

PETITIONER:
MAGANLAL ETC.

Vs.

RESPONDENT:
JAISWAL INDUSTRIES NEEMACH & ORS.

DATE OF JUDGMENT 07/08/1989

BENCH:
OJHA, N.D. (J)
BENCH:
OJHA, N.D. (J)
SAIKIA, K.N. (J)

CITATION:
1989 AIR 2113 1989 SCR (3) 696
1989 SCC (4) 344 JT 1989 (3) 415
1989 SCALE (2) 208

ACT:

Code of Civil Procedure, 1898: Order 34 Rule 5--Whether applicable to sale of property mortgaged under State Financial Corporation Act, 1951.

State Financial Corporations Act, 1951: Sections 31 and 32--Sale of property mortgaged under the Act--Whether provisions or Order 34 Rule 5 CPC are attracted.

HEADNOTE:

Maganlal executed a mortgage in favour of M.P. State Financial Corporation as security for a loan. The amount of loan not having been paid, the Corporation initiated proceedings before the District Judge under section 31 of the State Financial Corporations Act, 1951 for attachment and sale of the mortgaged property, which was ultimately auctioned and purchased by M/s Jaiswal Industries, the first purchaser. Maganlal made an application under Order 21 Rule 90 of the Code of Civil Procedure with the result that the sale was set aside by the Additional District Judge. The first purchaser preferred an appeal against the order setting aside the sale and also sought stay of further proceedings for re-sale. The High Court did not grant stay but only ordered that the fresh sale shall not be confirmed till the disposal of the appeal. Fresh auction was held and sale was knocked down in favour of Ramnarayan, the second purchaser. The appeal of the first purchaser was subsequently allowed by the High Court and the first sale in his favour was confirmed. Both Maganlal and Ramnarayan have filed two separate appeals in this Court challenging the order of the High Court.

Maganlal made an application before this Court under Order 34 Rule 5 of the Code, being C.M.P. No. 9940 of 1982, for redemption of the mortgage, and has urged that in case C.M.P. No. 9940 of 1982 is allowed, it would not be necessary for him to press the merits of the appeal. This contention has not been seriously disputed by the first and the second purchasers. They have however opposed this application on the ground that: (i) an order of sale of the mortgaged property passed

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by the District Judge under section 32 of the Act after

affecting an attachment under section 31 thereof will not come within the purview of a final decree for sale of mortgaged property contemplated by Order 34 Rule 5 of the Code and as such the benefit of that provision could not be extended to Maganlal; (ii) the High Court having confirmed the sale in first purchaser's favour, an application under Order 34 Rule 5 of the Code is not maintainable inasmuch as the said provision contemplates payment 'on or before the day fixed or at any time before the confirmation of a sale'; and (iii) section 32(8) of the State Finance Corporation Act makes the manner provided in the Code applicable only "as far as practicable" and there was neither a decree nor was the Financial Corporation a decree holder in a suit for sale it was only deemed to be a decree holder by legal fiction because of the expression "in execution of a decree as if the Financial Corporation were the decree-holder".

On the other hand, it is contended on behalf of Maganlal that (i) Order 34 Rule 5 of the Code is attracted even to an order of sale of mortgaged property passed under section 32 of the Act and since the right of redemption which vests in Maganlal has not yet extinguished in view of the pendency of these appeals, there is no impediment in the relief contemplated by Order 34 Rule 5 of the Code being granted. and (ii) in view of sub-section (8) of section 32 of the Act the applicability of the provisions of Order 34 Rule 5 of the Code cannot be denied to the facts of the instant case.

Allowing the CMP and the appeal filed by Maganlal and granting consequential reliefs to the first and the second purchasers, this Court.

HELD: (1) In case the provisions of Order 34 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. [707F-G]

Chandra Mani v. Anarjan Bibi, A.I.R. 1934 P.C. 134; Nilayam Ramkrishnan Rao v. Kandokari Chellayamma & Anr., [1950] S.C.R. 806; S.V. Ramalingam & Ors. v. K.E. Rajagopalan & Ors., [1975] 2 M.L.J. 494; M. Sevugan Chettiar v. V.A. Narayana Raja, A.I.R. 1984 Mad 334; Raghunath Singh & Ors. v. Pt. Hansraj Kunwar & Ors., A.I.R. 1934 P.C. 205 and Mhadagonda Ramgonda Patil & Ors. v. Shripal Balwant Rainade & Ors., [1980] 3 S.C.C. 298, referred to.

(2) An application under section 31(1) of the Act cannot be put on par to a suit for enforcement of a mortgage nor the order passed thereon under section 32 of the Act be put on par as if it was an order in a suit between a mortgagee and the mortgagor for sale of mortgaged property. On the other hand, the substantive relief in an application under section 31(1) is something akin to an application for attachment of property in execution of a decree at a stage posterior to the passing of the decree. [710E-F]

Gujarat State Financial Corporation v. M/s Natson Manufacturing Co. (P) Ltd., [1979] 1 S.C.R. 372 and M/s Everest Industrial Corporation & Ors. v. Gujarat State Financial Corporation, [1987] 3 S.C.C. 597, referred to.

(3) The purpose of enacting sections 31 and 32 of the Act was apparently to provide for a speedy remedy for recovery of the dues of the Financial Corporation. This purpose however was, in cases covered by clause (a) of sub-section (1) of section 31, confined to the stage of obtaining an

order asking to a decree in a suit, in execution whereof "the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation as security for the loan or advance" could be sold. Sections 31 and 32 of the Act cut across and dispense with the provisions of the Code from the stage of filing a suit to the stage of obtaining a decree in execution whereof such properties as are referred to in clause (a) of sub-section (1) of section 31 could be sold. After this stage was reached, sale in execution of an order under section 32 of the Act was for purposes of execution put at par with sale in execution of a decree obtained in a suit, by enacting sub-section (8) of section 32 of the Act. [711H-7 12B]

(4) If in its anxiety to ensure speedy recovery of the dues of the Financial Corporation Parliament had intended also to cut across and dispense with the procedure contained in the Code for execution of a decree for sale of such properties as are referred to in clause (a) of sub-section (1) of section 31 of the Act, it would have made some provision analogous to provisions contained in the enactments for revenue recovery. But that was not done. Instead, sub-section (8) was incorporated in section 32 of the Act. [712F]

(5) As is apparent from the plain language of section 32(8) of the

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Act, the legal fiction was created for the purpose of executing an order under section 32 of the Act 'as if' sale of attached property as if such order was a decree in a suit for sale and the financial Corporation was the decree holder whereas the debtor was the judgment debtor. [714B]

It is settled law that a legal fiction is to be limited to the purpose for which it was created and should not be extended beyond the legitimate field. [713H]

The Bengal Immunity Company Ltd. v. The State of Bihar & Ors., [1955] 2 S.C.R. 603; East End Dwellings Company Ltd. v. Finsbury Borough Council, [1952] Appeal Cases 109; The Commissioner of Income-tax, Bombay v. Amarchand N. Shroff, [1963] Supp. 1 S.C.R. 699; Commissioner of Income Tax, Gujarat v. Vedilal Lallubhai, [1973] 3 S.C.C. 17 and National Sewing Thread Co. Ltd. v. James Chadwick & Bros. Ltd., [1953] S.C.R. 1028, referred to.

(6) The provisions of the Code of Civil Procedure with regard to execution of a decree for sale of mortgaged property contained in Order 21 of the Code including the right to file an appeal against such orders passed during the course of execution which are appealable shall apply mutatis mutandis to provisions of an order under section 32 of the Act unless such provision is not practicable to be applied. [714C]

(7) Since, in the instant case, the equity of redemption has not been extinguished, there is no good ground to take the view that even though all the remaining provisions with regard to execution of a decree for sale of mortgaged property will apply to execution of an order under section 32 of the Act, the provision contained in Order 34 Rule 5 of the Code shall not apply. Nothing has been brought to the notice of the Court as to how and why it is not practicable to apply the said provision. [7 14F]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 2990-91 of 1980.

From the Judgment and Order dated 20.9. 1979 & 11.9.79

of the Madhya Pradesh High Court in Misc. Appeal No. 113 of 1976.

Shiv Dayal Srivastava, T.S. Krishna Moorthy Iyer, D.N. Mishra, R.P. Srivastava, S. Sukumaran and H.K. Puri, Harish N. Salve, K.K. Mohan, A.K. Sanghi, S.K. Agnihotri, Ashok Singh, H.K. Puri and

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S.K. Gambir for appearing parties.

The Judgment of the Court was delivered by

OJHA, J. These two appeals by special leave raise an interesting question as to whether the provisions contained in Order 34 Rule 5 of the Code of Civil Procedure (hereinafter referred to as the Code) are attracted during the course of execution of an order of sale of mortgaged property passed under section 32 of the State Financial Corporation Act, 1951 (hereinafter referred to as the Act). Necessary facts in order to appreciate the context in which this question arises may be stated in brief. Maganlal who is the appellant in Civil Appeal No. 2990 of 1980 executed a mortgage on July 16, 1965 in favour of M.P. State Financial Corporation (hereinafter referred to as the Corporation) as security for a loan taken by him from the Corporation. The amount of loan not having been paid by Maganlal the Corporation initiated proceedings under section 31 of the Act for recovery of Rs.51,799, which according to it was the amount due, by attachment and sale of the mortgaged property. This application was made as contemplated by Section 31 of the Act before the District Judge. After adopting the procedure contemplated by section 31 of the Act the District Judge passed an order for sale of the property which was ultimately sold for Rs.53,000 in an auction. M/s Jaiswal Industries (hereinafter referred to as the first purchaser) was the highest bidder. Maganlal made an application under Order 21 Rule 90 of the Code for setting aside the sale. This application was allowed by the Additional District Judge and the sale was set aside. Aggrieved by that order the first purchaser preferred a miscellaneous appeal in the High Court and also made an application for staying further proceedings for re-sale. The High Court, however, did not stay further proceedings for re-sale but only ordered that the fresh sale should not be confirmed till the disposal of the appeal. Fresh auction accordingly took place and the sale was knocked down in favour of Ramnarayan and others (hereinafter referred to as the second purchaser) who are the appellants in Civil Appeal No. 2991 of 1980. The appeal of the first purchaser was subsequently allowed by the High Court. The application made by Maganlal under Order 21 Rule 90 of the Code was dismissed and the sale in favour of the first purchaser was confirmed. It is this order which has been challenged in Civil Appeal No. 2990 of 1980 by Maganlal and by the second purchaser in Civil Appeal No. 2991 of 1980, as already indicated above.

Maganlal has made an application before this Court under order

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34 Rule 5 of the Code being C.M.P. No. 9940 of 1982 to which an objection has been filed. This application was ordered to be put up at the time of the hearing of the appeal. Subsequent events and proceedings of the court below on the basis whereof this application has been made as stated therein are these.

A sum of Rs.65,000 was paid by Maganlal to the Corporation on December 3, 1988 in full and final settlement of its claim and the Corporation acknowledged it by granting a receipt. Certification of the adjustment thus made was

recorded by the District Judge on April 6, 1981. An application purporting to be under Order 34 Rule 5 of the Code was made on November 20, 1981 by Maganlal for depositing Rs.2,650 equivalent of 5% of Rs.53,000 which was the highest bid of the first purchaser and a further sum of Rs.7,300, that is, 5% of Rs. 1,46,000 which was the highest bid of the second purchaser. The prayer which was made in this application was that the aforesaid sums may be paid to the first and second purchasers respectively and a final decree be passed in his favour in accordance with Order 34 Rule 5 of the Code. The Additional District Judge by his order dated November 27, 1981 permitted Maganlal to deposit the two amounts separately at his risk and we are informed by his learned counsel that these amounts were deposited in pursuance of the said permission. According to learned counsel for Maganlal no final orders were passed on the aforesaid application by the Additional District Judge in view of the pendency of these appeals in this Court and it was as such that C.M.P. No. 9940 of 1982 referred to above was filed in this Court.

It was urged by learned counsel for Maganlal that in case C.M.P. No. 9940 of 1982 is allowed it will not be necessary for him to press the merits of the appeals and it is only in the event of the said application being dismissed that merits of the appeal will have to be pressed. He, therefore, made a request that the said application may be decided first. Learned counsel for the first and the second purchasers did not seriously dispute the above contention. We have accordingly heard learned counsel for the parties on the said application and have not heard them on the merits of the appeals at this stage.

The aforesaid application has been opposed by learned counsel for the first and second purchasers on the ground that an order of sale of the mortgaged property passed by the District Judge under Section 32 of the Act after affecting an attachment under section 31 thereof will not come within the purview of a final decree for sale of mortgaged property contemplated by Order 34 Rule 5 of the Code and as such the

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benefit of that provision could not be extended to Maganlal. According to learned counsel for the purchasers Order 34 Rule 5 of the Code could be applied only if in a suit instituted in this behalf on the basis of a mortgage deed a final decree for sale was obtained and the property was put to auction in pursuance of such decree. The other submission which was made by them was that in any view of the matter the High Court after allowing the appeal filed by the first purchaser having confirmed the sale in his favour, an application under Order 34 Rule 5 of the Code was not maintainable inasmuch as the said provision contemplated payment "on or before the day fixed or at any time before the confirmation of a sale".

Learned counsel for Maganlal on the other hand urged that notwithstanding an order of confirmation of sale in favour of the first purchaser having been passed by the High Court Order 34 Rule 5 of the Code would still be attracted inasmuch as these appeals have been filed against the said order and till these appeals are decided the sale in favour of the first purchaser cannot become absolute. As regards the second purchaser he pointed out that while permitting fresh sale during the pendency of the appeal by the first purchaser the High Court had specifically directed that the fresh sale which may take place shall not be confirmed. He also urged that Order 34 Rule 5 of the Code was attracted

even to an order of sale of mortgaged property passed under section 32 of the Act and since the right of redemption which vests in Maganlal has not yet extinguished in view of the pendency of these appeals there was no impediment in the relief contemplated by Order 34 Rule 5 of the Code being granted.

We shall first deal with the question with regard to the effect of an appeal being pending against an order dismissing an application under Order 21 Rule 90 of the Code. In *Chandra Mani v. Anarjan Bibi*, A.I.R. 1934 P.C. Page 134 in execution of two final mortgage decrees for sale, the mortgaged properties were sold by auction. The judgment debtors filed applications under Order 21 Rule 90 of the Code which were dismissed and the sales were confirmed in pursuance of Order 21 Rule 92 on April 22, 1924. Appeals were filed against this order by some of the judgment debtors in the High Court which were dismissed on March 17, 1927. Sale certificates were thereafter granted to the two auction purchasers on May 19, 1928 and June 6, 1928 respectively, who thereupon applied on September 10, 1928 for possession of the properties purchased by them. These applications were objected to by the judgment debtors on the ground that they were barred by limitation under Article 180 of the Limitation Act, 1908

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which provided that such an application must be made within three years from the time when the sale becomes absolute. The Subordinate Judge overruled the objection on the ground that in view of the pendency of the appeals filed by the judgment debtors against the order dismissing their applications under Order 21 Rule 90 of the Code time did not begin to run until March 17, 1927 when the said appeals were dismissed by the High Court. On appeal by the judgment debtors the High Court took the view that the sale became absolute on April 22, 1924 when the Subordinate Judge confirmed the sales. On further appeal by the auction purchasers the order of the High Court was reversed by the Privy Council and it was held:

"Upon consideration of the sections and orders of the Code, their Lordships are of opinion that in construing the meaning of the words "when the sale becomes absolute" in Art. 180, Lim. Act, regard must be had not only to the provisions of O.21, R. 92(1) of the schedule to the Civil Procedure Code, but also to the other material sections and orders of the Code, including those which relate to appeals from orders made under O.21, R.92(1). The result is that where there is an appeal from an order of the Subordinate Judge, disallowing the application to set aside the sale, the sale will not become absolute within the meaning of Art. 180, Lim. Act, until the disposal of the appeal, even though the Subordinate Judge may have confirmed the sale, as he was bound to do, when he decided to disallow the above mentioned application.

Their Lordships therefore are of opinion that on the facts of this case the sales did not become absolute within the meaning of Art. 180, Lim. Act, until 17th March 1927, and that the applications for possession of the properties purchased at the auction sales were not barred by the Limitation Act."

A similar view was taken by this Court in Sri Ranga Nilayam Ramkrishan Rao v. Kandokari Chellayamma and another, [1950] S.C.R. 806 where it was held that when an appeal is filed against an order refusing to set aside an execution sale under Order 21 Rule 90 of the Code no finality can be attached to the order confirming the sale until the appeal is decided. In S.V. Ramalingam & others v. K.E. Rajagopalan and other, [1975] 2 M.L.J. Page 494 the question came up directly in connection with the applicability of Order 34 Rule

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5 itself which contemplates payment into court "on or before the day fixed or at any time before the confirmation of a sale". In that case too in pursuance of a final decree passed in this behalf the mortgaged property was sold and the applications made by the mortgagors for setting aside the sale were dismissed and the sale was confirmed and the sale certificate was also engrossed on stamp papers. The mortgagors filed an appeal against that order before the High Court and during the pendency of the appeal an application under Order 34 Rule 5 was filed for redemption of the mortgage. This application was opposed inter alia on the ground that such an application could not lie after the sale had been confirmed by the lower court. While repelling the objection of the auction purchaser and holding that the judgment debtors were entitled to the benefit of Order 34 Rule 5 of the Code it was held by Mr. Justice S. Natarajan (as His Lordship then was):

"The confirmation of a sale subsequent to the dismissal of a petition under Order 21, rule 90 cannot, in reality, alter the situation when the mortgagor-judgment-debtor has preferred within time an appeal against the dismissal of his petition under Order 21 Rule 90. Though the confirmation of the sale does take the auction-purchaser a step further than before the confirmation of the sale, the confirmation by itself, is in one sense, inchoate. The confirmation gives the sale only viability but does not render the sale an indefeasible one, till such time as the appeal preferred by the mortgagor against the validity of the sale remains undisposed. In that sense, the confirmation effected by the executing Court may become final as far as the executing Court is concerned, but it certainly does not stamp the transaction with irrevocable finality when alone the rights of parties get crystallised beyond retracement. Consequently, the appeal preferred by the judgment-debtor has the effect of rendering a sale and its confirmation fluidal and nebulous. It, therefore, follows that the finality of the sale is rendered at large before the appellate Court in appeal and as such, the petitioners will be entitled to exercise the right conferred on them under Order 34, rule 5 to redeem the mortgage."

The same view was reiterated in almost an identical case by a Bench of the Madras High Court in M. Sevugan Chettiar v. V.A. Narayana Raja, A.I.R. 1984 Madras Page 334. It was held that so long as there is no confirmation of sale in the eye of law and matter was sub-

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judice in appeal time was available for the judgment debtor

to make the deposit under Order 34 Rule 5 of the Code and the process of deposit could be worked out until the confirmation of sale reaches the finality.

Section 60 of the Transfer of Property Act confers on the mortgagor a right to redeem a mortgage. In so far as it is relevant for the purpose of these appeals the said section reads as hereunder:

"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 acknowledgment 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 act of the parties or by decree of a Court."

In Raghunath Singh and others v. Pt. Hansraj Kunwar and others, A.I.R. 1934 P.C. Page 205 in a suit filed for redemption of a mortgage a decree was passed containing the provision that in case of default by the plaintiff in payment his case will stand dismissed. Payment as contemplated by the decree was, however, not made and subsequently a second suit for redemption was filed. It was contested inter alia on the ground that in view of the non-payment of the decretal amount the previous suit stood dismissed and on account of the dismissal of that suit the subsequent suit was not maintainable inasmuch as right of redemption stood extinguished. The Privy Council after making reference to the proviso to section 60 of the Transfer of Property Act rejected the aforesaid objection and held:

"The right to redeem is a right conferred upon the mortgagor by enactment, of which he can only be deprived

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by means and in manner enacted for that purpose, and strictly complied with. In the present case the only basis for the claim that the right to redeem has been extinguished in S. 60; but in their Lordships' view the old decree cannot properly be construed as doing that which it does not purport to do, viz., as extinguishing the right to redeem."

This question came up very recently before this Court in Mhadagonda Ramgonda Patil and others v. Shripal Balwant Rainade and others, [1988] 3 S.C.C. Page 298. The mortgagors in that case filed a suit for redemption and obtained a final decree for sale of the mortgaged property. They, however, did not execute that decree and allowed the same to be time barred. Subsequently, a second suit for redemption was, filed claiming that the mortgage still subsisted and the mortgagors were entitled to redeem the same and get possession of the mortgaged property. The suit was contested

inter alia on the ground that as the mortgagors did not pay the decretal dues under the decree passed in the previous suit their right of redemption had been extinguished. The aforesaid plea raised in defence was repelled by the trial court and the suit for redemption was decreed. The defendants preferred an appeal against that decree before the High Court and raised a similar contention as was their defence in the trial court. It was held by the High Court that in spite of the fact that in the earlier suit a preliminary decree and final decree were passed and the mortgagors did not redeem the mortgages by depositing the decretal dues, still the right of redemption was not extinguished. The findings of the High Court aforesaid with regard to the maintainability of the second suit for redemption were challenged by the defendants before this Court and it was reiterated by their learned counsel that second suit was not maintainable. While repelling this submission and interpreting the provisions to section 60 of the Transfer of Property Act it was held:

"It is thus manifestly clear that the right of redemption will be extinguished (1) by the act of the parties or (2) by the decree of a court. We are not concerned with the question of extinguishment of the right of redemption by the act of the parties. The question is whether by the preliminary decree or final decrees passed in the earlier suit, the right of the respondents to redeem the mortgages has been extinguished. The decree that is referred to in the proviso to Section 60 of the Transfer of Property Act is a final decree in a suit for foreclosure, as provided in sub-rule (2) of Rule 3 of Order 34 and a final decree in a redemption suit as

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provided in Order 34, Rule 8(3)(a) of the Code of Civil Procedure. Sub-rule (2) of Rule 34, inter alia, provides that where payment in accordance with sub-rule (1) has not been made, the court shall, on an application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are 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. Thus, in a final decree in a suit for foreclosure, on the failure of the defendant to pay all amounts due, the extinguishment of the right of redemption has to be specifically declared. Again, in a final decree in a suit for redemption of mortgage by conditional sale or for redemption of an anomalous mortgage, the extinguishment of the right of redemption has to be specifically declared, as provided in clause (a) if sub-rule (3) of Rule 8 of Order 34 of the Code of Civil Procedure. These are the two circumstances--(1) a final decree in a suit for foreclosure under Order 34, Rule 3(2); and (2) a final decree in a suit for redemption under Order 34, Rule 8(3)(a) of the Code of Civil Procedure--When the right of redemption is extinguished."

It was further held that in a suit for redemption of a

mortgage other than a mortgage by conditional sale or an anomalous mortgage, the mortgagor has a right of redemption even after the sale has taken place pursuant to the final decree, but before the confirmation of such sale. In view of these provisions the question of merger of mortgage-debt in the decretal-debt does not arise at all.

In this view of the matter we are of the opinion that in case the provisions of Order 34 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.

We shall now advert to the question as to what is the nature of an order passed by the District Judge under sections 31 and 32 of the Act. Clause (a) of sub-section (1) of Section 31 of the Act which is relevant for the purpose of these appeals reads:

"31. (1) Where an industrial concern, in breach of any

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agreement, makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation or where the Financial Corporation requires an industrial concern to make immediate repayment of any loan or advance under section 30 and the industrial concern fails to make such repayment, then without prejudice to the provisions of section 29 of this Act and of section 69 of the Transfer of Property Act, 1882 any officer of the Financial Corporation, generally or specially authorised by the Board in this behalf, may apply to the district judge within the limits of whose jurisdiction the industrial concern carries on the whole or a substantial part of its business for one or more of the following reliefs, namely:

(a) for an order for the sale of the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation as security for the loan or advance; or
Sub-section (1) of section 32 of the Act provides:

"32. (1) When the application is for the reliefs mentioned in clauses (a) and (c) of sub-section (1) of section 31, the district judge shall pass an ad interim order attaching the security, or so much of the property of the industrial concern as would on being sold realise in his estimate an amount equivalent in value to the outstanding liability of the industrial concern to the Financial Corporation, together with the costs of the proceedings taken under section 31, with or without an ad interim injunction restraining the industrial concern from transferring or removing its machinery, plant or equipment."

Sub-section (4) of section 32 contemplates issue of a notice to the industrial concern in the manner stated therein. Sub-section (5) inter alia contemplates that if no cause

is shown on or before the date specified in the notice the District Judge shall forthwith make the ad interim order absolute and direct the sale of the attached property. Sub-section (6) on the other hand contains the procedure to be followed by the District Judge if cause is shown by the industrial concern

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on receipt of the notice and provides that after making an investigation as contemplated the District Judge may inter alia confirm the order of attachment and direct the sale of the attached property. Sub-section (8) of section 32 provides:

"(8) An order of attachment or sale of property under this section shall be carried into effect as far as practicable in the manner provided in the Code of Civil Procedure, 1908 for the attachment or sale of property in execution of a decree as if the Financial Corporation were the decreeholder."

In Gujarat State Financial Corporation v. M/s. Natson Manufacturing Co. (P) Ltd. & Ors., [1979] 1 S.C.R. Page 372 the question as to what was the nature of proceedings under Sections 31 and 32 of the Act came up for consideration before this Court in connection with an objection about payment of court fee on an application under section 31(1). It was held that the form of the application, the nature of the relief, the compulsion to make interim order, the limited inquiry contemplated by sub-section (6) of section 32 and the nature of relief that can be granted and the manner of execution clearly show that the application under section 31(1) is neither a plaint as contemplated by Article 1 of Schedule 1 nor an application in the nature of a plaint as contemplated by Article 7 of the Court Fees Act, 1870. It was also held that section 31(1) of the Act prescribes a special procedure for enforcement of the claims of the Financial Corporation and it is not even something akin to a suit of a mortgagee to recover mortgage money by sale of mortgaged property. It was pointed out that the distinguishing features noticeable between a suit for recovery of mortgage money by sale of mortgaged property and an application under section 31 for one or more reliefs specified therein are that even if the Corporation-applicant so chooses it cannot in the application pray for a preliminary decree for accounts or final decree for payment of money nor can it seek to enforce any personal liability even if such one is incurred under the contract of mortgage. The Corporation cannot pray for a decree of its outstanding dues and can make an application for one of the three reliefs mentioned in section 31(1), none of which if granted results in a money decree or decree for recovery of outstanding loans or advance. It was further held that a substantive relief in an application under section 31(1) "is something akin to an application for attachment of property in execution of a decree at a stage posterior to the passing of the decree". With regard to the scope of sub-section (6) of section 32 it was held that it has to be read in the context in

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which it is placed and it does not expand the context in the application as if it is a suit between a mortgagee and the mortgagor for sale of mortgaged property. The relief claimed under section 31(1) was held not to be a substantive relief which can be valued in terms of the monetary gain or prevention of monetary loss. It was pointed out that the claim of the Corporation in an application under section 31(1) was that there is a breach of agreement or default in making

repayment of loan or advance or instalment thereof and, therefore, the mortgaged property could be sold.

In *M/s. Everest Industrial Corporation and others v. Gujarat State Financial Corporation*, [1987] 3 S.C.C. Page 597 a question arose as to whether an order under section 34 of the Code could be passed in proceedings under section 31(1) of the Act. After referring to the decision in the case of *Gujarat State Financial Corporation (supra)* it was held that if as held by this Court in that case the proceeding instituted under section 31(1) of the Act is something akin to an application for attachment of property in execution of a decree at a stage posterior to the passing of the decree no question of passing any other order under section 34 of the Code would arise since that section could be applicable only at the stage of the passing of the decree and not to any stage posterior to the decree.

In view of these two decisions the law seems to be settled that an application under section 31(1) of the Act cannot be put on par to a suit for enforcement of a mortgage nor the order passed thereon under section 32 of the Act be put on par as if it was an order in a suit between a mortgagee and the mortgagor for sale of mortgaged property. On the other hand the substantive relief in an application under section 31(1) is something akin to an application for attachment of property in execution of a decree at a stage posterior to the passing of the decree.

We now turn to the crucial question as to whether the relief contemplated by Order 34 Rule 5 of the Code which in substance is to permit redemption of the mortgage during the course of executing of a final decree for sale of mortgaged property can be granted even after the property which was mortgaged as security for loan taken from the Corporation has, in execution of an Order under Section 32 of the Act passed on an application under Section 31(1) thereof, been sold by the District Judge following the procedure contemplated by Sub-section (8) of Section 32 of the Act.

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In this connection, it is relevant to note that in neither of the two cases namely, *Gujarat State Financial Corporation and M/s Everest India Corporation*, (supra) Sub-section (8) of the Section 32 of the Act came up for consideration. Section 46-B of the Act reads as hereunder:

"46B. The provisions of this Act and of any rules or orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the memorandum or articles of association of an industrial concern or in any other instrument having effect by virtue of any law other than this Act, but save as aforesaid, the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being applicable to an industrial concern."

No provision in the Act or any Rule or Order made thereunder has been brought to our notice stating that the effect of any action taken thereunder including the passing of orders of attachment and sale under Sections 31 and 32 thereof, is to extinguish the right of redemption. In other words, there is nothing in the Act or in any Rule or Order made thereunder which may be inconsistent with Section 60 of the Transfer of Property Act particularly the proviso thereto. Consequently no provision in the Act can be read "in derogation" of the said Section 60.

It is true that under the Code it is not necessary to

attach the mortgaged property before putting it to sale but Section 31 of the Act contemplates attachment of even the mortgaged property and Section 32 thereof speaks of an Order of sale of the attached property, but that alone can by no stretch of imagination have the effect of extinguishing the equity of redemption. Such attachment does not have that effect either under the proviso to Section 60 of the Transfer of Property Act or under any provision of the Act, or Rule or Order made thereunder Sections 31 and 32 of the Act in so far as they contain the requirement of attaching the mortgaged property before its sale and ordering sale of the attached property read with Sub-section (8) of Section 32 of the Act will, therefore, have the only effect that the said requirement "shall be in addition to, and not in derogation of" the provisions contained in the Code for sale of mortgaged property.

The purpose of enacting Sections 31 and 32 of the Act was apparently to provide for a speedy remedy for recovery of the dues of the Financial Corporation. This purpose however was, in cases covered by

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clause (a) of Sub-section (1) of Section 31 confined to the stage of obtaining an Order akin to a decree in a suit, in execution whereof "the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation as security for the loan or advance" could be sold. Sections 31 and 32 of the Act cut across and dispense with the provisions of the Code from the stage of filing a suit to the stage of obtaining a decree in execution whereof such properties as are referred to in clause (a) of Sub-section (1) of Section 31 could be sold. After this stage was reached sale in execution of an Order under Section 32 of the Act was for purposes 'of execution put at par with sale in execution of a decree obtained in a suit, by enacting Sub-section (8) of Section 32 of the Act. This Sub-section as noted earlier provides that an order of attachment or sale of property under this section shall be carried into effect as far as practicable in the manner provided in the Code of Civil Procedure, 1908 for the attachment or sale of property in execution of a decree as if the Financial Corporation were the decreeholder.

Expressions "as far as practicable" and "in execution of a decree as if the Financial Corporation were the decreeholder" are the only expressions which qualify the "manner provided" for "sale of property in execution of a decree", as contained not only in some specific provision of the Code e.g. Order 21 thereof but "in the Code of Civil Procedure, 1908" namely, all the provisions in the Code in this regard ' wherever they may be.

If in its anxiety to ensure speedy recovery of the dues of the Financial Corporation Parliament had intended also to cut across and dispense with the procedure contained in the Code for execution of a decree for sale of such properties. as are referred to in clause (a) of Sub-section (1) of Section 31 of the Act, it would have made some provision analogous to provisions contained in the enactments for revenue recovery. But that was not done. Instead, Sub-section (8) was incorporated in Section 32 of the Act. It is in this background that the question whether provisions of Order 34 Rule 5 of the Code will be attracted or not to the facts of the instant case has to be considered.

Relying on a decision of the Karnataka High Court in M/s Hotel Natraj v. Karnataka State Financial Corporation, A.I.R. 1989 Karnataka 90 it was urged by learned counsel for Maganlal that in view of sub-section (8) of section 32

of the Act the applicability of the provisions of Order 34 Rule 5 of the Code cannot be denied to the facts of the instant case. Learned counsel for the purchasers on the other

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hand urged that section 32(8) of the Act made the manner provided in the Code Applicable only "as far as practicable" and there was neither a decree nor was the Financial Corporation as decree holder in a suit for sale but was only deemed to be a decree holder by legal fiction because of the expression in execution of a decree as if the Financial Corporation were the decree-holder"

We shall first deal with the scope and import of the expression far as practicable" and "in execution of a decree as if the Financial Corporation were the decree-holder" used in sub-section (8) of section 32 of the Act. Without anything more the expression "as far as practicable" will mean that the manner provided in the Code for attachment or sale of property in execution of a decree shall be applicable in its entirety except such provision therein which may not be practicable to be applied. It will be for the person asserting that a particular provision with regard to execution of a decree for sale of an immovable property contained in the Code of Civil Procedure will not apply to execution of an order under section 32 of the Act on the ground that it was not practicable to show as to how and why it was not practicable. As regards the second expression namely "in execution of a decree as if the Financial Corporation were the decree-holder" it may be pointed out that even though an order under section 32 as seen above is not a decree stricto sensu as defined in section 2(2) of the Code and the Financial Corporation would not as such be called the decree holder, section 32(6) of the Act imports a legal fiction whereby the order under section 30 of the Act for purposes of execution would be a decree and the Financial Corporation a decree holder. Apparently, the person against whom such decree has been executed namely the debtor of the Financial Corporation would be the judgment debtor. In East End Dwellings Company Limited v. Finsbury Borough Council, [1952] Appeal Cases 109 Lord Asquith at page 132 observed "if you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it

The Statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of the state of affairs"

It is also settled law that a legal fiction is to be limited to the purpose for which it was created and should not be extended beyond the legitimate field. Reference for the proposition may be made to the

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decisions of this Court in The Bengal Immunity Company Limited v. The State of Bihar and others, [1955] 2 S.C.R. Page 603; The Commissioner of Income-Tax, Bombay City 1, Bombay v. Amarchand N. Shroff, [1963] Supp. 1 S.C.R. Page 699 and Commissioner of Income Tax. Gujarat v. Vadilal Lalubhai, etc. etc., [1973] 3S.C.C. Page 17.

As is apparent from the plain language of section 32(8) of the Act the legal fiction was created for the purpose of executing an order under section 32 of the Act for sale of attached property as if such order was a decree in a suit for sale and the Financial Corporation was the decree holder

whereas the debtor was the judgment debtor. Consequently, the provisions of the Code of Civil Procedure with regard to execution of a decree for sale of mortgaged property contained in Order 21 of the Code including the right to file an appeal against such orders passed during the course of execution which are appealable, shall apply mutatis mutandis to execution of an order under section 32 of the Act unless some provision is not practicable to be applied. It cannot be disputed that the provisions contained in Order 34 Rule 5 of the Code are attracted as is apparent from the plain language thereof during the proceedings in execution of a final decree for sale and are thus provisions contained in the Code with regard to and having a material bearing on the execution of a decree as aforesaid. As seen above, the provisions contained in Order 34 Rule 5 of the Code in substance permit the judgment debtor to redeem the mortgage even at the stage contemplated by Order 34 rule 5 unless the equity of redemption has got extinguished. Since the contingency whereunder an equity of redemption gets extinguished is contained in the proviso to section 60 of the Transfer of Property Act and since as indicated above, in the instant case the equity of redemption has not extinguished we find no good ground to take the view that even though all the remaining provisions with regard to execution of a decree for sale of mortgaged property will apply to execution of an order under section 32 of the Act, the provision contained in Order 34 Rule 5 of the Code shall not apply. Nothing has been brought to our notice as to how and why it is not practicable to apply the said provision. As already pointed out earlier it has been held by this Court in the case of Mhadagonda Ramgonda Patil, (supra) that in a suit for redemption of a mortgage other than a mortgage by conditional sale or an anomalous mortgage, the mortgagor has a right of redemption even after the sale has taken place pursuant to the final decree but before the confirmation of such sale and that in view of these provisions the question of merger of mortgage debt in the decretal debt does not at all arise. We again do not find any good ground for holding that the said principle will not be attracted to

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a sale which has taken place pursuant to an order under section 32 of the Act in so far as the provisions in the Code with regard to execution of a decree are concerned. Of course, in view of the limited scope of legal fiction as indicated above the provisions in the Code shall be applicable to an order of sale under the Act only with regard to execution of that order as if it was a decree in a suit and the Financial Corporation was a decree holder and the debtor a judgment debtor and this legal fiction will not be capable of being extended so as to treat an order of sale passed under the Act to be a decree in a suit for any other purpose for instance applying section 34 of the Code as was sought to be done in the case of M/s Everest Industrial Corporation, (supra) nor could it be extended for treating the application made under section 31(1) of the Act as a plaint for purposes of payment of court fee as was sought to be done in the case of Gujarat State Financial Corporation, (supra).

That the provisions of the Code with regard to execution of a decree for sale of mortgaged property would apply to execution of an order under section 32 of the Act is clear from section 32(8) of the Act and the reasons stated above. It would also be so inasmuch as even otherwise once the order under section 32 for sale is made executable by a District Judge in his capacity as District Judge and not

persona designata the provisions of the Code which are exercisable by the District Judge in execution of a decree for sale of mortgaged property would get attracted.

In *National Sewing Thread Co. Ltd. v. James Chadwick & Bros. Ltd.*, [1953] S.C.R. Page 1028 an appeal was filed before a Single Judge of the Bombay High Court under section 76(1) of the Trade Marks Act, 1940 which provides that an appeal shall lie from any decision of the Registrar under the Act or the rules made thereunder to the High Court having jurisdiction. The Trade Marks Act, however, did not make any provision with regard to the procedure to be followed by the High Court in the appeal or as to whether the order of the High Court was appealable. Against the judgment of the Single Judge an appeal was preferred under clause 15 of the Letters Patent. That appeal was allowed and the judgment of the Single Judge was reversed. Before the Supreme Court an objection was raised that the Letters Patent appeal was not maintainable. While repelling the said objection it was held:

"Obviously after the appeal had reached the High Court it has to be determined according to the rules of practice and
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procedure of that Court and in accordance with the provisions of the charter under which that Court is constituted and which confers on it power in respect to the method and manner of exercising that jurisdiction. The rule is well settled that when a statute directs that an appeal shall lie to a Court already established, then that appeal must be regulated by the practice and procedure of that Court. This rule was very succinctly stated by Viscount Haldane L.C. in *National Telephone Co., Ltd. v. Postmaster-General*, [1913] A.C. 546, in these terms:-

"When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decision likewise attaches."

The same view was expressed by their Lordships of the Privy Council in *R.M.A.R. KLA. Adaikappa Chettiar v. Ra. Chandrasekhara Thevar*, [1974] 741A 264, wherein it was said:

"Where a legal right is in dispute and the ordinary Courts of the country are seized of such dispute the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which does not, in terms confer a right of appeal."

Again in *Secretary of State for India v. Chellikani Rama Rao*, [1916] I.L.R. 39 Mad 617, when dealing with the case under the Madras Forest Act their Lordships observed as follows:

"It was contended on behalf of the appellant that all further proceedings in Courts in India or by way of appeal were incompetent, these being excluded by the terms of the statute just quoted. In their Lord-

ships' opinion this objection is not well-founded. Their view is that when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders, and decrees the ordinary rules of the Civil Procedure Code apply."

Though the facts of the cases laying down the above rule were not exactly similar to the facts of the present case, the principle enunciated therein is one of general application and has an apposit application to the facts and circumstances of the present case. Section 76 of the Trade Marks Act confers a right of appeal to the High Court and says nothing more about it. That being so, the High Court being seized as such of the appellate jurisdiction conferred by section 76 it has to exercise the jurisdiction in the same manner as it exercises its other appellate jurisdiction and when such jurisdiction is exercised by a single Judge, his judgment becomes subject to appeal under clause 15 of the Letters Patent there being nothing to the contrary in the Trade Marks Act."

In view of the foregoing discussion we are of the opinion that the application made by Maganlal under Order 34 Rule 5 of the Code is maintainable and the requirements of the said provision having been satisfied the application deserves to be allowed.

In the result, while C.M.P. No. 19760 of 1984 which is for initiating contempt proceedings is dismissed, C.M.P. No. 99409 1982 under Order 34 Rule 5 of the Code filed by Maganlal is allowed. Accordingly Civil Appeal No. 2990 of 1980 filed by Maganlal as also the application made by him under Order 21 Rule 90 of the Code are allowed. The order appealed against passed by the High Court is set aside and the order passed by the Additional District Judge setting aside the auction sale in favour of the first purchaser is restored. Civil Appeal No. 2991 of 1980 filed by the second purchaser is also allowed in so far as it prays for the setting aside of the order of the High Court. However, on the view we have taken the subsequent auction sale held in favour of the second purchaser cannot be sustained and is also hereby set aside. As a consequence we direct that since the Corporation in the instant case has accepted Rs.65,000 in full and final satisfaction of its claim, it shall return the mortgage deed executed by Maganlal to him. The Additional District Judge in whose court the application under Order 34 Rule 5 of the Code was made as stated earlier shall strike off the execution in full and final satisfaction. The sum of Rs.53,000 deposited by the first purchaser together with Rs.2,650 representing 5% of the said sum deposited by Maganlal and interest which may have accrued on these amounts shall be paid over to the first purchaser. Likewise, the

sum of Rs. 1,46,000 deposited by the second purchaser together with Rs.7,300 representing 5% of the said sum deposited by Maganlal and the interest which may have accrued on these amounts shall be paid over to the second purchaser. There shall be no order as to costs.

R.S.S.
allowed.

Appeals

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JUDIS