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C.A.No. 3419 OF 1998
ITEM No.102

COURT NO. 11

SECTION XIIA

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No. 3419/1998

Makuneni Amruth

Appellant

VERSUS

Thailam & Ors.
(With office report)

Respondent

Date: 1.8.2001. This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE D.P. MOHAPATRA
HON'BLE MR. JUSTICE K.G. BALAKRISHNAN

For Appellant (s)

Mr. Umesh Bhagwat,adv.

For Respondent (s)

Mrs. D.V.Padma Priya,adv.

UPON hearing counsel Court made the following
ORDER

.....L.....I.....T.....T.....T.....T.....T.J
.SP2

The Appeal is allowed. No costs.

.SP1

(Suman Wadhwa)
Court Master

(D.D.Jindal)
Assistant Registrar

Signed order is placed on the file.

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL No.3419 OF 1998

Makuneni Amruth

& Appellant

Vs.

Thailam & Ors.

& Respondent

O R D E R

The judgment-debtor in the suit based on a mortgage, is in appeal against the judgment/order of the Andhra Pradesh High Court allowing the revision petition filed

by the decree-holder respondent herein, and setting aside the order passed by the executing court allowing his petition under Order 34 Rule 5 Civil Procedure Code.

After the final decree was passed in the suit and execution was levied, the appellant filed three petitions, one under Order 21 Rule 90 C.P.C. alleging fraud and another under Order 21 Rule 89 C.P.C. for setting aside the sale and redemption of the property on accepting the decretal amount deposited by him and the third petition under Order 34 Rule 5 C.P.C. for redemption of the property on acceptance of the entire decretal amount plus 5% purchased money which had been deposited in Court.

The petition filed under Order 21 Rule 90 C.P.C. was dismissed as infructuous on the ground that the petition filed under Order 21 Rule 89 C.P.C. had been disposed of and the petition filed under Order 34 Rule 5 C.P.C. was considered by the executing court and the prayer for release of mortgage property was allowed. In the order the executing court specifically held that all the pre-conditions prescribed under Order 34 Rule 5 were satisfied by the judgment-debtor and the sale had not been confirmed. In those circumstances the court felt that there was no other alternative but to allow the prayer for release of the mortgaged property under Order 34 Rule 5 C.P.C. The decree-holder filed the revision petition challenging the said order which was allowed by the High Court by the order under challenge.

From the discussions in the order it is clear that the High Court proceeded on the assumption that the petition filed under Order 21 Rule 89 C.P.C. was allowed by the executing court without compliance with the provision in sub-rule (2) of Rule 89 which provides inter alia :

Where the person applies under Rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute application under this Rule.

The High Court held that the executing court had clearly erred in entertaining and allowing the petition filed under Order 21 Rule 89 without compliance of the provision in sub-rule (2) referred to above. We are constrained to observe that the High Court has failed to notice the statement in the order passed by the executing court expressly stating that it was dealing with the application filed by the judgment-debtor under Order 34 Rule 5 C.P.C. Order 34 Rule 5 C.P.C. is a special provision which applies in case of mortgage suits. The executing court on discussing the provisions therein held that all the requirements of the provision have been satisfied by the judgment-debtor in the case. It is not disputed before us that on the facts emerging from the record the judgment-debtor was entitled to apply for redemption of the mortgaged property under Order 34 Rule 5 C.P.C. It is, therefore, the clear that the High Court interfered with the order of the executing court on the erroneous assumption that the court was dealing with an application under Order 21 Rule 89 C.P.C. We may also mention here that the pendency of petition filed under Order 21 Rule 89 did not stand as a bar in law for filing the application under Order 34 Rule 5 C.P.C. which is a special provision applicable to mortgage suits. Thus the order of the High Court is clearly unsustainable. Accordingly, the appeal is allowed, the order under challenge is set aside. No costs.

& & & & & & & ..J.
(D.P. Mohapatra)

& & & & & & & ..J.
(K.G. Balakrishnan)

New Delhi
August 1, 2001
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