

Gour Chand Mullick Vs. Pradyumna Kumar Mullick and anr.

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Court : Kolkata

Decided On : Mar-22-1943

Reported in : AIR1945Cal6

Appellant : Gour Chand Mullick

Respondent : Pradyumna Kumar Mullick and anr.

Judgement :

ORDER

Das, J.

1. The suit in which the present application has been made was filed in 1937 by the plaintiff against the defendant, Pradyumna alone on a mortgage by deposit of title deeds praying for an account and sale of the mortgaged properties and other incidental reliefs. The sum secured was Rs. 79,273-14-0 with interest thereon. How this odd sum was arrived at does not appear from the papers before me. It may be, and this is only a surmise, that it was arrived at as a result of adjustment of previous dealings. The rate of interest agreed upon between the parties was 9 per cent, per annum which is in excess of the rate which has since been specified in the Bengal Money-Lenders Act 1940. The mortgaged properties were 2A Nanda Lal Mullick Lane, portion of 64A Upper Chitpur Road, (which may; be hereafter called Calcutta properties) and Premises Nos. 10/1, 11, 11/1-, 11/2, 11/3, 11/4 and 11/5 Cossipore Road which may hereafter be collectively called the Cossipore

properties. Shortly after the filing of the suit the plaintiff was appointed the Receiver of the mortgaged properties on certain terms which I need not refer to.

In October 1939 the defendant Pradyumna entered into an agreement with the petitioner for the sale of his equity of redemption in the Cossipore properties to the petitioner for Rs. 77,000 free from encumbrances and received Rs. 5001 as and by way of earnest money. The plaintiff promptly intervened and obtained an order on 19th January 1940 directing the defendant Pradyumna to deposit the sum of Rs. 5001 with his attorneys Messrs. N. E. Mondal & Co., within one month and providing that the plaintiff should agree to the sale being effected to the petitioner on the terms of the agreement of 1939 to which I have referred. The defendant Pradyumna deposited the sum of Rs. 5001 with his attorneys Messrs. N. E. Mondal & Co. The plaintiff has since obtained payment of this amount from the attorneys. On 2nd August 1940, a preliminary decree was passed in this suit by and with the consent of the plaintiff and the defendant Pradyumna. By this preliminary decree it was declared by consent that the properties mentioned in the schedule annexed to the plaint were charged with the payment of Rs. 79,273-14-0 payable to the plaintiff with interest at 9 per cent, per annum from 10th October 1936 until payment. The plaintiff having agreed to reconvey to the defendant or his nominee the Cossipore properties free from the mortgage in suit and undertaken to cancel the lease subsisting thereon On receipt of half of the amount to be found due to the plaintiff on the taking of accounts it was ordered and decreed that for the balance of the amount the plaintiff would be entitled to sell the Calcutta properties on the expiration of six months from the date of the report of the Registrar. The decree then directed the Registrar to take the usual accounts and to make a report to the Court and directed the Taxing Officer to tax the plaintiff his costs of the suit as between attorney and client. By Clause 4 of this decree it was ordered and decreed that in default of payment as aforesaid by the defendant for redeeming the two items of the properties thereinbefore provided, the defendant do pay into Court to the credit of this suit, within six months of the date of such counter-signature or any latter date upto which time may be extended, the entire sum as may be found due and the taxed costs of the suit awarded to the plaintiff and directions were given, upon such payment, for delivery of the titls deeds and for reconveyance of the mortgaged properties to the defendant. Clause 5 provided

that in default of payment the plaintiff might apply to Court for a final decree for sale of the mortgaged properties and that on such application being made the mortgaged properties or a sufficient part thereof should be directed to be sold. Clause 6 directed appropriation of the sale proceeds towards the costs of the sale and then towards the plaintiff's claim and costs as therein mentioned. The rest of the provisions of this decree is not material for our present purpose.

3. It should be remembered that at the time of the passing of this preliminary decree the parties to the suit were the plaintiff and the defendant Pradyumna. The present petitioner was not a party to the suit then. Nor was Sm. Bhabatarini Dassi the purchaser of the equity of redemption in respect of the Calcutta properties a party to the suit at that time. Bengal Money-Lenders Act, 1940, was not in force at the date of this preliminary decree and accordingly the agreed rate of interest was allowed in the decree. The Act came into force in September 1940. On 8th April 1941 the Registrar made his report finding that Rupees 95,794-9-6 would be due to the plaintiff on 20th October 1941. Bengal Money-Lenders Act 1940, having come into operation, the Registrar, in taking the accounts and arriving at the amount due, calculated interest at 8 per cent, per annum simple, the plaintiff having agreed to forgo the balance of interest. On 15th October 1941 the petitioner who had agreed in 1939 to purchase the Cossipore properties from the defendant Pradyumna paid Rs. 12,000 to the plaintiff and obtained an extension of time till 25th November 1941 for payment of the balance. The defendant Pradyumna having from time to time obtained the total sum of Rs. 26,697 from the petitioner, executed a conveyance on 8th January 1942 in favour of the petitioner in respect of the Cossipore properties subject to the payment of the balance that would be payable under the aforesaid preliminary decree for the redemption of the Cossipore properties. It also appears from the record of this suit that the defendant Pradyumna had also transferred his equity of redemption in respect of the Calcutta properties to one Sm. Bhabatarini Dassi. It further appears that these two purchasers were added as parties defendants in this suit but I am not clear about the dates when they were brought on the record. It seems that it must have been after the passing of the preliminary decree dated 2nd August 1940 and before the decree dated 20th March 1942 to which I shall presently refer.

4. No payment having been made the plaintiff on 27th February 1942 applied for a final decree. The petitioner appeared on the application as assignee of part of the mortgaged properties. Neither the defendant Pradyumna nor the other added defendant Sm. Bhabatarini appeared on the application. The petitioner asked for relief under the Bengal Money-Lenders Act, but it is not, clear, on the papers before me, what particular reliefs were prayed for by the petitioner. On 20th March 1942 a decree was passed in this suit. From the original decree, as drawn up and filed of record in this suit, it appears that it is headed 'Final decree for sale'. After reciting the preliminary decree dated 2nd August 1940 and the report of the Registrar dated 8th April 1941 and the application by the plaintiff dated 27th February 1942 for final decree for sale and, recording the fact of appearance of the plaintiff and the defendant Gobind Singh (the present petitioner) and the fact of non-appearance of the other defendants (namely the defendants Pradyumna and Sm. Bhabatarini Dassi) and also referring to the fact that payment directed by the said preliminary decree had not been made by the defendants or any person on their behalf or any other persons entitled to redeem the mortgage this decree fixes an amount, arrived at in the manner set out in the schedules, as payable by the petitioner within six months by monthly instalments, and directs that in default of payment 'of two instalments the Cossipore properties would be sold. There is also a direction for sale of the Calcutta properties. I shall have to refer to the terms of this decree in greater detail hereafter.

5. The defendants not having made any payment the plaintiff took steps to bring the properties to sale and accordingly the Registrar took up the sale reference on notice to parties to settle the notification and conditions of sale and abstract of title and so forth. The Registrar appointed one Mr. C.C. Sreemany an engineer and valuer to value the properties sought to be sold. Mr. Sreemany surveyed the properties and sent in his survey and valuation reports. Thereafter the notification and conditions of sale and abstract of title were settled by the Registrar and the sale was fixed for 16th December 1942. It was directed that the Cossipore properties would be sold in one lot. The specified price was fixed at Rs. 50,167. It will be necessary to refer to the minutes of the proceedings before the Registrar and the reports of Mr. Sreemany in' detail hereafter.

6. On 16th December 1942 the sale was adjourned and eventually the sale was fixed for 20th February 1943. It is alleged by the petitioner that the plaintiff received interest subsequent to the decree and consented to the sale being adjourned. The plaintiff denies having received any interest and states that he was induced to agree to the adjournment only by reason of the earnest importunities of the petitioner. The figures of charges, costs and interest set out in the schedule and included in the decree are not certainly calculated to inspire any very great confidence in this denial of the plaintiff but I do not lay any stress on this point for the purpose of this application. Suffice it to say that on 16th December 1942 the plaintiff himself having stated that there was a chance of settlement the sale fixed for that date was adjourned and eventually the sale was fixed for 20th February 1943 as I have said.

7. On 19th February 1943, that is to say on the day prior to the date fixed for sale an interview took place in the office of Mr. S.C. Mitter an attorney of this Court. That there was an interview is not denied. The dispute is as to what transpired at that interview. The petitioner's version is set out in paras. 15 and 16 of the petition. He states that prior to the sale the petitioner repeatedly called upon the plaintiff to assign the mortgage debt and the security to one Joynarain Singh who was willing to obtain such assignment but the plaintiff wrongfully refused to do so. He further states that on 19th February 1943 the plaintiff was called to the office of Mr. S.C. Mitter where he was again requested to assign the mortgage but the plaintiff refused to do so unless he was paid an extra sum of Rs. 2000 over and above his claim under the decree. The petitioner was at that time willing to pay an extra sum of Rs. 1000 but the plaintiff did not agree. The petitioner also states that in the evening of the same date the plaintiff was approached again but the plaintiff raised his demand from Rs. 2000 to Rs. 3000. The petitioner is supported in his version by Joynarain who has also affirmed an affidavit which has been filed herein. The plaintiff however denies these allegations in paras. 13 and 14, and in paras. 28 and 29 of his affidavit in opposition. He says he knows nothing of any assignment and submits that he is, in no event, bound to assign the mortgage to any person. He denies that he ever asked for any excess sum nor was any sum paid or offered. He admits that he went to the office of Mr. S.C. Mitter but says that he did so in good faith and on the representation that arrangement had been made to pay

his claim but on going there he found that no arrangement had been made and that the petitioner was merely bluffing him in order to obtain further adjournments of sale. He charges that the whole thing was a carefully prepared plan in order to set up a false story when occasion would arise for the same.

8. Mr. S.R. Das Gupta who appeals in support of the present application has commented on the statement of the plaintiff that he knew nothing of any assignment as a mere pretence and has urged that the attitude disclosed by the assertion of the plaintiff that he was not bound to assign the mortgage really points to the truth of the petitioner's version that the plaintiff put the screw on the petitioner by demanding an extra sum. It may be likely, in the circumstances, that the petitioner's story is true but I cannot say that I can act upon mere suspicion or probabilities. Nor do these allegations seem to me to be very material for the purpose of this application. On 20th February 1943, the Registrar held the sale and declared one Kanhailal Lohia as the highest bidder and purchaser of the Cossipore properties at and for Rs. 1,10,000. The purchaser is represented before me by Mr. S.P. Choudhury instructed by his attorney Mr. Sushil Sen. On 8th March 1943 the petitioner took out the present summons for the following orders:

(a) That the sale held on 20th February 1943 be set aside.

(b) That the decrees passed in this suit on 2nd August 1940 and 20th March 1942 be re-opened and fresh decrees be passed under the provisions of Bengal Money-Lenders Act.

(c) In the alternative for an order that upon your petitioner depositing in Court a sum equal to five per cent, of the purchase money and the amount specified in the proclamation of sale, i. e., Rs. 49,120-4-9 the sale held on 20th February 1943 be set aside.

(d) In the further alternative leave be given to your petitioner to deposit in Court five per cent, of the purchase money and the amount specified in the proclamation of sale.

(e) Such order, be made as to the costs of and incidental to this application as to the Hon'ble Court may seem fit and proper.

(f) Such further and other order as to this Hon'ble Court may seem fit and proper.

9. The application was moved before me by Mr. Das Gupta in chambers on the 17th instant and Mr. B.C. Ghose who appears for the plaintiff drew my attention to the provisions of Order 21, Rule 89, Civil P. C, and insisted on Mr. Das Gupta withdrawing the application in so far as it was for setting aside the sale for alleged material irregularity under Rule 90. Mr. Das Gupta insisted on pressing his client's claim for setting aside the sale under Rule 90. Mr. B.C. Ghose thereupon submitted that under Sub-rule (2) of Rule 89 the application, in so far as it was for setting aside the sale on payment of the claim and 5 per cent, of the purchase money under Rule 89, should be dismissed. Mr. Das Gupta differed to withdraw prayer (c) but insisted on prayer (d). He submitted that the judgment-debtor can apply for setting aside the sale only on payment into Court the requisite amounts and that therefore the application for paying into Court the requisite amounts is not an application for setting aside the sale under Rule 89. He says that payment into Court will enable his client to make the application under Rule 89. His client cannot pay into Court without an application and therefore an application is necessary and that limited application is not barred by Sub-rule (2) of Rule 89. Mr. Das Gupta in his argument did proceed on the footing that this application in so far as it prayed for setting aside the sale on payment of the requisite amounts was one under Rule 89 of Order 21, Civil P. C. Mr. Ghose contended that both the prayers (c) and (d) came within Rule 89. These two prayers, he submitted, were only two stages of the same application. Even if Rule 89 be construed as involving two separate applications, namely one for leave to pay into Court the requisite amounts and the other, after payment, for setting aside the sale, both the applications were within Rule 89 and as the petitioner did not withdraw his application under Rule 90, both the prayers (c) and (d) must be withdrawn or dismissed before the petitioner can proceed with his application under Rule 90 Mr. Ghose contended that the petitioner must elect here and now and relied on *Sarvi Begam v. Ram Chandar Sarup* : AIR1925 All778 .

10. The argument had not concluded but it appeared to me that this application raised several points of importance and complexity and I accordingly adjourned the application to Court and directed that it be placed on the next day's list. On the matter being called on for further argument on the 18th instant, I put to Mr. Ghose three propositions, namely: (1) Was prayer (a) of the summons wholly based on Rule 90 or was it based partly on Rule 90 and partly on Section 47, Civil P. C? In so far as it was not based on Rule 90, did it attract the operation of Rule 89(2)? (2) Even if Order 21, Rule 89 applied to prayers (c) and (d), must these prayers be withdrawn or dismissed in limine because the petitioner insists on going on with his application under Rule 90? and (3) can prayers (c) and (d) be treated, if necessary, as application under Order 34, Rule 5 if there is any difficulty in applying Order 21, Rule 89?

11. As to (1): Mr. Ghose replied that he was prepared to meet this application, in so far as it was one for setting aside the sale on the ground of alleged want of jurisdiction, but he submitted that the principle on which Sub-rule (2) of Rule 89 was based was that the judgment-debtor should not simultaneously prosecute two inconsistent remedies and that the same principle should apply when the judgment-debtor applies for setting aside the sale as a nullity for want of jurisdiction and also prays for setting aside the sale on payment of the requisite amounts. Here also he is prosecuting two inconsistent remedies. I do not accept this argument of Mr. B.C. Ghose. A sale in execution of a decree may be challenged under Order 21, Rule 90 on grounds falling within that rule. Such a sale may also be challenged by the judgment-debtor on grounds not covered by Rule 90, e.g., when (prior to decent amendment) the sale was impugned on the ground that notice under Order 21, Rule 22 had not been served or on the ground that the decree in execution of which the sale took place was a nullity. In these cases the application would come under Section 47 of the Code. As instances I may refer to *Golam Ahmad v. Judhisthir Chandra* ('03) 30 Cal. 142 and *Parasram v. Balmukund* ('08) 32 Bom. 572. In *Harihar v. Rama Pandu* ('09) 33 Bom. 698 : 4 I. C. 253 it has been held that an application which was not under Section 311 (which corresponds to Order 21, Rule 90, except that fraud has been included in the latter) was no bar to an application under Section 310A (which corresponds to Order 21, Rule 89). Further if the principle sought to be deduced by Mr. Ghose

from Sub-rule (2) of Rule 89 was to be applied in all cases, it would have been, quite easy for the Legislature to omit the words 'under Rule 90' from Sub-rule (2) of Rule 89. For these reasons, I do not feel compelled to accede to Mr. Ghose's contention on this point and I hold that an application for setting aside the sale on grounds not covered by Rule 90 may be combined with an application under Rule 89.

12. As to (2) : Mr. Ghose insisted that under Rule 89(2) if the petitioner does not withdraw his application under Rule 90, then the application under Rule 89 must be either withdrawn or dismissed. He relied on the case in *Sarvi Begam v. Ram Chandar Sarup* : AIR1925 All778 . The head-note of that case does support Mr. Ghose's contention but a perusal of the judgment will show that the head-note is not quite accurate. What happened in that case is that the judgment-debtor at first applied under Rule 89 but it was defective as the deposit was slightly short. While that application was going on, and was being argued he applied under Rule 90. The Subordinate Judge dismissed the application under Rule 89 on the merits and then he dismissed the other application, namely, the one under Rule 90, on the ground that the judgment-debtor by proceeding with his application under Rule 89 must have presumably withdrawn the application under Rule 90. This decision was overruled by the High Court and the learned Judges observed:

It seems to us that the Court ought to have called upon the applicant's counsel to make his election either to withdraw his application under Rule 90 or not. If he declined to do so, the Court should not have allowed him to press his application, under Order 21, Rule 89.

I do not find anything in the judgment which says that if the applicant declined to withdraw his application under Order 21, Rule 90, the application under Order 21, Rule 89 should be dismissed. Therefore, in my opinion, the head-note does not correctly summarise the actual decision. Mr. Das Gupta has referred me to *Mirza Altaf Beg v. Fazlul Huq* : AIR1928 All196 where it has been held that after the application under Rule 90 has been dismissed or withdrawn the judgment-debtor can then apply under Rule 89 provided he is within time. If that be so, then it follows that the judgment-debtor has the right to make the two applications

consecutively, provided they are made within 30 days. Why, then, should he be made to lose his right to apply under Order 21, Rule 89 on the fortuitous circumstance that his application under Order 21, Rule 90 remains undisposed of till after the expiry of 30 days within which time application under Order 21, Rule 89 has to be made under Article 166? The non-disposal of the application under Order 21, Rule 90 may be due to no fault or laches on his part. Was the intention of the Legislature to condone all irregularity and fraud by providing that the judgment-debtor can only apply for relief under Order 21, Rule 89 if he does not apply under Order 21, Rule 90? The limited time prescribed for application under Order 21, Rule 89 will in a very large majority of cases inevitably bring about this result. For it is only in exceptional cases that the application under Order 21, Rule 90 will be disposed of in time and enable the judgment-debtor to make an application under Rule 89 subsequently. In such circumstances, even where there is most flagrant irregularity or palpable fraud, no judgment-debtor who is able and anxious to save his property by paying up will ever venture to make any application under Order 21, Rule 90 and face the risk of an adverse finding being arrived at after the lapse of 30 days when his application under Order 21, Rule 89 will be barred. This cannot be the true position. If such a drastic result was really intended, then Sub-rule (2) of Rule 89 would have said that when the judgment-debtor applies under Order 21, Rule 90 then unless he withdraws his application under Rule 90, his application under Rule 89 shall be dismissed. The only case about election and dismissal that has been cited before me is that reported in *Sarvi Begam v. Ram Chandar Sarup* ('25) 12 A. I. R. 1925 All. 778. I have tried to explain that that decision does not support this extreme contention of dismissal. If that case can be taken to lay down the principle that dismissal is obligatory I would say respectfully that it was not necessary for the learned Judges, on the facts, of that case; to lay down any such principle. I do not overlook the case in *Rajendra Nath Haider v. Nil-ratan Mitter* ('96) 23 Cal. 958 where a Bench of this Court upheld the dismissal of an application under Order 21, Rule 89 merely on the ground that another application under Order 21, Rule 90 had been made subsequently. That case was decided under the old Code and at a time when the notion was that an application under Order 21, Rule 90 worked as a permanent disqualification against an application under Order 21, Rule 89. Now that the

subsequent cases have established that a subsequent application under Order 21, Rule 89 is competent even after an application under Order 21, Rule 90 has been dismissed or withdrawn, provided it is within time, the old decisions upholding dismissal of application under Order 21, Rule 89 on account of an application under Order 21, Rule 90 should be reconsidered. I am inclined to the view, for reasons stated above, that the requirements of Sub-rule (2) of Rule 89 are sufficiently complied with and satisfied if the application under Rule 89 is not allowed to be 'made' or 'prosecuted', i. e., actually moved or proceeded with and be stayed until the disposal of the application under Rule 90 and it is not obligatory on the Court to dismiss it in limine.

13. As to (3): Mr. Ghose argued that Mr. Das Gupta had admitted that the prayer (c) was really an application under Rule 89. Further the fact that in both prayers (c) and (d) offer has been made to deposit 5 per cent, of the whole of the purchase money indicates that these prayers were intended to be made under Rule 89 and Mr. Ghose urged that the Court should not permit the petitioner to take advantage of the observations made by the Court and change his case. It is quite true that on the first day of hearing in Chambers Mr. Das Gupta proceeded on the footing that prayers (c) and (d) were founded on Rule 89. It is equally true that the offer to pay 5 per cent, of the whole of the purchase money indicates that Rule 89 was in contemplation of the lawyer who drew up the summons. But the substance of the matter should not and cannot be overlooked altogether in giving way to mere form. In this connexion the observations of Chandavarkar J. in *Harihar v. Rama Pandu* ('09) 33 Bom. 698 : 4 I. C. 253 to which I have already referred seem to me to be appropriate. Said the learned Judge at p. 702 of the report,

Then it is argued that the judgment-debtor's application under Section 310A could not be granted, because he had applied to set aside the sale under Section 311. But was it an application under that section? It may be that, when the respondent presented the application he presented it as one falling under that section, but the question is, not what he thought or what section he had mentioned in his application, assuming that as a matter of fact he had mentioned Section 311 and none else. The substance of the grounds upon which he had made the application to set aside the sale must be looked to. If the allegations, on the strength of which

the respondent asked the Court to set aside the sale, did not bring it within the grounds specified in Section 311, the mere mention of the section could not in law make it an application under it. So looked at, it did not fall within Section 311, but it must be regarded as an application under Section 244.

What is the position now before me? The suit is a suit on a mortgage. The petitioner is the assignee of the mortgagor and as such entitled to all the special favours that a Court of equity has from old times shown to mortgagors in helping him to redeem his property. I find a provision in Order 21, Rule 89 giving a locus penitenti to all judgment-debtors whose property has been sold in execution of a decree. I find also a provision in Order 34, Rule 5 giving a locus penitenti to a mortgagor judgment-debtor whose property has been sold in execution of a mortgage decree for sale. On reading the two provisions I find that the provisions of Order 34, Rule 5 are more extensive and beneficial. It is an elementary principle of construction of statutes that when in one and the same statute there is a provision which applies to all persons and there is another provision which applies only to a particular class of persons, the former should be regarded as the general provision and the latter should be regarded as the special provision. On this principle when the mortgagor defendant applies to set aside the sale on depositing the requisite amounts, I cannot see why such application cannot be regarded as one both under the provisions of Order 34, Rule 5 and also under Order 21, Rule 89. The case in *Virjibandas Moolji v. Biseswar Lal Hargobind* ('21) 8 A.I.R. 1921 Cal. 169 where it was held that Rule 89 applied to sales in mortgage suits by the Registrar of the original side was decided before Sub-rule (2) was added to Order 34, Rule 5 and the case proceeded on the basis of Order 21, Rule 89 which alone then provided for deposit of 5 per cent, for the benefit of the purchaser. In that case the real point was as to what amount was to be deposited by the purchaser for the benefit of the decree-holder. The case is not in point at all.

14. I am indeed grateful to Mr. Ghose for his having very fairly referred me to the case in *National Tobacco Co. v. Mahmoodinnessa* ('43) 47 C. W. N. 147 and I am glad to find that my views can find support from the decision of Khundkar J. in that case. In these circumstances am I to hold the petitioner bound to Order 21, Rule 89 merely because learned counsel appearing for him on the first day proceeded

on the basis of Order 21, Rule 89 or because petitioner has offered to pay 5 per cent, of the whole of the purchase money as required by Order 21, Rule 89 and not 5 per cent, of the purchase money actually paid into Court as required by Order 34, Rule 5 or because he has not specifically asked for return of the title deeds and a reconveyance? Mr. Ghose has conceded that even if the application under Order 21, Rule 89 be dismissed the petitioner can yet again apply under Order 34, Rule 5 before the sale is confirmed. Indeed the case in *Shamangini v. Mahalaxmi* : AIR1942 Cal44 referred to in the judgment of Khundkar J. in *National Tobacco Co. v. Mahmoodinnessa* ('43) 47 C. W. N. 147 mentioned above lays down the above proposition. Am I then to encourage multiplicity of litigation by dismissing this application as one under Order 21, Rule 89 and driving the petitioner to another application under Order 34, Rule 5 to which Art. 166 Limitation Act, does not apply (see the case reported in *Subramania Asari v. Ramaswami Pillai* ('37) 24 A.I.R. 1937 Mad. 560)? Thirty days' time has not yet expired from the date of sale and Mr. Das Gupta on behalf of his client is anxious to fall back upon Order 34, Rule 5 as an alternative provision to found his prayers (c) and (d) upon. Should I still dismiss these prayers? I think not. In my opinion, Order 34, Rule 5 is an appropriate provision under which the mortgagor defendant whose property has been sold in execution of a mortgage decree for sale, can apply to have the sale set aside and to have a reconveyance, and I think the judgment-debtor can fall back upon Order 34, Rule 5 if his application fails under Order 21, Rule 89. If he can fall back upon Order 34, Rule 5 then Sub-rule (2) of Rule 89 will have no application and no question of election will arise at all. There is no such provision in Order 34, Rule 5 as in Order 21, Rule 89(2). In these circumstances I am willing to treat this application, if necessity arises, as one under Order 34, Rule 5. On this ground also I am prepared to allow the petitioner to retain prayers (c) and (d).

15. To summarise, I hold : (1) that the application in so far as it seeks to set aside the sale on grounds not covered by Order 21, Rule 90 may be combined with the application in so far as it seeks to set aside the sale on payment of the requisite amounts; (2) that if prayers (c) and (d) be treated as one under Order 21, Rule 89 it need not be dismissed in limine if the applicant does not withdraw his application under Order 21, Rule 90 and that it will be sufficient to stay that part of the

application until after the disposal of the other part of the application; (3) that this application in so far as it seeks to set aside the sale on payment of the requisite amounts may be treated as one substantially under Order 34, Rule 5 also if Order 21, Rule 89 fails and need not be dismissed in limine.

16. I now proceed to deal with the application on its merits. In prayer (a) the petitioner seeks to get the sale held on 20th February 1943, set aside. The grounds on which he seeks to get the sale set aside are two-fold: (i) that the decree in execution of which the sale was held was a nullity having been passed without jurisdiction and therefore the sale in execution of such decree is also a nullity; and (ii) that the sale was vitiated by material irregularity in publishing or conducting the sale.

17. I propose to deal with these grounds of objection separately.

18. As to ground (i): The objection under this head is formulated in para. 11 of the petition. It is contended that the final decree was made in contravention of the provisions of the Bengal Money-Lenders Act and is a nullity having been made without jurisdiction and the sale held thereunder is also a nullity. In dealing with this objection one has to bear in mind that the suit was one on a mortgage and pray-ed for sale of the mortgaged properties. Such a suit is ordinarily governed by the provisions of Order 34, Civil P. C. Rule 4 of this Order provides for the passing of a preliminary decree in a mortgage suit for sale. Rule 5 provides for the passing of a final decree for sale. From the language of Rules 4 and 5 it is quite clear that the two decrees go together. The final decree must follow the preliminary decree if the final decree is to be one passed under Rule 5(3). In passing a final decree under Rule 5(3) the Court has no power to go behind the preliminary decree. The final decree under Rule 5(3) has only to record the fact of non-payment and to direct a sale. The final decree under Rule 5(3) is complementary to the preliminary decree and works out the preliminary decree.

19. Turning now to the facts of the present case I find that the preliminary decree was passed in this case on 2nd August 1940. It directed the usual accounts and provided for payment of the whole amount within six months after the report of the Registrar was countersigned and in default of payment for liberty to the plaintiff to

apply for a final decree. It is true that provision was made for redemption of the Cossipore properties on payment of half of the amount but I do not think that this circumstance made it any the less a preliminary decree under Rule 4 of Order 34. I did not understand Mr. Ghose to contend that it was not a preliminary decree under Rule 4 of Order 34. This decree was passed by consent and at a time when Pradyumna was the sole defendant. Pursuant to this decree the Registrar took the accounts and made his report. Pradyumna having sold his equity of redemption to the petitioner in respect of the Cossipore properties and to Sm. Bhabatarini Dassi in respect of the Calcutta properties, these two purchasers were added as parties defendants. Then the plaintiff applied for a final decree. The defendants Pradyumna and Sm. Bhabatarini Dassi did not appear. Petitioner alone appeared and opposed the application and it is common ground that he prayed for reliefs under the Bengal Money-Lenders Act, 1940. Then the decree was passed on 20th March 1942, to which I have already referred.

20. Turning to the provisions of this decree dated 20th March 1942, I find that a different amount is fixed as separately payable by the petitioner. It is expressly stated that the amount is arrived at in the manner set out in the schedule after considering the rights of the petitioner under the Bengal Money-lenders Act. This amount is higher than the amount fixed in the preliminary decree as sufficient for redemption of the Cossipore properties. This amount is again made payable by certain monthly instalments within six months and there is a provision for reconveyance of the Cossipore properties on punctual payment of the amount fixed by this decree. There is a provision for giving credit to the petitioner for a sum of Rs. 12,000 paid by him and for payment of the sum of Rs. 5001 by Messrs. N. C. Mondal & Co. which had been deposited with them by the defendant Pradyumna. There was a direction on the petitioner for payment of the balance sum of Rs. 49,120-4-9 in instalments mentioned therein and that in default of payment of any two of the instalments the plaintiff shall be at liberty to put up the Cossipore properties for sale. There is also provision for sale of the Calcutta properties. Finally there is provision for the application of the proceeds of sale towards the amount due to the plaintiff. The question is what is this new decree and under what provision of law was such a decree passed?

21. Mr. Das Gupta argued that it is admitted that his client asked for relief under the Bengal Money-lenders Act. The decree itself shows that the figure mentioned therein was arrived at after considering his client's rights under the Bengal Money-lenders Act. He contended that the Court cannot give relief by simply altering the figure mentioned in the preliminary decree and reminds me that where the Court gives relief at all the preliminary decree must be reopened and a new preliminary decree must be passed giving all reliefs by scaling down the interest and providing for payment by instalments as provided in Section 34, Bengal Money-lenders Act. He complained that the Court by this new decree included interest from and after the date of the old preliminary decree. There is, in my opinion, nothing wrong in this; for, when the old preliminary decree is reopened and a new preliminary decree is passed, interest will have to be calculated up to the date of the new preliminary decree. There will, of course, be no further interest after this date. I do not think there is any substance in this part of Mr. Das Gupta's argument. He next argued that the Court had no jurisdiction to provide for payment within six months in monthly instalments and that it was bound to give annual instalments. He contended that the Court had no jurisdiction to direct a sale straight away and thereby deprive the petitioner of the benefit of the provisions of Clause (a) (ii) of Sub-section (1) of Section 34 or of Order 34, Rule 4. In short he contended that the new decree is not in terms of Section 34(1) (a) and the Court had no jurisdiction to pass any new decree in any form other than what is indicated in Section 34(1) (a), Bengal Money-lenders Act, and therefore this decree was a nullity and the sale held thereunder was also a nullity.

22. Mr. Ghose contended and in this he was supported by Mr. Sen that the Court did not pass a new preliminary decree at all. It passed a final decree as the heading of the decree shows. I do not think that the quality or nature of the decree can be determined by the terms of the heading. The actual provisions of the decree have to be examined in order to ascertain its real nature. If on a consideration of the terms of the decree it does not appear to be a final decree it cannot be treated as a final decree merely because it is headed as a final decree. The heading must, in that case, be regarded as a misdescription. Now looking at the terms of this new decree to which I have already referred it is quite clear to me that it cannot possibly be regarded as a final decree for sale such as is passed

under Order 34, Rule 5. It not only does not follow the preliminary decree passed in this case under. Order 34, Rule 4, as a final decree under Order 34, Rule 5 should do but it is inconsistent with that preliminary decree, in that it provides for the payment of a different amount for the redemption of the Cossipore properties, a different period of redemption by payment of monthly instalments. The two decrees being inconsistent cannot stand side by side. It appears to me that this new decree is not at all a final decree following a preliminary decree, for a final decree never provides a fresh period of redemption. It is in reality what has been called a composite decree partaking of the features of a preliminary decree in so far as it directs payment within a time and also of the features of a final decree in so far as it directs a sale. The direction for sale is conditional upon default of payment of the instalments. I am inclined to think that so far as the petitioner is concerned the old preliminary decree was re-opened and a new decree was passed as against him in a composite form or that as between them the old preliminary decree was adjusted by this new decree. The question is, had the Court any jurisdiction to pass such a new decree.

23. Mr. B.C. Ghose supported this decree on the ground that it was passed by consent of parties. Two questions then arise, namely, was this decree passed by consent of parties and, secondly, could such a decree be passed even by consent, under the provisions of Section 34, Bengal Money-lenders. Act. In the petition this decree has been said to be passed by consent. The argument before me has proceeded on the basis that it was a consent decree. After reserving judgment I looked into the original decree filed of record herein and I find that it does not at all purport to have been passed by consent and in truth it could not be passed by consent as regards two of the parties, namely, Pradyumna and Sm. Bhabatarini Dassi who did not appear on the application at all. It appears to me, however, that the parties appearing agreed to the figures and the manner of payment and learned counsel for the parties appearing stated to the Court the terms agreed to between the parties appearing and asked the Court to pass a decree on those terms, but as two of the defendants did not appear the decree was drawn up as having been passed by the Court of its own motion. Anybody familiar with the practice of the original side is familiar with this practice of handing in papers headed 'agreed minutes' and not 'terms of, settlement.' A decree was drawn up

incorporating these agreed minutes as if the decree was passed in invitum. Although here I find a decree which on the face of it does not purport to be a consent decree yet, having regard to its terms, I cannot take it as a decree passed in invitum especially as between the plaintiff and the petitioner, and I am bound to treat it as a consent decree as between them. I may here mention that if this decree were to be treated as a decree of, Court and not a consent decree, then it would be a nullity for I do not know of any provision of law under which, without consent of parties, the Court could pass such a decree. As I have said, however, that in the circumstances of this case I have to treat it as a consent decree as between, these two parties.

24. The next question is whether such a composite decree could be passed under Section 34, Bengal Money-lenders Act, with consent of parties. Was there any contravention of that section? If so, can the parties waive the provisions of Section 34 of the Act. In other words, does the contravention of the provisions of Section 34 of the Act, if any, make the decree a nullity or does such contravention amount merely to an irregularity which could be waived by the parties? To determine whether a contravention of a particular provision of a statute makes the proceeding, held in such contravention a nullity or whether such contravention operates only as an irregularity is at all times difficult. No hard and fast line can be drawn between a nullity and an irregularity. The question has to be determined having regard to the nature, scope and object of the particular provision which has been violated. The observations of Colridge J. in *Holmes v. Russel* (1811) 9 Dowling 487 are appropriate and useful in this connexion. His Lordship observed as follows:

It is difficult sometimes to distinguish between an irregularity and a nullity, but the safest rule to determine what is an irregularity and what is a nullity is to see whether the parties can waive the objection; if he can waive it, it amounts to an irregularity, if he cannot, it is a nullity.

25. The question whether a particular violation of the provision of a statute can be waived or not depends for its answer on the further question, namely, whether that provision of the statute is obligatory or merely directory. Lord Campbell L. C.

observed in *Liverpool Borough Bank v. Turner* (1860) 2 D.F. & J. 502 as follows:

No universal rules can be laid down as to whether mandatory enactment shall be considered directory only or obligatory with an implied nullification for disobedience; it is the duty of Courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.

26. In the light of the above observations it seems to me that the ultimate test is whether the particular statute or the particular provision in that statute is based on grounds of public policy or whether it was intended only for the benefit of a particular person or class of persons. If it is based on grounds of public policy it is obligatory and cannot be waived and a contravention of such a provision must be a nullity. On the other hand if it is not based on grounds of public policy but is intended only for the benefit of an individual person or class of persons then it is only directory and can be waived, because every one has a right to agree to waive the advantage of a law or rule, made solely for the benefit and protection of the individual and a contravention of such a provision will amount only to an irregularity. It was on this principle and relying On the above cited authorities that in *Ashutosh Sikdar v. Behari Lall* ('07) 35 Cal. 61 a sale held in contravention of Section 99, T. P. Act, was held to be an irregularity, and not a nullity. The judgment of Mookerjee J., in that Full Bench case is indeed; instructive and helpful. It was on this principle that a composite decree passed in a mortgage suit with the consent of parties in contravention of Sections 88 and 89 (corresponding to Order 34, Rules 4 and 5) has been held to be binding between parties in *Bechu Singh, v. Bicharam Sahu* ('09) 10 C. L. J. 91.

27. Keeping the above considerations in mind I turn to the Bengal Money-Lenders Act. Are the provisions of Section 34 of this Act mandatory and obligatory or are they merely directory as the provisions of Order 34, Rules 4 and 5 have been held to be. To put it in another way, are the provisions of Section 34 of this Act, based on grounds of public policy or are they intended only for the benefit and protection of individual persons as the provisions of Order 34, Civil P. C? As I have said one has to pay attention to the object and scope of the particular statute or the section

in question. The provisions of Order 34 have been regarded as only matters of procedure enacted for the benefit and protection of mortgagors. Are the provisions of Section 34, Bengal Money-Lenders Act, only matters of procedure enacted for the benefit and protection of debtors or are they broad, based on grounds of public policy?

28. The title and preamble of the Act show that it has been enacted for the purpose of making further and better provision for the control of money-lenders and for regulation and control of money-lending. Many of the provisions of the Act clearly indicate that it was designed to effectively control money-lenders and to regulate and control money-lending. Many of its provisions constitute serious violation of the sanctity of contract of parties. This violation of sanctity of contract was considered necessary to control money-lenders and money-lending. It is a remedial measure which sanctions violation of ordinary rules of law and the free right of contract. Most of the important sections of the Act including Section 34 begin with the words 'notwithstanding anything contained in any law for the time being in force, or in any agreement.' This is necessary for controlling money-lenders and money-lending. The general intention and object of the Act, as I have said, are to make further provisions for the control of money-lenders and money-lending. It necessarily gives relief and protection to debtors but that is incidental to controlling of money-lenders and money-lending. If the debtors are allowed to waive the main and important provisions of this Act, the money-lenders cannot be controlled and the whole object of the Act will be frustrated. In my opinion, therefore, this Act is enacted not merely to give relief to the debtor but is enacted to secure control over money-lenders and broadly speaking most of its provisions are based on grounds of public policy. It does not however follow that because the Act is generally based on public policy every provision contained in it must be mandatory or cannot be waived. Section 34 is, to my mind, a typical example of a provision which, although it is contained in an Act generally based on grounds of public policy, is really capable of being waived. It is true that it opens with the usual formula 'notwithstanding anything contained in any law for the time being in force, or in any agreement' and during arguments I was inclined to think it was based on grounds of public policy. On carefully going through the section, however, I find that the provisions of this section come into play only on the

application of the defendant.

29. If the defendant does not appear in the suit, the Court is not called upon to pass a decree in the form mentioned therein. If the defendant appears in the suit but does not invite the Court to pass a decree in terms of Sub-clauses (i) and (ii) of Clause (a) of Sub-section (1), the Court is, again, not bound to pass such a decree but will have to pass an ordinary decree under Order 34, Civil P. C. The very provision that the decree shall be passed in the particular form only on the application of the defendant clearly suggests that this section at any rate is not based on any ground of public policy, for, if it were, it would not have been left to the option of the defendant to decide in which form the decree would be passed. It appears to me that the provisions of this section come into play, notwithstanding anything contained in any law for the time being in force or in any agreement but only on the application of the defendant. If the defendant does not choose to avail himself of this provision which is enacted for his benefit and which is available to him for the mere asking he may please himself. In my opinion the language used in Section 34 of this Act clearly indicates that this section is only for the defendant's benefit and is merely directory and can be waived by the defendant. In this view of the matter this particular decree which was passed with the consent of parties is binding on parties. I do not find that there has been any contravention of Section 34 of this Act. There being no contravention, the question of nullity insisted upon by Mr. Das Gupta does not arise. I hold therefore that this composite decree is a good decree as between the parties. Parties have accepted this decree as binding on them and have acted upon that basis.

30. This finding, however, does not, in my opinion, conclude the matter. There is another matter of procedure of some importance to be considered. The terms of this decree show that the direction for sale contained therein is conditional upon there being a default in payment of two instalments. As far as I know it is the common practice on the original side in case of a conditional decree, for the plaintiff to apply to Court and obtain an order in the nature of an order absolute. Indeed in *Sudevi Devi v. Sovaram Agarwalla* ('06) 10 C. W. N. 306, Woodroffe J., at p. 310 laid down what the practice should be. His Lordship indicated that in the case of a conditional decree the plaintiff should apply for and obtain an order

absolute and then apply for execution of the last mentioned order. In a later case, namely, in Mannalal v. Nehalchand ('37) 41 C.W.N. 1133, Panckridge J., did not agree that two applications were necessary but he certainly expressed the View that the practice was for the plaintiff to apply for execution of the decree on notice to the judgment-debtor and to file a petition alleging default. Thus I find that the usual practice is that at least one application is commonly made to mark, as it were, that the default had taken place and that the decree should now be executed. I find that even in mofussil cases the practice is to apply for an order when the condition has not been fulfilled: see Kashichandra v. Priya Nath Bakshi : AIR1924 Cal645 . In the case now before me the plaintiff did not make any application but proceeded to take steps before the Registrar. The failure to apply for a final order before putting up the properties to sale was certainly an irregularity having regard to our practice. The question is does such irregularity vitiate the sale as having been held without jurisdiction. At one time I was inclined to think it did. But on mature thinking I have come to the conclusion that it does not. The practice of making a final application to adjudge the default is one intended for the protection of the judgment-debtor alone. There is no question of public policy involved here and there is no reason why the judgment-debtor cannot waive it. The case in Biswa Nath v. Bhagwandin Pandey ('11) 14 C. L. J. 648 is in point.

31. The result is that I hold that the decree dated 20th March 1942, was not a nullity and consequently the sale cannot be set aside on this ground.

32. As to ground (ii). The irregularities on which the sale is sought to be set aside are stated in paras. 19 to 24 of the petition. Broadly speaking the irregularities complained of are:

(a) That the entire Cossipore properties were sold in one lot although sale of any one of them would have been sufficient to satisfy the decree. The petitioner states that one Joynarain Sing was agreeable to purchase plot No. 2 for Rs. 60,000 and there was another intending purchaser of plot No. 1 at and for Rs. 75,000. The two intending purchasers have affirmed affidavits in support of this application;

(b) That the entire lot consisting of three properties was grossly undervalued by Mr. Sreemany at Rs. 50,000 whereas its real value would be about two lacs. On

this point the petitioner relies upon the affidavit and report of Mr. T.K. Ghose a surveyor and valuer who is on the Registrar's list of approved surveyors;

(c) That the plaintiff, although he had obtained no liberty to bid, actually bid at the sale;

(d) That on the day of the sale petitioner's attorney informed the Registrar that he had secured a person who was present at the sale who was willing to take an assignment of the mortgage decree and was prepared to deposit 25 per cent, of the plaintiff's claim then and there and prayed that the sale be adjourned for a week but the plaintiff having objected the Registrar proceeded with the sale.

33. Mr. Ghose drew my attention to the amendments and additions made by this Court in Order 21, Rule 90 and particularly to the new proviso (ii). Mr. Ghose contended that the notification of sale was settled by the Registrar on notice to the petitioner and in the presence of his attorney and none of the objections now urged by him were taken then and under this new proviso the petitioner cannot rely on such alleged irregularities. This leads me to look into the minutes of proceedings before the Registrar. (After going through the minutes of proceedings before the Registrar his Lordship proceeded.) On the materials before me I am satisfied that objection was taken on these grounds and it is open to the petitioner to rely on them for setting aside the sale.

34. The plaintiff not having obtained liberty to bid the Registrar had not to fix any reserve price. The valuation of Mr. Srimany was Rs. 50,167 and the plaintiff's claim was about Rs. 55,000. So the Registrar fixed the specified price as Rs. 50,167 and directed sale of the entire properties. The direction for sale of the entire properties was the necessary consequence of the valuation at Rs. 50,167 having regard to the claim. I have no doubt in my mind that the properties had been grossly undervalued. The petitioner himself had purchased them at about Rs. 77,000. At the sale the properties fetched a price of Rs. 1,10,000. It is difficult to have better proof of the real value. Further the report of Mr. T.K. Ghose has not been shown to be wrong in any way. I cannot act on the bare assertion of the plaintiff. Mr. Srimany's report does not take into consideration the structures on plot No. 2 at all. Those structures alone have been valued at Rs. 29,598 by Mr.

T.K. Ghose. I think Mr. Srimany proceeded on the valuation made in the previous sale of these properties in other; suits, which valuation had been insisted upon by the plaintiff before the Registrar, as I have already noted. I accept Mr. T.K. Ghose's valuation.

35. That gross under-valuation is a material irregularity which vitiates a court sale cannot be seriously disputed. Mr. Ghose argued that, assuming that it was an irregularity, the petitioner has not been prejudiced thereby as the highest bid went up to Rs. 1,10,000. I cannot accept this contention. I am by no means satisfied that if the proper value had been mentioned the highest bid would not have gone higher still. A grossly low valuation of a big property is calculated to induce the belief that there is something wrong with the property or the title and it is likely to scare away intending purchasers. Mr. Ghose says that there is no affidavit by any person stating that he had been scared away by the alleged low valuation. I do not think it is imperative to produce such an individual. The Court can form its own conclusions from the extremely low valuation. In this case I am convinced that the valuation was grossly low and I feel no hesitation in holding that the petitioner has been prejudiced by it. In view of the provisions of Section 35, Bengal Money-Lenders Act, I am equally convinced that it was wrong to put the entire properties to sale. The Registrar was certainly misled into doing this by the gross under-valuation. This is yet another proof of the injury suffered by the petitioner. The whole object of the Act is to preserve whatever can be preserved for the debtor. If the properties were properly valued the Registrar would not have put up the entire properties to sale. That would have saved something to the petitioner.

36. Physically the properties are separate. The boundaries set out in the notification of sale clearly show this. The plan handed up by Mr. Das Gupta puts it beyond doubt that the three plots are independent properties. I see no reason why, even if Mr. Srimany's valuation was correct, the three plots could not be put up to sale in three lots. It is common knowledge that there are more buyers for smaller properties and smaller plots fetch better-prices. In this respect also the petitioner has been prejudiced. If the plots were put up separately then one of them may have fetched the 'specified price and then the sale might have been stopped as regards the other properties which would have been saved to the

petitioner. Mr. Ghose and Mr. Sen have severely commented on the supporting affidavits. The way they have been drawn up invited those criticisms but I do not think they are altogether bogus affidavits. Both these persons had their own attorneys. There was admittedly an interview in the office of Mr. S.C. Mitter where one of these intending purchasers was present. With the other there was an interview in the office of Mr. Himatsingka. While there, fore conceding that the inartistic way in which the affidavits have been drawn up deserves the comments, I cannot overlook or ignore them altogether. It has not been suggested, far less proved, that these men are not of any substance. Objections (c) and (d) have not been pressed and I need say nothing about them. The result is that I hold that the applicant has made out a case under Order 21, Rule 90 and I set aside, the sale held on 20th February 1943. In view of this, I do not deal with the other prayers. Applicant to get costs of this application from the plaintiff. The purchaser will get his costs and charges from the plaintiff as provided in Rule 37 of chap. 27 and get back the deposit made by him. Certified for counsel.

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