

(1983) 04 MAD CK 0016

In the Madras High Court

Case No : C.M.P. No. 16308 of 1982 in A.A.O. No. 532 of 1977

V.A. Narayana Raja

APPELLANT

Vs

Renganayaki Achi (died) and Others

RESPONDENT

Date of Decision : 28-04-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 21 Rule 98, Order 34 Rule 5

Citation : AIR 1984 Mad 27 : (1984) ILR (Mad) 129 : (1983) 96 LW 536

Hon'ble Judges : Ramanujam, J

Bench : Single Bench

Advocate : M. Srinivasan, for the Appellant; A.R. Lakshmanan, D. Raju, M. Venkatachala, General, B. Jaganathan and S. Rajasekharan, for the Respondent

Judgement

1. This is a petition by the appellant in C. M. A. No. 532 of 1977 pending before this court Under O. 34, R. 5, read with S, 151, C. P. C to

permit the petitioner to deposit a sum of Rs. 2, 67, 974 - 64 into court

2. The circumstances under which the said application has been filed may briefly be stated. The appellant had executed a mortgage of two items of

properties in the year 1963. A suit O. S. 166 of 1965 was filed on the said mortgage and there was a preliminary decree, in that suit on 29-6-

1966 for Rs. 1,23,088.58 with subsequent interest thereon. Later on 28-2-1967, a final decree had been passed. An execution petition was filed

in E. P. No. 119 of 1967 for realising the decree amount by sale of the hypotheca. As the decree holder died later, his legal representation came

on record on 30-11-1967. The said execution petition was posted for disposal on 22-12-1967. However, it was advanced and taken up on 1-

12-1967 and posted to 2-12-1967, when the executing court directed the

properties to be sold on 22-1-1968. The sale was actually held on 23-1-1968 and item I was sold in favour, of the 5th respondent in the civil miscellaneous appeal for a sum of Rs. 40,000 and item 2 was Sold in the name of the 6th respondent in the civil miscellaneous appeal, for a sum of Rs. 73,500. On 10-3-1969. the defendant, the judgment debtor filed E. A. 157 of 1969. under O. 21. R 90 C.P.C. for setting aside the sale. Notwithstanding the filing of the application, the executing court had confirmed the sale.

3. In E. A. 151 of 1969, the judgment debtor contended that the Court auction purchasers of the two items of properties were close relations of the decree holder, and therefore, the purchase should be deemed to be by the judgment debtor without obtaining leave to bid and that, in addition to that, there was irregularities in the conduct of the sale. The said E. A. 157 of 1969 was resisted by respondents 2 and 3 who are the legal representatives of the original decree holder and the respondents 5 and 6 who are the purchasers of items 1 and 2 respectively. The 4th respondent was a subsequent mortgagee of the said properties. The executing court dismissed the said E. A. No. 157 of 1969 holding that there was no, irregularity in the conduct of the sale. Aggrieved by the said decision of the executing court, C. M. A. 532 of 1977 had been filed by the judgment debtor. That appeal was allowed by this court on the ground (1) that considerable prejudice has been caused to the judgment debtor in advancing the hearing of the execution petitioner without notice to him or his counsel. (2) that the advancement of the hearing of the execution petition is a clear case of the abuse of process of court and (3) that the sale had gone on without the judgment debtor's valuation being shown in the proclamation. The result was, E. A. 157 of 1969 stood allowed and the sale in favour of the respondents 5 and, 6 stood aside. Later, two petitions, one by the 3rd respondent and the other by the legal representatives of the 5th respondent were filed for setting aside the judgment of this court in C. M. A. 532 of 1977 dated 5-3-1981.

4. The grounds urged in the first case by the third respondent are that he was not personally served in the appeal, that he was said to have been served only by substituted service that as he had shifted his residence he could not be served personally, that he came to know about the disposal of

the civil miscellaneous appeal only a month before the filing of the petitioned and that therefore in the interest of justice, the order passed in the civil miscellaneous appeal should be set aside as far as he is concerned and the matter reheard. The second petition has, been filed by the legal representatives of the 5th respondent. The contention was that the 5th respondent had died long -long ago and the civil miscellaneous appeal has been heard without bringing the legal representatives of the 5th respondent on record and therefore the decision rendered in the civil miscellaneous appeal so far as the 5th respondent is concerned will not bind them. Taking into account the contentions advanced by the petitioners therein both the petitions were allowed so far as the petitioners are concerned, and the civil miscellaneous appeal was directed to be reheard only in respect of their interest. Thus the court auction sale now stands set wide so far as the other respondents are concerned except the 3rd respondent and the legal representatives of" the. 5th respondent. The judgment in civil. miscellaneous appeal has become final so far as the respondents other than respondent No. 3 and the legal representatives of the 5th respondent are concerned and the civil miscellaneous appeal stands posted for rehearing only to the extent of the interest of the third respondent and the legal representatives of the 5th, respondent. It is only at this stage the appellant has filed this petition under O. 34, R. 5 C.P.C. for deposit of the decree amount.

5. This petition is opposed by the 3rd respondent and the legal representatives of the 5th respondent in the civil miscellaneous appeal on the ground that any deposit under O. 34. R. 5, C.P.C. can be permitted to be made only before the actual confirmation of sale. But in this case, the confirmation of sale having taken place long before the filing of the civil miscellaneous appeal, the appellant cannot now be permitted to make the deposit. According to the petitioner, though the confirmation of sale has taken place, since the validity of the sale has been challenged under O. 21, R. 90. C.P.C. till the conclusion, of those proceedings, the deposit under O. 34. R. 5 C.P.C. could be made, and the confirmation of sale cannot be said to have become final and conclusive as long as the validity of the sale which is said to have been confirmed is the subject matter of challenge and until the validity of the sale is conclusively, decided, by the appellate court, the confirmation of sale should be taken to be in

abeyance.

6. The scope and ambit of O. 34, R. 5, C. P. C. came up for consideration in Vangayil Madhavan Nayanar Vs. V. Parameswara Ayyar and

Others, . In that case, there was a preliminary mortgage decree passed on 13th Sept. 1934, followed by final decree on 27th Jan. 1936 in the

mortgage suit O. S. 15 of 1933 on the file of the District Judge of North Malabar. The mortgaged property was sold in execution and purchased

by one Vengayil Madhavan Nayanar. On 16th Nov. 1944. the first defendant in the suit applied in E. A. 52 of 1944. under Order 21 Rule 90 C.

P.C. for setting aside the sale. This application under went several adjournments. On 6th Mar. 1945 the decree holder applied in E. A. 25 of 1945

under Order 21 R. 2 for recording full satisfaction of the decree alleging that defendant I agreed to pay and the decree holders agreed to receive

Rs. 6750 in full satisfaction of the decree. On 10th Mar. 1945, the trial court directed, that full satisfaction of the decree should be recorded and

that the sale should be cancelled, overruling the auction purchased content that no deposit under Order 34 R. 5 C. P. C. could be made after the

court auction sale has been confirmed. The trial court took the view that O. 34 R. 5 C. P. C does not specifically prohibit private adjustment of the

decree by arrangement arrived at between the judgment debtor and the decree holders even after the court auction sale of the judgment debtor's

property. The auction purchaser took the matter to this court contending that the language of O. 34 R. 5 of the Code is imperative and that as the

amount due to the decree holders was admittedly not deposited in court for satisfaction of the decree the sale cannot be set aside. On the other

hand, the judgment debtor contended that O. 21 R. 2 of the code would apply even after the sale of the mortgaged property and that satisfaction of

the decree can, therefore be recorded when payment is made out of court or the decree is otherwise adjusted net with standing that a sale was

already taken place. On these facts, the question that came up for consideration before the court was, Whether after a sale of the hypotheca in

execution of final decree for sale, it is open to the mortgagor more than 30 days, after the sale but before its confirmation to pay out of court, the

amount due to the decree holder or otherwise satisfy him and claim the benefit of O. 34 R. 5 of the code for in other words, whether or not the

require merit of the said rule that the said amount must be deposited in court is obligatory and is strictly to be complied with the court held that the

language of R. 5 of O. 34 is imperative and the requirement that the amount, due to the decree holder must be deposited in court is obligatory and

must be strictly complied with a Payment or adjustment out of court would not be in compliance with the strict requirements of the rule that O. 21

R. 2 is not applicable after a sale, of the mortgaged property in execution and that in the case of a mortgage decree for sale. O. 21 R. 89 is

available only within 30 days of the decree, and O. 31 R. 5 applies after the stage of the sale.

7. The Supreme Court also has considered the scope of R. 5 of O. 34 of the Code in *Hukamchand Vs. Bansilal and Others*, . In that case, there

was a decree passed by the Registrar of Co-operative Societies, against a member of the Co-operative Society directing the member to pay

certain amount within a particular date and if the amount is not paid the property could be sold in satisfaction of the amount. The amount was not

paid by the member as directed. Therefore, the property was sold in auction to one Hukamchand on 7th April 1956. As an application was made

by the judgment debtor on 3rd May 1958, the sale could not be confirmed under O. 21 R. 92 of the code. until the application was disposed of

the said application stood adjourned from time to time and ultimately on 7th Oct. 1958 the court granted time till Nov. 21. 1958 to the judgment

debtor to deposit the amount due and the application under O. 21 R. 90 of the code was dismissed as withdrawn, When the matter came up

before the executing court on Nov 22, the court noted that no amount had been deposited and although an application was made on behalf of the

respondents for a further extension of time, the executing court held that as the society decree holder and the auction purchaser were not willing to

extend time, the court could not, extend time, which had been given under an agreement. The Court therefore confirmed the sale under O. 21 R.92

C.P.C When the said order refusing extension of time was challenged, the Supreme Court held (1) that the order executing court refusing extension

of time and confirming the sale in favour of the appellant under O. 21 R. 92 C.P.C. was correct (2) that it was not open to the executing court to

extend time without the consent of parties: (3) that S. 148 of the C. P. C. would not apply to the facts of these cases; (4) that O. 34 R. 5 C. P. C.

recognises the right of the judgment debtor to pay the debtor amount in an execution relating to a mortgage decree for sale at any time before the

confirmation of sale: (5) that the rule does not give any power to the court to grant, time to deposit the money after the final decree has been

passed. (6) that it is not open to the court to go on filing date after date and postponing the confirmation of sale merely to accommodate a

judgment debtor, and (7) that a harmonious construction of O. 34 R. 5 and Order 21 Rule 92 makes it clear that if the provisions of O. 21 R. 92

(1) apply the sale must be confirmed unless before the confirmation the mortgagor-judgment-debtor has deposited the amount as permitted by

O.34 R. 5 C. P. C.

8. Though the above decision of the Supreme Court, laid down. that no deposit under O. 34 Rule 5 C.P. C, could be made after confirmation of

sale, which is what O.34,R.5 C. P. C itself says the learned counsel for the petitioner submits that though in this case, there is, confirmation of sale,

the confirmation has not become final as the petition filed under Order 21 Rule 95 C, P, C. should be deemed to have been pending , so far as the

civil miscellaneous .appeal has not been finally disposed of. According to the learned counsel, once a petition is filed under O. 21 R. 90. C. P. C.,

challenging the validity of the sale, till the validity of the sale is finally decided, the very confirmation of sale the meanwhile should be taken to be

tentative and therefore, the judgment debtor is entitled to file an application under O, 34 R, 5 of the Code. In support of the said submission. the

learned counsel for the petitioner refers to the decision of Natarajan J, in S.V. Ramalingam and Others Vs. K.E. Rajagopalan and Another, . In

that case, a suit was filed on a mortgage and preliminary decree and final, decree were passed, and thereafter the property was sold in court

auction and the same was purchased by a third. party, The mortgagors filed applications in the, executing, court for, setting aside the sale, These

applications were dismissed and the sale. was confirmed. The mortgagors filed an appeal to the High Court Before the appeal ,was heard, an

application under O. 34 R. 5 read with S. 151 C. P. C. was filed by the mortgagors for redemption of the mortgage by deposit The court auution

purchaser objected that the application was belated and that in any event such a Petition would not after the sale has been confirmed by the lower

court. Natarajan J., has held that the appeal preferred by the Judgment debtors against the rejection of their application for setting aside the sale

had the effect of rendering the sale and its confirmation fluidal and nebulous and that the finality of the sale was rendered at large and as such the

petitioners would be entitled to exercise the right conferred on them under O. 34 R. to redeem the mortgage.

9. The learned Advocate General appearing for one of the court auction purchasers, however, contended that the said decision of Natarajan, does

Rao lay down the correct law, and that by any event, that will not apply to the facts of this case. According to him, the title of the court auction

purchaser becomes perfected on the issue of sale certificate after confirmation of sale, as held in *Thunoli Kelu Nair Vs. Nambron Chirutheyi*

Amma and Others, and that therefore the purchasers, title which, has been perfected cannot be displaced by the Judgment debtor depositing the

amount under O. 34 R. 5 C. P. C., -vid it is for this reason O. 34, R. 5 C. P. C., prescribed the date of confirmation as the date before which the

deposit under that rule, is to be made. In that case the Bench has observed (at P. 761):-

On the issue of a sale certificate to the purchaser under O. 34 R. 5 C. P. C. the latter's title becomes perfected and the purchaser's right to

possession is unimpeachable as against the parties to the suit as well as those claiming under them. There is no obligation on his part, to apply to the

court for delivery, and, it is open to him to obtain possession out of Court.

According to the learned Advocate General, once the title has vested in the auction purchaser after the issue of a sale certificate as held in the

above-said decision, the judgment debtor by resorting to O. 34 R. 5 C. P. C. cannot seek to displace that title which had already inured

in the auction purchaser, and, therefore, it is not possible for the court to permit the judgment debtor to deposit the amount under O. 34 R. 5 C. P.

C. by way of redemption, & of the mortgage which has got the indirect effect of setting aside the sale.

10. Natarajan J. in *Kaki Venkatappa Vs. Toppal Timmappa*, has taken the view that when once an application under O. 21 R. 90 C.P.C.

has been filed, any confirmation of sale by the executing court cannot be said to be absolute so far as, that court is concerned." and if the matter is

taken in appeal and allowed and the sale is set aside- then. there will be me sale, and, of course, no confirmation and no absolute sale, taking into

accGunt the obseivatim-m made by the Privy Council in Chaudratneni Shaha v. AnarUri Wai ilkA) 61 1A 248 : AIR 1534 PC 1341 aiad

Varadarajan Vs. Muthu Venkatapathi Reddy and Others, The learned Judge also haq oh-Aervect that the appeal filed J-n the High Court against

the rejeetfon UT the executing court of m application under O. 21 R. 90 C. P. C. must be regarded as a continuation of the proceediews of the

lower court to set aside the sale. and Itill that appeal is decided, the sale does not become- absolute and even if confirmation of sale had taken

place ipi the meanwhile the effect of the pendency of an application under O. 21 K 90 C. P. C. automatically operated to vacate or render

ineffective the earlier order confirming the sale under O. 21 R. 92 C. F. C. and that the pendency of an application under O. 21 R. 90 C, P. C. is a

bar to an order of confirmation of sale under O. 21 R. 92 C. P. C.

11. Valli Ammal Vs. Subramania Iyer and Another, Ramachandra Iyer C, J. held that so long ""as the sale has not b,-en confirined, it would be

open to the mortgagors to deposit the amount due together with the solatium prescribed therein and avoid the sale that notwithstanding the fact that

the application for setting aside the sale had been dismissed by the trial court. The matter was at large before the appellate court in" appeal and that

therefore, there was no final order of confirmation of sale before the disposal of the appeal unreputed decision in of IM dt 1-6-1982, same view

and held in favour of a court has been confirmed dismissal of the application under G yet an application 5 C. P, C. can be as the appeal filed

Ratnam J. an C. M. A 1;1o, 186 has also taken the that though a sale action purchaser consequent to the plic-ation"i filed by O. 21 -R, 90 C, P.

ti,Dn under O, 34 R maintained so long against the order of dismissal of the application under O. 21 R. 90 C. P. C. filed before the appellate court

has not been disposed of.

12. 1 am inclined to agree with the view expressed in the above cases, It is no doubt true that deposit under O. 34 R. 5 C. P. C. can be made only

before the confirmation, of sale but not afterwards as has been held by the "Supreille Court in Hukamchand Vs. Bansilal and Others, .. But the

question" is as to what is. the date of confirmation of sale, Though. as a result of

the dismissal of the petition filed by the Judgment debtor under

Sec. 21 R. 90 C. P. C, "the sale has been confirmed in this case, there has been an appeal against the said decision and the appeal is pending

before this court. The pendency of the appeal makes the order of sale affected. The confirmed sale cannot become effective - only in the

event of this court dismissing the appeal filed by the judgment debtor joining the dismissal by, the executing Court of his application

under Sec. 21 R. 90 C. P. C. It is also true that as a result of the confirmation of the sale and the issue of a sale certificate, the auction purchaser

gets title to the property and the title of the Judgment debtor stands lost. But, since the sale is subject to the final result of the petition filed by the

judgment debtor under Sec. 21 R. 90 C. P. C. the confirmation of sale and the consequent issue of the sale certificate should all be taken to be

subject to the result of the petition under Sec. 21 R. 90 C. P. C. Therefore, the vesting of title on the auction purchaser resulting from the issue of a

sale certificate should also be taken to be subject to the result of the petition under Sec. 21 R. 90 C. P. C. This is obvious from the fact that if the

Appellate Court were to set aside the sale under Sec. 21 R. 90 C. P. C, the sale will stand set aside as also the subsequent confirmation of sale and

the issue of sale certificate. It is not therefore possible to accept the contention of the learned Advocate General that since the confirmation has

already taken place in this case, there is no question of Sec. 34 R. 5 C. P. C. being availed of by the judgment debtor. If the said contention were to

be accepted, the appeal filed against the order dismissing the application under Sec. 21 R. 90 C. P. C. cannot be prosecuted any further. It is also, to

be pointed out that this is an a fortiori case. Here, the application filed under Sec. 21 R. 90 C. P. C. has been allowed except in so far as it relates to

the third respondent and the legal representatives of the fifth respondent and the appeal as against them, alone is still pending. Even assuming the

appeal were to be dismissed as against the third respondent and the legal representatives of the fifth respondent, the sale so far as the other

respondent are concerned including the decree holders stands set aside. Since the sale has been partly set aside, the confirmation of sale will

automatically stand affected. In this view of the matter, I have to hold that the application under Sec. 34 R. 5 C. P. C. is maintainable. The learned

Advocate General then point out that O. 34 R. 5 C P. C. contemplates the deposit being made before the filing of the Application and, no such

"deposit having been made," the application; was rejected. It is to be noted, that unless there is an order made by the court, either

judicially or administratively, the deposit cannot be made in court and the petitioner only seeks the permission of the court to enable him

to make a deposit under O. 34 R. 5 of the Code, though any relief under O. 34 R. 5 of the Code can be got after the deposit.

13. This petition is therefore allowed, and the petitioner is permitted to deposit the sum of Rs 2,67,974-64 p. within two weeks before the

trial court. Once such deposit is made in the trial court, the court will go into the question of the sufficiency or otherwise of the amount deposited

or the purpose of redemption. The petition is ordered accordingly. No costs.

14. Petition allowed.