H.S.Goutham vs Rama Murthy And Anr. Etc. on 12 February, 2021

Equivalent citations: AIRONLINE 2021 SC 269

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Bench: M. R. Shah, R. Subhash Reddy, Ashok Bhushan

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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICITON

CIVIL APPEAL NO. 1844 OF 2010

H.S. Goutham .. Appellant

Versus

Rama Murthy and Anr. Etc. .. Responden

with

CIVIL APPEAL NO. 1845 OF 2010

H.M. Ravindra Kumar .. Appellant

Versus

Rama Murthy &Ors. .. Responden

JUDGMENT

M. R. Shah, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 16.09.2006 passed by the High Court of Karnataka at Bangalore in RFA No. 274 of 2001, MFA No. 3934 of 2000 and CRP No. 3297 of 2000, the original plaintiff and the subsequent auction purchaser who purchased the property in question in the Court auction in execution proceedings, have preferred the present appeals.

2. The facts leading to the present appeals in nutshell are as under:

2.1 That, as per the case of the original plaintiff, the respondents herein – original defendants (hereinafter referred to as the 'original defendants') borrowed a sum of Rs.1,00,000/- from the father of the appellant herein – original plaintiff (hereinafter referred to as the 'original plaintiff') in the year 1990 by way of a simple mortgage deed and then further Rs.50,000/- by way of a promissory note in the year 1992. The deed of simple mortgage was executed on 11.07.1990. The mortgage deed was executed between the original defendants as Mortgager and one partnership firm namely C.H. Shantilal & Co. as Mortgagee. The original plaintiff is the son of Shri C.H. Shantilal who was one of the partners of the firm which was dissolved on 17.12.1994. That, as per the case of the original plaintiff, the mortgager borrowed a loan of Rs.1,00,000/- from mortgagee in order to clear their earlier debt in lieu of mortgage of property – suit property. That the mortgager was to repay Rs.1,00,000/- to the mortgagee within a period of 5 years from the day the deed was entered into along with interest at the rate of 1.5% per mensem or 18% per annum. That the interest was required to be paid by the mortgagers to the mortgagee every month on or before the 10th of each month. According to the original plaintiff, in the event of failure to pay the principal or interest within the period, the mortgagee will be entitled to enforce the said mortgage and cause the property or any portion sold and appropriate the proceeds towards the satisfaction of the mortgage deed. A promissory note was also executed by the original defendants while taking a further sum of Rs.50,000/- on 13.12.1992 and created a further charge in the mortgaged property.

That, as the defendants-mortgagers did not pay the aforesaid amount, the plaintiff filed a suit being O.S. No. 3376 of 1995 on 30.5.1995 before the Court of learned City Civil Judge at Bangalore for a sum of Rs.2,50,000/- together with interest thereon. It was also further prayed that on failure of the defendants to pay the decretal amount, the plaintiff shall be at liberty to sell the mortgaged property and the sale considerations so realized to be adjusted over the decretal amount. According to the plaintiff, the defendants filed a written statement on 31.05.1995 and admitted borrowing of Rs.1,50,000/-. According to the plaintiff, the defendants were represented by an Advocate. A Compromise/Settlement was entered into between the plaintiff and the defendants on 01.06.1995. The defendants agreed to pay to the plaintiff a sum of Rs.2,50,000/- in a monthly installment of Rs.5,000/- within three years. Learned Trial Court accordingly decreed the suit in terms of the compromise vide judgment and decree dated 01.06.1995. That the plaintiff filed an execution petition being Execution Petition No. 232 of 1996 before the Court of City Civil Judge, Bangalore on 28.02.1996. The judgment debtor-defendant entered appearance through an advocate on 21.06.1996 in the execution petition. That the judgment debtor- defendant filed objections in the execution petition and contended that the decree dated 01.06.1995 was obtained by fraud. By order dated 03.03.1998, the Executing Court overruled the objections of the judgment debtor-defendant and specifically observed that the objections of the judgment debtor that the decree has been obtained by fraud, mis-representation etc., are overruled. By overruling the objections raised by the judgment debtor, learned Executing Court specifically observed that the judgment debtor has failed to lead any evidence in support of his objections that the decree was obtained by fraud or mis-representation. That, thereafter, learned Executing Court issued sale proclamation of the mortgaged property on 21.11.1998. The mortgaged property was put to sale by the Executing Court.

The appellant in Civil Appeal No. 1845 of 2010 was declared the highest bidder. He deposited 25% of the bid amount on 11.02.1999 itself on the day on which the sale was conducted. The auction purchaser offered Rs.4,50,000/- and his bid was accepted by the Executing Court. After the bid of the auction purchaser was accepted, the judgment debtors filed I.A. No. 03 of 1999 on 19.02.1999 in the Execution Petition under Section 151 C.P.C. before the learned Additional City Civil Judge (Executing Court) to stay further proceedings with regard to sale of the subject mortgaged property. On 22.02.1999, the judgment debtors filed another I.A. No. 04 of 1999 in the Execution Petition under Order XXI read with Rule 90 and Order XXI read with Rule 47 and Section 151 CPC to set aside the court auction/sale dated 11.02.1999 and 18.02.1999 with respect to the subject mortgaged property. By order dated 30.10.1999 the learned Executing Court dismissed both the aforesaid applications. While dismissing I.A. No. 3 of 1999, the learned Executing Court observed that the earlier order dated 03.03.1998 was a speaking order and the objections raised by the judgment debtors were overruled and the same had attained the finality as the same has not been assailed by the judgment debtor before any competent Appellate Forum. Learned Executing Court also further observed that the Executing Court cannot go behind the decree so as to decide the question of correctness and validity of the decree, when the decree has become final. The learned Executing Court dismissed I.A. No. 04 of 1999 on the ground that the judgment debtors have not deposited the decretal amount of Rs.4,50,000/- together with interest in terms of Order XXI Rule 90 and therefore it does not entitle them to any relief for setting aside the sale as per the requirement of Order XXI Rule 90. That, thereafter, the sale of the mortgaged property came to be confirmed in favour of the auction purchaser on 17.11.1999. Sale certificate was issued by the Court in favour of the auction purchaser and the sale was registered with the Sub-Registrar on 23.11.1999. That the judgment debtors thereafter on 24.11.1999 filed Civil Revision Application No. 3699 of 1999 before the High Court against the order dated 30.10.1999 passed by the learned Executing Court in I.A. No. 4 of 1999 which was thereafter converted into MFA No. 3934 of 2000. The judgment debtors thereafter filed another Civil Revision Application No. 3700 of 1999 in the High Court against the order dated 30.10.1999 passed by the learned Executing Court in I.A. No. 3 of 1999. The High Court vide its order dated 06.01.2000 dismissed Civil Revision Application No. 3700 of 1999 by observing that the issue regarding fraud has attained finality as the order dated 03.03.1998 passed by the learned Executing Court overruling the objections of the judgment debtor had attainted finality and the same remained unchallenged. Having realized that the judgment debtors were required to challenge the order dated 03.03.1998 overruling the objections, thereafter, after a period of two years from date of the order dated 03.03.1998, the judgment debtors filed Civil Revision Application No. 3297 of 2000 before the High Court. Thereafter and having realized that non-challenging of the judgment and decree dated 01.06.1995 passed by the learned Trial Court in O.S. No. 3376 of 1995 shall come in their way, after a period of five years from the date of passing the judgment and decree dated 01.06.1995, the judgment debtors filed an appeal being RFA no. 274 of 2001 in the High Court. The said appeal was preferred in the year 2001. It is the case on behalf of the plaintiff that before the High Court a Compromise Petition was prepared on 10.06.2004 wherein the judgment debtors agreed to pay Rs.6,96,062/- in full and final settlement of the decree passed by the learned Trial Court. However, at the time of filing of the Compromise Petition, the judgment debtors withdrew from the compromise agreed by them. Thereafter, the aforesaid first appeal proceeded further. The High Court vide order dated 19.09.2005 called for a finding/report from the Principal City Civil Judge and directed him to hold an enquiry as to whether the decree passed in O.S. No.

3376 of 1995 was obtained by fraud. The propriety and legality of the said order of calling for a report/finding from the learned Principal City Civil Judge shall be dealt with hereinafter at an appropriate stage. That the learned Principal City Civil Judge submitted the report dated 06.12.2005 before the High Court wherein he recorded the finding that the decree in O.S. No. 3376 of 1995 had been obtained by fraud. Relying upon the report submitted by the Principal City Civil Judge dated 06.12.2005 and having opined that the decree in O.S. No. 3376 of 1995 was obtained by fraud, the High Court vide its impugned judgment and order dated 16.09.2006 has allowed the appeals being RFA No. 274 of 2001, MFA No. 3934 of 2000 and CRP No. 3297 of 2000 and the operative part of the impugned common judgment and order passed by the High Court is as under:

> "RFA No. 274/2001 is allowed with cost. The order and decree passed by the Court of XV Addl. City Civil Judge, Bangalore in O.S. No. 3376/1995 dated 1.6.1995 is set aside and suit is remitted to the Addl. City Civil Judge, Bangalore, for fresh disposal, in accordance with law. Defendants are permitted to file written statement within sixty days from today before the trial court.
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> MFA No. 3394 /2000 is allowed. Order dated 30.10.1999 is set aside. However, it is open to the auction purchaser to make an application before the trial court for refund of the amount deposited by him and reimbursement of the amount spent by him for registration of the sale deed and other expenses incurred by him and trial court shall consider the said application and dispose of the same, in accordance with law.
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> CRP No.3297/2000 is allowed. Order dated 3.3.98 is set aside."

2.2 Feeling aggrieved and dissatisfied with the impugned common judgment and order passed by the High Court in allowing the appeals and quashing and setting aside the judgment and decree dated 01.06.1995 passed in O.S. No. 3376 of 1995; quashing and setting aside the order dated 30.10.1999 passed by the learned Executing Court and quashing and setting aside the order dated 03.03.1998 passed by the learned Executing Court in overruling the objection raised by the judgment debtors, the original defendants as well as the successful auction purchaser have preferred the present appeals.

3. Shri Rahul Arya, learned advocate appearing on behalf of the original plaintiff has vehemently submitted that the High Court has committed an error in quashing and setting aside the consent decree and also in quashing and setting aside the orders dated 01.06.1995 and 30.10.1999. It is vehemently submitted that the High Court has materially erred in relying upon the report submitted by the learned Principal City Civil Judge that the decree in O.S. No. 3376 of 1995 has been obtained by fraud. It is vehemently submitted that as such even the defendants admitted in the proceedings before the Principal City Civil Judge that he had mortgaged the property for Rs.1,00,000/- under the registered mortgage deed and that he took a further sum of Rs.50,000/- from Shantilal by executing a pro-note in his favour. It is submitted that

> he also admitted that the amount was not repaid. It is submitted that in fact and as an after-thought, the defendant came up with a case that he repaid the money. However, even as observed by the learned Principal City Civil Judge, he could not prove the payment.

It is submitted that the conduct on the part of the defendant that he has come up with a case that the consent decree in O.S. No. 3376 of 1995 was obtained by fraud is dishonest attempt to get out of the consent decree.

3.1 It is submitted that in fact the original defendant No. 1 had put his signature on the Vakalatnama, written statement and the compromise deed. It is submitted therefore that it is not a case of forged signature. It is further submitted that calling the report from the Principal City Civil Judge and directing him to hold an enquiry as to whether the decree was obtained by fraud itself was contrary to the provisions of the CPC and such a procedure is unknown to law. It is submitted that as such by referring the matter to the learned Principal City Civil Judge, the High Court gave ample opportunity to the defendants to fill in the lacuna. It is submitted that as such the learned Executing Court by passing the order dated 03.03.1998 specifically observed that the judgment debtors have failed to prove by leading cogent evidence that the decree was obtained by fraud. It is submitted that as such after two years of the order dated 03.03.1998 overruling the objections raised by the judgment debtors, a revision was filed belatedly and as an after- thought.

3.2 It is submitted that as such the first appeal itself before the High Court against the consent decree was not maintainable in view of the provisions of Section 96 read with Order XXIII of the CPC. It is submitted that the High Court has not properly appreciated and considered the fact that against the consent decree, the appeal shall not be maintainable. It is submitted that the High Court has materially erred in holding that the appeal would be maintainable. 3.3 It is further submitted that the High Court has failed to appreciate that the judgment debtors – original defendants challenged the consent decree dated 01.06.1995 only in the year 2001. It is submitted that in between number of proceedings were initiated before the Executing Court and the orders were passed by the Executing Court dated 03.03.1998, 30.10.1999 and even the mortgaged property was auctioned and the sale certificate was issued in favour of the auction purchaser in the month of November 1999 itself and the judgment debtors-original defendants did not challenge the consent decree on the ground that it was obtained by fraud till 2001. It is submitted therefore that the conduct of the respondents suffers from delay and laches.

3.4 It is further submitted that the High Court has failed to appreciate that pursuant to the compromise decree, execution proceedings were filed, sale notice had been issued, immovable property was sold, sale came to be confirmed in favour of the auction purchaser and the auction purchaser paid the sale consideration in the court and even thereafter the sale certificate was issued and registered before the Sub-Registrar in the year 1999 itself.

3.5 It is further submitted by the learned advocate appearing on behalf of the original plaintiff that the judgment debtors failed to deposit the amount of sale consideration before the Executing Court, which was required to be deposited under Order XXI Rule 90 of the CPC. It is submitted that

therefore the High Court has materially erred in quashing and setting aside not only the consent decree, but also the orders dated 01.06.1995 and 30.10.1999. 3.6 It is submitted that the learned Principal City Civil Judge erred in believing the plea of the judgment debtors-original defendants that as the compromise process and the written statement were in English and he was knowing only the vernacular language, he did not know what was there in the written statement and the consent compromise deed. It is submitted that the original defendants have signed the mortgage deed which was in English and was also signed by them on each and every page, it cannot be construed that the defendants were familiar only with the vernacular language.

4. Learned counsel appearing on behalf of the auction purchaser- appellant in Civil Appeal No. 1845 of 2010 has further submitted that the appeal itself before the High Court challenging the consent decree was not maintainable at all in view of the bar contained in Order XXIII Rule 3 and Section 96(3) CPC. In support of the above submission, he has heavily relied upon the decision of this Court in Pushpa Devi Bhagat v. Rajinder Singh (2006) 5 SCC 566. 4.1 It is further submitted by the learned counsel appearing on behalf of the auction purchaser that as such the auction purchaser purchased the property in the execution proceedings after he was declared the highest bidder. It is submitted that in the year 1999 itself the auction purchaser deposited the entire amount of sale consideration before the Executing Court and even a sale certificate was also issued in favour of the auction purchaser. It is further submitted that therefore in view of the Order XXI Rule 92 read with Rule 94 once the sale has become absolute and as held by this Court in the case of Chinnammal v. P. Arumugham(1990) 1 SCC 513, subsequent reversal of the decree shall not affect the auction purchaser who is not a party to the decree. It is submitted that as held by this Court in the aforesaid decision, the property bona fidely purchased ignorant of litigation should be protected. It is submitted that despite the fact that in the year 1999 the auction purchaser deposited the entire amount, because of the subsequent initiation of proceedings by the judgment debtors, the auction purchaser is not in a position to enjoy the property which the auction purchaser has purchased on payment of full sale consideration purchased in an auction in the execution proceedings.

4.2 It is further submitted that the High Court has failed to consider the conduct on the part of the judgment debtors-original defendants. It is submitted that even before the High Court a compromise petition was prepared wherein the judgment debtors- original defendants agreed to pay Rs.6,96,062/- in full and final settlement of the decree passed by the learned Trial Court, however, at the time of the compromise petition, the respondents withdrew from the compromise agreed by them. It is submitted that before the learned Principal City Civil Judge, the judgment debtor-original defendant admitted the said compromise petition and admitted that he put his signature on the compromise petition voluntarily and with free consent. It is submitted that therefore all through-out the conduct on the part of the defendants as original debtor is dis- honest and to delay the proceedings and deprive the auction purchaser from using the property purchased in the year 1999.

5. Shri P.R. Ramasesh, learned advocate appearing on behalf of the original defendants-judgment debtors has supported the impugned judgment and order passed by the High Court. 5.1 It is vehemently submitted that the learned Principal City Civil Judge in its report, which was called for by the High Court, has specifically observed that the consent decree was obtained by fraud. It is

submitted that therefore relying upon the report/finding by the learned Principal City Civil Judge and when the High Court has also come to the conclusion that the consent decree was obtained by fraud, the High Court has rightly set aside the consent decree and has rightly quashed and set aside the judgment and decree dated 01.06.1995 and order dated 30.10.1999 passed by the Executing Court and has rightly remanded the matter to the learned trial court to decide the suit on merits.

5.2 It is submitted that the High Court has rightly held that the first appeal against the consent decree would be maintainable. 5.3 It is submitted that the findings recorded by the learned Principal City Civil Judge that the consent decree obtained by fraud is on re-appreciation of evidence. It is submitted that the High Court rightly directed the Trial Court to hold an enquiry whether the decree was obtained by fraud, mis-representation. It is submitted that once it is observed and held that the consent decree was obtained by fraud, mis-representation right from the beginning and even prior to the filing of the suit, such consent decree is not a decree in the eye of law and therefore the High Court has rightly set aside the consent decree and remanded the matter to the Trial Court to decide the suit on merits. It is submitted that therefore all other subsequent orders passed in the executing proceedings would be nullity and therefore the same are rightly set aside by the High Court.

5.4 Making the above submissions, it is prayed to dismiss the present appeals.

6. Heard learned counsel appearing on behalf of the parties at length.

6.1 At the outset, it is required to be noted that by the impugned common judgment and order, the High Court has allowed the first appeal preferred by the original defendants and has quashed and set aside the consent decree passed by the learned Trial Court in O.S. No. 3376 of 1995 dated 01.06.1995, much after the mortgaged property came to be sold in the execution proceedings and much after the sale in favour of the auction purchaser was confirmed and the sale certificate was also issued. By the impugned judgment and order, the High Court has also set aside the order dated 30.10.1999 passed by the learned Executing Court in I.A. No. 4 of 1999, by which the learned Executing Court dismissed the application preferred by the judgment debtors under Order XXI Rule 90 read Section 47 C.P.C. praying for setting aside the Court auction sale. By the impugned judgment and order, the High Court has also allowed the Revision Application being CRP No. 3297 of 2000 and has also quashed and set aside the order dated 03.03.1998 overruling the objections raised by the judgment debtors, more particularly, overruling the objection raised by the judgment debtors that the consent decree was obtained by fraud. As observed hereinabove, both the judgment creditor-original plaintiff and the auction purchaser in whose favour the sale deed was confirmed and the sale certificate was issued in his favour as far back as on 17.11.1999/23.11.1999, have preferred the present appeals.

7. Therefore, the short question which is posed for consideration of this Court in the present appeals is whether in the facts and circumstances of the case, more particularly, when the mortgaged property was sold in the court auction in the execution proceedings and the sale was confirmed in favour of the auction purchaser and the sale certificate was issued and sale was confirmed after overruling the objections raised by the judgment debtors, more particularly, the objection that the consent decree was obtained by fraud and that initially the consent decree was not challenged at all

and not only that, even order dated 03.03.1998 overruling the objections raised by the judgment debtors was also not challenged at the earliest, the High Court is justified in quashing and setting aside the consent decree on the ground that the same was obtained by fraud, relying upon the report submitted by the Principal City Civil Judge which was called for in the appeal.

8. While considering the above-said questions, as such, the conduct/inaction on the part of the judgment debtors after the consent decree was passed are required to be considered, which are referred to hereinabove and which are again reiterated as under:

> 8.1 That the learned Trial Court passed the consent decree on 01.06.1995 and decreed that the defendants shall pay to the plaintiff a sum of Rs.2,50,000/- in a monthly installment of Rs.5,000/- within three years from that day. At the outset, it is required to be noted that the execution of the simple mortgage deed, execution of the promissory note and taking the amounts of loan, have not been disputed by the judgment debtors. That, after the consent decree was passed on 01.06.1995, the judgment creditor-original plaintiff filed an execution petition before the Additional City Civil Judge, Bangalore, being Execution Petition No. 232 of 1996 on 28.02.1996. The judgment debtors entered appearance through an Advocate in the execution petition on 21.06.1996. Therefore, at least, it can be said that the judgment debtors were aware of the consent decree at least on 21.06.1996.

Instead of challenging the said consent decree on the ground that it was obtained by fraud, the judgment debtors filed their objections in the execution petition contending that it was obtained by fraud. Such objections were filed on 04.10.1996. Learned Executing Court by a reasoned order dated 03.03.1998 overruled the objections of the judgment debtors that the decree has been obtained by fraud, mis-representation etc., by specifically observing that after filing of the objections, the matter was being posted for hearing, but the judgment debtors did not either adduce any evidence in that behalf nor have they addressed any arguments also and, therefore, in the absence of any proof of the allegation of fraud etc. made by the judgment debtors, the objections have to be overruled. That the judgment debtors did not challenge the order dated 03.03.1998 before the higher forum. Thereafter, after a period of eight months from the passing of the order dated 03.03.1998, the learned Executing Court issued the sale proclamation of the mortgaged property on 21.11.1998. The spot sale was held on 11.02.1999. The auction purchaser-appellant in Civil Appeal No. 1845 of 2010 was declared as the highest bidder. He deposited 25% of the bid amount. After his bid was accepted being the highest bidder, the Executing Court confirmed the sale/bid on 18.02.1999. Thereafter, judgment debtors filed I.A. No. 03 of 1999 before the Executing Court for stay of further proceedings in respect of sale of the subject mortgaged property. Judgment debtors also filed I.A. No. 4 of 1999 under Order XXI Rule 90 read with Rule 47 CPC before the Executing Court for setting aside Court sale in respect of the subject mortgaged property. The learned Executing Court dismissed both the aforesaid applications. Learned Executing Court dismissed I.A. No. 3 of 1999 by observing that the order dated 03.03.1998 overruling the objections filed by the judgment debtors has attained the finality as the same has not been assailed before any appellate forum and that the Executing Court cannot go behind the decree so as to decide the question of correctness and validity of the decree, when the decree had become final. The learned Executing Court dismissed I.A. No. 4 of 1999 on the ground

that the judgment debtors have not deposited the decretal amount of Rs.4,50,000/- together with interest in terms of Order XXI Rule 90 and therefore the judgment debtors are not entitled to seek for setting aside of the sale as per the requirement of Order XXI Rule 90. That, thereafter the learned Executing Court confirmed the sale in favour of the auction purchaser on 17.11.1999. On 23.11.1999, the sale certificate was issued by the court in favour of the auction purchaser and the sale was registered with the Sub-Registrar. That, after the sale was confirmed and the sale certificate was issued in favour of the auction purchaser and after the sale was registered with the Sub-Registrar, the judgment debtors filed Civil Revision Petition No. 3699 of 1999 in the High Court of Karnataka against the order dismissing I.A. No. 4 of 1999, which was thereafter converted into MFA No. 3934 of 2000. Thereafter the judgment debtors also filed Civil Revision Petition No. 3700 of 1999 in the High Court of Karnataka at Bangalore against the order dated 30.10.1999 passed by the Executing Court. Civil Revision Petition No. 3700 of 1999 came to be dismissed by the High Court by an order dated 06.01.2000 holding that the issue that the decree was obtained by fraud has attained finality in view of order dated 03.03.1998 rejecting the objections of the judgment debtors remained unchallenged. That, thereafter, after the lapse of around two years, the judgment debtors challenged the order dated 03.03.1998 by filing CRP No. 3297 of 2000. At this stage, it is required to be noted that till this time judgment debtors did not challenge the decree dated 01.06.1995 before the High Court. That, after a period of five years from the date of passing of the judgment and decree dated 01.06.1995 the judgment debtors preferred RFA No. 274 of 2001 challenging the decree dated 01.06.1995 passed by the learned Trial Court on the ground that the same has been obtained by fraud and mis-representation. After a period of five years from the date of filing of the appeal, the High Court called for a finding/report from the learned Principal City Civil Judge and directed him to hold an enquiry as to whether the decree dated 01.06.1995 was obtained by fraud. The legality and propriety of the said order shall be dealt with hereinbelow at an appropriate stage. Before the learned Principal City Civil Judge, the judgment debtors led the evidence in support of their claim that the judgment and decree was obtained by fraud and mis-representation, which evidence was not led by them before the Executing Court when they submitted the objections and contended that the decree was obtained by fraud. That, thereafter, the learned Principal City Civil Judge submitted the report that the decree was obtained by fraud and on the basis of the report submitted by learned Principal City Civil Judge mainly, the High Court has set aside the judgment and decree by the impugned judgment and order. Thus, from the aforesaid it is crystal clear that all through-out there was a delay and negligence on the part of the judgment debtors in not initiating the appropriate proceedings at appropriate stage. Order dated 03.03.1998 overruling the objections submitted by the judgment debtors to the effect that the judgment was obtained by fraud and mis-representation was not challenged by the judgment debtors till the mortgaged property was auctioned; sale of the mortgaged property was confirmed in favour of the auction purchaser and even the sale certificate was issued in favour of the auction purchaser and sale was registered with the Sub-Registrar and even also the dismissal of I.A. No. 3 of 1999 and I.A. No. 4 of 1999. Not only that, till that time even no appeal was assailed/challenged before the higher forum. The first appeal was filed in the year 2000 and by that time the mortgaged property was already sold in the execution proceedings and the sale was confirmed in favour of the auction purchaser and even the sale certificate was issued in favour of the auction purchaser.

9. At this stage, it is required to be noted that as per the relevant provisions of the Code of Civil Procedure, more particularly, Order XXI Rule 92 read with Order XXI Rule 94, once the sale is confirmed and the sale certificate has been issued in favour of the purchaser, the same shall become final.

10. Now, so far as the procedure adopted by the High Court calling for the report from the learned Principal City Civil Judge on whether the decree was obtained by fraud or not is concerned, at the outset, it is required to be noted that at the time when the High Court passed such an order, there was already an order passed by the learned Executing Court dated 03.03.1998 overruling the objections raised by the judgment debtors that the decree was obtained by fraud and mis-representation. As observed by the learned Executing Court in the order dated 03.03.1998, the judgment debtors except the averments that the decree was obtained by fraud, mis-representation, neither any further submissions were made on that nor even the judgment debtors led any evidence in support of the same. Therefore, as such, learned Executing Court was justified in overruling the objection that the decree was obtained by fraud, mis-representation etc. As per the settled principle of law, when the fraud is alleged the same is required to be pleaded and established by leading evidence. Mere allegation that there was a fraud is not sufficient. Therefore, subsequent order passed by the High Court calling for the report from the learned Principal City Civil Judge on the question whether the decree was obtained by fraud or not, can be said to be giving an opportunity to the judgment debtors to fill in the lacuna. Therefore, the course adopted by the High Court calling for the report from the learned Principal City Civil Judge cannot be approved. 10.1 Even otherwise, it is required to be noted that as per the provisions of Order XLI, the appellate court may permit additional evidence to be produced whether oral or documentary, if the conditions mentioned in Order XLI Rule 27 are satisfied after the additional evidence is permitted to be produced in exercise of powers under Order XLI Rule 27. Thereafter, the procedure under Order XLI Rules 28 and 29 is required to be followed. Therefore, unless and until the procedure under Order XLI Rules 27, 28 and 29 are followed, the parties to the appeal cannot be permitted to lead additional evidence and/or the appellate court is not justified to direct the court from whose decree the appeal is preferred or any other subordinate court, to take such evidence and to send it when taken to the Appellate Court. From the material produced on record, it appears that the said procedure has not been followed by the High Court while calling for the report from the learned Principal City Civil Judge.

10.2 Even otherwise, it is required to be noted that at the time when the learned Principal City Civil Judge permitted the parties to lead the evidence and submitted the report/finding that the decree was obtained by fraud, there was already an order passed by the Executing Court-Co-ordinate Court overruling the objections made by the judgment debtors that the decree was obtained by fraud. Therefore, unless and until the order dated 03.03.1998 was set aside, neither the High Court was justified in calling for the report from the learned Principal City Civil Judge nor even the learned Principal City Civil Judge was justified in permitting the judgment debtors to lead the evidence on the allegation that the decree was obtained by fraud, mis-representation, when the judgment debtors failed to lead any evidence earlier before the Executing Court when such objections were raised.

11. From the impugned judgment and order passed by the High Court, it appears that the High Court has heavily relied upon the report submitted by the learned Principal City Civil Judge and thereafter has come to the conclusion that the decree was obtained by fraud, mis-representation. Therefore, in the facts and circumstances of the case and for the reasons stated above, the High Court has committed an error in relying upon the report submitted by the learned Principal City Civil Judge holding that the decree was obtained by fraud.

11.1 Even otherwise, on perusal of the evidence led before the learned Principal City Civil Judge and even the findings recorded by the learned Principal City Civil Judge and the reasoning given by the High Court while holding that the decree was obtained by fraud, we are of the opinion that, in the facts and circumstances of the case, and even on the evidence led, the High Court has erred in holding that the decree was obtained by fraud. The judgment debtors-original defendants have put their signatures on the written statement or on the consent terms. The mortgaged property and the promissory note are not in dispute. Therefore, when the suit was filed and the judgment debtors wanted to get more time to repay the amount and when it was agreed to pay Rs.4,50,000/- (suit claim) in a monthly installment of Rs.5,000/- within three years, nothing was unnatural.

12. Now, so far as the objection raised on behalf of the appellant herein that the appeal before the High Court against a consent decree was not maintainable is concerned, the same has no substance. The High Court has elaborately dealt with the same in detail and has considered the relevant provisions of the Code of Civil Procedure, namely, Section 96, Order XXIII Rule 3, Order XLIII Rule 1 (m) and order XLIII Rule 1A(2). It is true that, as per Section 96(3), the appeal against the decree passed with the consent of the parties shall be barred. However, it is also true that as per Order XXIII Rule 3A no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. However, it is required to be noted that when Order XLIII Rule 1(m) came to be omitted by Act 104 of 1976, simultaneously, Rule XLIII Rule 1A came to be inserted by the very Act 104 of 1976, which provides that in an appeal against the decree passed in a suit for recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should or should not have been recorded. Therefore, the High Court has rightly relied upon the decision of this Court in Banwari Lal v. Chando Devi AIR 1993 SC 1139 (para

9) and has rightly come to the conclusion that the appeal before the High Court against the judgment and decree passed in O.S. No. 3376 of 1995 was maintainable. No error has been committed by the High Court in holding so.

13. Now, so far as the dismissal of I.A. No. 4 of 1999 by the learned Executing Court in the Execution Petition No. 232 of 1996 which was filed by the judgment debtors to set aside the court auction/sale dated 11.02.1999 and 18.02.1999 with respect to the subject mortgaged property is concerned, it is not in dispute that the judgment debtors as such did not deposit the amount of Rs.4,50,000/- i.e. sale consideration together with interest in terms of Order XXI Rule 90 CPC. Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in

publishing or conducting it. Therefore, as per Order XXI Rule 90, an application to set aside the sale on the ground of irregularity or fraud may be made by the decree holder on the ground of material irregularity or fraud in publishing or conducting it. It is required to be noted that in the present case, as such, it is not the case of the judgment debtors that there was any material irregularity or fraud in publishing or conducting the sale. No such submissions have been made before this Court. Their objection is that the decree was obtained by fraud. Therefore also, the application submitted by the original judgment debtors under Order XXI Rule 90 i.e. I.A. No. 4 of 1999 was required to be dismissed and was rightly dismissed by the learned Executing Court.

14. Now, so far as the impugned judgment and order passed by the High Court in CRP No. 3297 of 2000 quashing and setting aside the order passed by the Executing Court dated 03.03.1998 is concerned, from the impugned judgment and order passed by the High Court, it appears that the sale has been set aside by the High Court in view of the finding on Point No. 1 i.e. the decree was obtained by fraud and mis-representation and considering the report filed by the learned Principal City Civil Judge. However, it is required to be noted that at the time when learned Executing Court passed the order dated 03.03.1998 no evidence was led by the judgment debtors. The allegation that the decree was obtained by fraud and mis-representation was not substantiated. The High Court ought to have appreciated that even the order dated 03.03.1998 was not challenged by the judgment debtors till the year 2000 and, in the meantime, two applications being I.A. 3 of 1999 and I.A. No. 4 of 1999 were submitted by the judgment debtors under Order XXI Rule 90, which came to be dismissed and the mortgaged property was sold in the court auction and even the sale was confirmed and the sale certificate was issued and the same was registered with the Sub-Registrar. As observed hereinabove, as per Order XXI Rule 92, where an application is made under Order XXI Rule 89, Order XXI Rule 90 and Order XXI Rule 91 and the same is disallowed, the Court shall make an order confirming the sale and thereafter the sale shall become absolute. As per Order XXI Rule 94, where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear the date on which the sale became absolute. Therefore, when after the order dated 03.03.1998 overruling the objections raised by the judgment debtors and thereafter the order was passed in I.A. No. 4 of 1999 and thereafter when the sale was confirmed and the sale certificate was issued, the High Court ought not to have thereafter set aside the order dated 03.03.1998 overruling the objections raised by the judgment debtors, which order was not challenged by the judgment debtors before the High Court till the year 2000. Under the circumstances, the impugned judgment and order passed by the High Court in CRP No. 3297 of 2000 quashing and setting aside the order dated 03.03.1998 cannot be sustained and the same deserves to be quashed and set aside.

15. Now, so far as the impugned judgment and order passed by the High Court in MFA No. 3934 of 2000 quashing and setting aside the order dated 30.10.1999 dismissing I.A. No. 4 of 1999 which was filed by the judgment debtors under Order XXI Rule 90 is concerned, the High Court has set aside the same observing that the auction purchaser cannot be said to be the bona fide purchaser as he was related to the judgment creditor and that he was a partner of the firm in whose favour the mortgage was executed. However, it is required to be noted that I.A. No. 4 of 1999 was not filed to set aside the sale on the aforesaid grounds. The said application was submitted on the ground that

no proper publication was made to get the adequate market value. Therefore, the High Court has gone beyond the case of the judgment debtors in I.A. No. 4 of 1999. Even on merits also and factually, the High Court is not correct in observing that the auction purchaser was not a bona fide purchaser. According to the judgment creditor, the partnership firm was already dissolved much before and thereafter the plaintiff inherited the assets, claims and liabilities of the firm. Even as observed by the learned Executing Court while passing the order in I.A. No. 4 of 1999 the judgment debtors even did not deposit the entire amount. Under the circumstances, the High Court therefore committed an error in quashing and setting aside order dated 30.10.1999 passed in I.A. No. 4 of 1999.

16. In view of the above and for the reasons stated above, both these appeals succeed. The impugned common judgment and order passed by the High Court in RFA No. 274 of 2001, MFA No. 3934 of 2000 and CRP No. 3297 of 2000 is hereby quashed and set aside. However, there shall be no order as to costs.

.....J. (ASHOK BHUSHAN) .....J. (R. SUBHASH REDDY) .....J. (M. R. SHAH) New Delhi, February 12, 2021