IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 2ND DAY OF JULY 2015/11TH ASHADHA, 1937

CRP.No. 1872 of 2002 (C)

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AGAINST THE JUDGMENT IN AS 60/1996 of II ADDITIONAL DISTRICT COURT, PALAKKAD DATED 08-07-2002

AGAINST THE ORDER IN E.A.1557/94 IN E.P. 316/93 IN OS 68/1985 of PRINCIPAL SUB COURT, PALAKKAD DATED 09.02.1996

REVISION PETITIONER:RESPONDENT IN LAC-PTR. IN E.A.:

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JAYAKUMAR S/O. JANAKI AMMA,
PARAKKATTU VEEDU, NELLISSERI, VADAKKAMTHARA,
PALAKKAD. (DIED. LR. IMPLEADED)

ADDL.2ND REVISION PETITIONER

P. SANTHA, SANTHA NIVAS, NELLISSERY VILLAGE,
VADAKKUMTHARA, PALAKKAD.

(ADDL.2ND REVISION PETITIONER IS IMPLEADED AS the LEGAL HEIR OF THE DECEASED PETITIONER IN THE CRP AS PER ORDER DTD.20.3.14 IN I.A.280/08 IN CRP).

BY SRI.M.C.SEN (SENIOR ADVOCATE)
BY ADVS.SRI.M.P.SREEKRISHNAN
SMT.SHAHNA KARTHIKEYAN

RESPONDENTS:APPELLANTS IN THE LAC-DECREE HOLDERS IN EA :

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1. K.PADMAM, D/O. VASUMATHI AMMA, HOUSE No.16/388,
CHIRAKKAD (OPP.) VASANTHAM,
KUNNATUR MEDU P.O., PALAKKAD-678013.
(PRESENT ADDRESS).

2. K.J.RAJESH S/O. PADMAM, RESIDING AT
DO. DO.

3. K.J.RAMESH, S/O. PADMAM, DO. DO.

R1 TO R3 BY ADV. SRI.T.C.SURESH MENON

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 02-07-2015, ALONG WITH RSA. 515/2003, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**P.BHAVADASAN, J.**

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**Civil Revision Petition No.1872 OF 2002 &**
**Regular Second Appeal No.515 OF 2003**

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**Dated this the 2nd day of July, 2015.**

## O R D E R

These two cases are interlinked and the fate of the Second Appeal to a great extent depends on the result of the Civil Revision Petition.

2. The facts necessary for the disposal of these matters are as follows:

Admittedly, the revision petitioner in CRP No.1872/2002 who is the appellant in R.S.A.No.515/2003 was married to the 1st respondent in the CRP as well as in the appeal. The other respondents are their children. The revision petitioner married the 1st respondent in 1974 and they have two children in the wedlock. They lived together till 1983 and later they got separated. As per the records available before this Court, it is seen that the 1st respondent before this Court had taken up residence in the building said to have been put up by the petitioner in the CRP.

3. The wife i.e. 1st respondent instituted maintenance proceedings and obtained a decree therein. That decree was put in execution by way of E.P.No.316/1993. The property involved in these proceedings was attached and brought to sale to enforce the decree. The property was sold and it was purchased by the decree holder. The petitioner before this Court filed E.A.No.1557/1994 under Order 21 Rule 90 of the Code of Civil Procedure to set aside the sale on the ground of irregularity and fraud and also filed E.A.No.1556/1994 to condone the delay in filing E.A.No.1557/1994.

4. The grievance voiced by the judgment debtor in the execution petition was that he had no notice of attachment and settlement of proclamation of sale and therefore the sale is vitiated. He therefore wanted the sale to be set aside. It so happened that the E.A No.1557/1994 for setting aside the sale was filed beyond the 60 days period stipulated under Article 127

of Limitation Act and therefore for condoning the delay, he filed E.A.No.1556/1994.

5. The decree holder-wife resisted the petition and pointed out that there is no substance in the allegations in the petition. The main contention taken up was that the judgment debtor was represented by a counsel and he was aware of the entire proceedings and if that be so, it could not be said that the judgment debtor had no notice of execution proceedings namely, attachment and settlement of proclamation. It is further pointed out that an application under Order 21 Rule 90 CPC has to be filed within 60 days from the date of sale and any petition filed beyond that period is barred by limitation. It is trite that provisions of Limitation Act cannot be invoked in execution proceedings. On the basis of these contentions, decree holder prayed for dismissal of the petition.

6. It seems that before the execution court, no evidence was adduced by either of the parties. The execution court found the allegation, that the judgment debtor had no notice of attachment and settlement of proclamation of sale, to be correct

and therefore finding that the sale itself is totally vitiated set aside the sale. The decree holder preferred A.S.No.60/1996 against the said order. The lower appellate court found that even though there was no formal notice of attachment and settlement of proclamation of sale, since the judgment debtor was represented by a counsel, he should be deemed to be in the know of things and therefore there is no illegality or irregularity in the sale. The court also found that since a petition has been filed under Order 21 Rule 90 CPC, the same had to be filed within the stipulated period and a petition filed beyond the period has to be rejected under Section 3 of Limitation Act. The lower appellate court held that provisions of Section 5 of Limitation Act could not be taken aid of to condone the delay in filing an application under Order 21 Rule 90 CPC. Accordingly, the order of the execution court was set aside. Aggrieved judgment debtor comes up in revision before this Court.

7. While things stood so, it so happened that the judgment debtor instituted O.S.No.155/1988 to recover the property on the strength of title against his wife. The suit was resisted by the

defendant. However, it happened to be decreed by the trial court. The defendant carried the matter in appeal as A.S.No.222/1991. The lower appellate court finding that by the time the suit was instituted and the appeal was taken up for hearing, the plaintiff had no subsisting right over the property, allowed the appeal and dismissed the suit. Aggrieved plaintiff has come up before this Court in R.S.A.No.515/2003.

8. Notice has been issued on the following questions of law in the second appeal:

i) Whether the lower appellate court is justified in dismissing the suit holding that the appellant has no subsisting title over the plaint schedule property while the order confirming the sale of the plaint schedule property is stayed by this Court?

ii) Whether a decree stayed by the High Court can be relied upon by the District Court for the purpose of adjudicating the matter pending before it?

9. From the narration of the above facts, it could be seen that the result of the RSA to a great extent will depend upon the fate of the CRP. Probably, if CRP is allowed, the suit may have to be decreed but if, on the other hand, this Court is to confirm the

finding of the lower appellate court in execution proceedings necessarily the second appeal will have to be dismissed.

10. Sri.M.C Sen, learned Senior Counsel appearing for the appellant and the revision petitioner before this Court pointed out that the lower appellate court was not justified in interfering with the order of the execution court which found that the sale is invalid. Learned Senior Counsel brought to the attention of this Court that even the lower appellate court was satisfied that there was no notice of attachment under Order 21 Rule 54 CPC and notice of settlement of proclamation as envisaged under Order 21 Rule 66 CPC but it treated non issuance of notice only as an irregularity which does not go to the root of the matter.

11. The finding of the lower appellate court is that since the judgment debtor was represented by a counsel in the execution proceedings, it cannot be presumed that he was in the dark regarding further proceedings in execution of the decree and if that be so, he had to take necessary steps at the relevant time which he had failed to do.

12. Learned Senior Counsel pointed out that mere representation by a counsel does not mean that notice has been actually served on the judgment debtor or his counsel. In the absence of notice under Order 21 Rule 54 CPC and under Order 21 Rule 66 CPC, sale is vitiated and it is not a mere irregularity but it is an illegality that vitiates the sale as such. For the said proposition, learned Senior Counsel relied on the decisions in ***Mahakal Automobiles and another*** *vs.* ***Kishan Swaroop Sharma*** ((2008) 13 Supreme Court Cases 113) and in ***Desh Bandhu Gupta*** *vs.* ***N.L. Anand & Rajinder Singh*** ((1994) 1 Supreme Court Cases 131). Learned Senior Counsel also stressed that in fact maintenance amount had been deposited subsequently and that would come to only Rs.75,000/- and odd till the date of execution petition. Learned Senior Counsel pointed out that the property which was sold is 13½ cents with a building therein which was worth much more than the amount for which it was sold. Learned Senior Counsel emphasised that the court cannot omit to note that the purchaser of the property in auction sale is none other than the decree holder who is the wife

of the judgment debtor. The court had legal obligation under Order 21 Rule 64 CPC to see whether it was necessary to sell the whole property to meet the decree debt. Having not done so, sale is vitiated on that ground also. Accordingly, learned Senior Counsel contended that the order of the lower appellate court in execution proceedings cannot be sustained.

13. As far as the Second Appeal is concerned, learned Senior Counsel pointed out that if this Court is inclined to set aside the sale, the judgment debtor in the execution proceedings will have title to the property and the suit is therefore perfectly maintainable. Of course, maintenance decree still stands and consequence will follow.

14. Learned counsel appearing for the respondents, on the other hand, pointed out that there is clear distinction drawn by the legislature with regard to setting aside of sale i.e. between illegal sale and irregular sale. Learned counsel pointed out that it is not disputed before this Court that the judgment debtor had engaged a counsel in execution proceedings. Therefore, at least from the date of engaging the counsel, the judgment debtor

should be imputed with the knowledge of all the subsequent steps that had been taken in the execution proceedings and if that be so, judgment debtor cannot be heard to say that he had no notice of proclamation of sale, as he was represented by a counsel in the proceedings. Further it was contended that a specific time limit is prescribed by the Law of Limitation for filing a petition to set aside the sale under Order 21 Rule 90 CPC and there is no question of condoning the delay if the application is filed beyond the time so fixed. Learned counsel pointed out that a petition under Order 21 Rule 90 CPC to set aside the sale lies only in respect of post sale irregularities, and pre sale irregularities fall within the ambit of Section 47 CPC. Learned counsel pointed out that the judgment debtor in this case has chosen to approach the court under Order 21 Rule 90 CPC and therefore he is circumscribed by the said provision and unless he is able to show that the sale is vitiated, the petition had only to be dismissed.

15. In support of the above contention, learned counsel appearing for the respondents relied on the decision in ***A.G.M.***

***Constructions (P) Ltd.*** *vs.* ***Shibu Kumar*** (2010 (4) KLT 189). For the proposition that when a counsel is engaged by a person, normally it should be presumed that the said person has knowledge about the proceedings, learned counsel relied on the decisions in ***Rajarethna Naikkan*** *vs.* ***Parameswara Kurup*** (1997 (1) KLT 777), ***A.K. Moorthy*** *vs* ***D. Ramachandran*** (1992 (2) KLJ 215) and in ***Selvi*** *vs.* ***Nataraja Mudaliyar*** (1994 (1) KLT 82).

16. It is not in dispute that the decree holder in O.S.No.68/1985 brought to sell the property belonging to the judgment debtor who is none other than her husband. Execution was levied by filing E.P.No.316/1993. The execution court, on verification of the records while considering E.P.No.1557/1994, set aside the sale and found that no notice of attachment under Order 21 Rule 54 CPC and no notice of settlement of proclamation as envisaged under Order 21 Rule 66 CPC was also served on the judgment debtor. The execution court formed the opinion that the sale so conducted amounted to fraud and it had necessarily to be set aside and did so.

17. In appeal, the lower appellate court found that the application for setting aside the sale is one under Order 21 Rule 90 CPC and the application had to be filed within 60 days from the date of sale going by Article 127 of Limitation Act. The application which has been filed beyond the period is barred by limitation. There is no question of condoning the delay. In one portion of the order, the lower appellate court found that the claim made by the judgment debtor that there was no notice of attachment or notice of settlement of proclamation to be true and in another portion the court went on to observe that when the judgment debtor has chosen to engage a counsel, he cannot be heard to say that he was kept in the dark regarding further proceedings in execution.

18. The question that arises for consideration is whether the sale is vitiated for the reasons made mention of in E.A.No.1557/1994. True, the application is one filed under Order 21 Rule 90 CPC which reads as follows:

> "**90. Application to set aside sale on ground of irregularity or fraud**.- (1) 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.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

Explanation.-The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule".

19. The time prescribed for filing such an application is 60 days from the date of sale going by Article 127 of Limitation Act. Admittedly, the execution application in this case i.e. E.A.No.1557/1994 was filed beyond the period prescribed by the Limitation Act as found by the lower appellate court.

20. The contention now taken is that, going by the decisions relied on by the learned Senior Counsel appearing for the revision petitioner, in a case where it is found that there is no notice of attachment under Order 21 Rule 54 CPC and so also there is want of service of notice at the time of settlement of proclamation as envisaged under Order 21 Rule 66 CPC, the sale is vitiated and such sales are illegal and without jurisdiction. If that be so, the mere fact that petition is one filed under Order 21 Rule 90 CPC cannot be taken aid of by the decree holder to resist the claim for setting aside of sale. When the sale itself is shown to be illegal and void, the question of setting aside the same may not even arise as there is no sale in the eye of law.

21. It is significant to notice that both the courts below have found that there is no service of notice of attachment as envisaged under Order 21 Rule 54 CPC so also no notice of settlement of proclamation under Order 21 Rule 66 CPC. True, records indicate that the judgment debtor was represented by a counsel. But it does not appear that notice of attachment or notice of settlement of proclamation was served on the counsel.

At any rate, there is no endorsement to that effect. The grievance voiced that there was no notice of attachment may be correct because the attachment was effected soon after the execution petition was filed and before the date of return of Order 21 Rule 22 notice was fixed. There was nothing to show that notice as contemplated under Order 21 Rule 54 CPC was served on the judgment debtor.

22. It is difficult to accept the contention raised by the learned counsel appearing for the respondents before this Court that once a counsel is engaged by a judgment debtor, it will be presumed that he has knowledge about the subsequent proceedings. Both the courts below, at the risk of repetition, have concurrently found that there was no notice under the two provisions mentioned above but the lower appellate court also found that since the judgment debtor was represented by a counsel, it cannot be said that the judgment debtor was ignorant of the subsequent proceedings.

23. When it is found that there was no notice as contemplated under Order 21 Rule 54 CPC and also under Order

21 Rule 66 CPC, what will be the legal consequence of the sale is the question that arises for consideration.

24. In the decision in ***A.G.M. Constructions (P) Ltd.*** *vs.* ***Shibu Kumar*** (2010 (4) KLT 189), this Court had occasion to consider the application under Order 21 Rule 90 CPC and Section 47 CPC in execution proceedings. This Court held that Section 47 CPC is applicable only to pre-sale irregularities and not for post-sale irregularities. Post-sale irregularities are governed by Order 21 Rule 90 CPC. If that principle is applied to the facts of this case, necessarily it would mean that irregularities or illegalities pointed out are pre-sale irregularities and are governed by Section 47 CPC. As already noticed, application is one under Order 21 Rule 90 CPC.

25. The matter does not end there. The Apex Court had occasion to consider the effect of non service of notice as envisaged under Order 21 Rule 54 CPC and also under Order 21 Rule 66 CPC. A reading of the two provisions show that if there is a notice under Order 21 Rule 54(1A) CPC, it may not be strictly necessary to issue notice under Order 21 Rule 66 CPC. Normally

law insists for notice to judgment debtor in both the situations. It is equally well settled that for settlement of proclamation as per Order 21 Rule 66 CPC the executing court has to apply its mind to determine whether it is necessary to sell the entire property as demanded by the decree holder to meet the decree debt or sale of a portion of property is sufficient to meet the decree debt. The order passed for sale without applying its mind has also to be held to be bad in law.

26. It will be useful at this point of time to refer to the decision in ***Desh Bandhu Gupta*** *vs.* ***N.L. Anand & Rajinder Singh*** ((1994) 1 Supreme Court Cases 131). The facts would reveal that even though the judgment debtor was represented by a counsel, it was found that there was no notice as contemplated under Order 21 Rule 66 CPC. The Apex Court, referring to Order 21 Rule 54 CPC and Order 21 Rule 66 CPC, pointed out various steps in execution and highlighted the necessity and purpose for issuing notice under both the provisions. The Apex Court in the above decision highlighted the right the judgment debtor has at each stage and the role the judgment debtor has in

the sale of his property. The Apex Court, in paragraph 10 of the above decision, has observed as follows:

> "10. Above discussion indicates a discernible rule that service of notice on the judgment-debtor is a fundamental part of the procedure touching upon the jurisdiction of the Execution Court to take further steps to sell his immovable property. Therefore, notice under Order 21 Rule 66(2), unless proviso is applied (if not already issued under Order 21 Rule 22), and service is mandatory. It is made manifest by Order 21 Rule 54(1-A) brought on statute by 1976 Amendment Act with peremptory language that before settling the terms of the proclamation the judgment-debtor shall be served with a notice before settling the terms of the proclamation of sale. The omission thereof renders the further action and the sale in pursuance thereof void unless the judgment-debtor appears without notice and thereby waives the service of notice".

A reading of the above decision shows that if a sale is held without notice under Order 21 Rule 54 CPC or under Order 21 Rule 66 CPC, such a sale is held to be void in law.

27. In the decision in ***Mahakal Automobiles and another*** *vs.* ***Kishan Swaroop Sharma*** ((2008) 13 Supreme

Court Cases 113), again the issue was considered by the Apex Court. Three main points urged therein have been narrated in paragraph 8 of the judgment which read as follows:

> "8. In support of the appeal, learned counsel for the appellant submitted as follows:
>
> (i) .....
>
> (ii) Attachment of warrant was not as per Order 21 Rule 54(1-A) CPC.
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> (iii) .....
>
> (iv) Attachment proceedings were carried out in the absence of the judgment-debtor.
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> (v) No notice was given to the appellant under Order 21 Rules 54 and 66(2) CPC. The procedure under Order 21 Rules 54(1-A) and 66(2) CPC is mandatory. Hence, the objections taken by way of IAs Nos.1, 2 and 6 should have been accepted.
>
> (vi) .....
>
> (vii) .....".

28. The Apex Court found that on facts there was no notice served on the judgment debtor under Order 21 Rule 54 CPC and that there was no notice of proclamation of sale under Order 21 Rule 66 CPC. After considering the scope and ambit of Order 21 Rule 54 CPC and Order 21 Rule 66 CPC and also after referring to

the significance and necessity to comply with the above provisions, relying on the decisions in ***Desh Bandhu Gupta*** *vs.* ***N.L. Anand & Rajinder Singh*** ((1994) 1 Supreme Court Cases 131), ***M/s. Shalimar Cinema*** *vs.* ***Bhasin Film Corporation and another*** ((1987) 4 Supreme Court Cases 717) and in ***Gajadhar Prasad*** *vs.* ***Babu Bhakta Ratan*** ((1973) 2 Supreme Court Cases 629), it was observed in paragraph 13 as follows:

> "13. In Deshbandhu Gupta's case it was held as follows :
>
> "9...... The proclamation should include the estimate, if any, given by either judgment-debtor or decree holder or both the parties. Service of Notice on judgment-debtor under Order 21 Rule 66 (2) unless waive by appellants or remained ex-parte, is a fundamental step in the procedure of the Court in execution, judgment-debtor should have an opportunity to give his estimate of the property. The estimate of the value of the property is a material fact to enable the purchaser to know its value. It must be verify as accurately and fairly as possible so that the intending bidders are not mislead or to prevent them from offering inadequate price or to enable them to make a decision in offering adequate price. In *Gajadhar Prasad* vs. *Babu Bhakta Ratan*,

this Court after noticing the conflict of judicial opinion among the High Courts, said that a review of the authorities as well as amendments to Rule 66 (2) (e) make it abundantly clear that the Court, when stating the estimated value of the property to be sold, must not accept the ipse dixit of one side. It is certainly not necessary for it to state its own estimate. But, the essential facts which had a bearing on the very material question of value of the property and which could assist the purchaser in forming his own opinion must be stated, i.e. the value of the property, that is, after all, the whole object of Order 21 Rule 66 (2) (e) CPC. The court has only to decide what are all these material particular in each case. We think that this is an obligation imposed by Rule 66 (2) (e). In discharging it, the Court normally state the valuation given by both the Decree Holder as well as the Judgment Debtor where they both have valued the property, and it does not appear fantastic. ....The absence of notice causes irremediable injury to the judgment debtor. Equally publication of the proclamation of sale under Rule 67 and specifying the date and place of sale of the property under Rule 66 (2) are intended so that the prospective bidders would know the value so as to make up their mind to offer the price and to attempt that sale of the property and to secure competitive bidders and fair price to the property sold. Absence of notice to the Judgment Debtor disables him to offer his estimate of the value who better know its value and to publicise on his part, canvassing and bringing the intended bidders at the time of sale. Absence of notice prevents him to do the above and also disables him to know fraud committed in the publication and conduct of sale or other material irregularities in the conduct of sale. It would be broached from yet another angle. The compulsory sale of immovable property under Order 21 divests right, title and interest of the Judgment debtor and confers those rights, in favour of the purchaser. It thereby deals with the rights and disabilities either of the judgment debtor or the decree holder. A sale made, therefore, without notice to the judgment debtor is a nullity since it divests the judgment debtor of his right, title and interest in his property without an opportunity. The jurisdiction to sell the property would arise in a Court only where the owner is given notice of the execution for attachment and sale of his property. It is very salutary that a person's property cannot be sold without his being told that it is being so sold and given an opportunity to offer his estimate as he is the person who intimately knew the value of his property and prevailing in the locality, exaggeration may at time be possible".

29. When no notice under Order 21 Rule 54 CPC and Order 21 Rule 66 CPC is seen served on the judgment debtor, going by the above decisions, consequence are drastic. The Apex Court had occasion to observe that such sale is vitiated in law and in fact the sale is a void one. In fact, the Apex Court had gone to the extent of saying that such a sale is without jurisdiction and is a nullity. Probably, learned counsel for the respondents is justified in his submission that even in such a case petition under Order 21 Rule 90 CPC may not lie.

30. The grounds available under Order 21 Rule 90 CPC and Section 47 CPC are entirely different. In the decision relied on by the learned counsel for the respondents i.e. ***A.G.M. Constructions (P) Ltd.*** *vs.* ***Shibu Kumar*** (2010 (4) KLT 189), the distinction is clearly brought out between the application under Order 21 Rule 90 CPC and a petition under Section 47 CPC.

31. This Court had no occasion to consider the consequence of sale held in violation of the two provisions referred to above. In the case considered by this Court, facts indicate that the

property of the judgment debtor was brought to sale. He pointed out that the entire property need not have been sold and sale of a portion thereof would have been sufficient. The decision shows that the execution court applied its mind and found that it is not possible to sell a portion and held that entire property had to be sold. It was that order which was challenged before this Court. Under those circumstances this Court had occasion to hold that petition for such relief will only lie under Order 21 Rule 90 CPC. This Court has not considered the question whether for want of notice under Order 21 Rule 54 CPC or under Order 21 Rule 66 CPC sale is vitiated and is a nullity.

32. Learned counsel appearing for the respondents placed reliance on the decision in ***S.A.Sundararajan*** *vs.* ***A.P.V. Rajendran*** ((1981) 1 Supreme Court Cases 719) where a distinction was drawn between the application under Order 21 Rule 90 CPC and petition under Section 47 CPC. The question that was considered in the said decision was at what point of time a petition under Section 47 CPC could be maintainable and when an application under Order 21 Rule 90 CPC is entertainable. After

observing the requirements to be complied with in such a situation, it was held as follows:

> "6. It may be pointed out that when Rule 90 of Order XXI employs the expression "in publishing or conducting the sale", it envisages the proceeding commencing after the order for sale made under Rule 64 of Order XXI. The provisions after Rule 64 are provisions relating to publishing and conducting the sale. Settling the proclamation of sale is part of the proceeding for publishing the sale. Rule 65 of Order XXI declares that every sale in execution of a decree shall be conducted by an officer of the court or a person nominated by the court, and shall be made by public auction in the manner prescribed. How the sale will be published relates to the manner in which the sale is made. Rule 66 of Order XXI is the first step in that behalf. It provides for a proclamation of sale. When drawing up a sale proclamation, sub-rule (2) of Rule 66 requires that the several matters specified therein be taken into account. Other particulars relating to the sale are prescribed in the succeeding rules of Order XXI. In our view, the settling of the sale proclamation is part of the integral process of publishing the sale, and irregularities committed in the process of settling the sale proclamation are irregularities which fall within the amplitude of Rule 90 of Order XXI. It may be

> observed that in *Dhirendra Nath Gorai* case the question which this Court was called upon to consider was whether non-compliance with Section 35 of the Bengal Money Lenders Act, 1940 when drawing up the sale proclamation was a mere irregularity. Having held that it was, the court then considered it in the light of Rule 90 of Order XXI".

There the question was not one of want of notice. It was entirely a different issue as found in ***A.G.M. Constructions (P) Ltd.*** *vs.* ***Shibu Kumar*** (2010 (4) KLT 189). The facts in the above decision shows that the executing court had set aside the sale but the High Court held that application would lie only under Order 21 Rule 90 CPC and not under Section 47 CPC and therefore remanded the matter to the executing court for fresh consideration. That would indicate that even though wrong provision is shown, if the sale is vitiated, it has to be set aside.

33. In the case on hand, as found by the courts below and this Court also on verification of records, there is absolute want of notice under Order 21 Rule 54 CPC and also under Order 21 Rule 66 CPC and the sale has to be held to be a nullity and without jurisdiction. If that be so, following the principles laid

down in the decision in ***S.A.Sundararajan*** *vs.* ***A.P.V. Rajendran*** ((1981) 1 Supreme Court Cases 719), it will not be inappropriate to consider the application as one under Section 47 CPC. It is not necessary for this Court to send back the matter for fresh consideration in the light of the fact that both the courts have concurrently found that strictly there is no service of notice under Order 21 Rule 54 CPC and under Order 21 Rule 66 CPC.

34. One fact needs to be noticed here. During the pendency of the revision petition and the appeal before this Court, the appellant and the revision petitioner in these proceedings passed away and his sister came forward to implead herself in the matters on the basis of a Will said to have been executed by the deceased bequeathing his asserts in her favour. This Court directed the lower court to consider the validity of the Will and sent the matter for determination to the trial court. The trial court, after raising an issue regarding Will, found in favour of her and returned the matter to this Court and this Court based on the decision of the trial court, allowed the impleading application.

35. For the reasons mentioned above, the Civil Revision Petition is only to be allowed and the sale has to be set aside. It is accordingly held so.

36. As far as the Regular Second Appeal is concerned, in the light of the fact that the sale has been set aside and the lower appellate court has not addressed itself to the various issues that arose for consideration since the court disposed of the appeal before it on the ground that at the relevant time the plaintiff had no title to the suit property, necessarily the matter will have to be reconsidered by the lower appellate court in the light of various contentions and the rights claimed by the parties in relation to suit property. The claim made by the wife for maintenance which has been agitated before the trial court will have to be also considered by the lower appellate court. Therefore, the Second Appeal will have to be allowed and the matter will have to be remanded to the lower appellate court for fresh consideration in accordance with law after hearing the parties to the appeal.

In the result, this Civil Revision Petition is allowed. The impugned order is set aside and the order in I.A.No.1557/1994 by the execution court is restored. Regular Second Appeal is also allowed and the judgment and decree of the lower appellate court is set aside and the matter is remanded to the lower appellate court for fresh consideration in accordance with law and in the light of what has been stated above. The parties shall appear before the lower appellate court on 07.08.2015. The lower appellate court shall make every endeavour to dispose of the appeal as expeditiously as possible, at any rate, within a period of three months from the date of appearance of the parties. There will be no order as to costs in these proceedings.

Sd/-

**P.BHAVADASAN**
**JUDGE**

smp

// True Copy //

P.A. to Judge.