

- HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO

± C.R.P.No.5312 OF 2011

% 28th July, 2016.

Between:

K.Lakshmiddevamma and another

.. Petitioners

VS.

\$ Canara Bank and others

.. Respondents

! Counsel for the petitioners : Sri T.S.Anand and

Sri Y.Srinivas Murthy

^ Counsel for the respondents : Sri K.Sitaram and

Sri K.V.Subrahmanya Narsu

< **Gist:**

> Head Note:

? CITATIONS:

[1] (1966) AIR 1966 SC 1631

² AIR 1968 AP 309(VOL.55, C.68)

³ AIR 1971 SC 310

⁴ AIR 1977 SC 774

⁵ AIR 1991 SC 1825

⁶ (2007) 5 SCC 745

⁷ AIR 2006 SC 1162

⁸ AIR 2013 AP 31

⁹ AIR 2000 SC 1148

¹⁰ AIR 1968 SC 86

¹¹ AIR 1999 SC 3750

¹² 1989 SC 2113

¹³ 2011(3) ALT 591

¹⁴ 2012(3) ALD 526

¹⁴ 1987(2) APLJ 450

¹⁶ AIR 1973 AP 41 (V. 60 C 13)

¹⁷ AIR 1970 SC 1

¹⁸ 1955 SC 638

¹⁹ AIR 1962 SC 1513

²⁰ (2014) 5 SC 610

²¹ 1988 (2) ALT 417

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IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

Case No.C.R.P.No.5312 OF 2011

Between:

K.Lakshmiddevamma and another

... Petitioners

And

Canara Bank and others

... Respondent (s)

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DATE OF JUDGMENT PRONOUNCED: 28.07.2016

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HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO

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|----------|---|------------------------|
| <u>1</u> | <u>Whether Reporters of Local newspapers may be allowed to see the Judgments?</u> | <u>-</u>
<u>-</u> |
| <u>2</u> | <u>Whether the copies of judgment may be marked to Law Reporters/Journals</u> | <u>-</u>
<u>Yes</u> |
| <u>3</u> | <u>Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment?</u> | <u>-</u>
<u>Yes</u> |

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HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO
C.R.P.No.5312 OF 2011

ORDER :

The revision petitioners are the judgment debtors in E.P.No.25 of 2010 which is the out come of a preliminary and final decree in O.S.No.35 of 1991 obtained by the 1st respondent bank as decree holder/plaintiff.

2. The revision petitioners are the unsuccessful applicants in E.A.No.20 of 2010 filed under Order 34 Rule 5 of the Code of Civil Procedure (for short 'CPC'), vide order dated 18.11.2011 in dismissing the application saying that it is the right of the Judgment Debtor (mortgager) to liquidate the mortgage debt before confirmation of sale by deposit of the amount of the decree under execution with poundage, if any. The said application was originally filed under Order 21 Rules 89 and 90 CPC and subsequently, the prayer as complying with the provisions under Order 34 Rule 5 CPC seeking amendment was allowed, it appears on 25.03.2011 in E.A.No.210 of 2010.

3. In E.A.No.20 of 2010, the averments in the petition supporting affidavit filed on 29.01.2010 by the 2nd respondent/Judgment Debtor on behalf of two revision petitioners/judgment debtors show that EP schedule properties were auctioned on 03.12.2009 and sale is not yet confirmed. The Judgment Debtors, who are the applicants (revision petitioners), deposited Rs.3,36,000/- on 01.02.2010 after obtaining challan from

the executing Court to the credit of EP proceedings. The affidavit petition averments are to set aside the auction sale dated 03.12.2009 by permitting to deposit the amount.

4. The counter of DHr/Bank as respondent to the petition in opposing the same stated that the petitioners are well aware of the balance amount due to the Bank and intentionally now filed this petition for causing hurdles for confirmation of the sale and thereby there are no merits in the petition and the petition is liable to be dismissed with heavy costs.

5. The counter affidavit filed by the auction purchaser by name G.Sidda, who is the highest bidder of the Court auction dated 03.12.2009 is with contentions particularly from para 4 onwards that according to law, the petitioners/Judgment Debtors ought to have deposited the sale amount in addition to 5% equal to purchase money as poundage, costs and interest within 30 days (sic. 60 days) from the date of sale conducted on 03.12.2009; whereas the application to set aside the sale, even filed on 29.01.2010, amount deposited was on 01.02.2010 and what the petitioners deposited is even incorrect amount and thereby the application ought to have been rejected before numbering for the application is nothing but to harass the auction purchaser, who is the bonafide highest bidder, and for absolutely no merits.

6. The sum and substance of the petition averments thereby necessary for disposal of the revision are, they could secure money and will deposit the amount of Rs.3,36,000/- which represents sale warrant amount of Rs.3,20,000/- and (poundage of 5%) Rs.16,000/-. In fact, in the return of the application by Court it was only on other grounds, for there was no objection taken by the Court of the amount not fully represent, much less by verification

with reference to the sale warrant amount for which the auction was conducted of Rs.4,23,142/-; needless to say after deduction of the amounts paid by the judgment debtors pending execution of full satisfaction recorded of Rs.10,000/- + Rs.10,000/- + Rs.5,000/- + Rs.5,000/- during February and December, 2008 and November, 2009 what the sale warrant amount for which the auction could be conducted comes to only Rs.3,93,142/-. It is to say there is also part of act of Court in this regard therefrom in not rectifying by raising the objection and return of the application of the sale warrant mentioned to be deposited is not correct; further undisputedly the Court issued challan for the amount of Rs.3,36,000/- i.e. Rs.3,20,000/- and 5% poundage comes to Rs.16,000/-, when the judgment debtors sought by invoking Order 34 Rule 5 CPC to liquidate the mortgage decree before confirmation of sale in the factual scenario referred supra. It is to confirm from the above, the act of Court also contributed to the fault or mistake or inadvertence, as the case may be, of the judgment debtors from the wording “couched by respective contentions of the parties” in one saying fault and the other (judgment debtors) as mistake.

7. From the above facts, coming to the legal position, in this regard, the Apex Court’s expression in **Jang Singh v. Brij Lal**^[1] observed as follows:

“It is, no doubt, true that a litigant take care but where a litigant goes to Court and asks for the assistance of the Court so that his obligations under a decree might be fulfilled by him strictly, it is incumbent on the Court, if it does not leave the litigant to his own devices, to ensure that the correct information is furnished. If the Court in supplying the information makes a mistake the responsibility of the litigant, though it does not altogether cease, is at least shared by the Court. If the litigant acts on the faith of that information, the Court cannot hold him responsible for a mistake which it itself caused. There is no higher principle for the guidance of the Court than the one that no act of Court should harm a litigant and it is the

bounden duty of Courts to see that if a person is harmed by a mistake of the Court he should be restored to the position he would have occupied but for that mistake. This is aptly summed up in the maxim: 'Actus curiae neminem gravabit'(para 6)"

8. Above expression of the Apex Court from para 6 of its judgment is quoted for approval in para 7 of the judgment of this Court by a Single Judge in **Bathula Krishna Brahmam v. Gudipudi Shaik Meera Hassain**^[2], in dealing with an application under Order 21 Rule 89 CPC on the right of the judgment debtor to liquidate the debt after auction sale within the statutory period.

Para 8 of the expression reads as under:

"...It is, not denied that the execution clerk calculated the amount to be deposited and the Court accordingly directed the issue of challan and that the petitioner paid the amount accordingly and ultimately it was realized that the deposit on account of the mistake committed by the execution clerk was short of Rs.5/- towards payment of commission payable to the auction purchaser. Therefore, on the statement of facts made by the Court below the mistake if any, was committed by the Execution Clerk and the Court ordered the issue of a challan on the basis of particulars furnished by the Execution Clerk and therefore, it is the Court in supplying the information that committed the initial mistake and as such the Court cannot make the litigant (petitioner) alone responsible for which the Court also is responsible. The fact, that the litigant should have exercised a little more diligence or care, is not the question for consideration and harm to the litigant should not occasion on account of any mistake committed by the Court."

9. From this, before discussing further facts, it is necessary to consider the scope of Order 34 Rule 5 CPC, which reads as follows:

XXXIV. SUITS RELATING TO MORTGAGES OF IMMOVABLE PROPERTY.

R. 5. Final decree in suit for sale.

(1) Where, on or before the day fixed or at any time before the confirmation of sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under sub- rule (1) of Rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order ----

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary, ---

(b) ordering him to transfer the mortgaged property as directed in the said decree, and, also, if necessary ---

(c) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for payment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of Rule 4."

10. No doubt, Order 34 Rule 4 Sub Rule (1) that is referred to in Order 34 Rule 5 Sub-Rule (3) of compliance, speaks the amount that to be adjudged due as mortgage money and subsequent costs, charges, expenses and interest and the balance, if any, paid to the persons entitled to receive the same. Thus, it reflects what is due to be payable before the date and time of the confirmation of the sale fixed from the statutory right of the judgment debtor i.e. mortgagor or any person claiming through him, if any, to liquidate the debt to protect the property on the cordial principle, once a mortgage is always a mortgage, despite final decree from the preliminary decree after expiry of the time of redemption fixed was expired under Sections 60 read with 67 of the Transfer of Property Act and final decree obtained.

11. The Constitution Bench of the Apex Court considering the scope of law in this regard in **Mathuralal v. Keshar Bai**^[3] particularly from paras 12 to 15 categorically upheld the right of the mortgagor to liquidate the suit mortgaged debt before

confirmation of sale and transfer of the property pursuant thereto. Same is the position of law reiterated by the subsequent expressions of the Apex Court in **Narandas Karson Das v. S.A. Kamtam**^[4], **Sagar Mahila Vidyala, Sagar v Pandit Sadashiv Rao Harshe**^[5], and in **B. Arvind Kumar v Government of India**^[6], leave about the doctrine of merger recognized from the appeal is a continuation of suit, even pending appeal mortgaged property brought to sale in the event of appeal finalization and meantime the judgment debtor i.e., the defendant-borrower tenders the amount, it applies as due compliance of the requirement of Order 34 Rule 5 vide **Philimonia Jose v Federal Bank Limited**^[7]. The law is discussed also by a Division Bench of this Court in dealing with a matter under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'SARFAESI Act') vide **M/s. India Fine Lease Securities v Indian Overseas Bank**^[8].

12. Learned counsel for the revision petitioners relied apart from the above, mainly on the expressions of the Apex Court in **Kharaiti Lal v. Raminder Kaur and others**^[9]. In fact, those expressions among several other expressions were quoted with approval in the subsequent expression of the Apex Court in **Philimonia Jose** supra.

13. No doubt, in **Kharaiti Lal** supra, it is observed particularly from paras 8 to 11 that as per the expression of the Apex Court in **Hukumchand v. Bansilal**^[10] Order 34 Rule 5 CPC though recognizes the right of judgment debtor to pay the decretal amount in an execution relating to a mortgage decree for sale at any time

before the confirmation of sale, the Rule does not give any power to the Court to grant time to deposit the money and by postponing confirmation of sale, merely to accommodate the judgment debtor. However, by quoting the same at para 8 that placed reliance of Division Bench of this Court, for the Apex Court while setting aside in appeal against the order, it is further observed by the Apex Court from para 9 onwards that the Court did not hold in that case that a deposit under Order 34, Rule 5 CPC could not be made during the pendency of an appeal against the order by which the sale was confirmed. The entire case law was referred by this Court (paras 9 and 10) in a recent decision in **U. Nilan v.**

Kannayyan (dead) through LRs^[11], which reads as follows:

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

14. At para 11 of **Kharaiti Lal** supra the Apex Court observed ultimately that the above question is identical to the question framed by the Division Bench of the High Court in the case and this Court on consideration of a number of decisions, including the decision of this Court in **Hukamchand** supra laid down that, if an appeal was pending against an order refusing to set aside the sale, the confirmation of sale as also the issuance of Sale Certificate would be in a nebulous state and consequently, it would be open to the judgment-debtor to invoke the provisions of Order 34 Rule 5 CPC and make the necessary deposits to save his property from being transferred to a third person or, may be, to the decree holder, in execution of the decree passed in the mortgage suit. It may be mentioned that in **U. Nilan** supra, reliance was also placed upon the decision of this Court in **Maganlal v. Jaiswal Industries,** **Neemach**^[12] in which it was held that 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.

15. The sum and substance of the expressions of the Apex Court show that if an application or appeal is pending and in the meantime any confirmation of sale effected and sale certificate is issued, that is not a conclusive one as it all depends on the pending appeal result and ultimately on the appeal result, the confirmation of sale and issuing sale certificate is followed or not to be decided. The expression of **Kharaiti Lal's** case referred supra was reiterated by the Apex Court in **Philimonia Jose's** case referred supra.

16. Thus, the contention of the auction purchaser in this case on hand, that once the sale certificate was issued after confirming the sale, the right of the judgment debtor to liquidate the decree debt invoking Order 34 Rule 5 CPC is not available even any appeal pending and later reversed the decree under execution is not tenable.

17. The judgment debtors also placed reliance in this regard, a single expression of this Court in **Patnam Subbalakshamma v. Sunkugari Sreenivasa Reddy and others**^[13], which in fact relates to execution of sale and right of the judgment debtors in seeking to deposit of amount for annulment of sale out of the statutory period under Order 21 Rule 89 or to seek setting aside the sale or annulment of sale invoking Rule 92 of Order 21, and contextually it referred the expression in **Kharaiti Lal's** case supra on the scope of Order 34 Rule 5 CPC and observed

particularly after quoting with approval the relevant para of **Kharaiti Lal's case** referred supra in the expressions of **Patnam Subbalakshamma's** case referred supra that the judgment debtor in a suit for mortgage would have a facility to seek annulment of the sale which is more liberal in nature, when compared to the one available to a decree holder (sic judgment debtor) in other suits under Rule 89 of Order 21 CPC. In fact, this decision is of no help to the revision petitioners, as it discussed only the scope of Order 34 Rule 5 CPC when compared to a mortgage suit under Order 21 Rules 89 and 90 CPC.

18. The other expression of this Court placed reliance by the revision petitioners/judgment debtors is in **Addala Bhimeswara Rao v. Samayamanthula Sesharatnam and another** ^[14] wherein dealing with an application under Order 34 Rule 5 CPC, it was observed about the right of the judgment debtor in a mortgage decree under execution to pay the amount before confirmation of sale. In fact, in **Addala Bhimeswara Rao** supra also the expressions of the Apex Court in **Kharaiti Lal** and **U.Nilan** supra referred and **Kharaiti Lal** supra was placed reliance and ultimately at para 7 of the Judgment in **Addala Bhimeswara Rao** supra, what the learned single Judge expressed in his conclusion as the ratio thereunder is as follows:

"Therefore, the legal position is loud and clear that so long as an execution sale does not attain finality in the sense of being still the subject of adjudication of an application to set aside the sale before the executing Court or an appeal or second appeal against an adverse order in such an application, the right conferred on a judgment debtor by Order 34 Rule 5 of the Code of Civil Procedure to get over such sale by deposit of the entire decretal amount or any other charges or expenses to be paid into the executing Court still subsists."

19. A Division Bench of this Court referring to the earlier

expressions in **P.V.J.A. Prabhakar v. Lanka Venkata**

Ramana ^[15] held at para 16 and 20 as follows:

“16.....It is also well settled that the delay of any acts of judgment debtor trying to procrastinate confirmation of sale or by his manoeuvres will not take away his right under Rule 5 of Order 34 CPC so long as he pays all the requisite amounts and the delay so caused due to pendency of interlocutory petitions filed has only the effect of setting the confirmation in a fluid state. The right conferred under Order 34 Rule 5 CPC is a substantial right and the same cannot be whittled down.

20.....we have already held in C.M.A.No.380 of 1981 that pendency of an appeal keeps the list continue and that the confirmation will be in a fluid state and therefore, the Order 21 Rule 90 CPC cannot be deemed to have been final, in which case the mortgagor can invoke Order 34 Rule 5 CPC. In the instant case, though the request for redemption was after confirmation of sale, it was during the pendency of the appeal, as held in Sevugan's case. The judgment debtor could invoke Order 34 Rule 5 CPC since the confirmation of sale has not reached the stage of finality.”

20. Thus, the principle of law settled from the expressions of the Apex Court and this Court is that even pendency of an application to set aside sale or any appeal or revision against the trial Court's decree till attained finality, the right to liquidate the mortgage debt by the judgment debtor-cum-mortgagor is available, as long as the sale is not confirmed. Thus, the right can be exercised even after dismissal of that application any appeal or revision is pending for, it depends upon the result of the appeal or revision as the case may be.

21. No doubt, this Court way back in **Midumolu Lakshminarasimha Rao v. Vemuri Saramma and another** ^[16]

held on the scope of Order 34 Rule 4 Sub-rule (1) read with Order 34 Rule 3 CPC that payment of poundage, while seeking to set aside the confirmation by the mortgagor, is part of the amount to be deposited as expenses or costs.

22. Having regard to the above, once the law is fairly settled that even during pendency of the appeal, impugning the confirmation of sale, the right can be exercised under Order 34 Rule 5 CPC. However, it is subject to result of the appeal based on the doctrine of merger of trial Court decree with appellate Court decree. The same provisions equally apply to the revision is the settled law of the Apex Court. In **Sankar Ramchandra Abhyankar vs Krishnaji Dattatreya Bapat** ^[17] the Three Judge Bench in dealing with powers of the revision Court and powers of the appellate Court under Sections 96 and 115 CPC and Articles 226 and 227 of the Constitution of India and on the doctrine of merger expressed that the principle of merger of orders of inferior Courts in those of superior Court would be affected or would become inapplicable, by making no distinction between a petition for revision and an appeal, and for that conclusion placed reliance on the earlier expressions of the Apex Court in **U.J.S. Chopra v. State of Bombay** ^[18] and **Madan Lal Rungta v. Secretary to the Government of Orissa** ^[19]. Thus, it can be said unequivocally that the settled principle of merger not only applies to appeal, but also to revision filed either under Section 115 CPC or under Article 227 of the Constitution of India.

23. From the above, the right of the mortgagors/judgment debtors to invoke Order 34 Rule 5 CPC before confirmation of sale and even pending the application or after dismissal, sale confirmed and once appeal or revision maintained, the confirmation is either not for any stay, always subject to the result of revision or appeal when the doctrine of merger is very clear.

24. Now coming to the right of the bonafide auction purchaser,

more particularly after the sale is confirmed and appeal pending and thereby even there is right of the mortgagor/judgment debtor to invoke Order 34 Rule 5 CPC and when any improvements made by the third party, auction purchaser bonafide pursuant to the confirmation of sale and sale certificate and any alienation made by created rights to third party thereunder like the case on hand from the auction purchaser claimed (as reflected from the order of the lower Court also impugned in the revision) of mortgaged the property subsequent to getting possession on confirmation of sale with sale certificate from the title, in favour of HDFC bank and availed loan and made improvements to the property; there is in fact no evidence as to what are the improvements made by him specifically to consider even invoking Section 51 of the Transfer of Property Act for reimbursement for the bonafide improvements made in good faith on such belief of title. Thus, it is only concerned with the right of the auction purchaser since referred supra is subject to result of the revision on hand as per the right recognized supra, equally the right of alienee (mortgagee) from the auction purchaser pursuant thereto, to protect by any equitable order of the Court.

25. From the law referred supra, once the mortgagor as judgment debtor even before confirmation of sale entitled to liquidate the mortgaged debt due, the remedy of the auction purchaser is while seeking refund, at best to insist for payment of interest to compensate for his money is locked. It no way takes away thereby the mortgagor's right of redemption statutorily recognized by Order XXXIV Rule 5 CPC vis-à-vis Section 60 of the Transfer of Property Act from the expressions supra. When such is the case, equally such right of discharge to save the property is available to the transferee of the (mortgagor) judgment

debtor from reading of above provisions with reference to Section 146 and Order XXII Rule 10 CPC. However, such right of the transferee to judgment debtor (mortgagor) is subject to payment of entire amount paid of auction purchaser to refund with interest and by payment of poundage and full satisfaction of the mortgage decree debt due to the decree holder from out of amount lying in Court, deposited by auction purchaser if any for taking refund of excess amount if any by joining with or in presence of J.Dr. The right of auction purchaser to the amount he deposited with interest to claim in such event is well considered in the recent expression of the Apex Court in **Mathew Verghese v M. Amritha Kumar**^[20] while dealing with the sale of the property under the provisions of the SARFAESI Act brought by the secured creditor bank from the right of debtor to redeem vis-à-vis the right of the auction purchaser to claim interest in seeking refund of the amount. It was observed in this regard particularly at para 70.2 by ordering interest at 18% per annum that also to be paid while refunding the amount to the auction purchaser in fixing said rate of interest as just and reasonable.

26. It is because, the rate of interest entitled for the mortgage transaction by the mortgagee and also that is to be adjudged by the Court either under Order XXXIV Rule 11 CPC till expiry of the period of redemption and subsequently invoking the general provision under Section 34 of CPC is different from compensating the auction purchaser for refund of the amount under locking while recognizing the right of the mortgagor or his alienee and in ordering to redeem before confirmation of sale. As had the mortgagor failed to redeem of the bid knocked in favour of the auction purchaser from having deposited the amount pursuant to

the terms of the auction (non-voluntary either through process of Court or other statutory agency as the case may be) entitled to confirmation of auction sale, sale certificate and delivery of possession to have the benefit since depriving from the valid right of the mortgagor or his alienee before sale confirmation and transfer to liquidate.

27. Now from the above, coming to the impugned order of the lower Court and any requirement for interference, the lower Court in the impugned order particularly at para 8 observed that the application filed under Order 21 Rules 89 and 90 CPC was amended by converting into an application under Order 34 Rule 5 CPC since allowed and the sale was conducted on 03.12.2009 and amount of Rs.3,36,000/- was deposited by the Judgment Debtors/mortgagors on 01.02.2010, the petition to set aside the sale was filed on 29.01.2010 and the deposit thereby made is two days after that. The sale warrant amount as on date of sale was Rs.4,23,142/-. However, in the affidavit of the petitioners/mortgagors, it is mentioned as Rs.3,20,000/-, which is not correct it appears, learned counsel for the petitioners had not verified the sale warrant amount. In fact from four part payments comprising Rs.30,000/- paid by the judgment debtors, the sale warrant amount actually due comes to Rs.3,93,142/- what was deposited is Rs.3,36,000/-. Poundage fee collected separately from the auction purchaser was Rs.9,735/-. With these facts and having referred, Order 34 Rule 5 CPC; it was observed further that, as per said provision if the defendant wants to set aside the sale, he should make payment into the Court, amounts due under Sub-rule(1) of Rule 4 of Order 34 CPC and if the payment is not made in accordance therewith and if really they wanted to redeem the property, they must have deposited entire amount. The

decision placed reliance of **Subbarao vs. B. Surya Prakash Rao** ^[21] on the point of limitation for setting aside the sale in fact has no application to a mortgage suit from the provision enables to seek setting aside sale before confirmation of sale, which preposition is not in dispute. However, the entire amount due and not what the amount that was realized by conducting sale that requires to deposit and thereby not entitled to seek for setting aside the sale dated 03.12.2009 and subsequently dismissed the petition.

28. Here, so far as that conclusion on one hand impugned by the revision petitioners/mortgagers and on the other hand supported by the decree holder bank vis-à-vis the auction purchaser concerned, from the prepositions referred supra, once there is a contribution of the Court also in not raising the objection if at all though not of much reliance of the amount mentioned as Rs.3,20,000/- of the sale warrant due is not correct from the sale conducted, as per sale warrant amount mentioned of Rs.4,23,142/- and that too pursuant to which the Court issued the challan or lodgment schedule and the order of the lower Court also reflects by its inadvertence and even by not proper verification by the counsel for the judgment debtors if any, the Court could have been considered this aspect of the contribution of the Court also for giving that lodgment schedule. It is not even a case that despite brought to the notice either by return of the application or by return of the lodgment schedule, the judgment debtors wanted to deposit only that amount and thereby not entitled to any benefit. When such is the case and by the time the application is filed and even by the time the lower Court pronounced the order, the sale was not confirmed and the right of the mortgagors available under Order 34

Rule 5 CPC, before confirmation at any time, once the revision is filed impugning the order and after the impugned order only even on same date, sale is confirmed before filing revision and even before time available to file revision, from the revision filed and the doctrine of merger as is applicable to appeal equally applicable to the revision from the expressions of Apex Court referred supra and the impugned order of the lower Court when categorically shows not considered this aspect, it is no way sustainable. This Court within the power of revision under Article 227 of the Constitution of India when it is reflected not only the impugned order out come of non-exercise of the power that supposed to be exercised in ordering to pay the balance from the contribution by the Court also and thereby unsustainable and that causes prejudice to the rights of the revision petitioners, this Court while sitting in revision is constrained to interfere to allow the revision.

29. Accordingly, and in the result, the revision petition is allowed by setting aside the order of the lower Court dismissing the application in E.A.No.20 of 2010 and consequent thereof the sale confirmation and delivery of possession to the auction purchaser including alienation by mortgage created by the auction purchaser in favour of the bank; however, subject to conditions of the petitioners/mortgagors to deposit the balance amount also including poundage of sale warrant amount as on the date of sale from that day with interest @ 18% per annum and within one month from today to the credit of E.P. It is therefrom after payment to the auction purchaser, his amount from respective dates of deposit at 18% per annum and from balance, after satisfying the decree holders' debt as per FDR interest lying in deposit, the balance, if any, is entitled to claim back by the judgment debtors. The executing Court is directed from out of the

amount due to the auction purchaser pay the amount due to the creditor - bank of the auction purchaser i.e. HDFC and after redemption by virtue of this order, take back the sale certificate as title deed and cancel the same and intimate to the registrar pursuant to Section 31 of the Specific Relief Act, 1963 and the circular orders of this Court in ROC No.1911/SO/16, dated 21.07.2016 of the cancellation of the sale certificate to enter in the register to reflect in future encumbrance certificate or the like. Any non-compliance of the above conditions by the revision petitioners/mortgagors within the time fixed above of one month from today and they are not only entitled to any further extension of time, but also that disentitles them to the relief now granted supra and consequently it confirms the auction sale and sale confirmation made by the lower Court with sale certificate issued and delivery of possession to the auction purchaser by validating all the acts. It is needless to say in the event of compliance supra, restitution is entitled by the revision petitioners/judgment debtors by virtue of this order for not only cancellation of sale certificate issued to auction purchaser, but also delivery of possession back to the judgment debtors and recording of full satisfaction of mortgage decree debt etc. It is made clear that as the petitioners/mortgagors/judgment debtors already deposited Rs.33,000/- which is in deposit and the auction purchaser paid the bid amount of Rs.3,20,000/- plus Rs.9,735/- poundage or so which are lying in deposit, the balance is to be deposited to meet therefrom the amount payable to the auction purchaser of Rs.3,20,000/- plus Rs.9,735/- or so with interest @ 18% per annum by liquidation out of it to the creditor bank HDFC of auction purchaser and then to the decree holder for full satisfaction of the mortgage decree debt. It is needless to say that the entitlement of

the judgment debtors for refund if any is subject to the total satisfaction of the decree debt to the decree holder also and if it is not fully satisfied, for any balance of the decree holder, he is entitled to enforce, subject to the limitation by filing of execution application.

As a sequel, miscellaneous petitions, if any, pending in the revision shall stand closed.

Dr. B.SIVA SANKARA RAO, J

28.07.2016
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HON’BLE Dr. JUSTICE B.SIVA SANKARA RAO

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- [1] (1966) AIR 1966 SC 1631
- [2] AIR 1968 AP 309(VOL.55, C.68)
- [3] AIR 1971 SC 310
- [4] AIR 1977 SC 774
- [5] AIR 1991 SC 1825
- [6] (2007) 5 SCC 745
- [7] AIR 2006 SC 1162
- [8] AIR 2013 AP 31
- [9] AIR 2000 SC 1148
- [10] AIR 1968 SC 86
- [11] AIR 1999 SC 3750
- [12] 1989 SC 2113
- [13] 2011(3) ALT 591

- [\[14\]](#) 2012(3) ALD 526
- [\[15\]](#) 1987(2) APLJ 450
- [\[16\]](#) AIR 1973 AP 41 (V. 60 C 13)
- [\[17\]](#) AIR 1970 SC 1
- [\[18\]](#) 1955 SC 638
- [\[19\]](#) AIR 1962 SC 1513
- [\[20\]](#) (2014) 5 SC 610
- [\[21\]](#) 1988 (2) ALT 417