



IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

EFA-7-2023 (O&M)

Reserved on: 04.12.2024

Pronounced on: 07.01.2025

M/S SHERPUR RICE MILLS

... APPELLANT

Vs.

PUNGRAIN AND OTHERS

... RESPONDENTS

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. Aalok Jagga, and
Mr. Karan Inder Singh, Advocates,
for the appellant/ judgment-debtor N: 2 (JD N: 2)

Ms. Deepali Puri, Advocate,
for respondent No.1/ decree-holder (DH)

Mr. Vikrant Bhardwaj and
Mr. Aakash Singla, Advocates
for respondent No.2/ judgment-debtor N: 1 (JD N: 1)

Mr. Swaran Singh Tiwana and
Mr. Vishal Aggarwal, Advocates,
for respondent No.3/ auction-purchaser (AP)

DEEPAK GUPTA, J.

Present appeal has been preferred by the appellant, who is one of the Judgment debtor, against the order dated 05.09.2023, passed by the Executing Court of Ld. Additional District Judge, Sangrur in Execution Petition No.205 of 2018 [CNR N: PBSG01-003091-2018] titled as '*PUNGRAIN Vs. M/s Noor Agro Industries and another*', whereby objections filed by the appellant-JD under Order XXI Rule 90 CPC have been dismissed; and the Execution Petition has been disposed of by confirming the sale in favour of the auction purchaser-respondent No.3.

2.1 Facts of the case, in brief, are that JD N: 2 (*appellant herein*) is a partnership firm operating under the name of M/s Sherpur Rice Mills situated at Village Sherpur, Tehsil Dhuri, District Sangrur. On 19.10.2015, said appellant had entered into a lease agreement with JD N: 1 M/s Noor Agro Industries (*respondent No.2 herein*), whereby the said rice mill was leased to M/s Noor Agro Industries, a proprietorship firm through its proprietor-Jiwan Kumar. On 23.10.2015, decree holder - Punjab State Grains Procurement Corporation Ltd. ('PUNGRAIN') [*respondent No.1 herein*] and respondent No.2-M/s Noor Agro Industries-JD No.1 executed a Custom Milling Agreement for the crop year 2015-16. Respondent No.2 was required to deliver the milled rice in time and to clear all the outstanding dues, if any, towards any agency or Government and also be liable for any default. The appellant-JD No.2 furnished surety bond and affidavit to that effect. The agreement between DH & JD N: 1 i.e., respondent No.1 and 2 carried an arbitration clause. There was default on the part of JD N: 1 - respondent No.2 on account of shortage of paddy, due to which complaints were lodged against respondent No.2 for misappropriation of the paddy by respondent No.1 - DH.

2.2 On account of the said default, Rice Mill, Sherpur of the appellant – JD N: 2 was sealed by respondent No.1 - DH and was held to be not entitled for new allotment of paddy due to non-clearance of the dues of DH-respondent No.1. According to the appellant, aggrieved by the said order of the respondent No.1, appellant filed Civil Suit No.595 of 2016 before Ld. Civil Judge (Jr. Div.) Sangrur seeking declaration & permanent injunction that it was entitled to allotment of paddy for the crop year 2016-17 along with the prayer for opening the seal and handing over the vacant possession of the premises.

2.3 As disputes arose between DH & JD N: 1, so on account of the arbitration clause in the custom milling agreement, DH invoked the said arbitration clause and the matter was referred for arbitration. Arbitration award dated 09.01.2018 was made against the JD N: 1 & JD N: 2, as per which, an amount of ₹55,78,102/- was awarded in favour of respondent No.1 - DH along with future interest @ 12% per annum till its realization. The objections

filed by the appellant - JD N: 2 under Section 34 of the Arbitration and Conciliation Act, 1996 against the said award filed before District and Sessions Judge, Chandigarh are stated to be still pending. In the meantime, respondent No.1/DH preferred execution bearing Execution Petition No.205 of 2018 before Additional District Judge, Sangrur under Order XXI Rule 11 CPC for implementation of the award dated 09.01.2018.

2.4 Upon notice to the JDs, JD No.1-M/s Noor Agro Industries put in appearance through its counsel on 25.07.2018. However, notice to JD No.2-appellant herein was received back unserved, as the premises were stated to be lying closed. Counsel for the decree-holder informed the Court that no other address of JD No.2 was available and so, affixation was ordered. Based upon the service of JD No.2-appellant by way of publication in newspaper 'Azad Soch', JD No.2-appellant was proceeded *ex parte* vide order dated 07.12.2019. On 20.09.2021, warrant of attachment of the property of JD No.2-appellant was received back duly executed. An application under Order XXI Rule 66 CPC was moved by decree-holder on 11.01.2022 qua the property of JD No.2-appellant. The notice was received back unserved for the want of correct address and despite asking the decree-holder several times to provide the correct address, no fresh address was provided. However, on 23.01.2023, it was noticed that JD No.2-appellant had earlier been served by way of publication. As such, sale notice was issued and sale was directed to be conducted for 21.02.2023 vide order dated 23.01.2023. As per the report of the Naib Tehsildar, Sherpur dated 21.02.2023, the sale was conducted for an amount of ₹1,75,00,000/-, in which respondent No.3 - Jaicky Garg was the successful bidder.

2.5 On 28.02.2023, two applications were moved by JD No.2-appellant. One application was moved for setting aside the order dated 07.12.2019, whereby it was proceed *ex parte*; whereas second application was moved under order XXI Rule 90 CPC for setting aside the sale. Vide order of the same date i.e. 28.02.2023 of Id. Additional District Judge, the application to set aside the *ex parte* order dated 07.12.2019, was allowed. The application under Order XXI Rule 90 CPC was opposed by the decree-holder & respondent No.3/

auction purchaser, who filed separate replies. That application Order XXI Rule 90 CPC was dismissed by the Court by way of the impugned order dated 05.09.2023, which has been assailed by JD No.2-appellant by way of the present appeal.

3.1 It is contended by Id. counsel for the appellant/JD N: 2 that address mentioned in the execution petition filed by respondent No.1-decree-holder was incorrect. The address of rice mill was provided, which was already lying locked and sealed by DH/respondent No.1 in 2016, which fact was very much to its knowledge and also to its counsel since beginning. Execution petition was filed before the same court, where the suit filed by the appellant for de-sealing was pending. Sh. Hitesh Jindal, Advocate was contesting that suit for the decree holder and therefore, notice of execution could have been served upon the appellant either through the advocate of the appellant appearing in the Civil Court or he could have provided the addresses duly mentioned in the Aadhar card appended therein with the civil suit. Despite the fact that appellant mill was lying closed and the owners were not living at the given address, still the service was ordered at the wrong address. No order for *munadi* was ever issued and the service was got effected by way of publication in a hasty manner. The application moved under Order V Rule 20 CPC for substituted service was misconceived, as counsel of the decree-holder was having knowledge about the pendency of the suit filed by the appellant and he could have been served thereon.

3.2 Ld. counsel for the appellant further contends that there is complete violation of Order XXI Rule 66 CPC, as property was put to sale without determining the valuation thereof. The executing court did not even consider the extent of property, which was required to be put for sale to satisfy the decree and to ensure that only such portion of the property is sold, as per the requirement of Order XXI Rule 64 CPC. It is further contended that there is also the violation of Order XXI Rule 54 (1A) CPC, as despite direction for carrying out *munadi*, no such proclamation of *munadi* was carried out. A fresh notice is required to be served upon the JD at the time of proclamation of the

sale but no such notice was served on appellant-JD No.2, as the premises were lying locked and no fresh address was provided. The sale was conducted without issuing any notice or without conducting any *munadi* or publication about the sale in any newspaper nor any notice was served upon the appellant-JD, which is the violation of Order XXI Rule 67 CPC and so, in the absence of publication, property is not expected to fetch best price. It is argued that the application was moved by the appellant for framing of the issue and permission to lead the evidence but the same was dismissed by the Court on 23.08.2023. Ld. counsel further contends that on account of violation of the mandatory provisions of Order XXI Rules 54, 64, 66 and 67 CPC, the sale is liable to be set aside.

4. Refuting the aforesaid contentions, it is argued by Id. counsel for respondent No.1-DH as well as by counsel for respondent No.3-auction purchaser that appellant was fence sitter and watching the proceedings since beginning. It was well aware about the execution pending against it but they intentionally avoided the same. Ld. counsel for the decree holder-respondent has also drawn attention towards the various documents executed by the appellant and the pleadings, in which it has provided the same address, as was mentioned in the execution and on which notice was sent to it. It is further contended that in the proclamation of sale, estimated value of the property was duly mentioned and as such, there was no violation of Order XXI Rule 54 CPC. Ld. counsel has further drawn attention towards Order XXI Rule 66 CPC so as to argue that in case, the JD has already been served under Order XXI Rule 54 CPC regarding attachment of the property, the Court may dispense with the fresh notice of the application under Order XXI Rule 66 CPC. It is further contended that appellant has failed to establish any material irregularity or fraud; or even to plead any substantial injury, which is the necessary pre-condition to set aside the sale as per Order XXI Rule 90 CPC. Submitting that all the necessary statutory compliances were duly made, prayer is made for dismissal of the appeal, as sale was conducted and confirmed in accordance with law.

5. This Court has considered submissions of both the sides and has appraised the paper-book carefully.

6. It is undisputed that award dated 09.01.2018 was passed in favour of decree holder-PUNGRAIN (respondent No.1) and against respondent No.2-M/s Noor Agro Industries and the appellant-M/s Sherpur Rice Mills i.e. two JDs by the arbitrator for an amount of ₹55,78,102/- along with future interest @ 12% per annum till its realization. In order to execute the said award, the execution petition was filed by the decree holder, in which JD No.2-appellant was proceeded *ex-parte* on 07.12.2019.

7. To appreciate the contentions raised by the appellant, it is necessary to notice various orders passed by the Executing Court prior to proceeding the appellant *ex parte* and also the orders passed after 07.12.2019.

7.1 Numerous zimini orders passed by the executing court (*Annexure A-11 onwards*) as placed on record by the appellant reveal that the execution *Annexure A-10* was filed on 12.04.2018 and as per the order dated 21.05.2018, notice to JDs was directed to be issued for 25.07.2018. Appearance on behalf of JD No.1 - respondent No.2-M/s Noor Agro Industries was made through its counsel on 25.07.2018, but notice to JD No.2-appellant was received back on that day as unserved. Fresh notice to JD N: 2 was directed to be issued for 15.09.2018. The address of JD No.2-appellant on the summons dated 15.09.2018 is as under: -

“M/s Sherpur Rice Mills, Tehsil Dhuri, District Sangrur through its partner Darshan Singh son of Gurdial Singh, Nidhan Singh son of Gurdial Singh, Darshna Devi widow of Naresh Kumar son of Lekh Ram, Channi Bansal son of Naresh Kumar and Saloni Kumar d/o Naresh Kumar.”

7.2 As per the report of the concerned process-server *Annexure A12*, it was submitted by him that he visited the spot and was informed that firm had been closed. He enquired about the owners of M/s Sherpur Rice Mills as mentioned in the summons and was informed that the owners do not have residence in village Sherpur.

7.3 Matter was taken up on 14.09.2018, as presiding officer was to proceed on leave on 15.09.2018 and was adjourned to 15.11.2018. As per the order dated 15.11.2018 of the Executing Court, notice to the JD was received back unserved with the report that the premises was lying locked. However, it was informed by the counsel for the decree holder that there was no other address of JD available with the decree holder. In view of the same, notice of the execution was directed to be served for 05.01.2019 by way of affixation simultaneously.

7.4 Order dated 27.03.2019 would reveal that it was noticed by the executing court /Additional District Judge, Sangrur that munadi summons to JD No.2 was not received back and so, fresh summon for JD No.2 were directed to be issued for 24.04.2019. It is important to notice here itself that service by way of munadi was not directed to be effected by way of any of the previous orders.

7.5 As per the subsequent orders dated 24.04.2019, 31.05.2019 and 25.07.2019, correct address of JD No.2 was not furnished by the decree holder. On 25.07.2019, decree holder was directed to furnish correct address of JD No.2 within seven days and then notice to JD No.2 was directed to be issued for 21.09.2019. On the adjourned date of 21.09.2019, correct address of JD No.2 was not filed. However, decree holder moved an application under Order V Rule 20 CPC for substituted service of JD No.2 by stating that given address was the last known address.

7.6 The executing court vide order dated 21.09.2019 directed that JD No.2 to be served through publication in newspaper '*Azad Soch*' for 07.12.2019 after depositing the necessary charges. As per the order dated 07.12.2019, publication was received back duly effected on 08.11.2019 and as sufficient time had elapsed & nobody had put in appearance on behalf of JD No.2- (*appellant herein*), so said JD No.2 was proceeded against ex parte and the decree holder was directed to furnish the list of property.

8. Now, it is time to take note of provision of Order V Rule 20 of CPC providing for substituted service, which reads as under: -

20. Substituted service.—(1) Where the Court is satisfied that there is reason to believe that the defendant 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, the Court shall order 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 (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

(1A) Where the Court acting under sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.

(2) Effect of substituted service.—Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

(3) Where service substituted, time for appearance to be fixed.—Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

9. As it will be evident from the aforesaid provision, before ordering for substituted service of the defendant, the Court is required to record its satisfaction that defendant is keeping out of the way for the purpose of avoiding service; or for any other reason the summons cannot be served in ordinary way. Besides, Court is required to order 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 (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such manner as the Court thinks fit. In case, the Court orders service by an advertisement in a newspaper, such newspaper is required to be a daily newspaper circulating in the locality in which the defendant is last known to

have actually and voluntarily resided, carried on business or personally worked for gain.

10. However, in this case the report of concerned process-server on the summons meant for 15.09.2018 as noticed earlier clearly revealed that it was reported that the firm i.e. appellant / JD N: 2 was lying closed and the owners thereof as mentioned in the summons did not reside in village Sherpur. Despite this report and adjourning the case several times by directing the decree holder to provide correct address of JD No.2-appellant, no such correct address was ever provided by the DH and rather, application for substituted service under Order V Rule 20 CPC was moved, which was readily accepted by the Court, without recording its satisfaction that JD N: 2 is keeping out of the way for the purpose of avoiding service; or for any other reason the summons cannot be served in ordinary way, as will be evident from the following order dated 21.09.2019 passed by the Court, copy of which is Annexure A15: -

“Present: Sh. Hitesh Jindal Adv counsel for the claimant/DH.
Sh. Naveen Shrivastav Adv counsel for the JD No.1.

Correct address of JD no. 2 has not filed. The Ld. Counsel for DH moved an application under Order 5 Rule 20 for the substitute service of JD no. 2. Applications stands allowed. Now, JD no. 2 be served through publication in ‘Azad Soch’ for 07.12.2019 after depositing the necessary charges within 7 working days.

Dated: 21.09.2019

(Smriti Dhir)
ADJ, Sangrur
UID No. PB-0518”

11. The contention of the decree-holder as made in the application under Order V Rule 20 CPC to the effect that no other address of the JD No.2-appellant was available also appears to be incorrect. Perusal of the surety bond, which was furnished by the appellant-M/s Sherpur Rice Mills to the decree-holder and the agreement executed between JD No.1 & 2 as available with the decree-holder would reveal that in those documents, the address of all partners of the appellant-M/s Sherpur Rice Mills, Sherpur is mentioned as residents of Dhuri, Tehsil Dhuri, District Sangrur. This address of partners of the

appellant to be residents of Dhuri was not provided to the Court. As noticed earlier that notice upon the appellant-JD No.2 was effected by the process server at village Sherpur, where it was noticed that firm was lying closed and the partners did not reside in that village.

12. Moreover, a civil suit bearing CS No.1065 of 2016 was filed by the appellant M/s Sherpur Rice Mills against State of Punjab, PUNGRAIN i.e. decree holder and also proprietor of M/s Noor Agro Industries seeking declarations. That suit was filed on 23.09.2016. Sh. Hitesh Jindal, Advocate was representing the decree holder-PUNGRAIN in that civil suit. In case the decree-holder wanted to serve JD No.2-appellant in the Execution Petition, the summons could have been easily got served through the counsel of JD No.2 i.e. the plaintiff of Civil Suit No.1065 of 2016, but no such step was taken.

13. In view of all the aforesaid circumstances, when the provisions of Order V Rule 20 CPC have been clearly violated and it is apparent that JD No.2-appellant was not served in accordance with law regarding the execution, the order dated 07.12.2019 is not sustainable, whereby said JD N: 2 was proceeded against *ex parte*.

14. It is important to take note of the fact that the order dated 07.12.2019 was set aside by the Executing Court vide order dated 28.02.2023, without any rider. It will be evident from the order dated 28.02.2023 [Annexure A-26] of the Ld. ADJ, which reads as under: -

“ Present: Sh. Hitesh Jindal Adv counsel for the claimant/DH.

*Sh. Naveen Shrivastav Adv counsel for the JD No.1.
JD No.2 ex parte.*

Sh. Yogesh Gupta, Advocate has appeared and filed power of attorney on behalf of JD No.2, who was proceeded against exparte vide order dated 07.12.2019. Also an application for set aside the ex-parte order has been moved. In view of contents mentioned in the application for setting-aside the ex-parte order, same stands allowed.

Another application under Order 21 Rule 90 CPC be also filed. Notice of said application to auction purchase be issued for 15.03.2023.

Dated: 28.02.2023

(Saru Mehta Kaushik)
ADJ, Sangrur
(UID No.PB00442)"

15. It is clear from the aforesaid order dated 28.02.2023 of Ld. ADJ, Sangrur/ executing court that order dated 07.12.2019 was set aside without mentioning, as to whether the *ex parte* proceedings were being set aside from that stage only i.e., date of passing of the order; or from the stage, when the JD No.2 was proceeded *ex parte*. In the absence of any such rider, it is clear that order dated 07.12.2019, whereby JD N: 2 was proceeded *ex parte*, having been set aside, all the subsequent proceedings were automatically set aside.

16. As noticed above that although, it is not specifically mentioned in the order dated 28.02.2023 that the *ex parte* proceedings were being set aside from that stage only i.e., date of passing of the order, but the Court of Ld. Additional District Judge in its subsequent order dated 23.08.2023 [Annexure A-28], whereby an application of the appellant for framing of the issues, was disposed of, observed that JD No.2/appellant was only permitted to join proceedings at that stage and that merely because the application was accepted and JD No.2 was permitted to join proceedings, does not infer that entire proceedings in the execution subsequent to the said date had been set aside. It has already been noticed that there is no such condition in the order dated 28.02.2023 to the effect that appellant-JD No.2 was permitted to join the proceedings from that stage only. As such, observations made by the court in order dated 23.08.2023 to the effect that JD No.2 was only permitted to join subsequent proceedings, is contrary to the previous order dated 28.02.2023.

17. Assuming for the sake of arguments that appellant was permitted to join the proceedings only from the stage, when the order dated 28.02.2023 was passed, the question is as to whether the proceedings conducted after 07.12.2019 i.e. after proceeding the appellant/ JD N: 2 as *ex parte*, were conducted as per law.

18. Explaining the importance of service of the person, whose property is being sold in execution of the decree at each stage of the execution,

Hon'ble Supreme Court in *M/s Mahakal Automobiles and another Vs. Kishan Swaroop Sharma, 2008(3) RCR (Civil) 54*, has observed as under:

“6. 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.

7. Each stage of sale is governed by the provisions of the Code. For the purposes of the present case, the relevant provisions are Order XXI Rule 54 and Order XXI Rule 66 CPC. At each stage of the execution of the decree, when 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.”

19. It will be relevant to notice Order XXI Rule 54 CPC in this regard, which reads as under: -

“54. Attachment of immovable property.—(1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(1A) The order shall also require the judgment-debtor to attend Court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon, a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate and, where the property is land situate in a village,

also in the office of the Gram Panchayat, if any, having jurisdiction over that village.”

20. The abovesaid order would reveal that following conditions are required to be fulfilled for compliance of the said order, when immovable property is sought to be attached : -

- Order should prohibit the judgment-debtor
 - a. from transferring or charging the property in any way, and
 - b. all persons from taking any benefit from such transfer or charge.
- The order shall require the judgment-debtor to attend Court on a specified date so that a date be fixed for settling the terms of the proclamation of sale.
- The order is to be proclaimed at some place on or adjacent to such property
 - i. by beat of drum or
 - ii. other customary mode, and
- a copy of the order shall be affixed
 - i. on a conspicuous part of the property and
 - ii. a conspicuous part of the Court-house, and
 - iii. where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate and,
 - iv. where the property is land situate in a village, in the office of the Gram Panchayat, if any, having jurisdiction over that village.

21. In the present case, after the JD N: 2 was proceeded ex-parte on 7.12.2019, his property was attached as evident from order dated 20.09.2021 [Annexure A-18A], which are as under:

12.08.2021	File take up today, as I will be on leave on 13.08.2021. <u>Warrants of attachment of property of JD No.2 received back executed.</u> To come up on 18.08.021 for further proceedings. Counsel for DH is directed to furnish list of property of JD No.1 on the date fixed. Parties be informed accordingly.
18.08.2021	Perusal of the record shows that warrants of attachment of property of JD no.2 were issued on 30.07.2021 for 13.08.2021 and the warrants of attachment of property of JD no.2 was received back served through concerned clerk of the Collector but on order dated 12.08.2021, it was inadvertently mentioned

	that warrants of attachment of property of JD no.2 executed. Mistake is ordered to be rectified. Let fresh warrants of attachment of property of JD no.2 be issued for 20.09.2021 in terms of the order dated 30.07.2021. Counsel for DH is directed to furnish list of property of JD no.1 on the date fixed. Copy of order dated 30.07.2021 be also sent to the concerned official with the warrants of attachment of property of JD no.2.
20.09.2021	Warrants of attachment of property of JD N: 2 received back executed. Let Counsel for DH is directed to file application under Order 21 Rule 66 of CPC on 12.11.2021. Counsel for DH is directed to furnish list of property of JD N: 1 on the date fixed.

22. Subsequent to the attachment of the property of appellant/ JD N: 2, further relevant orders are reproduced as under:-

12.11.2021	As per office report, counsel for DH has not filed application under Order 21 Rule 66 of CPC qua JD no.2. Same be filed on 11.01.2022. List of property of JD no.1 not filed. Counsel for DH is directed to furnish list of property of JD no.1 on the date fixed.
11.01.2022	Counsel for DH has filed application under Order 21 Rule 66 of CPC qua JD no.2. Let notice of this application be issued to JD no.2 for 01.04.2022. List of property of JD no.1 not filed. Counsel for DH is directed to furnish list of property of JD no.1 on the date fixed.
01.04.2022	As per office report, notice of application under Order 21 Rule 66 of CPC issued to JD no.2 received back for want of correct address. Counsel for DH is directed to file correct address of JD no.2 within seven days, thereafter fresh notice of above said application be issued to JD no.2 for 02.07.2022. List of property of JD no.1 not filed. Counsel for DH is directed

	to furnish list of property of JD no.1 on the date fixed.
02.07.2022	Case received by way of transfer. It be registered. Last opportunity to DH to furnish complete particulars of JD No.2 within 7 days and then JD No.2 be summoned for 19.09.2022. list of property qua JD No.1 be submitted within 7 days and warrants of attachment be issued for the date fixed.
19.09.2022	On request of counsel for DH, case is adjourned to 04.10.2022 for filing correct address of JD No.2 and list of property qua JD NO.1, subject to last opportunity.
04.10.2022	List of property of JD No.2 filed. Let, warrants of attachment be issued qua JD No.2 be for 05.11.2022. DH is directed to file list of property qua JD No.1 be submitted within 7 days and warrants of attachment be issued for the date fixed.
05.11.2022	Warrants of attachment issued to JD No. 2 not received back. Fresh warrants of attachment of JD No. 2 be issued for 07.12.2022. DH is directed to accompany the bailiff for attachment process. List of property of JD No. 1 be also filed and thereafter warrants of attachment be issued for the date fixed.
07.12.2022	Warrants of attachment of property of JD No. 1 received back executed. Now, to come up on 15.12.2022 for filing application under Order 21 Rule 66 CPC. DH is directed to file list of property qua JD No.1 be submitted within 3 days and warrants of attachment be issued for the date fixed.
15.12.2022	None has appeared on behalf of DH. One opportunity to appear and pursue the matter for 20.12.2022 as matter is action plan case.
20.12.2022	Ld. Counsel for DH has moved application under order 21 rule 37 of CPC. Notice of application under order 21 rule 37 of CPC be issued to JD for 23.01.2023.
23.01.2023	Perusal of file indicates that earlier also notice could not be served to JDs and were served through Publication. In this eventuality, sale warrants are ordered to be issued qua attached

	property of JD No.2 as per the following schedule on making necessary compliance and filing requisite charges with immediate effect: Notice : 01.02.2023 Munadi : 12.02.2023 Sale : 21.02.2023 Report : 28.02.2023
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23. In the application dated 11.01.2022 moved by the decree holder under Order XXI Rule 66 CPC, it was mentioned that estimated value of the property attached was not less than approximately ₹30 lakhs. On the same day i.e., 11.01.2022, the Court had ordered the notice of the application under Order XXI Rule 66 CPC to be issued to JD No.2 for 01.04.2022.

24. After noticing the aforesaid orders, it is now time to take note of the provisions of Order XXI Rule 66 CPC, which read as under:

66. Proclamation of sales by public auction.—(1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

- (a) the property to be sold or, where a part of the property would be sufficient to satisfy the decree, such part;
- (b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;
- (c) any incumbrance to which the property is liable;
- (d) the amount for the recovery of which the sale is ordered; and
- (e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

Provided that where notice of the date for settling the terms of the proclamation has been given to the judgment-debtor by means of an order under rule 54, it shall not be necessary to give notice under this rule to the judgment-debtor unless the Court otherwise directs:

Provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given, by either or both of the Parties.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

25. Thus requirements of Order XXI Rule 66 CPC which read as under: -

a) Where any property is ordered to be sold by public auction in execution of a decree:

- proclamation of the intended sale is required to be made in the language of such Court.

b) Pre conditions for drawing up the proclamation:

- Only after notice to the decree-holder and the judgment-debtor, unless notice to JD already given under Rue 54,
- to state the time and place of sale, and
- specify as fairly and accurately as possible—
 - a. the property to be sold or, where a part of the property would be sufficient to satisfy the decree, such part;

- b. the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;
 - c. any incumbrance to which the property is liable;
 - d. the amount for the recovery of which the sale is ordered; and
 - e. every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property:
- Generally, the court is not required to mention in the proclamation of sale its own estimate of the value of the property. However, if estimate is given by either of the party, then same is to be included in the proclamation,

26. Rule 67 of Order XXI provides the mode of making proclamation. It reads as under:

“67. Mode of making proclamation.—(1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 54, sub-rule (2).

(2) Where the Court so directs, such proclamation shall also be published in the Official Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given.”

27. Although, as per proviso to Order XXI Rule 66 (2) CPC, where notice of the date for settling the terms of the proclamation has been given to the judgment-debtor by means of an order under Rule 54, it shall not be necessary to give notice under this rule to the judgment-debtor unless the Court otherwise directs, but in this case, after proceeding the JD No.2-appellant *ex parte* on 07.12.2019 in respect of the notice of the execution under Order XXI Rule 11 CPC, there is nothing on record to suggest that any separate notice for the purpose of attachment of property of JD No.2 was issued under Order XXI Rule 54 CPC.

28. Not only this, assuming that as JD No.2 was already proceeded ex parte, therefore, notice of attachment was not issued, still fresh notice under Order XXI Rule 66 CPC was directed to be issued as per order dated 11.01.2022 & various subsequent orders as reproduced earlier. The said notice could be dispensed with, only if the court directed otherwise by recording reasons therefor.

29. In this case, as the orders passed by the executing court on different dates as reproduced earlier would reveal that notice of the application under Order XXI Rule 66 CPC to JD No.2 was received back unserved for want of correct address as per order dated 01.04.2022. Thereafter, decree holder was directed to provide correct address of JD No.2 on several dates right from 01.04.2022 to 19.09.2022. The orders passed subsequent to 19.09.2022 appear to be quite confusing and it appears that Executing Court was not at all in control of the proceedings or it was not aware as to what order was being passed. Despite the fact that property of JD No.2 had already been attached as per order dated 20.09.2021, but vide order dated 04.10.2022, warrant of attachment of the property of JD No.2 were again directed to be issued for 05.11.2022. As per order dated 05.11.2022, the warrants of attachment were not received back and so, fresh warrants were directed to be issued for 07.12.2022. On 07.12.2022, the Court noticed that warrant of property of JD No.1 has been received back executed, though as per the previous order, it is the warrants of attachment of property of JD No.2, which was issued. On one hand, Court is noticing that warrants of attachment of property of JD No.1 is received back executed as per order dated 07.12.2022; on the other hand, the decree-holder has been directed to file the list of property qua JD No.1 and that warrants of attachment was directed to be issued for 15.12.2022. On 15.12.2022, nobody appeared for the decree-holder and the matter was adjourned for 20.12.2022. On 20.12.2022, the Executing Court is noticing that decree-holder had moved an application under Order XXI Rule 37 CPC, although no such application is available on record and rather, on 20.12.2022, it is the application [Annexure A/18] under Order XXI Rule 66 CPC, which was moved by

the decree holder. Notice of the application was directed to be issued to JDs for 23.01.2023.

30. The order dated 23.01.2023, as reproduced earlier, would reveal that the Court simply noticed that perusal of the file indicated that notice could not be served upon the JDs as they had been served through publication and therefore, sale warrants were directed to be issued. Meaning thereby, there is nothing on record to suggest that whether the notice of the application under Order XXI Rule 66 CPC for proclamation of sale, as per the applications dated 11.01.2022 & 20.12.2022 was ever served upon the JD No.2-appellant. Neither report in this regard has been made available on record nor any such report is reflected in the order dated 23.01.2023. As it appears that simply after noticing that JD No.2 had been earlier served through publication, the Court ordered for issuance of sale warrants of the attached property of JD No.2.

31. As per order dated 23.01.2023 of the Executing Court, proclamation by way of munadi/beat of drum was to be effected for 22.02.2023 as per Order XXI Rule 66 (1) CPC read with Order XXI Rules 67(1) read with Order XXI Clause 54 (2) CPC. However, as per the trial Court record, though the munadi fee was deposited on 27.01.2023, but no munadi report is available on file so as to prove that any proclamation by way of munadi was ever carried out. Even in the sale report by the Tehsildar dated 21.02.2023 (*Annexure A12*), there is no mention of the proclamation at all. Thus, sale has been carried out without any proclamation. Even if the appellant was proceeded *ex parte* earlier, munadi as per Order XXI Rule 66 (1) CPC was mandatory, which is to ensure transparent sale with wide publicity to have best price which is not done. It is well settled that where provision leads to divesting of the property, it is to be strictly followed, as has been held in ***Ram Krishan Vs. State of UP, 2012 AIR SC 2288***. Order XXI Rule 66(1) CPC provides for mandatory proclamation before sale. Without proclamation, no sale can take place.

32. Once it was noticed in the order dated 01.04.2022 that JD No.2 had not been served and decree-holder had been directed to provide correct address of JD No.2 from time to time for his service, the executing court could not turn around to hold that JD No.2 had already been served by way of publication. It is thus clear that without getting JD N: 2 served in respect of the application under Order XXI Rule 66 CPC, the sale warrants were directed to be issued. Thus, the procedure adopted by the Executing Court before issuing the sale warrants of the attached property of JD No.2, is clearly unlawful.

33. Proceeding further, in view of the order date 23.01.2023 issuing sale warrants, the sale was conducted on 21.02.2023, in which respondent No.3-Jaicky Garg was successful bidder for ₹1,75,00,000/-. On 28.02.2023, application under Order XXI Rule 90 CPC was moved by JD N: 2/ appellant herein to set aside the sale apart from another application to set aside the order dated 07.12.2019, whereby JD No.2-appellant was proceeded *ex parte*. It was specifically mentioned in the application by the appellant-JD No.2 that he had never been served at his correct address and that he came to know about the alleged sale on 24.02.2023, when Jaicky Garg sent intimation to the applicant-Darshan Singh about purchase of the premises in auction. However, the application under Order XXI Rule 90 CPC moved by JD N: 2/ appellant herein to set aside the sale, was dismissed by the executing court by way of impugned order dated 05.09.2023.

34. The impugned order is not sustainable, as there is complete violation of Order XXI Rule 66 CPC. JD N: 2/appellant, to whom the attached property belonged, was not served in terms of Order 21 Rule 66 to be read with Rule 67 CPC. There is also the violation of Order XXI Rule 54 (1A) CPC, as despite direction for carrying out munadi, no such proclamation of munadi was carried out. A fresh notice is required to be served upon the JD at the time of proclamation of the sale but no such notice was served on appellant-JD No.2, as the premises were lying locked and no fresh address was provided. It has rightly been contended by Ld. Counsel for the appellant that the sale was conducted without issuing any notice or without conducting any *munadi* or publication

about the sale in any newspaper nor any notice was served upon the appellant-JD, which is the violation of Order XXI Rule 67 CPC and so, in the absence of publication, property was not expected to fetch best price.

35. Not only above, the attached property was put to sale without determining the valuation thereof. The executing court did not even consider the extent of property, which was required to be put for sale to satisfy the decree and to ensure that only such portion of the property is sold, as per the requirement of Order XXI Rule 64 CPC.

36. Reliance can be placed on ***M/s Mahakal Automobiles and another (Supra)***, in which it has been held by Hon'ble Supreme Court as under: -

“6. 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

7. 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.

8. 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.

9. 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 irremediable injury to the judgment debtor. Equally publication of the proclamation of sale under Rule 67 and specifying the date and place of sale of the property under Rule 66 (2) are intended so that the prospective bidders would know the value so as to make up their mind to offer the price and to attempt that sale of the property and to secure competitive bidders and fair price to the property sold. Absence of Notice to the Judgment Debtor disables him to offer his estimate of the value who better knows 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."

10. In ***M/s. Shalimar Cinema v. Bhasin Film Corporation and Another [1987(4) SCC 717]*** it was held that the court has a duty to ensure that the requirement of order 21 Rule 66 has properly applied. It is incumbent on the court to be scrupulous in the extreme."

37. Still further, in ***S. Mariyappa (dead) By Lrs and others Vs. Siddappa and another, 2005(10) SCC 235***, it was observed by Hon'ble Supreme Court that before selling the property, the Executing Court did not consider whether sale of only a part of the property would be sufficient to meet the decretal debt of ₹8000/-. Property was one acre of agricultural land, which had been sold in execution for a paltry sum of ₹1500/- plus a prior mortgage debt of ₹700/-. It was held that since Executing Court did not observe its statutory duty, the sale was liable to be set aside. It was clarified that it will be open for the judgment debtor to seek execution of his decree in accordance with law.

38.1 In a latest judgment titled ***Bhikchand s/o Dhondiram Mutha (deceased) through Lrs. Vs. Shamabai Dhanraj Gugale (deceased) through Lrs, 2024 (3) RCR (Civil) 157***, it has been held by Hon'ble Supreme Court that whenever the attached immoveable property is to be sold in public auction, the

value thereof is required to be estimated. Either whole of the attached property or such portion thereof as may seem necessary to satisfy the decree shall be sold in auction. The Court is required to discharge its duty to ascertain whether the sale of the part of the attached property would be sufficient to satisfy the decree. The auction of the entire attached property caused great injustice to the judgment debtor.

38.2 In the above case before Hon'ble Supreme Court, three properties were attached under Order XXI Rule 54 CPC and thereafter, the Executing Court issued sale notice under Order XXI Rule 66 CPC for sale of the attached property by public auction. Hon'ble Supreme Court, referred to Order XXI Rule 66(2) CPC and then held as under: -

“21. The above quoted provisions contained in sub-rule (2) of Rule 66 of Order XXI CPC clearly mandates that the sale proclamation should mention the estimated value of the property and such estimated value can also be given under Rule 54 Order XXI CPC. The fact that the Court is also entitled to enter in the proclamation of sale its own estimate of the value of the property clearly demonstrates that whenever the attached immovable property is to be sold in public auction, the value thereof is required to be estimated. In between Rule 54 to Rule 66 of Order XXI CPC, there is no other provision requiring assessment of value of the property to be sold in auction.

22. It is also important to bear in mind the provisions contained in Rule 54(1) Order XXI read with Rule 66 of Order XXI CPC wherein it is provided that either whole of the attached property or such portion thereof as may seem necessary to satisfy the decree shall be sold in auction. If there is no valuation of the property in the attachment Panchanama and there being no separate provision for valuation of the property put to auction, it is to be understood that the valuation of the property mentioned in attachment Panchanama prepared under Rule 54 can always provide the estimated value of the property otherwise the provisions enabling the court to auction only a part of the property which would be sufficient to satisfy the decree would be unworkable or redundant. In the case in hand, the assessed value of all the attached properties is Rs. 1,05,700/- whereas the original decretal sum was Rs.

27,694/- which is about 26.2% of the total value of the property. Therefore, when only one of the attached properties was sufficient to satisfy the decree, there was no requirement for effecting the sale of the entire attached properties.

23. In the matter of **Balakrishnan vs. Malaiyandi Konar (2006) 3 SCC 49**, this Court observed thus:

"9. The provision contains some significant words. They are "necessary to satisfy the decree". Use of the said expression clearly indicates the legislative intent that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. (See **Takkaseela Pedda Subba Reddi v. Pujari Padmavathamma [(1977) 3 SCC 337: AIR 1977 SC 1789]**.) In all execution proceedings, the court has to first decide whether it is necessary to bring the entire property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small the court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree-holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This is not just a discretion, but an obligation imposed on the court. The sale held without examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction. (See **Ambati Narasayya v. M. Subba Rao [1989 Supp (2) SCC 693]**.) The duty cast upon the court to sell only such property or portion thereof as is necessary to satisfy the decree is a mandate of the legislature which cannot be ignored. Similar view has been expressed in **S. Mariyappa v. Siddappa [(2005) 10 SCC 235]**.

10. In **S.S. Dayananda v. K.S. Nagesh Rao [(1997) 4 SCC 451]** it was held that the procedural compliance with Order 21 Rule 64 of the Code is a mandatory requirement. This was also the view expressed in **Desh Bandhu Gupta v. N.L. Anand [(1994) 1 SCC 131]**."

24. In **Ambati Narasayya vs. M. Subba Rao, 1989 SUPP (2) 693**, this Court has held that in auction sale this is obligatory on Court that only such portion of property as would satisfy decree is sold and not the entire property. This court observed thus in paras 6, 7 & 8:

"6. The principal question that has been highlighted before us relates to the legality of the sale of 10 acres of land without considering whether a portion of the land could have been sold to satisfy the decree. It is said that the total sum claimed in the execution was Rs 2395.50. The relevant provision which has a bearing on the question is Rule 64 Order XXI of the Code of Civil Procedure and it reads as follows:-

"Order XXI Rule 64: Power to order property attached to be sold and proceeds to be paid to persons entitled.-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."

7. It is of importance to note from this provision that in all execution proceedings, the court has to first decide whether it is necessary to bring the entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree holder. It is immaterial whether the property is one, or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This, in our opinion, is not just a discretion, but an obligation imposed on the court. Care must be taken to put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The sale held without examining this aspect and not in conformity with this requirement would be illegal and without jurisdiction.

8. In **Takkaseela Pedda Subba Reddi v. Pujari Padmavathamma [(1977) 3 SCC 337, 340]** this Court after examining the scope of Rule 64 of Order XXI CPC has taken a similar view: (SCC p. 340, para 3)

"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."

25. It is, thus, settled principle of law that court's power to auction any property or part thereof is not just a discretion but an obligation imposed on the Court and the sale held without examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction. In the case at hand, the Executing Court did not discharge its duty to ascertain whether the sale of a part of the attached property would be sufficient to satisfy the decree. When the valuation of three attached properties is mentioned in the attachment Panchanama, it was the duty of the Court to have satisfied itself on this aspect and having failed to do so the Court has caused great injustice to the judgment debtor by auctioning his entire attached properties causing huge loss to the judgment debtor and undue benefit to the auction purchaser....."

39. It is the contention of Id. counsel for respondent No.3-auction purchaser that an auction sale can be set aside under Order XXI Rule 90 CPC only on the ground of material irregularity or fraud in publishing or conducting such sale and not otherwise. Order XXI Rule 90 CPC reads as under: -

"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, 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 conduction it.

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

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

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

40. Ld. counsel for respondent No.3-auction purchaser has referred to ***M/s Al-Can Export Pvt. Ltd. Vs. Prestige H.M. Polycontainers Ltd. & Ors. 2024(4) RCR (Civil) 155***, wherein it was held by Hon'ble Supreme Court as under: -

“36. Nature and Scope: Rule 90 of Order XXI deals with cases of setting aside auction-sale on the ground of material irregularity or fraud in publishing or conducting such sale. Sub-rule (1) states that where any immovable property has been sold in execution of a decree, any person adversely affected may apply to the court for setting aside sale on the ground of material irregularity or fraud in publishing or conducting the sale. Sub-rule (2) is in the nature of proviso to sub-rule (1) and declares that no sale shall be set aside unless the applicant proves substantial injury by reason of such irregularity or fraud. Sub-rule (3) bars the court from entertaining an application for setting aside sale on any ground which the applicant could have taken on or before the date of proclamation of sale. The Explanation to Rule 90 clarifies that mere absence of or defect in, attachment of property sold would be no ground for setting aside sale.

37. Order XXI of the CPC is exhaustive and in the nature of a complete code as to how the execution proceedings should take place. This is the second stage after the success of the party in the civil proceedings. This Court in many of its decisions has said that this is the second stage after the success of the party in the civil proceedings. It is often said in our country that another legal battle, more prolonged, starts in execution proceedings defeating the right of

the party which has succeeded in establishing its claim in civil proceedings. This is the reason why Order XXI Rule 90 provides that both the conditions enumerated therein should be fulfilled. (See: ***M/s Jagan Singh & Co. v. Ludhiana Improvement Trust & Ors. reported in (2024) 3 SCC 308***)

a. Difference between the auction sale conducted by the court in the execution proceedings initiated by the decree holder and the auction proceedings conducted by the State through its revenue authorities like Tahsildar, etc.

38. There is a fine distinction between the auction sale conducted by the executing court under the provisions of the CPC and the auction sale conducted by the State under the provisions of different enactments like Land Revenue Code etc. The whole object behind Order XXI Rule 90 of the CPC appears to be to discourage the judgment debtors from filing frivolous application complaining about the irregularity or fraud in the conduct of the auction sale. A lot of sanctity is attached to the auction sale conducted by the executing court under the provisions of the CPC compared to the auction sale conducted by the State through its authorities. Execution is the enforcement by the process of the court of its orders and decrees. This is in furtherance of the inherent power of the court to carry out its orders or decrees. Order XXI CPC deals with the elaborate procedure pertaining to the execution of orders and decrees. Sale is one of the methods employed for execution. Rule 89 of Order XXI of the CPC is the only means by which a judgment-debtor can escape from a sale that has been validly carried out. The object of the rule is to provide a last opportunity to put an end to the dispute at the instance of the judgment debtor before the sale is confirmed by the court and also to save his property from dispossession.

39. We are of the view that even otherwise the provisions of the CPC do not apply to writ petitions under Article 226 of the Constitution of India except some of the principles enshrined therein like res judicata, delay and laches, addition of parties, matters which have not been specifically dealt with by the writ rules framed by the respective High Court.

41. It is relevant to mention herein that in the above case, Hon'ble Supreme Court was considering the question that *as to whether a Writ Court, on finding an auction sale conducted by the State through its authorities in*

gross violation of Order XXI Rule 90 CPC, could set aside the sale? It was held that provisions of Order XXI Rule 90 CPC would not apply to the Writ proceedings under Article 226 of the Constitution of India and that it will be hazardous to apply the principles enshrined in Order XXI rule 90 CPC. Hon'ble Supreme Court clarified the difference between the auction sale conducted by the Court in the execution proceedings initiated by the decree-holder, and the auction proceedings conducted by the State through its revenue authorities like Tehsildar etc. As such, the cited authority is of not of much help to advance the case of the auction purchaser. Not only this, in the above case before Hon'ble Supreme Court, no proof of irregularity could be shown and there was found to be sufficient compliance of proclamation, which is not so in the present case.

42.1 Ld. counsel for respondent No.3 has further referred to ***Chilamkurti Bala Subrahmanyam Vs. Samanthapudi Vijaya Lakshmi and another, 2017 (3) RCR (Civil) 179***, wherein it was held by Hon'ble Supreme Court that any person affected by sale can apply to Court for setting aside the sale on the ground of material irregularity or fraud in publishing or conducting sale under Order XXI Rule 90 CPC. However, sale could not be set aside on material irregularity or fraud, unless the affected person is further able to establish that material irregularity or fraud has resulted in substantial injury to the applicant.

42.2 In the case before Hon'ble Supreme Court the sale of the property in execution of decree fetched ₹7.50 lakh. The judgment debtor prayed for setting aside sale on the ground that value of the property was between ₹12 lakh to ₹14 lakh. It was held that this objection had no substance for want of any evidence. It will be relevant to refer to the observations made by Hon'ble Supreme Court in this regard, which read as under: -

“15. After examining the facts of this case in the light of the law laid down in the case of ***Saheb Khan (supra)***, we are of the considered opinion that the reasoning and the conclusion arrived at by the executing Court deserves to be restored as against that of the High Court in the impugned order. In other words, no case was made out by the judgment debtor for setting aside of the sale of the property in question on the ground of committing any material

irregularity or fraud in publishing or in conducting the sale so as to enable the Court to invoke its powers under Order 21 Rule 90 (2) of the Code.

16. It is noticed that respondent No. 1, in her application for setting aside the sale, had mainly raised four objections. Firstly, clear 15 days' notice was not given for sale of the properties as required under the Rules. Secondly, the valuation of the property was not properly mentioned in the concerned documents so as to enable the parties to know its proper valuation prevailing on the date of sale. Thirdly, the market value of the property on the date of auction was more than the price actually fetched in the auction, and fourthly, no proper publication including beating of drum was made before the date of auction due to which there was less participation of the bidders in the auction sale.

17. The executing Court dealt with all the four objections with reference to the record of the proceedings and found as a fact that none of the objections had any merit. The High Court, however, found fault in the same though not in all but essentially in the matter relating to giving of clear 15 days' notice and the manner in which it was issued and finding merit in the objection, set aside the sale on imposing certain conditions enumerated above.

18. In our considered opinion, as mentioned above, the executing Court was justified in overruling the objections and we concur with the reasoning and the conclusion of the executing Court.

19. We also find on facts that firstly, the proper publicity was given for auction sale in papers so also by beat of drums pursuant to which as many as seven bidders including the appellant herein participated in the auction sale. Had there been no publicity, it would not have been possible for seven persons to participate in the auction proceedings.

20. Secondly, the details of the valuation of the property were duly mentioned, namely, decree holder's valuation at Rs.2,75,000/- likewise, Amin's valuation at Rs.4 lacs whereas the property was sold in auction for Rs.7,50,000/-. In this view of the matter, it could not be said that the bidders did not know the valuation or/and that it was not mentioned in the auction papers.

21. Thirdly, judgment debtor did not adduce any evidence nor brought any bidder to purchase the property for a higher price than the purchase bid (Rs.7,50,000/-) except to say in the application that value of the property was between Rs.12 lakhs to Rs.14 lakhs. In our view, this objection has no substance for want of any evidence.

22. Fourthly, there was adequate publicity given with the aid of beat of drums in the locality. It was proved with the record of the executing Court as was rightly held by the executing Court and lastly, in our view, a clear 15 days' notice was given for auction sale fixed for 17.11.1999 when counted from 05.10.1999. In other words, 15 days have to be counted from 05.10.1999 because it is on this date the order was issued as contemplated under Order 21 Rule 64 for proclamation of sale fixing the date of sale as 17.11.1999.

23. The executing Court, therefore, substantially and in letter and spirit followed the procedure prescribed under Order 21 Rules 64 and 66 of the Code while conducting the sale of the property in question.

24. The law on the question involved herein is clear. It is not the material irregularity that alone is sufficient for setting aside of the sale. The judgment debtor has to go further and establish to the satisfaction of the Court that the material irregularity or fraud, as the case may be, has resulted in causing substantial injury to the judgment- debtor in conducting the sale. It is only then the sale so conducted could be set aside under Order 21 Rule 90(2) of the Code. Such is not the case here."

43. Similar view was also taken by Hon'ble Supreme Court in the case of ***Saheb Khan Vs. Mohd. Yusufuddin and other, 2006 AIR (Supreme Court) 1871*** to the effect that auction sale cannot be set aside on the ground of fraud or material irregularity, unless it is made out that it has resulted in substantial injury to the applicant. It was also held that the proclamation of sale by beat of drum is not mandatory, so long as the sale notice is proclaimed at or adjacent to the property and that Rule 54(2) provides for proclamation being made by beat of drum or other customary mode.

44. In the present case, lot of material irregularities have already been noticed.

a) Firstly, appellant-JD No.2 was never served in the execution in accordance with law. Although, it was noticed that the firm was lying closed, and the partners of the firm were not residing at the given address in Village Sherpur, still no fresh address was provided despite available with the decree-holder as noticed earlier.

b) Secondly, after proceeding JD No.2-appellant *ex parte*, notice of the attachment under Order XXI Rule 54 CPC was not served upon him.

c) Thirdly, notice under Order XXI Rule 66 CPC to be read with Rule 67 was not served upon him.

d) Fourthly, in the proclamation of sale, it was not mentioned as to how much property is required to be sold for satisfaction of the decree, which is the requirement of Order XXI Rule 66 CPC. Although in the application under Order XXI Rule 66 CPC, decree holder mentioned that estimated value of the property was not less than ₹30 lakh but no such condition was put in the auction sale. No estimate was taken from any competent authority or Tehsildar or any registered valuer.

45. In the present case, decretal amount is ₹55,78,102/- plus 12% interest, which is around ₹94,00,00/-; whereas, 5 bigha 18 marla of the land of the appellant along with the rice mill installed therein has been sold for a paltry sum of ₹1,75,00,000/-. Simply because the appellant is unable to put forth any person, who can purchase the property for an amount of ₹4 crore as is claimed by him, does not mean that substantial injury has not been caused to the appellant. No reliable estimate was given by the decree-holder/ PUNGRAIN. As per application dated 11.01.2022, under Order XXI Rule 66 CPC, it was mentioned that estimate value of the property attached was not less than approximately ₹30 lakh. No valuation report was attached. It was not an estimate at all. More than ₹30 lakh can be anything. Estimate is required to enable the Court to consider how much property is enough to sell to satisfy the decree as per Order XXI Rule 66 and 64 CPC. In the absence of any such estimate, court could not consider as to how much property is to be put to sale.

Merely by mentioning that estimated value of the property was not less than ₹30 lakh does not satisfy the statutory requirement as estimate has to be done on the peaceful material and not *ipsi dixit* of one party. Reliance in this regard can be placed on ***M/s Mahakal Automobiles and another (Supra)***.

46. The contention of Ld. counsel for respondent No.3 and decree-holder that property was indivisible and not separable and so, it was not required for the Court to mention, as to how much property was sufficient to satisfy the decree, has no force, as no such reasoning has been given by the Executing Court in any of its order before ordering the auction sale of the attached property. Conducting of the sale of the entire property, when the decree could have been satisfied only by the part of the property is illegality in sale and it makes no difference whether property is separable or not, as has been held in ***Vinod Kumar Vs. Darbara Singh, 2015(2) PLJ 124*** and ***S. Mariyappa (dead) By Lrs and others (Supra)***.

47. In this case, the Executing Court did not at all even venture into exercise of examining the extent of property as even share of un-partitioned property can be sold. It has been rightly contended by learned counsel for the appellant that the attached property being a rice sheller, the machinery could have been sold as sufficient to satisfy the decree, but this exercise was never conducted, as the valuation of the machinery was not considered and this amounts to material irregularity as held in ***M/s Mahakal Automobiles and another (Supra)***.

48. The contention of Ld. counsel for the respondents to the effect that Order XXI Rule 90 CPC only deal with the material irregularity post sale is also unsustainable because Clause XXI of Order XXI Rule 90 CPC permits filing of objection by any other person, whose interest are affected by the sale, for setting aside the sale on the ground of material irregularity or fraud in publishing or conducting it. Evidently, objections can include irregularity in publishing, which is the case in hand because no proclamation was made as per Order XXI Rule 66 read with Order XXI Rule 67 (1) CPC read with Order XXI Rule 54 CPC.

49. Thus, there being irregularity in publishing, it is covered as one of the permissible objections under Order XII Rule 90 CPC. Further Order XXI Rule 90 CPC permits objections regarding conducting the sale and in the present case, the sale was conducted without proclamation as per law, which is illegal.

50. On account of the entire discussion as above, this Court is of the view that the impugned order refusing to set aside the auction sale under Order XXI Rule 90 CPC, cannot be sustained. The impugned order is hereby set aside. It has already been noticed that once the Executing Court had set aside the order dated 07.12.2019, whereby the *ex parte* proceeding against the appellant-JD No.2 was set aside, the executing Court was required to proceed further in accordance with law after joining the JD N: 2 in the proceeding from the stage of 07.12.2019 onwards.

51. As such, the present appeal is hereby accepted. The Executing Court is directed to proceed further in accordance with law. The auction sale and confirmation of the sale ordered by the Executing Court later on, are hereby set aside.

07.01.2025

Vivek

(DEEPAK GUPTA)

JUDGE

<i>Whether speaking/reasoned?</i>	<i>Yes</i>
<i>Whether reportable?</i>	<i>Yes</i>