



WEB COPY



C.R.P.(NPD).Nos.4092 & 4093 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.07.2024

Coram

THE HON'BLE MR JUSTICE V. LAKSHMINARAYANAN

C.R.P.(NPD).Nos.4092 & 4093 of 2023 &
C.M.P.No.25010 of 2023 &
C.M.P.Nos.2221 & 2225 of 2024

Kumar @ Kumaran

... Petitioner in both C.R.Ps.

-Versus-

1.Bose Ponnambalam
2.Nagarajan
Sadhu Sachidanandam (Died)
3.Kalaiyarasi
4.Mani
5.Karpagam

... Respondents in both C.R.Ps.

Prayer in C.R.P.(NPD).No.4092 of 2023: Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the impugned fair and decretal order dated 14.09.2023 passed in I.A.No.3 of 2022 in C.M.A.No.14 of 2019 by the learned Additional District Judge, Dharmapuri.

Prayer in C.R.P.(NPD).No.4093 of 2023: Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the impugned fair and decretal order dated 14.09.2023 passed in C.M.A.No.14 of 2019 by the learned



C.R.P.(NPD).Nos.4092 & 4093 of 2023

Additional District Judge, Dharmapuri dismissing the said CMA and thereby confirming the fair and decretal order dated 30.08.2019 passed in REA.No.56 of 2017 in REP.No.46 of 2008 in O.S.No.70 of 2005 by the learned Principal Sub Court, Dharmapuri.

For Petitioner : *Mr.Arun Anbumani*

For Respondent 1 : *Mr.Silambanan, Senior Advocate
for Ms.Kavya*

For Respondent 4 : *Mr.N.Manoharan*

COMMON ORDER

C.R.P.No.4093 of 2023 arises against the orders passed by the learned Additional District Judge at Dharmapuri in CMA.No. 14 of 2019 dated 14.09.2023 in confirming the order and decretal order of learned Principal Subordinate Judge at Dharmapuri in REA.No.56 of 2017 in REP.No.46 of 2008 in O.S.No.70 of 2005 dated 30.08.2019.

2. Pending the Civil Miscellaneous Appeal before the learned Additional District Judge, an application was filed by the civil revision petitioner in I.A.No.3 of 2022 under Order XLI Rule 27 to receive the valuation report of the approved valuer, death certificates of one Panjalai and M.G.Sami and their legal heirship certificate, and Panchayat Muchalika dated 17.08.2003. The said



application came to be dismissed, while dismissing the Civil Miscellaneous

Appeal. Hence, C.R.P.No.4092 of 2023.

3. Since both the revisions arise out of a common judgment, they were clubbed together and arguments were addressed on both matters.

4. The undisputed facts leading to these revisions are one Bose Ponnambalam filed a suit for recovery of money of Rs.3,50,000/- before the Subordinate Court at Dharmapuri. This suit was taken on file as O.S.No.70 of 2005. Pending the suit, an application was taken for attachment of the suit schedule mentioned properties in I.A.No.200 of 2005. The said application came to be allowed and an order of attachment was passed. Since the defendant had not contested the suit, the matter ended in an exparte decree on 07.02.2006. To execute this exparte decree, Bose Ponnambalam (hereinafter referred to as “the decree holder”), filed E.P.No.46 of 2008.

5. In order to set aside the exparte decree, an application was taken in I.A.No.436 of 2011. This was an application to condone the delay in filing an application to set aside the exparte decree. Learned Subordinate Judge dismissed the condone delay application against which a civil revision petition



C.R.P.(NPD).Nos.4092 & 4093 of 2023

was preferred in CRP.No.2199 of 2016. The said revision was dismissed on 09.11.2016. To review the order passed in CRP.No.2199 of 2016, review application No.218 of 2017 was filed. This application came to be dismissed on 26.03.2018. Aggrieved by the dismissal, a Special Leave Petition was preferred to the Supreme Court in SLP(Diary) No.20297 of 2018. The said Special Leave Petition was dismissed on 17.01.2020. I am narrating the aforesaid particulars of litigation for the purpose of stating that the decree passed on 07.02.2006 and the attempts to set aside the same had attained finality.

6. Now turning to the execution proceedings, notices were issued in E.P.No.46 of 2008 by the learned Subordinate Judge. Notices were served on 21.07.2008. After having received notices in the execution petition, the judgment debtors remained absent. An order setting them exparte was passed on 18.03.2009. The Executing Court proceeded further with the execution and called for the valuation of the property. Though the attachment was sought for two items of property that came to be attached, the execution proceedings took place only with respect to item No.2 of the execution petition schedule property.



C.R.P.(NPD).Nos.4092 & 4093 of 2023

7. The decree holder valued the property at Rs.7,00,000/-. The test report from the Amin valued item No.2 of the property at Rs.25,00,000/-. Taking into consideration both the values, the court fixed the upset price at Rs.30,00,000/-. The court thereafter ordered the sale. Before the sale could be held, a petition was filed by one M.G.Senthil, the brother of Kalaiyarasi, one of the judgment debtors, under Order XXI Rule 58 of the Code of Civil Procedure.

8. A counter was called for and received in the said application. Thereafter, the learned Subordinate Judge dismissed the claim petition on 03.02.2011. On the very date, the learned Subordinate Judge ordered fresh publication of a fresh proclamation of sale. Pursuant to the said proclamation, an auction was held but there were no bidders. Therefore, the decree holder filed an application in REA.No.41 of 2011 to reduce the upset price from 30,00,000/- to Rs.25,00,000/-. This application was kept pending for a period of nearly five years. On 06.06.2016, the upset price was reduced from Rs.30,00,000/- to Rs.26,00,000/-.

9. In the meantime, the civil revision petitioner filed an application under Order XXI Rule 58 of the Code of Civil Procedure. It was his case that item



C.R.P.(NPD).Nos.4092 & 4093 of 2023

No.2 of the schedule mentioned property belonged to his mother, Panjalai, who

had purchased the property by way of a registered sale deed on 12.12.1971.

Panjalai passed away on 16.02.1997, leaving behind her husband, M.G.Sami and seven children as her legal heirs. It was further stated that M.G.Sami passed away on 08.08.2003, and he was survived by his children born from the wedlock between Panjalai and M.G.Sami.

10. The civil revision petitioner, who is the fifth child of Panjalai and M.G.Sami, stating that since the original owner of the property was Panjalai and the children have succeeded to the estate, filed an application under Order XXI Rule 58 pleading that the judgment debtor was not the sole owner of the property. It was also argued that due to partition in the family of the civil revision petitioner and his siblings, item No.2 of the Execution Petition schedule mentioned property had been allotted to the petitioner and another brother and not to Kalaiyarasi, one of the judgment debtors. Reliance was passed on a panchayat Muchilika dated 17.08.2003 entered into between the children of M.G.Sami and Panjalai. This petition suffered several adjournments from 23.03.2011 to 25.06.2013. On 25.06.2013, since neither the claimant nor his counsel was present, the court was left with no other option than to dismiss



the petition filed under Order XXI Rule 58 for default. The stand that was taken by the decree holder in those proceedings was that the petition under Order XXI Rule 58 is not maintainable since the other brother, M.G.Senthil, had filed a similar petition in REA.No.192 of 2010 and that had been dismissed by the court.

11. I need not be concerned with the objections of the decree holder here but I am noting it for the purpose that the decree holder had due notice of the claim proceedings and had also filed a counter to the same. The records reveal that no application was filed to restore the said claim raised by the civil revision petitioner.

12. Pending the proceedings under Order XXI Rule 58, the judgment debtors filed an application to condone the delay of 1852 days in filing an application to set aside the exparte decree passed on 07.02.2006. This petition was filed on 05.04.2011. As already observed by me in paragraph 5 *supra*, the petition was dismissed and the order of dismissal was confirmed till the Supreme Court.

13. The court, agreeing with the decree holder, reduced the upset price



C.R.P.(NPD).Nos.4092 & 4093 of 2023

for the property from Rs.30,00,000/- as it was originally fixed to Rs.26,00,000/-. Thereafter, the sale was conducted in the execution proceedings. One Mani, who is arrayed as the fourth respondent in these revisions was declared as the successful auction purchaser. The upset price, as pointed out above, had been fixed at Rs.26,00,000/- and the auction purchaser was found successful as he bid a sum of Rs.26,16,000/-. After having got the auction in his favour, the fourth respondent is also said to have deposited the bid amount into the court. Four days before the amount was deposited, the civil revision petitioner filed an application in REA.No.56 of 2017 under Order XXI Rule 90 of the Code of Civil Procedure.

14. During the course of arguments, it was submitted by Mr.N.Manoharan, who is appearing for the auction purchaser, that the civil revision petitioner has also filed a suit in O.S.No.49 of 2018 on the file of the learned Additional District Judge at Dharmapuri seeking declaration of nullity regarding the decree passed in O.S.No.70 of 2005 as well as to set aside the sale and for partition. Mr.N.Manoharan would submit that the said suit had been dismissed for default and an application to restore the suit is pending consideration.



WEB COPY

15. Coming back to the present proceedings, after receiving a counter in Order XXI Rule 90 petition, the learned Subordinate Judge dismissed the petition on the ground that previously an application had been filed under Order XXI Rule 58 and that application having been dismissed on 25.06.2013, the civil revision petitioner cannot get any relief in the petition filed under Order XXI Rule 90. During the course of enquiry in Order XXI Rule 90 petition, both sides did not tender any oral evidence or mark any document.

16. Against the dismissal of the petition under Order XXI Rule 90, an appeal came to be preferred before the learned Additional District Judge at Dharmapuri. The learned Additional District Judge came to a conclusion that the petition to set aside the sale cannot be entertained as objections to the attachment of the said property were not taken before the sale proclamation and as the civil revision petitioner was closely watching the proceedings without agitating his right under Order XXI Rule 58, he is not entitled to file an application under Order XXI Rule 90.

17. The court also held that the plea that the property had been sold for a



meager amount cannot be considered, since the petitioner had not established his right over the property. It also dismissed the petition under Order XLI Rule 27 stating that the rights of the petitioner cannot be decided in the petition under Order XXI Rule 90 and therefore, the documents are unnecessary for the purpose of consideration.

18. Aggrieved by the same, the present civil revision petitions before me.

19. I have heard Mr. Arun Anbumani for the petitioner and Mr.Silambanan, Senior Advocate for Ms.Kavya Silambanan for the first respondent and Mr.N.Manoharan for the 4th respondent.

20. Mr. Arun Anbumani would submit as follows:

(i) The sale was made without a fresh proclamation and therefore, it deserves interference.

(ii) In terms of Order XXI Rule 64 read with Order XXI Rule 66 of the Code of Civil Procedure, the Court had not come to the conclusion that the entire item No.2 has to be sold for the purpose of realization of the debt, which



C.R.P.(NPD).Nos.4092 & 4093 of 2023

was miniscule compared to the value of the property.

WEB COPY

21. The gist of the argument of Mr.Arun Anbumani is that when the decree is only for an amount around Rs.6,00,000/- the alienation of the property worth Rs.26,00,000/-, even as per the valuation of the court, on the date of sale, is excessive. Inviting my attention to the additional typed set of papers enclosing the sale deed for the property, he would urge that on account of the death of Panjalai and M.G.Sami, the petitioner is entitled to one seventh share in the disputed property and this fact had not been brought before the Executing Court.

22. Mr. Arun Anbumani would refer to the sale proclamation in which the encumbrances of the property are found and on that basis, he would argue that the very encumbrance certificate would disclose to the court that apart from Kalaiyarasi, one of the judgment debtors, there are six other persons who are the owners of the property. He would state that this fact had not been captured in the sale proclamation.



23. Mr. Arun Anbumani would refer to a valuation report enclosed in the additional typed set of papers to state that the value of the property which had been sold in the court auction, even if it be a forced sale, would be around Rs.46,75,000/-, whereas in case of a negotiated sale, the market value would be around Rs.62,33,000/-. In addition, he would refer to the guideline value of the property to state that one square feet of the property would be sold for a sum of Rs.1,050/-, whereas the entire property which is to an extent of around 4686 sq. ft., had been sold only for Rs.26,16,000/-.

24. Rejecting this argument, Mr.Silambanan would submit that no document had been filed before the Executing Court in order to prove that the petitioner has a right over the property. He would point out that the entire attempt of the civil revision petitioner is only to protract the proceedings deliberately. He would state that already an application was filed by him under Order XXI Rule 58 and it was dismissed for default, which shows that the petitioner is not a vigilant litigant. He would state that the court must come only to the rescue of the vigilant litigant and not to the rescue of the person who had kept quiet from 2013 till 2017 i.e., from the date of dismissal of the petition under Order XXI Rule 58 till the petition was filed under Order XXI



Rule 90.

WEB COPY

25. Mr.N.Manoharan, in his usual vigorous and persuasive style, would submit that as the previous petition filed by the petitioner herein under Order XXI Rule 58 had been dismissed, it is not open to the petitioner to agitate the very same plea by virtue of Order XXI Rule 90(3). He would state, relying upon Order XXI Rule 90(2) that no sale can be set aside except on the grounds of irregularity or fraud and that too only on these grounds being proved. He adds only if the court is satisfied that the applicant/civil revision petitioner has sustained substantial injury can the sale be set aside. Taking me to the order passed by the learned trial judge, he would state that the petitioner herein did not let in any evidence to substantiate his case and therefore, the question of proof does not arise at all. Mr.N.Manoharan would submit his client is a bonafide purchaser in the auction sale conducted by the court and therefore, the court should lean in his favour and confirm this sale.

26. Mr.N.Manoharan would further plead that on the basis of the following rulings, no interference is necessary in this revision:

(a) ***Jagan Singh and Company vs. Ludhiana
improvement Trust and Others, (2024) 3 SCC 308;*** and



C.R.P.(NPD).Nos.4092 & 4093 of 2023

(b) *Dipali Biswas and Others vs. Nirmalendu*

Mukherjee and Others, 2021 SCC Online SC 869.

WEB COPY

27. I have carefully considered the arguments on either side. I had summoned the records of the courts below on 02.07.2024. I have also gone through the records in detail.

28. The point that I have to decide in these revisions is the interplay between Order XXI Rule 58 , Order XXI Rule 64, Order XXI Rule 66, and Order XXI Rule 90 of the Code of Civil Procedure.

**Dismissal of a petition under Order XXI Rule 58 is not a bar
for petition under Order XXI Rule 90**

29. When a property is attached during the course of a suit or in execution, the court freezes the right of the judgment debtor to alienate the property. The purpose of freezing is to keep the property within the control of the court. In case, the property is not attached and if an order prohibiting a private sale is not passed, then judgment debtor can defeat the interest of the decree holder or the plaintiff by alienating the property and reducing the decree granted by the Court into a mere paper decree. It is for that purpose, the courts



are empowered to grant orders of attachment.

WEB COPY

30. Once an order of attachment is passed, the property comes within the power of the court. If the defendant wants to get over the order of attachment so passed, his remedy is available under Order XXXVIII Rule 9 by furnishing security for the entire amount or to get the suit dismissed. Admittedly in the present case, the judgment debtors neither furnished the security nor did they appear before the Trial Court to contest the case and therefore, it ended in decree and attachment became absolute. In pursuance thereof, the decree holder has taken steps to bring the property for sale.

31. The headache of the decree holder commences only thereafter. Originally he faced the brother of the civil revision petitioner. Thereafter, it was the civil revision petitioner who filed an application under Order XXI Rule 58. Both these applications came to be dismissed for default leaving open to the decree holder to proceed further with execution.

32. The courts below came to the conclusion that since an application under Order XXI Rule 58 had been dismissed, the civil revision petitioner is



not entitled to maintain the application under Order XXI Rule 90. They did not delve deep into the other issues involved in the petition.

33. I have to record that these findings of the courts below are suspect. If an application under Order XXI Rule 58 is allowed, the effect of allowing the claim petition is that it has the same force as that of a decree. If an application under Order XXI Rule 58 at the instance of the brother of the civil revision petitioner or the civil revision petitioner himself had been allowed, the question of the court proceeding with the sale, as it stood, does not arise at all. Therefore, to hold that the dismissal of the petition under Order XXI Rule 58 is a bar for a petition under Order XXI Rule 90 might not be a correct position of law.

34. The reason is that under Order XXI Rule 58, it is a claim made by the third party stating that the property that is brought for sale or that has been attached is not liable for such sale or attachment. Whereas in a petition under Order XXI Rule 90, even if it were the property of the judgment debtor, the court is empowered to set aside the sale on it being satisfied that the sale is vitiated on account of material irregularity or fraud. They operate on two



different planes and on account of the dismissal of petition under Order XXI

Rule 58, the petition under Order XXI Rule 90 cannot be said as not maintainable. By dismissal of petition under Order XXI Rule 58, the claim made by the third party is disallowed. That does not mean that the judgment debtor or any person having interest in the property concedes to the court holding an auction or admits to the aforesaid vices, if any in this sale proceedings, as correct.

Scope of Order XXI Rule 90 of Code of Civil Procedure

35. The scope of Order XXI Rule 90 is on an entirely different field. If the sale has been held, the question of filing an application under Order XXI Rule 58 does not arise. Whereas insofar as Order XXI Rule 90 is concerned, the petition can be filed only after the sale. The grounds on which a petition under Order XXI Rule 90 can be filed are three folds, viz.,

- (a) Material irregularity; or
- (b) Fraud; or
- (c) Both; with respect to the publication or conduct of court auction.

36. The question of attaching the rights of the third party under Order



XXI Rule 90 is beyond the scope of the said application. Further, in terms of

Order XXI Rule 90(2), the court should come to a conclusion that even if there had been a fraud or material irregularity in publishing or conducting the sale, by virtue of the said material irregularity or fraud, there had been a substantial injury that had been suffered by the applicant. Clause 3 of Order XXI Rule 90 is similar to the “might or ought” rule, that is to say, if an applicant under Order XXI Rule 90 could have raised an issue regarding the material irregularity or fraud prior in point of time and does not do so, then he is barred from raising it.

37. Few examples with respect to Order XXI Rule 90(3) are

- (i) misdescription of the property,
- (ii) improper fixation of the value of the property, or
- (iii) an unreasonable reduction in the upset price.

At all these stages, the judgment debtors are put on notice and they should be aware of the material particulars of the said stages. As rightly pointed out by Mr.Silambanan and Mr.Manoharan, the judgment debtors should object that the court should not proceed further on the account of these defects if they find such to exist. If they do not do so and if they keep quiet, they cannot by virtue



C.R.P.(NPD).Nos.4092 & 4093 of 2023

of Order XXI Rule 90(3) turn around and plead that these defects exist in the sale proclamation.

38. Similarly if during the course of sale, any material irregularity occurs and the judgment debtor does not protest against the same, then Order XXI Rule 90 bars him from seeking the sale to be set aside. This discussion puts an end to the first submission of Mr.Anbumani that the upset price had been reduced by a laconic and non speaking order on 06.06.2016 and therefore, the sale must be set aside. The order has been placed before me and all that the order reads as follows:

“R.E.A.No.41/11 in R.E.P.No.46/2008 IN
O.S.No.70/2005

நாள் 06.06.2016

உத்தரவு பகரப்பட்டது

இம்மனு அனுமதிக்கப்பட்டு, மனு சொத்தின் ஏலத்

தொகை ரூ.26,00,000/ என்று நிர்ணயம் செய்து

உத்தரவிடப்படுகிறது. செலவுத் தொகை குறித்து எந்த

உத்தரவும் இல்லை.”

39. Mr.Arun Anbumani is right in his submission that the court must give reasons for the order passed by it. This is because if a revision or an



appeal is preferred as against an order of the court to a superior court, then the superior court, on perusal of the order, must be aware about the reasons for which the lower court had come to the conclusion that it did. The Supreme Court and the High Courts have declared repeatedly that an unreasoned order is not an order at all and does not answer the requirements of law. Yet by virtue of Order XXI Rule 90(3), I will not permit Mr.Arun Anbumani to make this submission before me.

40. This order was passed as early as on 06.06.2016 and no revision had been preferred by the judgment debtors as well as by the civil revision petitioner before this court. Having left that stage of the proceedings go by, it is not open to the judgment debtors or any other person attacking a sale to go back to a stage which had attained finality. *Res judicata* as pointed out by the Supreme Court, not only applies between two separate proceedings but also between two stages of the same proceedings. If a judgment is necessary to elucidate the said proposition, then ***Barkat Ali and Another vs. Badrinarain (Dead) by Legal Heirs, (2008) 4 SCC 615*** can be taken note of. Therefore, I am not convinced with the argument of Mr.Arun Anbumani that the reduction in upset price was without reason and therefore, it requires the interference by the



WEB COPY

Objection to the value of the property must be promptly made after the Executing Court arrives at a value

41. Turning to the next point of Mr.Arun Anbumani on the valuation of the property, on a perusal of the original records, I am able to see that on payment of test batta, a report was sought for from the court Amin regarding the valuation of the property. The decree holder, no doubt, in the execution petition has given the value as Rs.7,00,000/- However, the court Amin did not concur with this value and submitted a report that the value of the property is Rs.25,00,000/-. The court did not agree with both the values and fixed an higher amount of Rs.30,00,000/-.

42. Mr.Arun Anbumani would submit that on the basis of the valuation report dated 03.01.2016, the valuation for the property is around Rs.46,00,000/- in case of a forced sale or Rs.62,00,000/- in case of a negotiated sale. If the valuation had been improper, the remedy available to the judgment debtors was they should have objected to the value then and there. This is clear in terms of provisions of Order XXI. Subsequent increase in value of the property is not a ground to set aside the sale. Mr.Arun Anbumani has not produced any record to



show that the value of the property in 2010 was not approximately Rs.30,00,000/-. The record he produced is of the year 2016 which is six years after the value had been fixed by the court.

43. In the previous paragraphs, I have already held that though the Court has reduced the upset price, since it was not challenged, it has attained finality. Consequently, the argument of Mr.Arun Anbumani that the value of the property is Rs.60,00,000/- and therefore, the sale should not have been held for Rs.26,00,000/- does not appeal to me at all.

Courts are mandated to sell only that portion of property as required for satisfaction of the decree

44. Turning to the last point argued by Mr.Arun Anbumani that the sale of the property is in contravention of Order XXI Rule 64 and Order XXI Rule 66 is concerned, I would have to refer to the said provisions.

45. Order XXI Rule 64 of the Code empowers any court executing a decree to order the sale of the property. Prior to ordering the sale, the court must decide whether the entire property is to be brought for sale or whether a portion thereof may be sufficient in order to satisfy the decree. The provision



under Order XXI Rule 64 gets further clarified by virtue of the amendment to

Order XXI Rule 66 of the Code of Civil Procedure. Prior to the Civil Procedure Code Amendment Act of 1976, the CPC empowered the Court to proclaim sale for the entire property brought to be sold. The Parliament in its wisdom amended Order XXI Rule 66 (2)(a) to introduce the words “or where a part of the property would be sufficient to satisfy the decree, such part”. These two provisions have been interpreted by the Courts on several occasions. I shall discuss them later.

46. I have to observe here that the holder of a decree for payment of money is only interested in the satisfaction of the decree. He does not have any right over the property. His interest is only to bring the property for sale and realise the money due to him. However, it falls, as a duty, on the court to ensure that while ordering the sale and thereby recovering the money through such a process, the interests of both the judgment debtor and the decree holder are duly balanced.

47. As seen in the present case, the decree holder had valued the property at a ridiculously low price at Rs.7,00,000/-. This valuation was not agreeable



C.R.P.(NPD).Nos.4092 & 4093 of 2023

even to the court Amin, who fixed the value at Rs.25,00,000/-. The court, after having applied its mind, fixed the value at Rs.30,00,000/-.

48. I have already found that this process cannot be found fault with. However, there remained one further duty which the court had to discharge while fixing the value of the property.

49. A reading of Order XXI Rule 64 and Order XXI Rule 66(2)(a) makes it clear that the court should have come to the conclusion that the entire property is required to be sold prior to ordering the sale. The schedule reads that the total extent of the property is around 4686 sq.ft. If a portion thereof would have been sufficient to satisfy the decree, the court should have ordered sale for that portion alone.

50. The court could have appointed an Advocate Commissioner to find out whether the property is indivisible or capable of division. If he had come to the conclusion that the property is indivisible, then the court would have been left with no other option than to bring the entire property for sale or if a report had been received from the Commissioner that the property is capable of



division, then the court could have ordered the sale of only such portion of the property as necessary for the purpose of realisation of the decree. By virtue of Order XXVI Rule 18A, an Executing Court can direct the Commissioner to suggest a mode of division of the property. If a mode of division is suggested and accepted by the court, then the court has the power to sell such portion as valued by the Commissioner as being sufficient to satisfy the decree. For this purpose only, I have called for the original records from the courts below. A perusal of the records of the courts below do not reflect that the Executing Court had applied its mind to the aforesaid aspects. This is particularly seen from the fact that the schedule of the property shows apart from a vast extent of approximately 4700 sq. ft., situated in Dharmapuri Town, two houses have been constructed therein. The house property had not been valued separately. The records do not show that the houses are worthless and incapable of valuation.

51. The Supreme Court in ***Takkaseela Pedda Subba Reddi vs. Pujari Padmavathamma, (1977) 3 SCC 337***, interpreted Order XXI Rule 64 and held that the provision of law contained therein is a mandate on the court. It is the duty of the court to comply with the requirements of Order XXI Rule 64 and



Order XXI Rule 66(2)(a). The relevant portion of the said judgment is extracted

hereunder:

“Under this provision the Executing Court derives jurisdiction to sell properties attached only to the point at which the decree is fully satisfied. The words “necessary to satisfy the decree” clearly indicate that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. In other words, where the sale fetches a price equal to or higher than the amount mentioned in the sale proclamation and is sufficient to satisfy the decree, no further sale should be held and the Court should stop at that stage.”

**Courts cannot waive their duty under Order XXI Rule 64
read with Order XXI Rule 66**

52. Mr.N.Manoharan would submit that the said procedure envisaged under Order XXI Rule 64 read with Order XXI Rule 66(2)(a) becomes irrelevant in the light of Order XXI Rule 90(3). I am not in a position to agree with this submission. This is because the Parliamentary declaration imposes an unshuggable duty on the Court. In this regard, one can consider the



jurisprudential meaning of the term “duty”. According to Austin, in his work

“Jurisprudence defined”, a duty is the logical consequence of a command and hence, a legal duty results from a law - i.e., from a rule of law. He says, “wherever, a duty lies, a command has been signified; and wherever a command is signified a duty is imposed”. The Code of Civil Procedure, which is a code of fairness, has imposed a statutory duty upon the court under Order XXI Rule 64 and Rule 66. This shows that the Court is bound by the command of law under Order XXI Rule 64 and Rule 66 and this duty to act equitably and fairly cannot be whittled down by Order 21 Rule 90(3) which deals with only the situation of waiver.

53. Waiver as understood in law means, an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of an existing legal right or conduct such warranting inference of a relinquishment of known right or a privilege. This doctrine had been developed in order to prevent dilatory and dishonest conduct on the part of the litigants. However, waiver deals only with rights and not with duties. Any amount of waiver by a party cannot release the court from the performance of its duty under law.



54. By very nature of litigative proceeding, a decree holder who is in fight with the judgment debtor would want to recover his dues at the earliest. It is the duty of the Executing Court to perform that duty of recovery with all earnest. However, while performing the duty, the Executing Court cannot throw it to the winds the duty cast upon it by the statute.

55. By virtue of CPC, the Executing Court's duty to balance the interest of both sides and act fairly continues. It is this duty that has been clarified by the 1976 amendment to CPC, amending Order XXI Rule 66(2)(a). The court has to ensure that its act does not injure any litigant. If it does, then it is the duty of the Superior Courts to interfere and set right the situation.

56. If the law requires that only a portion of the property necessary for the satisfaction of the decree must be brought for sale, then this duty must be performed by the court. It is too much on the part of the person to argue, and indeed it would be ignominy on the part of the court especially a Constitutional Court like this court to agree to a submission that by conduct of the parties, the duty imposed on the court stood waived. The Code of Civil Procedure does not



conclusion had applied a classic judgment of itself in ***Ambati Narasayya vs.***

M.Subba Rao and another, 1989 Supp (2) SCC 693. This view of the Supreme Court has been consistently followed in ***S. Mariyappa v. Siddappa, (2005) 10 SCC 235*** and ***Balakrishnan v. Malaiyandi Konar, (2006) 3 SCC 49.***

59. These two provisions viz., Order XXI Rule 64 read with Order XXI Rule 66(2)(a) impose a duty on the court because the Code of Civil Procedure is not legal thumbscrew to extract more from the judgment debtor than what he is liable to honor under the decree. The Code of Civil Procedure demands that the Court perform its duty irrespective of the fact “whether the judgment debtor is before it or not”. If it is in contravention of these two provisions, the sale necessarily would have to go.

60. The view that has been taken by me finds assistance in that taken by my brother Mr.Justice R.Vijayakumar in ***Raghavan (died) and Others vs. Sivakumar and Others in (2023) 6 MLJ 73***, wherein he had held that the court has inherent power to set aside the sale, when it is brought to its notice that there is some irregularity in the conduct of the sale. Further this Court in the cases of ***K.J.Prakash Kumar vs. Rasheeda Yasin, (2009) 6 CTC 243*** and



Pavayammal vs. Thangammal and Others, (2014) 5 LW 29, had held that the

sale conducted by the Executing Court without meeting the requirements of Order XXI Rule 64 and Rule 66 is capable of being set aside by filing an application under Order XXI Rule 90 as the same amounts to material irregularity.

61. In the light of the admitted facts that the decree holder, on the date of execution petition, was entitled to only Rs.4,50,000/- and taking it roundly as Rs.6,00,000/-, to sell the property worth more than four times its value is excessive. Excessive execution is not in line with Order XXI Rule 64 and Order XXI Rule 66.

62. Mr.N.Manoharan would submit that several attempts had been made by the judgment debtors and their relatives to obstruct the sale and it is with great difficulty that the property was finally sold. He would plead that the judgments of the Supreme Court referred to below support his contention that the sale need not always be set aside as being excessive.



63. The first judgment relied upon by Mr.N.Manoharan in ***Jagan Singh***

and Company vs. Ludhiana improvement Trust and Others, (2024) 3 SCC

308 would show that the plea of excessive execution had not been a subject matter of interpretation. What was urged before the court was that there was a dispute over the identity of the properties. It was pleaded that the land that had been sold in the public auction was in Khasra No. 271 whereas only the property situated in Khasra No.272 could have been sold.

64. A careful reading of the aforesaid judgment would show that it was a case arising out of non payment of money for the lands acquired under the Land Acquisition Act, 1894. The proceedings had been pending for decades and yet the land acquisition decree had not been honoured. Further, the court specifically found that the value of the property on the date of sale was Rs.8,00,000/-, whereas the decree was for Rs.4,27,068/- together with interest at the rate of 9% per annum. Therefore, the court came to the conclusion that the entire property would be sufficient to cover the recovery. It was certainly not a case of excessive execution as in the present case.

65. The next judgment relied upon by Mr.N.Manoharan in ***Dipali Biswas***



and Others vs. Nirmalendu Mukherjee and Others, 2021 SCC Online SC 869

is certainly a judgment for the proposition that the points that can be urged for setting aside the sale under Order XXI Rule 90 cannot be urged in a petition under Order XXI Rule 95. The court had held that the judgment debtor had attempted to file a petition under Order XXI Rule 90 and it got dismissed. Thereafter, he had initiated 4 further rounds of litigation and in none of those proceedings, he had raised that plea. He attempted to raise that plea only during the course of proceedings under Order XXI Rule 95. It is pertinent to point out that the proceedings before the Supreme Court in that case arose out of the sale which had been held prior to the amendment to the Code of Civil Procedure on 01.02.1977. No doubt, Order XXI Rule 64 contains a similar provision, but a mandate imposing duty on the court came into being on and from 01.02.1977 by virtue of the amendment of Order XXI Rule 66(2)(a).

66. I am not dealing with a case under Order XXI Rule 95 and the aforesaid judgment is certainly not a proposition for a case which has arisen after the amendment has been made. As previously held by me, the amendment has imposed duty on the court and that duty not having been satisfied, I necessarily would have to interfere.



WEB COPY

**Non compliance of Order XXI Rule 64 read with Order XXI Rule 66
results in material irregularity**

67. That brings me to the next proposition of Mr.N.Manoharan that the plaintiff has not proved the material irregularity. Here is the case where fraud in conduct of the sale has not been urged. It is a plea of material irregularity. As held by the Supreme Court in *Ambati Narasayya's* case as well as the judgments of this Court referred to above, the violation of Order XXI Rule 64 read with Order XXI Rule 66 results in a material irregularity. This does not require spectral microscope for me to see the damages done to the judgment debtors or the brother of one of the judgments debtors.

68. If the property, which the court itself valued at Rs.26,00,000/-, is sold for a decree which is around Rs.6,00,000/-, it is an act of excessive execution. If it is an excessive execution, it is an exercise of jurisdiction beyond what the Executing Court has been empowered to do. Hence, there is a material irregularity resulting in substantial damage to the judgment debtor or any person having interest in the property. In terms of Article 227 of the Constitution of India, it is a duty of the High Court to ensure that the courts subordinate to the High Court are kept within its bounds.



WEB COPY

69. The Executing Court having violated Order XXI Rule 66 and Order XXI Rule 64 of the Code of Civil Procedure, I have to necessarily interfere. The courts of law are not agents of the decree holder. They have an independent duty to perform. While performing the duty, it is in terms of Parliamentary mandate under the Code of Civil Procedure, the courts are bound to ensure that they bring only that portion of the property to sale as required to satisfy the decree. If the Parliamentary mandate is violated, then it falls on this court to exercise the jurisdiction vested in it under Article 227 to ensure that the decree holder gets the dues but at the same time the judgment debtor is not injured. This is a balance between the interests of both parties. While balancing the interests, the court has to be extremely cautious and careful. If the duty of the court is abdicated or renounced, then the revisional court necessarily has to interfere.

The interests of the third-party auction purchaser cannot validate a sale in contravention to Order XXI Rule 64 and Rule 66

70. Insofar as the argument of Mr.N.Manoharan that the fourth respondent is a bonafide purchaser and therefore the sale must not be set aside is concerned, the records reveal that the sale has not been confirmed and



therefore, his rights are yet to crystallize.

WEB COPY

71. Apart from that, the reliance of Mr.N.Manoharan on a judgment proposing that the auction purchaser who is a third party deserves to be given a higher status than that of a permitted decree holder arises under different circumstances. If the decree holder were to purchase a property with the permission of the court and the decree is subsequently varied or set aside, the sale would certainly have to be interfered. However, if a purchaser of the property is a stranger to the proceedings, by the mere fact that the decree is subsequently set aside or varied will not affect the interest that has accrued on him. This proposition cannot be stretched to include a sale which is contrary to Order XXI Rule 64 and Order XXI Rule 66 of the Code of Civil Procedure. As pointed out by me in the previous paragraphs, if the duties of the court stand abdicated, the sale post of such vitiated circumstances also stands vitiated.

72. Further the situation that exists in this case, which I have to take note of is that interest of the decree holder has been fully satisfied by virtue of the deposit of the entire decree amount made by the judgment debtors on 07.10.2022. Before this revision was presented, the learned Executing Court,



C.R.P.(NPD).Nos.4092 & 4093 of 2023

pursuant to an order in EA.No.60 of 2020 in EP.No.46 of 2008, has permitted the judgment debtors to deposit the entire amount including 5% of the amount paid by the auction purchaser.

73. Mr.Arun Anbumani would invite my attention to the E-Challan dated 07.10.2022 whereby the entire decree amount of Rs.7,44,684/- had been deposited to the credit of the Execution Petition.

74. Both the courts below, instead of looking at the mandatory duty under Order XXI Rule 64 and Order XXI Rule 66 of the Code of Civil Procedure, had been carried away by the dismissal of the application that had been filed under Order XXI Rule 58. In the opening portion of this judgment itself, I have pointed out that the scope of Order XXI Rule 58 is fundamentally different from Order XXI Rule 90. This reflects the non application of mind on the part of the Executing Court and the court passing an order confirming it. As the sale is being set aside on account of the error that had been committed by the courts below, the auction purchaser cannot be left high and dry. Therefore, the civil revision petitioner would have to pay an additional amount. Therefore, the amount of Rs.26,16,000/- deposited by the fourth respondent, auction



C.R.P.(NPD).Nos.4092 & 4093 of 2023

purchaser will carry an interest of 6% to be calculated from the date of deposit namely 26.07.2016 till the date of payment.

Decision

75. C.R.P(NPD).No.4093 of 2023 is allowed and C.R.P.(NPD).No.4092 of 2023 is dismissed as unnecessary, with the following observations and directions:

(i) The sale of the property held by the learned Subordinate Judge, Dharmapuri in E.P.No.46 of 2008 dated 14.07.2016 is set aside.

(ii) The order of the learned Additional District Judge, Dharmapuri in CMA.No.14 of 2019 dated 14.09.2023 in confirming the order and decretal order in REA.No.56 of 2017 in REP.No.46 of 2008 in O.S.No.70 of 2005 by the learned Subordinate Judge, Dharmapuri dated 30.08.2019 are set aside.

(iii) The application in REA.No.56 of 2017 shall stand allowed.

(iv) The decree holder is entitled to withdraw his share of the amounts deposited on 07.10.2022.

(v) The auction purchaser is entitled to withdraw the amount deposited by him together with accrued interest.

(vi) The civil revision petitioner shall compensate the auction purchaser



C.R.P.(NPD).Nos.4092 & 4093 of 2023

by paying the interest at 4% per annum on the amount deposited by the auction purchaser. Till the amount is discharged, there shall be a charge over the property.

76. The auction purchaser will be entitled to the costs in these revisions.

Consequently, the connected miscellaneous petitions are closed.

26.07.2024

nl

Index : yes / no

Neutral Citation : yes / no

Speaking / Non Speaking Order



WEB COPY



C.R.P.(NPD).Nos.4092 & 4093 of 2023

To

- 1.The Additional District Judge, Dharmapuri
- 2.The Principal Sub Court, Dharmapuri.



WEB COPY



C.R.P.(NPD).Nos.4092 & 4093 of 2023

V.LAKSHMINARAYANAN, J.

nl

C.R.P.(NPD).Nos.4092 & 4093 of 2023 &
C.M.P.No.25010 of 2023 &
C.M.P.Nos.2221 & 2225 of 2024

26.07.2024