

KHARAITI LAL
v.
RAMINDER KAUR AND ORS.

MARCH 15, 2000

[S. SAGHIR AHMAD AND D.P. WADHWA, JJ.]

Code of Civil Procedure, 1908 :

Order 34 Rule 5, Order 21 Rule 90—Confirmation of sale—Mortgage suit—Auction sale—Application to set aside the sale, rejected—Confirmation of sale—Orders refusing to set aside the sale and confirmation of sale challenged in appeal—Deposits made pending appeal—Held, it would be open to judgment debtor to invoke provisions of Order 34 Rule 5 and make necessary deposits.

The appellant mortgaged an industrial plot. Later the mortgagee filed a suit for foreclosure in order to recover the mortgage money by sale of the said plot and the building constructed thereon. A preliminary decree was passed directing the appellant to deposit the amount along with future interest. The appellant did not deposit the amount. The Court passed the final decree. In execution proceedings the property was auctioned and was purchased by the predecessor-in-interest of the respondents. The appellant challenged the auction-sale under Order 21 Rule 90 CPC. The Court rejected the objection and confirmed the auction-sale. The appellant filed appeals before the High Court and also deposited the amount. The Single Judge held that the appellant had already deposited the requisite amount under Order 32 Rule 5 CPC, and allowed the appeals and set aside the auction sale as also its confirmation. The respondents filed two letters patent appeals and the Division Bench allowed the same. Aggrieved, the mortgagor filed the present appeals.

It was contended for the appellant that Order 34 Rule 5 CPC contemplated deposit before “confirmation of sale” and if the order by which the sale was confirmed was challenged in appeal, the sale would not be treated as confirmed unless the appeal was disposed of and; that since the appellant had made the deposits during pendency of the appeals, the deposits so made were valid and could not have been treated to have been made “after confirmation.”

A **Allowing the appeals, this Court**

B **HELD : If an appeal was pending against an order refusing to set aside the sale, the confirmation of sale as also the 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 the decree passed in the mortgage suit. [449-F]**

C *U. Nilan v. Kannayan (Dead) through Lrs.*, [1999] 8 SCC 511 = [1999] 6 Scale 358 = JT (1999) 7 SC621, reiterated.

Maganlal & Anr. v. Jaiswal Industries, Neemach & Ors., [1989] 4 SCC 344 = [1989] 3 SCR 696 = AIR (1989) SC 2113, relied on.

D *Hukamchand v. Bansilal & Ors.*, [1967] 3 SCR 695 = AIR (1968) SC 86, distinguished.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2126-2127 of 2000.

E From the Judgment and Order dated 2.7.98 of the Punjab & Haryana High Court in L.P.A. No. 1172-73 of 1985.

R.K. Kapoor, Sumit Kumar, S.K. Srivastava and Anis Ahmad Khan for the Appellant.

F Raju Ramachandran, Piyush Sharma and Pramod Dayal for the Respondents.

The Judgment of the Court was delivered by

S. SAGHIR AHMAD, J. Leave granted.

G The appellant, who was the owner of a plot of land measuring one and a half kanal, situated in Industrial Area, Chandigarh, had mortgaged the said land with one Col. Joginder Singh for a sum of Rs. 20,000 after raising certain constructions thereon.

H Col. Joginder Singh subsequently filed a suit for foreclosure in order to recover the mortgage money by sale of Industrial Plot No. 255-P and the

building constructed thereon. A preliminary decree was passed in that suit on January 23, 1976, directing the appellant to deposit a sum of Rs. 28,187.50 along with future interest at the rate of 9 per cent per annum on or before March 23, 1976. The amount was not deposited and, therefore, Col. Joginder Singh filed an application for final decree which was passed by the Sub-ordinate Court, Chandigarh, on April 8, 1976. The decree was put to execution and in execution proceedings, the property was auctioned on August 25, 1976. Nazar Singh, who is now represented by the present respondents, purchased the property at the auction for a sum of Rs. 45,000. The auction-sale was challenged by the appellant by filing an application under Order 21 Rule 90 C.P.C. on August 28, 1976. The objections were rejected on November 28, 1977 and on the next day, namely, on November 29, 1977, the Court confirmed the auction-sale.

The appellant, thereafter, filed two appeals (Appeal Nos. 373 and 374 of 1977) in the High Court. During the pendency of those appeals, he also deposited a sum of Rs. 47,250 on May 3, 1985 and another amount of Rs. 525 was deposited by him on August 19, 1985. When the appeals came up for hearing before the Single Judge, it was noticed that the appellant had already deposited the requisite amount under Order 34 Rule 5 of the Code of Civil Procedure and, therefore, the appeals were allowed on August 30, 1985 and the auction-sale as also its confirmation were set aside with the direction that the amount, deposited by the appellant, would be paid to the heirs of Nazar Singh who had, in the meantime, died and was substituted in the appeals by the present respondents. The judgment passed by the Single Judge was challenged by the respondents in the Letters Patent Appeals filed before the Division Bench, which allowed both the appeals by the impugned judgment dated July 2, 1998 and set aside the judgment passed by the Single Judge. It is in these circumstances that the present appeals have come up before us.

Learned counsel for the appellant has contended that the Division Bench of the High Court was in error in interfering with the judgment passed by the Learned Single Judge on the ground that the deposits, made by the appellant during the pendency of the appeals in the High Court, would not enure to his benefits and could not be treated to have been made under Order 34 Rule 5 C.P.C. as the auction-sale had already been confirmed. It is further contended that Order 34 Rule 5 C.P.C. contemplates deposit

A before "confirmation of sale" and if the order by which the sale was confirmed had been challenged in appeal, the sale would not be treated as confirmed unless the appeal was disposed of. It is further contended that since the appellant, in the instant case, had made the deposits during the pendency of the appeals in the High Court, which were directed against the auction-sale as also its confirmation, the deposits so made were valid and could not have been treated to have been made "after confirmation."

C Learned counsel for the respondents, on the contrary, contended that when a preliminary decree was passed by the trial court, the appellant was allowed time to deposit the whole of the decretal amount by a specific date, namely, by March 23, 1976 but the appellant did not do so and, consequently, the property was auction-sold. The sale was challenged by the appellant through objections under Order 21 Rule 90 C.P.C., which were rejected and the sale was thereafter confirmed. It is contended that after rejection of the objections under Order 21 Rule 90 C.P.C., the Executing Court was bound to confirm the sale and since the sale was confirmed on the next day of the rejection of the objections under Order 21 Rule 90 C.P.C., the sale, for all practical purposes, shall be deemed to have been confirmed on that day. Any deposit, made by the appellant thereafter, would be of no avail and on the basis of that deposit, the sale could not be set aside. It is contended that the Division Bench of the High Court was justified in setting aside the judgment passed by the Single Judge.

A perusal of the judgment passed by the Division Bench would show that after setting out the facts, it formulated a question as under :-

F "The question that arises for consideration is - when can a sale of the mortgaged property be said to have been confirmed? The ancillary question would be - Can a deposit be made under Order 34 Rule 5 even when an appeal is pending?"

G Thereafter, the Division Bench proceeded to answer the question by holding ultimately that the deposit of money, during the pendency of appeals in the High Court, could not be treated as a valid deposit under Order 34 Rule 5 C.P.C. For this purpose, it placed reliance upon a decision of this Court in *Hukamchand v. Bansilal & Ors.*, [1967] 3 SCR 695=AIR (1968) SC 86. The decision in *Hukamchand's* case (supra) was given on the particular facts of that case. It was noticed by the Court, in that case, as under :-

"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 postponing confirmation of sale merely to accommodate a judgment-debtor."

The Court did not hold in that case that a deposit under Order 34 Rule 5 C.P.C. could not be made during the pendency of an appeal against the order by which the sale was confirmed.

The entire case law was reviewed by this Court in a recent decision in *U. Nilan v. Kannayyan (Dead) through Lrs.*, [1999] 8 SCC 511=(1999) 6 Scale 358=JT (1999) 7 SC 621, in which also the Court had formulated the following question :-

"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."

The above question is identical to the question framed by the Division Bench of the High Court in this case. This Court, on a consideration of a number of decisions, including the decision of this Court in *Hukamchand's* case (supra) laid down that if an appeal was pending against an order refusing to set aside the sale, the confirmation of sale as also the 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 the decree passed in the mortgage suit. It may be mentioned that in *U. Nilan's* case (supra), reliance was also placed upon the decision of this Court in *Maganlal & Anr. v. Jaiswal Industries, Neemach & Ors.*, [1989] 4 SCC 344=[1989] 3 SCR 696=AIR (1989) SC 2113, in which 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.

A This decision, though rendered by this Court in 1989, was not noticed by the Division Bench of the High Court.

B For the reasons stated above, we allow the appeals, set aside the judgment dated July 2, 1998, passed by the Division Bench and restore the judgment dated 30.8.1985, passed by the Single Judge. There shall be no order as to costs.

R.P.

Appeals allowed.