

# Hukamchand vs Bansilal & Ors on 19 April, 1967

**Equivalent citations: 1968 AIR 86, 1967 SCR (3) 695**

**Author: K.N. Wanchoo**

**Bench: K.N. Wanchoo, Vishishtha Bhargava, G.K. Mitter**

PETITIONER:

HUKAMCHAND

Vs.

RESPONDENT:

BANSILAL & ORS.

DATE OF JUDGMENT:

19/04/1967

BENCH:

WANCHOO, K.N. (CJ)

BENCH:

WANCHOO, K.N. (CJ)

BHARGAVA, VISHISHTHA

MITTER, G.K.

CITATION:

1968 AIR 86 1967 SCR (3) 695

CITATOR INFO :

R 1974 SC 87 (11)

D 1983 SC 428 (1,3,4)

RF 1985 SC1124 (7)

R&E 1992 SC 385 (6,7)

ACT:

Civil Procedure Code, 1908, O. XXXI, rr. 90. 92, O. XXXIV, r. 5-Judgment-debtor making application under O. XVI r. 90 after decree passed-Application withdrawn and time extended with consent of parties-Whether court has power to grant further extension or must confirm sale under O. XXI. r. 92.

HEADNOTE:

The respondents were members of a Cooperative housing society and 'had created a mortgage on their property in favour of the society. As an amount due under the mortgage was not paid, the matter was referred to the Registrar of Cooperative Societies and he made an order on May 1, 1957 directing the respondent to pay the amount due from August

f. 1953 till the debt was discharged. He further directed that if the amount was not paid, the property could be sold in satisfaction of the amount. The amount was not paid as directed and the property was therefore sold on April 7, 1958 to the appellant. As an application was made by the respondents on May 3, 1958 under O. XXI, r. 90 the sale could not be confirmed under O. XXI, r. 92 until this application was disposed of. The proceedings on the application continued up to October 7, 1958 when an order was passed with the consent of the parties whereby the respondents were granted time till November 21, 1958 to deposit the amount due and the application under O. XXI r. 90 was dismissed as withdrawn. When the matter came up before the executing court on November 22, the court noted that no amount had been deposited and although an application was made on behalf of the respondents for a further extension of time, the executing court held that as the society decree-holder and the auction purchaser were not willing to extend time, the court could not extend time which had been given under an agreement of the parties by way of compromise. The court therefore confirmed the sale under O. XXI r. 92.

After appeals to the District Judge and a single bench of the High Court, a Division Bench, in a Letters Patent Appeal, held that O. XXXIV r. 5 would apply in a case of 'this kind and that even if it did not apply. it was a fundamental principle that before a mortgagor could be prevented from making the payment and redeeming 'the property. his rights must have come to an end and they would come to an end only when his title was lost by confirmation of sale. The court allowed the appeal holding that the application for extension of time was wrongly rejected by the executing court as it had the power to grant an extension. It further directed that as some amount had been paid by he respondents, if on making up the accounts it was found that any additional amount was due the court would give reasonable time for this to be deposited.

On appeal to this Court,

HELD : The order of the executing court refusing extension of time and confirming the sale in favour of the appellant under O. XXI r. 92 was correct. [702B]

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It was not open to the executing court to extend time without the consent of parties, for time between October 7, 1958 to November 21, 1958 was granted by consent of parties. Section 148 of the Code of Civil Procedure would not apply in these circumstances. [701H]

Though O. XXXIV r. 5(1) recognises the right of the judgment debtor to pay the decretal amount in an execution relating to a mortgage decree for sale at any time before the confirmation of sale, the rule does not give any power to the court to grant time to deposit the money after the final decree has been passed. It is not open to the court to go

on fixing date after date and postponing confirmation of sale merely to accommodate a judgment-debtor. A harmonious construction of O. XXXIV r. 5 and O. XXI r. 92 makes it clear that if the provisions of O. XXI r. 92(1) apply the sale must be confirmed unless before the confirmation the mortgagor judgment-debtor has deposited the amount as permitted by O. XXXIV r. 5. [699D-E. H; 700E]  
Janak Rai v. Gurdial Singh [1967] 2 S.C.R. 77, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals No. 1005 of 1964.

Appeal by special leave from the judgment and order dated July 12, 1962 of the Bombay High Court, Nagpur Bench in appeal No. 16 of 1960 under the Letters Patent. A. S. Bobde, G. L. Sanghi, and O. C. Mathur, for the appellant.

N. C. Chatterjee and M. S. Gupte, for respondents Nos. 1 and 2.

W. S. Barlingay and A. G. Ratnaparkhi, for respondent No.

4. The Judgment of the Court was delivered by Wanchoo, C.J. This is an appeal by special leave from the judgment of the Bombay High Court and arises in the following circumstances. The respondents were members of a Co-operative Housing Society and had created a mortgage on their property in favour of the society. As the amount due under the mortgage was not paid, the matter was referred to the Registrar, Co-operative Societies, and he made an order dated May 1, 1957 that the respondents should pay a sum of Rs. 9,000 and odd and interest at Rs. 12 per cent per annum from August 1, 1953 till satisfaction of the debt due to the Society. The Registrar further directed that if the amount was not paid in cash to the society, the property mentioned in his order would be sold in satisfaction of the amount. The order also provided that in case the amount due was not realised from the sale of the property, 'the society would have the right to proceed against the respondents for the balance. The amount was not paid as directed in the order. Consequently an application was made to the civil court as provided by law for recovery of the amount under the order of the Registrar which amounted to a decree. In consequence the property on which charge was created by the order of the Registrar was brought 'to sale. The sale was held on April 7, 1958 and the appellant being the highest bidder, the sale was concluded in his favour.

Normally the sale would have been confirmed after 30 days, if no application had been made under O. XXI r. 90 of the Code of Civil Procedure, for O. XXI r. 92 inter alia provides that "where no application is made under r. 89, r. 90 or r. 91, or where such application is made and disallowed, the court shall make an order confirming the sale and thereupon the sale shall become absolute". As an application had been made on May 3, 1958 under O. XXI r. 90, the sale could not be confirmed till that application was disposed of. Proceedings under O. XXI rule 90 seem to have gone on upto October 7, 1958. On that day it appears that one of the respondents gave evidence as a witness.

Thereafter it was the turn of the Society decree-holder to give evidence. But before the evidence of the society began, it appears that respondents requested for one month's time to deposit the decretal amount along with the auction-purchaser's commission. They also appear to have stated that in that event they were prepared to withdraw their application under O. XXI r. 90. The society as well as the auction-purchaser had no objection to time being allowed. The executing court therefore granted time to the respondents till November 21, 1958 to deposit the entire decretal amount along with the auction-purchaser's commission. After time was thus allowed with consent of the parties, the application under O. XXI r. 90 was dismissed as withdrawn with no order as to costs. On November 20, 1958, an application was made by the respondents in which they referred to what had been ordered on October 7, 1958. They further stated that November 21, 1958 was a holiday and it was not possible to deposit the amount on that day though they were prepared to do so. They consequently prayed for time for one day so that the deposit might be made on November 22, 1958. No order was passed on this application on November 20, 1958 though it bears an endorsement of the executing court to the effect that it had been filed on November 20, 1958. November 21, 1958 being a holiday it appears that the matter came before the executing court on November 22. On that day the court noted that no amount had been deposited. The order-sheet also shows that counsel for the respondents prayed for time for a fortnight. The society decree-holder as well as the auction-purchaser (appellant) opposed the prayer for extension of time. The executing court held that as the society decree-holder and the auction-purchaser were not willing to extend time the court could not extend time which had been given under an agreement of the parties by way of compromise. The court therefore rejected the prayer for extension of time and thereafter confirmed the sale as required by O. XXI r. 92 as the application under O. XXI r. 90 had already been dismissed on October 7, 1958.

The respondents went in appeal to the District Judge. He held that the court had always the power whether under S. 148 of the Code of Civil Procedure or otherwise, to postpone passing of orders confirming sale of immovable properties. He, went on to hold that the executing court erred in holding that it had no power to grant further extension of time. The appeal was therefore allowed, the order of the executing court set aside and the case remitted to the executing court for deciding the application for extension of time on merits. It may be mentioned that though the District Judge said in the order that the application presented on November 22, 1958 for granting further time would be disposed of after hearing parties and considering the merits of the case, there was in fact no written application on November 22, 1958 and there was only an oral prayer. That however makes no difference to the main question before us.

There was then a second appeal by the appellant to the High Court. A question was raised in the High Court whether O. XXXIV r. 5 applied to the present case. The learned Single Judge seems to have held that O. XXXIV r. 5 did not apply. He further held that in view of the provisions of O. XXI r. 92, the sale was rightly confirmed and s. 148 of the Code of Civil Procedure could not under the circumstances be invoked. The appeal therefore was allowed and the order of the executing court restored.

Then there was a Letters Patent Appeal by the respondents. The Division Bench appears to have held that O. XXXIV r. 5 would apply in a case of this kind. It also went on to say that even if O.

XXXIV r. 5 did not apply, it was a fundamental principle that before a mortgagor could be prevented from making the payment and redeeming the property, his rights must have come to an end and they would come to an end only when his title was lost by confirmation of sale. It went on to hold that if the application for extension of time was wrongly rejected if the mortgagor had the right and the court had 'the power to grant adjournment it would be open in appeal to consider whether the executing court refused the adjournment properly or not. If in appeal the court came 'to the conclusion that the order of the executing court refusing extension of time was wrong, the confirmation which followed on such wrong order would fall and the mortgagor judgment debtor would be entitled to deposit the amount. It appears that as the respondents had deposited some money after the order of the District Judge in appeal, the Letters Patent Bench allowed the appeal, set aside the order of the learned Single Judge and restored the order of the District Judge and further set aside the order of confirmation made by the executing court on November 22, 1958. It also ordered that the amount lying in deposit should be paid to the decree-holder mortgagee and the auction-purchaser. It may be added that this deposit was not made before the confirmation 69 9 of sale on November 22, 1958 but long afterwards in 1959. It further directed that if on making up the accounts, it was found that any additional amount had to be deposited, the court would give reasonable time to the judgment- debtors, namely, the present respondents before us. The High Court having refused leave to appeal, the appellant obtained special leave from this Court, and that is how the matter has come before us.

The principal question that arises for decision in this case is whether the executing court was right in the view that it could not extend time which had been given by consent of parties on October 7, 1958. If that view is correct, there would be no difficulty in holding, in view of O. XXI r. 92, that the order confirming sale was proper. We shall proceed on that assumption that O. XXXIV c. 5 applies in the present case and that the order of the Registrar which was under

execution was a final decree in a mortgage suit. O. XXXIV r. 5(1) gives an opportunity to the judgment' debtor in a mortgage decree for sale to deposit the amount due under the mortgage decree at any time before the confirmation of sale made in pursuance of the final decree, and if such a deposit is made the court executing the decree has to accept the payment and make an order in favour of the judgment-debtor in terms of O. XXXIV r. 5 (1). Though O. XXXIV r. 5 (1) recognises the right of the judgment-debtor to pay the decretal amount in an execution relating to a mortgage decree for sale at any time before, the confirmation of sale, that in our opinion does not mean that the said rule gives power to the court to extend time for payment on an application made by the judgment-debtor. There is- no pro-

vision in O. XXXIV r. 5 (1) like that contained in O. XXXIV r. 4 (2) to extend time for payment after the final decree is passed in a mortgage suit. As we read O. XXXIV r. 5 it only permits the judgment-debtor to deposit the amount due under the decree and such other amount as may be due in consequence of a sale having taken place, provided the deposit is made before the confirmation of sale. But there is no power in O. XXXIV r. 5 (1) to grant extension of time and postpone confirmation of sale there:or. The observation of the District Judge that the court has always the power to postpone passing orders confirming sale of immovable property is in our view incorrect, in

the face of the provisions contained in O. XXI r. 92 (1). That provision makes it absolutely clear that if no application is made under r. 89, r. 90 or r. 91 or where such application is made and disallowed, the court has to make an order confirming the sale and thereupon the sale becomes absolute. It is not open to the court to go on fixing late after date and postponing confirmation of sale merely to accommodate a judgment-debtor. If that were so, the court may go on postponing confirmation of sale for years in order to accommodate a judgment-debtor. What O. XXI r. 92 contemplates is that where conditions thereunder are satisfied an order for confirmation must follow.' Further we have already indicated that O. XXXIV r. 5 does not give any power to court to grant time to deposit the money after the final decree has been passed. All that it permits is that a judgment-debtor can deposit the amount even after the final decree is passed at any time before the confirmation of sale and if he does so, an order in terms of O. XXXIV r. 5 (1) in his favour has to be passed. With respect we cannot understand what the Letters Patent Bench meant by saying that before a mortgagor could be prevented from making payment and redeeming the property, his rights must have come to an end and that they could not come to an end unless his title to the property had been lost by confirmation of sale. It is true that so long as his right to redeem subsists the mortgagor may redeem the property. It is this principle which is recognised in O. XXXIV r. 5 which provides that the mortgagor judgment-debtor can deposit the amount due even after the final decree has been passed but this deposit must be made at any time before confirmation of sale. It may be noted that there is no power under O. XXXIV r. 5 to extend time and all that it does is to permit the mortgagor judgment-debtor to deposit the amount before confirmation of sale. It does not give any right to the mortgagor judgment-debtor to ask for postponement of confirmation of sale in order to enable him to deposit the amount. We have to interpret O. XXXIV r. 5 and O. XXI r. 92 harmoniously and on a harmonious interpretation of the two provisions it is clear that though the mortgagor has the right to deposit the amount due at any time before confirmation of sale, there is no question of his being granted time under O. XXXIV r. 5 and if the provisions of O. XXI r. 92 (1) apply the sale must be confirmed unless before the confirmation the mortgagor judgment-debtor has deposited the amount as permitted by O. XXXIV r. 5. We may in this connection refer to the decision of this Court in *Janak Rai v. Gurdial Singh*(1), where it has been laid down that once the conditions of O. XXI r. 92 (1) are complied with, the executing court must confirm the sale.

It is on these principles that we have to decide whether the trial court was correct. We have already indicated that the sale was held on April 7, 1958, and in the normal course it would have been confirmed after 30 days unless an application under r. 89, r. 90, or r. 91 of O. XXI was made. Besides, this case is, as we have already assumed, analogous to the case of a final mortgage decree. The judgment-debtor mortgagor had the right to deposit the amount at any time before confirmation of sale within 30 days after the sale or even more than 30 days after the sale under O. XXXIV r. 5 (1) so long as the sale was not confirmed. If the amount had been deposited before the confirmation of sale, the judgment-debtors had the right to ask for an order in terms of (1) [1967] 2 S.C.R. 77.

70 1 O. XXXIV r. 5 (1) in their favour. In this case an application under O. XXI r. 90 had been made and therefore the sale could not be confirmed immediately after 30 days which would be the normal course; the confirmation had to await the disposal of the application under O. XXI r. 90. O Chat application was disposed of on October 7, 1958 and was dismissed. It is obvious from the

order-sheet of October 7, 1958 that an oral compromise was arrived at between the parties in court on that day. By that compromise time was granted to the respondents to deposit the entire amount due to the decree-holder and the auction-purchaser by November 21, 1958. Obviously the basis of the compromise was that the respondents withdrew their application under O. XXI r. 90 while the decree-holder society and the auction-purchaser appellant agreed that time might be given to deposit the amount up to November 21, 1958. If this agreement had 'not been arrived at and if the application under O. XXI r. 90 had been dismissed (for example, on merits) on October 7, 1958, the court was bound under O. XXI r. 92(1) to confirm the sale at once. But because of the compromise between the parties by which the respondents were given time up to November 21, 1958, the court rightly postponed the question of confirmation of sale till that date by consent of parties. But the fact remains that the application under O. XXI r. 90 had been dismissed on October 7, 1958 and thereafter the court was bound to confirm the sale but for the compromise between the parties giving time upto November 21, 1958.

Now let us see what happened about November 21, 1958. On November 20, 1958, an application was made by the respondents praying that they might be given one day more as November 21, 1958 was a holiday. No order was passed on that date, but it is remarkable that no money was deposited on November 20, 1958. When the matter came up before the court on November 22, 1958 no money was deposited even on that day. Now under O. XXXIV r. 5 it was open to the respondents to deposit the entire amount on November 22, 1958 before the sale was confirmed, but no such deposit was made on November 22, 1958. On the other hand, counsel for the respondents prayed to the executing court for extension of time by 14 days. The executing court refused that holding that time upto November 21, 1958 had been granted by consent and it was no longer open to it to extend that time. The executing court has not referred to O. XXI r. 92 in its order, but it is obvious that the executing court held that it could not grant time in the absence of an agreement between the parties, because O. XXI r. 92 required that as the application under O. XXI r. 90 had been dismissed, the sale must be confirmed. We are of the view that in the circumstances it was not open to the executing court to extend time without consent of parties for time between October 7, 1958 to November 21, 1958 was granted by consent of parties. Section 148 of the Code Civil Procedure would not apply in these circumstances, and the executing court was right in holding that it could not extend time. Thereafter it rightly the sale as required under O. XXI r. 92, there being no question of the application of O. XXXIV r. 5, for the money had not been deposited on November 22, 1958 before the order of confirmation confirmed was passed. In this view of the matter, we are of opinion that the order of the executing court refusing grant of time and confirming the sale was correct.

it is however urged that it does not appear that the time was ,-ranted on October 7, 1958 by consent of parties because the respondents had only asked for one month's time and the court gave time for about six weeks. It appears however that the grant of 'time on October 7, 1958 was as a result of an oral compromise between the parties. This is quite, clear from the fact that the application under O. XXI r. 90 was withdrawn on the basis that time would be granted. The fact that time was actually granted for six weeks does not mean that that was done without the consent of the parties. It seems to us that the whole thing took place in the presence of the court and the order granting time upto November 21, 1958 must in the circumstances be read as a consent order. It is borne out by the fact that on November 22, 1958 the same presiding judge of the executing court said that time had been

granted with the consent of the parties by way of compromise. We cannot therefore accept the contention that time was not granted by consent of parties and therefore the court had power under s. 148 to extend time which had already been granted. We, allow the appeal, set aside the order of the Letters Patent Bench and of the District Judge and restore that of the executing court dated November 22, 1958. It follows that the sale stood confirmed in favour of the appellant on November 22, 1958. We direct that the respondents (judgment-debtors) will pay the costs of the appellant throughout. The money deposited by the respondent can be taken back by them.

R.K.P.S.

Appeal allowed.-

L7 Sup/67-17-5-68-2,500-GIPF.