(2010) 07 MAD CK 0353

Madras High Court

Case No: C.R.P. (NPD) . No. 1904 of 2005 and C.M.P. No. 1431 of 2008

C. Velu @ Venkatesalam and Others		APPELLANT
	Vs	
S. Kandasamy Chettiar (died) and Others		RESPONDENT

Date of Decision: July 15, 2010

Acts Referred:

- Civil Procedure Code Amendment Act, 1976 - Section 11

Citation: (2010) 4 LW 265

Hon'ble Judges: G. Rajasuria, J

Bench: Single Bench

Advocate: R. Subramanian, for the Appellant; S.A. Hafiz, for R 4, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

G. Rajasuria, J.
Inveighing the order dated 6.1.2005 passed by the Subordinate Judge, Sangagiri, in REA No. 185 of 2004, this civil revision petition is focused by the judgment debtors.

2. Heard both sides.

3. Compendiously and concisely the relevant facts necessary and germane for the disposal of this revision petition as well as C.M.P. No. 1431 of 2008 would run thus:

(i) The Respondents herein filed the suit O.S. No. 393 of 1990 so as to bring the mortgaged property belonging to the revision Petitioners for sale. The preliminary decree was passed and subsequently, final decree also was passed.

(ii) Thereafter, REP. No. 4 of 2003 was filed before the executing Court so as to bring the mortgaged property for sale.

(iii) While so, the lower Court in the process of conducting the sale, on seeing that the revision Petitioners/judgment debtors did not file any counter, passed order in the REA No. 136 of 2004 filed by the R4 herein, who is one of the decree holders under Order 21, Rule 72(1) and 72(A) seeking permission to bid in the Court auction and purchase the property. The said order is extracted hereunder:

Petition filed under Order XXI, Rule 72(1) and Section 72(A) to order to grant permission to the Petitioners/D Hs/to bid in Court auction and purchase the property in Court auction in REP No. 4/03 in Original Suit No. 393/90 on the file of this Court.

Counter filed. Posted for counter and disposal, but Respondent side not ready for enquiry. Heard Petitioners side. Petition is allowed.

(iv) However, the executing Court failed to fix the reserve price as contemplated under Order 21, Rule 72A(2) of Code of Civil Procedure.

(v) It so happened that the said REA. 136 of 2004 even though was filed on 14.9.2004, it was ordered only on 28.10.2004, so to say on the date of sale. Immediately, after such ordering of the petition, Ramalingam-R4 herein participated in the auction sale as the only bidder and he was declared as the successful bidder for the upset price already fixed by the Court even before passing order in the said REA No. 136 of 2004. Top it all, R4 herein was the only bidder in the said so called public Court auction sale surprisingly and shockingly.

(vi) The fact also remains that it was for the first time the property was brought for sale and at that time itself, one of the decree holders, namely, Ramalingam-R4 herein obtained such permission to bid on the date of sale itself and participated in the bid as the sole bidder and he was declared as the successful bidder.

(vii) Animadverting upon such sale, REA No. 185 of 2004 was filed u/s 47 of the CPC challenging and impugning the very sale.

(viii) After hearing both sides, the Executing Court dismissed the said REA and confirmed the sale in favor of Ramalingam-R4 herein.

4. Being aggrieved by and dissatisfied with such order of the Executing Court this revision has been filed on various grounds, the gist and kernal of them would run thus:

(i) The executing Court was not justified in holding that the auction sale held on 28.10.2004 was valid, ignoring the mandatory provisions as contained in Order 21, Rule 72A of Code of Civil Procedure.

(2) The property sold half of was 1 acre 47 cents along with half share in the three mills, namely, ginning mill, oil mill and rice mill.

(3) As per Order 21, Rule 72, 72(1) and 72A of Code of Civil Procedure, before conducting Court auction sale in pursuance of a mortgage decree, it is mandatory on the part of the Court to fix the reserve price, but without fixing such reserve price, the Court simply granted permission to one of the decree holders, namely R4 herein, to bid in the auction. After granting such permission, no fresh proclamation was ordered, but based on the earlier proclamation itself sale was conducted on the same day.

5. The learned Counsel for the revision Petitioners/judgment debtors reiterating the grounds of revision would pray for setting aside the said sale and also the confirmation of sale as ordered by the lower Court.

6. The learned Counsel for the revision Petitioners/judgment debtors also by placing reliance on the affidavit accompanying the C.M.P. No. 1431 of 2008, which has been filed with the following prayer:

- to permit the Petitioners herein to deposit the entire decree amount along with the poundage payable to the auction purchaser and interest up to date, would set forth and put forth his submissions thus:

(i) As per the dictum of the Honorable Apex Court in various decisions, the judgment debtors/mortgagors are having the right to deposit the entire dues under the final decree and get the sale set aside even at the stage of revision.

(ii) This revision is in continuation of the proceedings initiated in the lower Court and in such a case, the revision Petitioners are having the right to deposit the entire dues.

(iii) Even though the application was not filed under Order 21, Rule 90 of CPC challenging the sale, yet the revision Petitioners invoked Section 47 of CPC in view of the gross irregularities perpetrated in the proceedings from the beginning.

Accordingly, the learned Counsel seeks permission to deposit the entire dues payable under final decree.

7. Per contra, by way of torpedoing and pulverising the contentions and arguments as put forth on the side of the Petitioners herein, the learned Counsel for R4 herein would advance his arguments, the gist and kernal of them would run thus:

(i) Simply because as per Order 21, Rule 72A of CPC the reserve price was not fixed in pari material with the E.P. amount, it cannot be stated that the entire sale proceedings got vitiated.

(ii) Unless substantial injury is found to have been caused to the judgment debtors, the question of setting aside the sale would not arise and there are precedents also in support of the said proposition.

(iii) There is no hard and fast Rule that after granting permission in favor of the decree holder to bid, there should be any fresh proclamation of sale.

(iv) The revision Petitioners, ought to have, if at all they felt aggrieved by the sale, filed an application under Order 21, Rule 90 of Code of Civil Procedure, but the invocation of Section 47 of CPC was erroneous and to that effect counter also was filed by R4 herein before the lower Court.

(v) During the pendency of this revision petition itself, the lower Court granted permission to the judgment debtors to deposit the entire amount due and that there were spate of applications filed by the judgment debtors seeking extension of time to deposit the amount. Ultimately, the executing Court having got fed up with the dilatory tactics of the judgment debtors, dismissed their application to deposit the amount. In such a case by their conduct, the revision Petitioners/judgment debtors brought forth on themselves the principle of estoppel by accord and the principle of res-judicata also would be operating as against the present C.M.P. No. 1431 of 2008 and now they cannot try to seek the indulgence of this Court to deposit the dues and get the sale set aside.

(vi) Even though the application was filed u/s 47 of Code of Civil Procedure, in stricto senso the Executing Court''s order is deemed to have been passed in relation to an LA. u/s 21 Rule 90 of Code of Civil Procedure, over which only appeal would lie, but the revision Petitioners have chosen to file this revision petition straight away before this Court and on that ground also the revision is not tenable.

Accordingly, the learned Counsel for R4 prays for the dismissal of both revision petition as well as the CMP.

8. Despite the names of R2 and R3 having been found printed in the cause list, they have not appeared and there is no representation also on behalf of them.

9. The points for consideration are as under:

(i) Whether this Court could entertain revision in view of the substantial points decided relates to validity of Court auction sale in the order passed by the Executing Court in the application filed u/s 47 of Code of Civil Procedure?

(2) Whether the executing Court was justified in permitting one of the decree holders, namely, Ramalingam/R4 herein to participate in the Court auction sale, without fixing the reserve price as contemplated under Order 21, Rule 72A of CPC and if so, whether the revision Petitioners/judgment debtors sustained any substantial injury?

(3) Whether the revision Petitioners/judgment debtors are entitled to deposit the entire dues at this stage and get the sale set aside, in view of the pendency of this revision before this Court?

10. Point No. 1: The learned Counsel for R4 would cite the decision of this Court reported in (2004) 3 MLJ 504 -Pannerselvam v. Muthukrishna Naidu and develop his argument that even though the executing Court might have passed the order u/s 47 of Code of Civil Procedure, it should have been taken as the one passed under Order 21, Rule 90 of CPC and as against which, only appeal should have been filed.

11. Whereas the learned Counsel for the revision Petitioners/judgment debtors would submit that the scope of Section 47 of CPC is wide enough enabling the judgment debtors to canvas before the Executing Court, touching upon the irregularities in conducting the sale.

12. A mere perusal of the cited judgment of this Court supra on the side of R4 would reveal that it was a case in which the aggrieved party, namely, judgment debtor approached the appellate Court for getting the appeal numbered under Order 43, Rule 1(j) of Code of Civil Procedure. However, the appellate Court held that no CMA would lie. Whereupon in revision this Court ordered that such an appeal would lie and only to that limited extent the proposition of law is stood enunciated in the said judgment. However, here the facts and circumstances of this case are different. The revision Petitioners/judgment debtors challenge the very procedure adopted by the Executing Court in permitting the R4 herein-one of the decree holders to participate in the auction, without adhering to Order 21, Rule 72A of Code of Civil Procedure. Over and above that the revision Petitioners would also try to point out that there was no proclamation at all subsequent to the passing of such order. It is not as though there was any proper proclamation and thereafter any irregularity occurred.

13. Here it is a case where ex facie and prima facie clear that after passing the order in the application filed under Order 21, Rule 72A of CPC no proclamation at all was made. On the date of sale itself, just some time before the conduct of sale such permission to bid was granted to one of the decree holders and that too without fixing the reserve price. The fact also remains that for the first time when the sale was scheduled to be held, such permission was given. It is not a case where on previous several scheduled auction sale dates there were no bidders. The Court also on seeing that there were no other bidders participated, except R4, did not order for fresh sale. As such, considering the blatant and gross irregularities in the conduct of sale and that too in view of the gross defects detailed and delineated in this order under Point No. 2 infra, I am of the view that invocation of Section 47 of CPC cannot be found fault with and consequently after facing dismissal of the application filed u/s 47 Code of Civil Procedure, the filing of CRP cannot also be found fault with. I would like to point out that as on the date of filing of this revision the High Court was the appellate Court as well as the revisional Court in respect of this matter and this CRP is pending ever since 2005. It is also to be noted that the lower Court did not give any finding that Section 47 was not the proper provision to be invoked, but only Order 21, Rule 90 Code of Civil Procedure. Accordingly, this point is decided in favor of the revision Petitioners.

14. Point No. (2): Indubitably and indisputably, incontrovertibly and unarguably the factual position as stood exposited from the records available before me as well as from the submissions made by the learned Counsel on either side, could run thus.

(i) REP. No. 4 of 2003 for executing the final decree passed in the suit for sale of the mortgaged property, was filed in the year 2003; whereupon for the first time, the sale was ordered to be held on 28.10.2004. One of the decree holders, namely, R4-Ramalingam herein filed REA No. 136 of 2004 on 14.9.2004 under Order 21, Rule 72(1) and 72A of CPC seeking permission of the Court to bid in the Court auction. One other REA. 137 of 2004 was filed by the same Ramalingam under Order 21, Rule 72(2) of CPC to get set-off the decreetal dues in respect of the bid amount.

(ii) Both the applications were allowed on 28.10.2004, so to say, purely some time before conducting the auction sale for the first time. The proclamation of sale was signed by the Superintendent, Sub Court, Sankari, on 14.9.2004 itself. Whereas, both the above said orders in the R.E.A.s were passed by the Court only on 28.10.2004, so to say, on the date of sale. As such, the material and relevant fact namely the factum of one of the decree holders participating in the sale, could not be mentioned in the proclamation of sale so as to inform the public. The Court also did not order for fresh proclamation of sale, so as to invite more bidders to participate along with R4 herein/one of the decree holders. Adding fuel to the fire, the Court, while passing order in R.E.A. No. 136 of 2004, failed to adhere to the mandate as contemplated in Order 21, Rule 72A(2) of CPC in fixing the reserve price. The sale was conducted on 28.10.2004, as fixed earlier and no other bidders participated except R4- one of the decree holders and on that day itself, he deposited l/4th of the bid amount, so to say, the bid amount itself was Rs. 3,00,500/- so to say slightly above the upset price fixed earlier by the Executing Court even before passing orders in REA Nos. 136 and 137 of 2004.

(iii) It so happened that R4-himself deposited the remaining 3/4th amount on 8.11.2004 itself without availing the order as contained in REA No. 137 of 2004. In the meanwhile, REA No. 185 of 2004 u/s 47 of CPC was filed impugning and challenging the auction sale conducted on 28.10.2004. After hearing both sides, the Executing Court dismissed the said REA No. 185 of 2004 on 6.1.2005 and confirmed the sale on 12.1.2005. Being aggrieved by and dissatisfied by the said order, this revision has been filed as set out supra.

15. The learned Counsel for the revision Petitioners/judgment debtors would implore and entreat that the non-adherence to Order 21, Rule 72A(2) is fatal to the very sale itself and in such a case, the sale has to be set aside.

16. Whereas, the learned Counsel for R4/one of the decree holders would submit that unless substantial injury to the judgment debtor is found established before this Court, the sale cannot be set aside by this Court. In support of his submission, he would cite the decision of the Kerala High Court reported in K.V. Antony Vs.

Catholic Syrian Bank Ltd., certain excerpts from it would run thus:

8. Need to fix a reserve price as regards the mortgage would arise only when leave to bid is granted to the mortgagee. If the mortgagee and the decree-holder are one and the same person a leave obtained under Order 21, Rule 72(1) will be good enough under this rule as well and no separate leave is necessary. If the decree-holder is a mortgagee and when leave is granted by the Court, the legislative requirement is that then the Court shall fix a reserve price as regards the mortgage". The language employed in the sub-rule appears to convey the legislative message that the provision is mandatory that the Court has to fix the reserve price in such a situation. The words ''unless the Court otherwise directs'' do not whittle down the mandate that ''then the Courts shall fix''. The former words are intended to cover the clauses which follow thereafter and such clauses relater to the quantum of reserve price to be fixed.

12. Non-compliance with any particular formality, even if it is mandatory, need not necessarily follow that the resultant action is a nullity. In Ashutosh Sikdar v. Behari Lal ILR(1908) Cal 61 Justice Mookerjee, J has observed thus" "No hard and fast line can be drawn between a nullity and an irregularity, but this much is clear, that an irregularity is a deviation from a rule or law which does not taken away the foundation or authority for the proceedings, or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it or is so essentially defective as to be of avail or effect whatever, or is void and incapable of being validated". The aforesaid passage was quoted with approval by the Supreme Court in Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others, .

15. Rule 90(3) of Order 21 contains yet another interdict against setting aside a Court sale. It is in the following language: "No application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up". This provision was brought in the Code only in 1976, and the object is to make the judgment-debtor to be more circumspect and to inform the Court, right in time, of his objections. If he omits to do so without satisfactory cause, he cannot be heard to say on such objections subsequently. In Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh, , Para 15 : 1941 1 L.W. 49 Supreme Court has observed that Rule 90(3) is like a ''caveat emptor'' that the judgment-debtor be vigilant and watchful to vindicate pre-sale illegalities or material irregularities. "He should not stand by to procrastinate the execution proceedings. If he so does, Rule 90(3) forewarns him that he pays penalty for obduracy and contumacy."

16. Here the Appellant did not raise the present objection at any time before sale was held though he was participating in the proceedings. That apart, how the non-compliance has caused any injury, much less substantial injury, to the Appellant is not established by him. In Jaswantlal Natvarlal Thakkar Vs. Sushilaben Manilal

Dangarwala and others, Supreme Court pointed out that the party who seeks to set aside the sale must prove by adducing evidence that substantial injury has been caused to him as a result of non-compliance with the provision contained in Order 21, Rule 72. Leave to bid the sale is a condition precedent for a decree-holder to purchase the property in a Court sale as indicated in Rule 72(1) of the Code. Court is given a discretion to set aside the sale, as provided in Sub-rule (3) where the purchase was made by the decree-holder without such leave. It must be remembered that even in such a case Supreme Court pointed out that without showing substantial injury no such sale shall be set aside. In other words, Courts are not to set aside a sale ordinarily and unless the applicant satisfies the Court that he sustained (or would sustain) substantial loss or injury, the Court is not obliged to look back for considering whether all formalities have been duly complied with in conducting the sale.

For the aforesaid reasons, we uphold the decision of the learned sub-Judge and dismiss this appeal.

17. However, the learned Counsel for the revision Petitioners would cite the following decisions of the Honorable Apex Court:

(i) U. Nilan Vs. Kannayyan (Dead) Through Lrs., . certain excerpts from it would run thus:

29. In another Madras decision in S.V. Ramalingam v. K.E. Rajagopalan 5 rendered by S. Natarajan, J. (as his Lordship then was), this principle was reiterated and it was held that:

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 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 crystallized 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.

30. In another decision rendered by the Madras High Court in V.A. Narayana Raja v. Renganayaki Achi 6 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-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 Code of Civil Procedure, 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 CPC and make the necessary deposits to save his property from being transferred to a third person or, maybe, to the decree-holder, in execution of decree passed in the mortgage suit.
31. The entire legal position was reviewed by this Court in Maganlal v. Jaiswal Industries 7 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.

39. 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.

40. 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 therefore, 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 Code of Civil Procedure.

(ii) Philomina Jose Vs. Federal Bank Ltd. and Others, certain excerpts from it would run thus:

16. Right of redemption of a mortgage is a substantive right of the mortgagor which has accrued to him to be exercised under Order 34, Rule 5 of the Code when the decree was passed, which cannot be taken away by the amendment of Order 34 of the Code which was made only after the decree in this case.

17. An application under Order 34, Rule 5 is maintainable until the final determination of proceedings to set aside the sale under Order 34 either by way of appeal or revision. (See Maganlal v. Jaiswal Industries 5, New Kenilworth Hotels (P)

Ltd. v. Ashoka Industries Ltd. 6, S. Sivaprakasam v. B.V. Muniraj 7, U. Nilan v. Kannayyan 8, Kharaiti Lal v. Reminder Kaur 9, V.K. Palaniappa Chettiar v. Ramaswamy Gounder 10) In addition to the above, he would also cite the decision of this Court reported in AIR 1984 Mad 27 : (1983) 96 L.W. 356 V.A. Narayana Raja v. Renganayaki Achi (Died) and Ors. an excerpt from it would run thus:

12. I am inclined to agree with the view expressed in the above cases. It is no doubt true that deposit under Order 34, Rule 5 CPC can be made only before the confirmation of sale but not afterwards as has been held by the Supreme Court in Hukamchand Vs. Bansilal and Others, . But the question is as to what is the date of confirmation of sale. Though as a result of the dismissal of the petition filed by the judgment debtor u/s 21, Rule 90 CPC the sale has been confirmed in this case, there has been an appeal against the said decision and the appeal is pending before this Court. The pendency of the appeal makes the order of sale ineffective. The confirmation of, sale can become effective only in the event of this Court dismissing the appeal filed by the judgment debtor questioning the dismissal by the executing Court of his application under Order 21, Rule 90 Code of Civil Procedure. It is also true that as a result of the confirmation of the sale and the issue of a sale certificate, the auction purchaser gets title to the property and the title of the judgment debtor stands lost. But since the sale is subject to the final result of the petition filed by the judgment debtor under Order 21, Rule 90 CPC the confirmation of sale and the consequent issue of the sale certificate should all be taken to be subject to the result of the petition under 0rder 21, Rule 90 CPC Therefore, the vesting of title on the auction purchaser resulting from the issue of a sale certificate should also be taken to be subject to the result of the petition under Order 21, Rule 90 Code of Civil Procedure. This is obvious from the fact that if the appellate Court were to set aside the sale under Order 21, Rule 90 CPC the sale will stand set aside, as also the subsequent confirmation of sale and the issue of sale certificate. It is not therefore possible to accept the contention of the learned Advocate General that since the confirmation has already taken place in this case, there is no question of Order 34, Rule 5 CPC being availed of by the judgment debtor. If the said contention were to be accepted, the appeal filed against the order dismissing the application under Order 21, Rule 90 CPC cannot be prosecuted any further. It is also to be pointed out that this is an a fortiori case. Here, the application filed under Order 21, Rule 90 CPC has been allowed except in so far as it relates to the third Respondent and the legal representatives of the fifth Respondent and the appeal as against them alone is still pending. Even assuming the appeal were to be dismissed as against the third Respondent and the legal representatives of the fifth Respondent, the sale so far as the other Respondent are concerned including the decree holders stands set aside. Since the sale has been partly set aside, the confirmation of sale will automatically stand affected. In this view of the matter I have to hold that the application under Order 34, Rule 5 CPC is maintainable. The learned Advocate General then points out that Order 34, Rule 5 CPC contemplates the deposit being made before the filing of

the application and no such deposit having been made, the application has to be rejected. It is to be noted that unless there is an order made by the Court either judicially or administratively, the deposit cannot be made in Court and the Petitioner only seeks the permission of the Court to enable him to make a deposit under Order 34, Rule 5 of the Code, though any relief under Order 34, Rule 5 of the Code can be got after the deposit.

18. From the bare poring over and perusal of the above judgments cited on both sides, this Court could harmoniously formulate an opinion to the effect that incidentally while the Court finding fault with the lower Court relating to non adherence to the mandatory provisions as contained in Order 21, Rule 72A(2) of CPC should also consider as to whether any substantial injury was caused to the judgment debtors. The principle of res ipsa loquitur is squarely applicable to this case in addition to the maxims (1) Actus curiae neminem gravabit-An act of Court shall prejudice no man; (2) Actus legis nemini facit injuriam the act of the la does injury to no one; (3) Ex-ecutio juris non habet injuriam. The execution of law does no injury.

19. It has to be seen that neither of the party should be prejudiced because of the act of the Court and if it is found that there is any such prejudice caused, then that has to be rectified by the appellate/revisional Court keeping in mind one other maxim also ''Error juris no-cet'' (Error of lawinjures)

20. The E.P. was for recovering a sum of Rs. 10,09,350/-. In the sale proclamation, the amount intended to be recovered was Rs. 10,94,664/-, but the fact remains that the mortgaged property was valued by the Court Amin in a sum of Rs. 3 lakhs at his own whims and fancies and the Court also fixed the upset price, earlier to passing orders in those two RE As in a sum of Rs. 3 lakhs only without application of mind.

21. The Executing Court should have necessarily taken into account the very object of the said Order 21, Rule 72A of Code of Civil Procedure. The Executing Court is enjoined to fix a reserve price, which should not normally be less than the amount to be recovered under the mortgage and the upset price already fixed before granting permission to R4/Decree holder to bid was not reserve price. It is based on a wholesome and healthy principle, so to say, a decree holder, who ventured to lend money based on a mortgage should not be allowed to simply snatch away the mortgaged property for a song and that too by specifying cryptically the value of the mortgaged property grossly lower than the dues under the mortgage. In the case of ordinary bidders other than the decree holder, the position is somewhat different and at present in this case I need not dilate on that as it is quite obvious. But in the event of the decree holder being allowed to participate as one of the bidders in the public auction, necessarily the Court should fix the reserve price, as otherwise, there is every likelihood of the decree holder snatching away the property for a lesser price and over and above that, there is also the likelihood of the Decree holder proceeding further with the execution proceedings and also recovering the

remaining unsatisfied decretal amount from the mortgagors, which would be grossly oppressive.

22. Here this is a singularly singular case in which the learned Judge simply on finding that no counter was filed, on 28.10.2004-the date of sale, allowed the application REA No. 136 of 2004 filed by one of the decree holders under Order 21, Rule 72(1) and 72A of CPC without assigning any reason for allowing it.

23. I recollect and call up Rule 199 of the Civil Rules of Practice and it is extracted hereunder for ready reference:

Rule 199 of Civil Rules of Practice: (1) Leave to bid - An application for leave to bid at the sale shall be supported by an affidavit setting forth any facts showing that an advantageous sale cannot otherwise be had; and an undertaking shall be given by or on behalf of the applicant, that, in the event of his being declared the purchaser of the property, or of any lot or lots, he will give credit, or will enter up satisfaction of the decree or order under which the sale is made, for the purchase money. Provided that if there are several decree-holders entitled to rateable distribution the purchase money shall be paid into Court.

24. In pari materia with the salient features as found embodied in Order 21, Rule 72A of Code of Civil Procedure, Rule 199 of Civil Rules of Practice also would contemplate the very same wholesome principle that a decree holder should not in any case be allowed to snatch away the property of the judgment debtor for a song. In this case, absolutely there is no shard or shred, molecular or miniscule, iota or jot of evidence to show that the Executing Court before passing order applied its mind on those provisions of law, which embody the wholesome principle.

25. Catena of decisions of this Court as well as this Court''s Circular in ROC No. 195/76. Con. B2 dated 22nd November 1977 would clearly point out that the ex-parte order does not mean that it should be a one sided order. Even after recording ex-parte evidence the Court can very well dismiss the very Petitioner''s case. It is not that simply because the Respondent remained ex-parte, the petition has to be allowed after formally recording evidence. Despite non contest on the part of the Respondent, the Petitioner should satisfy the Court about the merit of his petition and the Court is bound to state reasons for allowing the petition ex-parte in favour of the Petitioner. But in this case, it is obvious and axiomatic that such a procedure has not been adhered to by the Court, warranting interference by this Court in revision.

26. I would also like to point out that soon after the auction sale dated 28.10.2004, R.E.A. No. 185 of 2004 was filed and the apparent and obvious irregularities were brought to the knowledge of the Executing Court and at least at that time, the lower Court judge could have had the nostalgia of all those happenings in the proceedings and could have verified the relevant provisions of law and corrected himself. Simply because the Nazir/The Sale Officer, knocked or declared on the date of auction sale

that a particular individual was the successful bidder that it does not mean that the Judge of the Executing Court is bound by it; he has to apply his mind and come to his own reasoned conclusion.

27. Here the fact remains that for the first time the sale was conducted on 28.10.2004 and in that just some time before such auction sale, the E.A. No. 136 of 2004 was allowed allowing one of the decree holders, namely R4-Ramalingam to bid in the auction. The one other crucial point is that no other person participated in the bid at all; no fresh proclamation was made and no wide publicity also was made. It is not as though on 28.10.2004 the property was brought for sale, after several auction sale dates, where there were no bidders. The usual and normal healthy practice cannot be lost site of. Whereas on the scheduled sale date if there are no bidders, the Nazir would return the sale warrant with the endorsement as no bidders and if there is recurrence of such returns as ''no bidders'', the decree holder himself will file application seeking permission to bid and whereupon the Court considering that an advantageous sale cannot otherwise be made within the meaning of Rule 199 of the Civil Rules of Practice, would grant permission to the decree holder and that too fixing a reserve price. But in this case, no such thing had happened at all and it is a clear case of non-application of mind on the part of the Executing Court in granting permission to the decree holder to bid unconditionally. Over and above that, even after the filing of the REA No. 185 of 2004 by the judgment debtor, the Court has not sensitized itself with the salient provisions of law and rectified the mistakes committed by him. However, the lower Court simply dismissed the REA. No. 185 of 2004 filed by the judgment debtors and confirmed the sale as set out supra, warranting interference by this Court.

28. I am fully aware of the fact that at times a mortgaged security will become a negative security, which means, the value of the mortgaged property would go far below the amount due payable under the mortgage. But in this case, if really any such thing had happened, then the Court should have applied its mind on that and R4/one of the Decree Holders also in his affidavit accompanying the said application REA No. 136 of 2004 should have detailed and delineated, expressed and expatiated all those facts and sought for permission but it was not done so.

29. I would also like to point out that even though in a given case where the Executing Court might not be in a position to fix the reserve price in pari materia with the EP amount itself, at least the Executing Court should take all possible steps to see as to whether it could fix the reserve price somewhat between the upset price already fixed and the amount to be recovered under the E.P. But in this case even that exercise was not done. The order, wherefore passed by the Executing Court is fraught with illegalities and improprieties, warranting interference in this revision.

30. The learned Counsel for the Decree holder-R4 would invite the attention of this Court to the fact that only half share in the land as well as the superstructure, including the machinery was sought to be sold in the Court auction.

31. In this connection I would like to point out that absolutely there is no clarity. I would like to extract hereunder what is found set out in the proclamation of sale relating to description of property to be sold.

32. There are certain well established principles relating to proclamation of sale, which have been given a go-by in this case. In respect of landed property is concerned, it is sufficient if the Survey Number is given with boundaries. But in respect of superstructures as well as the machinery, it is totally insufficient to specify vaguely as it had been done in this case. The type of superstructures, the measurements, the details of the machinery, all should have been found spelt out in the proclamation of sale. On the one hand I find fault with the decree holders in not specifying such details and on the other hand I would like to find fault with the Executing Court as well as the Court Office concerned for not adhering to those basic principles.

Order XXI, Rule 66(2)(f) of Code of Civil Procedure.(as amended by High Court Amendment, Madras, vide amendment dated 10.4.1963 would contemplate as under:

Order 21, Rule 66(2)(f) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

(emphasis supplied)

and it is obvious that specification of reserve price as per Order 21, Rule 72A(2) and also the factum of permission having been granted to one of the decree holders to bid are all material facts, worthy of being specified in the proclamation of sale.

33. A mere reading of the above description in the proclamation of sale would not give any picture much less clear picture to any prospective bidder. From the said description what one could understand is that there are three mills, so to say, one ginning mill, one oil mill and one rice mill, including machinery and half of them are to be sold along with half share in the land. Steps should have been taken to obtain valuation report from some competent person concerning the mills and machinery but that was not done also. Order 21, Rule 66(4) of CPC enables and also enjoins the Court to make such enquiry as might be necessary to gather relevant particulars to specify in the proclamation. It is the bounden duty of the decree holder as well as the Court to see that common sense principles are adhered to in describing the property to be sold in Court auction sale and in fact a harmonious reading of the relevant provisions of CPC and the Civil Rules of Practice would highlight the same. But in this case, no such thing has been done.

34. The learned Counsel for the revision Petitioners would appropriately submit that it is quite unthinkable that half an extent of land measuring 1.42 acres with half extent of Ginning Mill, rice mill and oil mill with machinery could be sold for such paltry sum of Rs. 3 lakhs and the lower Court without au fait with law and au courant

with facts dealt with the matter illegally and thereby rendering the sale void, attracting adjudication u/s 47 of Code of Civil Procedure. In fact R4 was declared as successful bidder for Rs. 3,00,500/-. Hence, I am of the considered view that the sale should necessarily be set aside. A fortiori, substantial injury has been done to the judgment Debtors. If not the aforesaid illegalities highlighted above me, would constitute substantial injury, then I am at a loss to understand as to what would constitute substantial injury to judgment Debtors.

35. At this juncture, the learned Counsel for R4 would submit that if for any reason the Court finds that the sale conducted was not in order, the only course open for the Court is to set side the sale and once again direct the Executing Court to conduct fresh sale as per law, for which, the learned Counsel for the revision petitions/judgment debtors would submit that in ordinary circumstance that might be the order of this Court, but here already C.M.P. No. 1431 of 2008 is pending seeking permission of this Court to deposit the entire dues under the mortgage and this Court can even impose reasonable cost also to be paid by the judgment debtors to the decree holders.

36. Fruitfully, a reference to the famous treatise Potter''s Historical Introduction to English Law could be made. An excerpt from it would run thus:

The development of the equity of redemption- In the reign of Edward IV there is evidence that the Chancellor had acquired some sort of jurisdiction over mortgages which was recognised even by the common law Courts. In 1469 it was pointed out, in respect of a claim to recover land on repayment of a loan, that "although there is no remedy in our law, he may have subpoena if he pays the money." This relief was granted where failure to redeem was due to accident, or to any other ground on which equity was in the habit of interfering in private transactions, as, for example, in cases of fraud, and later in cases of misfortune, and upon any strict condition for undoing the estate of another in lands, upon a small or trifling default," that is, taking advantage of a penalty.

It was at the end of the sixteenth century that the Chancellors began to recognize the right of the borrower to redeem the land on repayment of the loan after the day for repayment (date of redemption) was past. As it was put in a case early in the next century, "though the Money be not paid at the Day, but afterwards, the said Lease ought to be void in Equity, as well as on legal Payment it had been void in Law against them." Consequently, during the early part of the seventeenth century the Chancellors came to regard the interest of the mortgagee merely as a security; and hence the mortgagor, even after the day for redemption was past, was entitled in equity to an interest in the land. In how V. Vigures this right appears as settled law, and the same case shows that the right of the mortgagor could be cut short by a decree of the Court, which is now known as a foreclosure decree. In Thornborough v. Basker Lord Nottingham finally laid it down that the equity of redemption was an interest in land.

Foreclosure became an essential right of the mortgagee. Until he obtained a decree of foreclosure he was not in any sense a true owner of the land. By a decree of foreclosure the whole right of the mortgagor in the land disappears. It is true that there are certain grounds on which the foreclosure can be reopened, sufficient indeed to knock the bottom out of the common novelist''s plots, but if there have been dealings with the foreclosed land, no right to redeem can survive save in rare cases. On the other hand, these transactions will have the effect of destroying any right of the creditor to sue on the covenant to pay the money while retaining the land.

The method of foreclosure illustrates the attitude of equity. Even from the earliest case of How V. Vigures the mortgagor has a limited time after the Court''s decree, now called a decree nisi, in which to repay the money. Failure to do so within the limited time now results in the decree absolute.

From the first the Chancellors of the later seventeenth and eighteenth centuries insisted that the now accepted maxim "Once a mortgage always a mortgage" should be followed. The mortgagor''s interest could therefore be devised by will, and finally it was held that the mortgagor could assign his equity to a third party, who might then enforce it against the mortgagee. This equitable interest became known as the equity of redemption, which must, however, be distinguished from the right to redeem, which may exist separately.

The doctrine "Once a mortgage always a mortgage" simply meant that no clog might be imposed on the right to redeem, but it implied that the test whether a mortgage had been created was simply whether the conveyance, whatever its form, was made as security. It also involved the ultimate acceptance of the principle that was finally established by Lord Hardwicke in Casborne v. Scarfe that "an Equity of redemption is considered as an estate in the land.

Mortgagee''s interest personality- The effect of conferring this interest on the mortgagor was to cause doubt as to the true character of the interest of the mortgagee. It was, however, finally settled in 1975 by Lord Nottingham that "the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money." Hence, on his death, the right to the money passed to his executor, and not to his heir. At the same time it had been earlier decided that the legal estate in the land passed to his heir, and with it the right to get foreclosure.

Another important development of the seventeenth century was a discouragement of the mortgagee''s right to go into possession of the land during the continuance of the equity of redemption. If he did enter he was liable to account for any advantage that he obtained in excess of the interest due on his money. If he now enters without good cause he is said to be liable to account "on the footing of willful default.'' Since 1936 the Chancery may also refuse to allow a mortgagee to go into possession without real cause."

The position of mortgaged land - The result of this development of the equity of redemption gave mortgaged land an anomalous position. The legal owner of the estate was in fact a secured creditor having little real relation to the land unless he foreclosed under his security. The owner of the equity of redemption exercised all the rights of owner possible to a person not having the legal estate. To enable him to make valid leases and otherwise do acts involving common law obligations it became the practice to confer express powers in the mortgage deed. During the latter part of the nineteenth century most of these powers became statutory.

(emphasis supplied)

37. The above excerpts would display and convey, cannot and denote as to how several centuries ago itself in England the Legislators as well as the Courts were zealous and jealous in seeing that the mortgagees should not be allowed to snatch away the property of the mortgagors and with that avowed intention, then and there the Legislators evolved Legislations for protecting the interest of the mortgagors. Echoing the same view, the Honourable Apex Court in U. Nilan Vs. Kannayyan (Dead) Through Lrs., , pointed out that the penurious/cash strapped situation of a mortgagor should not act as a boom for the mortgagee to snatch away the property and that even at the appeal or revisional stage of the case, the mortgagor should be allowed to deposit the amounts due and get himself wriggled out of his precarious Position.

38. No doubt, in this case after dismissing the application filed u/s 47 of Code of Civil Procedure, the sale was confirmed and thereafter alone revision was filed. Even then those judgments supra would highlight that the right of the mortgagor to deposit the amount could be considered and the Court could pass orders permitting him to deposit the dues.

39. While formally agreeing with the proposition of law as found enunciated in the decisions of the Honourable Apex Court, the learned Counsel for R4 would submit that this is a different case, where the judgment debtors were given ample opportunity by the lower Court itself to deposit the amount due under the mortgage even during the pendency of this revision petition but that was not utilised and in such a case, the judgment debtors attracted as against them the concept estoppel by accord and also the principle of res-judicata.

40. At this juncture I call up and recollect the following maxims:

(i) res judicata pro veritate accipitur - A matter adjudged is taken for truth. A matter decided or passed upon by a Court of competent jurisdiction is received as evidence of truth.

(ii) Nemo debet bis vexari pro una et eadem causa - No man ought to be twice troubled or harassed for one and the same cause.

(iii) Nemo debet bis puniri pro uno delicto. No man ought to be punished twice for one offense. No man shall be placed in peril of legal penalties more than once upon the same accusation.

and those maxims are found embodied in Section 11 of CPC which cannot be pressed into service in matters of this nature. Merely because earlier the amounts due were not deposited by the judgment debtors availing the time granted by the lower Court, that it does not mean that the right of redemption got extinguished. I would like to refer to the maxim ''Ubi jus, ibi remedium'' - There is no right without a remedy. Accordingly, unless a right has got extinguished as per law, such right could be exercised by the judgment debtors, so as to redeem the mortgage.

41. No doubt, the very fact that the judgment debtors remained absent in the proceedings connected with R.E.A. 136 of 2004 and that subsequently, despite the Court having granted time to deposit the dues, they had not utilised the same in depositing the money would all bespeak about the negligence and laches of the judgment debtors, still I am of the firm opinion that the right to re-deem the mortgage as contemplated under law exists in favor of the revision Petitioners/judgment debtors and it cannot be denied. However, they should be put on certain terms in view of the discomfiture and difficulties to which the decree holders have been put into because, of the conduct of the judgment debtors.

42. In the result, I am of the view that the sale dated 28.10.2004 and as confirmed by the lower Court has to be set aside and accordingly, it is set aside by allowing this revision and the C.M.P. No. 1431 of 2008 is allowed directing the Petitioners/judgment debtors to deposit the entire dues under the final decree till the date of deposit, on or before 5.8.2010, before the lower Court, along with the cost of Rs. 1,00,000/- (Rupees one lakhs only) in favor of the decree holders. It is made clear that if there is failure on the part of the revision Petitioners/judgment debtors in complying with the condition imposed in this order, then the benefit of this order will not ensure to them. Accordingly, the civil revision petition is disposed of. No costs. Consequently, connected miscellaneous petition is closed.