

(1991) 07 MAD CK 0037

In the Madras High Court

Case No : Civil Miscellaneous Petition No. 10917 of 1989; Cr. P. No. 4903/84

N. Krishnamoorthy

APPELLANT

Vs

N.M.A.R.H. Ramaswamy Chettiar (died), P.S.V. Sevugan
Chettiar and another

RESPONDENT

Date of Decision : 10-07-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 5, 115
Limitation Act, 1908 — Article 182(2)

Citation : AIR 1992 Mad 200 : (1991) 2 MLJ 376

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Advocate : S.V. Jayaraman and C.T. Selvamani, for the Respondent

Judgement

1. This is an application for permission to deposit a sum of Rs. 25,000/- into Court and to redeem the mortgage forming the subject matter of the

suit, O.S. No. 317 of 1975 on the file of Sub-Court, Madurai. The revision arises out of an application to set aside the Court auction sale. The

application was dismissed by the trial Court and the appellate Court affirmed the said order of dismissal. The Judgment debtor has filed this

revision petition. The petitioner's contention is that the provisions of Order 34, Rule 5, Code of Civil Procedure, can be invoked by him during the

pendency of the revision and he is now prepared to deposit the amount, which due under the said mortgage and if time is given to him, he will

make the deposit. According to him, if the deposit is made, the Court is bound to set aside the sale.

2. This application is opposed by counsel for the respondents. According to them, the provision under Order 34, Rule 5, C.P.C. for deposit of the

amount is not available to the judgment debtor at the stage of revision. It is argued that once the application to set aside the sale is dismissed and

the sale is confirmed and thereafter, an appeal against the order of the executing Court is also dismissed, there is no question of the mortgagor

invoking the provisions of Order 34, Rule 5, C.P.C. at the stage of revision. Learned Counsel for the respondents submit that the proceeding in

revision cannot be treated as a continuation of the original proceeding and a revision cannot be equated to an appeal. According to learned counsel

for the respondents, the right of the mortgagor to invoke the provisions of Order 31, Rule 5, C.P.C. has been recognised only in cases of appeals

pending against order dismissing the applications to set aside sales.

2A. It is not in dispute now that if an appeal is pending against an order dismissing an application to set aside a sale, it is open to the mortgagor to

invoke the provisions of O. 34, Rule 5, C.P.C. and deposit the amount due as per that rule and thereby redeem the mortgagor, after setting aside

the sale. The petitioner places reliance on the judgment of the Supreme Court in *Maganlal Vs. Jaiswal Industries, Neemach and Others*, , wherein

the Supreme Court held that so long as an appeal is pending against an order of the executing Court dismissing an applica- tion for setting aside the

sale, the confirmation of sale has not become final and order 34, Rule 5, C.P.C. can be invoked by the mortgagor. The Supreme Court has

approved of the judgment of this Court in *M. Sevugan Chettiar and Another Vs. V.A. Narayana Raja and Others*, . The Supreme Court has also

made reference to an earlier judgment of the Privy Council in AIR 1934 134 (Privy Council) and its own judgment in *Sri Ranga Nilayam*

Ramakrishna Rao v. Kandokori Chellay-amma, AIR 1953 SC 425.

3. Learned counsel for the respondents contends that in all the cases referred to above, the appeal against the order refusing to set aside the sale

was pending and there can be no dispute about the position that during the pendency of an appeal, the provisions of Order 31, Rule 5, C.P.C. can

be invoked, but according to learned counsel, once such an appeal is dismissed, the matter attains finality and it cannot be said to be nebulous.

According to him, thereafter, the provisions of Order 34, Rule 5, C.P.C. are not available to the mortgagor. Learned counsel makes a distinction

between the position "during the pendency of the appeal" and "during the

pendency of a revision". He places reliance on the judgment of the Supreme Court in *State of Kerala Vs. K.M. Charia Abdullah and Co.*, . The relevant passage in the judgment reads as follows: There is an essential distinction between an appeal and a revision. The distinction is based on differences implicit in the said two expressions. An appeal is a continuation of the proceedings; in effect the entire proceedings are before the appellate authority audit has power to review the evidence subject to the statutory limitations prescribed. But in the case of a revision, whatever powers the revisional authority may or may not have, it does not (have) the power to review the evidence unless the statute expressly confers on it that power. That limitation is implicit in the concept of revision.

4. Learned counsel also places reliance on the judgment of Bhat, J. in *Islamia College of Science and Commerce Vs. Gh. Hassan Balkhi and*

Another, . In that case, the question was with reference to the period of Limitation for bringing on record the legal representatives of the deceased

in a revision petition. The Court held that Art. 176 of the J& K Limitation Act (Act 9 of 1995 Svt), which applied to suits and appeals, would not

apply to revisions and the residue Article i.e. Article 181 would apply. It was observed the Revision petition is not a original proceeding. It is a

proceeding of a civil nature, but cannot be termed as original civil proceeding it has to be distinguished from appeal and suit.

5. I do not agree with the above submissions. No doubt, a revision is essentially different from an appeal and the scope of a revision is much

limited than the scope of an appeal. But a revision is also a limb of appellate jurisdiction exercised by a Superior Court. u/s 115, Code of Civil

Procedure, this Court is empowered to exercise its jurisdiction in certain matters. The jurisdiction of this Court is circumscribed by the provisions

of S. 115, C.P.C. That would not however mean that in a revision, the proceeding in the court below does not continue and it has come to an end

with the order made by the lower appellate Court, exercising the appellate jurisdiction. Once a revision petition in admitted , this court has got

jurisdiction to set aside that order, if it falls within the scope of S. 115, C.P.C. when such a revision is pending, it is open to the mortgagor to

invoke the provisions of Order 34, Rule 5, C.P.C.

6. Dealing with the scope of a revision and an appeal, the Supreme Court has, in

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Bapat, , observed as follows (at page 3) :

It would appear that their Lordships of the Privy Council regarded the revisional jurisdiction to be a part and parcel of the appellate jurisdiction of

the High Court. This is what was said in AIR 1932 165 (Privy Council) :

There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an Appellate

Court, making it to set aside or revise a decision of a Subordinate Court, in an appeal within the ordinary acceptance of the term.....

Similary in Raja of Ramnad v. Kamid Rowthen 53 Ind App 74 ; AIR 1925 PC 22 a civil revision petition was considered to be an appropriate

form of appeal from the judgment in a suit of small causes nature. A Full Bench of the Madras High Court in P.P.P. Chidambara Nadar Vs.

C.P.A. Rama Nadar (deceased) Pichaimani alias Arunachalam by guardian Thillai Ammal as L.R. of the deceased and Others, had to decide

whether with reference to Article 182(2) of the Limitation Act, 1908, the term "appeal" was used in a restrictive sense so as to exclude revision

petitions and the expressions "appellate Court" was to be confined to a Court exercising appellate as opposed to, revisional powers. After an

exhaustive examination of the case law including the decisions of the Privy Council mentioned above, the Full Bench expressed the view that

Article 182(2) applied to civil revisions as well and not only to appeals in the narrow sense of that term as used in the Civil P.C. In Secretary of

State for India in Council v. British India Steam Navigation Company (1911) Cai LJ 90 an order passed by the High Court in exercise of its

revisional jurisdiction under S. 115, C.P.C. was held to be an order made or passed in appeal within the meaning of S. 39 of the Letters Patent.

Mookerji J. who delivered the judgment of the Division Bench referred to the observation of Lord Westbury in Attorney General v. Sillom, (1964)

10 HLC 704, and of Subramania Iyer J. in Chappan v. Moidin (1899) 22 Mad 68 on the true nature of the right of appeal. Such a right was one

of entering of superior court and invoking its aid and interposition to redress the error of the Court below. Two things which were required to

constitute appellate jurisdiction were the exisetnce of the relation of superior and inferior court and the power on the part of the former to review

decisions of the latter. In the well known work of Story on Constitution (of United States) Volume 2, Article 1761, it is stated that the essential

criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. The

appellate jurisdiction may be exercised in a variety of forms and, indeed, in any form in which the legislature may choose to prescribe. According

to Article 1762, the most usual modes of exercising appellate jurisdiction, at least those which are most known in the United States, are by a writ

of error, or by an appeal, by some process of removal of a suit from an inferior Tribunal. An appeal is a process of civil law origin and removes a

cause, entirely subjecting the fact as well as the law, to a review and a retrial. A writ of error is a process of common law origin, and it removes

nothing for re-examination but the law. The former mode is usually adopted in cases of equity and admiralty jurisdiction; the latter, in suits at

common law tried by a jury.

How, when the aid of the High Court is invoked on the revisional side, it is done because it is a superior Court and it can interfere for the purpose

of rectifying the error of the Court below. Section 115, of the Code of Civil Procedure, circumscribes the limits of that jurisdiction, but the

jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court. It is only one of the modes

of exercising power conferred by the statute; basically and fundamentally it is the appellate jurisdiction of the High Court, which is being invoked

and exercised in a wider and larger sense.

7. Thus, the Supreme Court has pointed out that a revision is only a part of the appellate jurisdiction of a superior Court and therefore, the

principles, which will be applicable to an appeal, vis-a-vis Order 34, Rule 5, C.P.C. would also apply to a revision petition. Consequently, I reject

the contention put forward by the respondents and hold that the petitioner can invoke the provisions of Order 34, Rule 5, C.P.C. The petitioner is

entitled to make a deposit of the amount under the said rule. The petitioner has filed a calculation memo, according to which, a sum of Rs.25,920/-

was due as on 7-7-1991 including 5% solatium and the poundage. The petitioner is directed to deposit the sum of Rs.25,920/- (Rs. twenty five-

thousand nine hundred and twenty only) to the credit of E.P. No. 539/81 on the

file of Additional District Munsif, Madurai Town (O.S. No. 317

of 1975, Sub Court, Madurai), on or before 31-7-1991. He shall get a receipt from that Court and produce the same before this Court.

Post the C.R.P. for further orders on 5-8-1991.

8. Order accordingly.