

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.02.2017

CORAM :

THE HONOURABLE MS.JUSTICE R.MALA

C.R.P.(NPD).No.1097 of 2016andC.M.P.No.6044 of 2016

Date of Reserving the Judgment 30.01.2017	Date of Pronouncing the Judgment 10.02.2017
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K.M.Balasubramanian
S/o.Mosuvanna Gounder

.. Petitioner/Petitioner/Respondent/
Respondent/Judgment Debtor

-Vs.-

1.C.Loganathan
S/o.chinnappa Gounder

.. 1strespondent/1strespondent/1strespondent/
Petitioner/Decree Holder

2.N.G.Deivasigamani
S/o.N.S.Gurusamy Gounder

.. 2nd Respondent/2nd Respondent/
Petitioner/Auction Purchaser

Prayer:

Civil Revision Petition is filed under Section 115 CPC against the fair and decretal order dated 06.11.2015 made in E.A.No.136 of 2009 in E.A.No.277 of 2008 in E.P.No.292 of 2006 in O.S.No.656 of 2002 on the file of the learned First Additional Subordinate Court, Erode.

For Petitioner : Mr.T.V.Ramanujam, Senior Counsel
for Mr.J.Karthikeyan

For Respondents : Mr.AR.L.Sundaresan, Senior Counsel
for Mr.P.Valliappan, for R2

ORDER

Challenging the dismissal of the application in E.A.No.136 of 2009, filed under Section 47 and 151 CPC, the present Civil Revision Petition has been preferred.

2.The first respondent herein as a plaintiff had filed the suit in O.S.No.656 of 2002 against the revision petitioner herein for recovery of money due on a promissory note. The said suit was decreed exparte. At the time of filing the suit, the property was attached before judgment and after the suit was decreed, an execution petition was filed in E.P.No.292 of 2006 in O.S.No.656 of 2002 for recovery of amount in which the property was sold in Court auction. The second respondent herein was the auction purchaser and he filed the application for delivery after receipt of the sale certificate. Only at that point of time, the revision petitioner/judgment debtor came to know about the sale. Immediately thereafter, the revision petitioner/judgment debtor filed an application in E.A.No.136 of 2009 under Section 47 and 151 CPC

seeking the following reliefs:

- (a) To decide the right of the petitioner over the schedule of properties;*
- (b) To determine the validity of the sale proceedings in the execution proceedings;*
- (c) To decide the matter of the execution proceedings in accordance with law;*
- and*
- (d) Pass such other suitable and favourable orders and thus render justice.*

3. The revision petitioner/judgment debtor contended before the Trial Court that since an application in I.A.No.129 of 2009 which has been filed for setting aside the ex parte decree along with an application for condonation of delay of 1581 days is pending, the execution petition seeking delivery is not maintainable. Further, it was contended that no proper publication was made for sale of the petition mentioned property and the first respondent has abused the process of law and therefore, the sale itself is invalid. But the executing Court, after considering the counter filed by the second respondent had dismissed the application preferred by the revision petitioner/judgment debtor in E.A.No.136 of 2009 under Section 47 and 151 CPC stating that the relief sought for by the revision petitioner/judgment debtor will fall under Order 21 Rule 90 CPC and hence, it is barred under Article 127 of the Limitation Act. Further, the application filed under Section 47 and 151 CPC is not maintainable,

against which the present Civil Revision Petition has been preferred.

4.The learned Senior Counsel appearing on behalf of the revision petitioner would submit that the application filed in E.A.No.136 of 2009 under Section 47 and 151 CPC is maintainable because there was irregularity and illegality in conducting the public auction. No sale proclamation was made and there was no notice before proclamation of sale and hence, the sale is nullity. The learned Senior Counsel had drawn my attention to the oral evidence of R.W.2 and R.W.3 and the decisions reported in,

- 1. (1994) 1 Supreme Court Cases 131, *Desh Bandhu Gupta v. N.L.Anand & Rajinder Singh***
- 2. AIR 1990 Madras 226, *Jagannathan alias Govindarasu and others v. Angamuthu Pillai and others.***
- 3. (2008) 13 Supreme Court Cases 113, *Mahakal Automobiles and Another v. Kishan Swaroop Sharma***

and submits that notice under Order 21 Rule 54(1-A) is mandatory.

5.The learned Senior Counsel also relied on the decision reported in ***AIR 2003 Calcutta 218, Smt.Arati Daw v. Pradip Roy Chowdhury and others*** wherein it was held that if the sale is found to be vitiated on ground of fraud practiced on Court in providing low valuation of property, the revisional Court

has jurisdiction to set aside the sale in order to do justice to the judgment debtor. In the instant case, the property had been sold for a meager price and the auction purchaser is none other than the relative of the decree holder. But the executing Court had failed to consider the said factum and hence, the learned Senior Counsel appearing for the petitioner prayed for setting aside the impugned order. To substantiate his contention, the learned Senior Counsel appearing for the revision petitioner also relied on the following decisions:

1. *AIR 1954 Madras 1024 (Vol.41, C.N.357)(1), Srikakula Chinna Venkatanarayana and others v. Pannapati Elias*
2. *1987 (Supp) Supreme Court Cases 124, A.Venkatachalam and Others v. E.M.Zackria and Other*
3. *(1995) 3 Supreme Court Cases 579, Nani Gopal Paul v. T.Prasad Singh and Others*
4. *AIR 2006 Madras 104, G.Chandrasekaran v. Palaniappa Company and others*
5. *AIR 1980 Madras 123, A.P.V.Rajendran v. S.A.Sundararajan and Others*
6. *1997-1-L.W.373, Athianna Gounder and another v. Kumnaraswamy (now deceased) and R.Natarajan*
7. *2016 SCC OnLine Mad 4533, G.Janobai v. V.M.Devadoss*
8. *(1993) 4 Supreme Court Cases 414, Satyanarain Bajoria and*

another v. Ramnarain Tibrewal and another

9. AIR 2005 Andhra Pradesh 239, Pappasani Narayana Reddy v. Mandem Reddappa Reddy

6. Resisting the same, the learned Senior Counsel appearing for the 2nd respondent would put forth his argument on the following grounds. The first limb of argument is that the petitioner has no locus standi to file the present application. Even though at the time of filing of the suit, the property has been attached under Order 38 Rule 5 CPC by an order of interim attachment dated 28.01.2003 granted in I.A.No.816 of 2002 and the same was subsequently made absolute on 07.02.2003, the revision petitioner/judgment debtor sold the property to one M.Elangovan @ Karuppasamy on 10.04.2006, when the attachment was in force. While so, the second respondent herein purchased the property through Court auction held on 27.09.2007 and sale in favour of the second respondent was confirmed and sale certificate was issued on 10.12.2007. However, the said M.Elangovan @ Karuppasamy sold the property in favour of one Parimala Devi, who is the wife of the petitioner's Advocate on 18.03.2009. It is pertinent to note that the revision petitioner/judgment debtor has no interest over the property on the date of the aforesaid public auction. Hence, he has no locus standi to file the application in E.A.No.136 of 2009 under Section 47 and 151 CPC.

7.The second limb of argument is that the alleged irregularity pleaded by the revision petitioner will come within the purview of Order 21 Rule 90 CPC. However, without filing an application under the said provision, the revision petitioner had filed the application under Section 47 and 151 CPC. Further, the said Parimala Devi filed an application in E.A.No.388 of 2011 was dismissed and the revision petition preferred against the said order was also dismissed as withdrawn. Hence, as per Article 127 of the Limitation Act, the revision petitioner/judgment debtor ought to have filed an application to set aside the sale within 60 days. But in order to circumvent the limitation, the revision petitioner/judgment debtor had filed an application under Section 47 and 151 CPC. Hence, the said application is not maintainable.

8.The learned Senior Counsel would further contend that the property was sold in the Court auction for a sum of Rs.4,50,000/- on 27.09.2007 and on the other hand, it was stated to be purchased by Parimala Devi, who is the wife of the petitioner's Advocate for a sum of Rs.5,00,000/- on 18.03.2009. In such circumstances, the contention raised by the learned Senior counsel appearing for the revision petitioner that the property was sold for a meager price in the Court auction cannot be appreciated.

9. The learned Senior Counsel for the 2nd respondent relied on the following decisions to put forth his prime contentions.

1. By relying on the decision reported in ***AIR 1981 Supreme Court 693, S.A.Sundararajan v. A.P.V.Rajendran***, he would submit that only Order 21 Rule 90 is applicable.
2. By relying on the decision reported in ***AIR 1971 Supreme Court 2337, Radhy Shyam v. Shyam Behari Singh***, he would submit that merely because the property was sold for an inadequate price, the same cannot be a ground for setting aside the sale.
3. By relying on the decision reported in ***AIR 2000 Supreme Court 3402, Sri Ram Maurya v. Kailash Nath and others***, he would submit that even though the revision petitioner/judgment debtor had contended that he had not received the notice before proclamation and publication of proclamation, he had not pleaded the same in his petition and hence, the same cannot be looked into.

The learned Senior Counsel for the 2nd respondent also distinguished the decision relied on by the learned Senior Counsel appearing for the revision petitioner and prayed for dismissal of the Civil Revision Petition stating that only with a view to drag on the proceedings and prevent the auction purchaser from taking possession of the property, the present revision has been preferred.

10. The learned Senior Counsel appearing for the 2nd respondent would further submit that in order to set aside the exparte decree, the revision petitioner/judgment debtor filed an application in I.A.No.129 of 2009 along with an application for condonation of delay of 1581 days. However, the said application was dismissed as against which he preferred a revision which was also dismissed. The SLP preferred before the Hon'ble Apex Court in SLP(Civil) No.31300 of 2011 also came to be dismissed on 28.11.2011 and therefore, the exparte decree has become final. Thus, the learned Senior Counsel prayed for dismissal of the Civil Revision Petition. To substantiate his contention, the learned Senior Counsel appearing for the 2nd respondent also relied on the following decisions:

- 1. AIR 1980 Madras 123, A.P.V.Rajendran v. S.A.Sundararajan and Others**
- 2. AIR 2001 Supreme Court 2220, Rajender Singh v. Ramdhar Singh and others**
- 3. 1997-3-L.W.835, A.Kuppusamy Mudaliar v. G.Subramania Mudaliar**
- 4. 2004 (1) CTC 10, UCO Bank, Represented by its Branch Manager v. Dr.Ugra Pandian and others**
- 5. 2009 (4) CTC 360, The Secretary, Tamil Nadu State Transport Corporation v. Chellathankam**

11.Considered the rival submissions made by both sides and perused the typed set of papers.

12.The first respondent herein as a plaintiff had filed the suit in O.S.No.656 of 2002 on 01.08.2002, against the revision petitioner herein for recovery of money due on a promissory note. It is pertinent to note that at the time of filing of the suit, the first respondent filed an application in I.A.No.816 of 2002 under Order 38 Rule 5 CPC seeking for attachment before judgment of the suit scheduled property and the Trial Court had also passed an order of interim attachment on 28.01.2003 and the same was made absolute on 07.02.2003. The suit in O.S.No.656 of 2002 was decreed exparte on 08.09.2004. But the revision petitioner/judgment debtor sold the property to one M.Elangovan @ Karuppasamy on 10.04.2006. The first respondent/decreed holder filed an execution petition in E.P.No.87 of 2005 on 28.07.2006 for arrest of the revision petitioner/judgment debtor. However, the said application was closed as the revision petitioner/judgment debtor could not be found. Thereafter, the first respondent/decreed holder filed an execution petition in E.P.No.292 of 2006 on 01.08.2006 to bring the property which was already attached for public auction.

13.The second respondent herein purchased the property through Court auction held on 27.09.2007 for a sum of Rs.4,00,500/- and the sale in favour of the second respondent was confirmed and sale certificate was issued on 10.12.2007. Hence, the second respondent filed an application in E.A.No.277 of 2008 against the revision petitioner/judgment debtor for delivery of possession. Only on receipt of notice in the said application, the revision petitioner/judgment debtor filed an application in I.A.No.129 of 2009 on 10.03.2009 to set aside the exparte decree dated 08.09.2004 along with an application for condonation of delay of 1581 days. After contest, the said application came to be dismissed, as against which he preferred a revision before this Court in C.R.P.No.179 of 2010 and the revision was also dismissed. As against the said order of dismissal, an SLP was preferred before the Hon'ble Apex Court in S.L.P.(Civil).No.31300 of 2011 and the same was also dismissed on 28.11.2011. In the meantime, the said M.Elangovan @ Karuppasamy sold the property in favour of one Parimala Devi, who is the wife of the petitioner's Advocate on 18.03.2009. While so, the said Parimala Devi filed an application in E.A.No.388 of 2011 to implead herself as party to the proceedings. But the said application was dismissed, as against which she filed a revision in C.R.P.No.1239 of 2014 and the same was also dismissed.

14.Now, the first point to be decided is whether the revision

petitioner/judgment debtor has locus standi to file an application in E.A.No.136 of 2009 to set aside the sale?

It is pertinent to note that the revision petitioner/judgment debtor has no interest over the property on the date of the aforesaid transactions. Furthermore, as already stated, even though the property was attached on 28.01.2003 and the same was made absolute on 07.02.2003, the petitioner sold the property in favour of one M.Elangovan @ Karuppasamy on 10.04.2006 and he in turn sold the property in favour of one Parimala Devi, who is the wife of the petitioner's Advocate on 18.03.2009. Thereafter, the revision petitioner/judgment debtor had filed this application on 18.04.2009 in E.A.No.136 of 2009 to set aside the sale on the ground that there was no proper publication of sale and that the decree itself is inexecutable. But as already stated, on the date of filing of the application in E.A.No.136 of 2009 and also on the date of the Court auction viz., 27.09.2007, the revision petitioner/judgment debtor is not the owner of the property and he is not having any right or interest in the property. In such circumstances, I am of the view that the revision petitioner/judgment debtor has locus standi to file the application.

15.Now this Court has to decide whether the application preferred under Section 47 CPC is maintainable?

At this juncture, it would be appropriate to incorporate Section 47 CPC.

“47. Questions to be determined by the Court executing decree.-

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) omitted by Act 104 of 1976. effective from 1-2-1977

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court ”

At this juncture, it would also be appropriate to incorporate Order 21 Rule 90 CPC.

“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.”

16. Now it would be appropriate to consider the decisions relied on by both the parties to decide whether application under Section 47 CPC or Order 21 Rule 90 CPC is maintainable?

17. The learned Senior counsel appearing for the revision petitioner relied on the following decisions to substantiate his contention that when there is no proper publication of the sale, the alleged sale is a nullity.

17.1. In the decision reported in ***AIR 1954 Madras 1024 (Vol.41, C.N.357)(1), Srikakula Chinna Venkatanarayana and others v. Pannapati Elias***, it was held that the sale held without proclamation is void. It would be appropriate to incorporate paragraph 5 of the said decision:

“5. The substantial question which emerges at the outset is whether a court sale held without any publication whatever of the proclamation of sale is void or only voidable at

the instance of the judgment-debtor or other aggrieved party and that only by an application under O.21 R.90 of the Code. In dealing with the authorities cited before me on both sides, one has to keep the distinction between a case where there has been a publication of the proclamation but the publication has been found to be defective in certain particulars and a case in which there has been no publication at all.

A case of this Court in which there was no proclamation at all is that covered by the decision in 'Venkateswara Ettu Naicker v. Ayyammal', AIR 1950 Mad 367(B). There, Krishnaswami Nayudu, J after accepting the finding of the Court below that there was no proclamation at all, held that the sale held without proclamation was void. The learned Judge observed:

“It cannot be said that the total failure to make the proclamation under O.21 R.66 is a mere-irregularity in the publication or conduct of the sale.”

He relied upon the decision of a Bench of this Court in 'Jayarama Aiyar v. Vridhagiri Aiyar', AIR 1921 Mad 583 (C). That was not a case where the proclamation of sale was not published at all. It was published but not in the village where the lands were situate. But the process server had, intimated at the village that the sale would be held at a place and by an officer different from those fixed by the proclamation. It was held that the sale was illegal and a nullity and not merely “irregular” within the meaning of O.21 R.90 of the Code.”

The above citation is squarely applicable to the facts of the present case and hence, only the petition under Order 21 Rule 90 is maintainable.

17.2. The above decision was relied on by the Hon'ble Apex Court reported in the decision reported in **1987 (Supp) Supreme Court Cases 124, A. Venkatachalam and Others v. E.M. Zackria and Other**, it was held that sale without publication is void. It is appropriate to incorporate paragraphs 2, 3 and 4 of the said decision:

"2. These observations only mean that on (sic) proceedings prior to the stage of Order 21 Rule 64 do not relate to "publishing and conducting the sale " and not that proceedings subsequent to the stage of Order 21 Rule 64 will only attract Order 21 Rule 90 and not Section 47. We do not see how a sale held without any publication whatsoever can possibly be held to be a sale which is not void.

3. The case of Srikakula Chinna Venkatanarayana v. Pannapati Elias² deals with the question of non publication of sale. Rajamannar, C.J. after referring to the observations of Justice Seshagiri Aiyar in an earlier case observed as follows:

"Sheshagiri Aiyar, J. was of the opinion that the Code itself gave some indication as to when a sale can be regarded as irregular and when illegal. He thought that on the language of Order 21 Rule 90, where there was no publication or conduct of the sale, the sale should be regarded as illegal. On the facts of the case before him, his conclusion was that in effect there had been no publication at all.

We are not now concerned with the correctness of the

decision insofar as it held that on the facts of the case there had been no publication at all. The value of the decision, in my opinion, lies in the enunciation of the general principle that where there is no publication or conduct of the sale, then it is not a case of mere irregularity. It is as if a sale had not been held at all within the meaning of the Code. If there was no publication of the sale whatever, at any place or in any manner, but some officer of the court chose to hold a sale at some places on some date, it cannot be said that there has been a material irregularity or fraud in publishing a sale.

Likewise it follows from this decision that if there is in effect no conducting of the sale it would not be a case of material irregularity in conducting it. Suppose the selling officer does not conduct an auction but merely takes a private offer and reports to the court that the property has been sold to the person making that offer. Can it be said that there has been a conduct of the sale? I think not. Following the principle of this decision and the decision of Krishnaswami Nayudu, J. in Venkateswara Ettu Naicker v. Ayyammal³ and on the concurrent findings of the courts below that there was no publication of the sale whatever, I hold that there has been no sale at all under the Code and the alleged sale was a nullity. "

4. We entirely agree with what has been said by the learned Chief Justice in the above decision. The civil appeal is dismissed with costs."

Supreme Court Cases 579, Nani Gopal Paul v. T.Prasad Singh and Others, it was held in paragraph 4 as follows:

“Though, as contended by Shri.Ganesh that normally an application under Order 21 Rule 89 or 90 or under s.48 CPC need to be filed within limitation to have the sale conducted by the court set aside and that procedure need to be insisted upon, we are of the view that this court or appellate court would not remain a mute or helpless spectator to obvious and manifest illegality committed in conducting court sales. We are informed and it is not disputed that the appellant had deposited only Rs.5 lakhs and balance amount was assured to be deposited only after delivery of possession. That also would be illegal.”

17.4.In the decision reported in **AIR 2006 Madras 104, G.Chandrasekaran v. Palaniappa Company and others**, it was held that even though the sale is confirmed and sale certificate has been issued, when the irregularity/fraud is brought to the notice of the Court, the Court cannot remain a mute spectator solely because the sale was already confirmed and the Court can cancel the sale even at the stage of delivery of possession. It would be appropriate to incorporate paragraph 24 of the decision:

“24.Generally speaking all irregularities are cured by the issuance of the Sale Certificate. In other words, on the issue of Sale Certificate, the auction-purchaser's title becomes final and the right to possession becomes impeachable. Though the

confirmation Of sale and the issuance of Sale Certificate is prima facie evidence of title of the auction-purchaser, the circumstances brought forth in this case and the abuse of process of Court in the Court auction sale compel the Executing Court to take suo motu notice of the abuse of the process of Court. In such circumstances of abuse of process of Court, it is not as if the Court is powerless. The Court has got exorbitant power to take note of such things when they are brought to the notice of the Court. Taking suo motu judicial notice of the illegality in conducting of the sale, learned Counsel for the sixth respondent has relied upon the decision reported in [Nani Gopal Paul v. T. Prasad Singh](#) wherein the Supreme Court has observed :

...We are of the view that we can take suo motu judicial notice of the illegality pointed out by the Division Bench, committed by the single Judge of the High Court in bringing the properties to sale. Accordingly, we are of the view that the circumstances are sufficient to vitiate the validity of the sale conducted by the Court Receiver' as approved by the learned single Judge. Confirmation of sale was illegal. Though, as contended by Shri Ganesh that normally an application under Order 21, Rule 89 or Rule 90 or under Section 47, CPC need to be filed within limitation to have the sale conducted by the Court set aside and that procedure need to be insisted upon, we are of the view that this Court or appellate Court would not remain a mute or helpless spectator to obvious and manifest illegality committed in conducting Court sales. We are informed and it is not disputed that the appellant had deposited only Rs. 5 lakhs and balance

amount was assured to be deposited, only after delivery of possession. That also would be illegal....

The Supreme Court has taken suo motu judicial notice of the illegality in the sale and set aside the sale even after the expiry of period of limitation prescribed therefor. Viewed in the light of the above decision, the Executing Court cannot be said to have exceeded its limits in setting aside the sale recalling the Sale Certificate in the proceedings under Order XXI, Rule 85, CPC. When such irregularity/fraud is brought to the notice of the Court, the Court cannot remain a mute spectator solely because the sale was already confirmed.”

There is no quarrel over the said proposition. But in the instant case, the revision petitioner/judgment debtor has no locus standi to file the application. Further, on perusal of the records would show that sale proclamation has been made in accordance with law. In such circumstances, I am of the view that the above citation will not be applicable to the facts of the present case.

17.5. In the decision reported in **AIR 1980 Madras 123, A.P.V.Rajendran v. S.A.Sundararajan and Others**, it was held that if the sale is sought to be set aside on the ground of material irregularity in publishing and conducting the sale within the meaning of Order 21 Rule 90, then Section 47 cannot come into play at all, and the sale could be set aside only by invoking

Order 21 Rule 90. But if the sale is claimed to be void for certain illegality or voidable on ground of material irregularities not referred to in Order 21 Rule 90, then Section 47 has to be invoked and in such cases Order 21 Rule 90 CPC cannot come into play at all. It would be appropriate to incorporate the relevant portion in paragraph 13 of the said decision:

“13. Though Section 47 is very wide in its terms and in one sense all questions relating to the execution, discharge or satisfaction of the decree that arise between the decree holder and the judgment-debtor are within the purview of that section, nevertheless that section ought to be so interpreted as not to render redundant the other provisions contained in the Code, particularly Rules 89, 90 and 91 of Order 21, and as between the Judgment-debtor and the decree-holder only such applications to set aside an auction purchase made by the decree-holder as do not come within the purview of Rules 89, 90 and 91 of Order 21 are within the scope of Section 47 of the Code. Notwithstanding the wording of Section 47 which is enough to cover all applications to set aside sales on the ground either of illegality or of irregularity, its scope has naturally to be restricted so as to give due effect to Order 21, Rule 90 C. P. C. Thus, if the sale is sought to be set aside on the ground of material irregularity in publishing and conducting the sale within the meaning of Order 21 Rule 90, then Section 47 cannot come into play at all, and the sale could be set aside only by invoking Order 21, Rule 90. But if the sale is claimed to be void for certain illegality or avoidable on ground of material irregularities not referred to in O. 21, Rule

*90 then **Section 47** has to be invoked and in such cases Order 21, Rule 90, C. P. C. cannot come into Play at all.”*

In the above citation, it was clearly held that if the sale is ought to be set side on the ground of material irregularity in publishing and conducting the sale within the meaning of Order 21 Rule 90, then Section 47 cannot come into play at all and the sale can be set aside only by invoking Order 21 Rule 90 CPC. But in the instant case, the argument is that the sale proclamation has not been properly published. So, it is a material irregularity in publishing and conducting the sale and hence, only an application under Order 21 Rule 90 CPC is applicable and not an application under Section 47 CPC.

17.6.The next decision relied on by the learned counsel for the revision petitioner is reported in **1997-1-L.W.373, Athianna Gounder and another v. Kumnaraswamy (now deceased) and R.Natarajan**. In the said decision the sale certificate has been issued while the application under Section 47 CPC is still pending. Hence, the above decision is not applicable to the facts of the present case.

17.7.In the decision reported in **2016 SCC OnLine Mad 4533, G.Janobai v. V.M.Devadoss**, it was held in paragraph 16 as follows:

“16.It cannot be disputed that under Section 47 of the

Civil Procedure Code, the Executing Court can determine all questions arising between the parties, in which decree was passed and relating to the execution, discharge or satisfaction of the decree and not by a separate suit.”

There is no quarrel over the said proposition. But the above citation is not applicable to the facts of the present case.

17.8. The learned counsel relied upon the decision reported in **(1994) 1 Supreme Court Cases 131, Desh Bandhu Gupta v. N.L. Anand & Rajinder Singh** and submits that application under Section 47 is maintainable. It is appropriate to incorporate paragraphs 12, 13 and 17 of the said decision:

“12. The contentions of S/Shri Madhava Reddy and Gujral that the appellant had not given his valuation and that, therefore, it is not open to him to raise the objections after the sale is unacceptable. Since the court had not given any notice to the appellant which is mandatory, the need to submit his valuation did not arise. Order 21 Rule 54, sub-rule (1-A) brought in by 1976 [Amendment Act](#) mandates that the court should require the judgment-debtor to attend the court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale. Form 24 of Appendix 'E' second para and the Court Rules also envisage the mandate. It is a reminder to the court that it has a statutory duty to issue notice to the judgment-debtor before settlement of the terms of proclamation of sale. Then only the proviso to Rule 66(2) comes into play

dispensing with multiplicity of notices and not dispensation of mandatory compliance of notice to the judgment-debtor. Had it been a case where notice was served and the appellant lay by, without objecting to the valuation given by the decree-holder, certainly that would be put against the appellant to impugn the irregularities after the sale or the under-valuation settled by the court in the proclamation of sale. The further contentions of both the counsel that merely because there is no order under Order 21 Rule 66(2), it cannot be construed that the Execution Court had not applied its mind in settling the terms of the proclamation of sale, is one of desperation. Except giving a schedule of dates for conducting the sale the Execution Court totally abdicated its duty to scrupulously comply with the mandatory procedure and did not apply its mind to the mandatory duty cast on it by Order 21 Rule 66 to settle the terms of proclamation of sale, and proper publication under Rule 67. After April 20, 1979, the court had merely ensured its publication on the court notice board and on the site at the respective dates and no further. This Court in [Shalimar Cinema v. Bhasin Film Corpn.](#)⁴ held that the court has a duty to see that the requirements of Order 21 Rule 66 are properly complied with. It is incumbent on the court to be scrupulous in the extreme. No action of the court or its officer should be such as to give rise to the criticism that it was done in a casual way. Therefore, a proclamation of sale drawn casualty without compliance of the mandatory requirement and a sale held in furtherance thereof is not a sale in the eye of law. We are of the considered view that

the procedure adopted by the court in non-compliance of Order 21 Rules 66 and 67 is in flagrant breach of the mandatory provision. It is a nullity ab initio.

13. Yet another contention of Mr Gupta is that the sale of the plot of 550 sq. yards is in excess of the execution and the order to sell it is the result of non-application of mind touching the jurisdiction of the court rendering the sale void or manifestly illegal. Therefore, the need to invoke Order 21 Rule 90 does not arise and it can be set aside under Section 47 CPC.

17. Under [Section 47](#) all questions relating to execution, discharge or satisfaction of the decree should be determined by the Executing Court alone. The pre-sale illegalities committed in the execution are amenable to the remedy under [Section 47](#). Post-sale illegalities or irregularities causing substantial injury to the judgment-debtor are covered under Order 21 Rule 90. Sub-rule (1) thereof covers the field of material irregularities or fraud in publicity or conducting the sale. Sub-rule (2) enjoins proof thereof and the court should find that by reason thereof the applicant sustained substantial injury. The total absence of drawing up of the proclamation of sale and settlement of its term by judicial application of mind renders the sale a nullity being void. It is covered by [Section 47](#). The non- application of mind whether sale of a part of the property would satisfy the decree debt is a material irregularity doing substantial injury to the appellant attracting Order 21 Rule 90. In either case the sale is liable to be set aside. It is true that there is distinction between mere irregularity and material irregularities and the

sale is not liable to be set aside on proof of mere irregularity. It must be material irregularity and the court must be satisfied that on account thereof substantial injury was sustained by the appellant. The sale of 550 sq. yards for recovery of a paltry sum of Rs 7,780.33, without selling a portion thereof, caused substantial injury to the appellant.”

17.9. The learned counsel relied on the decision reported in ***AIR 1990 Madras 226, Jagannathan alsias Govindarasu and others v. Angamuthu Pillai and others*** and submits that if the sale proclamation is a question of nullity, the relevant provision would be Section 47 CPC and not Order 21 Rule 90 CPC. By relying on the decision reported in AIR 1954 Madras 1024, it was held that a Court sale held without any publication whatever of the proclamation of the sale, as required by Order 21, Rule 66 and 68 of CPC, is illegal and void and not merely voidable.

17.10. The learned counsel would rely upon the decision reported in ***(2008) 13 Supreme Court cases 113, Mahakal Automobiles and another v. Kishan Swaroop Sharma*** and submits that compliance of Order 21 Rule 66 CPC is mandatory. It would be appropriate to incorporate paragraphs 11, 12, 13 and 15 of the said decision:

“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 Immoveable Property:

(b) Proclamation of Sale by Public Auction;

(c) Sale by Public Auction

Each stage of the sale is governed by the provisions of the Code. For the purposes of the present case, the relevant provisions are Order 21 Rule 54 and Order 21 Rule 66. At each stage of the execution of the decree, when a property is sold, it is mandatory that notice shall be served upon the person whose property is being sold in execution of the decree, and any property which is sold, without notice to the person whose property is being sold is a nullity, and all actions pursuant thereto are liable to be struck down/quashed.

12. The admitted position that has emerged is that:

(i) There was no notice served upon the Judgment-Debtor under Order 21 Rule 54 (1-A).

(ii) There was no valuation of the property carried out;

(iii) There was no proclamation of sale as per the statutory provisions of the M.P. Civil Court Rules, 1961 read with Order 21 Rule 66.

(iv) There was no publication of the sale.

13. In Deshbandhu Gupta's case (supra) it was held as follows:

"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 waived 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 verified as accurately and fairly as possible so that the intending bidders are not misled 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 XXI, Rule 66 (2) (e) CPC. The Court has only to decide what are all these material particulars in each case. We think that this is an obligation imposed by Rule 66 (2) (e). In discharging it, the Court normally states 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 irreparable 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 at time be possible.

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."

17.11. In the decision reported in **(1993) 4 Supreme Court Cases 414, *Satyanarain Bajoria and another v. Ramnarain Tibrewal and another***, it was held that notice under Order 21 Rule 54(1-A) of the Code is mandatory for the Court. It is appropriate to incorporate paragraph 17 of the said decision:

"17. Learned Counsel for the decree-holder submitted that these are questions of fact since the High Court dismissed the revision petition in limine this Court should not interfere with the questions of fact. If it was merely a case of questions of fact proved on record, learned Counsel for the decree-holder would have been right. It appears lower appellate court had no knowledge whatsoever of how even notice under Order 21 Rule 22 of the Code was required to be served or the evidence in relation thereto being led in proceedings for setting aside of the sale at the instance of the judgment-debtor. The lower appellate court could not read the order sheet or proceedings purporting to be under Order 21 Rule 22 of the Code while dealing with proceedings under Order 21 Rule 90 of the Code and hold that the notices have been served. Lower appellate court again was mixing up the service on judgment-debtor of notice under Order 21 Rule 54 of the Code and of proclamation of sale. The lower appellate court again was ignoring the importance of notice under Order 21 Rule 54 (1-A) and (2) to enable the judgment-

debtor to have notice of proceedings for settlement of terms of proclamation under Order 21 rule of the Code. It is true that now it has been specifically clarified by the explanation to Rule 90 of Order 21 of the Code that "the mere absence of, or defect in, attachment of the property sold shall not, itself, be a ground for setting aside a sale under this rule". But if the judgment-debtor is kept totally ignorant of the execution proceedings rights from the date of execution application till sale, it cannot be merely called a mere irregularity in attachment and thus of no consequence. Proceedings under Order 21 Rule 66 of the Code for settlement of terms of proclamation of sale are very material for both the parties, much more for the judgment-debtor as it is well known that the decree-holder always tries to under value the property whereas the judgment-debtor tries to over-value the property. However, provisions are made in the Code in Sub-rule (2) of Rule 66 of Order 21 that the sale proclamation shall be drawn up after notice to both the decree-holder as well as the judgment-debtor and shall state the time and place of sale and other requirements mentioned therein. No notice was given under Order 21 Rule 54 (1-A) of the Code which was mandatory for the court. In any case no notice for settlement of terms of proclamation of sale was served on the judgment-debtor personally as contemplated by Sub-rule (2) of Rule 66 of Order 21 of the Code."

17.12. In the decision reported in **AIR 2005 Andhra Pradesh 239**, **Pappasani Narayana Reddy v. Mandem Reddappa Reddy**, it was held that

notice under Order 21 Rule 66(2) is mandatory in nature. It is appropriate to incorporate paragraph 12 of the said decision:

“12. Admittedly, Process Server even did not bother to make repeated effort to effect personal service on the Judgment Debtor. He did not bother to record on the summons that there was no agent available to serve the summons on the Judgment Debtor. There is no order by the Court as contemplated under Order 5 rule 20 that Judgment Debtor is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, hence the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house, in which Judgment Debtor is known to have last resided or service by way of advertisement in a newspaper. Such procedure can be followed on a report submitted by the Process Server. In the absence of same, service of notice by Process Server by way of affixation is not a proper service and it is held that report on the summons is either fake or purposely made to give a colour of due service. In view of the same, the submission made by the learned counsel for the petitioner that notice served by Process Server by way of affixation amounts to service under Order 21 Rule 66(2) cannot be accepted.”

17.13. The learned counsel relied upon the decision reported in **AIR 2003 Calcutta 218, Smt. Arati Daw v. Pradip Roy Chowdhury and others** and

submit that Court must exercise due care in accepting the valuation for the property. If any irregularities are found in fixing the price of the property, the plea of limitation cannot protect the interest of the wrong-doers and save the sale from being set aside. It would be appropriate to incorporate paragraph 44 of the said decision:

“44.In the present case, I am constrained to hold that the learned Judge of the Executing Court had blindly accepted the valuation supplied only by the decree holder in respect of the valuable house property and such blind acceptance of the valuation by the Court should be considered as gross carelessness on the part of the Court, No publication of sale was admittedly, made by the decree holder even though the same is mandatory under Order 21, Rule 67. The shockingly low value in respect of the house property itself is an ingredient of fraud.”

18.On the other hand, the learned Senior Counsel appearing for the second respondent relied on the following decisions.

18.1.In the decision reported in ***AIR 1971 Supreme Court 2337, Radhy Shyam v. Shyam Behari singh***, it was held that no sale shall be set aside on the ground of irregularity or even fraud unless upon the facts proved the Court is satisfied that the applicant has sustained injury by reason of such gularity or fraud. It would be appropriate to incorporate paragraph 8 of the said decision:

“8.Rule 90 of O. XXI of the Code, as amended by the Allahabad High Court, inter alia provides that -no sale shall be set aside on the ground of irregularity or even fraud unless upon the facts proved the Court is satisfied that the applicant has sustained injury by reason of such irregularity or fraud. Mere proof of a material irregularity such as the one under r.. 69 and inadequacy of price realised in such a sale, in other words injury, is therefore, not sufficient. What has to be established is that there was not only inadequacy of the price but that that inadequacy was caused by reason of the material irregularity or fraud. A connection has thus to be established between the inadequacy of the price and the material irregularity.”

But the above citation is not applicable to the facts of the present case because an amendment has been made by the Allahabad High Court.

18.2.In the decision reported in ***AIR 1980 Madras 123, A.P.V.Rajendran v. S.A.Sundararajan and Others***, it was held that if the sale is sought to be set aside on the ground of material irregularity in publishing and conducting the sale within the meaning of Order 21 Rule 90, then Section 47 cannot come into play at all, and the sale could be set aside only by invoking Order 21 Rule 90. Hence, the learned Senior Counsel would submit that application made under Section 47 CPC is not maintainable.

18.3.In the decision reported in ***AIR 1981 Supreme Court 693***,

S.A.Sundararajan v. A.P.V.Rajendran, it was held that Order 21 Rule 90 is applicable. It would be appropriate to incorporate paragraph 6 of the said decision:

“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 proceedings 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's case (supra) the question which this Court was called upon to consider was whether non-compliance with s. 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.”

18.4. In the decision reported in ***AIR 2000 Supreme Court 3402, Sri Ram Maurya v. Kailash Nath and others***, it was held that without pleadings no evidence can be looked into. The learned Senior Counsel drawn my attention to paragraph 6 of the petition in this regard.

“6. The petitioner submits that taking advantage of the exparte decree passed in the above matter, the 1st respondent has filed the execution petition for auction of the petition mentioned properties and for realisation of the decree amount. But in fact, the 1st respondent has not made any proper publication for sale of the petition mentioned properties and that therefore the 1st respondent has abused the process of law and thereby the sale held is not a valid one.”

The above pleading will clearly indicate that only Order 21 Rule 90 CPC can be invoked. It is also pertinent to note that except this pleading nothing has been mentioned to show that the sale is void.

18.5. In the decision reported in ***AIR 2001 Supreme Court 2220, Rajender Singh v. Ramdhar Singh and others***, it was held that mere inadequacy of price is not a ground for setting aside the Court sale. It would be

appropriate to incorporate paragraph 17 of the said decision;

“17.The other ground for setting aside the same is the inadequacy of the price. The respondents have not alleged any fraud or material irregularity in the conduct of the Court's auction sale, whereby they suffered injustice. Mere inadequacy of the price is not a ground for setting aside the Court sale, That finding of the learned Judge also is not sustainable in law.”

18.6.In the decision reported in **1997-3-L.W.835, A.Kuppusamy Mudaliar v. G.Subramania Mudaliar**, it was held that when sale is impeached on the ground of irregularity in sale proclamation and conduct of sale, it is Order 21 Rule 90 that applies and not Section 47 CPC. It would be appropriate to incorporate the relevant portion in paragraph 28 of the said decision.

“28.Even in the present application, petitioner has not averred that the non-mentioning of the door numbers of the shops has materially affected the sale. The only contention that is raised is, that the description of the property furnished in the sale warrant as well as sale certificate are not correct. Even though there is an allegation that the order of attachment was not affixed in the Municipal Office at Thiruvannamalai, P.W.1 does not speak about it. In the evidence of P.W.1, he only says that there was no tom tom in the conduct of sale. No such allegation was made in the petition. As it stands, a major part of the evidence and the main contention that is raised in the application is the so called irregularities in the sale proclamation and conduct of the sale. In this connection, it may also be noted

that the very same respondent filed an application under Order 21 Rule 90, CPC for setting aside the sale on the very same grounds. This Court directed him to furnish security, and the same was not accepted. It is on the very same ground, the present application was also filed, though under Section 47, CPC. When a sale is impeached on the ground that there is an irregularity in the sale proclamation and conduct of the sale, it is Order 21 Rule 90 CPC that applies and not Section 47 CPC. In the decision reported AIR 1964 SC 1300 (Dhirendra Nath v. Sudhir Chandra), their Lordships said that if certain statutory conditions are inserted by the Legislature simply for the security or benefit of the parties to their actions themselves, and no public interests are involved, such conditions will not be considered as indispensable, and either party may waive them without affecting the jurisdiction of the Court. In that case, their Lordships said that any irregularity in the conduct of sale can also be waived, and there is no question of any public policy involved. Even though the provisions of Order 21 Rule 90 CPC are prima facie mandatory, any sale conducted on the alleged irregularity is liable to be set aside under that Rule, for, it is not a nullity.”

18.7. The learned Senior Counsel relied on the decision reported in **2004 (1) CTC 10, UCO Bank, Represented by its Branch Manager v. Dr. Ugra Pandian and others** and submitted that an application under Order 21 Rule 90 CPC has to be filed within a period of 60 days from the date of sale as

contemplated under Article 127 of Limitation Act. It would be appropriate to incorporate paragraphs 9 and 13 of the said decision:

“9. To file an Application under Order 21, Rule 91 of the Code, limitation is contemplated under [Article 127 of the Limitation Act](#). In the present case, though the sale was held on 14.3.1990 and confirmed on 11.6.1990, the Application was filed only on 24.7.1990. As contemplated under [Article 127 of the Limitation Act](#), the said Application should have been filed within 60 days from the date of sale. But, in this case, admittedly, the Application was filed, after four months.

13. The auction purchaser takes the risk and bear the loss if it is found that the property sold does not belong to the judgment-debtor. Merely because the judgment debtor has no saleable interest in the property which was sold in the Court auction sale, it cannot be said that it is void insofar as the purchaser is concerned. But, Order 21, Rule 91 of the Code is an exception to the general principle which enables the Court auction purchaser to approach the Court to set aside the sale on the ground that the judgment-debtor has no saleable interest. But such Application cannot be sustained after confirmation is made. In the present case, the sale was confirmed on 11.6.1990. Even if the judgment-debtors had no title to the property in question, the remedy could be availed of, before the sale was confirmed. If want of title is discovered after the Court auction sale is confirmed, then the Court auction purchaser has no remedy under the Civil Procedure Code. Such a view has been

taken by the learned Judge of this Court in the decision In Butchi Raddi v. Suryaprakasa Rao, 57 LW 541.”

18.8. For the very same proposition, the learned Senior Counsel relied on the decision reported in **2009 (4) CTC 360, The Secretary, Tamil Nadu State Transport Corporation v. Chellathankam**, wherein it was held that the application to set aside the sale was filed beyond a period of 60 days from the date of sale and therefore, it is barred by the provisions of Article 127 of the Limitation Act, 1963. It would be appropriate to incorporate paragraph 29 of the said decision:

“29. In E.P.No.30 of 2001 in O.S.No.54 of 2000, the auction has been taken place on 21.11.2001. The revision petitioner/ third party has filed E.A.No.422 of 2002 on 05.09.2002. However, auction has been confirmed on 18.02.2002. As per Article 127 of the Limitation Act, to set aside a sale in execution of a decree, including any such application by a judgment-debtor, the period of limitation prescribed is sixty days from the date of sale. Admittedly, in the case on hand, E.A.No.422 of 2002, has been filed on 05.09.2002 before the Lower Court nearly after six months and eighteen days from the date of confirmation of sale on 18.02.2002.”

19. Considering the facts of the present case in the light of the decision reported in **AIR 1980 Madras 123, A.P.V.Rajendran v. S.A.Sundararajan and Others** relied on by the learned Senior Counsels appearing for the revision

petitioner as well as the second respondent, it can be safely concluded that only the application under Order 21 Rule 90 is maintainable.

20.The next contention raised by the learned Senior Counsel appearing for the revision petitioner is that the sale proclamation was not published.

21.It is pertinent to note that as the execution petition came to be filed, notice under Order 21 Rule 66 CPC was ordered with copy to the petitioner returnable by 06.11.2006. However, as R1 was absent on 06.11.2006, fresh notice was ordered to the respondent through Court and the matter was posted on 05.12.2006. Since the respondent was absent and not found, the matter was adjourned and it was ordered for publication in one issue of tamil daily 'Kalaikathir'. Even after the same, since the respondent was called absent, he was set exparte and settlement of proclamation by 06.03.2007. Thereafter, settlement of proclamation has been done and the matter was adjourned to 03.08.2007.

22.On perusal of the typed set of papers would show that the property was attached before judgment and on filing of the execution petition, notice under Order 21 Rule 66 CPC was issued. Since he was absent, he was set exparte. Hence, the property was sold on 27.09.2007 after following due

procedures in accordance with law and the same was also confirmed. Thus, the mandatory provision has been followed by the Court and hence, there is no illegality or irregularity committed by the executing Court while conducting the auction and confirming the sale.

23. In such circumstances, I am of the view that the argument advanced by the learned Senior counsel appearing for the revision petitioner that no notice has been issued does not merit acceptance. Further, as per the decision reported in *AIR 1980 Madras 123, A.P.V.Rajendran v. S.A.Sundararajan and Others*, if the sale is sought to be set aside on the ground of material irregularity in publishing and conducting the sale within the meaning of Order 21 Rule 90, then Section 47 cannot come into play at all, and the sale could be set aside only by invoking Order 21 Rule 90. So, the revision petitioner/judgment debtor ought to have filed an application within a period of 60 days from the date of sale, as per Article 127. But the sale was conducted on 27.09.2007 and the present application came to be filed only on 18.04.2009. Hence, I am of the view that only in order to circumvent the period of limitation, the revision petitioner/judgment debtor has filed the application under Section 47 CPC. Therefore, the petition filed under Section 47 CPC is not maintainable.

24.Further, the revision petitioner in his evidence has categorically stated that he is aware of the fact that the sale has been conducted within one month from the date of auction. But instead of filing application under Order 21 Rule 90 CPC, he has filed the present application under Section 47 CPC, after a time period of 1 ½ years. So, on the date of filing of the said application, the revision petitioner was not having any right or interest over the property. So, the executing Court has rightly considered the same and came to a correct conclusion. Hence, I do not find any reason to interfere with the finding of the executing Court.

25.In view of the above stated facts and circumstances, the impugned order dated 06.11.2015 made in E.A.No.136 of 2009 in E.A.No.277 of 2008 in E.P.No.292 of 2006 in O.S.No.656 of 2002 on the file of the learned First Additional Subordinate Court, Erode is hereby confirmed and the Civil Revision Petition stands dismissed. Consequently, connected miscellaneous petition is closed. No costs.

10.02.2017

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R.MALA, J.

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Pre-Delivery order made in
C.R.P.(NPD).No.1097 of 2016

Dated : 10.02.2017