

# KARNATAKA HIGH COURT

Hotel Nataraj

Vs.

Karnataka State Financial Corpn

Misc. First Appeals Nos. 2260 and 2261 of 1984

(P.K. Shyamasundar, J.)

19.04.1988

## JUDGEMENT

### **P.K. Shyamasundar, J.**

1. These appeals arise under Section 32(9) of the State Financial Corporations Act, 1951 (to be hereinafter called the 'Act') and are directed against the order made by the learned District Judge, Belgaum, in Misc. Cases Nos. 83 and 85 of 1978 in E.P. Case No. 2 of 1978 on the file of that Court on the 11th Sept., 1984 rejecting both the petitions made by the appellants herein under Order 21, Rule 90, Civil Procedure Code for setting aside the auction sale of immovable properties belonging to the appellant, pursuant to orders of the Court made in the execution case referred to supra.

2. The auction sale in question was held on 15-6-1978 and thereat the 2nd respondent, who is the same contesting respondent in both these appeals was the successful bidder having offered the highest bid of Rs. 4,25,000/The Court below having since refused to set aside that auction sale the same has resulted in turn in the dismissal of the application made by the appellant, and has further resorted in the confirmation of the sale itself. In these appeals which are necessarily to be disposed of by a common order the only point that arises for consideration is whether the auction sale held on 15-6-1978 in respect of the property of the judgment-writer viz., appellant-2 (who will hereinafter be referred to as the judgment-debtor) is liable to be set aside in the facts and circumstances of the case.

3. These appeals brings to the fore the persistent effort made by the judgment-debtor so far unsuccessfully to shake off the auction purchaser from its back after having composed successfully its differences with the decree-holder by paying all the decretal dues and receiving in turn a certificate of full satisfaction accompanied by a written acknowledgment notifying the court below that in consideration of having received all its dues to its satisfaction, it was

withdrawing the objections filed earlier in opposition to the application for setting aside the auction sale. In short the decree-holder having admittedly notified the court that it had no objection to the auction-sale being set aside and the execution petition be closed by entering full satisfaction, the judgment-debtor still finds itself in the predicament of being non-suited following the rejection of its application for setting aside the auction sale.

4. A few more facts necessary to be stated for consideration of the grievance of the judgment-debtor are as follows :

5. The records indicate that as far back as the year 1972 the judgment-debtor a partnership firm intending to run a hotel in the suit property viz., a large size building consisting of three floors standing on land measuring about 35 guntas, admittedly situate in a prime locality in the City of Belgaum on the Poona-Bangalore National highway had sought and obtained a covered loan from the 1st respondent the State Financial Corporation (to be hereinafter referred to as the decree-holder) in the sum of Rs. 3,10,000/to be repaid in fixed annual installments with interest. It so happened that after some time, the judgment debtor fell behind in the payment of instalments and, therefore, the decree-holder had to apply to the Court of the District Judge at Belgaum by filing an application under Section 31 of the Act for an order of attachment and sale of the judgment-debtor's property covered by a deed of mortgage and hypothecation. Further the decree-holder had also obtained an order of attachment before judgment and subsequently the judgment-debtor suffered by consent an order for recovery of money in the sum due to the decree-holder and that order came to be made under a compromise duly recorded by the Court by an Order dt. 3-4-1978. In terms of that order the judgment-debtor was allowed to work out its liability to the decree-holder in phased manner but even so it turned out that the judgment-debtor was unable to comply with the terms of the compromise with the result the decree-holder was forced to put in execution the order of the Court to realise the dues owed by the judgment-debtor and in consequence the decree-holder filed an execution proceeding against the judgment-debtor in Execution Petition No. 2 of 1975 and sought the assistance of the Court for an order of sale of the judgment-debtor's property. Accordingly, the judgment-debtor's properties were put up for sale on three different occasions. It is only, on the last occasion i.e., at the auction-sale held on 15th June, 1978 the property fetched the highest bid of Rs. 4,25,000/- offered by the auction purchaser herein and that bid came to be accepted by the Court resulting in the deposit of a sum of Rs. 4,25,000/- by the auction purchaser into Court in terms of the auction-sale proceeding.

6. The judgment-debtor who had all along claimed that the property was worth more than Rs. 5,00,000/- and at the second auction sale where the property fetched only Rs. 1,25,000/- the decree-holder intervened and asked the Court not to accept that bid pointing out *inter alia* the property was worth at least Rs. 8,00,000/-, then filed an application under Order 21, Rule 90, Civil Procedure Code asking the Court to set aside the auction sale holding it to be vitiated by a galore of illegalities as also by fraud. Finally claiming that the property had fetched a ridiculously low price, therefore, urged the Court not to accept the bid.

7. In the first instance the court disposed of the application on the basis of affidavits filed around and proceeded to dismiss the application by an order made on 30-9-1978. Against that order there were two appeals to this Court in M. F.As. 1224 and 1278 of 1978. This Court by an order made on 1-2-1983 allowed the appeals and remitted them back to the Court of the District Judge, for a fresh disposal after holding an enquiry, and recording evidence touching the complaint made by the judgment-debtor regards the regularity of the auction-sale. This Court also made an interim order directing the judgment-debtor to deposit month after month a sum of Rs. 2,250/- from out of the realisations from the property in his possession, preceded by another direction to deposit a sum of Rs. 75,000/., into Court, I am given to understand that while the direction in regard to deposit of Rs. 75,000/- was fully complied with, the direction as regards the monthly deposit had been complied with only intermittently. I am further told by the learned counsel for the judgment-debtor that in all a sum of Rs. 3,75,000/- is deposited currently before the Court below to the credit of the execution petition being the aggregate of the deposits made by the judgment-debtor pursuant to the directions of this Court in the earlier appeals. This information is of course tentative and subject to verification. One other development, to which I must advert to is that the sale proceeds of Rs. 4,25,000/- tendered by the auction purchaser has been invested by the Court gainfully and to the advantage of the auction purchaser, who appears to have been paid a sum of Rs. 1,45,835-47 p. on 24-1-1984 being the interest accruing on the deposit of Rs. 4,25,000/- there can be no doubt that by now there is found to be substantial accrual of interest on the aforesaid deposit.

8. After the case was remanded to the District Judge, Belgaum, evidence in relation to the application made by the judgment debtor was adduced. The judgment-debtor examined four witnesses two witnesses were examined on behalf of the decree-holder. The learned Judge, did not accept the judgment-debtor's case of sale being vitiated by practice of fraud and by a galore of irregularities etc., the Judge also did not agree with the judgment-debtor's contention that the sale price of Rs. 4,25,000/- realized at the auction-sale was too low or wholly inadequate as to warrant the sale being set aside. The learned Judge did not pay any heed to the circumstance of the decree debt itself, being wholly satisfied during the pendency of the proceedings resulting in the withdrawal of the decree-holder's objections to the, application made by the judgment-debtor for setting aside the auction sale and of the fact of the decree-holder, itself, making in turn a prayer for calling off the auction-sale, for entering full satisfaction of the decree and terminating the execution proceedings itself. This in brief is the factual round up forming the back-drop for these appeals, in which as a first limb of the argument touching the alleged blemish in the auction-sale is the question whether the court should not have proceeded to set aside the auction sale upon certification by the decree-holder of having received the decretal amount in full and thereby making an order under Rule 5, or 8 of Order 34 directing terminus a quo of the proceedings relating to the auction sale by treating the judgment-debtor as having been absolved of all liabilities under the decree debt.

9. The above no doubt was not an aspect that was in contention before the Court below, and is

pleaded for the first time in this Court. Sri Vijayashankar, learned counsel appearing for the auction purchaser, who is the sole contestant of these appeals in this court urges that the scheme of Order 34, Civil Procedure Code is attracted only to a mortgage decree and the proceedings before the Court below, adopted under Section 31 of the Act, being not a suit or the order directing the sale of the judgment-debtor's property, for realizing monies due to the financial institution was a decree. Order 34 was not attacked. It was also pointed out that the application under Section 31 of the Act, made by the decree-holder was not a plaint in a suit. Basing himself on these pleas Shri Vijayashankar, contends that the scheme of Order 34, Civil Procedure Code does not apply at all and in fact he went one step ahead and contended that even the scheme of Order 21, C.P.C did not apply to a proceeding under the Act.

10. It seems to me while the objection, that the scheme of Order 34 C.P.C was not attracted to a proceeding in execution of an order made under Section 31 of the Act for sale of judgment-debtor's properties may bear some examination, the contention that Order 21, Civil Procedure Code was not applicable at all does not appear to be well founded. Reference in this connection may be made to Section 32(2) of the Act, which reads :

"32. Procedure of District Judge in respect of applications under Section 31.

"(8) An order of attachment or sale of property under this section shall be carried into effect as far as practicable in the manner provided in the Civil Procedure Code, 1908 for attachment or sale of property in execution of a decree as if the Financial Corporation were the decree-holder."

In the context Section 8-A may also be noticed. I may also draw attention to sub-section(12) of Section 32, which says :

"(12) For the removal of doubts it is hereby declared that any Court competent to grant an ad interim injunction under this section shall also have the power to appoint a Receiver and to exercise all the other powers incidental thereto."

From a reading of these provisions, it becomes clear, power is vested in the court to which an application is made under Section 31 of the Act, for realization of monies owed to a Financial Corporation to ensure such realization of money in accordance with the procedure laid down under the Civil Procedure Code, subject, however, to the stipulation that the machinery under the Civil Procedure Code is to be availed of only to the extent it is possible to resort to and that the ailing of the relevant provisions of the Civil Procedure Code could not in any manner offend the provisions of the Act. The expression as far as practicable occurring in Section 32(8) of the Act, brings the foregoing concept to the fore and is further endorsed by the language of Sub-section(8-A) which applies to the different situation of carrying into effect an order of the Court directing the transfer of the management of an industrial concern to the Financial Corporation which has to be done in the manner provided by the Civil Procedure Code as enjoined therein. At

any rate the provisions of sub-section(12) of Section 32 of the Act, enjoining that a court granting an interim injunction under Section 32, having also the power to appoint a Receiver and to exercise all other powers incidental thereto, it becomes dear, that the entrustment of the task of realizing the monies due to the financial institution to a court that same attracts all the powers exercisable by that Court incidental to the 16 on hand. Although Section 32(1) refers to a District Judge, as the person empowered to make an order therein the enacting of sub-d.(12) of Section 32, leaves no doubt that the scheme underlying the disposal of an application made under Section 32(1) of the Act, envisages action by the Court of the District Judge and not by any ' person designata.

11. But, even in the absence of a provision like Section 32(12), upon the general principle that wherever an ordinary Court of common law jurisdiction is entrusted with the task of administering a special law, then the same without more attracts the procedure applicable to that Court including the right of appeal, avilment of the procedural provisions of the Civil Procedure Code are enabled. This principle was propounded by the House of Lords

in *National Telephone Co., Ltd v. Post Master General*<sup>1</sup>as follows :

"When a question is stated to be referred to an established Court without more, it in my opinion imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decision likewise attaches "

The same view was expressed by the Privy Council in *Secretary of State for India v. Chellikani Rama Rao*<sup>2</sup>, and in *Adaikappa Chettiar v. Chandrashekhara Thevar*<sup>3</sup>, In the former case their Lordships observed :

" It was contended on behalf of the appellant that all further proceedings in Courts in India or by way of appeal were incompetent, these being excluded by the terms of the statute just quoted. In their Lordships' opinion this objection is not well founded. Their view is that when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders and decrees the ordinary rules of the Civil Procedure Code apply."

And in the latter case their Lordships of the Privy Council observed :

"Where a legal right is in dispute and the ordinary courts of the country are seized of such dispute the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies if authorized by such rules, notwithstanding that the legal right claimed arises under a special statute which does not, in terms confer a right of appeal."

The Supreme Court has followed both these decisions with approval in *N.S. Thread Co., Ltd v.*

*James Chadwick and Bros*<sup>4</sup>, while, holding that an order of the single Judge of the Bombay High Court made under the Trade Marks Act, was appealable to a Division Bench under the Letters Patent Act. After referring to the decisions of the Privy Council referred to supra and of the House of Lords in *National Telephone Co., Ltd. v. Postmaster General*<sup>5</sup>, the Supreme Court made the following enunciation. –

"Though the facts of the cases laying down the above rule were not exactly similar to the facts of the present case, the principle enunciated therein is one of general application and has an apposite application to the facts and circumstances of the present case. Section 76, Trade Marks Act, confers a right of appeal to the High Court and says nothing more about it. That being so, the High Court being seized as such of the appellate jurisdiction conferred by Section 76, it has to exercise that jurisdiction in the same manner as it exercises its other appellate jurisdiction and when such jurisdiction is exercised by a single Judge, his judgment becomes subject to appeal under Clause 15 of the Letters Patent there being nothing to the contrary in the Trade Marks Act."

Regard being had to the foregoing enunciation made by the Supreme Court on the

<sup>1</sup> (1913) AC 546

<sup>3</sup> AIR 1948 PC 12.

<sup>5</sup>(1913) AC 546

<sup>2</sup> AIR 1916 PC 21

<sup>4</sup> AIR 1953 SC 357

General powers of the Court exercising jurisdiction under a special enactment as inclusive of all the procedural inputs that facilitate effective exercise of power in disposing of an application arising under the special enactment, there can hence be little doubt that the District Judge in disposing of an application under Section 32 of the Act, and while ordering a sale of the judgment-debtor's properties for realizing monies due to the institution as also in the conduct of the sale itself, must necessarily take recourse to the provisions of the Civil Procedure Code regulating procedure in that behalf, just as in any other case arising before him, more so with the Act itself not providing for any different procedure and as a matter of fact, not providing any procedure at all for ensuring the realization of monies due to the decree-holder. Therefore, ultimately the parties and the court must take refuge and find the requisite sanctum only under Order 21, Civil Procedure Code. I must hence reject the contention of Mr. S. Vijayashankar, of Order 21 itself not being applicable to the proceedings before the District Judge. At one stage, learned counsel was inclined to take the stand that it was only the decree-holder who could take the benefit of the provisions of the Civil Procedure Code in order to, enforce recovery of monies due to it from the judgment-debtor and that the judgment-debtor could not in turn indent upon those very provisions of the Civil Procedure Code to resist that the endeavour of the decree-holder in that behalf. But when it was pointed out that once the provisions of the Civil Procedure Code came in to reckoning in the disposal of the application by the decree-holder made under Section 32(1) of the Act, its application could not be restricted to or confined to the benefit of the decree-holder alone since indenting on those provisions only for the purpose of regulating the Sale without extending the benefit thereof to the judgment-debtor could result, in invidious distinction learned counsel did not pursue that line of enquiry further.

12. Having regard to the foregoing conclusion that Order 21 was applicable and available for the disposal of an application made by a financial institution under Section 32(1) of the Act, and that the provisions of the Civil Procedure Code regulated the disposal of that application at different stages, we must now proceed to consider the question whether the scheme of Order 34, Rule 5 or 8, Civil Procedure Code also applies. I may point out, if those provisions are held to apply, then without more as enjoined by either of those provisions upon the payment of all the monies due to the decree-holder the judgment-debtor is to be, treated as free from all liabilities and property relieved from all burden.

13. It has been held in a decision of this Court in *S. Veeramma v. B.G. Siddappa*<sup>6</sup>, that Order 34, Rule 5, Civil Procedure Code which applies to execution of mortgage decrees is not controlled by Rule 89 of Order 21, Civil Procedure Code. It was further held in that case, that till the auction sale was not confirmed, the judgment-debtor can deposit or tender the mortgage money for payment to the decree-holder even beyond 30 days from the sale and that the limitation prescribed for making an application under Rules 89 to 91 does not apply to sales in execution of mortgage decree, covered by the specific provisions of Order 34, Rule 5.

14. Strong reliance was placed on this decision by Mr. Sundaraswamy, learned counsel for the appellant who seeks to have the auction-sale set aside on the basis of the admitted satisfaction of the decree dues in to, it is pointed out that in order to relieve the judgment-debtor's properties from the grappling hands of the auction-purchaser payment

<sup>6</sup>(1963) 2 Mys LJ 413

can even now be made without reference to the period of limitation prescribed for an application to be made under Rules 89 to 90. Reliance is also placed on a Bench decision of the Madras High Court in *M. Sevugan Chettiar v. V.A. Narayana Raja*<sup>7</sup>, for the proposition that until confirmation of sale becomes final, provisions of Order 34, Rule 5, can be invoked. That was a case in which an appeal had been preferred from an order refusing to set aside the auction-sale and confirming the auctionsale as well. During the pendency of the appeal, the judgment-debtor having sought permission to deposit the amounts due under the decree was accorded such permission. The question involved, therein was whether the judgment-debtor could invoke Order 34, Rule 5, to make the requisite deposit as confirmation had not reached finality and the matter was still sub judice in appeal. In dealing with the contention that there ought to have been an actual deposit of the amount under Order 34, Rule 5, before an application was made under the provision, Their Lordships made the following observations at the end of para 18 at page 340.

" So long as there is no confirmation of sale in the eye of law and the matter is sub judice in appeal, time is available for the judgment-debtor to make the deposit and the process of deposit could be worked out until the confirmation of the sale reaches the finality."

(Emphasis supplied)

The principle of the decision referred to supra will certainly assist the appellant subject, however, to accepting the main argument herein seeking to press into service the provisions of Order 34, Civil Procedure Code while considering the challenge to the auction sale in question. Undoubtedly, the judgment-debtor herein can probably consider its case to be invincible since there is a certification by the decree-holder in writing that the totality of the decree debt has been satisfied and a statement to that effect has been made to the Court itself. Therefore, from the stage of the statement in writing by the decree-holder as aforesaid all the subsequent proceedings could be treated as motion made under Order 34, Rule 5, Civil Procedure Code by the judgment-debtor for crying a halt to the execution proceedings and to treat the judgment-debtor as relieved of all liabilities under the decree debt. But then who really blocks the way in enabling the judgment-debtor from getting a clean chit from the court is the somewhat vexed question as to whether the scheme of Order 34, itself, applies to the case on hand.

15. The reason why it is stated that Order 34(a) is not attracted is traced back to the application made by the financial institution under Section 32(1) of the Act, and the nature of the proceedings that follow.

It is urged by Mr. Vijayashankar for the auction purchaser that an application made by the decree-holder herein under Section 32(1) is not a plaint and the proceeding is not therefore a suit nor is the order of sale made therein a decree. In support of these contentions strong reliance is placed on two judgments of the Supreme Court in *Gujarat State Financial Corporation v. Natson Manufacturing Company*<sup>8</sup>, and *E.I. Corporation v. Gujarath State Financial Corporation*<sup>9</sup>, Reliance is also placed on three other cases

<sup>7</sup> AIR 1984 Mad 334

<sup>9</sup> AIR 1987 SC 1950

<sup>8</sup> AIR 1978 SC 1765

which have followed the decision of the Supreme Court in *Gujarath State Financial Corporation's* case AIR 1978 Gujarat 1765. The said case was followed by a single Judge of the Orissa High Court in *M/s. M.K. Rout v. Orissa State Financial Corporation*<sup>10</sup>, It is followed again by the Gujarath High Court in *M/s. Bharath Chemical Works v. Gujarath State Financial Corporation*<sup>11</sup>, by the Kerala High Court in *Rahima Beevi v. Kerala Financial Corporation*<sup>12</sup>, On the basis of these decisions, it is contended that, having regard to the nature of the proceedings before the Court of the District Judge, the scheme of O. 34, cannot be invoked at all.

16. In the case of *Gujarath State Financial Corporation v. Natson Manufacturing Co*<sup>13</sup>, the point for consideration was whether ad valorem court-fee had to be paid under Schedule I, Article 1 or 7 of the Bombay Court-fees Act, on the basis of the relief-claimed in an application made under Section 31(1) of the Gujarat State Financial Corporation Act, which is the same as Section 31 of the State Financial Corporation Act, pointing out that the application made under Section 31(1) was not a plaint as contemplated under Article 1, Sch.I or by Article 7 of the Schedule I of Bombay Court-fees Act, it was held that the said application made by the Financial Corporation

under Section 31(1) of the Act, was covered by residuary Article 1(c) of Sch.II of the Bombay Court-fees Act and should therefore bear a fixed court-fee in the sum of 0-65 paise. Their Lordships on a consideration of the conspectus of the provisions of Sections 31 and 32 held that the application under Section 31(1), was not a suit for money between the mortgagee and the mortgagor, although it may ultimately be that the property would be sold for repayment of the loan or advance taken by the industrial concern from a Financial Corporation, but it could not be said that the substantive relief claimed by the Corporation as such could be valued in terms of money. This decision has been explained by a later judgment of the Supreme Court in the case of E.I. Corporation's case AIR 1987 Supreme Court 1950. In that case the question for consideration was whether Section 34, stipulating payment of interest was attracted to a proceeding under Section 32 of the Act. The Supreme Court, after referring to the enunciation made in Gujarat Financial Corporation's case, supra held :

"Proceeding instituted under Section 31(1) of the Act is something akin to an application for attachment of property in execution of a decree at stage posterior to the passing of the decree, no question of passing any order under Section 34 of the Code would therefore arise since Section 34 of the Code would be applicable only at the stage of the passing of the decree and not to any stage posterior to the decree. Moreover even under the Code the question of interest payable in mortgage suits filed in Civil Courts is governed by Order 34, Rule 11 of the Code and not by Section 34 of the Code which may be applicable only to cases of personal decrees passed under Order 34, Rule 6 of the Code."

(Emphasis supplied)

Aforesaid decision of the Supreme Court, relied on by Mr. Vijayashankar, succinctly

<sup>10</sup> ILR (1980) 2 Cut 604

<sup>12</sup> AIR 1987 Ker 126

<sup>11</sup> AIR 1983 Guj104

<sup>13</sup> AIR 1978 SC 1765

states the purport of the decision in the earlier case namely *Gujarat State Financial Corporation v. Natson Manufacturing Co<sup>14</sup>*, as laying down that a proceeding under Section 31(1) of the Act, was akin to a proceeding resulting in the attachment of property prior to the stage of the passing of a decree (sic) of posterior to the passing of a decree which ratio leads as pointed out by Mr. Sundaraswamy for the appellant to the further inference that at any rate in relation to the subsequent stages of an order made with reference to an application under Section 31(1) of the Act, the provisions of the Civil Procedure Code regulating procedure can be availed of. It is pointed out that the two decisions of the Supreme court supra did not lay down anything contrary and enact a bar if any in availing the provisions of the Civil Procedure Code in general and the ban if any was only regards regulation of the substantive rights of the parties. It may well be that the two decisions of the Supreme Court can be confined to the principle that having regard to the nature of the application under Section 31(1) of the Act, and the mode of disposal under Section 32 of the Act, it is not open or possible to rely on the provisions of the Civil

Procedure Code in regard to the regulation of substantive rights. But in regard to procedural matters, the provisions of the Civil Procedure Code in so far as they are attracted can be availed of. This aspect of the matter becomes evident from the categorical statement made in *Everest Industrial Corporation v. Gujarat State Financial Corporation*<sup>15</sup>, that the application under Section 31(1) of the Act, being in the nature of a petition seeking attachment of immovable property in execution of a decree at a stage before passing of the decree is not inhibited further, so as not to attract the procedural parts of the Civil Procedure Code relating to the actual execution of a decree. It is to be seen that we are now at the stage of the execution of the order for sale which if treated as an execution of a decree for sale in a suit on mortgage, then there is little reason to keep out the provisions of either Order 21 or Order 34, Civil Procedure Code. In fact the application out of which the order under appeal is made arises under Order 28, Rules 89 and 90 Civil Procedure Code and it is for the first time in this Court this question as to the applicability of the scheme of Order 21 or Order 34 has been raised and debated.

17. That the scheme under the Act may deny application only of the substantive provisions of the Civil Procedure Code and not of the procedural provisions regulating the execution of any order or decree remains unaffected despite the two decisions of the Supreme Court referred to supra, is made further evident from the Bench decision of the Kerala High Court in *Rahima Beevi v. Kerala Financial Corporation*<sup>16</sup>, on which Mr. Vijayashankar relied. In that case the question for consideration was whether the exemption from sale of property belonging to an agriculturist enjoined by Section 60 of the Civil Procedure Code was applicable to a sale of mortgaged property in proceedings under Section 31 of the Financial Corporations Act. Holding that an order for sale was not a decree within the meaning of Section 2(2) Civil Procedure Code. Their Lordships after referring to sub-section(8) of Section 31 of the Act, which provided that an order for attachment of sale of property under this section shall be carried into effect as far as practicable in any manner provided by the Civil Procedure Code for attachment of sale of property in execution of a decree as if the Financial Corporation was the decree-holder, made the following enunciation.

<sup>14</sup> AIR 1978 SC 1765      <sup>16</sup> AIR 1987 Ker 126

<sup>15</sup> AIR 1987 SC 1950

"It is important to note that the sub-section is framed in such a way as to indicate that the provisions in the Code (for attachment or sale etc.) are not intended to be applied implicitly. The words "as far as practicable" would effectively convey the idea that the application of the said provisions of the Code is not intended to be without limitation. In other words the Act enables the Court to use the provisions of the Code as an aid to carry out the order of attachment or sale in an effective manner. Therefore, the said subsections provide for the procedure to be followed while carrying into effect the order of attachment or sale. Those sub-sections thus cannot be understood as converting an order U/s.31(1) of the Act, into a decree as defined in the Code."

(Emphasis supplied)

The aforesaid enunciation was made by their Lordships after following the decision of the Supreme Court in Gujarat Financial Corporation's case AIR 1978 Supreme Court 1765 referred to supra

18. The decision in Rahima Beevi's case AIR 1987 Kerala 126 was further relied upon by Shri Vijayashankar, in support of his contention that an application under Section 31 of the Act not being a decree as enjoined by the Civil Procedure Code an order made under Section 31(1), cannot be treated on par with a decree under Section 2(2) Civil Procedure Code and consequently provisions of the Civil Procedure Code that are attracted to a decree, should without more be kept by, while dealing with an application under Section 31(1) of the Act. As already pointed out, if the decisions of the Supreme Court relied on by Shri Vijayashankar, are treated as having laid down nothing more than identifying an application under Section 31 of the Act, as a mere petition made for attachment of immovable property before the passing of a decree, then the decision of the Kerala High Court in Rahima Beevi's case, supra makes it very clear that the bar if any in the matter of availment of the Civil Procedure Code en masse is only in regard to substantive provisions and not with reference to procedural matters. Therefore, neither the two decisions of the Supreme Court nor the decision of the Kerala High Court in Rahima Beevi's case following the Supreme Court decision can be said to have laid down anything contrary to the view which I propose to take herein viz., applicability of the procedural provisions of the Civil Procedure Code. Hence the argument that neither Order 21, Civil Procedure Code nor Order 34, Civil Procedure Code can be relied upon in the context of an order made under Section 32 of the Act, directing the sale of immovable properties belonging to the judgment-debtor and attached before judgment does not commend itself.

19. Although an order of sale under Section 32(6) of the Act, cannot be a decree under Section 2(2), Civil Procedure Code *stricto sensu*, it nonetheless simulates a decree for sale of immovable property secured by a deed of mortgage. At the very start of his argument Mr. Sundaraswamy, was very anxious to impress on me the fact that the judgment-debtor's property had been mortgaged to the financial corporation and the corporation had lent money only on the basis of that mortgage. He also sought to urge that proceedings before the District Judge were clearly steps taken to enforce the mortgage debt. Learned counsel submitted that the nature of the proceeding arising under Section 31 of the Act, really had all the trappings of a suit for recovery of the mortgage debt and the order for sale was not different from a decree for sale in a mortgage suit. He therefore urges that even granting that Order 34, Rule 5 or Rule 8, Civil Procedure Code did not apply directly to the proceedings, the principle behind these provisions can still be applied and, in law there was no bar against relying on the provisions of Order 34, Rule 5, Civil Procedure Code. In this connection, he placed reliance on a Bench decision of the Bombay High Court in *Bansilal v. Hukumchand*<sup>17</sup>, wherein the question for consideration was whether in a sale in execution pursuant to the award made by the Registrar of Co-operative Society directing sale of mortgage property Order 34, Rule 5, can be invoked. The enunciation made by their Lordships in that connection is as follows :

"Even if by its wording Order 34, Rule 5, may not apply to a given case, its principles ought to be applied and it cannot make any difference in principle whether the sale is held in pursuance of a compromise decree which does not fall within that rule or of a decision or order of a tribunal which is or is not to be regarded as a decree. The fundamental principle is that before the mortgagor can be prevented from making the payment and redeeming the property his right must have come to an end, and that cannot come to an end unless his title to the property is lost by the confirmation of the sale.

Upon the sale of the mortgaged property in execution of the award passed by the Registrar of the Co-operative Societies, the mortgagor judgment-debtor filed an application under Order 21, Rule 90 and pending it he applied under Order 34, Rule 5 for time to deposit the amount of the mortgagor-debtor. Time was granted and the application under Order 21, Rule 90 was dismissed. Before the date fixed for payment the mortgagor judgment-debtor deposited certain amount which included the commission of the auction purchaser and prayed for further time to deposit the balance. Further time was rejected and sale was confirmed. Held that the principles of Order 34, Rule 5 could be applied and the mortgagor's right to redeem the mortgage was not extinguished. In the circumstances, the executing Court was not justified in rejecting the application for further time. AIR 1945 Madras 422, Foll and AIR 1933 Lahore 48 and AIR 1924 Patna 263, Disting. As against the decision Mr. Vijayashankar, relied on the decision rendered by the Punjab High Court in *Swaya Mal v. Punjab Financial Corporation*<sup>18</sup>, Therein it was held that the provisions of the Civil Procedure Code in general did not apply to an application under Section 31 of the Act and at any rate the provisions of the Code apply only to a claim made by an industrial concern and, therefore, an application made by the industrial concern to implead as parties the creditors of the debtor concern could not be granted by invoking Order 34, Rule 4, Civil Procedure Code. In that context it was held that the financial institution cannot on the basis of Order 34, Rule 4 seek to have the other creditors of the debtor concern impleaded. The decision is clearly distinguishable and was also justified in the facts and circumstances of the case, but otherwise has no bearing on the present controversy. On the otherhand I would rely on the decision of the Bombay High Court in *Bansilal v. Hukumchand*<sup>19</sup>, I have already endeavoured to show that even on the contrary hypothesis the provisions of the Civil Procedure Code pertaining to procedure can be invoked and relied upon.

20. In the result, therefore I am to hold that an order made by the Court under Section 32(6) of the Act directing the sale of immovable property belonging to a Debtor of the

<sup>17</sup> AIR 1963 Bom 230

<sup>19</sup> AIR 1963 Bom 230

<sup>18</sup> AIR 1963 Pun 555

Corporation attracts the procedural provisions of the Civil Procedure Code and insofar as the order is one for enforcement of money due to the Corporation and for recovery of mortgage money; applicability of Order 34, Rule 5 cannot be denied at all A further angle to this aspect of the matter, lies in the direction of Section 36, Civil Procedure Code which enables the application of the provisions of the Code, relating to execution of decrees also to an executable order.

Section 36 reads :

"The provisions of this code relating to the execution of decrees (including provisions relating to payment under a decree) shall, so far as they are applicable, be deemed to apply to the execution of orders (including payment under an order)."

The above provision would in my opinion apply to the case on hand and cover an order for sale made under Section 32 of the Act, and on that basis justify or merit invoking the other provisions of the Civil Procedure Code, thus enabling the application of the provisions of the Code relating to execution of a decree. If therefore as regards the execution of a mortgage decree the provisions of Order 34 can be invoked then on the same considerations, the aforesaid provisions of Order 34 will apply a fortiori to an order under Section 32 of Act. I would in this connection refer again to the decision of the Supreme Court in *N.S. Thread Co. v. James Chadwick and Bros*<sup>20</sup>, wherein the Supreme Court accepted the principle that when a special jurisdiction is administered by an ordinary Court, then the procedure applicable to that Court applied without more to any proceeding arising before that Court under a special enactment. Herein the application made under Section 31, by the Financial Corporation is to the Court of the District Judge and consequently the procedure which that Court can employ in the disposal of any claim for money on the basis of security of immovable property will apply and govern the same.

For the reasons aforesaid I must hold that the principles of Order 34, Rule 5, applied to the case and can be invoked at this stage where the matter is pending in appeal as pointed out by the Bench of the Madras High Court in *M. Sevugan Chettiar's case*, AIR 1984 Madras 334. Therein, it was held that until confirmation of the sale becomes a finality in the eye of law the provisions of Order 34, Rule 5, Civil Procedure Code for depositing of mortgage money can be availed of by the judgment debtor and it was further held, when the matter was sub judice in appeal, confirmation of the sale could not be held to have reached a finality and, therefore, a deposit can be made even at that stage. This aspect of the matter is highlighted by the following passage found at page 340.

"So long as there is no confirmation of sale in the eye of law and the matter is sub judice in appeal, time is available for the judgment debtor to make the deposit and the process of deposit could be worked out until the confirmation of the sale reaches the finality."

(Emphasis supplied)

But in this case total exclusion of the Judgment debtors liability to all concerned including the auction purchaser is sought for on account of the payment already made to the decree-holder on the basis of which the decree-holder had itself sought for entering debt satisfaction of the decree in the execution proceedings. The question of confirmation

<sup>20</sup> AIR 1953 SC 357

of the auction sale being still sub judice in view of the pendency of these appeals, the payment

made to the decree-holder in the meanwhile can be taken note of to mould the relief to be given to the parties in the context of the aforesaid development. At any rate as pointed out by their Lordships of the Madras High Court, in the decision referred to supra pendency of the appeal from an order of confirmation of sale can be availed of by a judgment-debtor to pay off the decree debt as in the eye of law confirmation is yet to attain finality in view of the pendency of the appeal Mr. Sundaraswamy, also submits that he could endeavour to agitate this issue till the extinction of the right of the judgment-debtor to seek for liberty his property from the mortgage debt and until that right being the right to redeem is extinguished, he can pursue his remedies, appears to be tenable. Reliance is placed by learned counsel on the decision of the Himachal Pradesh High Court in *Vishwanath v. Shaktiram*<sup>21</sup>, holding that more than one suit for redemption of a mortgage can be brought so long as the mortgage subsists and the right of redemption is not extinguished either by efflux of time or by a decree of the Court, seems to be in point. In the result therefore on the first limb of the point herein, I must hold that notwithstanding the limited scope of for dealing with an application under Section 31, the procedural provisions of the Civil Procedure Code including those under Order 34, Civil Procedure Code stand attracted in the regulation and execution of an order made under Section 32(6) of the Act, directing the sale of immoveable property mortgaged to a financial corporation.

21. The next question for consideration is covered by the second limb of the argument which adverts to the grievance of the appellant touching the irregularities and illegalities touching the auction-sale, itself, resulting according to him in the ridiculously low price fetched by the immovable property in question.

22. It is pointed out that the Court had made no worthwhile effort to publish the auction-sale widely so as to attract large number of bidders to ensure the offering of a reasonably adequate price for the property. It is alleged that the time and place of the acceptance of the second bid was not mentioned in the sale proclamation at all and that the sale proclamation was not published at the Collector's office or at the premises of the municipality as enjoined by the Civil Rules of Practice.

23. It has got to be mentioned that after the case was remanded by this Court following the orders made in the interlocutory application the oral evidence was adduced by both sides in support of their respective cases, which the judgment-debtor tried to establish that the auction-sale was beset with so many errors and therefore had to be set aside, while the auction-purchaser has sought for upholding of the same. The judgment-debtor examined four witnesses one of whom was an appraiser, who stated that he had estimated the properties at Rs. 17,00,000/- (Seventeen lakh rupees) in the year 1978 and a few days before he gave evidence in the year 1983 he had once again estimated the properties in a like-sum, but stated that the property value in the year 1983 had escalated a lot and it would therefore be worth three to four times more than what it was worth in 1978, P.Ws.2 and 3 were examined to show that had there been a proper publication of the auction-sale, they would have gone and participated in the sale and they would have

offered a minimum of seven to eight lakh rupees. The witnesses examined by the other side was the person who spoke to the circulation of the paper 'Prajavani' Kannada News

<sup>21</sup> AIR 1987 SC 29

Paper in Belgaum City in the year 1978 and the local daily called 'Taruna Bharat' stated to be very popular in which there was no advertisement of this auction sale. It transpires from the evidence that 'Prajavani' had only a local circulation of three to four hundred daily. The circulation of 'Tarun Bharat', which is also a daily ran into thousands and as pointed out before, in 'Taruna Bharat' there was no advertisement.

24. In assessing the likelihood of the prejudice caused to the judgment-debtor on both these counts i.e. adequacy of the price fetched at the auction sale and the lack of publicity, it seems to me that the learned Judge, was inclined to be somewhat casual. He appears to think that the argument centered on these objections failed, for the reason that the Judgment-debtor had not taken care to put in sufficient inputs to ensure success on these points.

25. The Court, has a major role to perform in these matters and has a duty towards the judgment debtor to ensure securing of a fair price, for the properties sold in Court auction and to see that it does not suffer because a Court auction is more often held and treated as a poor orphan. Where some of the mandatory requirements such as giving adequate publicity results in the non fetching of adequate price at an auction sale warrants the sale to be annulled, the said circumstance must themselves be treated as indicating the serious prejudice caused by irregularities of a material character, is the dictum of this Court in *Shankar v. Syndicate Bank*<sup>22</sup>

26. A much later judgment of this Court in *Manjamma v. Suryanarayana Rao*<sup>23</sup>, the need to follow the mandatory provisions enjoining the holding of the sale at the spot is highlighted. In that case the sale was challenged on the ground that the sale proclamation was in English instead of Kannada and no sale was held at the Spot in violation of Rule 138 Civil Procedure Code and that the sale proclamation was not published in the premises of the municipality or local authority. It was held in those circumstances that the default committed on all the three aspects aforesaid was venial to the sale and it had therefore, to be set aside.

27. In this case omission to hold the sale at the spot and the omission to get the sale proclamation published at the municipality or local authority are aspects that cannot at all be denied. It therefore, follows without more on the basis of the decision referred to supra, the auction sale must fall to the ground.

28. The learned District Judge, referred to the Bailiff's report in the course of his order that the sale proclamation was affixed only on the property. Bailiff in his report did not make any reference to the affixation of the sale proclamation at any other place, which means by implication that the same had not been affixed either at the Collector's office or the local municipal office as required by law. The learned Judge, did not give the benefit of this omission

to the judgment-debtor on the ground that the judgment-debtor ought to have called in more evidence, in that behalf. I do not think that the learned Judge was justified in holding so, since the only man who was competent to speak to this aspect being the Bailiff had produced a report in which he had referred to affixation of the sale proclamation only on the property. Under those circumstances, there being nothing to

<sup>22</sup> ILR (1979) 1 Kant 1326 and 1327

<sup>23</sup> ILR 1986 Kant 912

show that the sale proclamation had been affixed at the Collector's Office, or at the local Municipal Office, as required by Civil Procedure Code the omission in that behalf being very clear and evident the learned District Judge, failed to take note of the same.

29. Similarly, in dealing with the omission occurring in the sale proclamation regards the time and place of the second bid leading literally to the omission to hold the second sale at the spot a mandatory requirement as pointed out by Kulkarni, J. in Manjamma's case ILR 1986 Kar 912, the learned District Judge, thought the sale proclamation having furnished details of the third and the final bid to be held at the court the deficiency in the second auction sale to be held at the spot was cured. The non holding of the sale at the spot as held by the Court in Manjamma's case supra is a total violation of the requirement of law and the sale has therefore got to yield.

30. Yet another ground on which the auction sale had to be vacated is the one based on the inadequacy of the price fetched At the 3rd and the last bid, highest price fetched was Rs. 4,25,000/- (four lakhs and twenty-five thousand rupees) offered by the auction purchaser. The earlier bids were very discouraging the decree-holder itself has made a statement that the property was worth more than eight lakhs of rupees and had therefore asked for postponement of the sale. This development is adverted to by the Judge in his order. The property had been admittedly valued by the Judgment-debtor at more than Rs. 5,00,000/- (Five lakh rupees) at all times. The learned Judge thinks that the bid of Rs. 4,25,000/- which came within reasonable distance of the price stipulated by the judgment debtor, at more than five lakh rupees was adequately compensating. He made light of the minute recorded by the Court on the earlier occasion treating the value of the property as atleast Rs. 8,00,000/- (Eight lakh rupees) while declining to accept the bid of Rs. 1,75,000/- on an earlier occasion.

31. At the hearing of these applications before the Court below some evidence was led on behalf of the judgment-debtors to show that the property was worth Rs. 7 to 8 lakhs in the year 1978. There was no rebuttal evidence in that behalf by the auction purchaser. Even granting that the evidence tendered by the Judgment-debtor was some what interested regard must further be had to the fact that the decree-holder itself had at one stage of the proceedings, valued the property at rupees eight lakhs. Thus, the absence of any rebuttal evidence at the instance of the auction-purchaser or anybody else, seeking to discount the value of the property in the context of the evidence adduced by the judgment-debtor must lead to the inference that the price of Rs. 4,25,000/- fetched at the auction sale could only be treated as wholly inadequate. The logic employed by the District Judge, in upholding the reasonableness of the price fetched in the final

auction sale at Rs. 4,25,000/- basing it on the statement of judgment-debtor that property was worth more than Rs. 5,00,000 (Rupees five lakhs) is clearly undeniable. The juxtapositioning of the two figures and the acceptance of the lower one as being close to the higher appears extremely specious and unreasonable.

32. The fact that there was very poor advertisement in the media appears to have been largely responsible for the inadequate price fetched by the property which consists of a three storeyed building with all amenities standing on grounds of more than 35 guntas in a prime locality of the border city of at Belgaum cannot be said to have commanded a plentiful price at Rs. 4,25,000/- even according to the rates prevailing in the year 1978. When the question of reasonableness of the price fetched by the property comes up before us ten years later the sum of Rs. 4,25,000/- undoubtedly appears to be a throw-away price and a Court of justice cannot therefore allow this auction sale which has since become a mill-stone round the neck of this judgment-debtor and is trying to strangle him completely, to stand. I am satisfied on the evidence that there has been irregularity and illegality in holding and conducting the sale, which are material in character and the same has also resulted in the fetching of a very low price, of property which is probably worth several times more than what has been of paid by the auction-purchaser.

33. For the foregoing reasons, I feel constrained to vacate the auction-sale held on the 15th June, 1979. Without recourse to all these technicalities, it seems to me that the power of this Court is sufficiently plenary to pass any appropriate order in these matters regard being had to the language of sub-section(9) of Section 32 of the Act, which reads :

"Any party aggrieved by an order under sub-section(5) or sub-section(7), may within thirty days from the date of the order, appeal to the High Court, and upon such appeal the High Court may, after hearing the parties, pass such orders thereon as it thinks proper."

(emphasis supplied)

34. In the result, therefore, these appeals succeed and are allowed. The order dated 11-9-1984 made in Misc. Case. No. 85 of 1978 by the District Judge, Belgaum, is hereby set aside and in lieu thereof an order is made herein setting aside the auction-sale held on 15-6-1978 wherein the immovable property attached by the Court in Execution proceeding in E.P.2/75 is set aside. It is further ordered that full satisfaction be entered in the execution case and the execution proceedings therein shall stand terminated further. The sale proceeds of the auction sale deposited in the Court will be returned to the auction purchaser, who will be entitled to not merely the corpus of Rs. 4,25,000/- but also to all the interest that was accrued thereon in view of the investment made. In addition the auction purchaser will also be entitled to a further sum of Rs. 50,000/- by way of compensation ex gratia, taking into account the fact that its money had been locked up in this litigation for not less than a decade and consequently the auction purchaser which is stated to be an educational institution has been deprived of substantial sums of money

which it could have otherwise made use of for developing its institution. This sum of Rs. 50,000/- be paid to the auction purchaser, out of the deposits made by the judgment-debtor in the court below following the directions of this court made while disposing of Miscellaneous First Appeals Nos. 1224 and 1278 of 1978. The balance of the money in the deposit made by the judgment-debtor lying in credit of the proceedings in the court below is ordered to be paid back to the Judgment-debtor who made the deposit i.e., the appellant in M.F.A. No. 2261 of 1984. There will be no order as to costs.  
Appeals allowed.