
(2015) 09 AP CK 0052
In the Andhra Pradesh High Court
Case No : C.R.P. No. 6084 of 2010

Lanka Babu Surendra Mohana Benarji	APPELLANT
Vs	
Canara Bank, Unguturu and Others	RESPONDENT

Date of Decision : 07-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, Order 21 Rule 64, Order 21 Rule 66, Order 21 Rule 82, Order 21 Rule 89
Constitution of India, 1950 — Article 141
Transfer of Property Act, 1882 — Section 100, 58, 59, 60, 61

Citation : (2015) 6 ALD 562 : (2015) 6 ALT 473

Hon'ble Judges : M.S. Ramachandra Rao, J.

Bench : Single Bench

Advocate : V.L.N.G.K. Murthy and Sindoor V.N.L., for the Appellant; K. Sairama Murthy, for the Respondent

Final Decision : Allowed

Judgement

M.S. Ramachandra Rao, J.—Heard Sri V.L.N.G.K. Murthy and Ms. Sindoor V.N.L., learned Counsel for the petitioner and Sri K. Sairama Murthy, learned counsel for the respondent No. 1. The 2nd respondent appears to have expired but his presence is not necessary to decide the Revision Petition.

THE BRIEF FACTS:

This Revision Petition is filed under Section 115 CPC challenging the order dt. 10-08-2010 in E.P. No. 21 of 2008 in O.S. No. 12 of 1999 (sic. 1989) of the Senior Civil Judge, Nuzvid.

2. The petitioner herein is Judgment Debtor No. 1.

3. The above suit had been filed by 1st respondent Bank against him and the 2nd respondent for recovery of a sum of Rs. 95,092-78 ps. being the principal and interest due on a mortgage bond dated 18-07-1986 executed by then in its favour for Rs. 72,450/- payable with interest @ 16.5% per annum with half

yearly rests with penal interest at 2% and costs.

4. Preliminary decree in the said suit was passed on 16-12-1994 by the Subordinate Judge, Nuzvid.

5. The preliminary decree declared that the amount due to the bank on the mortgage mentioned in the plaint calculated up to 16-02-1995 (the date of redemption) is a sum of Rs. 72,450/- towards principal and Rs. 74,806.78 ps. towards interest apart from costs of Rs. 8857/-, totaling Rs. 1,56,113.78 ps. It ordered the petitioner to pay it into Court on or before 16-02-1995 or any later date up to which the time for payment may be extended by the Court, the above sum with interest at 12% per annum on the balance principal amount of Rs. 72,450/- from 16-02-1995 (the date of redemption) till date of payment. It further directed that in default of the payment as aforesaid, the 1st respondent bank may apply to the Court for a final decree and for the sale of the mortgaged property; on such application, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale, the 1st respondent shall produce before the Court or such officer as it appoints, all documents in its possession or power relating to the mortgaged property. We are not concerned with the other clauses in the decree.

6. Thereafter the 1st respondent filed I.A. No. 157 of 1999 for passing of final decree in terms of the preliminary decree dt. 16-12-1994 but the same was dismissed on 14-08-2003.

7. Notwithstanding the same the 1st respondent filed E.P. No. 21 of 2008 under Order 21 Rule 22 , 64 , 66 and 82 CPC for recovery of the E.P. amount of Rs. 2,54,770.78 ps. on the ground that the petitioner and the 2nd respondent, who are judgment debtors, had not discharged the decretal amount.

8. Counter affidavit was filed by the petitioner contending that the preliminary decree in the above suit, which was a suit on the basis of a mortgage, is not executable and that it is only the final decree which is executable. The petitioner pointed out that the 1st respondent had suppressed the fact that I.A. No. 157 of 1999 filed by it for passing of final decree had been dismissed on 14-08-2003 and that the said order operates as res judicata and bars the E.P. He contended that as per clause 7 of the preliminary decree dt. 16-12-1994, the 1st respondent had to obtain final decree for sale of the mortgaged properties and since no final decree was passed in the case, the preliminary decree cannot be executed and the mortgaged property cannot be brought to sale. He also contended that the 1st respondent is not entitled to seek attachment of the movable properties or arrest and detention of the petitioner in civil prison, in the absence of a personal decree against the petitioner. It was also lastly contended that as per a recent Agricultural Debt Relief Scheme announced by the Government of India, the entire decree debt must be deemed to have been waived and the petitioner is not liable to pay any amount to the 1st respondent bank.

THE ORDER OF THE EXECUTING COURT

9. By order dt. 10-08-2010, the Court below rejected the objections raised by the petitioner and allowed the E.P. It held that in Chandra Mani Saha and Others vs. Anarjan Bibi and Others AIR 1934 134 (Privy Council) , a Division Bench of this Court had taken the view that a preliminary decree in a mortgage suit is not a tentative decree but is conclusive so far as the matters dealt with therein; although application for passing of final decree was dismissed on the ground of limitation, in view of the above decision (which had held that such dismissal is not a bar to the decree holder to execute the preliminary decree and bring the charged properties to sale), the E.P. should proceed. It further held that the E.P. is at the stage of Or. 21 Rule 22 enquiry, and the D.Hr. cannot directly ask to bring the mortgaged property for auction and the Court can look into the maintainability of the E.P. at the Order 21 Rule 64 , 66 stage when the J.Dr. will be given opportunity to defend. It further opined that the passing of the final decree is only to confirm the non-satisfaction of the preliminary decree and that the scope and object of the final decree petition is not again to challenge the authenticity of the preliminary decree passed; that passing of final decree is only for technical reason and further to provide an opportunity to the D.Hr. to clear the preliminary decree debt and thereby to relax the charge created over the mortgaged property; and the D.Hr. is entitled to proceed with the execution as against the charged properties. It held that the J.Dr. would have considerable opportunities to convince the Court with above defence at a later stage.

THE REVISION IN THIS COURT

10. Challenging the same, this Revision Petition is filed.

11. On 31-12-2010, this Court granted stay of all further proceedings and issued notice before admission. After service of notice on the 1st respondent-bank, the matter was heard at length and is being disposed of by this order.

CONTENTIONS OF COUNSEL FOR PETITIONER

12. Learned counsel for the petitioner contended that the Court below erred in holding that a preliminary decree in a mortgage suit is capable of execution even though application for passing of final decree had been dismissed; this runs contrary to clause 7 of the preliminary decree which directs the 1st respondent to obtain a final decree and then to apply for sale of the mortgaged property; Order 34 Rule 5 CPC permits a J.Dr. to deposit the mortgage money at any time before confirmation of sale and provides a last chance to the mortgager to save his property from being passed on to the auction purchaser and to avoid the disturbance of his title ensuring, at the same time, that mortgage money is paid to the person in whose favour the property had been mortgaged by depositing the entire amount in the Court, including the amount, where the property has been sold, contemplated by sub-rule (2) of Order 34 Rule 5 CPC; before a final decree is passed in a suit for foreclosure of mortgage debarring the defendant from all right to redeeming the mortgaged property, the defendant is entitled to

make payment into Court and can apply for ordering the plaintiff to deliver all the documents referred to in the preliminary decree to the defendant; till the passing of final decree, the defendant is entitled to redeem the mortgage; Rule 5 of Order 34 gives an indication that at any time before the confirmation of the sale made in pursuance of the final decree passed under sub-rule (3) of Rule 5 of Order 34 CPC, the defendant can make payment into Court of the amount due from him; and if he does so, the Court shall, on an application made by the defendant, pass a final decree ordering the plaintiff to deliver the documents referred to in the preliminary decree to the defendant and also ordering him to transfer the mortgaged property etc.; if the contention that a preliminary decree can be executed is accepted, it would render Order 34 Rule 3 and Rule 5 of CPC redundant; such a view has been taken in Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) ; and this judgment was not noticed by the Division Bench which decided Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) .

13. He further contended that the Division Bench had also not noticed in its judgment the distinction between a charge created by a decree and a charge created by operation of law or act of parties which are governed by Section 100 of the Transfer of Property Act, 1882 and incorrectly interpreted Order 34 Rule 15(2) CPC to apply even to decrees in mortgage suits; a Full Bench of this Court in Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) categorically held that a charge created by a decree cannot be deemed to have been created by act of parties and would also not fall within the category denoted by the words "operation of law"; this also was not noticed by the Division Bench which decided Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) ; Section 100 does not contemplate a charge provided by a decree at all; sub-rule (2) of Order 34 Rule 15 CPC deals with only decrees for payment of money which create a charge on immovable property on default of payment and it permits the amounts to be realized by sale of that property in execution of that decree even without a final decree; but it is not attracted in the case of decrees in mortgage suits like the preliminary decree in the present suit at all.

14. He pointed out that the Division Bench judgment in Sri Venugopala Swami and Anjaneya Swami Temples v. V. Narayana and others 1988 (2) ALT 347 (D.B.) which was relied upon in Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) , was not a case of a charge created by act of parties such as a mortgage and was a case where, for the first time, a charge was created under a decree; therefore the said case was erroneously applied to the present case which is arising out of a mortgage; the decisions of the Supreme Court relied upon in Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) dealt with a partition suit and an accounts suit, and not with mortgage suits; and therefore the decision in Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) has to be held to be wrongly decided; and consequently the C.R.P.

should be allowed.

CONTENTION OF COUNSEL FOR RESPONDENT NO. 1

15. Learned counsel for the 1st respondent refuted the above contentions. He stated that the Court below had rightly relied upon the Division Bench judgment in Chandra Mani Saha and Others vs. Anarjan Bibi and Others AIR 1934 134 (Privy Council) and that the said decision is correct in law, and so the C.R.P. be dismissed. He also contended that sub-rule (2) of Order 34 Rule 15 CPC deals with a charge created under a decree and would apply even to mortgage suits in view of sub-section (1) of Order 34 Rule 15 CPC.

16. I have noted the submissions of both sides.

17. The points for consideration is:

(i) "whether the law declared in Chandra Mani Saha and Others vs. Anarjan Bibi and Others AIR 1934 134 (Privy Council) that a preliminary decree in a mortgage suit can be executed even if an application for final decree had been dismissed, represents the correct legal position?"

(ii) "Whether the decision in Chandra Mani Saha and Others vs. Anarjan Bibi and Others AIR 1934 134 (Privy Council) is per incuriam?"

(iii) "If not, what relief can be granted to petitioner?"

Point No. (i) and (ii):-

18. Before I deal with the above point, it is necessary to notice some of the statutory provisions.

19. Section 58 of the Transfer of Property Act, 1882 defines a "mortgage" as a transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

20. Sections 58 to 99 of the Transfer of Property Act, 1882 deal with the law governing mortgages.

21. Section 60 of the Transfer of Property, 1882 states:

"60. Right of mortgagor to redeem:-At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered

instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of a Court.

The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption.

Nothing in the section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money. Redemption of portion of mortgaged property.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor."

22. Section 61 of the Transfer of Property, 1882 states:

"61. Right to redeem separately or simultaneously:-A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together."

23. Section 100 deals with "charges". It states:

"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....."

24. The distinction between a mortgage and a charge is that a mortgage is a transfer of an interest in property while a charge is merely a right to receive payment out of some specified property. This has been explained by the Supreme Court in the following cases.

25. In Janapareddy Latchan Naidu Vs. Janapareddy Sanyasamma, , a Constitution bench of the Supreme Court declared:

"6. A charge is different from a mortgage. A mortgage is a transfer of an interest in property while a charge is merely a right to receive payment out of some specified property. The former is described a jus in rem and the latter as only a jus ad rem. In the case of a simple mortgage, there is a personal liability express or implied, but in the case of charge there is no such personal liability

and the decree, if it seeks to charge the judgment-debtor personally, has to do so in addition to the charge..."

26. In J.K. (Bombay) P. Ltd. Vs. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. and Others, , the Supreme Court reiterated:

"While in the case of a charge there is no transfer of property or any interest therein, but only the creation of a right of payment out of the specified property, a mortgage effectuates transfer of property or an interest therein. No particular form of words is necessary to create a charge and all that is necessary is that there must be a clear intention to make a property security for payment of money in praesenti."

27. Order 34 CPC deals with suits relating to mortgages of immoveable property.

28. Sub-rule (1) of Order 34 Rule 2 CPC states that in a suit for foreclosure, if the plaintiff succeeds the Court shall pass a preliminary decree ordering that an account be taken of what was due to the plaintiff at the date of a decree for principal and interest on the mortgage, the costs of the suit, if any awarded to him, and other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage security, together with interest thereon; or declaring the amount so due at that date, and directing that if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and counter signs the account taken under clause (a) or from the date on which such amount is declared in Court under clause (b), the plaintiff shall deliver to the defendant all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant at his cost free from the mortgage. It further provides that if the payment is not so made of the amount adjudged, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property. Sub-rule (2) entitles the Court, on good cause being shown by the defendant and upon terms to be fixed by it, at any time before a final decree is passed, to extend the time fixed for payment of amount found or declared due under sub-rule (1).

29. Rule 3 of Order 34 CPC entitles the defendant to make payment into Court of all amounts due from him under sub-rule (1) of Rule 2 before a final decree is passed debarring the defendant from all right to redeem the mortgaged property and if he does so, it directs that the Court shall pass a final decree ordering the plaintiff to deliver up the document referred to in the preliminary decree and if necessary order him to retransfer at the cost of the defendant the mortgaged property as directed in the said decree and also if necessary, ordering him to put the defendant in possession from the property. But if such payment is not made, sub-rule (2) of Rule 3 of Order 34 directs that the Court shall, on application made by the plaintiff in this behalf, pass a final decree declaring that the defendant is debarred from all right to redeem the mortgaged property and also

if necessary, ordering the defendant to put the plaintiff in possession of the property. On passing of such final decree, sub-rule (3) of Rule 3 of Order 34 CPC states that all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged.

30. Rule 4 of Order 34 CPC states:

"4. Preliminary decree in suit for sale. (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in clauses (a), (b) and (c)(i) of sub-rule (1) of Rule 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1), or of the amount adjudged due in respect of subsequent costs, charges expenses and interest.

(3) Power to decree sale in foreclosure suit:-In a suit for foreclosure in the case of an anomalous mortgage if the plaintiff succeeds, the Court may, at the instance of any party to the suit or of any other person interested in the mortgage security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms.

(4) Where, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11, as the case may be, of Appendix D with such variations as the circumstances of the case may require."

31. Rule 5 of Order 34 states:

"5. Final decree in suit for sale:- (1) Where, on or before the day fixed or at any time before the confirmation of sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of Rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree or, if such

decree has been passed, an order-

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,

and if necessary:-

(b) ordering him to transfer the mortgaged property as directed in the said decree,

and, also if necessary:-

(c) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for payment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of Rule 4."

32. Rule 15 of Order 34 states:

"15. Mortgages by the deposit of title-deeds and charges:-(1) All the provisions contained in this Order which apply to a simple mortgage shall, so 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, 1882.

(2) Where a decree orders payment of money and charges it on immoveable property on default of payment, the amount may be realised by sale of that property in execution of that decree."

THE PUBLIC POLICY BEHIND THE PROVISIONS CONTAINED IN SEC. 60 TRANSFER OF PROPERTY ACT, 1882 AND OR. 34 CPC.

33. Courts have always zealously tried to protect the interests of mortgagors since transactions in the nature of mortgage are most of times forced by circumstances on men and the creditors try to take advantage of the plight of needy men, exploit them and try to deprive them of their property.

34. The philosophy behind these provisions has been succinctly explained in *Chandra Mani Saha and Others vs. Anarjan Bibi and Others* AIR 1934 134 (Privy Council) by the Supreme Court:

"In a very early case, namely, *Vernon v. Bethell* ((1762) 2 EDEN 110 @ 113) Earl of Northington L.C. said,

"This court, as a court of conscience, is very jealous of persons taking securities for a loan, and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them."

14. In comparatively recent times Viscount Haldane, L.C. repeated the same view when he said in *G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Company Ltd.* ((1914) AC 25, 35, 36)

"This jurisdiction was merely a special application of a more general power to relieve against penalties and to mould them into mere securities. The case of the common law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon the condition that if the money he had advanced to the feoffor was repaid on a date and at a place named, the fee simple would revert in the latter, but that if the condition was not strictly and literally fulfilled he should lose the land for ever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffor notwithstanding that he had actually forfeited the land to the mortgagee. Equity, therefore, at an early date began to relieve against what was virtually a penalty by compelling the creditor to use his legal title as a mere security.

My Lords, this was the origin of the jurisdiction which we are now considering, and it is important to bear that origin in mind. For the end to accomplish which the jurisdiction has been evolved ought to govern and limit its exercise by equity judges. That end has always been to ascertain, by parol evidence if need be, the real nature and substance of the transaction, and if it turned out to be in truth one of mortgage simply, to place it on that footing. It was, in ordinary cases, only where there was conduct which the Court of Chancery regarded as unconscientious that it interfered with freedom of contract. The lending of money, on mortgage or otherwise, was looked on with suspicion and the court was on the alert to discover want of conscience in the terms imposed by lenders."

(emphasis supplied)

35. This was echoed by *Chandra Mani Saha and Others vs. Anarjan Bibi and Others* AIR 1934 134 (Privy Council) in the following words:

"40. Adversity of a person is not a boon for others. If a person in stringent

financial conditions had taken the loan and placed his properties as security therefore, the situation cannot be exploited by the person who had advanced the loan. The court seeks to protect the person affected by adverse circumstances from being a victim of exploitation. It is this philosophy which is followed by the court in allowing that person to redeem his properties by making the deposit under Order 34 Rule 5 CPC."

THE EXTENT TO WHICH COURTS IN INDIA PROTECTED A MORTGAGOR

36. The right to redeem a mortgage has been held to be an incident of a subsisting mortgage and cannot be extinguished except by act of parties or by decree of a court. A mortgage being a security for the debt, the right of redemption continues although the mortgagor fails to pay the debt at the due date. Any provision inserted to prevent, evade or hamper the redemption is void.

37. In *L.K. Trust Vs. EDC Ltd. and Others*, , the Supreme Court explained:

"61. The mortgagor under Indian law is the owner who had parted with some rights of ownership and the right of redemption is the right which he exercises by virtue of his residuary ownership to resume what he has parted with. In India this right of redemption, however, is a statutory one. A right of redemption is an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists. The judicial trend indicates that dismissal of an earlier suit for redemption whether as abated or as withdrawn or in default would not debar the mortgagor from filing a second suit for redemption so long as the mortgage subsists. This right cannot be extinguished except by the act of parties or by the decree of a court. As explained by this Court in *Jayasingh Dnyanu Mhoprekar v. Krishna Babaji Patih* (SCC p. 167, para 6)

"6. ... the right of redemption under a mortgage deed can come to an end only in a manner known to law. Such extinguishment of the right can take place by contract between the parties, by a merger or by a statutory provision which debars the mortgagor from redeeming the mortgage."

62. The mortgagor's right of redemption is exercised by the payment or tender to the mortgagee at the proper time and at the proper place of the mortgage money. When it is extinguished by the act of parties, the act must take the shape and observe the formalities which the law prescribes. A mortgage being a security for the debt, the right of redemption continues although the mortgagor fails to pay the debt at the due date. Any provision inserted to prevent, evade or hamper the redemption is void."

It declared in para 53:

"53. On analysis of arguments advanced at the Bar, this Court finds that the proposition that in India it is only on execution of conveyance and the registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption stands extinguished is well settled..."

38. The Court also reiterated the same in *Shri Shivdev Singh and Another Vs. Sh. Sucha Singh and Another*, , and observed:

"8. Section 60 of the Transfer of Property Act provides that at any time after the money has become due, the mortgagor has a right, on payment or tender, at a proper time and place of the mortgage-money to require the mortgagee to deliver the mortgage deed and all documents relating to the mortgaged property and where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor. Such a right of the mortgagor is called, in English law, the equity of redemption. The mortgagor being an owner who has parted with some rights of ownership has a right to get back the mortgage deed or mortgaged property, in exercise of his right of ownership. The right of redemption recognised under the Transfer of Property Act is thus a statutory and legal right which cannot be extinguished by any agreement made at the time of mortgage as part of the mortgage transaction.

9. This Court in *Jayasingh Dnyanu Mhoprekar v. Krishna Babaji Patil* held: (SCC p. 167, para 6)

"It is well settled that the right of redemption under a mortgage deed can come to an end only in a manner known to law. Such extinguishment of 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. A mortgagee who has entered into possession of the mortgaged property under a mortgage will have to give up possession of the property when the suit for redemption is filed unless he is able to show that the right of redemption has come to an end or that the suit is liable to be dismissed on some other valid ground. This flows from the legal principle which is applicable to all mortgages, namely "Once a mortgage, always a mortgage"."

10. Any provision incorporated in the mortgage deed to prevent or hamper the redemption would thus be void. ..."

39. From the above decisions, it is clear that the Courts in India guard zealously the right of a mortgagor to save his property by allowing him to redeem his properties by making the deposit under Order 34 Rule 5 C.P.C.

40. Order 34 Rule 5 C.P.C. provides the last chance to the mortgagor to save his property from being passed on to the auction purchaser by allowing him to deposit the entire amount in the court, including the amount, where the property has been sold, at any time before confirmation of sale made in pursuance of a final decree passed under sub-rule (3). It thus continues till the confirmation of the sale.

41. An application to set aside the sale can be filed under Order 21 Rule 89 C.P.C. or on the ground of irregularity or fraud under Order 21 Rule 90 C.P.C. Order 21 Rule 92(1) C.P.C. states that where no application is made under Rule 89, 90 or 91 C.P.C., or where such application is made and disallowed, the court

shall make an order confirming the sale, and thereupon the sale shall become absolute. When the "sale" thus becomes absolute, the court is required to grant a certificate under Order 21 Rule 94 to the person in whose favour the sale has been confirmed, specifying therein the details of the property sold, the name of the purchaser as also the date on which the sale became absolute. Once these steps have been taken and a certificate has been issued to the purchaser, the latter viz., the purchaser can obtain delivery of possession of the property sold through the court process by making an application under Order 21 Rule 95 C.P.C. or if the property is in possession of the tenant, symbolic possession would be delivered to him.

42. The Privy Council in *Chandra Mani Saha and Others vs. Anarjan Bibi and Others* AIR 1934 134 (Privy Council) has held that the sale of property, in execution of decree, does not become absolute merely on the passing of an order confirming the sale under Order 21 Rule 92 C.P.C., but if there has been an appeal against an order rejecting an application for setting aside the sale, made either under Order 21 Rule 89 or Rule 90 or Rule 91, the sale would not become absolute till the disposal of that appeal.

43. In *Subba Rao v. Raju* AIR 1950 FC 1, the Federal Court went to the extent of saying that if the right of redemption is not extinguished, provisions like Or. 9 R. 9 CPC or Or. 23 R. 1 CPC, will not debar the mortgagor from filing a second suit because, as in a partition suit, the cause of action in a redemption suit is a recurring one; and that the cause of action in each successive action, until the right of redemption is extinguished or a suit for redemption is time barred, is a different one. It also held that the right to redeem was not extinguished by the procedural provisions contained in the CPC and that it can only be extinguished as provided in Sec. 60. It held that unless the equity of redemption is so extinguished, a second suit for redemption by the mortgagor, if filed within the period of limitation, is not barred. It held that if the mortgagee failed to establish that the old decree extinguished the right to redeem, there was no ground for saying that the old decree operated as *res judicata* and that the Courts are prevented from trying the second suit under Sec. 11 CPC.

44. This principle was followed in *Chandra Mani Saha and Others vs. Anarjan Bibi and Others* AIR 1934 134 (Privy Council) by the Supreme Court. The Court held that the sale does not become absolute or irrevocable merely on passing an order confirming the sale under Order 21 Rule 92, but it would attain finality only on the disposal of the appeal, if any, filed against an order refusing to set aside the sale.

45. In *Chandra Mani Saha and Others vs. Anarjan Bibi and Others* AIR 1934 134 (Privy Council) and in *Chandra Mani Saha and Others vs. Anarjan Bibi and Others* AIR 1934 134 (Privy Council), the Supreme Court held that an application under Order 34 Rule 5 C.P.C. would be maintainable by a mortgagor for deposit of balance mortgage money even after confirmation of sale but during pendency of appeal filed by judgment-debtor against an order passed by an executing

court rejecting application for setting aside the sale in execution of decree passed in mortgage suit or against an order rejecting the application for restoration of application for setting aside the sale. It reiterated that sale is deemed to be absolute not on confirmation of sale but on and from the date of disposal of such appeal, if any.

46. This is the extent to which the courts in India have gone to ensure that a mortgagor is not deprived of his property even though he had not paid the mortgage money by the due date.

47. The upshot of the decisions of the Supreme Court and the provisions of Section 60 and 61 of the Transfer of Property Act, 1882 and Order 34 Rule 5 C.P.C., is that the right to redeem the mortgage is a very valuable statutory right vested by the Legislature in the mortgagor and it is so sacrosanct that it cannot be allowed to be extinguished by any method except as provided by law. The Legislature further intended to see that that right is kept alive, (once the time for payment has been reached):

- (i) till the passing of the preliminary decree;
- (ii) till the passing of final decree;
- (iii) till the mortgaged property is brought to sale under Order 21 Rule 64 C.P.C.;
- (iv) till applications for setting aside sale under Order 21 Rule 89 or 90 C.P.C. are decided;
- (v) till the sale becomes absolute; and
- (vi) till the appeals or other remedies against orders refusing to set aside the sale are passed finally.

48. Therefore, any interpretation which seeks to allow a decree holder in a mortgage suit to execute the preliminary decree passed therein, by bringing the charged properties to sale invoking Order 34 Rule 15(2) C.P.C., cannot be said to be correct. Such an interpretation, if accepted, renders Order 34 Rule 5 C.P.C. entitling a defendant in such a suit to redeem the mortgage on complying with the conditions contained therein, to become redundant.

49. This view was expressed in *Chandra Mani Saha and Others vs. Anarjan Bibi and Others* AIR 1934 134 (Privy Council) . In that case, a contention was advanced that a preliminary decree obtained in a suit for foreclosure of mortgage can be executed without obtaining a final decree. This contention was rejected. The Court held that a reading of Rules 2 , 3 and 5 of Order 34 C.P.C. indicates that before a final decree is passed in a suit for foreclosure of a mortgage barring the defendant from all right to redeem the mortgaged property, the defendant is entitled to make payment into court and can apply for ordering the plaintiff to deliver all the documents referred to in the preliminary decree to the defendant and so till the passing of final decree, the defendant is entitled to redeem the mortgage. The court observed that Order 34 Rule 5 C.P.C. in fact gives an

indication that at any time before the confirmation of the sale made in pursuance of the final decree passed under sub-rule (3) of Rule 5 of Order 34, the defendant can make a payment into court of the amount due from him and that only if he fails to do so, at the instance of the plaintiff, a final decree can be passed directing sale of the mortgaged property. Thus, till the passing of final decree and even till the confirmation of the sale made in pursuance of the final decree or the disposal of any appeal against orders passed under Order 21 Rule 89 or 90 C.P.C., a right to redeem continues to subsist in the mortgagor.

THE INTERPRETATION OF ORDER 34 RULE 15 CPC

50. Order 34 Rule 15(2) no doubt directs that where a decree orders payment of money and charges it on immoveable property on default of payment, the amount may be realized by sale of that property in execution of that decree. Thus in cases to which this provision applies, even without a final decree, charged property may be sold.

51. As stated above, Section 100 of the Transfer of Property Act, 1882 enacts that 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 which apply to a simple mortgage shall so far as may be, apply to such charge.

52. Charges are of different kinds. Some arise by operation of law, like an owelty in a partitions suit. If on valuation of properties allotted to two sharers, one gets a more valuable plot, the difference in value gives an implied charge by operation of law, in favor of the party who got the less valuable plot, and this charge can be enforced by a suit against the sharer who has got the more valuable plot. In such cases, where there is a charge by operation of law, such a charge is already in existence before a suit is filed to enforce it. By virtue of Sec. 100 of the Transfer of Property Act, 1882, the procedure for enforcing a charge which arises by operation of substantive law, is the same as for simple mortgage.

53. But the position of a charge created by a decree stands on a different footing, as in a suit for maintenance by a wife against the husband. In that case before the decree creating a charge is passed, there is no charge in the eye of the law, while in the case of a charge arising on account of law, as in the case of an owelty, there is a charge even before the decree is passed.

54. As pointed out above, in case of a charge, there is no transfer of interest in property and there is no equity of redemption in favor of the debtor. The only right of the charge holder is the right to recover the money from the property.

55. But the essence of a mortgage is that there is a transfer of right in the property and the equity of redemption is vested in the mortgagor and continues till the confirmation of sale or till disposal of appeals against orders passed under Order 21 Rule 89 or 90 C.P.C. Also, there is personal liability on the mortgagor.

56. Now, sub-rule (1) of Order 34 Rule 15 refers to mortgages and charges created by operation of law (where there is a prior charge before the suit is filed as in the case of an owelty), while sub-rule (2) of Order 34 Rule 15 refers to cases where a charge is created for the first time in the decree as in a suit for maintenance. In the latter case, there is no charge prior to the decree and it is only a money claim for maintenance.

57. In this background, question is whether in the case of a mortgage where there is a transfer of an interest in property, coupled with a charge, retaining the equity of redemption in the mortgagor, (a right which subsists till a final decree is passed and till the confirmation of sale becomes final), can the mortgagor bring the property to sale at the stage of a mortgage preliminary decree, without obtaining a final decree?

58. If so, then does not the equity of redemption simply vanish into thin air, an equity held sacrosanct till a final mortgage decree is passed and till the sale is confirmed finally after putting the property to sale in execution of the final decree?

59. In my considered opinion, sub-rule (2) of Order 34 Rule 15 is intended to apply to suits where there is no prior charge until it was created by the decree, and in such a suit there is only a right to recover from the charged property, and there is no equity of redemption vested in the mortgagor. In such a suit where charge is created for the first time under a decree, sub-rule (2) of Order 34 Rule 15 permits the property to be brought to sale without a final decree.

60. As it is not a case of mortgage nor a case of a prior charge created by operation of law (as in the case of an owelty), sub-rule (1) of Order 34 Rule 15 does not apply. Thus a wife, who obtains a decree for money against her husband towards maintenance, can simply bring his property to sale, without a final decree, as there is no equity of redemption vested in the debtor, as in the case of a mortgage.

61. Therefore, it is clear that sub-rule (2) of Rule 15 of Order 34, is a separate and independent clause, meant to give speedy relief to the decree holder who gets a charge for the first time under the decree as there is no question of any equity of redemption remaining with the debtor in that situation.

62. On the other hand, sub-rule (2) of Rule 15 of Order 34 is not at all attracted in the situation covered by sub-rule (1) of Rule 15 of Order 34. Sub-rule (1) of Rule 15 of Order 34 applies to cases of mortgage and preexisting charges i.e. charges existing before a decree is passed, and in those cases the procedure under the Civil Procedure Code is different.

63. When sub-rule (1) of Order 34 Rule 15 makes all the provisions of Order 34 applicable to a simple mortgage also applicable to 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, 1882, it cannot be construed that in

a suit for recovery of money by sale of mortgaged property, sub-rule (2) of Order 34 Rule 15 would apply and enable the mortgaged property to be sold in execution of a preliminary decree without there being a final decree.

64. This is because charge within the meaning of Section 100 would cover only situations where immovable property of a person is by act of parties or operation of law made security for payment of money and a charge created by a decree for the first time cannot be deemed to have been created by act of parties.

65. It has been held by a Full Bench of this Court in Chandra Mani Saha and Others vs. Anarjan Bibi and Others AIR 1934 134 (Privy Council) that a charge created by a court in a decree will not fall in the category of "charge created by operation of law". The Full Bench had also held that Section 100 does not contemplate a charge provided by a decree and that the expression "charge created by operation of law" would cover only statutory charges such as those created under a statute passed by the Legislature. One such illustration is a charge created under Sec. 238 the Hyderabad Municipal Corporation Act, 1955 on property of a owner for recovery of municipal taxes.

66. This decision was followed and applied in Sri Rama Mandiram v. Yadam Raghavamma (1984) 1 ALT 8. In that case, the petitioner-temple obtained a decree against the defendants-tenants for recovery of money towards arrears of Maktha and it also obtained a charge for the recovery of the said amount in respect of property belonging to the defendants. It was thus a classic case of a charge created by a decree of court for the first time to which sub-rule (2) of Order 34 Rule 15 CPC would apply, and without there being a final decree, there can be execution of the preliminary decree itself. It was not a case of mortgage.

67. Likewise, in Sri Venugopala Swamy and Anjaneya Swamy Temples 1988 (2) ALT 347 (D.B.) (supra), a decree-holder obtained a decree for recovery of arrears of Maktha from the judgment-debtors and the said decree created a charge over the property belonging to the judgment-debtors. An execution petition was filed therein for relief's of arrest of the judgment-debtor, attachment of immovable property and sale of the charged property. In that case also, since charge was created on immovable property under a decree for the first time, sub-rule (2) of Order 34 Rule 15 was held attracted and it was declared that there was no necessity to obtain a final decree and that the preliminary decree itself can be executed in case there is default by the judgment-debtor in satisfying the decree.

68. Thus, sub-rule (2) of Order 34 Rule 15 would apply only when the decree for the first time creates a charge on property belonging to the defendant such as a decree for maintenance or recovery of arrears of rents. This provision cannot be invoked when suit is filed on the basis of a mortgage security.

THE DECISION OF THE DIVISION BENCH IN Chandra Mani Saha and Others vs. Anarjan Bibi and Others AIR 1934 134 (Privy Council)

69. Chandra Mani Saha and Others vs. Anarjan Bibi and Others AIR 1934 134

(Privy Council) is a decision of a Division Bench of this Court on a reference made by a learned Single Judge of this Court. Even in that case the preliminary decree obtained by a Decree-Holder in a mortgage suit was sought to be executed without obtaining a final decree invoking sub-rule (2) of Order 34 Rule 15 C.P.C.

70. In that case also application for passing of final decree filed by the Decree-Holder had been dismissed after contest on the ground of bar of limitation and the said decision had become final. In spite of that, the Decree-Holder filed the E.P. for bringing the properties covered by the plaint schedule to sale on the ground that a charge was created over the said immovable property. The Bench relied upon the decisions in Sri Rama Mandiram (1984) 1 ALT (supra) and the Division Bench decision in Sri Venugopala Swamy and Anjaneya Swamy Temples 1988 (2) ALT 347 (D.B.) (supra) and held that sub-rule (2) of Rule 15 of Order 34 C.P.C. clearly authorizes the Decree-Holder to execute the decree in default of payment of the amount by bringing the charged property for sale in execution of the very decree under which the charge is created. The Bench held that there is no need to obtain a separate final decree under sub-rule (2) of Rule 15 of Order 34 C.P.C. and that the decree can be executed without the Decree-Holder obtaining a separate final decree to recover the amount decreed under the suit. It also relied upon observations of the Supreme Court in Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) (a case dealing with a partition suit) and Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) (a case dealing with an accounts suit) wherein the Court expressed a view that a preliminary decree in a partition suit and in an account suit is not a tentative decree and must, so far as matters dealt with by it are concerned, has to be regarded as conclusive. Relying on these decisions the Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) opined that a preliminary decree in a mortgage suit can be straightaway executed without there being a final decree.

WHY THE DIVISION BENCH Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) IS NOT CORRECT IN LAW

71. With great respect to the Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) , it has ignored the entire body of precedents consisting of at least 6 Supreme Court decisions, one Privy Council decision and one Federal Court Decision binding on it, and which have been dealt with supra in this order, which specifically dealt with the right of the mortgagor to redeem the mortgage till the appeal if any against an order refusing to set aside the sale is decided.

72. The Division Bench has also over looked the public policy behind Section 60 of Transfer of Property Act, 1882 and Order 34 Rule 5 C.P.C. as explained in Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) and in Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) . None of the above decisions of the Supreme Court

have even been adverted to where the Court emphasized the need to protect the valuable statutory right of redemption provided in Section 60 , 61 and Order 34 Rule 5 C.P.C.

73. In fact these provisions of law, i.e., Section 60 , 61 and Order 34 Rule 5 C.P.C., which have a direct bearing on the issue, have also not been referred to or considered by it. The effect of the view of the Division Bench in Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) is to reduce the status of mortgagor to the status of a debtor against whom a charge is created under a decree and who has no statutory right of redemption (before the sale becomes absolute or till the appeals or revisions therefrom are decided).

74. Creditors have not been given a right by the legislature or by the Supreme Court to execute a preliminary decree in a mortgage suit and bring the property to sale straightaway, ignoring the mortgagor's statutory rights to opt for redeeming the mortgage till the stage when a final mortgage decree is passed, or later till the sale becomes absolute or much later till the appeals and other remedies against the sale are finally disposed of.

75. I have already explained why the decisions in Sri Rama Mandiram (1984) 1 ALT 8 (supra) and Sri Venugopala Swamy and Anjaneya Swamy Temples 1988 (2) ALT 347 (D.B.) (supra) cannot apply to mortgage suits. In those cases there was no charge prior to the decree as in a mortgage sum and charge was created for the first time under the decree. Therefore the Division Bench is also not right in relying on the said decisions in support of its conclusion that in mortgage suits, the preliminary decree is executable without there being a final decree.

76. In fact in Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) , the passage extracted by the Division Bench itself indicates that in suits which contemplate the making of two decrees, a preliminary decree and a final decree, the decree which would be executable would be the final decree. This observation was not taken note of by the Division Bench and it only took note of the later observation that finality of decree does not necessarily depend upon its being executable.

77. Therefore the view expressed by the Division Bench, in my considered opinion, goes against the consistent view of the Supreme Court that the right of mortgagor to redeem the mortgage property subsists till the appeals against orders refusing to set aside the sale are passed finally. It therefore does not represent the correct position of law.

78. In my considered opinion, for the above reasons, the decision of the Division Bench in Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) is per incurium and does not represent the correct legal position and therefore not binding on this Court and the decisions of the Supreme Court referred to supra are binding and are being followed.

79. In Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134

(Privy Council) , the Supreme Court explained the concept of a per incuriam decision as one rendered when it has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of the Supreme Court.

80. In Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) , the Supreme Court declared:

""Incuria" literally means "carelessness". In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law" is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority". (Young v. Bristol Aeroplane Co. Ltd). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding."

81. The exception to the doctrine of binding nature of precedent referred to in the above decision from it's earlier decision in Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) is:

"The court is not bound to follow a decision of its own if given per incuriam. A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a Court of a coordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords. In the former case it must decide which decision to follow, and in the latter it is bound by the decision of the House of Lords."

82. Therefore I hold that the decision in Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) is not being followed by this Court since it a per incuriam decision. It is declared that in view of Sections 60 and 61 of the Transfer of Property Act, 1882, Order 34 Rule 5 C.P.C. and the public policy declared by the Supreme Court and applied by it in the various decisions referred to above holding that the right of redemption of a mortgagor is very valuable, and that it should be zealously protected, there cannot be execution of a preliminary decree in suit on a mortgage. The right of redemption of a mortgagor should be kept alive beyond the passing of the final decree till even the appeals or other remedies against orders refusing to set aside the sale are passed finally.

83. Therefore, point (i) is answered to the effect that the law declared in Chandra Mani Saha and Others vs. Anarjan Bibi and OthersAIR 1934 134 (Privy Council) that a preliminary decree in a mortgage suit can be executed even if an application for final decree had been dismissed, does not represent the correct legal position and point (ii) is also answered that the said decision is rendered

per incuriam.

Point (iii):

84. In the present case (since) the application for final decree I.A. No. 157 of 1999 filed by the 1st respondent-Bank had been admittedly rejected on 14-08-2003. This order had attained finality. There is therefore no question of the 1st respondent-Bank obtaining a final decree as mandated by clause (7) of the Preliminary decree or by Order 34 Rule 5 C.P.C. In the absence of a final decree, there is no question of the 1st respondent-Bank executing the preliminary decree.

85. Therefore, I am of the opinion that the order dt. 10-08-2010 in E.P. No. 21 of 2008 in O.S. No. 12 of 1999 of the Senior Civil Judge, Nuzvid holding that the E.P. is maintainable, and the preliminary decree can be executed, is unsustainable. Point (iii) is also answered accordingly.

86. The Civil Revision Petition is accordingly allowed and order dated 10-08-2010 in E.P. No. 21 of 2008 in O.S. No. 12 of 1999 of the Senior Civil Judge, Nuzvid is set aside and the said E.P. is dismissed. No costs. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.