

(1985) 09 MAD CK 0026
In the Madras High Court

B.V. Muniraj and Another

APPELLANT

Vs

The Catholic Syrian Bank Ltd. and Others

RESPONDENT

Date of Decision : 23-09-1985

Acts Referred:

Citation : (1986) 1 MLJ 139

Hon'ble Judges : S.A. Kader, J

Bench : Division Bench

Judgement

S.A. Kader, J.—The revision is directed against the order of the first Additional Subordinate Judge, Erode in E.A.No. 283 of 1984 in E.P. No. 69 of 1984. The petitioners in E.A. No. 283 of 1984 are the revision petitioners.

2. The important question that arises for consideration in this revision petition is, whether a mortgagor/defendant is entitled under Order 34, Rule 5, C.P.C to deposit into court all the amounts due from him including 5% of the amount of the purchase money paid by the court auction purchaser and seek redemption of the mortgage till a formal order of confirmation of the auction sale is made by the Court or whether he is bound to deposit the money before the expiry of the period (now 10 days from the date of sale) for filing an application to set aside the auction sale or before an application to set aside the sale is finally disallowed.

2-A. The brief facts of the case necessary for the purpose of this petition are these:-The first respondent herein, which is the Catholic Syrian Bank Limited, Erode, obtained a mortgage decree against the second respondent herein in O.S. No. 340 of 1951 on the file of the Court of the Subordinate Judge, Coimbatore and brought the mortgaged properties to sale in E.P.No. 162 of 1963 on the file of Sub-Court, Erode. In the auction held on 3.7.1980, items 4 to 6 of the mortgaged properties were sold. Item 4 with which we are now concerned in this revision was purchased by the third respondent herein. Meanwhile one Kandasami has purchased this 4th item in the court auction in execution of a money decree against the second respondent/defendant in O.S. No. 321 of 1958 on 4.3.1963 and taken delivery of the property. After the court auction sale of

the 4th item in favour of the third respondent herein in the auction held on 3.7.1980 in the mortgage suit, the aforesaid Kandasami who has purchased the property in execution of the money decree and the revision petitioners herein filed E.A.No. 836 of 1980 u/s 37, C.P.C in E.P. No. 162 of 1963 on the file of the Sub-Court, Erode to set aside the court auction sale in favour of the third respondent held on 3.7.1980. It was contended by the petitioners in the said execution application (E.A. No. 836/80) that the first petitioner/ Kandasami purchased the said property on behalf of the petitioners 2 and 3 in the said execution application and has subsequently released his interest in favour of petitioners 2 and 3 who are the revision petitioners herein. During the pendency of E.A. No. 836 of 1980, the Tamil Nadu Civil Courts and Madras City Civil Court Amendment Act 84 of 1980 came into force enhancing the jurisdiction of the Court of the District Munsif to Rs. 15,000/-and consequently these proceedings in execution pending before the Subordinate Judge, Erode stood transferred to the Court of the District Munsif of Erode. E.P.No. 162 of 1963 on the file of the Sub-Court, Erode was re-numbered as E.P. No. 341 of 1981 on the file of the District Munsif of Erode and E.A.No. 836 of 1980 on the file of the Sub-Court, Erode was re-numbered as E.A. No. 158 of 1981 on the file of the Court of the District Munsif, Erode. The learned District Munsif allowed E.A.No. 836 of 1980, and set aside the auction sale of item 4 in favour of the third respondent herein. The matter came up in revision before this Court in C.R.P. No. 79 of 1982 filed by the third respondent/auction purchaser. This Court by its order dated 14.7.1983 allowed the revision, set aside the order of the District Munsif in E.A.No. 158 of 1981 and directed the District Munsif, Erode to proceed further with the execution petition and dispose of it as expeditiously as possible. But, the District Munsif, Erode did not at once confirm the sale in favour of the auction purchaser the third respondent herein. In the meantime, these proceedings in execution were transferred to the Court of the District Munsif, Bhavani on the constitution of that Court as the property was situate within its jurisdiction. The third respondent-auction purchaser filed a memo before the court of the District Munsif, Bhavani on 6.12.1983 inviting the attention of the Court of the District Munsif to the order of this Court in C.R.P. No. 79 of 1982 and praying for the confirmation of the sale in favour of the third respondent herein. Despite thereof the District Munsif did not take any action. On 10.1.1984 the revision petitioners filed E.A. No. 48 of 1984 under Order 34, Rule 5, C.P.C. depositing of the mortgage and setting aside the sale in favour of the third respondent herein. Under the orders of the District Judge of Erode in O.P. No. 26 of 1974 these execution proceedings were transferred to the first Additional Subordinate Judge Erode where E.A. No. 48 of 1984 was re-numbered as E.A.No. 283 of 1984 and the execution petition was numbered as E.P.No. 69 of 1984. The first Additional Subordinate Judge, Erode enquired into this petition and dismissed the same. Aggrieved thereby the petitioners in the said execution application have preferred this revision.

3. The first question which arises for consideration is whether these revision

petitioners have any locus standi to file the petition under Order 34, Rule 5, C.P.C. The contention of the auction purchaser the third respondent herein is that the sale in favour of Kandaswami Mudaliar from whom the revision petitioners herein have obtained a deed of release, in the money decree in O.S. No. 321 of 1958 on 4.9.1963 was long subsequent to the mortgage suit in O.S. No. 340 of 1951 in which the third respondent has purchased the fourth item on 3.7.1980. and hence the sale in favour of the said Kandasami Mudaliar cannot take precedence over the sale in favour of the third respondent herein and he has therefore no right to file this application. This contention has found favour with the court below. It is no doubt true that the court auction sale in favour of Kandasami Mudaliar in execution of the money decree in O.S. No. 321 of 1958 is long after the mortgage suit in O.S. No. 340 of 1951 and hence it cannot take precedence over the sale in favour the third respondent herein in execution of the mortgage decree. But, that is not the question involved in this application. The question here is whether the revision petitioners are entitled to maintain an application under Order 34, Rule 5, C.P.C. which gives a right to the defendant in a mortgage suit to redeem the mortgage by payment of the amounts due until the sale in the mortgage decree is confirmed. The right is no doubt conferred upon the defendant in the mortgage suit but u/s 146, C.P.C. where any proceeding may be taken or application made by any party to a suit then the proceedings may be taken or the application may be made by any person claiming under him. It cannot be disputed that the purchaser in court-auction in execution of the money decree gets the right, title and interest of the judgment-debtor. The aforesaid Kandasami Mudaliar, who has purchased this fourth item in execution of the money decree in O.S. No. 321 of 1958 against the second respondent herein, who is the mortgagor-defendant in this mortgage suit in O.S. No. 340 of 1951 steps into the shoes of the second respondent-mortgagor and is entitled to the right, title and interest of the second respondent herein. An application under Order 34, Rule 5, C.P.C. is therefore maintainable by the said Kandasami Mudaliar. The aforesaid Kandasami Mudaliar claims to have purchased this fourth item in execution of the money decree in O.S. No. 321 of 1958 as the agent of the revision petitioners herein and has subsequently executed a deed of release in favour of the revision petitioners. Ex.A-5 is the registered deed of release and Ex.A-4 is the registration copy thereof. Subsequent to the release, the registry has been transferred in the name of the revision petitioners as is evidenced by Ex.A-6. The revision-petitioners are, therefore, claiming under the second respondent herein, who is the mortgagor-defendant in the mortgage suit and they are therefore entitled to file this application under Order 34, Rule 5, C.P.C. Advisedly, therefore, the learned Counsel for the third respondent-auction purchaser in the mortgage suit did not seriously canvass this question before me.

4. The next point which arises for consideration is whether the amount deposited by the revision petitioners is correct. The amount mentioned in the sale warrant is Rs. 26,903/-. On account of the sale of items 5 and 6 in the mortgage decree a sum of Rs. 11,000/-has been realised. The balance due under the mortgage

decree is Rs. 15,803/-. The third respondent herein has purchased the fourth item for Rs. 7,050/- and 5% commission due to him comes to Rs. 355/-. A sum of Rs. 215/- is payable towards the poundage. All tosd, the sum comes to Rs. 16,373/-. As pointed out by a Bench of this Court in Chellappa Chettiar and Others Vs. T.P. Kalyanasundaram and Others, the expression "amounts due from the judgment-debtor under Sub-rule (1) of Rule 4" occurring in Rule 5 of Order 34, C.P.C. should be interpreted as all amounts due under the decree at the time when the application is made under Order 34, Rule 5. C.P.C. and the amounts already appropriated towards the decree by other sales held under the decree must be taken into account. Accordingly the revision petitioners have taken into account the sum of Rs. 11,000/- already realised by the sale of items 5 and 6 and deposited the balance of the decree amount along with the other amounts. I therefore held that the amount deposited is correct.

5. The most important point which arises for consideration is whether this application under Order 34, Rule 5, C.P.C is in time. The contention of the third respondent-auction purchaser is that under Order 21, Rule 92, C.P.C. on the expiry of the period fixed for filing an application to set aside the auction sale or where an application is made to set aside the sale on the dismissal of the said application the Court shall make an order confirming the sale, the confirmation of sale is merely an administrative act of the Court and hence the application under Order 34, Rule 5, C.P.C. must have been filed by the petitioners on or before 14.7.1983 when the application filed by the revision petitioners to set aside the sale in favour of the third respondent herein was finally dismissed by this Court in C.R.P.No. 79 of 1982. It is argued on behalf of the revision petitioners that a formal order of confirmation of sale by the Court is absolutely necessary in order to render the auction sale absolute and hence an application under Order 34, Rule 5 could be filed by a defendant in a mortgage suit till the formal order of confirmation is passed by the Court and inasmuch as this application under Order 34, Rule 5, C.P.C. has been filed by the revision petitioners before the sale was confirmed it is in time. There appears to be a conflict of decisions on this aspect to which I shall now refer.

6. In V.S. Subramania Asari Vs. Ramaswami Pillai, Mr. Justice Horwill observed that Order 21, Rule 92, C.P.C. contemplates the passing of an order of confirmation and it is the passing of this order which makes the sale absolute; so that it is not the lapse of 30 days that confirms the sale but passing of an order which cannot be passed within 30 days. He therefore held that the application filed under Order 34, Rule 5, C.P.C. before the sale had been confirmed was in order and the Court was bound to direct the mortgagee to receive the sum of money tendered and give up, the documents contemplated by Order 34, Rule 5, C.P.C. In Priti Rekha Mitra Vs. Narayan Chandra Dutta, a single Judge of the Calcutta High Court has held that the equity of redemption in a mortgage suit is not extinguished by the final decree for sale nor by the actual sale itself but survives until the sale is confirmed and made absolute and ah application under Order 34, Rule 5, C.P.C. can lie till the sale is actually confirmed. A Bench of the

Patna High Court in Ramchandra Bhagat and Another Vs. Mrs. Eva Mitra and Others, has also taken the view that a court auction sale is incomplete and legally ineffective to pass a good title unless and until the sale is confirmed and the sale becomes absolute. It is only when confirmation of the sale takes place, the provisions of Section 65, C.P.C. as to the retrospective vesting of title from the date of the sale comes into operation. A Bench of this Court in a very recent decision rendered in M. Sevugan Chettiar and Another Vs. V.A. Narayana Raja and Others, has held that:

Until the confirmation of the sale becomes a finality in the eye of law, the provisions of Order 34, Rule 5, C.P.C. can be availed of by the judgment-debtor and it is not possible to give a narrow and a literal meaning to the expression "before confirmation of sale" occurring in Order 34, Rule 5, C.P.C. as meaning only the order confirming the sale passed by the first Court since on appeal being filed, that order is left at large....As to when the sale would become absolute has got to be gleaned only from Order 21, Rule 92 of the Code. As per that provision as stated above, the sale will become absolute only on the Court making an order confirming it.

In that case before the Bench, the confirmation had taken place even before the application filed by the judgment-debtor under Order 21, Rule 90, C.P.C. to set aside the sale was finally disposed of and an application under Order 34, Rule 5, C.P.C. depositing the amounts due from the judgment-debtor was filed during the pendency of an appeal against the dismissal of the application under Order 21, Rule 90, C.P.C. The Bench held that the order of confirmation had not become final in the eye of law and the provisions of Order 34, Rule 5 could be availed of by the judgment-debtor. The learned Judges clearly pointed out that so long as there is no confirmation of sale in the eye of law and the matter is subjudice in appeal, time is available for the judgment-debtor to make deposit under Order 34, Rule 5, C.P.C.

7. Per contra, is the judgment of the Bench of the Calcutta High Court in Sashi Bhusan Mitra and Others Vs. Ramlal Mitra, . The judgment-debtor therein filed an application under Order 34, Rule 5 for making payment of the amount due under the decree after the dismissal of his application under Order 21, Rule 90, C.P.C. and contended that as there was no express order for confirmation of the sale by the Court, his application under Order 34, Rule 5, C.P.C. was in time. The Bench repelled this argument and held that the fact that a distinct order has not been recorded confirming the sale is quite immaterial. An express order for confirmation of sale is not absolutely necessary. The learned Judges relied on an earlier Bench decision of that Court in Mt. Rahela Khatun and Others Vs. Amburennessa Choudhurani and Others, where it was held that the sale certificate was no more than evidence of title and absence in the record of a sale certificate or of a formal order confirming the sale did not affect the purchaser's title when in substance and effect the Court did confirm the sale. In Veda Gounder and Others Vs. Arunachalam Chettiar, which has also been relied on by

the Bench of the Calcutta High Court in Sashi Bhusan Mitra and Others Vs. Ramlal Mitra, , Raja gopalan, J. has held:

Confirmation of sale under Order 21, Rule 92, C.P.C. does not require an application by the auction purchaser. Confirmation is a statutory obligation imposed on the Court if the requirements of Order 21, Rule 92, C.P.C. are satisfied.

It may be pointed out that the Bench decision of the Calcutta High Court in Mt. Rahela Khatun and Others Vs. Amburennessa Choudhurani and Others, and the decision of this Court in Veda Gounder and Others Vs. Arunachalam Chettiar, do not arise under Order 34, Rule 5, C.P.C. They deal with auction sales held in execution of money decrees. The question whether there should be an express or formal order of confirmation of sale by the Court does not assume much importance in the case of an auction sale in a money suit. For, the judgment-debtor in a money suit has only one opportunity to deposit the decree amount and 5% of the solatium due to the purchaser and save his property sold in the court auction and this he can do within 60 days of the sale under Article 127 of the Limitation Act of 1963 as amended by the Act 104 of 1976. If he does not avail of that opportunity he cannot thereafter deposit the money and seek to set aside the sale, no matter whether an application to set aside the sale on other grounds is or is not pending and no matter when the sale is actually confirmed of a mortgage decree, the right of the mortgagor-judgment-debtor-defendant to redeem the mortgage by deposit of the amounts due enures under Order 34, Rule 5, C.P.C. till the confirmation of sale. Hence the date of confirmation of the sale assumes great importance in the case of an auction sale in a mortgage suit.

8. From the foregoing discussion it is clear that the preponderance of authorities is in favour of the view that an express order of confirmation of sale by the Court is necessary and the mortgagor-defendant is entitled to deposit the amounts due under Order 34, Rule 5, C.P.C. until the actual order of confirmation of sale is passed by the Court. The revision petitioners herein have filed this application under Order 34, Rule 5, C.P.C and deposited the moneys due from them before an actual order of confirmation has been passed by the executing court and their application is therefore in time.

9. In the result, the revision petition is allowed, the order of the Subordinate Judge in E.A.No. 283 of 1984 is set aside and the said application is allowed. No costs.