

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.10.2017

CORAM

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

**C.R.P. NPD No.1147 of 1998
and CMP No.5825 of 1998**

Judgment reserved on 19.09.2017	Judgment pronounced on 04.10.2017
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K.R.Sundaresan

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Petitioner

Vs

- 1.K.Natesa Mudaliar
- 2.R.Kasinathan (died)
- 3.Parameshwari
- 4.Vasuki
- 5.Poongothai
- 6.Muthunagai
- 7.Kanimozhi
- 8.Shanthi
- 9.Venkatesan
- 10.Malarvizhi

[RR3 to 10 impleaded as LR's of R2
vide order of Court dated 03.01.2012
made in CMP Nos.687 to 689 of 2011]

- 11.N.Lakshmi
- 12.N.Lalitha Bai
- 13.N.Chandrasekaran
- 14.N.Santha Kumar
- 15.R.Poongothai
- 16.N.Sivakumar

[RR11 to 16 brought on record as LR's
of the deceased 1st respondent vide
order of court dated 22.01.2013 made
in CMP No.161/2012 in CRP (NPD)1147/1998]

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Respondents

the judgment and decree dated 03.10.1997 made in CMA No.5 of 1997 on the file of the Additional District Judge, Tiruvannamalai.

For Petitioner : Mr.A.Jenasenan

For Respondents : R1 & R2 died
Mr/A/Gouthaman for
R3 to R10
Mr.M.Suresh for
R11 to R16.

ORDER

This Civil Revision Petition is filed against the the judgment and decree dated 03.10.1997 made in CMA No.5 of 1997 on the file of the Additional District Judge, Tiruvannamalai.

2. The petitioner is the judgment debtor, first respondent is the decree holder and the second respondent is the auction purchaser. Pending CRP, second respondent died and his legal heirs were impleaded as R3 to R10 and the first respondent also died and his legal heirs were impleaded as R11 to R16.

3. The first respondent filed the suit in O.S.No.4 of 1982 before Sub Court, Vellore and obtained a decree against the petitioner. The first respondent, after obtaining the decree, filed E.P.No.15 of 1991 for execution of the decree by sale of the properties mentioned therein. According to first respondent, notice was ordered in the EP for sale and sale notice was served on the petitioner. The petitioner did not appear

and he was set exparte. EP was proceeded with and in the public auction held by the Court, the second respondent purchased the property. The petitioner filed OEA No.145 of 1991 in EP No.15 of 1991 in OS.No.4 of 1982 to set aside the sale.

4. According to the petitioner, no notice was served on him in the Execution Proceedings. The second respondent is a close friend of first respondent and he is only a benami of first respondent. Only the first respondent purchased the property in the name of second respondent for a very low price. The proclamation of sale was not properly settled. The sale notice was not served on the petitioner and not affixed in the property. No tom-tom was effected at the property sought to be sold. The first item of the property is worth Rs.1 Lakh and in the proclamation, the value is settled at Rs.10,000/-. The second item of the property is worth Rs.500/- per cent but the value fixed for the same was only Rs.8,000/-. The second respondent purchased the property for a very low price, i.e. Rs.10,100/- and Rs.8,100/- for item Nos.1 & 2 respectively. The learned Judge erred in ordering sale of entire property instead of ordering portion of the property.

5. The first and second respondent filed separate counters and opposed the said application denying all the averments and submitted

that even after service of notice in the EP, petitioner did not appear and hence he was set exparte and EP was proceeded with. Public auction was conducted after complying with all the procedures contemplated under Civil Procedure Code for sale of immovable properties.

6. Before the learned Judge, the petitioner examined himself as PW1 and no document was marked. The first respondent examined himself as RW1, Mr.Munusamy, Process Server and Mr.Subramanian were examined as RW2 & RW3. No document was marked on the side of the respondents. Notice served on the petitioner in the EP No.38 of 1987 was marked as Ex.C1, Auction notice served on the petitioner in EP No.15 of 1991 was marked as Ex.C2, Petition filed by the petitioner under Order 13 Rule 2 was marked as Ex.C3, Auction Proclamation was marked as Ex.C4 and Signature of RW3 found in Auction Proclamation was marked as Ex.C5.

7. The learned Judge, considering the materials on record, oral evidence let in by the parties and documents marked as Exs.C1 to C5, dismissed the application. Against the said order dated 12.11.1996 made in E.A No.145 of 1991, the petitioner filed CMA No.5 of 1997. The learned Judge, comparing the signature in Ex.C2 and the admitted signature of the petitioner in the court proceedings, dismissed CMA

No.5 of 1997 holding that only the petitioner had received the notice.

8. Against the said order of dismissal dated 03.02.1997 made in CMA No.5 of 1997, the present Civil Revision Petition has been filed.

9. The learned counsel appearing for the petitioner submitted that without serving notice, the petitioner was set *exparte* and without properly settling the proclamation of sale, auction was conducted and the property was sold to the second respondent for a very low price. The second respondent is the sister's husband of first respondent and that he is only a benami of first respondent. Before ordering sale, Order XXI Rules 54 (2), 66 and 67 were not complied with and no evidence was recorded before the Trial Court with regard to complying of provisions under Order 21 Rule 54 (2) CPC.

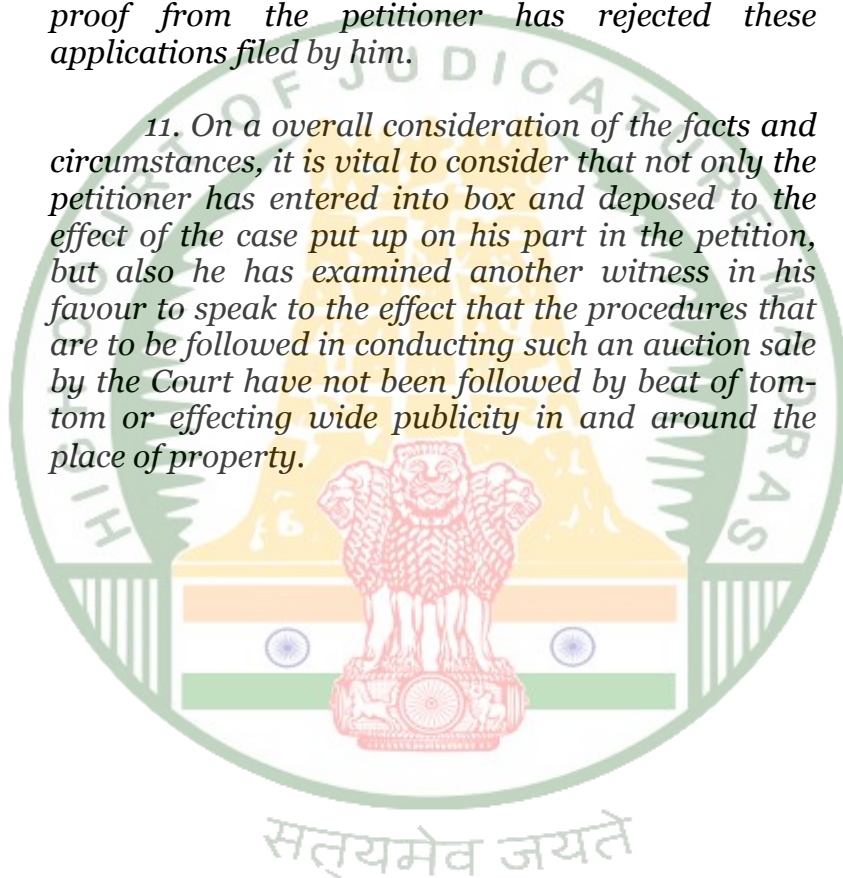
10. In support of his contention, the learned counsel for the petitioner relied on the following judgments -

(i) 2001 (4) CTC 612 [C.Ponnusamy v. R.Krishnasamy]

9. Even for the other allegations that the property which is worth Rs. 1 lakh has been brought to sale for realisation of an amount of Rs.5,000 that too valuing the same at Rs.2,000 by the respondent and if such a big property is brought to sale for realisation of a meager sum the petitioner would contend that he would be subjected to irreparable loss and hardship. Even for this the lower Court would expect some proof from the petitioner to the

effect that the property is worth Rs.1 lakh. The Court below at this juncture is not bothered about ascertaining the actual value of the property brought to sale on authenticated documents produced by the respondent since it is the respondent who is valuing the said property at Rs.2,000 for the realisation of a sum of Rs.5,000 and odd. These anomalies have neither been attempted to be explained nor proved by proper evidence. However, the lower Court seeking proof from the petitioner has rejected these applications filed by him.

11. On a overall consideration of the facts and circumstances, it is vital to consider that not only the petitioner has entered into box and deposed to the effect of the case put up on his part in the petition, but also he has examined another witness in his favour to speak to the effect that the procedures that are to be followed in conducting such an auction sale by the Court have not been followed by beat of tom-tom or effecting wide publicity in and around the place of property.



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**(ii) 2008 (13) SCC 113 [Mahakal Automobiles and
anr. v. Kishan Swaroop Sharma]**

1.

11. When a property is put up for auction to satisfy a decree of the Court, it is mandatory for the Court executing the Decree, to comply with the following stages before a property is sold in execution of a particular decree:

- (a) Attachment of the Immovable Property;
- (b) Proclamation of Sale by Public Auction;
- (c) Sale by Public Auction

15. The records do not reveal that the appellant-judgment debtor was served with a notice as required under Order 21 Rule 54(1)(A) of the Code in the appendix B Forms 23, 24 and 29. It is to be noted that the records reveal that the address of the appellant as contained in the sale deed was different from the address at which the process server purportedly affixed the notice on the door and in open court and at the chorah only. It has also to be noted that under Order 21 Rule 66(2) the service of the notice has to be personally affected on the judgment debtor. That also does not appear to have been done. Interestingly, the valuation of the property as required to be done under the proviso to sub-rule (2) of Rule 66 of Order 21 of the Code has not been done. The same appears to have been valued on the spot at Rs.9,00,000/- and it was not done by the Court. There are admittedly other non-compliance with certain requirements. We do not think it necessary to deal with those aspects in detail in view of the order proposed to be passed. From the records it is revealed that Rs.14,38,893/- and Rs.4,46,926/- have been deposited by the appellant purportedly for satisfaction of the Execution Court Ujjain and Indore respectively. The appellant shall further deposit a sum of Rs.15,00,000/- within 4 months from today. The respondent No.1 shall be entitled to withdraw the amount deposited in the bank with accrued interest. The appellant shall be responsible for payment of the property tax of the property from the date of execution of sale deed i.e. 5.12.1986 till date and the same shall be paid

deposited with the concerned authority within the aforesaid period of four months. On payment of the amounts, the title to the property described in the registered sale deed will vest free of all encumbrances on the appellant.

(iii) AIR 1969 MADRAS 5 [V.Rajagopal Naidu v. Muthulakshmi Ammal and ors.]

4. But applying the same test to the particular facts of the case before me, it appears to me that if a sale proclamation. does not contain a mandatory and a statutory requirement, the mere fact that constructive 'notice of sale and notice under Order 21, Rule 66, Civil Procedure Code is imputed to the judgment-debtor by an a priori consideration of the facts, it would nevertheless be a sale held on a proclamation which was not drawn up in accordance with law. Learned Counsel for the petitioner rightly contends 'that : Order 21, Rule 66 (2) (e), which is a particular and peculiar amendment introduced in Madras State, has to be strictly enforced and if as a fact there is any defect in the sale proclamation in that it does not disclose the two valuations, that is, both of the decree-holders and that of the judgment-debtor, which are obligatorily to be described, then the proclamation suffers from an irregularity which cannot be cured even by acquiescence.

(iv) 2006 (3) CTC 39 [Central Bank of India v. Antony Hardware Mart]

9. At the outset, we want to point out that the Trial Court has committed an error in comparing the signatures in Ex.A-2 and Ex.A-5 with the admitted signature of the defendant in the Vakalath and written statement. In the judgment reported in 1999 (3) C.T.C. 156 (Somasundaram Vs. Palani) this Court has held as follows:

Even though the Court may have the power to compare the signatures, there must be some admitted signature of the defendant, on the basis of which a comparison will have to be made. In this case, a comparison has been made on the basis of

signatures affixed by defendant in the vakalath and written statement, which are documents that have come into existence after the dispute arose, and after the promissory note in question was filed into Court along with plaint. A comparison should not have been made on the basis of those signatures. If that be so, it has to be held that the comparison was not made in accordance with law, even though the Court is empowered to make a comparison.

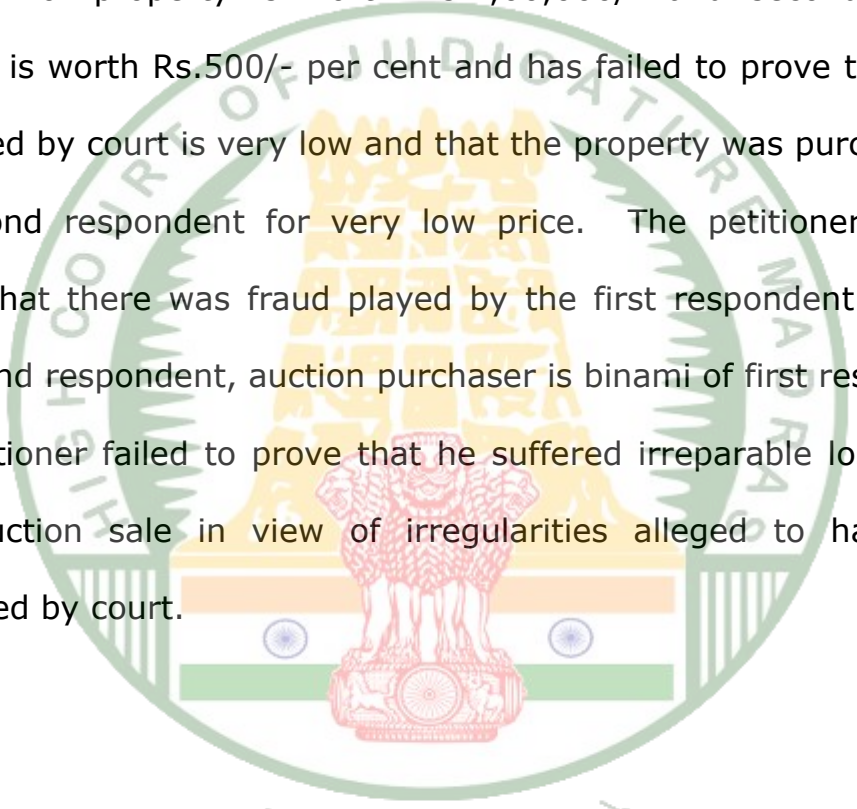
It is settled law that the disputed signature can be compared with admitted signature, which were contemporaneous and not with the admitted signatures obtained subsequent to the date of the disputed signature. By lapse of time, there may be some difference in the signature of a person. Only based on that principle, the above said judgment has been rendered by the learned single Judge of this Court. Therefore, the Trial Court erred in comparing the signatures in Ex.A-2 and Ex.A-5 with the signatures found in the Vakalath and written statement of the defendant.

(v) 1997 (4) SCC 356 [Lal Chand v. VIII Additional District Judge and ors.]

7. It is also to be seen that the sale was conducted without there being any proper notice and publicity as is evident from the report submitted by the Court Amin. After the bid was started, sale was notified in the village by beat of drum and thereafter people started coming and five persons including the respondent participated in the bid. This part of the procedure adopted is clearly illegal and caused great prejudice to the interest of the appellant.

11. The learned counsel appearing for the respondents 3 to 10 who are the legal heirs of second respondent, auction purchaser contended that the notice in the EP as well as proclamation of sale were served on the petitioner by court process server. Similarly, the proclamation of sale was affixed in the properties sought to be sold and tom-tom was effected. First respondent examined himself as

RW1, examined Court Process Server as RW2 and resident of locality as RW3 and proved that the auction was conducted complying with the procedures contemplated in Order XXI CPC and there is no irregularity. The petitioner has not produced any material to show that first item of property is worth Rs.1,00,000/- and second item of property is worth Rs.500/- per cent and has failed to prove that upset price fixed by court is very low and that the property was purchased by the second respondent for very low price. The petitioner has not proved that there was fraud played by the first respondent and that the second respondent, auction purchaser is binami of first respondent. The petitioner failed to prove that he suffered irreparable loss by the court auction sale in view of irregularities alleged to have been committed by court.

The watermark is a large, circular seal of the Indian Judiciary. It features the Ashoka Lion Capital in the center, with the words 'JUDICIAL' and 'INQUIRY' on the left and right respectively. Below the lion capital is the Indian national flag (saffron, white, and green horizontal stripes with the Ashoka Chakra in the center). At the bottom, the motto 'सत्यमेव जयते' (Satyameva Jayate) is written in Devanagari script.

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12. The learned counsel appearing for the respondents 3 to 10 relied on the following judgments in support of his contention -

(i) 2000 (3) SCC 87 [Kadiyala Rama Rao v. Gutala Kahna Rao]

6. To appreciate the contentions raised in the matter, it would however, be convenient to note the provisions of Order 21 Rule 90 which reads as below:

90. [S.311] (1) Where any immovable property has been sold in execution of a decree, the decree-holder, or set aside the sale the purchaser, or any other person entitled to on ground of share in a rateable distribution of assets, or irregularity or whose interests are affected by the sale, may fraud. apply to the Court to set aside the sale on the ground of 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 shall not, by itself, be a ground for setting aside a sale under this rule.

7. On a plain reading of the provisions thus three several factors emerge and which ought to be taken note of in the matter of setting aside the sale of an immovable property, viz., (i) material irregularity and fraud in publishing or conducting the sale; (ii) the Court dealing with such an application is satisfied that the applicant has sustained substantial injury by reason of such an irregularity or fraud; and (iii) no application would be entertained upon a ground which the applicant

could have taken on or before the date of drawing up of the proclamation of sale.

8. The third requirement as above needs, however, special mention by reason of the factum of incorporation of the principles analogous of the doctrine of constructive res judicata as envisaged under Section 11 of the Code. The legislative intent is clear and categorical in both the provisions as above that in the even of an intentional relinquishment of a known right, question of proceeding further would not arise.

(ii) 2016 (1) MWN (civil) 55 [R.Viswanathan v. R.Santhanam & Ors.

20. When the appellant had an opportunity to raise the question of value of property, the same was rejected. Therefore, as per Sub-Rule 3 of Rule 90 of Order 21 C.P.C., no fresh application can be entertained by the Court in this regard. As per the explanation, mere absence or defect in the attachment of property sold, will not be a ground for setting aside the sale. Further, to get favourable orders in a petition filed under Rule 90 C.P.C., the appellant must not only prove irregularity or fraud, but also must satisfy the Court that he has sustained substantial injury by the irregularity or fraud. In the present case, the appellant failed to prove that there was irregularity or fraud in conducting the auction sale and that he suffered substantial injury.

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13. The learned counsel appearing for the respondents 11 to 16 made submission on the same line.

14. Heard the learned counsel appearing for the petitioner as well as respondents and perused the materials available on record.

15. The points for consideration is -

(i) Whether notice in the EP and proclamation of sale were served on the petitioner and whether proclamation of sale and tom-tom was effected at the place of property sought to be sold.

(ii) Whether the petitioner has suffered irreparable loss by auction sale conducted without following the procedures as contemplated under Order XXI Rules 54 (2), 66 and 67 CPC.

Point No.1 :

16. According to petitioner, the notice in EP and proclamation of sale were not served on him and the first respondent fabricated documents to show that notice in EP and proclamation of sale were served on him. The petitioner examined himself as PW1 and deposed to the above averments. The first respondent apart from examining himself as RW1, examined RW2, the Court Process Server to prove that notice in EP and proclamation of sale were served on the

petitioner. RW2, in his evidence made contradictory statement than what is stated in the notices alleged to have been served on the petitioner. In Exs.C1 and C2, RW2 has stated that one Varadharajan identified the petitioner and he served the notice and proclamation of sale on the petitioner. In the evidence before Court, RW2 had stated that he knew the petitioner and served on him the notice in the EP and proclamation of sale and after that he obtained signature from witness Varadharajan. Executing Court brushed aside this vital contradiction on the ground that RW2, due to loss of memory had deposed contrary to Exs.C1 & C2. Executing Court failed to consider that this contradiction creates suspicion about service of notice in EP and proclamation of sale on the petitioner. Similarly, RW3 a resident of locality where the property sought to be sold were situated deposed that tom-tom was effected in the locality. He deposed that by tom-tom, it was made known to the people that auction would be held at District Munsif Court, Cheyyar whereas the auction was ordered by District Munsif Court, Arani and auction was held at District Munsif Court, Arani. Again the Executing Court did not take into consideration this vital fact and has stated that due to loss of memory, RW3 had stated that auction would be held at District Munsif Court, Cheyyar instead of District Munsif Court, Arani. This fact coupled with the fact, second respondent was the only person who participated in the auction and his bid was just Rs.100/- more than the upset price fixed by the

Court. In addition to that, petitioner has averred that the second respondent is close friend of first respondent and he is only a binami of first respondent. Both first and second respondent denied the same. During arguments in the Civil Revision Petition, the learned counsel appearing for the petitioner submitted that second respondent is the brother-in-law of first respondent being sister's husband. This averment was denied by the learned counsel for the respondents 3 to 16.

17. It is well settled that close relative like son, father, father-in-law, etc. of decree holder can participate in court auction and purchase the property and cannot be said that they are binami of decree holder. But in the present case, the first and second respondents have suppressed the fact that the second respondent is the brother-in-law of the first respondent and they went to the extent of denying that the second respondent is a friend of first respondent. This clearly shows that the second respondent is only a binami of first respondent and it is deemed to be first respondent is auction purchaser. The first respondent, by indirect way through his brother-in-law has participated in court auction and purchased the property without obtaining any leave or permission from the court. The Appellate Authority compared the signature in Ex.C2 and signature in petition filed by the petitioner and came to the conclusion that

signature in Ex.C2, the notice in EP is that of petitioner. The learned Appellate Authority has not stated that both the admitted signature in the petition as well as disputed signature in Ex.C2 are contemporaneous signatures. When there is a serious doubt about service of proclamation of sale and notice in EP as Exs.C1 & C2, the learned Appellate Judge committed an irregularity in holding that signature in Ex.C2 is that of petitioner. The learned Judge also failed to consider the discrepancy in the oral evidence of RW2, Process Server and Exs.C1 & C2. The learned Judge has not given any reason for accepting the evidence of RW2, when there is a vital discrepancy in the oral and documentary evidence. For the above reason, I hold that the auction sale held on 09.09.1991 was not conducted by following the procedures and that notice in EP and proclamation of sale were not served on the petitioner. The Executing Court has committed serious irregularity in conducting auction sale. The Courts below erred in holding that proclamation of sale as well as notice in EP were served on the petitioner. In the result, Point No.1 is answered in favour of the petitioner.

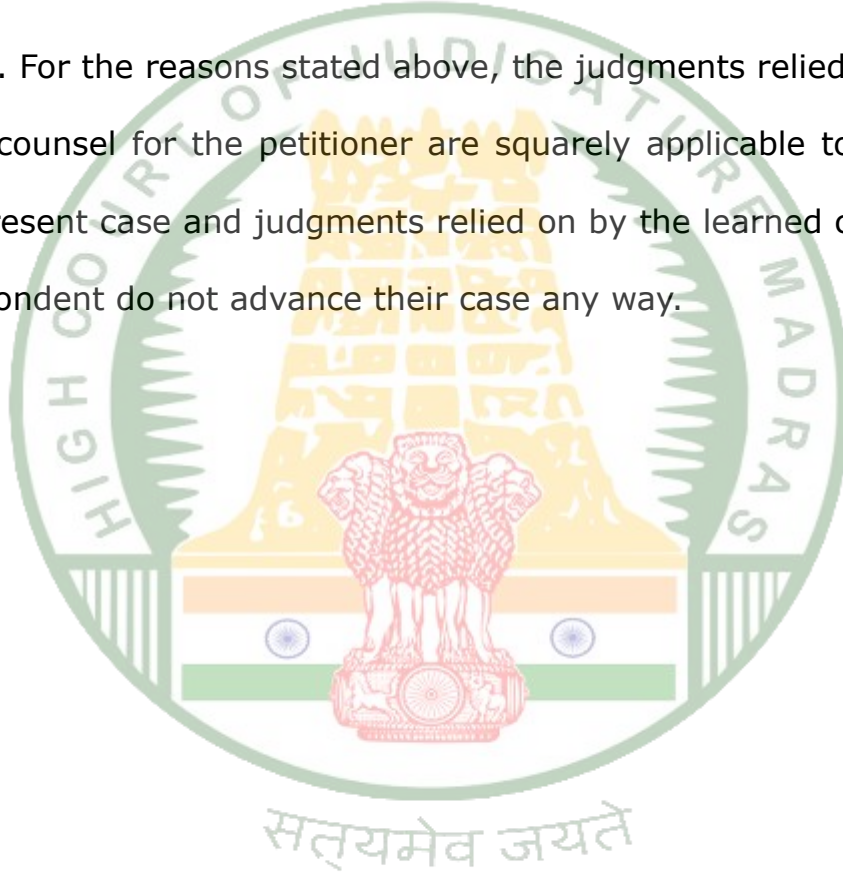
Point No.2 :

18. According to the petitioner, the first property is worth Rs.1,00,000/- and second property is worth Rs.500/- per cent. The Executing Court has fixed the value of the first property at Rs.10,000/-

and second property at Rs.8,000/-. Courts below held that the upset price so fixed is proper as the same is fixed more than the price stated by court amen. The Courts below also held that the petitioner has not produced any document to show that value of property is more than the value fixed by the court and the property was sold for a lower price and he has suffered any loss by irregularity committed in conducting auction sale. The reasoning of courts below is erroneous. This Court, in the decision reported in 2001 (4) CTC 612 cited supra has held that it is not proper on the court to hold that the petitioner must produce evidence that the property is worth more than Rs.1,00,000/- and it is sold for realisation of meagre decree amounts of Rs.5,000/- and odd. This decision is squarely applicable to the facts of the present case. This Court took note of the fact that the second respondent who is the brother-in-law of the first respondent decree holder was the only person participated in the auction sale and his offer is only just Rs.100/- more than the upset price fixed by the court. The Executing Court in the order has not stated on what basis it fixed the upset price at Rs.10,000/- and Rs.8,000/- respectively. There is nothing on record to show that the first respondent furnished any particulars as to the value of the property and that value given by the first respondent was incorporated in the proclamation of sale. The properties sold are measuring 4 acres and upset price fixed is very low for the total extent of the property. When the properties worth Rs.1,00,000/- and

Rs.500/- per cent were sold for Rs.10,100/- and Rs.8,100/- respectively, and the petitioner had to pay balance sale consideration, definitely the petitioner had suffered irreparable loss. For the above reason, point No.2 is answered in favour of the petitioner.

19. For the reasons stated above, the judgments relied on by the learned counsel for the petitioner are squarely applicable to the facts of the present case and judgments relied on by the learned counsel for the respondent do not advance their case any way.



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20. In the result, the order of the Executing Court dated 12.11.1996 made in E.A.No.145 of 1991 in E.P.No.15 of 1991 in O.S.No.4 of 1982 and judgment of the Appellate Court dated 03.10.1997 made in CMA No.5 of 1997 are liable to be set aside and they are hereby set aside.

21. Accordingly, this Civil Revision Petition is allowed. No costs. The matter is remitted back to the Executing Court to proceed with the E.P. from the stage of settling proclamation of sale after giving notice to the petitioner and respondent and hearing them and settle the proclamation of sale to proceed further with E.P. As E.P. is of the year 1991, the learned Subordinate Judge, Arani is directed to dispose of the E.P. within a period of three (3) months from the date of receipt of a copy of this order. Consequently, connected Miscellaneous Petition is closed.

04.10.2017

Index : Yes/No

rgr

To

1. The Additional District Judge, Tiruvannamalai.

2. The Subordinate Judge, Arani.

V.M.VELUMANI, J.

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**Pre-delivery order in
C.R.P. NPD No.1147 of 1998**

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04.10.2017