennai-18, was purchased by the second defendant firm from the Official Receiver of Calcutta under a Sale Deed dated 12.12.1988.

(c) The second defendant firm M/s.Ramu & Co., was reconstituted under two deeds dated 18.01.1989 and 20.4.1989. Upon reconstitution, the second defendant firm had 8 partners by name (1) A.Thayumanaguru (plaintiff in Tr.CS 2/2003) (2) G.Anbazhagan (plaintiff in Tr.CS 3/2003) (3) M.K.Ayyanar (4) A.Muthulingam (5) N.Amaravathy (6) A.Arunagiri (7) Balasikhamani and (8) B.Sudha.

(d) On 27.5.1989, all the 8 partners decided to partition the plaint schedule 'A' property among themselves and a Koorchit (unregistered document of partition) was executed.

(e) Under the Koorchit, the plaintiffs in these two suits were each allotted the land of an extent of 4 grounds and 1,541 sq. ft. What was so allotted is described in plaint schedule 'B' and also marked 'D' and 'B' respectively in the plan attached to the Koorchit.

(f) Ever since the partition, the plaintiffs are in possession and enjoyment of their respective holdings of 4 grounds and 1,541 sq. ft.

(g) Based on the Koorchit dated 27.5.1989, the plaintiffs made representations to the Competent Authority under the Tamil Nadu Urban Land (Ceiling and Regulation) Act. The Assistant Commissioner of Urban Land Tax passed assessment orders in Form 5-G on 17.01.1994 and the plaintiffs paid urban land tax for the plaint 'B' schedule properties.

(h) The plaintiffs in both the suits retired from the partnership in 1992. At the time of retirement, they had executed a power of attorney in favour of K.Balasikhamani, the then Managing Director.

(i) The plaintiffs happened to see a circular dated 02.5.2001 issued by an Advocate by name Sathya Rao, inviting offers for the sale of plaint 'A' schedule property. Since the second defendant did not have the authority to sell the plaint 'A' schedule property, the plaintiffs made enquiries and came to know about the sale made in a public auction by the first defendant as a mortgagee, in favour of the third defendant. The plaintiffs also came to know about the money borrowed and the mortgage created.

(j) Since the second defendant firm did not have the right to mortgage the property already borrowed, the plaintiffs had come up with the above suits.

(k) The reliefs sought in these two suits are as follows:-

"Tr.C.S.No.2 of 2003:

(i) For a declaration to declare that the Registered Mortgage Deed dated 31.7.1995 executed by the second defendant M/s.Ramu & Co., represented by its partners in favour of the first defendant, the Egmore Benefit Society Ltd., and registered as Doc.No.1987/1995 with Sub Registrar Office, Mylapore, covering the Plaint Schedule 'A' property unauthorisedly and illegally including therein the plaintiff's property is illegal, null and void and non-enforceable.

(ii) For a declaration to declare that the auction sale conducted by the first defendant on 13.12.1999 in favour of the third defendant in respect of the plaint schedule 'A' property illegally and unauthorisedly including the plaintiff's plaint schedule 'B' (marked 'D' in Koorchit) property is illegal and null and void.

(iii) To pass an order of permanent injunction restraining the defendants herein from in any manner dealing with or encumbering the plaint schedule 'B' (marked 'D' in Koorchit) property including the plaintiff's easementary rights and other rights appurtenants etc., schedule 'A' property in pursuance of the illegal mortgage transaction dated 31.7.1995 and auction sale held on 13.12.1999.

(iv) For costs of this suit.

Tr.C.S.No.3 of 2003:

(i) For a declaration to declare that the Registered Mortgage Deed dated 31.7.1995 for Registered Document No.1987/1995 in the Office of Sub Registrar, Mylapore, executed by the second defendant M/s.Ramu & Co., represented by its partners in favour of the first defendant, the Egmore Benefit Society Ltd., in respect of the Plaint Schedule 'A' property unauthorisedly and illegally including therein the plaintiff's Plaint Schedule 'B' property is illegal, invalid, null and void and non-est in law as far as the plaintiff's portion of land is concerned.

(ii) For a declaration to declare that the auction sale conducted by the first defendant on 13.12.1999 in favour of the third defendant in respect of the plaint schedule 'A' property illegally and unauthorisedly including the plaintiff's plaint schedule 'B' property is illegal and null and void.

(iii) To pass an order of permanent injunction restraining the defendants herein from in any manner dealing with or encumbering the plaint schedule 'B' property owned

by the plaintiff either directly or in pursuance of the registered mortgage deed dated 31.7.1995 executed by the second defendant in favour of the first defendant.

(iv) For costs of this suit."

19. The first defendant in both these suits viz., The Egmore Benefit Society Ltd., has filed a written statement. The contents of the other written statement in both the suits are one and the same. The written statement of the first defendant in both the suits is on the following lines:-

(a) The first defendant is a Mutual Benefit Nidhi Company registered under the Companies Act, 1956.

(b) The second defendant partnership firm filed a loan application on 16.6.1995 for a loan of Rs.5 crores on the mortgage of the plaint 'A' schedule property.

(c) The firm was represented by six partners by name (1) K.Balasikhamani, (2) A.Arunagiri, (3) N.Amaravathy, (4) M.K.Ayyanar, (5) A.Muthulingam and (6) B.Sudha.

(d) A loan agreement dated 01.8.1995 was entered into between defendants 1 and 2, as per which, a sum of Rs.25 lakhs was to be secured by a registered deed of simple mortgage with power under Section 69 to sell the property without the intervention of the Court. The balance loan amount is to be secured by the creation of an equitable mortgage by deposit of title deeds of the same property.

(e) Under clauses 17 and 18 of the loan agreement, any amount paid can be first appropriated towards the loan secured by equitable mortgage.

(f) Necessary security documents were executed by K.Balasikhamani on behalf of the second defendant, by virtue of the power conferred upon him under the power of attorney dated 01.8.1989.

(g) The first defendant issued a legal notice dated 12.7.1997. But the second defendant filed O.S.No.6201 of 1997 and obtained an injunction in I.A. No.16406 of 1997.

(h) The first defendant filed a civil revision petition in CRP No.1999 of 1998 and it was disposed of on the basis of an affidavit of undertaking on 30.01.1999.

(i) The order passed in the civil revision petition was challenged by the second defendant before the Supreme Court, but the special leave petition was later withdrawn.

(j) The application for extension of time to make payment as per the affidavit of undertaking, was rejected by the High Court and the same was confirmed by the Supreme Court.

(k) Therefore, the auction sale was fixed on 31.5.1999 and at that time, one of the erstwhile partners A.Arunagiri filed the suit C.S.No.339 of 1999 on the file of the High Court of Madras. In the suit, an interim injunction was granted on 25.5.1999 with a condition.

(l) The injunction was vacated on 25.10.1999 and the same was confirmed on appeal in O.S.A.No.237 of 1999, imposing cost of Rs.1 lakh upon A.Arunagiri for his unpardonable conduct in filing a false affidavit. The dismissal was challenged before the Supreme Court, but it was later withdrawn.

(m) In the meantime, an auction was conducted on 13.12.1999 after due publicity and the third defendant became the highest bidder offering Rs.9 crores. He also deposited Rs.2.25 crores on the same day.

(n) The second defendant thereafter filed C.S.No.995 of 1999 and obtained an interim order in O.A.No.812 of 1999 to maintain status-quo. But the order was vacated on 28.7.2000 and the same was confirmed in O.S.A. No.196 of 2000 and Review Application No.113 of 2000.

(o) The Supreme Court dismissed SLP (Civil) Nos.1711 and 1712 of 2001 against these orders.

(p) Subsequently, another suit in C.S.No.551 of 2001 was filed for redemption of the simple mortgage. While it is pending, the above suit is filed as a collusive one between the plaintiff and the second defendant.

(q) There was no partition of suit 'A' schedule property by metes and bounds, by way of Koorchit as alleged by the plaintiff.

(r) The claim that the plaintiff is in possession of schedule 'B' property is denied. The plaintiff admittedly retired from the partnership firm on 01.4.1992. Even the deed of reconstitution does not disclose any partition. On the other hand, clause 9 provides for continuation of the business with the assets and liabilities of the firm as a running concern.

(s) The concept of partition of properties by way of Koorchit is unknown to the properties of partnership firm. Section 17(1)(c) of the Registration Act, is a bar for such documents.

(t) Section 3 read with Article 45 of the Schedule to the Stamp Act, 1899 makes stamp duty payable on such instruments.

(u) Moreover, the plaintiff is one of the executants to the deed of power of attorney dated 01.8.1989 in favour of K.Balasikhamani. This power was executed after the date of the Koorchit empowering the firm to borrow money on the security of the properties of the firm. Therefore, the Koorchit is a fabricated document.

(v) The reliance placed by the plaintiff on the alleged assessment of urban land tax in 1994 is untenable and suspicious.

(w) The value of the relief claimed in the suit exceeds the pecuniary limits of the jurisdiction of the Court and hence, the suit is liable to be dismissed.

20. The second defendant partnership has filed a very short written statement in both the suits. The averments are identical and hence the substance of the averments contained in the written statement of the second defendant in both the suits are as follows:-

(a) The plaintiff became a partner in the second defendant firm on 18.01.1989. At that time, the second defendant owned the plaint 'A' schedule property.

(b) The second defendant obtained a loan of Rs.5 crores from the first defendant-Society at the instance of the then Chairman of the first defendant. A simple mortgage for Rs.25 lakhs and an equitable mortgage by deposit of title deeds for Rs.4.75 crores were executed.

(c) At the time of sanction of the loan, the defect in the title was brought to the notice of late N.P.V.Ramasamy Udaiyar, the then Chairman/ President of the first defendant-Society. The then Chairman/President took a commission of Rs.10 lakhs, Rs.5 lakhs in the form of cash and another Rs.5 lakhs paid by way of cheque in favour of his wife.

(d) On account of the default in payment of the loan, the first defendant attempted to sell the property. Since another interlocutory proceedings, in this suit, went in favour of the first defendant, they sold the property in an auction held on 13.12.1999 in favour of the third defendant. But the sale is challenged by this defendant in two suits C.S.Nos.995 of 1999 and 551 of 2001.

21. The third defendant has filed a written statement in both the suits and the averments contained therein are identical. Therefore, they are extracted as follows:-

(a) The suit is a frivolous one, having been filed by a partner set up by the second defendant firm. This is the third suit filed by individual partners, after the borrower firm failed in its attempts to prevent the auction.

(b) The Koorchit and partition pleaded by the plaintiff are concocted for the purpose of this case. If they were true, the other partners, who are fighting the issue with the first defendant-Society, for the past over five years, could have brought it to the notice of this Court.

(c) The number of civil suits, the number of applications, the number of appeals and the special leave petitions already filed would disclose that the second defendant is somehow attempting to prevent the recovery of the monies lawfully due to the first defendant.

(d) In the declaration before the Urban Land Tax Authorities, the plaintiff has not disclosed about the division in status, in Form 5-G.

(e) Even according to the plaintiff, he retired from the partnership on 01.4.1992. But, reconstituting, the firm took over all assets and liabilities as they stood on 31.3.1992.

(f) Koorchit is inadmissible in evidence for want of stamp duty and registration.

(g) The suit is a collusive one and there is absolutely no basis for the claim of the plaintiff.

ISSUES FRAMED:

22. On 19.3.2004, the following issues were framed by this Court, in common for all the 5 suits:-

(1) Whether the second defendant firm had the right to mortgage the property of the plaintiff in favour of the first defendant ?

(2) Whether the entire contract between the first and second defendants is binding on the plaintiff ?

(3) Whether the Power given to the Agent by way of Power of Attorney by the Principal can be utilised detrimental to the interest of the Principal ?

(4) Whether the first defendant Society can advance a loan to the second defendant firm without verifying the title of the property ?

(5) Whether any illegal gratification was received by the erstwhile Chairman of the second defendant Society for sanctioning the loan of Rs.5 crores to the plaintiff partnership firm and splitting the loan into two parts viz., Rs.25 lakhs by registered simple mortgage and Rs.4.75 crores by deposit of title deeds of the property ?

(6) Whether any proper auction was conducted by the second and third defendants on 13.12.1999 ?

(7) Whether any bungling has taken place in the auction sale ?

(8) Is the alleged partition of the mortgaged property in favour of G.Anbazhagan and A.Thayumanaguru (plaintiffs in Tr.C.S.Nos.2 and 3 of 2003) is true and valid and if so, does the same affect mortgage interests of the Egmore Benefit Society Limited in that property ?

(9) Whether the Egmore Benefit Society Limited is not entitled to bring the mortgaged property for sale in public auction without intervention of the Court for realisation of its dues under the loan obtained by M/s.Ramu & Co.?

(10) Whether M/s.Ramu & Co., or any of its partners, past or present are entitled to redeem the registered simple mortgage for Rs.25 lakhs alone without discharging the loan secured by equitable mortgage by deposit of title deeds for Rs.4,75,00,000/- ?

(11) Whether the splitting of the loan of Rs.5 crores into a registered simple mortgage of Rs.25 lakhs and mortgage by deposit of title deeds of the property in violation of the Memorandum and Articles of Association of the first defendant Society is against public policy and amounts to evasion of Stamp Duty?

(12) Whether the mortgage contract between the plaintiff partnership firm and first defendant void ab initio under Section 23 of the Contract Act ?

(13) Whether the first defendant mortgagee can claim power of sale without intervention of Court by any process other than conferment of the power in the registered mortgage deed as per Section 69 of the Transfer of Property Act ?

(14) Whether such an unregistered loan agreement containing clauses usually found in a simple registered mortgage deed, namely payment schedule, acceleration clause, penal interest etc., should be stamped under the Stamp Act and registered under the Registration Act as a simple mortgage ?

(15) Whether any cut-back commission/secret commission/bribery of Rs.10 lakhs was received by the erstwhile Chairman of the first defendant Society for sanctioning the loan of Rs.5 crores to the plaintiff partnership firm in contravention of its own rules and in contravention of the statutes ?

(16) Whether the order passed in CRP No.1999 of 1998 based on an affidavit of undertaking filed by some partners of the plaintiffs firm contrary to statutes and without any adjudication by Court is an order "per incurium" ? And such an order is binding on the plaintiff ?

(17) Whether the plaintiff is entitled to redeem the registered simple mortgage for Rs.25 lakhs without complying with the condition imposed or ignoring the clog of

redemption created by way of an unregistered agreement ?

(18) What relief/s the plaintiff is entitled to ?

EVIDENCE LET IN:

23. Since all the suits were tried together and also since issues were framed in common for all the five suits, a joint trial was held. Mr.K.Balasikhamani, the partner of the mortgagor firm, examined himself as PW1 and through him about 40 documents were marked as Exx.P1 to P40. Similarly, during cross-examination of PW1, about 43 documents were marked as Exx.D1 to D43.

24. One Mr.U.Ramanathan, Secretary of the mortgagee, viz., Egmore Benefit Society Ltd., was examined as DW1. Through him, five documents were marked as Ex.D44 to D48.

25. One Mr.D.Sudhakar Reddy, who was the Director of the Company, which was the highest bidder in the public auction, was examined as DW2. Through him, 13 documents were marked as Exx.D49 to D61.

26. Therefore, in fine, only one witness was examined on the side of the plaintiff and 40 documents came to be marked as exhibits on the side of the plaintiff. Two witnesses were examined on the side of the defendants and 61 documents came to be marked as exhibits on the side of the defendants. Keeping this in mind, let me take up the issues arising for consideration one by one.

Issue No.(8):

27.1. The eighth issue is as to whether the alleged partition of the mortgaged property in favour of G.Anbazhagan and A.Thayumanaguru plaintiffs in Tr.C.S.Nos.2 and 3 of 2003 is true and valid and if so, whether the same would affect the interests of the Egmore Benefit Society Limited in that property. I am taking up this issue first for consideration, in view of the fact that this is the only issue that is relatable to Tr.C.S.Nos.2 and 3 of 2003. Therefore, a finding on Issue No.(8) would actually dispose of two out of 5 suits on hand. Hence, it is taken up first.

27.2. The claim of the plaintiffs in Tr.C.S.Nos.2 and 3 of 2003 is that they were the partners of the borrower firm M/s.Ramu & Co. They claim to have become partners under the deed of partnership dated 18.01.1989. According to the plaintiffs, the partners decided to partition the plaint 'A' schedule property and accordingly, they entered into a on 27.5.1989. The plaint 'A' schedule property, according to the plaintiffs, measuring an extent of 39 grounds, was divided into 8 equal moieties, each measuring about 4 grounds and 1541 sq.ft., and that each of the 8 partners was allotted one such share. The plaintiffs further claimed that they were put in possession of the divided portions and that they were also assessed to urban land tax by the proceedings dated 17.01.1994.

27.3. In short, the claim of the plaintiffs in Tr.C.S.Nos.2 and 3 of 2003 is based upon a Koorchit dated 27.5.1989 and an assessment of urban land tax in Form 5-G on 17.01.1994.

27.4. But at the outset, the plaintiffs have fought shy on getting into the witness box to prove the above facts. They simply allowed one of the continuing partners by name K.Balasikhamani to depose even on their behalf. But, in the written statement filed by the partnership firm M/s.Ramu & Co., there was no categorical admission of the execution of a Koorchit on 27.5.1989. Though in paragraph 4 of the written statement of M/s.Ramu & Co. (second defendant), it was claimed that there was a decision to divide the property among the partners, the firm did not even confirm that there was actually a partition. In paragraph 3 of the written statement filed by M/s.Ramu & Co., in Tr.C.S.Nos.2 and 3 of 2003, it is stated that all the allegations contained in the plaint are denied, except those that are specifically admitted. The partnership firm failed to specifically admit the averments regarding partition and the execution of the Koorchit. The plaintiffs also failed to get into the witness box. But, strangely, PW1, who deposed on behalf of the partnership firm and whose testimony was taken to be in common for all the suits, identified the Koorchits as Exx.P36 and P37, when confronted, with the documents filed by the plaintiffs in Tr.C.S.Nos.2 and 3 of 2003. It means the partnership firm did not want to be seen apparently as supporting the case of the plaintiffs in Tr.C.S.Nos.2 and 3 of 2003. But, that is exactly what they did, by allowing PW1 to support. Therefore, it is clear that the theory of partition is actually invented, concocted and fabricated by the plaintiffs, for the purpose of saving the property of the firm.

27.5. As a matter of fact, A.Thayumanaguru, the plaintiff in Tr.C.S.No.2 of 2003, is the son of one M.K.Ayyanar, who continued to be a partner even after the retirement of the plaintiff. Therefore, it is clear that the claim of partition under the Koorchit is a hoax.

27.6. Interestingly, PW1 - K.Balasikhamani, did not toe the line of the plaintiffs in Tr.C.S.Nos.2 and 3 of 2003 during examination in chief. In the examination in chief, he did not even claim that there was any partition on 27.5.1989. But, it was the learned counsel for the Egmore Benefit Society Limited, who put question during cross examination of PW1, about the claim made by the plaintiffs in Tr.C.S.Nos.2 and 3 of 2003.

27.7. During cross-examination, PW1 admitted that the plaintiff in Tr.C.S.No.2 of 2003 A.Thayumanaguru is his younger sister's husband. The plaintiff in the other suit G.Anbazhagan was admitted to be the younger brother of PW1.

27.8. In cross-examination, a specific question was put to PW1 as to whether there was any partition of the mortgaged property in question by way of Koorchit on 27.5.1989. The reply of PW1 was that he had to verify the records.

27.9. PW1 also admitted that except in Tr.C.S.Nos.2 and 3 of 2003, there was no mention about the partition in any other suit. He admitted that even in Ex.D3 partnership deed dated 01.4.1992, there was no mention about the partition and the execution of Koorchit on 27.5.1989. PW1 admitted that Ex.D5 is the power of attorney executed in his favour by all the partners, including the plaintiffs in Tr.C.S.Nos.2 and 3 of 2003. It is a registered document. Upon being confronted with this fact, PW1 suddenly came up with a theory that the plaintiffs in Tr.C.S.Nos.2 and 3 of 2003 cancelled Ex.D5. But PW1 admitted that it was not by any registered instrument and that he had not chosen to file the notice of cancellation of the power of attorney.

27.10. One question put to PW1 and the answer given by him would actually clinch this issue. The question and answer are as follows:-

> "Q: Since Anbazhagan and Thayumanaguru do not have any right over the mortgaged property after their retirement from Ramu & Co., their suits Tr.C.S.Nos.2 and 3 of 2003 are liable to be dismissed ?
>
> A: I am not competent to answer this question."

27.11. Therefore, it is clear that PW1 disowned the plaintiffs. He did not specifically admit the execution of a Koorchit in the written statement. In chief-examination, he did not make a whisper about the partition and Koorchit. But, he identified the Koorchits and they eventually came to be marked as Exx.P36 and P37. But, in cross-examination, his answers were contradictory. Therefore, it is clear that there was no partition as alleged by the plaintiffs and that the Koorchit dated 27.5.1989 and Form 5-G from the Urban Land Tax Authorities were concocted and fabricated for the purpose of this case. In such circumstances, Issue No.(8) is answered against the plaintiffs and in favour of the defendants. In other words, the alleged partition of the mortgaged property in favour of G.Anbazhagan and A.Thayumanaguru (plaintiffs in Tr.C.S.Nos.2 and 3 of 2003), is false and not valid. Therefore, it would not affect the rights of the mortgagee viz., Egmore Benefit Society Limited.

Issue Nos.(1) & (2):

28.1. The first issue is as to whether the second defendant firm had the right to mortgage the property of the plaintiff in favour of the first defendant. The second issue is as to whether the entire contract between the first and second defendant is binding on the plaintiffs.

28.2. Since all the 18 issues are framed in common for all the five suits, we have to first identify the suits to which these two issues relate. This is not difficult. The mortgagor is M/s. Ramu & Co., which is a partnership firm. The mortgagee is the Egmore Benefit Society Limited. The mortgagor firm is the second defendant and the mortgagee is the first defendant only in Tr.C.S.Nos.2 and 3 of 2003. Therefore, Issue Nos.(1) and (2) can be identified with the claims in these two suits. In C.S.Nos.339 of 1999 and 551 of 2001, the mortgagee is the first defendant and the auctioneer is the second defendant. In C.S.No.995 of 1999, the auction purchaser is the first defendant and the mortgagee is the second defendant. Therefore, Issue Nos.(1) and (2) tally only with the suits Tr.C.S.Nos.2 and 3 of 2003 and hence, they should be decided only with reference to these two suits.

28.3. As we have already seen, Tr.C.S.Nos.2 and 3 of 2003 are filed by the erstwhile partners of the mortgagor firm, claiming that they became partners of the firm under deeds dated 18.01.1989 and 20.4.1989. As per the averments contained in the plaints in these suits, the partners decided to divide the property by metes and bounds and to have one share allotted. The plaintiffs rely upon an unstamped and unregistered koorchit dated 27.5.1989 in support of their contention that the entire suit property was divided into eight equal shares and one share measuring 4 grounds and 1541 sq.ft. was allotted to each one of the partners. The plaintiffs claim that ever since the date of partition, they are in possession and that the competent authority levied urban land tax. They rely upon Form

5-G dated 17.01.1994. The plaintiffs in these two suits agree that they retired from the partnership in 1992 and that at the time of joining the partnership firm, they gave a power of attorney and that the same was also cancelled at the time of retirement, by sending a communication to K.Balasikhamani. They further claim that they came to know about the claim made by the mortgagee only when they saw a circular dated 02.5.2001.

28.4. Thus, the plaints in both the suits proceed on the basis of an alleged oral partition and three documents namely, (i) a koorchit dated 27.5.1989, (ii) Form 5-G under Tamil Nadu Urban Land Tax Act dated 17.01.1994, and (iii) a written communication issued at the time of retiring from the partnership, to K.Balasikhamani, cancelling the power given to him earlier.

28.5. Therefore, the very foundation of the case of the plaintiffs is an oral partition that allegedly took place in May 1989. Hence, the least that is expected of the plaintiffs is to get into the witness box, at least to say in formal words that there was an oral partition. But, the plaintiffs in both these suits avoided getting into the witness box.

28.6. The plaintiffs cannot allow K.Balasikhamani, examined as PW1, to prove oral partition, since Balasikhamani avoided signing and verifying the pleadings, even in the two suits filed by M/s. Ramu & Co. It was his daughter B.Sudha who signed and verified the pleadings in those two suits, but, she shirked the responsibility of getting into the witness box. Therefore, the oral partition pleaded by the plaintiffs will have to fail miserably.

28.7. In any case, an unstamped and unregistered partition deed, by whatever name it is called, is not admissible in evidence. The recognition granted by law to an oral partition, as evidenced by a koorchit, is available only to properties belonging to joint families. This facility is not extended to properties owned by partnership firms. While under Section 14 of the Partnership Act, it is possible for a partner to bring into the partnership, property belonging to him by the evidence of his intention to make it part of the assets of the partnership, the release of a property from partnership to an individual, without a stamped and registered document, is not possible. In The Chief Controlling Revenue Authority v. Chidambaram (1969 (82) LW 321 Madras FB) a full Bench of this Court pointed out, citing with approval, a decision of the Full Bench of the Calcutta High Court in Premraj Brahmin v. Bhaniram Brahmin, that the property of an individual could be thrown into the partnership stock without any formal document, on the principle underlying Section 14. But, the same Full Bench pointed out in The Chief Controlling Revenue Authority v. M.Abdullah (1969 (82) LW 317) that whenever a division of property takes place under a deed of dissolution of partnership, the document is both a deed of dissolution as well as a deed of partition and that therefore, under Section 6 of the Indian Stamp Act, the higher duty payable for a deed of partition will be payable on the instrument. However, another Full Bench of this Court held in Chief Controlling Revenue Authority v. Sarojini Muthusamy (2001 (1) LW 489) that when a partnership firm is dissolved, the partners are entitled to the benefits that flow from it and that a deed of dissolution made at that time cannot be regarded as a deed to convey or transfer. This decision followed the decision of the Supreme Court in S.V.Chandra Pandian v. S.V.Sivalinga Nadar (1993 (1) LW 612).

28.8. However, in this case, the plaintiffs do not rely upon any deed of dissolution, but, rely upon a koorchit. Therefore, even the Full Bench decision in Sarojini Muthusamy would not go to their rescue. At any rate, koorchit is always identified to be a record of an oral partition that had taken place earlier. Therefore, oral evidence on the part of the parties pleading such a partition, is a necessary corollary to establish it. But, the plaintiffs failed to get into the witness box. Therefore, the claim of partition is wholly unbelievable.

28.9. Interestingly, a question was put to PW1 during cross examination as to whether there was any partition as evidenced by koorchit dated 27.5.1989. His immediate answer was that he had to verify the records. Thereafter, the counsel for the first defendant fired an array of questions, as though he was interested in establishing a partition.

28.10. It was also brought on record that at the time when the alleged partition took place, there was a subsisting loan with the Indian Bank and that no information was passed on to them. PW1 further admitted that there was no mention about the partition, in the deed of Admission cum Retirement dated 01.4.1992 marked as Ex.D3. A perusal of Ex.D3 dated 01.4.1992 shows that the partnership firm carried on business at the very same schedule mentioned property namely, No.91, Dr.C.P.Ramasamy Road, Alwarpet, Chennai 600 018, by running a hotel called Hotel Kavitha and a Kalyana Mandapam called "Gokul Kalyana Mandapam". Clauses 3 and 4 of Ex.D3 indicated that the firm will continue to run the same businesses at the same property. Clause 9 indicated that the re-constituted firm will continue the business with the entire assets and liabilities of the firm, as a running business without any break. If the claim that the suit property comprising of land of an extent of 39 grounds had been partitioned (on 27.5.1989) into eight equal moieties and divided among the eight partners is true, the Hotel and Kalyana Mandapam could not have been carried on at the same location, either up to or even after 01.4.1992. What is worse is the fact that the power of attorney Ex.D5 was executed by the plaintiffs (Anbalagan and Thayumanaguru) on 01.8.1989 under Ex.D5, much after the alleged partition.

28.11. The story that the power of attorney under Ex.D5 was cancelled by the plaintiffs, was also not fully supported by PW1. First of all, he admitted that the cancellation was not by a registered document, though the power of attorney was a registered one. He did not produce even a notice of cancellation of power. PW1 pleaded ignorance of any public notice of cancellation of the power.

28.12. To cap it all, PW1 gave two answers, which are sufficient to answer these two issues against the plaintiffs and throw both the suits Tr.C.S.Nos.2 and 3 of 2003 out. The questions and answers are as follows:

> "Q: Since Anbalagan and Thayumanaguru do not have any right over the mortgage property after their retirement from Ramu & Co., their suits namely Tr.C.S.2 and 3/2003 are liable to be dismissed?
>
> A: I am not competent to answer this question.
>
> Q: Similarly, C.S.339/1999 filed by Anbalagan is also liable to be dismissed?

A: I am not competent to answer this question."

28.13. Therefore, it is clear that PW1 admitted his incompetence to answer the questions relating to the rights claimed by the plaintiffs in Tr.C.S. Nos.2 and 3 of 2003 on the basis of an alleged partition. If the plaintiffs in these two suits were the beneficiaries of an oral partition, the other partners including K.Balasikhamani and Arunagiri were also the beneficiaries. But, none of them ever pleaded any oral partition at any point of time, ever since the dispute started. Therefore, the story that there was an oral partition is obviously cooked up for the purpose of this case.

28.14. Once it is clear that there was no partition, it is not open to the retired partners to question the right of the continuing partners to mortgage the property of the firm. The plaintiffs in these two suits admittedly retired from partnership on 01.4.1992. Therefore, they cannot question the right or validity of the transaction entered into between the defendants 1 and 2. The partnership firm has not disputed the borrowal of money and the creation of a mortgage. Once the claim of partition fails, the property is naturally that of the firm. Therefore, I answer Issue No.(1) to the effect that the second defendant firm (in Tr.C.S.Nos.2 and 3 of 2003), had the right to mortgage the suit property (described in Schedule A to these suits) in favour of the first defendant, namely, Egmore Benefit Society Limited. No portion of Schedule A property belonged or belongs to the plaintiffs and hence, they cannot question the mortgage.

28.15. Once it is found that the plaintiffs in these two suits had nothing to do either with the loan transaction or with the property, then it is not for them to question the contract between the defendants 1 and 2. The plaintiffs are not parties to the loan transaction, as they had retired from the partnership even before. The property became vested with the firm absolutely and they had created a mortgage, which the mortgagee attempted to enforce. The mortgagee is not proceeding against the personal properties of the plaintiffs. Therefore, the question of the contract (loan transaction), entered into between the defendants 1 and 2, binding the plaintiffs does not arise. Hence, Issue No.(2) is answered to the effect that the loan transaction between the defendants 1 and 2 is binding on persons who were partners on the date of the loan agreement and that the property in entirety is covered by the mortgage created in favour of the lender.

Issue Nos.(5) & (15):

29.1. The fifth issue is as to whether any illegal gratification was received by the erstwhile Chairman of the second defendant Society for sanctioning the loan of Rs.5 crores to the plaintiff partnership firm and splitting the loan into two parts viz., Rs.25 lakhs by registered simple mortgage and Rs.4.75 crores by deposit of title deeds of the property. The fifteenth issue is as to whether any cut-back commission/secret commission/bribery of Rs.10 lakhs was received by the erstwhile Chairman of the first defendant Society for sanctioning the loan of Rs.5 crores to the plaintiff partnership firm in contravention of its own rules and in contravention of the statutes.

29.2. As indicated already, there are five suits on hand, out of which only 2 are by the partnership firm which borrowed the loan and created a mortgage. Two suits are by persons who had retired from the partnership. One suit is by a continuing partner.

29.3. Two out of the five suits were filed in the year 1999. The first of them was by the continuing partner and the second was by the firm. The third suit was filed in the year 2001 by the partnership firm. The fourth and the fifth suits were filed by the retired partners in the year 2001.

29.4. In the first suit, C.S.No.339 of 1999, filed by the continuing partner, he has claimed in paragraph 4 of the plaint that he and the defendants 4 to 8 in C.S.No.339 of 1999 approached the Egmore Benefit Society Ltd., for a loan and that the same was sanctioned. The entire averments contained in the plaint in C.S.No.339 of 1999 would go to show that the plaintiff therein was aware of the application for loan, the sanction of the loan, the creation of the mortgage and the execution of necessary documents. But, he has not stated anywhere in the plaint that a bribe or illegal gratification or cut back or commission was ever paid to the former Chairman of the Mortgagee.

29.5. The second suit, C.S.No.995 of 1999, was filed by the partnership firm M/s.Ramu & Co. The pleadings were signed and verified on behalf of the partnership firm by Mrs.B.Sudha, D/o.Balasikhamani. In the original plaint as it was filed in C.S.No.995 of 1999, there was no averment to the effect that the former Chairman of the Mortgagee took a bribe.

29.6. Subsequently, the partnership firm came up with a third suit in C.S.No.551 of 2001. The pleadings in the said suit were also verified and signed only by Mrs.B.Sudha on behalf of the firm. It was only in the plaint in that suit that an averment was made to the effect that a bribe amount was paid.

29.7. After taking up such a plea for the first time in the third suit, wisdom dawned upon the plaintiff and hence they got the plaint in C.S.No.995 of 1999 amended to include certain averments in paragraph 6 of the plaint. The amendment was ordered on 20.3.2002 in the application A.No.5796 of 2001. Therefore, it is clear that the very averments relating to illegal gratification were made for the first time in the year 2001, despite the partnership firm having started the litigation way back in 1997. Keeping this in mind, let me now look at the evidence on record.

29.8. Mrs.B.Sudha, who had signed the pleadings in C.S.Nos.995 of 1999 and 551 of 2001, did not choose to go to the witness box. On the other hand, her father who is one of the partners of the firm, examined himself as PW1. He was not an ordinary person. He was, as seen from his deposition, an employee of the Vysya Bank. He left the Bank and started a Construction Company. He admitted to be a Commerce Graduate with a Diploma in Banking. In response to a question during cross-examination, PW1 admitted that he was the person who was handling and representing the plaintiff firm, at the time of the borrowing. Therefore, one would have expected him to sign and verify the pleadings. But he did not choose to do so. On the contrary, he allowed another partner to sign and verify the pleadings and that partner did not go to the witness box.

29.9. In the same portion of cross-examination, where PW1 claims to have handled and represented the plaintiff firm before the Mortgagee, he also claims that a part of the loan amount was given to the Chairman of the first defendant. He did not indicate the amount and he did not also say that it was an illegal gratification.

29.10. What is worse is that when PW1 was confronted with his signature in Ex.P8, which is the affidavit of undertaking filed in CRP No.1999 of 1998, he stated in his cross-examination that though he signed the affidavit, he was not a partner of the firm. Therefore, a question was put to him as to how he was entitled to give evidence on behalf of the firm, when he claims to be not a partner. To this question, he replied that he was entitled to conduct the suit and that he joined as a partner, but did not remember the date and that he had to see the records like the partnership deed. When the same question was repeated subsequently, PW1 said that he rejoined the partnership, but that he has to see the partnership deed to tell the exact date.

29.11. Towards the end of cross-examination, PW1 also admitted that his daughter (and partner) Mrs.B.Sudha gave instructions to the counsel to prepare the plaints in C.S.Nos.995 of 1999 and 551 of 2001. But, she not only failed to get into the witness box, but also failed to make an allegation of payment of illegal gratification to the former Chairman of the Egmore Benefit Society, in the first suit. This allegation proceeds on the basis that a sum of Rs.5 lakhs was paid in cash to the former Chairman N.P.V.Ramasamy Udayar and a sum of Rs.5 lakhs was paid by way of cheque to the Chairman's wife. Though the former Chairman was dead, there was no averment that his wife was also dead. Therefore, the plaintiff should have at least made her a party to the suit. When a serious allegation of demand and acceptance of illegal gratification is made, the plaintiff cannot seek a finding without impleading the concerned person as a party. The attempt to invite a finding without making at least the wife of the former Chairman as a party, is nothing but a fraudulent attempt.

29.12. In any case, I do not know what effect the said allegation, even if true, could have on the borrowal of loan. The Egmore Benefit Society Ltd., is a corporate entity. It would be bound only by the lawful acts on the part of the Principal Officers. The Benefit Society cannot be deprived of the recovery of the loan advanced by them, on the specious plea that one of its Officers took illegal gratification. The receipt of the full loan amount of Rs.5 crores, as sanctioned by the Benefit Society, is admitted by the plaintiffs in all the suits. Therefore, the allegations made against the former Chairman are hardly of any significance. In any event, the person who pleaded the same, did not go to the witness box. The person against whom such a pleading was set up, was not made a party and the person who went into the witness box, claimed that he was not a partner. Therefore, the allegations of payment of cut back/commission/illegal gratification are completely unfounded and frivolous. Hence, Issue Nos.(5) and (15) are answered against the plaintiffs by holding that payment of cut back/commission/illegal gratification by the plaintiff to the former Chairman of the Benefit Society and to his wife, is not established.

Issue No.(4):

30.1. The fourth issue is as to whether the first defendant Egmore Benefit Society Limited was entitled to advance a loan to the second defendant firm without verifying the title to the property.

30.2. This issue is an off-shoot of the claim made by the plaintiffs in Tr.C.S.Nos.2 and 3 of 2003 to the effect that much before the creation of the mortgage, the property was partitioned and that on the date of creation of the mortgage, the borrower firm was not the owner of the property.

30.3. But, I have already found on Issue Nos.(8), (1) and (2) that the claim of partition is a farce and frivolous one. Once the claim of partition made by the plaintiffs fails and once it is found that the firm was the absolute owner of the property, entitled to deal with it in a manner known to law, it cannot be contended that the first defendant advanced a loan to the firm without verifying the title.

30.4. The contention that the first defendant Society advanced loan without verifying the title of the firm to the property, is both ill-conceived and ill-explained. The partnership firm as well as the individual partner who have come up before Court claim that the property belongs to the firm absolutely. The story of partition set up by the retired partners has been rejected by me. Therefore, there is no use contending that the Society advanced a loan without verifying the title of the partnership firm to the property. There are only two things. If the title of the firm is defective, they need not bother. If the title is perfect, the fourth issue does not arise. Therefore, I hold on Issue No.(4) that the first defendant Society advanced the loan to the second defendant firm only after verifying their title to the property.

Issue No.(3):

31.1. The third issue is as to whether the power of attorney given to an agent can be utilised in such a manner as to be detrimental to the interest of the principal.

31.2. This issue appears to have been framed in connection with the first suit C.S.No.339 of 1999. As I have indicated in the first portion of the judgment, where the pleadings are extracted, the plaintiff in C.S.No.339 of 1999 claims that he and three other partners, namely, defendants 6 to 8, were retired from the firm and in their place, defendants 9 to 11 were inducted, under a deed of Admission cum Retirement dated 01.4.1998. This deed, according to the plaintiff A.Arunagiri, was executed by the fourth defendant K.Balasikhamani, on the basis of a Power of Attorney given to him by all the partners. Unfortunately, the deed of Admission cum Retirement dated 01.4.1998 was not filed as an exhibit. The plaintiff A.Arunagiri also did not get into the witness box. The Power of Attorney dated 01.8.1989, by which the plaintiff A.Arunagiri and others authorised K.Balasikhamani, was filed as Ex.D5.

31.3. The plaintiff in C.S.No.339 of 1999 has pleaded in paragraphs 19 and 20 of the plaint that only upon coming to know of the auction sale fixed on 31.5.1999, he came to know of the affidavit of undertaking filed by the partners in CRP No.1999 of 1998 and that thereafter, he came to know of his retirement from partnership with effect from 01.4.1998. Therefore, the plaintiff assails in paragraphs 21 to 25 of the plaint in C.S.No.339 of 1999, the power of the fourth defendant K.Balasikhamani to retire the plaintiff and defendants 6 to 8 from the partnership and the propriety of the old as well as the newly inducted partners in filing an affidavit of undertaking in CRP No.1999 of 1998 for discharging the loan.

31.4. But, the plaintiff A.Arunagiri failed to get into the witness box. He also failed to mark the deed of Admission cum Retirement dated 01.4.1998 as an exhibit. Mr.K.Balasikhamani, who alone deposed on the side of the plaintiffs as PW1, also failed to mark a copy of the said deed as an exhibit. On the question of retirement of old partners and admission of new partners, PW1 made certain

admissions during cross examination. It may be useful to extract all of them, as they would determine the fate of Issue No.(3). The relevant questions and answers are as follows:

> "Q: Arunagiri says in the suit No.339/1999 that you have defrauded him. Is it correct?
>
> A: I deny.
>
> Q: Therefore, when you retired Arunagiri from the partnership firm, you did consciously and intimated him?
>
> A: Whatever power I had, I have exercised. Arunagiri's retirement was done consciously. I do not remember whether I have intimated.
>
> Q: There is no dispute that you have absolute power to retire Arunagiri from the partnership firm?
>
> A: I had the power to retire him. I had the power of attorney from him.
>
> Q: Is Ex.D5 the power of attorney given by Arunagiri?
>
> A: Yes.
>
> Q: Arunagiri is wrong in saying that you do not have power to retire him from the partnership firm, Ramu & Co.?
>
> A: Yes.
>
> Q: Why did you retire Arunagiri and the other partners from the firm by using Ex.D5-power of attorney?
>
> A: It was due to exigency of the business.
>
> Q: What was the business exigency that prompted you to retire him?
>
> A: It was an arrangement between the remaining partners and the retiring partners.
>
> Q: That means Arunagiri was consulted and informed before his retirement?
>
> A: I do not remember whether he was consulted or informed."

31.5. Interestingly, the allegations of A.Arunagiri, the plaintiff in C.S.No.339 of 1999, were directed against the fourth defendant K.Balasikhamani, to the effect that he acted on the basis of the Power of Attorney, in a manner detrimental to the interest of the partners. Conveniently, K.Balasikhamani,

who was the fourth defendant, failed to file a written statement, supporting or opposing the allegations of A.Arunagiri. On the contrary, when A.Arunagiri moved C.S.No.339 of 1999 and sought an interim stay of auction before this Court, this Court imposed a condition for payment of an amount of Rs.3.00 crores. This amount was paid and the mortgagee issued receipts which were marked as Exx.D17 and D18. These receipts were actually acknowledged only by K.Balasikhamani. Therefore, it is clear that it was PW1 who set up A.Arunagiri to file a suit, as otherwise, he could not have obtained the receipts on behalf of A.Arunagiri.

31.6. In the plaint, A.Arunagiri specifically alleged collusion between K.Balasikhamani and Egmore Benefit Society Limited. But, it became clear in the course of evidence that only they were in collusion. To a question in cross-examination whether there was collusion between him and the Benefit Society, PW1 replied in the negative. PW1 also admitted that four of the partners of the firm were his own kith and kin. One was his mother, one was his wife and two were his daughters. The plaintiff A.Arunagiri was admittedly PW1's younger sister's husband.

31.7. Therefore, it is clear that all the partners of the borrower firm, somehow or the other, were making attempts to avoid repayment of the amount borrowed from the mortgagee and to wriggle out of their obligations. The suits filed by two retired partners Anbalagan and Thayumanaguru and the suit filed by A.Arunagiri were part of a larger scheme designed by all of them to retrieve the mortgaged property without repaying the loan. The attack on the Power of Attorney and its use by K.Balasikhamani is just a part of the said design.

31.8. It is on the strength of the Power of Attorney executed by all the partners in favour of K.Balasikhamani that he secured a loan of Rs.5.00 Crores for the partnership firm. The firm was the beneficiary of the amount of loan. The loan transaction entered into by the Power Agent, was for the benefit of the firm and the property was offered only as a security for the due repayment of the loan. Even in a contract of sale, adequacy of consideration is not a ground to assail the transaction. While so, it is futile on the part of the plaintiff to contend that by abusing his position as the Power Agent, PW1 offered as security, a property worth Rs.50.00 Crores for a loan of Rs.5.00 Crores. The amount of loan has no correlation to the value of the security, insofar as the borrower is concerned. This is for the reason that the borrower could have always repaid the loan and taken back the property. Hence, I hold on Issue No.(3) that the power given by all the partners in favour of K.Balasikhamani, for getting a loan from the Benefit Society and for doing all things incidental thereto, was not utilised by the Agent in a manner detrimental to the interest of the Principal. Except A.Arunagiri, none of the other partners make an issue of the manner in which K.Balasikhamani procured a loan. Therefore, Issue No.(3) is answered against the plaintiff.

Issue Nos.(12) & (16):

32.1. The twelfth issue is as to whether the mortgage transaction between the plaintiff firm and the first defendant Society is void ab initio under Section 23 of the Contract Act. The sixteenth issue is as to whether the order passed in CRP No.1999 of 1998 based on an affidavit of undertaking filed by some partners of the plaintiffs firm contrary to statutes and without any adjudication by Court is an order "per incuriam" and such an order is binding on the plaintiff.

32.2. Both these issues are taken up together in view of the fact that the defence in terms of Section 23 of the Contract Act is taken both by the borrower firm and by A.Arunagiri, the plaintiff in the first suit, while challenging the affidavit of undertaking filed by the partners before this Court in the civil revision petition. It is their contention in the plaints in C.S.Nos.339 and 995 of 1999 and in C.S.No.551 of 2001 that the right of sale conferred by Section 69 of the Transfer of Property Act to sell a mortgaged property without the intervention of Court, is confined only to registered simple mortgages and that by passing an order in the civil revision petition on the basis of the affidavit of undertaking to clear both the components of the loan, this Court acted in contravention of the provisions of law. Therefore, the plaintiffs contend that the same is violative of Section 23 of the Contract Act and makes the order of this Court in the civil revision petition one in per incuriam.

32.3. The affidavit of undertaking filed before this Court in CRP No.1999 of 1998, is filed as Ex.P8. It was signed by five persons, namely, PW1, his wife, his mother and two daughters. In paragraph 1 of Ex.P8, the deponents declared that they are the partners of the borrower firm. But, PW1 asserted any number of times during cross examination that he was not a partner of the firm. If his deposition is true, he is guilty of filing a false affidavit. If the affidavit was true, his deposition was false. Either way, he is guilty of adducing false evidence and abusing the process of Court.

32.4. It is needless to point out that an affidavit is evidence within the meaning of Section 191 of the Indian Penal Code and a person swearing to a false affidavit is guilty of perjury punishable under Section 193 of the Indian Penal Code. Condemning such an action and attitude on the part of litigants and witnesses, the Supreme Court pointed out In Re: Suo Motu proceedings against R.Karuppan, Advocate ((2001) 5 SCC 289), as follows:

> "It is a fact, though unfortunate, that a general impression is created that most of the witnesses coming in the courts despite taking oath make false statements to suit the interests of the parties calling them. Effective and stern action is required to be taken for preventing the evil of perjury, concededly let loose by vested interest and professional litigants. The mere existence of the penal provisions to deal with perjury would be a cruel joke with the society unless the courts stop to take an evasive recourse despite proof of the commission of the offence under Chapter XI of the Indian Penal Code. If the system is to survive, effective action is the need of the time. The present case is no exception to the general practice being followed by many of the litigants in the country."

32.5. PW1 as well as his daughter B.Sudha, who have signed and verified the pleadings on behalf of the partnership firm, are really guilty of perjury. In the civil revision petition CRP No.1999 of 1998, which arose out of interim orders of stay granted by the City Civil Court against the proposed auction sale, PW1, his wife, his mother and two daughters were offered two tangible benefits, as a quid pro quo for filing the affidavit of undertaking Ex.P8. The first benefit offered to them was the stay of auction till 30.4.1999. The second benefit offered was the withdrawal of the criminal prosecution launched by the Egmore Benefit Society Limited against PW1 in C.C.No.3063 of 1997 on the file of the IX Metropolitan Magistrate, Chennai, in respect of a dishonoured cheque for an amount of Rs.73,10,281/-. This is seen from paragraph 9 of the affidavit of undertaking Ex.P8. One

more benefit would have accrued to the partnership firm, in the form of waiver of 25% of overdue interest and interest tax amount of Rs.28,12,182/-, if the firm had acted in accordance with the affidavit of undertaking and paid the amount fixed thereunder. Therefore, it is clear that the affidavit of undertaking was not a one sided affair, but, contained lot of benefits for PW1 as well as his family members who were partners of the firm. In such circumstances, I do not know how the affidavit of undertaking could be assailed by the firm as well as the former and present partners, as opposed to public policy.

32.6. Under Section 23 of the Contract Act, every agreement, of which the object or consideration is unlawful, is void. The consideration or object of an agreement is lawful, unless (i) it is forbidden by law, or (ii) is of such a nature that, if permitted, would defeat the provisions of any law or is fraudulent, or (iii) involves or implies injury to the person or property of another, or (iv) the Court regards it as immoral or opposed to public policy. ' 32.7. The plaintiffs claim that the affidavit of undertaking filed by them was for the performance of something which was intended to defeat the provisions of law (Section 69 of the Transfer of Property Act) and that it was opposed to public policy.

32.8. The contention that the affidavit of undertaking was opposed to public policy, is to be stated only to be rejected. A careful look at Section 23 would show that the opinion that something is opposed to public policy, should be that of the Court and not that of the party to the contract. Insofar as something that strikes at the root of the contract on account of being immoral or opposed to public policy is concerned, it is the opinion of the Court that matters. This is why the phraseology used in Section 23 is "The Court regards it as immoral or opposed to public policy".

32.9. The affidavit of undertaking Ex.P8 was filed before this Court in the civil revision petition and this Court did not consider the same to be opposed to public policy. It was accepted by this Court and an order was passed postponing the auction and granting time to the borrower to make payment and also conferring certain benefits on the borrower. An attempt was made to challenge before the Supreme Court, the order passed by this Court in the civil revision petition. But, it did not bring the desired result. The affidavit of undertaking was acted upon by the other party, namely, the lender. Therefore, it cannot be assailed as opposed to public policy.

32.10. The second ground on which the affidavit is assailed is that the compliance with the same would have defeated the provisions of Section 69 of the Transfer of Property Act. Section 69 empowers the mortgagee to sell the mortgaged property without the intervention of the Court, only if the mortgage had been created by way of a registered deed of simple mortgage, incorporating a provision for such sale. The contention of the plaintiff is that the deed of simple mortgage executed by the firm was confined to the loan amount of Rs.25.00 Lakhs and that the next component of the loan, namely Rs.4.75 Crores was secured only by an equitable mortgage by deposit of title deeds. But, in the affidavit of undertaking, the partners agreed to repay the entire loan due in respect of both components and submitted themselves to a sale without the intervention of the Court, if the whole amount was not repaid. Therefore, the plaintiffs claim that what was not facilitated by Section 69, could not have been encouraged by this Court, by accepting an affidavit of undertaking and passing an order on the basis of the same.

32.11. But, the above contention is wholly frivolous. It is true that the provisions of Section 69 of the Transfer of Property Act confer upon the mortgagee, the power of sale without the intervention of Court, only in respect of a deed of registered simple mortgage. But, the plaintiffs have conveniently forgotten that even at the time of taking the loan, the borrower executed a Power of Attorney dated 01.8.1995, marked as Ex.D44, in favour of the Egmore Benefit Society Limited, conferring the power of sale. It was an irrevocable Power of Attorney, as seen from one of the preamble portions. The irrevocability is valid in view of the fact that the power was coupled with interest. In the last portion of the deed of Power Ex.D44, it was made clear that the Power is irrevocable till the entire loan and all monies payable to the Society were fully repaid. This Power of Attorney cannot be said to be opposed to public policy or intended to defeat the provisions of any law. As a matter of fact the plaintiffs do not take a stand that Ex.D44 was ever cancelled or revoked. It could not have been revoked without repayment of all the monies. The affidavit of undertaking has to be seen in the light of Ex.D44. Once this is done, it will be clear that neither the mortgage, nor the affidavit of undertaking was hit by Section 23 of the Contract Act. They are also not intended to defeat the provisions of Section 69 of the Transfer of Property Act and hence, the affidavit cannot be considered as per incuriam.

32.12. One of the contentions raised by the Egmore Benefit Society Ltd. was that the affidavit of undertaking filed on 30.01.1999 in CRP No.1999 of 1998 amounted to an admission of liability and that therefore, their failure to honour the commitment on or before 30.4.1999, gave rise to a right to the Society to bring the property to sale. Taking exception to such a stand on the ground that the affidavit of undertaking did not amount to an admission of liability, as contemplated by Order XII, Rule 6, CPC, the plaintiffs rely upon the following decisions:

(i) P.R.Deshpande v. Maruti Balaram Haibatti (1991 (1) LW 68);

(ii) Melagiriappa v. Tumalappa (AIR 1996 Kar. 150);

(iii) Raj Gopal (Huf) v. State Bank of India (1999 Delhi Law Times 229);

(iv) Balraj Taneja v. Sunil Madan (1999 (8) SCC 396);

(v) Naresh Jain v. Krishna Rani (2002 AIHC 2573); and

(vi) KSD Siva Prasad v. K.A.Padmanabhan (2000 AIHC 4245).

32.13. I do not think that I should deal with each one of those cases, to find out if there was an admission of liability on the part of the plaintiff in terms of Order XII, Rule 6, CPC, or not. The contention of the Society that there was an admission of liability was a mere response to the claim of the plaintiff that the order passed in the civil revision petition is not a decree. But, a reference to Order XII, Rule 6, CPC, whether made by the plaintiff or by the defendant, is completely misconceived. The Egmore Benefit Society did not bring the property to sale in execution of any decree, interim or final, passed in terms of Order XII, Rule 6, CPC. Irrespective of whether the affidavit of undertaking filed on 30.01.1999 amounted to an admission of liability in terms of Order

XII, Rule 6, CPC or not, the sale that took place on 13.5.1999 was only in pursuance of the power conferred by Section 69. It was not a sale in execution of a decree. Therefore, the question relating to Order XII, Rule 6, CPC, and all the decisions on the same, have no significance insofar as a sale that took place not in execution of a decree, but, in exercise of the power of the sale.

32.14. Out of the aforesaid decisions relied on by the plaintiffs, I think I should deal with the one in P.R.Deshpande vs. Maruti Balaram Haibatti (1999 (1) LW 68). It was held therein by the Supreme Court, as follows:-

> "A party to a lis can be asked to give an undertaking to the Court if he requires stay of operation of the judgment. It is done on the supposition that the order would remain unchanged. By directing the party to give such an undertaking no Court can scuttle or foreclose a statutory remedy of appeal or revision, much less a Constitutional remedy."

Therefore, it is contended by the plaintiff that the statutory right of redemption cannot be said to be lost merely due to the affidavit of undertaking filed on 30.1.1999.

32.15. But the said decision is quoted out of context by the plaintiffs. The said decision arose under the Rent Control Legislation. The affidavit of undertaking filed before the High Court, was held by the Supreme Court to be one that would not take away the statutory right of the tenant to appeal to the Supreme Court. In the case on hand, I am not holding that by filing the affidavit of undertaking, the plaintiffs lost their right of redemption. I am just taking note of the same, for the purpose of understanding how the plaintiffs employed all kinds of tactics available in the text books to stall every auction sale. Therefore, the decision in Deshpande, the correctness of which has recently been doubted by another Bench of the Supreme Court, is not of any assistance to the plaintiffs.

32.16. Enlarging on the scope of the controversy relating to the affidavit of undertaking, which in my opinion was wholly unnecessary and irrelevant, the plaintiffs argued what an affidavit is and how an evidence on affidavit should be dealt with. After referring to Section 3(3) of the General Clauses Act, which defines the expression "affidavit", the learned counsel for the plaintiff relied upon the decision of the Supreme Court in M.Veerabhadra Rao v. Tek Chand (1984 (Supp.) SCC 571) for driving home the necessary ingredients of an affidavit. He also relied upon the decision in V.R.Kamath v. Divisional Controller (AIR 1997 Kant. 275) to highlight the manner in which an attestation should take place. Further, the learned counsel relied upon the following decisions, where an affidavit was held to be not included in the definition of the expression "evidence" in Section 3 of the Evidence Act:

(i) Gooru Narayana v. Lakshmayya (AIR 1939 Mad. 927);

(ii) Marneedi Satyam v. Venkataswami (AIR 1949 Mad. 689); and

(iii) Babulal v. Motilal (AIR 1953 MB 82).

However, the learned counsel for the plaintiff also brought to my notice the following decisions, where an affidavit was held to be an affirmation on oath, which must stand until it is contradicted and that the only right of the opponent is to call the deponent for cross examination:

(i) Kanhaiyalal v. Meghraj (AIR 1954 Nag. 260);

(ii) Federal India Insurance Co. v. Anandrao (AIR 1944 Nag. 161);

(iii) Gopika Bai v. Narayana Govinde (AIR 1953 Nag. 135);

(iv) Shib Sahai v. Tika (1942 Oudh 350);

(v) Srinivasa v. Pichamani (AIR 1933 Mad. 164);

(vi) Jamaluddin Abdul Wahab v. Dr. Abdul Ali (1950 ILR All. 65); and

(vii) Munibasappa v. Gurusiddaraja (AIR 1959 Mys. 139).

32.17. But, the question whether an affidavit is evidence or not and the question as to how an affidavit is to be sworn to and attested and the question as to how an oath is to be administered, are all unnecessary and irrelevant. The affidavit of undertaking dated 30.01.1999 filed in the civil revision petition, a copy of which was marked as Ex.P8, was not used as a piece of evidence in the civil revision petition, to decree any suit against the plaintiffs. I am also not deciding the liability of the plaintiffs, either on the basis of Ex.P8 affidavit of undertaking or on the basis of any other affidavit.

32.18. First of all, the amendments to the Civil Procedure Code, that were made in 1999 and 2002, completely changed the outlook of Courts towards affidavits. Today, examination-in-chief can take place in terms of Order XVIII, Rule 4(1), CPC, by way of affidavit. This is why PW1 himself filed an affidavit in lieu of chief examination. I do not know if the plaintiffs or PW1 may turn back tomorrow and call the entire chief examination as a piece of waste paper to be dumped into the dustbin. The affidavit of undertaking filed by this very PW1 in the civil revision petition, was not actually by way of evidence. It was like an affidavit of undertaking filed by tenants in Rent Control Proceedings, agreeing to vacate within a particular time frame. This affidavit of undertaking is not to be confused with any piece of evidence. It was a solemn undertaking made by PW1 and the partners of the firm to this Court, for the purpose of securing at least three benefits, namely, (i) postponement of the auction, (ii) waiver of penal interest; and (iii) withdrawal of the criminal case. This is why I have referred to the decision of the Supreme Court in In Re: Suo Motu proceedings against R.Karuppan, Advocate ((2001) 5 SCC 289), to point out how the plaintiffs had taken this Court as well as the defendant for a jolly ride. Hence, all the contentions that revolve around the question whether an affidavit is an evidence or not and whether it was an admission of liability or not, are completely out of context and irrelevant. They are irrelevant for two reasons, namely, (a) I am not determining either the liability or otherwise of the plaintiffs, nor am I determining the quantum of liability of the

plaintiffs to the defendant, on the basis of any affidavit; and (b) even in the civil revision petition, this Court did not decide the quantum of liability of the plaintiffs on the basis of the affidavit of undertaking. It was the plaintiffs (particularly PW1), who indicated the amount payable by them, in the affidavit of undertaking. Therefore, nothing turns out on any affidavit, insofar as the present suits are concerned.

32.19. In view of the above, I hold on Issue No.(12) that the mortgage is not hit by Section 23 of the Contract Act. I hold on Issue No.(16) that the order passed in CRP No.1999 of 1998 is not contrary to any statute, nor is it per incuriam. Hence, both these issues are answered against the defendants.

Issue No.(11):

33.1. The 11th issue is whether the splitting of the loan of Rs.5 crores into a registered simple mortgage of Rs.25 lakhs and mortgage by deposit of title deeds of the property in violation of the Memorandum and Articles of Association of the first defendant Society is against the public policy and amounts to evasion of Stamp Duty.

33.2. The plaintiffs admit that they made a loan application on 16.6.1995 under Ex.P1, for the grant of a loan of Rs.5 crores. The loan was sanctioned and the plaintiffs admittedly executed several documents. The deed of mortgage titled as "Special Loan Mortgage Deed" executed on 31.7.1995 is filed as Ex.P2. It was registered in the office of the Sub Registrar, Mylapore. Paragraph 8 of Ex.P2 states that if the mortgagor failed to pay the amounts as set out in paragraph 7, the mortgagee will have the power to sell the property in public auction or by private sale as provided in Section 69 of the Transfer of Property Act.

33.3. The borrower firm also executed a memorandum on 01.8.1995, filed as Ex.P3, recording the fact that all title deeds relating to the property have been deposited with the lender, with the intention to create a collateral security, for the debt of Rs.4.75 crores. On the same date, a Loan Agreement dated 01.8.1995 was also executed by the borrower firm and the lender Society. It was filed as Ex.P4. Under Clause 1 of the said Loan Agreement, the Society agreed to advance a loan of Rs.5 crores and the borrower agreed to execute a simple mortgage for Rs.25 lakhs and agreed to create a mortgage by deposit of title deeds for Rs.4.75 crores.

33.4. Clause 6 of the Loan Agreement Ex.P4 made it obligatory for the borrowers to execute and register, at the cost and expenses of the borrowers, a mortgage deed, if the lender so felt that the equitable mortgage created was not sufficient. Under Clause 7 of Ex.P4, the borrowers undertook to execute an irrevocable power of attorney authorising the lender to sell, mortgage etc., the property in question.

33.5. Clauses 17 and 18 of Ex.P4 reads as follows:-

> "17. LENDER has the right to appropriate any moneys paid by the BORROWERS as per order of priorities to be decided at the sole discretion of the LENDER and the LENDER has power to appropriate such moneys first against all amounts due to the

> LENDER which is secured by the mortgage of deposit of title deeds including the instalments not due, all interest and other amounts due to the LENDER.
>
> 18. BORROWERS hereby agree to redeem the simple registered mortgage by resort to the provisions of Section 69 of the Transfer of Property Act and only after the BORROWERS have satisfied in full all amounts due and outstanding, secured under the mortgage of deposit of title deeds including instalments not due, all interest and other amounts due to the LENDER."

33.6. The Memorandum of Association and Articles of Association of the lender was filed as Ex.P5. Clause 3 of the Memorandum of Association states that the objects for which the Society was established, are to do banking business of all kinds among its shareholders. Clause 2 of the Articles of Association states that the transactions of the Society shall be restricted to its shareholders. Clause 2 also states that a person whose application for allotment of shares is accepted by the Secretary, shall be deemed to be a shareholder. The expression "shareholder" is defined in Clause 5(a) to mean a registered holder of one or more share in the Society.

33.7. A printed circular of the Egmore Benefit Society Ltd., titled "Property Loans-Salient Rules and Conditions for the Information of Applicants" was filed by the plaintiffs as Ex.P6. The said document merely contains the conditions subject to which loans would be granted. Though nothing turns on the said document, the plaintiffs rely upon condition No.10 in Ex.P6, which gives a list of documents to be filed along with the loan application. From condition No.10, the plaintiffs want me to infer that a loan cannot be advanced by the Society to partnership firms carrying on businesses and that it cannot also be granted to persons other than shareholders.

33.8. The printed booklet containing the Memorandum and Articles of Association of the Egmore Benefit Society, is filed by the Society itself as Ex.D4. A careful perusal of the same would show that there are no restrictions for anyone to become a shareholder. Clause 10 of the Articles of Association is of relevance and importance. Therefore, it is extracted as follows:-

> "10. Any Persons may become a shareholders of the Society a share may be allotted to one or more persons jointly. The expression "person" occurring in this articles shall include a Body Corporate."

Therefore, primarily there was no restriction for the partnership firm to become a shareholder.

33.9. In any case, all the partners became shareholders individually by making applications through their power agent K.Balasikhamani, as seen from Ex.D7 series. In fact, K.Balasikhamani, examined as PW1, was himself a shareholder. Therefore, none of the Articles of Association of the Egmore Benefit Society Ltd., stood violated by the sanction of the loan.

33.10. The splitting of the loan into two components viz., (i) Rs.25 lakhs secured by a registered mortgage and (ii) Rs.4.75 crores secured by a mortgage by deposit of title deeds, is also not prohibited by any of the clauses in the Memorandum and Articles of Association of the Egmore

Benefit Society Ltd. Clause 52 of the Articles of Association confers sole discretion upon the Board of Directors regarding the utilisation of the funds of the Society, including the grant of regular or special loans on the security of movable and immovable properties. None of the clauses in the Memorandum or Articles of Association, stipulates that the security on the immovable property can be created only in one way and not the other. In other words, the Articles of Association confers absolute discretion upon the Board of Directors to decide the manner in which regular or special loans could be granted and they also have the absolute discretion to decide the manner in which a security is to be created. Therefore, creation of security in the form of a registered deed of simple mortgage for Rs.25 lakhs and the creation of security in the form of mortgage by deposit of title deeds for Rs.4.75 crores, is not prohibited by any of the clauses in the Memorandum or Articles of Association of the Society.

33.11. It is contended by the plaintiffs that the splitting of loans into two components and creating security in two different methods, were intended to defeat the provisions of the Indian Stamp Act and that therefore, the same was opposed to public policy.

33.12. It is true that if a registered deed of simple mortgage had been created for the entire loan amount of Rs.5 crores, an enormous amount would have been charged towards stamp duty and registration charges. The splitting of the loans into two components, reduced the incidence of stamp duty and registration charges.

33.13. But there is a distinction, well recognised and approved in law between tax planning and tax evasion. For Centuries, law has approved that a man can arrange his affairs in such a manner that the incidence of tax is kept to the minimum. This is too well settled a proposition, hardly requiring the citation of any authorities.

33.14. Moreover, the clauses contained in the loan application and the Loan Agreement, indicate that the stamp duty and registration charges are payable only by the borrower. Therefore, the splitting of the loans actually enured to the benefit of the plaintiff. After having enjoyed a benefit on account of a Scheme devised by the Society for reducing the incidence of tax, the plaintiff is now shedding crocodile tears for the State for losing stamp duty. Nothing prevented the plaintiff from being a honest duty payer, by insisting at the time of sanction of loan that they would execute a deed of simple mortgage for the entire amount of the loan.

33.15. The contention that the splitting of loans was opposed to public policy, is also frivolous. I have already dealt with the question of public policy, while dealing with issue No.12. For a contract to be hit by Section 23 of the Contract Act, the Court should consider the same to be opposed to public policy. In my careful consideration, I have found that it was not opposed to public policy. The splitting of loans was not intended to defeat the provisions of any law, especially the law relating to stamp duty. The law recognises the creation of mortgage by many methods. The law itself imposes an obligation to pay stamp duty and to register a deed of mortgage, only if it is a deed of simple mortgage. The Stamp Act, does not impose an obligation for payment of stamp duty, in respect of mortgages by deposit of title deeds, despite the fact that the creation of such a mortgage is well recognised. When law gives several options to a person, one of which carrying an incidence of

tax/duty and another not carrying such an incidence, it is up to that person to choose any one of the two options. The choice of that option where there is no incidence of stamp duty or tax, cannot be said to be to defeat the provisions of law. Therefore, I hold on issue No.11 that the splitting of loans into two components and the creation of two different mortgages, was neither violative of the Memorandum and Articles of Association nor opposed to public policy, for evasion of stamp duty. Thus, Issue No.(11) is also answered against the plaintiffs.

Issue No.(14):

34.1. The 14th issue is whether such an unregistered loan agreement containing clauses usually found in a simple registered mortgage deed, namely payment schedule, acceleration clause, penal interest etc., should be stamped under the Stamp Act and registered under the Registration Act as a simple mortgage.

34.2. As we have already seen, the plaintiff firm applied for the sanction of a loan of Rs.5 crores. It was sanctioned by the Society primarily on the understanding that the suit property will be mortgaged. While doing so, the loan was split into two components, one for a sum of Rs.25 lakhs, to be secured by a registered deed of simple mortgage and another for a sum of Rs.4.75 crores, to be secured by a mortgage by deposit of title deeds.

34.3. The parties entered into a Loan Agreement on 01.8.1995, filed as Ex.P4. This Loan Agreement did not contain any payment schedule. It merely stipulated that the lender will charge interest at 24% per annum on both components of loan. Clause 4 of the Agreement which is supposed to indicate the monthly instalments, was partly scored off, not by the defendants but by PW1. Ex.P4 did not contain even a single clause that would have attracted stamp duty and registration. As a matter of fact, Ex.P4 came into existence only on 01.8.1995, after the execution of the deed of simple mortgage on 31.7.1995. But the deed of simple mortgage was presented for registration only on 02.8.1995. It was filed as Ex.P2. It is only this registered deed, which contained the date for payment, acceleration clause, penal interest clause etc. Therefore, the plaintiffs have wrongly presumed that the unregistered Loan Agreement contained these clauses.

34.4. In any event, this issue raised by the plaintiffs, is wholly irrelevant. If a document is not duly stamped and registered, despite the law requiring the same to be stamped and registered, it is inadmissible in evidence. But in this case, it was the plaintiff who filed the Loan Agreement dated 01.8.1995 as Ex.P4 and the registered mortgage deed as Ex.P2 and the Memorandum and Deposit of Title Deeds as Ex.P3. The defendants did not seek to mark them. In fact, the plaintiffs filed the unregistered Loan Agreement, for the purpose of assailing Clauses 17 and 18 of the same. If Ex.P4 is thrown out as inadmissible in evidence for want of stamp duty and registration, automatically the challenge to clauses 17 and 18 of the same should also be thrown out, as the Agreement itself will not be on record.

34.5. Therefore, on Issue No.(14), I hold that at the outset, the unregistered Loan Agreement did not contain any clause including payment schedule, which made the document assessable to stamp duty and requiring registration. This issue is accordingly answered against the plaintiff.

Issue Nos.(9) & (13):

35.1. The ninth issue is whether the Benefit Society Limited is not entitled to bring the mortgaged property for sale in public auction without intervention of the Court for realisation of its dues under the loan obtained by M/s.Ramu & Co., and the thirteenth issue is whether the first defendant mortgagee can claim power of sale without intervention of Court by any process other than conferment of the power in the registered mortgage deed as per Section 69 of the Transfer of Property Act.

35.2. Issue Nos.(9) and (13) actually overlap with each other and hence, they are taken up together. The answer to these issues are to be found partly on facts and partly in law.

35.3. There are 3 documents which will throw light upon these issues. The first document is Ex.P2, the registered deed of simple mortgage dated 31.7.1995. The second document is the Loan Agreement dated 01.8.1995 marked as Ex.P4. The third document is the Deed of Power of Attorney dated 01.8.1995, filed as Ex.D44. For the present, I am ignoring Ex.P3, the Memorandum of Deposit of Title Deeds created for securing the loan of Rs.4.75 crores.

35.4. The case on hand falls under Section 69(1)(c) of the Transfer of Property Act. Ex.P2 is a registered deed of simple mortgage, which contains a clause empowering the mortgagee to sell the property without the intervention of Court. The property is situate in Chennai. Therefore, all conditions found in Section 69(1)(c) stand satisfied. Even the plaintiffs have no quarrel about the power of the mortgagee to bring the property to sale without the intervention of the Court, at least in so far as the loan amount of Rs.25 lakhs is concerned.

35.5. The only contention of the plaintiff which had led to Issue Nos.(9) and (13) is that in respect of the loan amount of Rs.4.75 crores, the conditions stipulated in Section 69(1)(c) are not satisfied and that therefore, for the recovery of this part of the loan, the mortgagee cannot exercise the power of sale without the intervention of the Court.

35.6. But the above contention has no basis in view of two facts viz., (a) that under Clauses 17 and 18 of Ex.P4 (Loan Agreement), the mortgagee is entitled to appropriate the sale proceeds first towards the discharge of the second loan; and (b) that the mortgagor also executed a deed of irrevocable power of attorney under Ex.D44, enabling the mortgagee to sell the property as the agent of the mortgagor. There is no law which prohibits a mortgagee from doing this. If the contention of the plaintiff that the right of sale without the intervention of Court should have been exercised by the mortgagee only for the amount of Rs.25 lakhs is accepted, it would lead to ridiculous consequences. In other words, if the plaintiffs contention is accepted, the mortgagee should first sell the property at his cost, recover only Rs.25 lakhs with interest and return the excess sale consideration to the mortgagor and thereafter, file a suit and wait for a preliminary decree, a final decree and execution to realise the same amount. I am sure the plaintiff would not choose such a course of action, if they had advanced money to somebody.

35.7. Even plaintiffs concede that the mortgagee was entitled to bring the property to sale without the intervention of Court, in terms of Section 69(1)(c), in so far as the loan amount of Rs.25 lakhs is concerned. Once this is conceded, then the only question that would arise for consideration is whether the mortgagee could have retained with them, the balance sale consideration over and above this amount of Rs.25 lakhs with interest or whether they should have refunded that money to the mortgagor. In other words, the question whether the mortgagee is entitled to invoke Section 69(1) will not survive, if the mortgagee is found to have a statutory right at least in respect of one portion of the amount. The only question that would survive is as to what should happen to the balance of sale consideration. This question is answered by Clauses 17 and 18 of Ex.P4.

35.8. Unfortunately, the plaintiffs have misunderstood and mixed up two independent questions, one relating to the right of sale under Section 69 and another relating to appropriation of the sale proceeds. Once the plaintiffs agree that the mortgagee has a right of sale under Section 69, then the only question left to be decided would be about appropriation of the sale proceeds. Apart from the fact that the mortgagee had the right of appropriation, under Clauses 17 and 18 of Ex.P4, it is to be noted that the plaintiffs have not come up with any suit for refund of the balance consideration. Even assuming without admitting for the sake of argument that the entire sale proceeds could not have been appropriated, the only remedy open to the plaintiff is to seek refund of money, but not to question the sale itself.

35.9. Therefore, I hold on Issue No.(9) that the mortgagee was entitled to bring the property to sale in public auction without the intervention of the Court, for the realisation of the dues of M/s.Ramu & Co. I also hold on Issue No.(13) that the mortgagee was entitled to claim the power of sale without the intervention of Court, both by virtue of the express clause in the registered deed of simple mortgage as per Section 69 and also by virtue of the deed of irrevocable power of attorney filed as Ex.D44. This power of attorney was coupled with interest and hence irrevocable.

Issue Nos.(6) & (7) 36.1. The sixth issue framed for consideration is as to whether any proper auction was conducted by the second and third defendants on 13.12.1999. The seventh issue is as to whether any bungling had taken place in the auction sale.

36.2. Briefly stated, the auction held on 13.12.1999 is assailed by the plaintiffs on the following grounds:-

> (i) that no proper publicity for the auction was given, no adequate time was available between the date of advertisement and the date of auction and no upset price was fixed in the advertisement as required by Order XXI, Rules 65, 66, 67, 68 etc., of the Code of Civil Procedure.
>
> (ii) that persons closely related to the former chairman of the Egmore Benefit Society were present at the time of auction and that genuine bidders were prevented from participating in the auction, due to the collusion between Directors of the Society and the bidders.

(iii) that the highest bidder failed to pay 25% of the bid amount, on the spot, in tune with the principles laid down under Order XXI, Rule 84 of the Code of Civil Procedure and the terms and conditions of auction.

(iv) that the auction purchaser did not pay even the balance of sale consideration of 75% within the time stipulated.

(v) that there was sale in excess of the requirement.

36.3. In their written submissions, the plaintiffs have given the following factual context in which the above contentions are raised by them:

(i) The auction was challenged first by A.Arunagiri in C.S.No.339 of 1999 and he obtained an interim injunction on condition that he pays Rs.3 crores. Though A.Arunagiri complied with the conditional order, the injunction application was eventually dismissed. The appeal filed by A.Arunagiri in O.S.A.No.237 of 1999 was dismissed on 29.11.1999. The carbon copy as well as the certified copy of the judgment was made available only on 09.12.1999. By this time, advertisements were issued on 03.12.1999 and 04.12.1999 fixing the auction on 13.12.1999. Though Arunagiri filed a Special Leave Petition before the Supreme Court, the Society did not wait for the Special Leave Petition to be decided, but proceeded with the auction sale.

(ii) No upset price was fixed in the auction notice Ex.P26 and this was admitted by DW1. However, he claimed that oral instructions were given to the auctioneer to commence the bid at Rs.19 crores.

(iii) As per Ex.P6, which incorporates the rules and conditions of the defendant Society for the grant of loan, a loan can be considered only to the extent of 50% of the value of the property offered as security. In 1995, the same property was mortgaged for Rs.5 crores, as the mortgagee found the value of the property to be Rs.10 crores. DW1 admitted that the value of the property kept appreciating and hence the value fixed at Rs.10 crores in 1995 should have gone up in December 1999 when the auction took place. But even according to DW1 the starting price of Rs.19 crores was lowered and the bid started only from Rs.7.80 crores, showing thereby that the property was sold for a song.

(iv) The person who became the successful bidder was a company which was floated with a share capital of just Rs.2,000/-. Even the bid amount was paid by another company by name Orient Plastic Limited which was subsequently merged with Indus-E-Solutions. This Indus-E-Solutions was one of the participants and it was represented by one Venkatraman, who was admittedly the Auditor of the highest bidder. This Indus-E-Solutions later merged with another company by name Mega Soft Limited, which is one of the group companies of the successful bidder, as admitted by DW2. Therefore, it is clear that persons who wanted to snatch away this

property came in a group, formed into a cartel and knocked away the property for less than half the price.

(v) The payment of 25% of the bid amount by way of cheques and the subsequent non-payment of the balance amount of 75% show that the auction lacked bona fides.

36.4. But, as I have pointed out earlier, the persons, who signed and verified the pleadings in all these suits, stayed away from the witness box. The evidence of PW1 is of no avail at all for four reasons, namely (a) he was not present at the time of auction; (b) he claimed to be not a partner even at the time when the affidavit of undertaking was signed on 30.1.1999; (c) he blinked at every question in cross examination and repeatedly said that he could not answer many of the questions without referring to documents, indicating thereby a tendency not to connect the bat with the ball, but to call every throw as a no ball; and (d) his cross examination itself could not be completed, as he failed to appear for further cross examination after 12.12.2006, forcing this Court to close his evidence on 31.10.2008 for non appearance. Therefore, all averments contained in the plaints, relating to the manner of conduct of auction, have to be assessed, keeping in view the fact that no evidence whatsoever, worth any consideration was let in by the plaintiffs. No one is entitled to expect that a lender like Egmore Benefit Society should have waited for Arunagiri to file a special leave petition against the judgment in O.S.A.No.237 of 1999 and also awaited the outcome of the special leave petition to bring the property to sale.

36.5. As a matter of fact, the plaintiffs have exhibited such a cantankerous attitude ever since 1997 that any attempt on the part of the Egmore Benefit Society to bring the property to sale, proved to be a nightmare. In the revision arising out of an interlocutory order in the first civil suit, the partnership firm filed an affidavit of undertaking on the file of this Court on 30-1-1999 and got the auction postponed beyond 30.4.1999. After making this Court pass an order in C.R.P.No.1999 of 1998, the plaintiff had the audacity and unscrupulous attitude to challenge the order passed in the civil revision petition, by way of a special leave petition before the Supreme Court. After allowing the special leave petition to be dismissed as withdrawn, the plaintiff sought extension of time beyond 30.4.1999, but the application C.M.P. No.7283 of 1999 was dismissed on 30.4.1999. The special leave petition against the said order was rejected by the Supreme Court on 13.5.1999. Therefore, there was no impediment for the Society to conduct an auction in May 1999 and hence the Society actually advertised on 10.5.1999 for a fresh auction on 31.5.1999.

36.6. For this auction sale, there was 21 days time. But, this time was effectively made use of, by the plaintiff, to set up a retired partner by name A.Arunagiri to come up with C.S.No.339 of 1999 during summer vacation in the last week of May 1999 and stall the auction sale. A.Arunagiri obtained an injunction on 25.5.1999, restraining the Society from going ahead with the auction on 31.5.1999. Eventually, his application for injunction was dismissed on 25.10.1999. Thereafter, he filed an appeal in O.S.A.No.237 of 1999 in which he filed an affidavit of undertaking on 17.11.1999. But, as had become the usual practice of the plaintiff and its partners, this commitment was also not honoured. This conduct on the part of A.Arunagiri invited the wrath of the Division Bench, when O.S.A.No.237 of 1999 came up for hearing.

36.7. The copy of the order passed by the Division Bench comprising of R.Jayasimha Babu and P.Sathasivam,JJ on 29.11.1999 is filed as Ex.D.24. This order of the Division Bench contains an extract of the affidavit filed by A.Arunagiri on 17.11.1999. It will be useful to extract the affidavit filed on 17.11.1999 by A.Arunagiri before the Division Bench, which forms part of Ex.D24 :

> "1. I am the petitioner herein and the plaintiff in the above suit.
>
> 2. I am today making payment of Rs.1,00,00,000/- (Rupees one crore only) by way of two bankers cheques on for a sum of Rs.39,00,000/- (Thirty nine lakhs only) dated 16.11.1999 on Dena Bank and another for a sum of Rs.61,00,000/- (Rupees sixty one lakhs only) dated 17.11.1999 on the Dena Bank in favour of the 1st respondent, Egmore Benefit Society Ltd.
>
> 3. I hereby undertake to pay further sum of Rs.1,00,00,000/- (Rupees one crore only) on or before 30.11.1999 in favour of the first respondent society.
>
> 4. I further undertake to pay the entire balance of amount remaining in the loan account of Ramu & Co. with the first respondent society on or before 17.12.1999, failing which, the first respondent society will be entitled to realise the balance remaining due under the loan account of Ramu & Co. by public auction."

36.8. After the above affidavit of undertaking filed by A.Arunagiri on 17.11.1999 before the Division Bench, followed the same fate as that of the earlier affidavit of undertaking filed on 30.1.1999 by P.W.1 in C.R.P.No.1999 of 1998, the Division Bench imposed costs of Rs.1 lakh upon A.Arunagiri and directed the said amount to be paid to the High Court Legal Services Authority. Thereafter, the appeal O.S.A.No.237 of 1999 itself was dismissed on 29.11.1999 with costs of Rs.25,000/- to be paid to the Egmore Benefit Society.

36.9. It appears that A.Arunagiri was represented by one Senior Counsel, when the affidavit of undertaking was filed before the Division Bench. Subsequently, the counsel was changed and a new Senior Counsel requested the leave of the Division Bench to give a go-by to the affidavit already filed and to argue the appeal afresh. After hearing the arguments, the Division Bench dismissed the appeal by order dated 29.11.1999 filed as Ex.D.24, recording its displeasure at the contumacious conduct on the part of the appellant. Some of the portions of the judgment of the Division Bench are to be extracted, to see whether all the high-sounding principles of law argued before me have any basis or require any consideration. Therefore, the observations of the Division Bench are extracted as follows :

> "We are shocked and saddened by the conduct of the appellant, who, through a respected Senior Counsel, had submitted before the Bench, when the appeal was taken up for admission on the 17th of November 1999, that all he sought was some breathing time to pay off the amount due to the first respondent society so that the property, which was very valuable one, might be saved. To enable the appellant to raise the amount, the Bench agreed to cancel the public auction, which had been

scheduled to be held on the following day of 18th November 1999, on the basis of the affidavit filed by the appellant before us on the 17th of November, 1999.

....The learned Senior Counsel Mr.V.T.Gopalan, who had appeared for the appellant on 17.11.1999 and 18.11.1999 was profusely apologetic to the court when he told us that he himself had been taken for a ride by his client, and that was the first time such a thing had happened to him in his 38 years of practice at the bar. He also told the Bench that his client had on that day told him that at least within a day or two the money would be raised and would be paid over.

...When the matter came up before us today, we must say, we were taken aback when we are told by the learned Senior Counsel Mr.U.N.R.Rao, who appeared for the appellant today, that the appellant was desirous of arguing his appeal and that the affidavit which he had filed on the 17th of November was filed in a hurry and therefore, he had a right to give it a go by. We expressed our displeasure to the learned counsel for the appellant who however persisted in his stand and stated that before we pass any order on the appeal the appellant may be afforded an opportunity even though the appellant is not in the least entitled to any such opportunity, in view of the conduct which had been exhibited by him and which we have referred to in the paragraphs above.

....The facts which we have narrated above and which we have set out in some detail, clearly establish beyond any reasonable doubt that Arunagiri is a name lender for Balasikhamani who has been making repeated attempts but which attempts have so far been futile in avoiding the public auction of the mortgaged property.

The appellant has produced the copy of an agreement dated 28.1.1999. The parties to that agreement are GPS Investment Ltd., a company registered in Mauritius; Mr.Balasikhamani, his wife Smt.Gurubagiam, their daughters Sudha who are together termed as principal shareholders of Ramu and Company Hotels Pvt. Ltd., and Ramu and Company, the partnership firm. In that agreement, it has been recorded in Article 10.2, under the heading, 'land' thus:

'10.2. The principal shareholders and Ramu Hotels represent, warrant and undertake that :

(a) Ramu & Co. have availed of financial assistance from M/s. Egmore by mortgage of the project land.

(b) the outstanding loan liability as at the current date is approximately Rs.90,000,000/- (Rupees ninety million only).

(e) Ramu & Co. and the principal shareholders agree that GPS Investments Ltd., reserves the rights to clear the entire outstanding liability of Ramu & Co., with Egmore Benefit Society and get the property released in favour of the JV company. It is agreed that the payment to M/s.Egmore Benefit Society for the satisfaction of their dues will be made from the agreed consideration and that these amounts will be made by GPS Investments for and/or the principal shareholders.' One of the annexures to that agreement, which sets out the documents which are to be furnished to the investor company in Mauritius, is an affidavit by the owners of the property declaring that the parties stated in the deed of partnership dated 1.4.1998 are the only persons entitled to subject property.

In the affidavit filed by the appellant before the learned trial judge in May 1999, it was averred in paragraph 6 thus :

'In this connection, the applicant submits that the 3rd respondent/defendant firm in which the appellant/plaintiff is the partner, has already entered into contracts for the construction of a five star hotel on the suit schedule mentioned property in collaboration with foreign investment companies willing to offer a consideration of Rs.48.00 crores for the suit schedule mentioned property, and collaboration agreements have already been concluded and the foreign investors have also obtained the necessary permission/sanctions from the Foreign Investment Promotion Board and other departments of the Government of India. At this stage, if the schedule mentioned suit property is allowed to be sold in public auction, interest of third parties will intervene and that would lead to multiplicity of proceedings. Hence, it is just and necessary that the proposed auction sale in pursuance of the notification in The Hindu dated 10.5.1999 issued by the first and second respondents/defendants has to be stayed...'.

The gist of the appellant's case for seeking stay of the auction was that there was a collaboration agreement under which Ramu and Company was likely to realise Rs.48 crores for the suit property. It was with a view to enable Ramu and Company to secure that price if they really could that the learned vacation Judge has directed that the auction not to be held.

When the Bench heard this matter on the 17th of November, it had been submitted by the learned Senior Counsel Mr.V.T. Gopalan, who appeared for the appellant on that day that his client was about to leave for London to settle the details of the collaboration and a prayer was made for some breathing time to secure the funds required to pay off the loan. The affidavit of Arunagiri filed on that day was filed after the Bench had heard the submissions so made by the learned Senior Counsel who appeared on his behalf on that day. What we are now being told today is altogether different from what was said to the Bench on 17th November, 1999 through a respected Senior Counsel of this Court Mr.V.T.Gopalan. It is obvious that the appellant, behind whom is the obvious presence of Balasikhamani, has not only been

seeking to mislead this Court, but has also been misleading his counsel as well. We deprecate his conduct in the strongest terms."

36.10. Interestingly, this order of the Division Bench dated 29.11.1999 was taken on appeal to the Supreme Court in S.L.P. (Civil). No. 18593 of 1999 by A.Arunagiri. In the meantime, the mortgagee issued advertisements on 3.12.1999 and 4.12.1999. Therefore, A.Arunagiri sought before the Supreme Court, exemption from filing the certified copy, since the auction had been fixed on 13.12.1999. Along with the prayer for exemption from filing the certified copy, the special leave petition was listed before the Supreme Court on 10.12.1999, three days before the date of auction. But, by an order, a copy of which is filed as Ex.D.26, the Supreme Court rejected the prayer for exemption from filing the certified copy and directed the special leave petition to be listed in the normal course. Hence, it was listed on 27.3.2000, after the auction concluded and A.Arunagiri withdrew his special leave petition on that day, as seen from the order dated 27.3.2000 filed as Ex.D.27.

36.11. If the conduct of Egmore Benefit Society in issuing the notices of auction on 3rd and 4th December, for the auction fixed for 13th December, is seen in the background of the above circumstances, it would be clear that a longer duration of time from the date of advertisement till the date of auction, would have resulted only in one more frustration of the statutory rights of the mortgagee. Therefore, I am of the view that the time gap of ten days from 3.12.1999 to 13.12.1999, cannot be said to be a vitiating factor, in the circumstances of the case.

36.12. The fact that the upset price was not indicated in the auction notice, did not also vitiate the auction. It must be remembered that the public notice dated 3.12.1999/4.12.1999 published in the newspapers, was the third or the fourth successive notice of auction. The issue of every auction notice triggered a litigation that sent the mortgagee on a merry-go-round and every notice in newspapers like The Hindu and Daily Thanthi costed a few lakhs for the mortgagee. From the number of persons who participated and from the unwillingness on the part of the participants to accept even Rs.19 Crores, as a fair price, it is clear that there were no takers for the property. As a matter of fact, the plaintiffs themselves appeared to have made attempts to bring buyers. This is seen from two things namely (i) the facts recorded in the order of the Division Bench Ex.D.24, showing the attempts made overseas to bring a buyer for Rs.48 Crores and (ii) the averments contained in the plaints in Tr.C.S Nos.2 and 3 of 2003 to the effect that by a circular dated 2.5.2001, the plaintiff firm made attempts to sell the property through an advocate by name Sathya Rao. Though what happened in May 2001 is subsequent to the auction, what happened when the matter was pending before the Division Bench, was before the auction. Therefore, it is clear that the plaintiffs made attempts and failed to bring any buyer for a higher price. Hence the conduct of the plaintiff as well as the unwillingness on the part of the participants in the auction show that an indication about the upset price would have kept all the buyers away. In any case, at the start of

the auction, the auctioneer fixed the upset price at Rs.19 crores, as seen from the pleadings and evidence on record. Therefore, I do not think that the property fetched a lesser price only due to the failure to fix an upset price.

36.13. Admittedly one auction sale notice was published in the "Daily Thanthi" on 03.12.1999 and another notice was published in "The Hindu" on 04.12.1999. The auction was conducted on 13.12.1999 at the site. As seen from the bidders list with signatures filed as Ex.D.34 and the auction proceedings recorded by the auctioneer M/s.Sri Raj and Co., and filed as Ex.B.35, there were actually 5 bidders in all viz.,

(i) Indus-E-Solutions Ltd., represented by L.S.Venkatraman

(ii)D.Surendra Reddy & Surendra Enterprises

(iii) Ravi Builders

(iv)Viswakarma Properties

(v)NMR Investments/D.Sudhakar Reddy 36.14. Ex.D.34 shows that Indus-E-Solutions Limited offered the lowest quotation of Rs.7.80 crores and the price slowly went up. It appears there were actually 31 calls totally. Finally, NMR Investments made the highest offer of Rs.9 crores.

36.15. Ex.D.35 shows that the higher offeror NMR Investments Private Limited paid 25% of the bid amount viz., Rs.2.25 crores, by way of (i) Cash of Rs.1 lakh (ii)Cheque for Rs.1.5 Crores and (iii)Cheque for Rs.74 lakhs, both cheques drawn on Global Trust Bank Limited, Chennai -4.

36.16. After the conduct of the auction, the plaintiffs issued a notice dated 16.12.1999, a copy of which was marked as Ex.D.36. It is pertinent to note that the plaintiffs did not choose to mark the document. It was marked by the defendants, while cross examining P.W.1. There is no indication in Ex.D.36 as to whether any of the partners of the plaintiff-firm was present at the time of the auction. On the contrary, the details called for by the plaintiff-firm in their notice Ex.D.36 give an indication that none of the representatives of the plaintiff was present at the time of the auction.

36.17. Therefore, all allegations made by the plaintiff that goondas were present and that genuine bidders were prevented from participating and that the Directors of the mortgagee acted in collusion with the highest bidder, become hearsay evidence and not direct evidence. P.W.1 himself admitted in cross-examination (towards the closing portion of his cross examination) that he was not present at the time of the auction. There is a specific admission by PW-1 to this effect. This is why the plaintiff did not raise these points in their earliest notice Ex.D.36 and the plaintiff did not even choose to mark this notice on their side as the plaintiff's exhibit.

36.18. As I have already pointed out, the averments relating to incidents that allegedly happened at the time of the auction, are narrated in the plaint, which is signed and verified by B.Sudha. She did

not go to the witness box. Even Ex.D36 notice issued on 16.12.1999, within three days of the auction sale, was signed by another partner by name B.Gurubackiam and not by K.Balasikhamani, who deposed as P.W.1 on behalf of the plaintiffs. Therefore apart from the fact that P.W.1 had no personal knowledge of what actually transpired on the date of the auction, he was also not competent to speak about it and none of these averments was also made at the earliest point of time. Therefore, the allegations that some unlawful elements were present and that genuine bidders were prevented from effective participation and that a few bidders formed themselves into a cartel and acted in collusion with the mortgagee are all cooked up for the purpose of this case and these averments are obviously added as pepper and salt at the time of filing the plaint into Court, presumably on legal (or illegal) advise.

36.19. This takes us to the next question as to whether the payment by the highest bidder, of 25% of the amount by way of cheque, is a proper payment or not. The auction notice filed as Ex.P26 shows that it contained a condition under Clause No.5 to the effect that the purchaser shall pay into the hands of the auctioneer, immediately after the property is knocked down, a deposit of 25% of the purchase money inclusive of cash deposit if any paid before the commencement of the auction. This condition is similar to the one found in Order 21 Rule 84(1) of the Code of Civil Procedure. Under the said Rule, the person to be the purchaser of an immovable property in an auction, shall pay immediately after the declaration of sale, a deposit of 25% of the amount of the purchase money to the officer conducting the sale. Therefore drawing my attention to Section 4(1) of the Code, it was contended by the learned counsel for the plaintiff that even in a sale in exercise of the power conferred by Section 69 of the Transfer of Property Act, the procedure prescribed in Order XXI, Rule 84 should be followed to its letter and spirit. In this connection, the learned counsel for the plaintiff relies upon a decision of the Bombay High court in Satyapal v. Rukayyabai (AIR 1993 Bom. 203).

36.20. But it appears that the question whether the procedure prescribed under Order 21 Rule 84 (or for that matter rules 65 to 68 including) of the Code of Civil Procedure would apply mutatis mutandis to a sale of this nature, is actually in a grey area.

36.21. The plaintiffs rely upon a decision of a Division Bench of this Court in C.N.Paramasivam v. Sunrise Plaza (2010 (3) CTC 372), wherein, it was held that the deposit of 25% of the bid amount in cash by the auction purchaser was mandatory and that payment by way of cheque at that point of time would not satisfy the requirements. The said decision arose out of a sale made in pursuance of a certificate of recovery issued by the Debts Recovery Tribunal under the RDDB Act of 1993. By virtue of Section 29 of Act 51 of 1993, the second schedule to the Income Tax Act, 1961 is applicable to all sales made by the Recovery Officers. Rule 57 of the Second Schedule to the Income Tax Act is similar to Rule 84 of Order 21 of the Code. Therefore, following a decision of the Supreme Court in Rao Mahmood Ahmed Khan v. Ranbeer Singh (AIR 1985 SC 2195), the Division Bench held in C.N.Paramasivam's case (cited supra) that the deposit of 25% of the bid amount by way of cheque, was not a valid tender. The reason why the Division Bench came to such a conclusion was that the decision of the Supreme Court in Rao Mahmood Ahmed Khan's case arose out Rule 285-D of the UP Zamindari Abolition and Land Reforms Rules, which was in pari materia with Order 21 Rule 84. The plaintiffs also rely upon a decision of R.Banumathi, J., in Annamalai Vs. Nagoorgani 2006 (5) CTC

649 which arose directly under Order 21, Rule 84 in a sale in execution of a decree.

36.22. But the above decisions, whether they be of the Supreme Court or of this Court, arose out of cases where the sales were governed either by the Code itself or by statutory Rules which were identical with or in pari materia with the provisions of Order 21 Rule 84. Therefore it was but natural for the Courts to think that if something is prescribed by law to be done in a particular manner, it shall be done only in that manner and not otherwise. But a sale under Section 69 (1)(c) of the Transfer of Property Act, is not regulated by any procedure prescribed by any statutory rule. Therefore, whether a Court should adopt the same reasoning as applicable to sales which are regulated by statutory rules, is a question that requires my consideration.

36.23. The mortgagee contends that the procedure prescribed by law for an auction sale in execution of a decree, cannot be imported to an auction sale conducted in pursuance of a statutory right conferred upon a mortgagee with reference to the terms of a contract between the Mortgagor and the Mortgagee. In support of such a contention, the defendants rely upon the decision of the Patna High Court in Durga Bhavani Cold Storage v. Bihar State Financial Corporation (AIR 2002 Patna 46). In that case, it was held that a sale under Section 29 of the State Financial Corporations Act, is in the nature of a commercial sale and that therefore considerations governing such a sale cannot be the same as those regulated by Order 21 Rule 84.

36.24. Though the decision of the Patna High Court may not fully support the case of the defendants, inasmuch as a sale under Section 29 of the State Financial Corporations Act, is also regulated by statutory provisions, there is a division bench decision of this court in P.S.Duraikannoo v. M.Saravan Chettiar (AIR 1963 Mad 468) which supports the case of the defendants. The facts out of which the said decision arose are almost similar to the case on hand. It was also a case where the mortgagee brought the mortgaged property to sale by public auction through M/s.Murray and Co., in exercise of the power of sale conferred in terms of Section 69 of the Transfer of Property Act. The sale took place on 04.06.1957 and highest bid was for Rs.15,000/-. The person who was declared as the highest bidder did not have sufficient funds to make the initial deposit of 25%, though the terms and conditions of sale mandated such a payment on the spot. The down payment that should have been made was Rs.3,750/-. But the highest bidder made payment of Rs.1,000/- on the spot and paid Rs.2,000/- at his house, later in the day. The balance of Rs.750/- was paid only on the following day. Thus the spot payment of 25% itself was not made as per the terms of the auction. This failure became aggravated with the auction purchaser failing to pay the balance 75% of the sale consideration also within 15 days as stipulated in the terms of conditions of auction. In the mean time, the mortgagor challenged the auction sale on the ground that the property was sold for 50% of the market value. Since the auction purchaser did not pay 75% of consideration, the mortgagee informed the mortgagor that he was prepared to cancel the sale if the mortgagor brought any one with a higher offer. But the mortgagor could not. In the mean time, the highest bidder sought extension of time and extension of time was granted. After he was granted extension of time, the mortgagor brought a new offer. Therefore, the mortgagee refused to confirm the sale in favour of the highest bidder. Hence, the highest bidder filed a suit for specific performance. When the matter reached the High Court, the Division Bench pointed out the distinction between a private sale and a sale in execution of a decree and the Division Bench highlighted the duties and obligations of the

mortgagee in such cases.

36.25. The important principles that were laid down by the Division Bench in P.S.Duraikannoo's case (cited supra) were :

> (i) the Mortgagee exercising the power of sale is not a trustee for the mortgagor, as he exercises the power of sale for his own benefit. But he will be undoubtedly in a fiduciary position in regard to any surplus that may remain after the discharge of his claim.
>
> (ii) Acting as he does under the power to convey another man's property, he should act bonafide so as not to imperil the interest of the other. For instance, the mortgagee cannot stop the bid at the auction sale, the moment he obtains a bid to cover his own claim, but should go further and obtain the highest bid if available.
>
> (iii) Having regard to the amplitude of the powers of the mortgagee in whom a power of sale is vested, he may no doubt have the power to extend the 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 the second sale of the property, he should not extend the time.
>
> (iv) An extension of time or duration of the contract of sale must be judged on the same touchstone of bona fides and prudence as the sale itself ought to be.

36.26. To come to the above conclusions, the Division Bench in P.S.Duraikannoo, quoted a passage from the decision of Lindley.L.J. in Kennedy v. De Trafford (1896) 1 Ch.762 at Page 772 which is as follows:-

> "A mortgagee is not a trustee for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interest 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".

36.27. A passage from Halsbury, extracted in the decision of the Division Bench in P.S.Duraikannoo, is also of relevance and hence it is extracted as follows:-

> "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 changes 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;....

"A mortgagee is not a trustee for the mortgagor as regard 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;..

36.28. From what was laid down very clearly in P.S.Duraikannoo, it is apparent that the procedure prescribed by the statutory provisions in Order 21 Rule 84 or the second schedule to the Income Tax or the SARFAESI Act, 2002 or the State Financial Corporations Act, are not per se applicable to the sale by a mortgagee in exercise of the power conferred by the Deed of Mortgage, in accordance with Section 69 of the Transfer of Property Act.

36.29. Assuming for a minute that the principles behind Order 21, Rule 84 would apply, even then I do not think that the acceptance of 25% of the amount by way of cheques could be found to be an illegality that would mandate this court to set aside the sale. This is in view of a decision of the Supreme court in Rosali.V. v. Taico Bank (AIR 2007 SC 998). In that case, a court auction sale in execution of a decree was set aside by the Karnataka High Court, on the ground that 25% of the bid amount as required by Order XXI Rule 84 of the Code was not deposited on the same day, namely 26.10.1988, but was paid on the next day namely 27.10.1988. When the matter was taken to the Supreme Court, the Supreme Court considered the meaning to be assigned to the expression 'immediately' appearing in Order XXI Rule 84 and came to the conclusion that the term has two meanings. One indicates the relation of cause and effect and the other, the absence of time between two events. In the former sense, the term 'immediately' means proximately without the intervention of anything, as opposed to 'mediately'. In the latter sense, the term 'immediately' means instantaneously. Therefore, the Court eventually held that the term 'immediately' may mean 'within reasonable time'.

36.30. Therefore, even if the principles of Order XXI Rule 84 would apply to the fact situation on hand, the payment of 25% of the amount by way of cheques, cannot be taken to be a gross violation of the terms and conditions of the auction. But as I have pointed out above, the only restrictions formulated both in England and in India are :

(i) that the mortgagee should act bona fide;

(ii)that the mortgagee should act as a prudent man;

(iii) the mortgagee can take care of himself first and also to take care the mortgagor next.

36.31. The question whether the mortgagee acted as a prudent man would do and whether the mortgagee acted bonafide, has to be seen in the light of the facts pleaded and the evidence adduced.

36.32. As I have already pointed out, PW1 was not present at the venue of the auction and it is admitted by him during cross examination. No other partner of the firm, past or present, has come forward to depose that he/she was present and that there was any collusion between the mortgagee and the auction purchaser. Though the plaintiffs plead that the auction sale was fraudulent and was a product of fraud and collusion, even the pleadings of the plaintiffs are not sufficient to uphold any fraud or collusion. Under Order VI, Rule 4 of the Code of Civil Procedure, a party who pleads mis-representation, fraud, breach of trust, wilful default, or undue influence, should give particulars with dates and items, if necessary in the pleading itself. In other words, there must be special pleadings, whenever fraud and collusion are alleged. In P.L.Chakrapani Naidu v. T.Gopal Mudaliar (1972 (2) MLJ 390), a Division Bench of this Court held that the mere use of the words fraud and collusion in the plaint meant nothing and that there must be positive proof of the same and that the burden of proving fraud and collusion was on the mortgagors. In fact, the Division Bench noted in that case that sufficient number of bidders were not forthcoming because of the obstructive tactics adopted by the mortgagors. While following the said decision, another Division Bench held in Shri Bhagwandas/B.Kishore v. K.G.Purushothaman & Others (1996 (1) LW 372) that the burden is entirely upon the mortgagor to plead and prove fraud. Even if an inference of fraud can be made if the price for which the property is sold is so low, the burden of proof is still on the mortgagor. The observations of the Division Bench in paragraph 25 of the decision in Shri Bhagwandas are as follows:

> "But, the burden is on the mortgagor to plead and prove such fraud or the gross inadequacy of price from which an inference can be drawn by the Court of the fraud. In the absence of such proof, the Court cannot and will not interfere with the sale even if the sale price is lesser than the market value of the property or there was want of publicity or want of notice as required by the instrument or that many bidders had not participated in the auction."

The plaints in all the five cases, do not contain any special pleadings. On the contrary, they contain very vague pleadings. The plaintiffs actually want fraud and collusion to be inferred from the circumstances. The circumstances pleaded by them are:

(i) sale of the property for less than half of the upset price or the market value.

(ii) the payment of 25% by way of cheques and

(iii)non-payment of 75% of the balance of sale consideration within the time stipulated.

36.33. From the decision of the Division Bench of this Court in P.S.Duraikannoo, it is clear that the acceptance of cheques towards payment of 25% of the sale consideration by the highest offeror and the belated payment of the balance of 75% of the consideration, could at the most be termed as an extension of time granted by the mortgagee to the highest bidder. But the law laid down by the Division Bench is that in a sale under section 69, the mortgagee has the power to grant extension of time and even vary the terms of the contract. Therefore, the acceptance of payment of 25% by way of cheques and the belated payment of 75%, by themselves cannot be termed as fraudulent.

36.34. Before taking up the reasons pleaded for non-payment of 75% of the consideration within the time stipulated, let me first take up the question of adequacy of sale consideration. It is too fundamental to state that inadequacy of consideration cannot be a ground to set aside any contract. But sometimes the price accepted by a mortgagee might indicate whether he acted bonafide or as a prudent person or not. Therefore, let me see whether in accepting the offer made by the highest bidder, the mortgagee acted as a prudent person and whether their action was bonafide or not.

36.35. In the written statement, the Egmore Benefit Society has taken a plea that they fixed the upset price at Rs.19 crores and that when the bidding commenced there were no takers. Therefore the upset price had to be brought down and eventually, the bidding commenced from Rs.7.80 crores. The participants in the auction started showing interest only after the bidding started at Rs.7.80 crores. In the bidding, the price went up to Rs.9 crores. There is no allegation in any of the five plaints that the mortgagee stopped the auction at this stage. On the contrary, the Society has taken a consistent stand that there was no one to offer more than Rs.9 crores. The only option that the mortgagee had at that time was either to accept Rs.9 crores or to cancel the auction and to issue a fresh advertisement. If they had chosen the second option, the Society would never have recovered a single penny. The way the plaintiffs have spent lakhs of rupees on litigating and depriving the Society of their legitimate dues, shows that Egmore Benefit Society which was a non-banking financial company and which was answerable to thousands of depositors, was simply harassed by the plaintiff after taking a huge amount as a loan. I shall deal with this aspect separately, as it is a story by itself and it requires an independent chapter. Therefore, the acceptance of the amount of Rs.9 crores and the confirmation of the sale by the mortgagee, cannot be said to be a fraudulent act.

36.36. For testing whether the conduct of the mortgagee in this case was bona fide and resembled that of a prudent person, it may be useful to take note of a very scholarly decision rendered by Ramasami.,J, of this court way back in 1955 in V.Narasimhachariar v. Egmore Benefit Society (AIR 1955 Mad 135). In that case, the learned Judge listed the rights, duties and obligations of a mortgagee under Section 69 in the form of certain do's and dont's. They are as follows:-

(1) It is incumbent on the mortgagee exercising his power of sale to act in good faith:--'Kennedy v. De Trafford', 1897 AC 180 (Z30). He must sell as a prudent owner, intending to sell his own property with reasonable conditions and if the state of the title justifies, to offer a marketable title. The power is to be regarded as a sacred

thing, for it is only a security:-- 'Jenkins v. Jones', (1860) 66 FR 43 (Z31);-- 'Chablldas Lallubhoy v. Mowji Dayal', 26 Bom 82 (Z32).

(2). The motives actuating a mortgagee in exercising his power of sale will not be considered by a Court:-- 'Colson v. Williams', (1889) 58 LJ Ch.539 (Z33).

(3) 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: (1987 AC 180 (Z30). The exercise of the power of sale shall not be oppressive or depreciatory:--'Dance v. Goldingham', (1873) 8 Ch.App 902 (Z34).

(4) He must not sell after tender made to him of the mortgage-money and his costs, charges and expenses, though the latter be under protest.

(5) A mortgagee may sell under special circumstances even of a stringent character, if not un-reasonably depreciatory:-- 'Falkner v. Equitable Reversionary Society', (1858) 62 ER 138 (Z35). But the conditions however must be such as an owner will use in the sale of his own property and should not be depreciatory:-- "Mc Hugh v. Union Bank of Canada', (1913) 108 LT 273 (PC) (Can)(Z36).

(6)He must hold the balance of the sale proceeds in trust for the mortgagor and if there are subsequent encumbrances, in trust for them and ultimately for the mortgagors:-- 'Warner v.Jacob', (1882) 20 Ch D 220 (Z37);- 'Abdul Bahman v. Noor Mahomed', 16 Bom 141 (Z38);- 'Rajah Kishendutt Rajah v. Mumtaz All Khan', 5 Cal 198 (PC) (Z39).

(7) He must not buy himself or through his solicitors or agent, for such a sale would be vitiated even though there be no fraud or under value:-- "National Bank of Australasia v. United Hand-in-Hand and Bond of Hope Co.', (1879)4 AC 391(Z40);--"Downes v. Grazebrook', (1817) 36 ER 77 (Z41);--'Henderson v. Astwood', 1894 AC 150 at p.158 (Z42).

(8) He must hold the sale strictly adhering to the conditions which give him the right to exercise his power:-- 'Devey v. Durrant', (1857) 44 ER 830 (Z43).

(9) He must not sell by private treaty if the mortgage deed allows him to sell by public auction only (--'Brouard v. Dumaresque', (1841) 3 Moo PC 457 (Z44)'.

(10) He is not bound to advertise the sale. But he must give reasonable publicity. And though the mortgagee is not a trustee for the mortgagor he is something more than a perfunctory agent and must at least see that in subserving his own interest he does not sacrifice the interest of those equally interested in the property. He must not do anything which would scare away the bidders:-- 'Chabildas v. Dayal Mowji', 31 Bom

566(PC)(Z45).

(11)He must use every exertion to sell the property at the best price for he is chargeable with the full value of the mortgaged property sold, if for want of due care and diligence it has been sold at an undervalue:-- 'Orme v. Wright', (1839) 3 Jur 972 (z46): '(1879) 4 AC 391 (Z40)'.

(12) He must not sell before the mortgage money has become due:--'Jarup Tejaa & Co. v. Peerboy Adamji', AIR 1921 Bom 421 (Z47).

(13) He must not sell without giving to the mortgagor a written notice for payment of the principal money and before default has been made for three months after service in payment.

(14)He must not sell unless some interest amounting to at least Rs.500 is in arrear and unpaid for three months after becoming due.

(15) His particulars of sale, even if inserted by his auctioneer, should give a correct description of the property.

(16) If he exercises the power bona fide 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: '(1882) 20 Ch D 220 (Z37)';-- 'Haddington Island Quarry Co. Ltd. v. Alden Wesley', 10 Mad LT 554 (PC) (Z48). (See Darashaw Vakil Commentaries on the Transfer of Property Act (1938) for an exhaustive discussion of duties of mortgagees on sale pp, 632-641).

36.37. After listing out the duties and obligations of the mortgagee as aforesaid, the learned Judge brought out a fine distinction between two types of remedies that a mortgagor has in such cases, namely, the remedies available before sale and the remedies available after sale. In paragraph 22 of the report, the learned Judge crystallized the position as follows:-

(i) a mortgagor can come to Court before sale with a prayer for injunction or stay of sale, if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings must clearly disclose a fraud or irregularity on the basis of which relief is sought [(Adams v. Scott) 1859 7 WR (Eng). 213].

ii) the mortgagor can also come to Court after the sale, seeking damages for unauthorised, improper or irregular sale. The power of sale given is for the benefits of the mortgagee and not for the benefits of the mortgagor. He has therefore a perfect right to hold the sale of the property in such manner as he thinks fit most conducive to his benefits. But the conditions of sale however must be such as the owner will use

in the sale of his own property and should not be depreciatory. It is also necessary that the mortgagees must act bona fide in the conduct of the sale.

36.38. Therefore, the payment of 25% of the bid amount by way of cheques, did not vitiate the auction, in view of the leverage granted to a mortgagee, on whom, a power of sale is conferred by the deed of mortgage in terms of Section 69 of the Transfer of Property Act. I have already cited the decision of Ramasamy,J in V.Narasimhachariar and the decision of the Division Bench in P.S.Duraikannoo, which recognise the right of the mortgagee even to vary the terms of the contract. I have also discussed the decision of the Supreme Court in which the scope of the expression 'immediately' appearing in Order XXI Rule 84 was expounded. The fact-scenario which compelled the mortgagee to accept cheques towards payment of 25% of the sale consideration, goes to show that the mortgagee (i) acted bona fide; (ii) acted as a prudent person would do; and (iii) acted in the interests of the society, which was answerable to thousands of depositors, without sacrificing the interests of the borrower.

36.39. This takes us to the next question as to whether the non payment of 75% of the sale consideration, within 15 days of the auction sale, vitiated the sale.

36.40. It is admitted by the plaintiffs that all along, some interim order or the other, had been operating against the mortgagee and the auction purchaser. Even according to Mr.N.Jothi, learned counsel for the plaintiff, there was no interim order only for a period of 77 days from 12.5.2001 to 27.7.2001 and that there was no impediment for the auction purchaser to pay the balance of 75%, during this period of 77 days. It is also admitted that at the time when the auction sale took place, there was a requirement for a certificate of no objection to be obtained from the Appropriate Authority under Section 269UC of the Income Tax Act, 1961. There is no dispute about two facts namely (i) that an application was made for the no objection certificate; and (ii) that under Exx.P15 and P16, the counsel for the plaintiff firm requested the Appropriate Authority as well as the Sub-Registrar not to proceed with the grant of a no objection certificate and the registration of the property.

36.41. The special leave petitions filed by the plaintiff firm against the judgments of this Court dismissing the interim applications for injunction, were dismissed by the Supreme Court on 12.5.2001 as seen from Ex.P22. Immediately, the plaintiff firm sent a letter dated 9.6.2001 marked as Ex.P23 offering to redeem only the loan under the simple mortgage and also enclosing a pay order for an amount of Rs.48,95,695/-. Again the plaintiff sent another letter dated 11.6.2001 under Ex.P24 seeking redemption. After the mortgagee sent a reply under Ex.P25, the plaintiff firm sent a notice dated 13.7.2001 under Ex.P27 to the Appropriate Authority under the Income Tax Act. Simultaneously, telegrams were also sent under Ex.P29 series, to the mortgagee and the auction purchaser as well as the auctioneer and the Appropriate Authority. Again by a notice dated 08.8.2001, filed as Ex.P30, the firm cautioned the Appropriate Authority not to issue the no objection certificate. In the meantime, an order was passed on 6.8.2001 by this Court to maintain status quo. This order of status quo continues till date. The net result is that the no objection certificate from the Appropriate Authority never came. Therefore, the auction purchaser cannot be blamed for not paying 75% of the sale consideration.

36.42. In view of the foregoing discussion, I hold that the mortgagee acted bona fide in the conduct of the auction sale on 13.12.1999. They also acted bona fide in accepting the payment of 25% of the bid amount by way of cheques from the highest bidder. There is no doubt that the mortgagee acted as a prudent person, both before and after the conduct of the auction. In fact, I would have considered the mortgagee as imprudent, if he had missed this opportunity to bring this property to sale at that time.

36.43. Once it is found that the twin tests of bona fides and prudence are satisfied, then the auction sale cannot be impeached. Apart from the fact that the allegations contained in the plaints, at the most constitute allegations of irregularities which could not also be established by the plaintiffs, I should also point out that the right of the mortgagee to vary the terms of the contract and to accept payments from the auction purchaser, is now well recognised. It is especially so in the facts and circumstances of the case, where the conduct (or misconduct) of the mortgagor stares at one's face. Therefore, I hold on Issue Nos.(6) and (7) that a proper auction was conducted and that there was no bungling. The allegations made by the plaintiffs about the auction do not either constitute fraud and collusion, nor has the plaintiff led any evidence worth consideration for holding the auction to be fraudulent and collusive. Therefore, Issue Nos.(6) and (7) are also held against the plaintiffs.

36.44. That would leave me with one incidental question as to whether the mortgagee can now convey the property to the auction purchaser or not. As we have already seen, the auction was conducted on 13.12.1999. The first defendant in C.S.No.995 of 1999 was the highest bidder who offered Rs.9 crores for the property. He had paid Rs.2.25 crores on the date of the auction. The balance of Rs.6.75 crores was liable to be paid by the auction purchaser within 15 days. The last date for payment was 28.12.1999. But within 12 days of the conduct of the auction, the borrower firm moved C.S.No.995 of 1999 and obtained an interim order to maintain status quo. Therefore, the auction purchaser did not pay the balance.

36.45. It is admitted on both sides that from the date of auction till this date, some interim order or the other is operating against the defendants, except for a brief period of 77 days in the year 2001. But I have already found, in the preceding portions of this part of the judgment, that the auction purchaser has satisfactorily explained the reason for non-payment during this period of 77 days. I have also found that in such sales by mortgagees in exercise of the power under Section 69(1)(c), a right inheres in the mortgagee to vary the terms of the contract. This right is recognised by this Court, following English precedents.

36.46. Today, the mortgagor cries foul that if the auction is now confirmed by the mortgagee, an unintended benefit of retention of such a huge money by the auction purchaser for such a long period of time of more than 12 years would accrue to them. It is contended by the learned counsel for the plaintiff that there was no impediment for the auction purchaser to deposit the money, even when an interim order was in force. According to the learned counsel for the plaintiff, the auction purchaser neither took steps to get the interim order vacated nor remitted the money even when there was no interim order for 77 days. Therefore, it is contended that it would be highly inequitable to allow the auction purchaser to pay the balance now and get a sale deed executed.

36.47. But I think the mortgagor cannot make an issue of it, as it is their own making. In any case, neither the mortgagee nor the auction purchaser has come up with any suit or counter claim before me asking for a decree for the execution of the sale deed. Only when such a plea is made, I can decide whether the auction purchaser could be allowed at this distance of time to pay the balance amount and have the sale deed executed or not. Since there is no suit or counter claim either by the mortgagee or by the auction purchaser for execution of the sale deed, I do not wish to venture to predict or profess what the mortgagee and the auction purchaser should do. As I have pointed out, the law permits the mortgagee to vary the terms of the contract and to do what is in his best interest, without sacrificing the interest of the mortgagor. Therefore, the mortgagee has several options today. He may choose to receive the balance of sale consideration together with the same rate of interest as they had charged on the mortgagor viz., 24% per annum from 13.12.1999 till the date of payment, so that the purchaser does not walk away with the benefit of 14 years of litigation and the mortgagor also does not successfully stake a claim for damages on this ground. Another option open to the mortgagee is to cancel the auction held on 13.12.1999 and bring the property to fresh auction. I do not know which option the mortgagee will choose. I also do not know whether the option chosen by the mortgagee is acceptable to the auction purchaser or not. But, these are mere questions of academic importance in these five suits, since the mortgagee and the auction purchaser have not come up with any plea.

36.48. I should clarify that Issue Nos.(6) and (7) have been decided by me, on the pleadings and evidence available before me and also on an objective assessment of the rights of the mortgagor. I have found on facts that the auction was conducted in a fair and proper manner and that there was no bungling in the auction. But, it is not for me to say what the mortgagee and the auction purchaser should now do. Therefore, I leave it to the wisdom of the mortgagee to choose any of the above options, since the auction purchaser has not come up before me seeking any relief.

Issue Nos. (10) & (17):

37.1. Issue No.(10) is whether M/s.Ramu & Co., or any of its partners, past or present are entitled to redeem the registered simple mortgage for Rs.25 lakhs alone, without discharging the loan secured by equitable mortgage by deposit of title deeds for Rs.4,75,00,000/-. Issue No.(17) is whether the plaintiff is entitled to redeem the registered simple mortgage for Rs.25 lakhs without complying with the condition imposed or ignoring the clog of redemption created by way of an unregistered agreement.

37.2. In normal circumstances, a mortgagor is entitled to redeem one mortgage (of his choice) before another, in the absence of a contract to the contrary. But in the case on hand, we have already seen that the parties are bound by the terms and conditions of Agreement between themselves. Clause 18 of the Loan Agreement filed as Ex.P4, obliges the mortgagor to redeem the simple mortgage only after they have satisfied in full, all the amounts outstanding, secured by deposit of title deeds.

37.3. Clause 18 is assailed by the plaintiffs as a clog on redemption and hence invalid. But, at the time when the amount was borrowed, the plaintiff did not think so. Even at the time when the

previous litigations were fought, the plaintiff did not think so. Suddenly, they have found that their right to redeem the mortgage was affected by Clause 18. As a matter of fact, if the plaintiff had objected to the clause even at that time, the Egmore Benefit Society would have insisted upon a simple mortgage being created for the whole amount of Rs.5 crores, at the cost and consequences of the plaintiff. But the plaintiff chose to turn clause 18 to their advantage at that time and agreed for creation of simple mortgage only for Rs.25 lakhs. Therefore, today, it is not open to the plaintiff to brand Clause 18 as a clog on redemption.

37.4. The contention of the plaintiff that there is a clog on redemption, arises out of a misunderstanding of what a clog on the equity of redemption is. The principle behind the rule against a clog on the equity of redemption, is stated by Lindley, M.R., in Snatley vs. Wilde (1899 (2) Ch. 474) in the following words:-

> "A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of mortgage and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That in my opinion is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this that 'once a mortgage always a mortgage' ".

37.5. The doctrine relating to clog on the equity of redemption is a rule of justice, equity and good conscience. It was pointed out by the Supreme Court in Ganga Dhar vs. Shankar Lal (AIR 1958 SC 770) that a mortgage shall always be redeemable and a mortgagor's right to redeem shall neither be taken away nor be limited by any contract between the parties. The same position was reiterated in Jayasingh vs. Krishna Babaji Patil (AIR 1985 SC 1646), where it was held that the right of redemption can come to an end only in a manner known to law. But the Court also pointed out that such extinguishment of the right can take place by a contract between the parties, by a merger or by a statutory provision which debars the mortgagor from redeeming the mortgage.

37.6. What is known in English Law as the equity of redemption, is statutorily conferred upon a mortgagor under Section 60 of the Transfer of Property Act, 1882. Since it is statutorily conferred, the Supreme Court held in Shivdev Singh vs. Sucha Singh (2001 (2) LW 107 (SC)) that such a statutory and legal right cannot be extinguished by an Agreement made at the time of mortgage as part of the mortgage transaction. In other words, what is considered to be a clog on redemption is only a contract made at the time of creating the mortgage, which would have the effect of making the equity of redemption illusory. However, the Court quoted a very interesting passage from Ganga Dhar, which reads as follows:-

> "The reason then justifying the Court's power to relieve a mortgagor from the effects of his bargain is its want of conscience. Putting it in more familiar language, the Court's jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might

> have been in when he borrowed the moneys on the mortgage. Was the mortgagor oppressed? Was he imposed upon? If he was, then he may be entitled to relief. We then have to see if there was anything unconscionable in the agreement that the mortgage would not be redeemed for eighty five years. Is it oppressive? Was he forced to agree to it because of his difficulties? Now this question is essentially one of fact and has to be decided on the circumstances of each case. It would be wholly unprofitable in enquiring into this question to examine the large number of reported cases on the subject, for each turns on its own facts."

37.7. In Shivdev Singh, the Supreme Court cited with approval the opinion rendered in Pomal Kanji Govindji vs. Vrajlal Karsandas Purohit (AIR 1989 SC 436) to the effect that the doctrine "clog on equity of redemption" must be adopted to the reality of situation and individuality of transaction and that the Court should take note of the time, the condition, the price spiral, the term bargain and other obligations in the background of financial conditions of parties.

37.8. Therefore, it is clear that the question whether a condition imposed upon the mortgagor operates as a clog on redemption or not, depends upon the reality of the situation and individuality of the transaction. It also depends upon whether the condition was oppressive on the mortgagor. In N.Ramakrishna Mudali Vs. Official Assignee of Madras (AIR 1922 Madras 390), a Division Bench of this Court was concerned with an appeal that arose out of the dismissal of a suit for redemption. In that case, the property had been brought to sale by the mortgagee in exercise of the power under Section 69, not only for the recovery of the debt due under the simple mortgage which conferred the power of sale, but also for recovery of a subsequent debt due under a second mortgage created only by deposit of title deeds. Among others, two questions arose for consideration before the Division Bench of this court. One was about the application of Section 52 of the T.P.Act, since the sale took place after the institution of the suit for redemption. The second question was as to whether the power of sale could not have been exercised in respect of both the debts. On the first question, the Division Bench of this Court held that Section 52 of the T.P.Act has no application whatever to a mortgagor, who has given an express power of sale. On the second question, which is exactly the question that is now before me (about clog on redemption), the Division Bench held that the point is covered by both the Act itself and by the Authorities. After referring to Section 69(3), the Division Bench held that such a sale for recovery of both debts, could, at the most, come within the phraseology employed in Section 69(3), namely 'damnified by an unauthorised or improper or irregular exercise of power'. Therefore, the Bench concluded that the remedy lies only in damages and not in seeking to set aside the sale.

37.9. Keeping the above principles in mind, if we come back to the facts of the case, it is seen that no condition was imposed either in the Loan Agreement Ex.P4 or in any other document, extinguishing or restricting the right of the plaintiff to redeem the mortgage. Clause 18 of Ex.P4 merely lists out the order in which two mortgages could be redeemed by the plaintiff. Admittedly, there were two mortgages, one by way of a registered deed of simple mortgage and another by way of deposit of title deeds. All that Clause 18 demanded was that the money due under the mortgage by deposit of title deeds should be paid first, before the money due under simple mortgage is paid. The effect of this clause is that the mortgage by deposit of title deeds was to be redeemed first before the simple

mortgage was redeemed. Asking a mortgagee to redeem one mortgage before another, is neither a restriction nor a prohibition of the right of redemption.

37.10. What was done by the mortgagee was just to prescribe the order of priorities between two mortgages. The demand for redemption of one before another, is neither a prohibition nor a restriction of the right of redemption. Section 60 which confers this right of redemption, does not distinguish between a simple mortgage and a mortgage by deposit of title deeds. Both are mortgages for the purposes of Section 60 and the mortgagor has a right to redeem both mortgages. Therefore, the prescription made by the mortgagee that the redemption of two mortgages should take place one after another in a particular sequence, cannot be said to be a clog on redemption.

37.11. A Full Bench of the Allahabad High Court held in Har Prasad v. Ram Chandar ((1922) ILR 44 All. 37 (FB)) that where the mortgagor executed a fresh mortgage for further advances and stipulated in the latter mortgage that the prior mortgage cannot be redeemed unless and until the amount due under the subsequent mortgage had been paid, the clause did not operate as a clog on redemption. Similarly, a Full Bench of the Bombay High Court held in Hari vs. Vishnu (28 Bom. 349 (FB)) that a covenant in a subsequent mortgage not to redeem that mortgage without redeeming at the same time a prior debt or mortgage, is not a clog. Therefore, asking a mortgagor to redeem one mortgage before another mortgage cannot, by any stretch of imagination be termed as a clog.

37.12. In Ram Kishore Ahir vs. Ram Nandan Ram (AIR 1928 All. 99) a Division Bench of the Allahabad High court went to the extent of holding that "a mere stipulation to pay an amount due to the mortgagee simultaneously with other amounts due to him and which are charged upon the mortgaged premises, cannot in law be construed to be a clog on the equity of redemption." For taking such a view, the Court referred to two decisions of the House of Lords in Noakes and Co. vs. Rice ((1902) AC 24) and Bradley vs. Carritt ((1903) AC 253). Therefore, the stipulation for redeeming one mortgage before another is not a clog and issues 10 and 17 are to be answered against the plaintiffs.

37.13. In fine, my answer to Issue No.10 would be that M/s.Ramu and Co. or any of its partners, past or present, are not entitled to redeem the registered simple mortgage for Rs.25,00,000/- alone, without discharging the loan secured by equitable mortgage by deposit of title deeds for Rs.4,75,00,000/-. Similarly my answer to Issue No.17 would be that the plaintiff is not entitled to redeem the registered simple mortgage for Rs.25,00,000/- without complying with the condition imposed, since that condition imposed under the unregistered agreement was not a clog on redemption.

37.14. But the above answers may not be full and complete answers to the actual problem on hand. Once I find that borrower firm or any of its past or present partners are not entitled to redeem the registered simple mortgage without repaying the loan secured by the equitable mortgage by deposit of title deeds, then the next question that arises incidentally is as to whether the plaintiffs can be permitted at least to redeem both mortgages together or not.

37.15. According to the Egmore Benefit Society, the plaintiffs have lost their right of redemption of both mortgages in view of the auction sale that had already taken place on 13.12.1999. In this regard, the mortgagee relies upon the provisions of Section 69(3) of the Transfer of Property Act.

37.16. However, the plaintiff claims that the auction sale conducted on 13.12.1999 was not complete in as much as a sale deed has not so far been executed and that therefore, the right of redemption is not yet lost. Mr.S.V.Jayaraman, learned Senior Counsel and Mr.N.Jothi, learned counsel, appearing for the plaintiffs, rely upon the decision of the Supreme Court in Narandas Karsondas v. S.A.Kamtam (AIR 1977 SC 774), for driving home their contention that till a sale deed is executed in favour of the auction purchaser, the right of redemption for the plaintiff is not lost. In other words, their contention is that the defendants cannot press into service, Section 69(3) of the Transfer of Property Act, to deny the plaintiff of the right of redemption, till a sale deed is executed. Since no sale deed is executed so far, in favour of the auction purchaser, they contend that the plaintiff is entitled to redemption.

37.17. In Narandas Karsondas, a cooperative housing society registered under the Maharashtra Cooperative Housing Finance Society Limited mortgaged a land and structure with power to sell. The society failed to repay and the mortgagee conducted a public auction. The highest bidder paid the entire sale consideration and also took possession. The cooperative society raised a dispute in terms of the statutory provisions before the Officer on Special Duty and obtained an injunction. Ultimately, the Officer on Special Duty held that the sale was not vitiated. However, he held that the society was entitled to redeem the property, since the conveyance was not complete. That decision was challenged before the Appellate Court under the Cooperative Societies Act. During the pendency of the appeal, the society got their original plaint amended to include a prayer for redemption. The Appellate Court held that the society was entitled to redemption, as the auction sale was not complete. When the matter went before the Supreme Court, the Supreme Court took note of the proviso to Section 60, which stated that the right of redemption can be exercised provided it is not extinguished by act of parties. Thereafter, the Supreme Court pointed out the distinction between a contract of sale under the English doctrine and a contract of sale in India. After referring to Section 54 of the Transfer of Property Act and the definition of the word "conveys" in Section 5 of the same Act, the Supreme Court held that the equity of redemption will not be extinguished by a mere contract of sale and that the mortgagor's right to redeem will survive until there has been a completion of sale by a registered deed. In paragraph 35 of the report, the Supreme Court emphasised that "the mortgagor does not lose the right of redemption until the sale is complete by registration". In paragraph 37, the Supreme Court laid down in no uncertain terms that "only on execution of conveyance, ownership passes from one party to another and that therefore, it cannot be held that the mortgagor lost the right of redemption just because the property was put to auction".

37.18. Therefore, it is clear that the plaintiff cannot be said to have lost the right of redemption, solely on the basis of the mandate of Section 69(3). Once it is conceded that the payment of the balance of 75% of the purchase money has not been made by the auction purchaser, for whatever reasons and once it is admitted that a sale deed has not so far been executed in favour of the auction purchaser, the requirement of Section 69(3) is not satisfied. Therefore, I cannot today hold that the

right of redemption was lost to the plaintiffs, merely in the light of Section 69(3).

37.19. But, it should be pointed out that in Shri Bhagwandas/B.Kishore v. K.G.Purushothaman & Others (1996 (1) LW 372), a Division Bench of this Court held the right of redemption to have been extinguished in terms of Section 69(3), in a case where the sale deed came to be executed by the mortgagee, after the institution of a suit for redemption. In other words, there was no conveyance, when the suit for redemption was instituted. But, a sale deed was executed after the interim order of injunction was vacated in the suit for redemption. The Division Bench of this Court held that the moment the sale deed was executed, the right got extinguished.

37.20. In any case, the issue is not clinched with Section 69(3). The right of redemption flows out of Section 60. The proviso to Section 60 makes it clear that the mortgagor can exercise the right of redemption, so long as it is not extinguished by act of parties. Therefore, the question whether the right of redemption is lost or not, need not necessarily be traced only to Section 69(3), but can also be traced to the proviso under Section 60. Hence, let us see whether the borrower firm lost its right of redemption by way of extinguishment, due to act of parties.

37.21. In Parichan Mistry v. Achhiabar Mistry ((1996) 5 SCC 526), the Supreme Court pointed out that when the right of redemption is extinguished by the act of parties, the act must take the shape and observe the formalities which the law prescribes. The Court further held that the expression "act of parties" refers to some transaction subsequent to the mortgage and standing apart from the mortgage transaction. Therefore, it should be seen whether there was any act of parties, that had resulted in the extinguishment of the right.

37.22. We have already seen that an affidavit of undertaking was filed on 30.01.1999 on behalf of the mortgagor, in the civil revision petition, agreeing and undertaking to pay the amount indicated in the affidavit itself, on or before 30.4.1999, with a default clause that the failure to pay would result in the property being sold in public auction. There was an attempt to give a goby to this affidavit of undertaking, by filing a special leave petition. Since the attempt failed, an application for extension of time was made, but the same was also rejected. Therefore, the property was advertised for sale in May 1999. Then came the suit filed by A.Arunagiri. In an appeal arising out of the dismissal of the application for injunction, A.Arunagiri also filed an affidavit of undertaking on 17.11.1999. What happened subsequently to this affidavit of undertaking and how one senior counsel after another attempted to bail A.Arunagiri out of the said affidavit of undertaking and how the Division Bench condemned the conduct not only of A.Arunagiri, but also of K.Balasikhamani (PW1), have been highlighted by me elsewhere in this judgment.

37.23. Therefore, it is clear that the mortgagor repeatedly made assurances, not merely to the mortgagee, but also to this Court to make payment before a deadline agreed in common, for the redemption of the property. But, none of these assurances was ever honoured by the mortgagor. On the contrary, the mortgagor and their kith and kin, repeatedly approbated and reprobated before Court. Hence, the mortgagee eventually succeeded in conducting at least one auction on 13.12.1999.

37.24. Keeping in mind the above sequence of events, let us now look at the reliefs sought in these five suits. The prayer in C.S.No.339 of 1999 filed by A.Arunagiri, is only to redeem the simple mortgage for Rs.25.00 Lakhs and not for redemption of the debts due under both mortgages. The relief prayed by the partnership firm in C.S.No.995 of 1999, is not for redemption, but for just declaring that there is no concluded contract between the mortgagee and the auction purchaser. In C.S.No.551 of 2001, the prayer of the borrower firm is only for redemption of the simple mortgage for Rs.25.00 Lakhs and not for the redemption of both mortgages. The reliefs sought in two transfer suits go one step further and seek a declaration that even the registered mortgage deed (simple mortgage deed) dated 31.7.1995 is illegal, null and void and unenforceable.

37.25. Thus, there are actually two suits for redemption, one filed by a retired partner and another filed by the partnership firm itself. But both the suits are only for redemption of one mortgage. It is not even the plea of the plaintiffs in these two suits that they would redeem one mortgage now and redeem the other mortgage later. They have come up with a positive (cantankerous) stand in both these suits that they would redeem only the simple mortgage and that the mortgagee should file a suit for recovery of money due under the second mortgage (which was by deposit of title deeds). Therefore, I cannot grant the relief of redemption to the plaintiffs, when they are vociferous in their stand that they need not seek redemption of the mortgage by deposit of title deeds.

37.26. The partnership firm, which is the mortgagor, has made its position much worse, by not even filing any written statement to the two suits Tr.C.S.Nos.2 and 3 of 2003, filed by the retired partners, praying for a declaration that even the simple mortgage is null and void. Apart from the fact that the partnership firm did not file any written statement to the two suits Tr. C.S.Nos.2 and 3 of 2003, the firm let in common evidence in all the five suits. Mr. K.Balasikhamani examined himself as PW1 and marked all documents, in common for all the five suits together. Therefore, the borrower firm demonstrated a commonality of interest with the plaintiffs in Tr.C.S.Nos.2 and 3 of 2003, where the prayer is for destroying even the simple mortgage deed for Rs.25 lakhs. The culpability of K.Balasikhamani got compounded by the fact that during cross-examination, he even supported the case of the plaintiffs in Tr.C.S.Nos.2 and 3 of 2003 and sought to mark the koorchits as Exx.P36 and P37. PW1 also marked the urban land tax proceedings as Ex.P39, to support the case of the plaintiffs in Tr.C.S.Nos.2 and 3 of 2003 that even the simple mortgage deed executed for Rs.25 lakhs on 31.7.1995 in favour of the mortgagee was null and void.

37.27. Therefore, I would construe the expression "act of parties" appearing in the proviso to Section 60 of the Transfer of Property Act, 1882, to include the following acts on the part of the plaintiffs:-

> (i) Filing an affidavit of undertaking on 30.1.1999 in the civil revision petition CRP No.1999 of 1998 before this Court, agreeing to pay the entire amount due under both mortgages on or before 30.4.1999 and also agreeing to allow the mortgagee to sell the property by public auction, in the event of a failure to pay the money and later going back on the affidavit of undertaking.
>
> (ii) Filing another affidavit of undertaking on 17.11.1999 by A.Arunagiri and giving a go by to the same, inviting the wrath of the Division Bench of this Court, which

exposed K.Balasikhamani's role as a person operating his family members and other partners as puppets in his hands.

(iii) Filing a suit in C.S.No.551 of 2001 for redemption of only the simple mortgage and expressing unwillingness in unequivocal terms to redeem the mortgage by deposit of title deeds.

(iv) Setting up two retired partners to file Tr.C.S.Nos.2 and 3 of 2003 for a declaration that even the registered deed of simple mortgage dated 31.7.1995 is null and void.

(v) Leading evidence in common in all five suits and supporting the case of the plaintiffs in Tr.C.S.Nos.2 and 3 of 2003 by filing the koorchits and urban land tax proceedings.

37.28. Therefore, a cumulative consideration of all the five plaints and the oral and documentary evidence let in on the side of the plaintiffs would show that the mortgagor had come to Court with the following intentions:-

(i) The first priority for the mortgagor is to get the property back without paying a single penny, if possible, by having even the deed of simple mortgage declared as null and void.

(ii) If they could not achieve the first priority, the next priority for the mortgagor is to take away the property after redeeming only the deed of simple mortgage for Rs.25 lakhs, so that the loan amount of Rs.4.75 crores mortgaged by deposit of title deeds, need not be paid at all.

(iii) The second priority for them, is not merely to redeem the simple mortgage by paying the principal and interest at contractual rate, but to redeem it with a rate of interest as dictated by them. In other words, the desire of the plaintiff is to redeem the simple mortgage alone, by paying the principal together with interest at a rate far below the contractual rate of interest. This is why the learned counsel for the plaintiffs relied upon innumerable decisions to contend that there can be no interest on interest and that the award of compound interest was contrary to public policy. Some of the decisions cited by the learned counsel for the plaintiffs are:-

(1) State of Haryana v. S.L.Arora and Co. (AIR 2010 SC 1511), where it was held by the Supreme Court that in the absence of a provision in the contract, the Arbitral Tribunal is entitled to award interest upon interest or compound interest, either for the pre-award period or for the post-award period.

(2) Renusagar Power Co. Ltd. v. General Electric Co. (AIR 1994 SC 860)), wherein it was held that award of interest on interest i.e., compound interest, cannot be said to

be contrary to public policy of India.

(3) State Bank India v. Ganjam District Tractor Owners' Association (1994 (5) SCC 238), where it was held that in the absence of a provision for charging compound interest or interest with periodical rests, the same cannot be claimed.

(4) Central Bank of India v. Ravindra (AIR 2001 SC 3095), where it was held by the Supreme Court that penal interest is an extraordinary liability, which cannot be permitted to be capitalised and that interest pendente lite and future interest not exceeding 6% per annum shall be awarded. The Court also warned that interest once capitalised, becomes part of the principal and therefore, the question of awarding interest on interest does not arise at all.

(5) M.M.Veerappa v. Canara Bank (AIR 1998 SC 1101), where the Supreme Court held that in so far as mortgage suits are concerned, the provisions of Section 34 of the Code may not apply and that the special provision in Order XXXIV, Rule 11, alone would apply. Consequently, the Court held that the Court has a discretion to fix the rate of interest. The discretionary power of the Court to fix interest under Order XXXIV, Rule 11, was held by the Supreme Court in this case to be an independent power, not traceable either to Section 74 of the Contract Act or to any power under the Usurious Loans Act, 1918 or to any statute permitting a Court to scale down contractual rate of interest.

37.29. Therefore, it is clear that the first choice for the plaintiffs is to take back their property without paying a single penny. If this is not possible, the plaintiffs are prepared to adopt a very charitable (?) attitude by offering to redeem only the simple mortgage of Rs.25 lakhs and that too with a rate of interest as fixed by this Court in terms of Order XXXIV, Rule 11. They do not wish to redeem the mortgage by deposit of title deeds, which was created for securing the loan of Rs.4.75 crores sanctioned in 1995. This is why the borrower firm has come up with two suits, one for redemption of the simple mortgage and another for a declaration. Simultaneously, they have set up retired partners, who were willing to lend their names, to file suits even to destroy that simple mortgage. Therefore, I am of the view that this condemnable conduct on the part of the mortgagor, would amount to an "act of party", within the meaning of the proviso to Section 60.

37.30. I am conscious of the fact that the expression "act of parties" appearing in the proviso to Section 60 of the Transfer of Property Act, 1882, has been understood and interpreted by Courts to mean any agreement reached between the mortgagor and the mortgagee subsequent to the mortgage transaction. But, the Courts have not so far confronted such a monstrous situation as the one on hand, where all kinds of tactics have been employed by the mortgagor without any qualms. No Court has so far given a comprehensive and all inclusive definition and interpretation of the expression "act of parties". Therefore, if a new situation demands that the said expression has to be understood in a particular manner, I think it should be done.

37.31. Let me assume for a minute that whatever the mortgagor had done so far, including the abuse of the process of this Court, dishonouring the commitments made before this Court in the form of affidavits of undertaking and repeatedly stalling the exercise of the power of sale by adopting all kinds of tactics, does not fall within the definition of the expression "act of parties". Even then, the plaintiff is not entitled to redemption, as the mortgagor is not seeking redemption of both mortgages, as required by the stipulations contained in the loan agreement filed as Ex.P4. Therefore, even if I wish to grant the relief of redemption to the plaintiffs, I cannot do so, in view of the unwillingness on the part of the mortgagor to redeem both mortgages. This is why Issue Nos.(10) and (17) were framed in such a manner as to see if the plaintiff is entitled to redemption of the simple mortgage alone without discharging the mortgage by deposit of title deeds. I think at least this unwillingness on the part of the mortgagor to redeem one mortgage would certainly fall within the meaning of the expression "act of parties", appearing in the proviso to Section 60. Even if it does not fall within the meaning of the said expression, it is not possible for this Court to grant a decree for redemption of both mortgages, as the mortgagor does not want it. Any decree, even if passed by me for redemption of both mortgages together with interest at 24% per annum as compounded as per the terms and conditions of the agreement, will not be acceptable to the mortgagor. Apart from the fact that it will not be acceptable to the mortgagor, there is also a grave danger in experimenting it. The danger in passing such a decree is that it will give a handle for the mortgagor to prolong the agony of the mortgagee and the auction purchaser.

37.32. Therefore, in fine, I hold on Issue No.(10) that M/s.Ramu & Co., or any of its partners, past or present, are not entitled to redeem the registered simple mortgage for Rs.25 lakhs without discharging the loan secured by equitable mortgage by deposit of title deeds for Rs.4.75 crores. Similarly, I hold on Issue No.(17) that the plaintiff is not entitled to redeem the registered simple mortgage for Rs.25 lakhs without complying with the condition imposed for redemption of the mortgage created by way of deposit of title deeds. I also hold that the clause contained in the loan agreement is not a clog on redemption. The question of allowing the plaintiff to redeem the both mortgages does not arise, as there is no prayer for the same in any of the suits. But there is actually a prayer contrary to the grant of such a relief.

Issue No.(18):

38.1. The 18th and the last issue framed for consideration is as to what relief the plaintiff is entitled for.

38.2. I have already answered all the other issues against the plaintiffs. From the year 1997, the plaintiffs have exhibited a conduct, both inside and outside the Court, which calls for imposition of exemplary costs. By way of recapitulation and easy appreciation, the attitude and conduct of the plaintiffs could be summarised as follows:-

> (i) On 31.7.1995/1.8.1995, the partnership firm borrows Rs.5 crores and executes a deed of simple mortgage for Rs.25 lakhs and creates another mortgage by deposit of title deeds for Rs.4.75 crores.

(ii) When a default was committed and the property is brought to sale by the mortgagee in terms of Section 69(1)(c), the mortgagor does not ask for redemption, but files a simple suit for bare injunction in O.S.No.6201 of 1997 on the file of the City Civil Court and obtained an injunction.

(iii) When the interlocutory order of injunction was extended endlessly, due to a variety of tactics adopted by the plaintiff, the mortgagee approached this Court by way of a revision in CRP No.1999 of 1998.

(iv) In the civil revision petition, the mortgagor took this Court for a jolly ride, by filing an affidavit of undertaking on 30.1.1999, agreeing to redeem the mortgage in entirety by paying nearly Rs.8.40 crores on or before 30.4.1999 and also agreeing for the sale of the property, if they failed to make payment.

(v) The order passed by this Court on the basis of the affidavit of undertaking, is then challenged before the Supreme Court. Later a petition for extension of time beyond 30.4.1999 is filed and the dismissal of the same is again challenged before the Supreme Court.

(vi) When the first litigation thus came to face a road block, resulting in the mortgagee issuing an advertisement for sale, the plaintiff started the second round of litigation through A.Arunagiri in C.S.No.339 of 1999.

(vii) The interim order enjoyed by A.Arunagiri was short lived and when he went before the Division Bench, he also adopted unscrupulous methods. He filed an affidavit of undertaking on 17.11.1999 and went back on the same, putting the Senior Counsel who appeared on his behalf before the Division Bench to shame. But through another Senior Counsel, he withdrew the affidavit of undertaking and argued the appeal on merits and secured an order of dismissal of appeal, with strictures and costs.

(viii) After the dismissal of the appeal filed by A.Arunagiri, the auction sale took place and immediately the mortgagor came up with two suits, one in C.S.No.995 of 1999 and another in C.S.No.551 of 2001. As a matter of fact, the reliefs sought by the mortgagor in C.S.No.995 of 1999 is confined only to the auction sale, but without a prayer for setting aside the sale. It is only in the next suit C.S.No.551 of 2001 that the mortgagor made a prayer for redemption. This prayer was also only for redemption of one mortgage and that too with interest at a lesser rate.

(ix) Not satisfied with the 3 suits already on Board (one filed by A.Arunagiri and the other 2 filed by the mortgagor), they set up 2 retired partners to file suits in the City Civil Court for destroying even the simple mortgage. I am not saying out of imagination that the suits by the retired partners are stage managed by the mortgagor. It is recorded even by the Division Bench in its order dated 29.11.2009.

That they were all stage managed, is made clear by the plaintiffs joining together and leading evidence in common. Even the evidence of PW-1 could not be completed as he deserted the witness box before the conclusion of the cross-examination in full.

38.3. It must be pointed out that the borrower in this case is not an entity which deserves some sympathy. The borrower was engaged in the business of construction and development of properties. The borrowing was for commercial purposes. PW-1 admitted that they have a construction company by name Gokul Constructions that promoted flat complexes. It was stated before the Division Bench that PW-1 went to London at that time to strike a deal for infusing Rs.48 crores towards this property. Therefore, the ordinary sympathy towards borrowers that has always been the hallmark of every Court in the country, cannot be extended to the plaintiffs.

38.4. It must be remembered that the plaintiffs have come to Court, seeking equitable relief on the ground that he was a borrower and that he would lose his property, mortgaged with the Benefit Society. But, it is well settled that a man who seeks equity should do equity. What the plaintiffs have done so far, in the past 16 years, is anything but equity. Hence, I am of the view that all the suits are to be dismissed with exemplary costs.

CONCLUSION:

39. In the light of the above, all the 18 issues are answered against the plaintiffs. Consequently, all the suits are dismissed with exemplary costs of Rs.25,000/- in each of the 5 suits. The costs are to be paid to Egmore Benefit Society Limited.

kpl svn