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**(1984) 06 MAD CK 0044**  
**In the Madras High Court**

M. Sheik Ali and Another

APPELLANT

Vs

State Bank of India and Others

RESPONDENT

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**Date of Decision :** 14-06-1984

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 21, Order 21 Rule 89, Order 21 Rule 90, Order 34 Rule 5  
Limitation Act, 1963 — Section 5

**Citation :** (1984) 97 LW 482 : (1984) 2 MLJ 477

**Hon'ble Judges :** Ramanujam, J

**Bench :** Single Bench

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**Judgement**

Ramanujam, J.—These two civil miscellaneous appeals arise out of the same proceedings. The appellants herein are the judgment-debtors in respect of a mortgage decree dated 19-9-1979 passed in O.S. No. 25 of 1978 on the file of the Sub Court, Nagercoil, for Rs. 87,858-58. The mortgaged properties were brought to sale at the instance of the decree-holder and the properties were sold in Court auction on 14-2-1980. Subsequent to the sale, the first defendant filed an application under Order 21, Rule 89 C.P.C., for setting aside the sale with an application for condonation of the delay. The second defendant filed an application for setting aside the sale under Order 21, Rule 90 C.P.C. . The Court below took the application, E.A. No. 604 of 1980, for excusing the delay in filing the application under Order 21, Rule 89 C.P.C., filed by the first defendant first, and dismissed the same by its order dated 1-7-1981, holding that Section 5 of the Limitation Act will not apply to applications filed under Order 21, C.P.C. Later the lower Court took the application under Order 21, Rule 89 C.P.C., and dismissed the same on the ground that the application to excuse the delay having been dismissed, the main application does not survive. The Court below also considered the application filed by the second defendant under Order 21, Rule 90 C.P.C., and held that the sale has not been shown to have been vitiated either by irregularity or illegality as claimed by him therein, in that view, he dismissed the application filed by the second defendant under Order 21, Rule 90

C.P.C. Thus, all the petitions filed by defendants 1 and 2 for setting aside the sale came to be dismissed.

2. C.M.A. No. 552 of 1981 is directed against the order of the Court below in E.A. No. 605 of 1980 filed by the first defendant under Order 21, Rule 89 C.P.C., while C.M.A. No. 555 of 1983 is directed against the order passed by the Court below in E.A. No. 334 of 1980 filed by the second defendant under Order 21, Rule 90 C.P.C. We will take up for consideration first C.M.A. No. 552 of 1981.

3. As already stated, the lower Court has dismissed the application under Order 21, Rule 89 C.P.C., filed by the first defendant on the sole ground that his application for condonation of the delay in filing that application has been dismissed and, therefore, the main application does not survive. But, it is represented by the learned Counsel for the appellant that after filing the application for condonation of the delay in filing the application under Order 21, Rule 89 C.P.C., substantial amounts have been deposited on two dates towards the interest, commission and poundage and the auction amount, and in view of those payments, the Court is bound to set aside the sale under Order 34, Rule 5 C.P.C., if the payment has been made before confirmation. According to the learned Counsel for appellant, in this case, the payments have been made long before the application E.A. No. 605 of 1980 filed under Order 21, Rule 89 C.P.C., came up for consideration. It is stated that a sum of Rs. 1,25,850/- was deposited on 3-3-1981 and a further sum of Rs. 14,442/- came to be deposited on 20-3-1981. However, the lower Court had not taken into consideration the deposits made by the appellant towards the amount due under the mortgage decree and the implication of Order 34, Rule 5 C.P.C. The learned Counsel also refers to the affidavit filed by the first defendant in support of his application for condonation of the delay and also the affidavit filed in support of his application under Order 21, Rule 89 C.P.C., to show that the first defendant has stated at the earliest stage that he is willing to deposit the auction amount along with the interest, commission and poundage. A cursory perusal of those affidavits by the learned Subordinate Judge would have put him on enquiry as to whether any payment has been made as contemplated by Order 34, Rule 5 C.P.C., and that enquiry could have revealed the deposits said to have been made by the first defendant on 3-3-1981 and 20-3-1981. However, the order of the lower Court, which is under appeal in C.M.A. No. 552 of 1981, does not indicate that the Court adverted its mind to the question of deposits which have been referred to in the affidavit filed in support of the petition under Order 21, Rule 89 C.P.C., and which have been made by the first defendant on two dates under two challans filed into Court then and there. If really the first defendant has paid the two amounts of Rs. 1,25,850/- and Rs. 14,422/- on 3-3-1981 and 20-3-1981 respectively as pointed out by the learned Counsel for the appellants, then the appellant is entitled to invoke Order 34, Rule 5 C.P.C., in which case there will be no question of condoning the delay in filing the application under Order 21, Rule 89 C.P.C. If the lower Court was aware of the deposits said to have been made by the appellant on 3-3-1981 and 20-3-1981, then even while disposing of the

application E.A. No. 605 of 1980 filed under Order 21, Rule 89 C.P.C., the Court could have invoked Order 34, Rule 5, C.P.C., and accepted the deposits and set aside the sale. From the order passed by the lower Court which is the subject matter of appeal in C.M.A. No. 552 of 1981, it is seen that the Court was not aware of the deposits said to have been made by the appellant, nor was it brought to its notice by the counsel appearing for the appellant before it. Whoever is at fault, the fact remains that if there have been deposits on 3-3-1981 and 20-3-1981 towards the amount due under the mortgage decree, the appellant is undoubtedly entitled to the benefit of Order 34, Rule 5 C.P.C., for the payments are made specifically towards the auction amount, commission, poundage and interest. Whether the amounts paid are proper or sufficient, has alone to be gone into for the purpose of giving relief to the appellant under Order 34, Rule 5 C.P.C. If the amounts paid are found to be deficient in any respect, the Court has to determine the correct amount payable by the appellant and give him time to make up the deficit, and only when that deficit is made up, the relief under Order 34, Rule 5 C.P.C., of setting aside the sale could be granted. Since in this case, the court below has proceeded on the basis that there has been a delay in making the application under Order 21, Rule 89 C.P.C., without reference to the payments made by the appellant towards the auction amount, etc., the order cannot legally be sustained. The order of the Court below is, therefore, set aside with a direction to consider the question as to whether any payment was made by the first defendant towards the auction amount on any day prior to the actual confirmation, and if any payment has been made, to determine whether the payment made represents the correct amount payable by the first defendant for setting aside the sale, and to grant relief under Order 34, Rule 5 C.P.C., if the conditions set out in that rule are satisfied. If, on enquiry, the Court below finds that no amount has been paid for setting aside the auction sale before the confirmation, as alleged by the appellant, then the application filed under Order 21, Rule 89 C.P.C., had naturally to be dismissed. C.M.A. No. 552 of 1981 is allowed accordingly.

4. The learned Counsel for the appellant In C.M.A. No. 555 of 1983 represents that the appeal may be dismissed as unnecessary in view of the fact C.M.A. No. 552 of 1981 has been allowed. Hence it is dismissed.

5. There will be no order as to costs in both the appeals.