THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.6167 of 2016

ORDER:

This petition under Section 115 of Code of Civil Procedure is filed challenging the order in E.A.No.89 of 2016 in E.P.No.109 of 2000 in O.S.No.59 of 2000, dated 22.11.2016, passed by the Principal Junior Civil Judge, Kovur, Nellore District. The petitioner before this Court was the petitioner before the executing Court i.e. Principal Junior Civil Judge, Kovur. He filed petition under Section 47 read with Section 151 CPC to set aside the sale of E.P. schedule property, in the auction held on 10.06.2002 in E.P.No.109 of 2000 in O.S.No59 of 2000, in view of the material irregularities or fraud in publishing the sale proclamation or conducting the sale from time to time.

2. It is alleged in the affidavit filed along with the petition that the 1st petitioner is the obstructor, petitioners 2 and 3 are her daughters and she is the J.Dr. in the main E.P. The 1st respondent before this Court/DHr obtained a decree dated 16.10.2000 for recovery of Rs.51,600/- against her. The 1st respondent /DHr filed E.P.No.109 of 2000 in O.S.No.59 of 2000 on 10.11.2000 for realization of decretal amount of Rs.51,600/- together with interest and costs which comes to Rs.58,464.50p, under Order XXI Rules 54, 64 and 66 of CPC, obtained the order of attachment of immovable property under Order XXI Rule 54 on 20.11.2001. As a matter of fact, the 1st respondent/DHr did not obtain market value certificate as on 16.10.2000 pertaining to the schedule property, which is mandatory but deliberately under valued the E.P. schedule property only for meagre amount of Rs.25,000/- and the Amin value was shown as Rs.50,000/- without giving

sufficient time for publication of proclamation of sale in E.P. schedule property on 10.06.2000. The sale was held with utmost haste. The value of the schedule property in the open market as on 10.06.2000 might be Rs.15,000/- to Rs.20,000/- as per the Basic Value Register but without insisting upon the production of valuation certificate as per Basic Value Register and without fixing upset price on correct lines, the sale was conducted as official formality which resulted in serious irregularities and illegalities amounting to fraud, which caused substantial injury to the petitioners.

3. The 1st petitioner was the absolute owner of the E.P. Schedule property as on 09.04.1992 by virtue of registered sale deed executed by Kedari Subbamma in her favour bearing Document No.201/1992 and continued as owner thereafter till 23.07.2007, prior to confirmation of sale, she executed a registered settlement deed bearing Document No.1672/2007 in favour of her husband Kedari Srinivasarao, and transferred the property in his name including delivery of actual possession thereafter. The said Kedari Srinivasarao died subsequently intestate on 31.05.2008 leaving behind the petitioners as legal heirs who succeeded the estate including the schedule property and therefore the confirmation of sale of property without impleading legal heirs of the deceased Kedari Srinivasarao is a serious irregularity.

4. One Madrasu Changaiah filed E.A.No.342/2008 under Section 47 read with Order XXI Rules 97, 98 and 101 of CPC to set aside the sale by deciding the salable interest of 2nd respondent therein i.e., the 1st petitioner herein in the E.P.schedule property. Along with the said petition E.A.No.162 of 2011, in E.A.No.263 of 2008 in E.P.No.109 of 2000 in O.S.No.59 of 2000 was filed for stay of delivery of E.P. Schedule property to the legal heirs of the

deceased auction purchaser in E.A.No.263 of 2008. E.A.No.342 of 2008 was dismissed by the executing Court on 27.08.2009. Aggrieved by the order, Madrasu Chengaiah preferred CRP No.4768 of 2009 on the file of this Court and the same was dismissed on 28.09.2015. The stay continued till 18.12.2015 and also in view of pendency of CRP No.4768 of 2009, the E.P. proceedings were in dormant condition.

5. One Gorre Rangaiah, the DHr was the brother in law (sister's husband) of the auction purchaser of Vengara Nageswararao, who is the 2nd respondent herein and the father of the respondents 3 and 4, deliberately colluded together by entering into conspiracy, intending to grab the E.P. schedule property at a cheaper rate though the E.P. schedule property costs about Rs.3,00,000/- as per the Basic Value Register and costs about Rs.4,00,000/- if it is sold away in an open market at present.

6. The sale of the property was stage-managed and for realization of Rs.54,000/- as on 10.06.2002, the entire property was sold and the sale was got confirmed on 27.08.2007, sale certificate was obtained on 14.08.2008 behind these petitioners in collusion with the counsel who was on record by that time and thus the sale of property for Rs.54,000/- caused substantial loss to the petitioners and that in view of the illegalities and irregularities, the sale is liable to be set aside and prayed to set aside the same exercising powers under Section 47 of the CPC.

7. The respondents 3 and 4 filed counter affidavit before the trial Court, the legal heirs of the deceased auction purchaser, the 2nd respondent before the executing Court, denying the material allegations, inter alia contending that E.A.No.2 of 2015 in E.P.No.109 of 2009 was dismissed by the trial Court with exemplary costs of Rs.3,000/- but without depositing the same, a revision was preferred before the High Court, which ended in dismissal; as

such the J.Dr. is not entitled to file an application under Order XXI Rule 26 after a lapse of 16 years and similarly an application under section 47 and 151 CPC is not maintainable as the petitiones lost their claim in a petition under Rules 89 or 90 of Order XXI CPC, after a lapse of 60 days which was hopelessly barred by limitation and it was dismissed. The C.R.P. along with the C.R.P.M.P. filed before the High Court was dismissed on 28.09.2015 and another revision petition was dismissed on 17.03.2016 and as such the JDr is disentitled to a third innings before the executing Court by abuse of process of Court and thereby filing of application under Section 47 of CPC after a lapse of 16 years is an abuse of process of Court and therefore, the petitioner is disentitled to claim any relief in the petition.

8. The respondents 2 and 4 denied the alleged market value was between Rs.1,50,000/- to Rs.2,00,000/- as on the date of sale and the valuation certificate is not contemplated anywhere and that the sale was not vitiated by any irregularity and prayed for dismissal of the petition.

9. The respondent/DHr also filed counter independently almost in the lines of respondents 3 and 4. Therefore, I need not reiterate the specific grounds raised by the 1st respondent/DHr, all the respondents prayed for dismissal of petition.

10. During enquiry, on behalf of the petitioners PWs.1 to 4 were examined and marked Exs.P1 and P2. None were examined and no documents were marked on behalf of respondents.

11. After hearing argument of both the counsel, the trial Court dismissed the petition holding that when the petitioners lost their remedy under Order XXI Rule 90 vide E.A.No.209 of 2002 filed by her henchmen Madrasu

Chengaiah in E.A.No.342 of 2008 and the petition is not maintainable at this stage, after 16 years of sale of property.

12. Aggrieved by the order passed by the trial Court, the present revision petition is filed on various grounds.

13. The main grounds urged before this Court are:

(a) The irregularity committed by the executing Court in sale of the property occasioning failure of justice and causing irreparable injury to the revision petitioners while dismissing E.A.No.89 of 2016 and also failed to take note of the petitioners failure to participate in Order XXI Rule 66 of CPC proceedings which amounts to violation of principles of natural justice, while bringing the property for sale on 10.06.2002.

(b) The executing Court also did not insist for production of market value certificate as per Basic Value register which is an essential document to sell the property in the Court auction for realization of decretal amount and without insisting compliance of such formality, sold the property in the Court auction for realization of decretal amount.

(c) It is further contended that the market value certificate of property sold in EP was fixed by the Sub-Registrar as Rs.3,54,000/-, whereas on the date of sale i.e., on 10.06.2002, the market value was Rs.1,16,540 which is one time higher than the amount due to the respondents under the decree; and thus the executing Court failed to consider the market value fixed by the sub-registrar.

(d) The executing Court failed to consider the evidence on record in proper perspective and committed serious error, dismissed the petition and prayed to set aside the impugned order.

14. During hearing, the learned counsel for the petitioner Sri K.S. Gopalakrishnan, contended that though the petition is filed under Order XXI Rule 90 CPC which ended in dismissal on the ground of limitation, the petition under Section 47 CPC which deals with execution, discharge and

satisfaction and when the execution proceedings itself are illegal, the Court can set aside the order exercising powers under Section 47 of CPC. The learned counsel placed reliance on the judgment of the Apex Court in Desh Bandhu Gupta v. N.L. Anand and Rajinder Singh[1], to contend that under Section 47 of CPC, 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 XXI Rule 90. Sub rule (1) thereof covers the field of material irregularities or fraud in publicity or conducting the sale and proclamation are covered by Section 47 CPC and on this ground alone, the sale is liable to be set aside by exercising power under Section 47.

15. He also placed reliance on another judgment of Division Bench of Kerala High Court in Babu John v. A.K. Ramakrishnan and another[2], dated 18.03.2016; and an unreported judgment of this Court in C.Doraswamy Naidu v. D. Kannaiah[3], dated 25.10.2013, to support his contention that under Section 47 CPC also, the material irregularities committed in the sale of the property i.e., post sale irregularities can be questioned, and the grounds urged in the petition are all pertaining to post sale irregularities which vitiate the sale of immovable property in the court auction and thereby the petitioners are entitled to get the sale annulled or set aside invoking Section 47 of CPC.

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[1] 1994 SCC (1) 131
[2] FAO No.306 of 2013
[3] CRP No.3720 of 2013

16. Whereas, Sri P. Rajashekar, learned counsel for the respondents contended that when a petition is filed under Order 21 Rule 90 of CPC, the petitioners cannot invoke Section 47 of CPC, file another application and it is an abuse of process of Court, therefore the petition is not maintainable and liable to be dismissed *in limini* therefore, the execution Court dismissed the petition. In support of his contention, the learned counsel placed reliance on the judgment of this Court in E. Aruna v. Vemala Sreenu and others[4]; the judgment of Madras High Court in S.A. Sundararajan v. A.P.V. Rajendran[5]; and a judgment of Kerala High Court in Mohammed Khan and another v. Graceamma Philip and others[6]. On the strength of the principles laid down in the judgments referred above, the counsel sought to dismiss the petition by affirming the order passed by the Court below.

17. Considering rival contentions, and perusing the material on record, the sole point that arises for consideration of this Court is :

> *Whether a petition under Section 47 of CPC can be maintained to set aside or annul the sale held in the Court auction for realization of decretal amount when a petition under Order 21 Rule 90 was filed and dismissed, if so, whether this Court can decide the alleged illegalities or fraud committed in sale of property, and, whether the sale can be annulled or set aside by exercising power under Section 47 CPC.*

<u>In Re. POINT:</u>

18. The admitted facts of the case are that the 1st petitioner is the JDr against whom the 1st respondent DHr obtained a decree for realization of Rs.51,600/- on 16.10.2000 and filed E.P. for realization of decretal amount in

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[4] 2015 (5) ALD 676
[5] AIR 1981 Supreme Court 693
[6] AIR 1998 KERALA 201

E.P.No.109 of 2000 on 10.11.2000 under Order XXI Rules 54, 64 and 66 of CPC, the attachment under Section 64 of CPC was effected long prior to filing of this petition i.e., 20.11.2001 after following necessary procedure, the proclamation was made on 10.06.2002 and the sale was conducted for realization of decretal amount. The petitioner admittedly filed an application under Order XXI Rule 90, also one Madrasu Chengaiah filed E.A.No.342 of 2008 under Section 47 read with Order XXI Rules 97, 98 and 101 of CPC. All these petitions ended in dismissal by the executing Court and also by this Court. The E.A. filed by this petitioner was also dismissed on the ground that it is barred by limitation which is confirmed by this Court in revision.

19. Section 47 of CPC deals with the questions to be determined by the Court executing decree. 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. Sub-section 2 was omitted by Act 104 of 1976 with effect from 01.02.1977. 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. Explanation I thereto made it clear that for the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit. Explanation II further specified that a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.

20. In view of the specific language used in Section 47(1) i.e., relating to execution, discharge and satisfaction, it is clear that the executing Court can decide the executability i.e., enforcement of the decree, discharge or satisfaction of the decree.

21. In the present case, the petitioner pointed out certain irregularities, illegalities and fraud in the sale conducted by the Court. What is "execution" is not defined anywhere in the CPC. But the apex Court while dealing with limitation for execution of the decree in Hameed Joharan (D) and Ors. v. Abdul Salam (D) by LRs. and Ors.[7], had occasion to define the word "execution". Execution means enforceability of a decree. But in the present case, the executability of the decree is not the question, but the alleged fraud or irregularities or illegalities committed in sale of the property are in question. Therefore, virtually, the questions raised before this Court are not pertaining to execution, strictly speaking.

22. The Apex Court in the Judgment in Hameed Joharan (referred supra), had an occasion to advert to the definition of the word "enforce" in Black's Law Dictionary. The word enforce in common acceptation means and implies "compel observance of" (vide Concise Oxford Dictionary) and in Black's Law Dictionary" "enforce" has been attributed a meaning "to give force or effect to; to compel obedience to" and "enforcement" has been defined as "the act or process of compelling compliance with a law, mandate or command". In ordinary parlance, "enforce" means and implies "compel observance of". *Corpus Juris Secundum* attributes the following for the word "enforce":

> "ENFORCE In general, to cause to be executed or performed, to cause to take effect, or to compel obedience to, as to

[7] (2001) 7 SCC 573

> enforce laws or rules; to control; to execute with vigor; to put in execution; to put in force; also to exact, or to obtain authoritatively. The word is used in a multiplicity of ways and is given many shades of meaning and applicability, but it does not necessarily imply actual force or coercion. As applied to process, the term implies execution and embraces all the legal means of collecting a judgment, including proceedings supplemental to execution.

23. The past tense or past participle "enforced" has been said to have the same primary meaning as "compelled". The language used by the legislature in Article 136 of Limitation if read in its proper perspective to wit: when the decree or order becomes enforceable must have been to clear up any confusion that might have arisen by reason of the user of the expression 'the date of the decree or order which was used in the earlier Act. The intention of the legislature stands clearly exposed by the language used therein viz., to permit twelve years, certain period from the date of the decree or order. It is in this context that a decision of the Calcutta High Court in the case of Biswapati Dev v. Kennsington Stores and Ors, AIR (1972) Calcutta (2) - the learned Single Judge in no uncertain terms expressed his opinion that there cannot be any ambiguity in the language used in the third column and the words used therein to wit: 'when the decree or order becomes enforceable' should be read in their literal sense. 'We do feel it expedient to lend our concurrence to such an observation of the learned Single Judge of the Calcutta High Court. The requirement of the Limitation Act in the matter of enforcement of a decree is the date on which the decree becomes enforceable or capable of being enforced-what is required is to assess the legislative intent and if the intent appears to be otherwise clear and unambiguous, question of attributing a different meaning other than the literal meaning of the words used would not arise. It is in this context, we

also do feel it inclined to record our concurrence to the observations of the full Bench of the Bombay High Court in Subhash Ganpatrao Buty v. Maroti Krishnaji Dorlikar, AIR (1975) Bom. 244. The Full Bench in the decision observed:

> "......it is the duty of the Court to interpret the language actually employed and to determine the intention of the legislature from such language and since there is no ambiguity about the language actually employed, neither the recommendation of the Law Commission nor the a ms and object as set out in the Statement of Objects and reasons can be brought in and or can be allowed to influence the natural and grammatical meaning of the Explanation as enacted by the Parliament".

24. In view of above, the definition of the word "enforceable", means executability. But in the present case, it is not the question of enforceability of decree i.e., executability of the decree but it is the question of alleged irregularities, fraud etc allegedly committed in sale of the property.

25. Almost all the grounds urged are based on the alleged illegalities in bringing the property for sale. But the petitioners questioned the illegality in effecting attachment under Order XXI Rule 54 CPC but not questioned the irregularity or illegality in settlement of the terms of sale and proclamation. Since, the Court below did not insist upon the petitioners to produce certificate of valuation from the registry, but no such procedure is contemplated in the entire CPC or Civil Rules of Practice, directing the DHr to produce valuation certificate but in normal course along with the sale papers, the DHr is required to produce encumbrance certificate and House Tax demand registration extract issued by either Panchayat or Municipality or Corporation depending upon location of the property but the only question raised before the executing Court and this Court is that non-production of

valuation certificate issued by the sub-registrar is a serious irregularity as the value of the property by the date of sale is more than Rs.1,00,000/-.

26. When the law did not contemplate such procedure for production of valuation certificate along with the sale papers, it cannot be described as an irregularity or illegality or fraud in bringing the property for sale. Even otherwise, the petitioner contested the execution proceedings at different levels and even at the time of settling the terms, summons were served for settling the terms but she did appear either personally or through her counsel but later engaged a counsel, on the date of sale she was represented by a counsel and her husband were also present. On the date of sale, the petitioners did not raise any objection, moreover, no petition was filed under Order XXI Rule 89 of CPC at least by depositing the E.P. amount and costs as permitted by the provisions of CPC. But at the time of confirmation of sale, one Madrasu Chengaiah filed an application under Section 47 read with Order XXI Rules 97, 98 and 101 of CPC to set aside the order of dismissal. He filed a petition for execution of sale made in favour of Chengaiah and more curiously, it is her contention that she executed agreement of sale in favour of her husband before confirmation of sale.

27. The conduct of petitioners clinchingly establishes that she is abusing the process of Court in different ways and means, in obstructing the 1st respondent herein to realize the decree debt and the present petition was filed after a lapse of 14 years from the date of auction and till date she is making sincere attempt to deprive the auction purchaser to enjoy the property, either by the auction purchaser who died during the pendency of the proceedings or by his legal heirs who are impleaded as respondents 3 and 4 in the petition before this Court.

28. The main endeavour of the petitioner is that the irregularities are: (1) non production of valuation certificate from the competent authority which is not mandatory as discussed by me; (2) the other irregularity complained is that she was not served with any sale notice, to be present at the time when the sale was held and; (3) the fraud committed in the sale of the property.

29. As seen from the order under challenge, a notice was served on the respondent under Order XXI Rule 66 for settling the terms of sale and she did not appear before the Court initially and later engaged a counsel on her behalf as observed by the executing Court and her husband was present at the time of auction in the Court hall and the JDr was represented by the counsel engaged by them as observed in paragraph 16 of the order of the Court below.

30. Therefore, the allegation that no notice was issued to her at the time of sale is a bare lie and on that ground the sale cannot be set aside. More so, she was represented by her counsel and her husband was also present in the Court hall at the time of sale of property, as observed in paragraph 16 of the order passed by the Court below.

31. Secondly, on the ground that no notice was given to her for her appearance on the date of sale is not an illegality, more so, when the sale proclamation was made in daily newspaper circulated in the local area. Therefore, on this ground, the sale cannot be interfered.

32. The third ground urged by the petitioner before the executing Court and this Court is fraud. The entire petition is bereft of details of fraud except making an allegation.

33. Section 17 of the Indian Contract Act, defines the word "fraud" as follows:

> 17. "Fraud" defined —"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto of his agent, or to induce him to enter into the contract: —1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) the active concealment of a fact by one having knowledge or belief of the fact; (3) a promise made without any intention of performing it; (4) any other act fitted to deceive; (5) any such act or omission as the law specially declares to be fraudulent.
>
> <u>Explanation —</u>
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> Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

34. Therefore, to constitute a fraud, the petitioner has to plead either of the requirements contained in Clause (1) to (5) of Section 17; and the transaction is designed to defeat the rights of the petitioners, it amounts to fraud.

35. According to Order VI Rule 4 CPC, in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading. Therefore, it is obligatory on the part of these petitioners to plead with the

details of fraud including dates of items if necessary but also adduce evidence in support of those contentions.

36. In the present facts of the case, the only allegation which amounted to fraud pleaded in the petition is non-production of valuation of certificate. But valuation certificate from the sub-registrar is not mandatory and none of the provisions of Civil Rules of Practice mandates production of such certificate to bring property for sale to realise decree debt. Therefore, in the absence of any other details with regard to fraud and proof of it, it is difficult to sustain the contention of the counsel for petitioner that the sale is vitiated by any fraud or irregularities or illegalities.

37. Yet another contention raised by the counsel for the respondents is that when the petitioners filed an application under Order XXI Rule 90 CPC for setting aside the sale, which ended in dismissal, the petitioners are not entitled to raise same grounds before this Court in a petition filed under Section 47 of CPC.

38. No doubt the petitioners filed a petition under Order XXI Rule 90 CPC, which was dismissed, on the ground of limitation on 17.03.2016 and that order was carried in revision before this Court, which also ended in dismissal. A copy of the said petition filed under Order XXI Rule 90 is not placed on record, however, Order XXI Rule 90 deals with setting aside the sale on the ground of irregularity or fraud in publishing or conducting it unless upon the facts proved that the Court is satisfied that the applicant has sustained substantial injury on the ground of substantial irregularity or fraud.

39. Thus, where the property was attached and the sale was held, confirmed and the sale certificate was issued, when application for delivery of property was made to the executing Court, issued a warrant of delivery; the

petitioner started causing hindrance to the proceedings to the legal heirs of auction purchasers in different ways and means.

40. When the petitioners filed an application under Order XXI Rule 90 of CPC to set aside the sale complaining the illegalities and irregularities and fraud in conducting the sale and the same was dismissed by the trial Court, the petitioners are not entitled to raise the same ground in the petition filed under Section 47 of CPC.

41. Learned counsel for the petitioners Sri Gopala Krishnan while contending that pre-sale irregularities can be decided only in a petition filed under Section 47 CPC and post sale irregularities can be raised only in a petition filed under Order XXI Rule 90 CPC and drawn the attention of the Court to the judgment of Desh Bandhu Gupta (referred supra). In para 17 of the judgment, the Supreme Court held as follows:

> 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.

42. In view of the law declared by the Division Bench of the Apex Court, if the illegality or irregularity pointed out by the petitioners pertains to pre-sale of immovable property, such questions can be decided in a petition filed under Section 47 CPC. Same view was expressed by Kerala High Court in Babu John (referred supra), and held in paragraph as follows:

> 19. Subsequently, a Division Bench of this Court had also occasion to consider a similar case in P.K.Kuruvilla v. Corporation Bank [2008 (1) KHC 258], where, it was held thus:
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> "22. It is true that the Execution Petition was filed long back. It may also be true that the judgment debtor tried to protract the execution proceedings. But that is not a ground for selling the property of the judgment debtor without complying with the mandatory requirements of law. The court could effectively prevent the judgment debtor from protracting the proceedings. Even a judgment debtor who tried to protract the proceedings, is entitled to contend that he lost his property in a court action sale which was held in flagrant violation of mandatory procedural requirements and safeguards, and impugn such sale on those grounds. It is relevant in this context to note that in the earlier round of litigation, namely, C.M.A. No. 161 of 1997, the appellant offered to deposit Rs.Ten lakhs and the amount was deposited."

43. Similarly, this Court also in unreported judgment in C.R.P.No.3720 of 2013 while considering the law laid down by various judgments, with the

approval of principle laid down in A. Narassayya v. M. Subba Rao[8] has held that the sale can be set aside by exercising power under Section 151 of CPC.

44. In view of the law declared by the Apex Court in Desh Bandhu Gupta (referred supra), a pre-sale irregularity can be adjudicated in a petition under Section 47 CPC.

45. Whereas the learned counsel for respondent Sri Rajashekar would draw the attention to the judgment of Madras High Court in A.P.V. Rajendran v. S.A. Sundararajan (AIR 1980 Madras 123), a full bench of the Madras High Court had an occasion to deal with a similar situation and was of the view that irregularities and defects pertaining to pre-sale would also fall within the Order XXI Rule 90 of CPC. This view is affirmed by the apex Court in S.A. Soundararajan v. A.P.V. Rajendran (AIR 1981 SC 693). The apex Court in paragraph 7 of the said judgment held as under:

> Our attention has been invited by the appellant to the Madras amendment made in 1952 in rule 66 of Order XXI where by a new sub-rule (2) has been substituted for the original provision. It has not been shown to us, however, that the substituted provision makes any material difference so far as the point under consideration is concerned. It is urged that an opportunity has been provided under the substituted provision to a judgment-debtor to participate in the drawing up of the sale proclamation, and therefore there is no further right to complain against the sale proclamation under rule 90 of Order XXI. But that right was also available in somewhat similar terms under the original provision. Whether or not a judgment-debtor, to whom notice has been issued under rule 66 of Order XXI to participate in the proceeding and who does not do so, should be permitted thereafter to

[8] CRP No.3720 of 2013

> challenge the sale under rule 90 of Order XXI, is a matter to be determined by other considerations. It is sufficient to point out that the application for setting aside the sale on the grounds taken by the appellant is referable to rule 90 of Order XXI, and, therefore, not to S.47.

46. This view is also supported by judgment of Kerala High Court in Mohammad Khan and others v/s. Graceamma Philip and others[9], in paragraphs 8 of 9 which read as under:

> 8. In the affidavit filed by the decree-holder on 14-10-1985 he had sought permission for the Court to bid at the auction in the case there are no others to purchase the attached property in the Court auction. The decree-holder was allowed to bid. Therefore it is not correct to say that the decree-holder did not seek leave of the Court, and he bid and brought the property without permission, as there was no objection from the judgment-debtors till the filing of the present petition. Order XXI, Rule 72(3) enables the judgment-debtor or any other person whose interests are affected by the sale to apply to the Court to set aside the sale if the decree-holder purchases the property by himself without permission of the Court. As there was no objection for the sale on 20-1-1988 sale has been confirmed on 25-2-1988, it has to be held that the petitioners have their objection and cannot be allowed to raise this objection nearly after 10 years of the sale. It is found that notice under Order XXI, Rule 66, C.P.C. was issued to the petitioners on 15-10-1989. The notice was accepted by the petitioners and they did not care to file any objection following which the proclamation was made and properties were sold on 20-1-1988. Thereafter also no objection was filed regarding the conduct of the sale and the sale was affirmed on 25-2-1988. Even in this application they do not claim any right, title or interest over the properties sold. Therefore, their con intention that sale was taken without express permission of the Court cannot be sustained.

[9] AIR 1998 KERALA 201

> 9. In their memorandum of revision it is alleged that the value of the property is considerable and same can be ascertained by sending out a commission. It is also stated that the Court below acted with material irregularity since the property would fetch a price not less than Rs. 1,50,000/-. The approximate value given by the petitioners may be the present value. But the petitioners have brought the property for sale about 10 years back and the property was sold depending upon the market value then. In any event the petitioners who had noticed of the sale on 15-10-1989 and the value of the property at the time of settling the sale proclamation never thought it fit to the object of the valuation at any time. Further they had not filed any application under Order XXI, Rule 90 to set aside the sale on the ground of material irregularity in publishing or conducting it. Therefore, the present application under Section 47, C.P.C. is not bona fide and not maintainable and is time-barred.

47. Same principle of law was followed by this Court in E. Aruna v/s Vemala Sreenu & others[10].

48. The full bench of the apex Court in Shaukat Hussain @ Ali Akram and others v/s Smt. Bhuneshwari Devi (dead) by L.Rs. and others[11], held in paragraph 4 as follows:

> "A judgment-debtor can ask for setting aside a sale in execution of a decree under section 47 C.P.C. and, in special circumstances which attract the provisions of Order XXI rule 90 he may also apply to the court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting the sale provided he further proves to the satisfaction of the court that he has sustained substantial injury by reason of the irregularity or fraud. The application made to the executing court in the present case

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[10] 2015 (5) ALD 676

[11] AIR 1973 SC 528

by the judgment-debtors was not one under Order XXI rule 90 C.P.C. That is conceded by Mr. Chagla. Had it been the case that on account of fraud or material irregularity in conducting the sale, the sale required to be set aside, evidence would have been led on the point and there would have been a clear finding as to the substantial injury. The judgments of all the three courts proceed entirely on the basis that the application was one under section 47 C.P.C. and not under Order XXI Rule 90 C.P.C. They do not deal with the question of- material irregularity or fraud in the conduct of the sale, nor do they deal with the injury caused to the judgment-debtors. The only question which was agitated before the courts was whether the sale was illegal in view of the fact that the execution proceedings had taken place during the existence of a stay issued by a competent court. It was also common ground that the stay issued by the Munsif was an Order passed under Order XXI Rule 29 C.P.C. The first two courts held that the stay was in existence when the execution proceedings ended in the sale while the High Court held that factually it was so because the sale took place on 6-8-1963, the stay, if any, having ceased to operate after 5-8-1963. The High Court further pointed out that the stay under Order XXI Rule 20 issued by the court of the Munsif Gaya was null and void as it was passed by a court without competence and, therefore, in law there was no legal stay of execution and the sale which took place in due course after attachment and proclamation of sale, was a valid one."

49. If this principle is applied to the present facts of the case that the sale was held despite stay granted by the Court which passed the decree that would not fall under Section 47 but it would fall under Order XXI Rule 90 CPC.

50. The judgment of the full bench of the Supreme Court, after taking into consideration the illegalities committed in a sale of the property can always be a subject matter of a petition under Order XXI Rule 90, but it is explicit

from the language used in Order XXI Rule 90 that the sale can be set aside only for the irregularities in proclamation of sale of property invoking order XXI Rule 90 CPC.

51. But the grounds urged in the present petition is not pertaining to irregularities in publication and conducting of sale but the illegality in bringing the property for sale without furnishing valuation certificate obtained from competent authority before the Court. But to bring the property for sale for realization of decree debt, valuation certificate obtained from competent authority need not be produced and it is not mandatory under law. Therefore, on the ground of non-production of valuation certificate obtained from competent authority, the sale cannot be set aside.

52. The main endeavour of the counsel for petitioners is that when the value of property was more than one lakh as on the date of sale, for realization of Rs.51,600, entire property cannot be sold, and the provisions of CPC under Order XXI Rule 64 made it clear that any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

53. Taking advantage of the language used in Rule 64 of Order XXI CPC, learned counsel contended that when part of the property is sufficient to realise the decree debt, sale of the entire property is an illegality and that this Court in CRP No.3720 of 2013 by relying on A. Narassayya (referred supra), and concluded that where a decree holder appears to have played fraud on the Court in bringing entire property to sale for meager decretal amount, the sale can be set aside, as it is an illegality in view of the statutory obligation cast upon the Court under Order XXI Rule 64 CPC. But this contention was

not raised before the executing Court in the petition filed before the Court, except demonstrating that the value of the property is more as on the date of execution of sale and subsequent to the sale is more than lakh and three lakh and examined PW.3 sub-registrar before the Court. The petitioner had an opportunity to raise the objection when notice was served on the petitioners for settling the terms of proclamation under Order XXI Rule 64 CPC and if such objection is raised before the Court when notice was received, the Court would have passed appropriate orders since the total extent of property is less than 70 Sq.yards and a house built therein. For realization of decretal amount, part of the property cannot be sold in view of the power that conferred on the executing Court under Order XXI Rule 64 CPC. Moreover, when the petitioners failed to raise such objection at the stage when a notice was received under Order XXI Rule 64 CPC, such plea cannot be permitted at this stage, i.e., after sale of the property as the plea of the petitioners is hit by Explanation (4) of Section (11).

54. According to Section 11, “No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.” Explanation 4 thereto made it clear that “any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Further Explanation 7 made it clear that “the provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall

be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

55. Therefore, when the petitioners received notice under Order XXI Rule 64 CPC, he ought to have raised such a defence though it is under the same proceedings and when he failed to raise such objection, he is debarred from raising such issue at a subsequent stage. Therefore, by applying the principle of constructive *res judicata* enunciated under Explanation 4 of Section 11 coupled with Explanation 7, the plea of the petitioners is liable to be rejected.

56. On overall consideration of the material on record, it is evident that the decree was obtained in the year 2000, and filed execution petition during the same year for realisation of decree amount under Order XXI Rules 54, 64 and 66 of CPC for attachment of immovable property and by sale of the same. Auction was held, the sale was confirmed and sale certificate was issued. After execution proceedings, the auction purchaser had expired but till date the petitioners are not permitting to reap the fruits of purchase, atleast by the legal heirs of the deceased auction purchaser and it is a classic case where the petitioners have dragged the proceedings for a substantial period of 18 years by adopting different procedures. It is a classic example which establishes that obtaining a decree is easy and realizing the fruits of the decree became a Herculean task to the Decree holder in view of the procedural impediments contained in the CPC; and filing of such applications one after the other and causing hindrances to the execution of proceedings is nothing but abuse of process of Court and such a person who abuses the process is not entitled to claim any relief.

57. In view of the foregoing discussion, I find no fraud or illegality committed in bringing the property for sale, and the sale is not vitiated. Consequently, the sale cannot be set aside even by invoking Section 47 CPC. Hence, I find no merits in the revision petition and the same is liable to be dismissed.

58. Accordingly, the civil revision petition is dismissed with costs of Rs.5,000/-, affirming the order passed by the trial Court in the E.A.No.89 of 2016 in E.P.No.109 of 2000 in O.S.No.59 of 2000, dated 22.11.2016.

M. SATYANARAYANA MURTHY, J

21st December, 2018

KSM

THE HON' BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.6167 of 2016

21st December, 2018

KSM