

CASE NO.:
Appeal (civil) 5073 of 1993

PETITIONER:
V.K. PALANIAPPA CHETTIAR (DEAD) BY LRS.

Vs.

RESPONDENT:
RAMASAMI GOUNDER & ANR.

DATE OF JUDGMENT: 17/04/2001

BENCH:
D.P. Mohapatra & Brijesh Kumar

JUDGMENT:

L...I...T.....T.....T.....T.....T.....T.....T...J

BRIJESH KUMAR, J.

This appeal has been preferred by the judgment-debtor, against the judgment and order dated 16.10.1992 passed by the Madras High Court in Civil Revision Petition No.513 of 1990 stemming out of execution proceedings, setting aside the order by which the application moved by the judgment-debtor under Order 34 Rule 5 CPC was allowed in appeal by the Addl. District Judge, Salem.

The brief facts are that two mortgages were created by V.K. Palaniappa Chettiar (died and whose LRs are on record as petitioners) in favour of respondent No.2 M. Karuppuswamy. The mortgagee filed O.S. No.863 of 1973 for recovery of mortgage money. The suit was decreed and a preliminary decree was passed by the Ist Addl. Sub-Judge, Salem and the final decree was also passed on 3.7.1974. The decree-holder moved application for execution of the decree in R.E.P.No.45 of 1980 in pursuance whereof, the property of the judgment-debtor was auctioned on 9.10.1980. The respondent No.1 Ramaswamy Gounder is the auction purchaser of the property. The auction sale was confirmed on 3.11.1981 under Order 21 Rule 92 CPC and the application preferred by the judgment-debtor under Order 21 Rule 90 was dismissed.

Aggrieved by the order dismissing the application, moved by the judgment-debtor under Order 21 Rule 90 CPC, he preferred an appeal some time in August, 1982 viz. C.M.A.No. 78 of 1982 in the Court of the District Judge, Salem. Later, it appears that the judgment-debtor also moved an application I.A. No.65 of 1988 (I.A.No.594/83 1st ADJ) under Order 34 Rule 5 CPC. It also transpires that the judgment-debtor was permitted by the Appellate Court to deposit the amount which he did on 6.4.1985. However, the C.M.A. No.78 of 1982 as well as I.A.No.65 of 1988 ultimately came to be finally disposed of by the IInd Addl.District Judge, Salem who by order dated 23.8.1988 dismissed C.M.A.No.78 of 1982 but allowed I.A.No.65 of 1988. The learned Appellate Court placed reliance upon two

decisions reported in 2 M.L.J. 1975 page 494 (S.V. Ramalingam and another vs. K. Rajagopal and another) and 1964 1 M.L.J. Page 275 (Velliammal Vs. Subramania Iyer) for the proposition that a petition under Order 34 Rule 5 CPC can be entertained during the pendency of an appeal against the order rejecting the application under Order 21 Rule 89 and 90 CPC for setting aside the sale. The proposition which was relied upon, in view of the two decisions referred to above, is that even though the application for setting aside the sale was dismissed by the executing court yet in appeal against such an order, the matter remains at large before the Appellate Court and confirmation of sale is not still final until disposal of the appeal. The Appellate Court, as indicated earlier, dismissed the appeal preferred against the order of the execution court dismissing the application for setting aside of the sale moved under Order 21 Rule 90 CPC but allowed the application I.A.No.65 of 1988 moved under Order 34 Rule 5 CPC to set aside the sale on deposit of decretal amount.

The auction purchaser namely, Ramaswamy Gounder, preferred Civil Revision under Section 115 CPC against the order dated 23.8.1988 allowing I.A. No.65 of 1988. No revision seems to have been preferred by the judgment-debtor against the part of the appellate order dismissing their appeal C.M.A.No.78/1982. The revisional court held that it is permissible to move an application under Order 34 Rule 5 CPC during the pendency of an appeal against the order of the execution court refusing to set aside the sale under Order 21 Rule 90 CPC as the order passed would be in a nebulous state, and the order on being set aside in appeal, the application under Order 34 Rule 5 CPC would be deemed to have been filed before confirmation of the sale. But in the facts of the present case, the revisional court came to the conclusion that the Appellate Court, by the same order first rejected the appeal C.M.A.No.78 of 1982 preferred against the order passed by the execution court refusing to set aside the auction sale but thereafter allowed the application I.A.No.65 of 1988 under Order 34 Rule 5. The order, therefore, it was observed, was self-contradictory as while confirming the sale, application under Order 34 Rule 5 CPC could not be allowed. Thus the order passed in I.A.No.65 of 1988 under Order 34 Rule 5 CPC has been set aside by the revisional court. This order is under challenge by the judgment-debtor.

To appreciate the point, we may look to the relevant provisions. Order 21 Rule 89 CPC provides that where immovable property has been sold in execution of a decree, any person claiming an interest in the property may apply for setting aside of the sale on depositing certain amount as indicated in the provision. Order 21 Rule 90 provides for moving an application to set aside the sale on the ground of irregularity or fraud in publishing or conducting the sale. Order 21 Rule 92 provides that where no application is made under Rule 89 or Rule 90 or where such application has been moved and disallowed, the court shall make an order confirming the sale and the sale will become absolute.

In the present case, undisputedly, the sale was confirmed and was made absolute under Order 21 Rule 92 CPC. It also appears from the facts narrated in the judgment of the High Court that the sale certificate was issued and symbolic possession was also delivered to the

auction-purchaser. The appeal was, however, preferred namely, C.M.A.No.78 of 1982 during the pendency of which application under Order 34 Rule 5 was made. Order 34 Rule 5 CPC reads as follows:-

5. Final decree in suit for sale.-(1) Where, on or before the day fixed or at any time before the confirmation of a 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 repayment 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.

A perusal of the above provision would make it clear that the judgment-debtor is required to make deposit of all amounts due in court, on or before the day fixed or any time before the confirmation of sale is made in pursuance of a final decree passed under Sub-rule (3).

In the present case, admittedly, the application was moved under Order 34 Rule 5 CPC, after the order of confirmation of sale was passed rejecting the objections preferred by the judgment-debtor under Order 21 Rule 90 CPC but during the pendency of appeal against the above noted order passed by the execution court. The correctness of the contention raised on behalf of the judgment-debtor about maintainability of the application under Order 34 Rule 5 CPC is not in doubt. A decision of this Court on the point is reported in (1989) 4 SCC 344 (Maganlal vs. M/s Jaiswal Industries, Neemach and others). It has been held that notwithstanding confirmation of sale, Order 34 Rule 5 CPC would still be attracted where appeal against the order of confirmation is pending, as till the appeal is finally decided, the sale does not become absolute. Reliance was

placed on some earlier decisions of this Court including a case reported in 1950 SCR 806 (Sri Ranga Nilayam Rama Krishna Rao vs. Kandokori Chellayamma alias Mangamma and another) . In paragraph 14 of the Judgment in Maganlals case (supra), their Lordships observed as follows:-

14. In this view of the matter we are of the opinion that in case the provisions of Order XXXIV, Rule 5 of the Code are held to be applicable to the facts of the instant case appropriate relief can be granted thereunder as the order of confirmation of the sale passed by the High Court in favour of the first purchaser has not become absolute due to the pendency of these appeals against that order nor has the right of redemption of Maganlal yet extinguished.

Reliance has also been placed upon two recent decisions of this Court one of which is reported in (1999) 8 SCC 511@ JJJ [U. Nilan vs. Kannayyan (Dead) through LRs.]. Considering@ JJJ the whole gamut of case law on the point, it has been held that the confirmation of sale would be absolute only after final orders are passed in appeal. The reason being that in case the appeal succeeds, there would be no confirmation of the sale and in such circumstances, an application moved under Order 34 Rule 5 CPC during pendency of the appeal would be deemed to have been moved before confirmation of the sale. Same view has been reiterated in another decision reported in (2000) 3 SCC 664 (Kharaiti Lal vs. Raminder Kaur and others). Learned counsel for the respondents, however, submitted that in the present case, though it is true that the judgment-debtor was given permission to deposit the amount on an application moved during the pendency of the appeal No.78 of 1982, but finally by means of one order, the said appeal viz. C.M.A. No.78 of 1982 was dismissed, i.e., the order of confirmation of the sale was upheld, but on the other hand, application under Order 34 Rule 5 CPC was allowed. In such a situation, it could not be said that the application under Order 34 Rule 5 CPC would, in any manner, be relatable to any point of time prior to confirmation of the sale. That position could be deemed only in case appeal C.M.A. No.78 of 1982 was allowed and the order of confirmation of sale was set aside. Thus the requirement of Order 34 Rule 5 CPC that the amount should be deposited in court on the date fixed for or before confirmation of sale, is not fulfilled. Yet another fact, which is noticeable, is that the judgment-debtor did not file any Revision against the part of the order dismissing appeal No.78 of 1982. The order, thus, as passed by the Addl. District Judge, attained finality. In no way, it can be said that the application under Order 34 Rule 5 CPC can be treated to have been moved before confirmation of the sale.

Learned counsel for the appellants, in connection with the above, submitted that once the court allowed to make the deposit under an application moved under Order 34 Rule 5 CPC, it was not necessary to challenge the part of the order dismissing the appeal No.78 of 1982. In our view, it will create a very anomalous situation. It has not been submitted that the condition for moving an application under Order 34 Rule 5 C.P.C. before confirmation of sale is not a binding pre-condition. Such application could be deemed to have been moved before confirmation of the sale, on

Appeal being allowed during pendency of which money was deposited .viz CMA No. 78/82. As a result of dismissal of appeal No.78 of 1982, the conditions laid down for moving an application under Order 34, Rule 5 CPC is not fulfilled.

Learned counsel for the appellants has submitted that both matters have been disposed of by a common order and the application under Order 34 Rule 5 was allowed first and thereafter the appeal was dismissed, or in any case simultaneously. We feel that nothing significant would turn upon this. Since however such an argument has been raised, it is to be noticed that the Appellate Court first dealt with the appeal No.78 of 1982 and dismissed the same. Thereafter, in the later part of the judgment, disposed of the I.A. No. 65 of 1988, allowing the same, that is to say, first upholding the order confirming the sale and rejecting the objections. In the normal course, it is submitted that after dismissing the appeal No.78/82, the appellate court should have rejected the other application viz. I.A No.65/88 under Order 34, Rule 5 CPC having not been moved before confirmation of sale.

It has already been indicated earlier that the judgment-debtor did not challenge the orders of the appellate court by which his appeal No.78/82 was dismissed. On the other hand, the decree-holder challenged the order of the appellate court allowing the application IA No.65/88 moved under Order 34 Rule 5 CPC. Learned counsel for the appellants submitted that it was not necessary to challenge the orders by which his appeal No.78/82 was dismissed since the application under Order 34 Rule 5 CPC namely, I.A. No.65/88 was allowed and the appellants had been granted permission to deposit the amount in the Court. We fail to appreciate the argument. The application under Order 34, Rule 5 CPC moved by the appellant-judgment- debtor was entertained only during the pendency of appeal No.78/82. Had the said application not been pending, there was no occasion to permit the judgment-debtor to make the deposit of the decretal amount etc. under Order 34 Rule 5 C.P.C. since the sale had been confirmed prior to moving of the application. In such circumstances, the appellants cannot feel totally unconcerned with the final order passed in the main appeal namely C.A. No. 78/82. The dismissal of the appeal would only affirm the confirmation of the sale which was in nebulous state during pendency of the appeal. We are not considering here, at this stage, as to what appropriate order could or should have been passed on deposit of the money during the pendency of the appeal. The fact remains that two orders one dismissing the appeal and the other allowing the application would not co-exist rather they would be self- contradictory in nature. Somewhat similar facts and situation came to be considered by this Court in the case of U. Nilan (supra). There also it appears a number of applications had been moved ultimately resulting in two contradictory orders. The argument which was raised on behalf of the decree-holder about existence of contradictory orders and the judgment- debtor having not moved this Court against dismissal of his appeal, was found to be valid but it was observed that after permitting deposit of the amount and passing an order for return of the documents under Order 34 Rule 5 (a) CPC the appeals should not have been dismissed. Ultimately, considering the facts and circumstances of the case and number of applications moved, it was observed, invoking the principles contained

under Order 41, Rule 33 CPC that the orders passed in two appeals against the judgment-debtor by the High Court, though not challenged, should be set aside to do complete justice between the parties and to bring the two contradictory orders in conformity. So the appellate orders had been set aside suo motu. advanced

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As a result of the discussion held above, we find no merit in the appeal and it is accordingly dismissed. Costs@@@
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