

# SUPREME COURT OF INDIA

T. Vijendradas

Vs.

M. Subramanian

(S.B. Sinha and Harjit Singh Bedi JJ.)

09.10.2007

## JUDGMENT

**S.B. SINHA, J :**

1. Leave granted.

2. A short but interesting question in regard to interpretation of Order XXI, Rule 92(4) of the Code of Civil Procedure, 1908 (for short, CPC) is involved in this appeal.

Facts :

3. R. Venugopal (since deceased), original defendant No.3, was the owner of the suit property consisting of 8 cents and 116 sq. ft. of land situated within the Coimbatore Municipal Corporation (for short, the Municipality). He transferred his right, title and interest therein by reason of a registered deed of sale in favour of one Sakunthala, the original plaintiff no. 1 in the suit and mother of Respondent Nos. 1 and 2 herein. It is, however, not in dispute that the factum of sale was not intimated to the authorities of the Municipality either by the vendor or by the vendee thereof. The vendee's name was not mutated in the records of the Municipality. Indisputably, property tax in respect of premises in question had not been paid for the period from 01.04.1970 to 31.03.1973. The property tax for two quarters, thus, was to be paid by Venugopal whereas the rest was to be paid by the vendee. The matter relating to payment of property tax is governed by the Tamil Nadu District Municipalities Act (Tamil Nadu Act V of 1920) (for the sake of brevity, hereinafter called and referred to as the 1920 Act).

4. With a view to enforce a statutory charge as laid down in the 1920 Act, the Municipality filed a suit, which was marked as O.S. No. 986 of 1973. Sakunthala was not a party therein. Venugopal although entered his appearance in the suit but at the subsequent stages, did not appear. Yet again he did not inform the court about the fact that he had sold the property in favour of Sakunthala. He allegedly sent an information to Sakunthala in regard thereto, but admittedly, the latter was sent at a wrong address.

The said suit was decreed in 1978. The Municipality filed an application for execution of the said decree, which was marked as E.P. No. 2620 of 1978. The property in question was put up on auction sale, the upset price wherefor was fixed at Rs.20,000/- by an order dated 19.03.1979. However, as allegedly no buyer was available, an application for reduction of upset price was filed being E.A. No. 284 of 1979 for bringing it down from Rs.20,000/- to Rs. 5,000/-. It was, however, directed to

be reduced to Rs. 10,000/-, but therefor no notice was issued to the judgment debtor, as is required in terms of Order XXI, Rule 66 CPC. Yet again without any other order being passed for further reduction of the upset price, the suit property was sold on auction for a sum of Rs.8,010/- in favour of one Manickam, original defendant no. 1, on 06.08.1979.

5. It will be appropriate to place on record that although at one point of time there existed a dispute as to whether the said Manickam was the wife of Venugopal or not, it stands accepted that a relationship of husband and wife had been existing by and between them. The said auction sale was not only confirmed by an order dated 11.10.1979, but a sale certificate was also issued on or about 04.12.1979. An application for withdrawal of the said auction amount was filed by the Municipality, which had been allowed and a cheque was directed to be issued in its favour. The said order was complied with on 20.02.1981.

6. Manickam allegedly sold the said property in favour of one M/s Ramans for a sum of Rs.41,066/- by a registered deed of sale dated 22.08.1981. Having learnt that the property in question had been sold in auction, Sakunthala filed a suit for declaration and possession, against her vendor, his mother and wife on or about 27.08.1981. The plaintiff then allegedly had no knowledge in regard to the sale of the said property in favour of one M/s Ramans. In her written statement, defendant no. 1 denied that she was the wife of the judgment-debtor and disclosed that she had sold the property during the pendency of the said suit. M/s Ramans despite knowledge of the pendency of the suit sold the said property in favour of the appellants herein. M/s Ramans and the appellants herein thereafter on an application made in that behalf were impleaded as defendants in the said suit. Indisputably, in their written statement, the appellants raised a plea that the Municipality was a necessary party. The said suit was decreed by a judgment and decree dated 19.12.1996. An appeal thereagainst preferred by the appellants has been dismissed by a judgment and order dated 12.01.1999. A Second Appeal preferred by the appellants has also been dismissed.

Submissions :

7. The principal contentions raised in this appeal by Mr. K.V. Viswanathan, leaned counsel for the appellants are :

(i) In view of the mandatory provisions contained in sub-rule (4) of Rule 92 of Order XXI CPC, the decree-holder was a necessary party and in its absence the judgment and decree passed by the courts below are nullities.

(ii) In terms of Order I, Rule 9 CPC, non-impleadment of a necessary party would render a suit not maintainable.

(iii) Sakunthala having questioned the title of Venugopal as on the date of holding of the auction, in terms of the aforementioned provision, she was bound to implead the Municipality as a party defendant in the suit.

(iv) The finding of commission of fraud as alleged by the plaintiff either on the part of the Municipality or on the part of the appellants and his predecessors, would not render the auction sale void. (v) Had the Municipality been impleaded as a party, it could have shown that no fraud had been committed on the court in the matter of holding of the auction.

(vi) The plaintiff having not examined herself, and only an auditor having been examined on her behalf, an adverse inference should have been drawn in that regard by the courts below.

8. Mr. K. Parasaran, learned Senior Counsel appearing on behalf of the respondents, on the other hand, would submit :

(i) A specific plea of fraud having been raised on the part of the auction purchaser, who was wife of the judgment-debtor and the defendant in the suit, and a finding of fact in that behalf having been arrived at by the trial court as also by the appellate court, the Municipality can not be said to be a necessary party.

(ii) The plaintiffs-respondents had rightly been held to have not raised any contention in regard to commission of fraud on the part of the Municipality, as has been held by the learned Trial Judge as also the Appellate Court, it was not a necessary party to the suit. (iii) The suit as framed did not attract the provisions of Order XXI, Rule 92 CPC, as a decree passed in favour of the judgment-debtor Venugopal was a mortgage decree, as contemplated under Order XXXIV, Rule 1 CPC vis-à-vis the Transfer of Property Act, (iv) Order XXI, Rule 92, in any event, must be given a contextual meaning.

(v) The principle of caveat emptor will be applicable in this case. (vi) Appellants being purchasers pendente lite are bound by the decree passed by the learned Trial Judge.

(vii) The position of the judgment-debtor Venugopal being that of a trustee, as envisaged under Section 88 of the Indian Trusts Act, 1882 it was obligatory on his part to protect the interest of Sakunthala.

Statutory Provisions :

9. Sections 85 and 88 of the 1920 Act, which are relevant for the purpose of adjudication of this case, read as under : 85. Property tax a first charge on property. The property tax on buildings and lands shall, subject to the prior payment of land revenue, if any, due to the Government thereon, be a first charge upon the said buildings or lands and upon the movable property, if any, found within or upon the same and belonging to the person liable to such tax.

88. Obligation of transferor and transferee to give notice of transfer. (1) Whenever the title of any person primarily liable to the payment of property tax on any premises to or over such premises is transferred, the person whose title is transferred, and the person to whom the same shall be transferred shall within three months after the execution of the instrument of transfer or after its registration if it be registered or after the transfer is effected, if no instrument be executed, give notice of such transfer to the Executive authority.

(2) In the event of death of any person primarily liable as aforesaid the person to whom the title of the deceased shall be transferred, as heir or otherwise shall give written notice of such transfer to the executive authority within one year from the death of the deceased.

(3) The notice to be given under this section shall be in such form as the executive authority may direct and the transferee or the person to whom the title passes, as the case may be, shall, if so required, be bound to produce before the executive authority any documents evidencing the transfer

or succession.

(4) Every person who makes a transfer as aforesaid without giving such notice to the executive authority shall in addition to any other liability which he incurs through such neglect, continue liable for the payment of property tax assessed on the premises transferred until he gives notice or until the transfer shall have been recorded in the municipal registers but nothing in this section shall be held to affect

(a) the liability of the transferee for the payment of the said tax, or

(b) the prior claim of the municipal council under section 85.

Fraud :

10. Relationship between Venugopal and Manickam is not dispute. A contention has, however, been raised by the respondents themselves that Sakunthala was a national of Malaysian origin. Venugopal and Manickam, as noticed hereinbefore, denied and disputed their relationship of husband and wife. Despite such a stand taken at least before the High Court, the same was given up. Keeping that aspect in view we may notice the findings of the learned Trial Judge :

The sale deed Ex.A.1 has been suppressed and an ex- parte decree has been obtained in that suit. It is a fraudulent act of Venugopal. The suit property has been brought in auction in E.P. No. 2620 of 1978 suppressing the already existing sale in favour of the plaintiff Sakuntala. This Court therefore, considers that such an act is unjust and fraudulent.

The First Appellate Court also found as under :

It is also clear that the 3rd respondent did not inform the plaintiffs/appellants that for the arrears of property tax in respect of the property sold to them, a decree has been obtained and that the 3rd respondent did not appear in court and inform the Court that he had sold the property to the plaintiffs and hence the plaintiffs also should be impleaded as parties to the suit. D.W.1, the 5th respondent examined on the side of the respondents, has stated in his evidence that on 2.8.1978 Venugopal appeared in Court in the case filed by the Corporation, that Venugopal had means to pay the arrears of tax of Rs. 406/- and that even after the decree in the said suit, Venugopal did not pay the arrears of property tax of Rs. 406/-. It is therefore, clear that the 3rd respondent has acted fraudulently by not paying the arrears of tax even after the sale in favour of the plaintiffs, though he had means to pay and the plaintiffs were also not informed about the same. Even when the property was brought for auction, the 3rd respondent did not contest it. Though the property tax arrears is a small amount of Rs. 406/-, he has not chosen to pay the same.

It was further found :

The 3rd respondent in his written statement has stated that the 1st respondent is not his wife, that the 1st respondent in the written statement has stated that the 3rd respondent is not her husband and that she is not married. The fraudulent conduct is very clear from their statement in their written statement that the 1st respondent is not the wife of the 3rd respondent. There is no doubt that Corporation has filed a suit for recovery of a small amount of Rs. 406.76 towards arrears of property tax and obtained a decree, which was followed by execution proceedings, which was also

not contested, that wantonly allowing all the proceedings to go on, the 3rd respondent, through his wife, fraudulently took the property in auction for Rs.8,010/-

The Court held :

The 3rd respondent in his written statement has stated that though it is not necessary for him to inform anything about the proceedings to anybody regarding the auction sale, he informed the plaintiff by registered post and that under those circumstances there is no chance to say that he acted fraudulently. It was stated by the learned counsel for the appellants that on the side of the respondents, in support of the above, Ex. B.1 has been filed. A perusal of Ex. B.1 shows that the registered post has been returned stating that there is no such addressee. In the above registered post, the address found is M. Sakunthala, wife of Muthyya Chettiar, Thisoolpadam, Thirupathur Post, Ramanathapuram District. But it is clear from the plaint documents that the place of plaintiff Sakunthala is Siruoodalpatti village, Tirupathur Taluk, Sivaganga District. There is no doubt that the 3rd respondent want only sent the registered post giving a false address, got it returned and filing it into Court is clearly a continuation of his fraudulent action.

11. Although not very relevant, but we may notice that the vendor had never paid the arrears of property tax to the Municipality. He had other properties and the quantum of tax for which the suit was filed was only Rs.406.76. A further finding of fact had been arrived at that despite knowledge, no notice was sent to Sakunthala at her known address i.e. Sirukoodalpatti Village which was the address disclosed in the sale deed, but sent to another address. In the suit only the registered cover had been filed but the contents thereof had not been disclosed. It was obligatory on the part of the appellant to bring the office copy of the said notice on the record. On the basis of the aforementioned findings, the courts below had arrived at a conclusion that Venugopal had not been acting bona fide and an attempt had been made to create evidence to cover up his fraud. Statutory application :

12. Section 55(1)(g) of the Transfer of Property Act, 1882 envisages payment of taxes in respect of the property by the vendor up to the date of sale. The liability of the vendee to pay the property tax arises only from the date of sale. However, Sections 85 and 88 of the 1920 Act provide that in the event, the factum of sale is not communicated, the liability of the vendor shall continue. Consequently a statutory charge is created on the property. A person having an interest in the property, therefore, might have a right of redemption. A suit for realisation of the dues in respect of a property in respect whereof a statutory charge is created, a suit could also be filed by the Municipality, apart from taking recourse to the procedure provided for realisation of the said dues as land revenue.

13. A decree passed in terms of Order XXXIV, Rule 1 CPC is somewhat different from a decree passed in an ordinary money suit. If in terms of the provisions of the statute, plaintiffs-respondents are found to be liable to pay the property tax, at an appropriate stage, they can redeem the charge. The plaintiffs-respondents did not claim any relief against the Municipality. Its right, title and interest over the property having regard to the statutory charge thereover has not been denied or disputed. It is also not a case where fraud was alleged to have been committed by the Municipality either in conspiracy with the judgment-debtor Venugopal or otherwise. What was contended was that having regard to the fact that upset price was brought down without following the procedure as contained in Order XXI, Rule 66 CPC, an irregularity or fraud was practised in the context of the conduct of the auction sale. Irregularity committed in conducting the auction sale and commission

of fraud either on court or on a party to the suit stand completely on different footings.

14. Mr. Viswanathans contention that in effect and substance the plaint contained allegation of fraud on Municipality, in our opinion, cannot be accepted. As is well-known, the pleadings must be read in their entirety for the purpose of proper construction thereof. What had been alleged in the plaint is the commission of fraud by Venugopal. His conduct throughout the proceedings has been taken into consideration by the courts below; viz., despite transferring the property he did not intimate thereabout to the Municipality. Even when the suit was filed, he did not make any attempt to raise a plea which was expected of any reasonable and prudent man that he ceased to be liable to pay the property tax as he had already transferred the property. The purported intimation given to the plaintiffs was also found to be an act of fraud on his part inasmuch as the purported notice to the plaintiff had deliberately been sent at a wrong address. The contents of the notice had also not been brought on record. Despite having sufficient means he voluntarily suffered an ex parte decree. He never objected to reduction of upset price. He despite the fact did not contest the suit, participated in the auction sale and purchased the property in the name of his wife. Not only that the auction purchaser sold the property to a third party, who again despite the knowledge of pendency of the suit transferred the property in favour of the appellants.

The effect of commission of such fraud either on court or on a party is no longer res integra. [See S.P. Chengalvaraya Naidu (Dead) by Lrs. v. Jagannath (Dead) by L.Rs. and Others [(1994) 1 SCC 1], Ram Chandra Singh v. Savitri Devi [(2003) 8 SCC 319] and Tulsi and Others v. Chandrika Prasad and Others [(2006) 8 SCC 322].

15. In A.V. Papayya Sastry and Others v. Govt. of A.P. and Others [(2007) 4 SCC 221], it was held :

21. Now, it is well settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed : Fraud avoids all judicial acts, ecclesiastical or temporal.

22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order --by the first Court or by the final Court-- has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings.

Non-impleadment of the Municipality in a suit :

16. Keeping in view the principles of law, we may notice the effect of non-impleadment of the Municipality, as envisaged under Order XXI, Rule 92(4) & Rule 92(5) CPC, which reads as under :

92. Sale when to become absolute or be set aside

(4) Where a third party challenges the judgment- debtors title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit.

(5) If the suit referred to in sub-rule (4) is decreed, the Court shall direct the decree-holder to refund the money to the auction-purchaser, and where such an order is passed the execution proceeding in which the sale had been held shall, unless the Court otherwise directs, be revived at the stage at which the sale was ordered.

17. The purported allegations of the fraud on the Municipality in the plaint reads as under :

IX The property originally proclaimed for sale at Rs. 20,000/-. The upset price was allowed to be reduced on application without notice being issued to other side. The entire execution is not only fraud but also irregular, illegal and void.

XI The property originally proclaimed for sale at Rs. 20,000. Due to irregularities in the procedure and want of proper publication and publicity the sale did not take place and there were series of application to reduce and upset price and the property ultimately sold on the upset price fixed at Rs. 8000/-

The findings of the Trial Court on the said issue are as under : Ex A-9 is the copy of the interim application filed in the execution petition no. 2620 of 1978 by the corporation. That application has been filed to reduce the upset price from Rs. 20,000/- to 5,000/-. Further it has been stated in that petition that reduction of upset price is prayed for on account of the fact that the house constructed in the suit property is in a dilapidated condition. For the purpose of reduction of price, false details have been furnished. With the intention of suppressing the real facts from the eyes of the court, it has been stated that there is a building in the suit property in a dilapidated condition. Further in that application it is stated that 12 years have lapsed after the judgment in OS No. 986/73. But the judgment has been delivered in 1973. Execution petition has been filed in 1978, 5 years after the judgment. While so, it is clear that the said application contains allegations against the truth

18. It may be true that an observation had been made that the Municipality did so at the instance of Venugopal, but there was no warrant for the following finding :

No notice has been given to the respondents in the petition filed for reduction of upset price. Because of these defects in bringing the property for auction in the execution petition, it is clear that that there are legal flaws.

It was also found :

It was argued on the side of the defendants that since Coimbatore Corporation has not been made a party to this suit, this suit has to be dismissed. This suit has been filed for the relief of declaration that the suit property absolutely belongs to the plaintiff on the basis of Ex. A..1. For deciding the right with regard to the suit property, Corporation is not a necessary party. The powers to decide as to which property belongs to whom has not been granted to the Corporation. Only a power to collect property tax is vested with the Corporation. The Court therefore holds that in the suit filed to decide as to whether the suit property belongs to the plaintiff or the defendants, the Corporation is an unnecessary party. It is not necessary to implead Corporation as a party to decide the disputes arising between the individuals. Further in the suit and in the execution proceedings by the Corporation, Plaintiff Sakunthala is not a party. While so, this Court holds that it is not necessary to add Corporation as a party to the suit. The Corporation has also not sent any notice at any time stating that the suit property did not belong to the plaintiffs. Hence this Court holds that so far as this case is concerned, the Corporation need not be impleaded as a party. Hence this issue is answered against the defendants. Such findings had been affirmed by the Appellate Court, stating :

A perusal of the above shows that the Corporation need not be impleaded as a party nor any case to be filed to set aside the auction proceedings and this will not affect the plaintiffs case in any way.

From the above, it is clear that the 3rd respondent has executed Ex. A.1 sale deed in favour of the first plaintiff for valid consideration, which has not been denied by the 3rd respondent, that the 1st respondent became entitled to the property so purchased later under the court auction sale, which has been held to be invalid under law, this court hold that the first plaintiff is entitled to a declaration that the suit property purchased under Ex.A.1 belongs to the first plaintiff and after her plaintiffs 2 and 3 are entitled to the suit property

19. We have noticed hereinbefore that a suit filed in terms of Order XXXIV, Rule 1 CPC stands on a different footing. Non-joinder of a property party in terms of Order I, Rule 9 would not render a suit not maintainable. We are, however, not oblivious of the purport and object in amendment of Order XXI, Rule 92 CPC. The Law Commission in its 54th Report recommended :

21.48D. Whatever be the correct view on the existing language, it appears to us that something should be done to improve the position. No doubt, to permit the auction-purchaser to sue for refund from the decree- holder, is to add to the troubles of the decree-holder, and thus to delay execution. But that seems to be the only possible alternative. As between the decree-holder and the auction-purchaser, if some one has to suffer, the former should suffer.

It may not be feasible for the court to inquire into the title of the judgment-debtor (at the time of the proclamation), in an elaborate manner; but that does not answer the basic question, namely, when a sale held by a Court and culminating in a certificate issued by the court is held to be a nullity for want of title, by reason of a defect discovered after expiry of the period for making objections under rule 91 etc., is it justice to dispose of the purchasers grievance by saying that the purchaser purchased the property at his peril? The decree-holder should re-imburse him for the loss suffered by him, because it is the decree-holder at whose instance the sale was held. The abstract principle that there is no warranty at court sales fails to yield a just result in this case.

The auction-purchaser should have a right to sue the decree-holder. Where a third party challenges the judgment-debtors title by filing a suit against the auction-purchaser the decree-holder and judgment-debtor should be necessary parties, and in that suit the court shall direct the decree-holder to refund the money to the auction-purchaser.

If such a decree is passed, the original execution proceedings shall be revived at the stage where the sale was ordered, unless the court otherwise directs. This provision is necessary to avoid complications as to limitation.

#### Recommendation

21.49. We, therefore, recommend that the following sub-rules should be added to Order 21, rule 92 :-

(5) Where a third party challenges the judgment- debtors title by filing a suit against the auction-purchaser, the decree-holder and the judgment- debtor shall be necessary parties to the suit; (6) If the suit referred to in sub-rule 5 is decreed, the court shall, direct the decree-holder to refund the money to the auction-purchaser, and, where such an order is passed, the execution proceedings in

which the sale had been held shall, unless the court otherwise directs, be revived at the stage at which the sale was ordered.

20. The Statement of Objects and Reasons also lead to the same inference, wherein it was, inter alia, stated :

Rule 92 is being amended to provide that where a third party challenges the judgment-debtors title by filing a suit against the auction-purchaser, the decree holder and the judgment-debtor should be necessary parties to that suit and if the suit is decreed, the Court shall direct the decree-holder to refund the money to the auction-purchaser. With a view to avoiding complications with regard to limitation, the rule further provides that where a decree is passed in favour of such third party, the original execution proceeding will become revived at the stage where the sale was ordered unless the Court otherwise directs.

21. It is true the purpose of impleadment of a necessary party is to see as to whether without it no order can be made effectively. If an effective order can be made, the suit will not be defeated. A decree which is passed in terms of Order XXI, Rule 92(4) does not take into consideration the effect of a statutory charge on a property, vis-`-vis the statutory right of any persons having interest in the property to redeem or sell the same at any point of time. When a fraud is practised on a court, the same is rendered a nullity. In a case of nullity, even the principles of natural justice are not required to be complied with. [Kendriya Vidyalaya Sangathan and Others v. Ajay Kumar Das and Others (2002) 4 SCC 503 & A. Umarani v. Registrar, Cooperative societies and Others (2004) 7 SCC 112-para 65].

22. Once it is held that by reason of commission of a fraud, a decree is rendered to be void rendering all subsequent proceedings taken pursuant thereto also nullity, in our opinion, it would be wholly inequitable to confer a benefit on a party, who is a beneficiary thereunder. The decisions rendered in Udit Narain Singh Malpaharia v. Additional Member, Board of Revenue, Bihar [(1963) Supp. 1 SCR 676] and Profulla Chrono Requitte and Others v. Satya Chorone Requitte [(1979) 3 SCC 409] whereupon reliance has been placed by Mr. Viswanathan, may not have any application in a case of this nature in view of the fact that the principal question which, in our opinion, would be more pertinent is as to whether even in a situation of this nature, the discretionary jurisdiction under Article 136 of the Constitution of India should be invoked particularly when the party raising the said question has been impleaded as a party.

23. We would assume that the courts below proceeded on a wrong premise that Order XXI, Rule 92(4) is not attracted, but the question as regards fraud committed by the judgment-debtor has been gone into a great details. We are satisfied that the findings arrived at by the learned Trial Judge and affirmed by the First Appellate Court also by the High Court are equitable. It is in a situation of this nature, we are of the opinion that this Court in exercise of its jurisdiction under Article 142 of the Constitution of India can pass an appropriate order with a view to do complete justice to the parties. [Chandra Singh v. State of Rajasthan & Another (2003) 6 SCC 545 Oriental Insurance Co. Ltd. v. Brij Mohan & Ors. -2007 (7) SCALE 753 - para 14].

Are the Appellants bound by the decree ?

24. In this case the appellants as also the aforementioned M/s Ramans purchased the property pendente lite. They would be deemed to have notice of the sale made by Venugopal in favour of the

plaintiff-respondents. Section 3 of the Transfer of Property Act provides that a person is said to have notice of the fact when he actually knows that fact, where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument. [See Lachhman Dass v. Jagat Ram & Others 2007 (3) SCALE 349]. They have purchased the property with notice, apart from the fact that the transfer made in their favour was hit by Section 52 of the Transfer of Property Act. The decree obtained by the Municipality had been passed under Order XXXIV CPC. Respondents had a subsisting right of redemption. Order XXXIV, Rule 15 CPC provides that all the provisions contained therein shall, as far as may be, apply to a mortgage by deposit of title-deeds within the meaning of Section 58, and to a charge within the meaning of Section 100 of the Transfer of Property Act. The charge created under Section 85 of the 1920 Act would be one covered by Section 100 of the Transfer of Property Act. Section 100 of the Transfer of Property Act reads as under :

S. 100 Charges Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.

25. In Mangru Mahto & Others v. Shri Thakur Taraknathji Tarakeshwar Math & Others [1967 (3) SCR 125], this Court held : A lease granted by the mortgagor, out of the ordinary course of management, though not binding on the mortgagee, is binding as between the mortgagor and the lessee. Such a lessee acquires an interest in the right of redemption and is entitled to redeem. If such a lease is created before the institution of a suit relating to the mortgage, the lessee must be joined as a party to the suit under Order 34 Rule 1 CPC; otherwise he will not be bound by the decree passed in the suit and will continue to retain his right of redemption. But in view of Section 52 of the Transfer of Property Act, if the mortgagor grants such a lease during the pendency of a suit for sale by the mortgagee, the lessee is bound by the result of the litigation. If the property is sold in execution of the decree passed in the suit, the lessee cannot resist a claim for possession by the auction-purchaser. The lessee could apply for being joined as a party to the suit and ask for an opportunity to redeem the property. But if he allows the property to be sold in execution of the mortgage decree and they have now lost the present case, the lessees allowed the suit lands to be sold in execution of the mortgage decree and they have now lost the right of redemption. They cannot resist the claim of the auction purchaser of recovery of possession of the lands.

26. Materials have been brought on record to show that a preliminary decree and a final decree in terms of Order XXXIV have been passed. The learned Trial Judge also found so. It is also appropriate to notice the following findings of the learned Trial Judge in regard to issuance of the two encumbrances certificates :

Ex. A.17 is the encumbrance certificate. Thiru E. Ayyasami filed an application and obtained that encumbrance certificate. That encumbrance certificate has been issued on 28.6.1983 from the office of the Sub Registrar. In that the sale deed dated 12.11.70 in favour of the plaintiff is shown.

Similarly in that encumbrance certificate, the sale deed dated 4.12.79 in respect of the suit property and another sale deed dated 22.8.81 in favour of Manickam find a place. Ex. A. 18 is the questionnaire regarding family card. In that it is mentioned that Manickam is the wife of Venugopal. But in the written statement filed by the defendant it is stated that Manickam is not the wife of Venugopal. Ex. A. 16 is the voters list issued to the family of Venugopal. In that document also it is stated that Manickam is the wife of Venugopal. Ex. A. 20 is the copy of the complaint filed in the criminal Court in STC No. 2119/94. That complaint has been filed by advocate Thiru N. Sundaravadivelu and advocate Thiru S. Krishnamurthy. This document has been filed to show that the defendants Venugopal and Manickam together engaged those two lawyers and were conducting the case.

32. Ex. B. 4 is the encumbrance certificate obtained on the application by Thiru James. That certificate has been issued on 24.7.80 by the Sub Registrars Office. In that the sale in favour of Sakunthala do not find a place. But in Ex. A. 17 the encumbrance certificate obtained on 28.6.1983, the sale deed in favour of the plaintiff Sakunthala has been mentioned. In an encumbrance certificate issued three years before Ex. B4 encumbrance certificate was issued, the sale deed in favour of the plaintiff Sakunthala finds a place. In an encumbrance certificate obtained thereafter that sale does not find a place. Hence it is clear that because of the arrangements made by the defendant Venugopal, the sale in favour of the plaintiff Sakunthala does not find a place there. Similarly Ex. B. 5 is the encumbrance certificate obtained by Thiru M.P. Ramakrishnan on his application issued by the office of the Sub Registrar on 26.4.84 containing no encumbrance. Hence it is clear that the matters contained in that encumbrance certificate are false. Ex. B. 6 is the encumbrance certificate obtained by Mr. M.P. Ramakrishnan on 12.4.84. In that, the sale dated 22.8.1981 in favour of Manickam finds a place. Therefore is clear that the encumbrance certificates marked on the side of the defendants contained details contrary to truth. This court therefore hold that those encumbrance certificates have been issued only in connivance with Venugopal. This Court hold that by selling the property to 5th defendant to get more profit, the sale in favour of Sakunthala in the encumbrance certificate was suppressed.

Conclusion :

27. Appellants and their predecessors, therefore, are also guilty of suppressio veri. Ordinarily a statute shall prevail over the common law principle. However, in a case of this nature, in the event of any conflicting interest, this Court in exercise of its equity jurisdiction under Article 142 of the Constitution of India is to weigh the effect of a fraud and the consequence of non-impleadment of a necessary party. We would hold that the scale of justice weighs in favour of the person who is a victim of fraud and, thus, we should not refuse any relief in his favour, only because he might have been wrongly advised. The purport and object for which Order XXI, Rule 92(5) was enacted furthermore would be better subserved if it is directed that the respondents shall pay the amount which the Court paid to the Municipality out of the amount of auction.

28. We have noticed hereinbefore that one of the objects sought to be achieved in amending Order XXI, Rule 92 was to do complete justice to the parties so as to enable the auction purchaser to get back the amount from the decree-holder and revive the execution proceedings so that the decree-holder may proceed against the judgment-debtor for realisation of the decretal amount. In this case, the plaintiffs-respondents had not claimed any relief against the Municipality. The Municipality's right to realise the amount of property tax together with interest, if any, is not in dispute. Although the liability of Venugopal in terms of the 1920 Act to pay the property tax continued, it has been

accepted at the Bar that the plaintiffs-respondents was also liable to pay the amount of property tax after the date of sale. In a case of this nature, therefore, the plaintiffs-respondents can be directed to pay the amount of property tax by way of redemption of mortgage in favour of the Municipality.

29. If any amount is available with the court out of the amount received from the auction sale, the same may be paid to the appellants. Appellants would also be otherwise entitled to file an appropriate suit as against Manickam and others.

30. We, therefore, are of the opinion that subject to the terms aforementioned, the appellants should not be granted any relief.

31. For the views we have taken, it is not necessary for us to go into the other contentions raised by the learned counsel for the parties. We, therefore, direct the plaintiffs-respondents to deposit the amount paid to the Municipality out of the auction amount by the order of the executing court within six months from date and on such payment, the appeal shall stand dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.