

U. NILAN  
v.  
KANNAYYAN (DEAD) THROUGH LRS.

OCTOBER 5, 1999

[S. SAGHIR AHMAD AND S. RAJENDRA BABU, JJ.]

*Code of Civil Procedure, 1908—Order 34 Rule 5, Order 21 Rules 89, 90, 91, 92 and 95—Mortgage deed—Suit for recovery of mortgage money—Decreed—Non-payment of decretal amount—Auction sale—Confirmation of sale—Appeals—Pendency of—Application for deposit of mortgage money under Order 34 Rule 5—Maintainability of—Held, can be maintained even after confirmation of sale but during the pendency of appeal against an order rejecting an application for setting aside sale or confirmation of sale—Sale does not become absolute merely on passing an order of confirmation but only on disposal of appeals pending.*

*Limitation Act, 1908—Article 180—Sale—Confirmation of sale—Application for delivery of possession—Filling of—Prescribed period of three years—Reckoning of—Held, the prescribed period would run not from the date of confirmation of sale but from the date when the appeals are disposed of—Civil Procedure Code, 1908—Order 21 Rule 95.*

The predecessor-in-interest of respondent mortgaged his property by depositing the title deeds in favour of appellant. Appellant filed a suit for recovery of mortgage money which was decreed. On non-payment of decretal amount, the property was put to auction and sale was conducted. Respondent mortgagor's application for setting aside the sale was dismissed in default and sale was confirmed. Thereafter, respondent made applications for setting aside the confirmation of sale for restoration of application for setting aside sale. On rejection, appeals were filed before High Court. In the meantime, respondent made an application under Order 34 Rule 5 CPC for deposit of mortgage money which was allowed and the mortgage was discharged. Hence the present appeal.

On behalf of appellant it was contended that the application of the respondent for setting aside the sale having been dismissed in default by the Trial Court and the application for restoration also having been dismissed, the sale as also its confirmation in favour of the appellant,

A should be treated to have been upheld by the High Court. Consequently, the High Court was not justified in allowing the application under Order 34 Rule 5 CPC.

B On behalf of respondent-mortgagor it was contended that when the applications for setting aside the order for default of dismissal was rejected, an appeal was filed in the High Court and it was during the pendency of that appeal that an application under Order 34 Rule 5 CPC was filed for depositing the balance of the mortgage money. Thus, the application under Order 34 Rule 5 CPC cannot be said to be not maintainable and Court had rightly discharged the mortgage.

C Dismissing the appeal, the Court

HELD : 1.1. Application filed by the respondent-mortgagor for deposit of mortgage money under Order 34 Rule, 5, Civil Procedure Code 1908, during the pendency of appeals before the High Court against D confirmation of sale, is maintainable. [400-H; 401-A-D]

1.2. An application under Order 34 Rule 5 CPC can be filed or moved by the mortgagor for the deposit of mortgage money at any time before the confirmation of sale. The sale of property, in execution of decree, does not become absolute merely on the passing of an order confirming the sale E under Order 21 Rule 92 but if there has been an appeal against an order rejecting an application for setting aside the sale, made either under Order 21 Rule 89 or Rules 90 or 91, the sale would not become absolute till the disposal of that appeal. Further, the limitation of three years prescribed under Article 180 of the Limitation Act, 1908 for making an application for F delivery of possession under Order 21 Rule 95 would run, not from the date on which the sale is confirmed under Order 21 Rule 92 but from the date on which the appeals are disposed of. [402-G; 405-D; E; F]

*Chandra Mani Saha and Ors. v. Anarjan Bibi and Ors.*, AIR (1934) Privy Council 134 and *Maganlal & Anr. v. Jaiswal Industries Neemach & G Ors.*, [1989] 3 SCR 696, relied on .

*Hukamchand v. Bansilal & Ors.*, [1967] 3 SCR 695, referred to.

*Chhogan Lal Bagri v. Behari Lal Shah Ray*, AIR (1933) Cal. 311; *Kandukuri Chellamma alias Mangamma & Anr. v. Shri Ranganilayam H Ramakrishnarao*, I.L.R. (1946) Madras 795 = AIR (1946) Madras 337;

*S.V. Ramalingam and Ors. v. K.E. Rajagopalan and Anr.*, (1975) 2 Madras Law Journal 494; *V.A. Narayana Raja v. Renganayaki Achi (died) and Ors.*, AIR (1984) Madras 27; *Varadarajan v. Venkatapathy Reddy*, (1953) 1 M.L.J. 148; *Ramathal v. Nagarathinammal*, (1967) 1 M.L.J. 260 and *Satyanarayana v. Ramamurthi*, (1960) 2 An. W.R. 430, approved. A

*Neckbar Sahai v. Prakash Chandra Nag Chaudhuri*, AIR (1930) Cal. 86 already overruled. B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 841 of 1988.

From the Judgment and Order dated 14.1.88 of the Madras High Court in C.R.P. No. 4402 of 1985. C

V. Balaji and A.T.M. Sampath for the Appellant.

R. Sundaravaradan and M.A. Krishnamoorthy for the Respondent. D

The Judgment of the Court was delivered by

**SAGHIR AHMAD, J.** The facts labyrinthically placed in the jargon of hosts of applications, appeals and revisions, are summed up below. E

The respondent who is since dead and is now represented by his legal representatives (hereinafter referred to as 'respondent'), had mortgaged his properties by deposit of title deeds in favour of the appellant in 1976. On January 9, 1978, the appellant filed O.S. No. 21/78 for the recovery of mortgage money in the Court of Sub-Judge, Thanjore. A preliminary decree in the suit was passed on 10th September, 1979 for a sum of Rs. 73,915. This was followed by a final decree passed on 21.3.1980. F

Since the respondent did not pay the decretal amount to the appellant, the latter, namely, the appellant filed an Execution Application (E.P.No.164/80) for the sale of the hypothecated property. When the property was put up for sale on 25.6.1981, no person was available to offer his bid and, therefore, E.P.No.164/80 was consigned to record as closed. G

The appellant, thereafter, filed E.P.No.106/81 for sale of the mortgaged properties but when this application too failed to fetch bidders for the properties which were put up for sale on 25.1.1982 and 25.3.1982, H

A the appellant himself, through another application, namely E.A.No. 88/82, sought permission of the Court to bid at the auction sale and to set off the decretal amount against the sale price. This application was allowed on 28.4.1982. The respondent, in the meantime, filed E. Al. Nos. 115 and 116 of 1982 claiming relief under the Debt Relief Act but the Applications were rejected by the Court.

B  
 In the auction which was held on 29th April, 1982, the appellant offered his bid in the sum of Rs.75,005 . The case was directed to come up on 1st July, 1982 for confirmation of sale. In the meantime on 21st of June, 1982, respondent filed E.A.No. 151/82 under Order 21 Rule 90 read with  
 C Section 47 CPC for setting aside the sale held on 29.4.1982. This Application was contested by the appellant who indicated in his counter affidavit that there was no irregularity or fraud committed in conducting the sale.

D On 18th of September, 1982, E.P. No.151/82 was dismissed in default and the sale was confirmed under Order 21 Rule 92 C.P.C. The respondent, thereafter, filed E.A.No. 293/82 for restoration of E.P.No. 151/82 which was dismissed in default. He also filed another application, namely, E.A.No. 294/82 for setting aside the confirmation of sale. Application for setting aside the sale was rejected by the Executing Court on 2.4.1983 as not maintainable and on the same day, E.A.No. 294/82 was  
 E also dismissed.

The respondent then filed C.M.A. No.267/83 in the High Court against the order by which E.A.No. 294/82 for setting aside the confirmation of sale was rejected. He also filed C.M.A. No. 462 of 1983 in the High  
 F Court against the order rejecting the Application (E.A. No. 293 of 1982) for restoration of E.A. No. 151 of 1982. In C.M.A. No. 267 of 1983, respondent moved an application (C.M.P. 7710 of 1983) for an order of interim stay which was granted subject to his depositing Rs.25,000 in the Court before 30.6.83. This order was complied with and the respondent  
 G deposited that amount in the Executing Court on 24.6.83.

While C.M.A. No. 267 of 1983 and C.M.A. No. 462 of 1983 were pending in the High Court, the respondent made an Application (E.A. No. 226 of 1983) in the Suit (O.S.No. 21 of 1978) for depositing the balance of the mortgage amount under Order 34 Rule 5 CPC. While this Application  
 H was pending, C.M.A. No. 267 of 1983 was allowed by the High Court by

its judgment dated 21st July, 1983 and the order passed by the Executing Court in E.A. No. 294 of 1982 was set aside and the case was remanded to the Executing Court to hear and decide the Application (E.A. No. 294 of 1982) afresh after allowing the parties to lead such evidence as they considered necessary. In the meantime, by order dated 27th July, 1983, respondent's Application (E.A. No.226 of 1983) under Order 34 Rule 5 was dismissed on the ground that it was not maintainable as the High Court, in its judgment dated 21st July, 1983 while remanding the case, had not indicated anything in that regard nor had it issued any direction. Against this order, the respondent filed C.R.P. No. 3473 of 1983.

C.M.A. No. 462 of 1983 and C.R.P. No. 3473 of 1983 were taken up together and the High Court by its judgment dated 7th September, 1983, allowed both the matters with a direction to the lower court to issue challan for the deposit of Rs. 62,563 by the respondent without prejudice to the contentions of the parties.

On 16th September, 1983, when the matter was taken up by the Trial Court, respondent's Application (E.A. No. 226 of 1983) was allowed and the balance amount of Rs. 62,563, which was directed to be deposited, was accepted and it was recorded that the mortgage was discharged.

After remand by the High Court, E.A. No. 293 of 1982 and E.A. No. 294 of 1982 were both dismissed by the Trial Court on 12th December, 1983 with the finding that the respondent had committed forgery by filing and relying upon false documents for which he was liable to be prosecuted. Against this judgment, the respondent filed C.M.A. 19 of 1984 and C.M.A. 74 of 1984. While these two appeals were pending in the High Court, the respondent filed I.A. 337 of 1984 before the Trial Court for return of documents under Order 34 Rule 5A CPC, but the application was rejected by the Trial Court on 6th September, 1985, against which the respondent filed C.R.P. No.4402 of 1985 in the High Court.

C.M.A. No.19 of 1984 and C.M.A. No.74 of 1984, as also C.R.P. No.4402 of 1985 were taken up together by the High Court and by the common judgment dated 14th January, 1988, C.M.A. 19 of 1984 and C.M.A. 74 of 1984 were dismissed, but C.R.P. 4402 of 1985 was allowed with the findings : (i) Application under Order 34 Rule 5 had been filed during the pendency of the appeal in the High Court and the High Court in that proceeding had already directed a challan to be issued to the

A respondent to enable him to deposit the balance of the mortgage money, which he did deposit though without prejudice to the respective contentions of the parties. (ii) After remand, respondent's Application No. 226 of 1983 was allowed and the balance amount of Rs.62,563 was deposited by the respondent, which order became final as it was never challenged by the appellant. Therefore, the Application, namely, I.A. 337 of 1984 for return of documents, which was dismissed by the Trial Court on 6.9.1985, was liable to be allowed.

The High Court reversed the order of the Trial Court and allowed the Revision. It is against this judgment that the present appeal has been filed.

Mr. A.T.M. Sampath, learned counsel appearing on behalf of the appellant, has contended that the application of the respondent for setting aside the sale having been dismissed in default by the Trial Court and the application for restoration also having been dismissed, the sale as also its confirmation in favour of the appellant, shall be treated to have been upheld by the High Court and consequently the application of the respondent under Order 34 Rule 5 CPC as also the application filed under Order 34 Rule 5A for return of documents, were liable to be dismissed. It is contended that the sale having been confirmed in favour of the appellant and the confirmation of sale having been upheld by the High Court, there was no jurisdiction left in the High Court to allow the application under Order 34 Rule 5 CPC. It is also contended that the High Court passed contradictory orders. It is pointed out that as respondent's application for setting aside that order, by which his application for setting aside the sale was dismissed in default, was rejected and the confirmation of sale in favour of the appellant was thus upheld, the High Court passed a contradictory order that mortgage amount could be legally deposited by respondent and on the amount being so deposited, the mortgage stood discharged.

Learned counsel for the respondent, on the contrary, contended that when the application for setting aside the order by which E.A. No. 151 of 1982 was dismissed for default was rejected, an appeal was filed in the High Court and it was during the pendency of that appeal that an application under Order 34 Rule 5 C.P.C. was filed by the respondent for depositing the balance of the mortgage money. This application was ultimately allowed

and the balance of the amount of Rs.62,563 was deposited by the respondent and consequently the mortgage was discharged. The application under Order 34 Rule 5 C.P.C. was clearly maintainable even at that stage. It is contended that C.M.A. No. 267 and A.A.O. No. 462 of 1983 were allowed by the High Court and the case was remanded to the Executing Court for deciding the application of the respondent for setting aside the sale afresh. That being the stage of the proceedings, the application under Order 34 Rule 5 C.P.C. cannot be said to be not maintainable. In fact, the application, it is contended, was clearly maintainable and the Execution Court by its order dated 16.9.1983 had rightly discharged the mortgage. This order, it is contended, had not been challenged by the appellant at any stage and has become final. The appellant cannot, therefore, rely upon the order dated 16.9.1983 by which the sale in his favour was confirmed.

In view of the respective contentions made by the learned counsel for the parties, the question which is required to be decided by us in this appeal is whether the application filed by the respondent under Order 34 Rule 5 C.P.C. was maintainable even after confirmation of sale. The further question which is required to be decided is whether an application under Order 34 Rule 5 C.P.C. would be maintainable during the pendency of the appeal against the order of the Executing Court by which the application for setting aside the sale was rejected.

Order 34 Rule 5 provides as under :

“XXXIV. SUITS RELATING TO MORTGAGES OF IMMOVABLE PROPERTY.

R. 5. Final decree in suit for sale.

(1) Where, on or before the day fixed or at any time before the confirmation of 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

- A in the preliminary decree,  
and, if necessary, —
- (b) ordering him to transfer the mortgaged property as directed in the said decree,
- B and, also, if necessary, —
- (c) ordering him to put the defendant in possession of the property.
- C (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.
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Where such deposit has been made, the purchaser shall be entitled to an order for payment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent thereof.

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- (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.”
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The provisions extracted above clearly indicate that an application under Order 34 Rule 5 C.P.C. can be filed or moved by the mortgagor for the deposit of mortgage money at any time before the confirmation of sale.

- G Originally, there was no provision under Order 34 Rule 5 C.P.C. enabling the defendant to deposit the mortgage money into Court at any time before confirmation of sale so as to save his property from being sold.
- H This provision was introduced by the Transfer of Property (Amendment)

Act (21 of 1929) and it was provided that if, at any time, before the confirmation of sale made in pursuance of a final decree, the defendant makes payment into Court of all amounts due from him under Sub-rule (1) of Rule 4 of Order 34, the Court shall, on an application made by the defendant, pass a final decree and if such a decree has already been passed, it would be open to the Court to pass an order :

- (a) directing the plaintiff-mortgagee to deliver up the documents referred to in the preliminary decree to the mortgagor; and, if necessary
- (b) directing him to transfer the mortgaged property, as directed in the said decree and, also, if necessary,
- (c) directing the plaintiff-mortgagee to put the defendant in possession of the property.

Order 34 Rule 5 provides the last chance to the mortgagor to save his property from being passed on to the auction purchaser and avoid the disturbance of his title ensuring, at the same time, that mortgage money is paid to the person in whose favour the property had been mortgaged by depositing the entire amount in the Court, including the amount, where the property has been sold, contemplated by sub-rule (2) of this Rule. The whole step has to be taken before the confirmation of sale.

What is the meaning of the phrase "before the confirmation of sale" may now be considered in the light of other relevant provisions of the Code of Civil Procedure.

Now, an application to set aside the sale can be filed under Order 21 Rule 89 C.P.C. while another application for setting aside the sale on the ground of irregularity or fraud can also be given under Order 21 Rule 90 C.P.C. Similarly, if the property has been sold, it would be open to the purchaser to make an application for setting aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold in execution of the decree.

Order 21 Rule 92(1) C.P.C. including the proviso thereto provides as under :

A “R. 92. Sale when shall become absolute or be set aside.- Where no application is made under Rule 89, Rule 90 or Rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

B Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the Court shall not confirm such sale until the final disposal of such claim or objection.”

C The above provisions indicate that if an application is not made either under Rule 89 or Rule 90 or Rule 91 for setting aside the sale, the Court would confirm the sale. So also, where such application is made and is disallowed, the sale would be confirmed. When the ‘sale’ thus becomes absolute, the Court is required to grant a certificate under Order 21 Rule 94 to the person in whose favour the sale has been confirmed specifying therein the details of the property sold, the name of the purchaser as also the date on which the sale became absolute. Once these steps have been taken and a certificate has been issued to the purchaser, the latter, namely, the purchaser can obtain delivery of possession of the property sold through the Court process by making an application under Order 21 Rule 95 C.P.C. or if the property is in possession of the tenant, symbolic possession would be delivered to him.

F Article 180 of the Limitation Act, 1908 which has since been replaced by the Limitation Act, 1963, provided for a limitation of three years for making an application for delivery of possession under Order 21 Rule 95 C.P.C.

G In a case which was ultimately decided by the Privy Council, the question arose as to when the sale shall be deemed to have become absolute; either on and from the date on which it was confirmed or on and from the date on which the appeal, filed against an order rejecting application for setting aside the sale, was disposed of. The Privy Council in *Chandra Mani Saha and Others v. Anarjan Bibi and Others*, AIR (1934) Privy Council 134, held as under :

H “...in construing the meaning of the words ‘when the sale becomes absolute’ in Art. 180, Limitation 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, Limitation 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, Limitation 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.”

The Privy Council confirmed the view taken by the Calcutta High Court in *Chhogan Lal Bagri v. Behari Lal Saha Ray*, AIR (1933) Cal. 311 and overruled the earlier judgment of that court in *Neckbar Sahai v. Prakash Chandra Nag Chaudhuri*, AIR (1930) Cal. 86. The effect of the Privy Council decision is that the sale of property, in execution of decree, does not become absolute merely on the passing of an order confirming the sale under Order 21 Rule 92 but if there has been an appeal against an order rejecting an application for setting aside the sale, made either under Order 21 Rule 89 or Rules 90 or 91, the sale would not become absolute till the disposal of that appeal. It was held that the limitation of three years prescribed under Article 180 of the Limitation Act, 1908 for making an application for delivery of possession under Order 21 Rule 95 would run, not from the date on which the sale is confirmed under Order 21 Rule 92 but from the date on which the appeals are disposed of.

This question was also considered in a slightly different situation by the Madras High Court in *Kandukuri Chellamma alias Mangamma & Anr. v. Shri Ranganilayam Ramakrishnarao*, I.L.R. (1946) Madras 795 = AIR (1946) Madras 337. The question in that case was whether an application under Section 19 of Madras Act IV of 1938 to scale down the decree-debt would lie during the pendency of an appeal against the order refusing to set aside the sale. The objection was that once the sale has become absolute

- A and has been confirmed, an application to scale down the decree-debt would not lie. This was rejected by the High Court which held that in view of the pendency of the appeal, the validity of the sale was still in question and until that question was finally decided by the High Court, the sale could not be treated to have become absolute particularly as the appeal had to be regarded as a continuation of the proceedings initiated in the lower Court for setting aside the sale.
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- In another Madras decision in *S.V. Ramalingam and Others v. K.E. Rajagopalan and Another*, (1975) 2 Madras Law Journal 494, rendered by S.Natarajan, J. (as His Lordship then was), this principle was reiterated and it was held that :
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- “16. The confirmation of a sale subsequent to the dismissal of a petition under Order 21, rule 90 cannot, in reality, after 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 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.”
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- In another decision rendered by the Madras High Court in *V.A. Narayana Raja v. Renganayaki Achi (died) and Others*, AIR (1984) Madras 27, it was again reiterated that an application under Order 34 Rule 5 would be maintainable during the pendency of the appeal filed by the judgment-
- H

debtor against an order passed by the Executing Court refusing to set aside the sale effected in execution of the decree passed in the mortgage suit. It was further held that although as a result of the confirmation of sale and the issue of a sale certificate, the auction purchaser got title to the property and the title of the judgment-debtor was lost but since the sale was subject to the final result of the petition, filed by the judgment-debtor under Order 21 Rule 90 C.P.C., the confirmation of sale and the sale certificate issued thereafter would also be subject to the result of that petition. Similarly, if an appeal was pending against an order refusing to set aside the sale, the whole situation relating to confirmation of sale and issuance of sale certificate would be in a nebulous state and consequently it would be open to the judgment-debtor to invoke the provisions of Order 34 Rule 5 C.P.C. and make the necessary deposits to save his property from being transferred to a third person or, may be, to the decree holder, in execution of decree passed in the mortgage suit.

The entire legal position was reviewed by this Court in *Maganlal & Anr. v. Jaiswal Industries Neemach & Ors.*, [1989] 3 SCR 696, and it was held that the sale does not become absolute or irrevocable merely on passing an order confirming the sale under Order 21 Rule 92 but it would attain finality on the disposal of the appeal, if any, filed against an order refusing to set aside the sale.

Mr. A.T.M. Sampath, learned counsel appearing on behalf of the appellant has vehemently contended that the principles set out above would not be applicable to the present case inasmuch as the appeal was not filed by the respondents against the order refusing to set aside the sale but it was filed against an order by which their application for restoration of another application, namely, the application for setting aside the sale under Order 21 Rule 90, which was dismissed in default, was rejected. He has invited our attention to the decision of this Court in *Hukamchand v. Bansital & Ors.*, [1967] 3 SCR 695, in which it was held that :

“Though O. XXXIV r. 5(1) recognises the right of the judgment-debtor to pay the decretal amount in an execution relating to a mortgage decree for sale at any time before the confirmation of sale, the rule does not give any power to the court to grant time to deposit the money after the final decree has been passed. It is not open to the Court to go on fixing date after date and postpon-

A ing confirmation of sale merely to accommodate a judgment-debtor.”

It was further held :

B “A harmonious construction of O. XXXIV r. 5 and O. XXI r. 92 would make it clear that if the provisions of O. XXI 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. XXXIV r. 5.”

C The first part of the above extract is wholly inapplicable to the present case as it is nobody’s case that the Court had been deliberately fixing dates after dates to avoid confirmation of sale or to accommodate the judgment-debtor. The other part of the extract is relied upon by both the parties, specially the respondent in support of the contention that the deposits under Order 34 Rule 5 can be made and has to be made before  
D the confirmation of sale.

E It is true that when the sale was held under the Court auction, the respondent, in the present case, had made an application (E.A.No. 151/82) for setting aside the sale but the application was dismissed in default and the sale was confirmed. Thereafter, the respondent had made an application (E.A.No. 293/82) for restoration of that application. They had also made an application (E.A.No. 294/82) for setting aside the confirmation of sale but both these applications were rejected and it was against these orders that the respondent had filed appeals (C.M.A.No. 267/83 and C.M.A.No. 462/83) in the High Court. It was during the pendency of these  
F appeals that the respondents had made an application under Order 34 Rule 5 for deposit of money. The situation where an appeal is filed directly against the order dismissing an application under Order 21 Rule 90 is not different from the situation where the appeal is filed against the order dismissing that application in default inasmuch as in both the situations, it  
G is the validity of confirmation of sale, which is involved and is under possible jeopardy.

H An identical situation with which we are faced in this case was considered by the Madras High Court itself in *Varadarajan v. Venkatapathy Reddy*, (1953) 1 M.L.J. 148, in which the appeal was filed against an order by which the application under Order 21 Rule 90 C.P.C. was dismissed in

default. It was held that restoration of the application under Order 21 Rule 90 C.P.C. would automatically operate to vacate, or, render ineffective, the earlier order confirming the sale under Order 21 Rule 92. The High Court was of the opinion that pendency of an application under Order 21 Rule 90 C.P.C. would operate as a bar to an order of confirmation of sale being made under Order 21 Rule 92. It was further of the view that restoration of an application under Order 21 Rule 90 C.P.C., which was earlier dismissed for default, would relegate the parties to the earlier position and the application for setting aside the sale would be treated as pending and not disposed of despite the confirmation of sale in the interregnum.

In *Ramathal v. Nagarathinammal*, (1967) 1 M.L.J. 260, the above view was reiterated and it was held that the restoration of an application under Order 21 Rule 90, which was earlier dismissed in default, would render ineffective the order by which the sale was confirmed.

The Andhra Pradesh High Court in *Satyanarayana v. Ramamurthi*, (1960) 2 An.W.R. 430, held that it is only where no application under Order 21 Rule 90 is made within the statutory period or where such an application is made but is rejected that the Court can exercise its power to confirm the sale. It further held that the existence of an application for setting aside the sale would operate as a bar in making the sale absolute. It also held that during the pendency of the appeal, no finality attaches to the sale notwithstanding the confirmation of sale having been made in the meantime.

Mr. A.T.M. Sampath then pointed out that even after remand by the High Court, both the applications, namely, application for restoration as also the application for setting aside the confirmation of sale were dismissed on 12.12.1983 and the appeals filed against those orders, being C.M.A. No.19 of 1984 and C.M.A. No.74 of 1984, have also been dismissed by the impugned judgment with the result that the objections under Order 21 Rule 90 C.P.C. shall be treated to have been dismissed on merits, and the confirmation of sale in favour of the appellant shall be treated to have been validly done. It is contended that once the order, by which the sale was confirmed in favour of the appellant, is found to have been validly passed, the title in the property passed in favour of the appellant while the title of the respondent, from that moment, came to an end. The consequence of this situation, it is further contended, was that the application

A under Order 34 Rule 5 C.P.C. for deposit of money was not maintainable and was liable to be rejected. It was not open to the Executing Court to have accepted the deposit or to have passed an order for return of document.

B Having given our anxious consideration to these submissions, we are unable to accept them not only on equitable considerations but on the merits of the case also.

C Adversity of a person is not a boon for others. If a person in stringent financial conditions had taken the loan and placed his properties as security therefor, the situation cannot be exploited by the person who had advanced the loan. The Court seeks to protect the person affected by adverse circumstances from being a victim of exploitation. It is this philosophy which is followed by the Court in allowing that person to redeem his properties by making the deposit under Order 34 Rule 5 C.P.C.

D We may, at this moment, recapitulate the facts which have already been given above.

E In this case, the sale was held on 29th of April, 1982. The respondent made an application on 21st of June, 1982 for setting aside the sale but this application was dismissed in default on 18.9.1982. Thereafter, the sale was confirmed. This compelled the respondent to make an application for setting aside the confirmation of sale. They also made an application for restoration of their earlier application under Order 21 Rule 90 C.P.C. Both the applications were made on 12.10.1982 but they were rejected on 2.4.1983 against which, as pointed out earlier, C.M.A. No. 267/83 and F C.M.A. No. 462/83 were filed. In these appeals, the respondent also moved an application (C.M.P. No. 7710/83) for stay and the High Court passed conditional order of stay by directing the respondent to deposit a sum of Rs.25,000 in the Executing Court on or before 30.6.1983. The respondent deposited the amount on 26.6.1983. While these appeals were pending in G the High Court, the respondent made an application (E.A. No. 226/83) in the original suit for deposit of money under Order 34 Rule 5.

C.M.A. No. 267/83 was allowed by the High Court on 21.7.1983 by the following order :

H “Appellant came forward with a claim that on 12.9.1982 he was

afflicted with chicken pox and this was preceded by fever for two days. Court below held that when no prescription issued by a doctor or any bill produced regarding purchase of medicines, this claim cannot be accepted, though for chicken pox there are no medicines.

Learned counsel for the respondent would state that appellant herein indulges in protracting the proceedings, and at every stage he deliberately allows the matter to be dismissed for default and thereby prevents an early conclusion of proceedings.

On behalf of appellant, it is pleaded that a *bonafide* impression was entertained that by filing such affidavit, the matter could be successfully concluded, but since the Court below had approached the matter differently by stating that no other evidence had been adduced, if only it had been indicated by Court that this matter calls for oral and documentary evidence to be adduced as well, then appellant would have adduced the necessary evidence. Therefore, to enable the appellant to establish the truthfulness of the claim made, the matter is now remitted, for him to adduce such evidence as he may choose to give, thereafter for the Court below to pass suitable orders. Accordingly, the C.M.A. is allowed. No costs. It is open to both parties to adduce such oral and documentary evidence as they may consider necessary, and the enquiry is to be completed positively, on or before 31.8.1983.

It is stated that pursuant to the Orders passed in C.R.P. No.2251 of 1983, the premises is kept under lock and key. Since respondent herein is prevented from enjoying the property in spite of securing an order for confirmation of sale, the premises will continue to be kept under lock and key as per the orders passed in the above C.R.P., subject to an added condition that appellant herein shall deposit by the 10th of every succeeding month to the credit of the E.P. a sum of Rs. 300 per month into the Court below, failing which, it will be open to the Court below to proceed to pass suitable orders.

Sd/-  
July 21, 1983."

A The Trial Court, in the meantime, by its order dated 27.7.1983 rejected the respondent's application (E.A. No. 226/83) for permission to deposit the balance of the mortgage money under Order 34 Rule 5 C.P.C. against which C.R.P. No. 3473/83 was filed in the High Court. This Revision Petition as also C.M.A. No. 462/83 were taken up together and disposed of by a common judgment dated 7.9.1983. The Revision Petition and the  
B appeal both were allowed. The judgment, *inter alia*, provided as under :

C "It is stated that in respect of orders passed in E.A. No. 293 of 1982 which was filed to set aside the orders passed in E.A. No. 151 of 1982 and which in turn was filed to set aside the sale, C.M.A. No. 262 of 1983 is filed to this Court. In the light of the orders already passed in C.M.A. No. 267 of 1983 and the entire matter having been reopened, both the appeal and the revision petition are allowed with costs with a direction to the Court below to dispose of the connected E.As. along with E.A. No. 294 of 1982, which is being presently enquired into.  
D

E It is stated that the Court below did not issue chalan for remittance of Rs. 62,563. Now that the matter has been reopened, the Court below is directed to issue necessary challan for the amount to be deposited but without prejudice to the contentions of parties. If by the date of deposit, it is open to the Judgment debtor to deposit the high amount. On production of the Steno copy of this order, the Court below shall proceed further in the matter.  
F

F Sd/-  
7.9.1983."

G A perusal of the portion of the order extracted above would show that the whole matter was reopened with the result that the confirmation of sale could not be treated as final and it was open, even at that stage, to the respondent to deposit the balance of the mortgage money.

H Thereafter, the Trial Court, by its order dated 16.9.1983, allowed E.A. No. 226/83 and accepted the balance of the mortgage money amounting to Rs. 62,563. The Trial Court discharged the mortgage. It is contended by the learned counsel for the respondent that this order has become final as it was, at no stage, challenged by the appellants. But the matter does not

end here. The Trial Court, in the meantime, by its order dated 12.12.1983, dismissed E.A. Nos. 293/82 and 294/82 against which C.M.A. No. 19/84 and C.M.A. No.74/84 were filed in the High Court. It also, by its order dated 16.9.1984, dismissed the respondent's application (I.A. 337/84) for return of documents under Order 34 Rule 5A C.P.C. Against this order, C.R.P. No. 4402/85 was filed in the High Court.

C.M.A. No. 19/84, C.M.A. No. 74/84 and C.R.P. 4402/85 were disposed of by the High Court by a common judgment dated 14.1.1988 by which C.M.A. Nos. 19 and 74 of 1984 have been dismissed while C.R.P. No. 4402/85 has been allowed. The judgment apparently is self- contradictory. While rejecting C.M.A. Nos. 19/84 and 74/84, the High Court allowed C.R.P. No. 4402/85 and has held that the mortgage stood discharged. The relevant portion of the judgment is reproduced below :

"24. I am afraid that the above said principles are not applicable to the facts of the present case, since there is no foundation for holding that the order passed by Sathiadev, J., was obtained by fraud and the matter is being raised for the first time before this Court. It is no doubt true that the conduct of the petitioner in adopting all sorts of dilatory tactics in delaying the execution of the decree has to be condemned. But that will not be sufficient to ignore the order passed by the Court on the basis of the alleged fraud. Therefore, I find that the order passed by the lower Court in I.A. No. 337 of 1984 in O.S. No. 21 of 1978 is not sustainable. As already observed, the order passed by the lower Court in E.A. No. 226 of 1983 has given a complete discharge of the mortgage decree and consequently the petitioner is entitled to get return of the documents as prayed for in I.A.No.337 of 1984.

25. In the result, this revision petition is allowed and the order of the lower Court is set aside. No costs."

The High Court endorsed the view of the Trial Court that on the deposit of the balance amount of the mortgage money, the mortgage stood discharged. The Trial Court having also allowed the application of the respondent for return of documents under Order 34 Rule 5A C.P.C., there was no occasion for the High Court to have dismissed C.M.A.Nos. 19 and 74/84.

- A Mr. A.T.M. Sampath has contended that having dismissed C.M.A.Nos.19 and 74/84, the High Court should not have allowed C.R.P.No.4402/85 nor should have it allowed the respondent's application under Order 34 Rule 5A for return of documents. He is, to that extent, right. But once the balance of the mortgage money was allowed to be deposited under Order 34 Rule 5 and the documents were also ordered to be returned under Rule 5A, with the consequence that the mortgage was treated as discharged, the obvious conflict can be removed by allowing both the appeals, namely, C.M.A. Nos. 19 and 74 of 1984, which are hereby allowed, so as to bring in harmony the earlier part of the judgment with the latter part. The objection that the respondent had not filed any appeal in this Court against that part of the judgment of the High Court by which C.M.A. Nos. 19 and 74 of 1984 were dismissed, cannot be entertained as the principles contained in Order 41 Rule 33 can be invoked in the instant case so as to do complete justice between the parties.

- D For the reasons stated above, we find no merit in this appeal which is hereby dismissed with the observation that the amount deposited by the appellant from time to time in the High Court or any other Court, in this case, shall be refunded to him together with all interest accrued thereon. There shall be no order as to costs.

S.V.K.

Appeal dismissed.