



**HIGH COURT OF ANDHRA PRADESH**  
THURSDAY ,THE TWENTY SEVENTH DAY OF JANUARY  
TWO THOUSAND AND TWENTY TWO

**PRESENT**

**THE HONOURABLE SRI JUSTICE A V SSHA SAI**  
**CIVIL REVISION PETITION NO: 921 OF 2019**

**Between:**

1. SMT.BONDA MARY ANR W/o.late Nageswaara Rao, Indian Christian  
Hosuehold Duties  
R/o.D.No.2/292, Indira Gandhi Nagar,  
Dairy Farm Post, Visakhapatnam.
2. Bonda Rangunath, S/o.late Nageswaara Rao, Aged 32 years,Hindu  
Advocate [P1 & 2 are being rep by their Sale Agreement cum  
GPA Holder M/s.Kalyani Construction, a partnership firm rep  
by its Managing Partner Smt.Rajamudali Sijatha,  
W/o.Satyanarayana, Hindu, 34 years  
R/o.D.No.2/292, Indiragandhi Nagar,Dairy Farm Post, Visakha

**...PETITIONER(S)**

**AND:**

1. M/S.SIMHAGIRI CHITS FUNDS PVT LTD and 7 others rep by its  
Managing Director D.Vijaya Bhaskar Reddy  
S/o.late Nrayana Reddy, Aged 50 Years  
R/o.D.No.47-9-28,  
Dwarakanagar,  
Visakhapatnam.
3. Kata Venkata Reddy S/o.Pera Reddy, Hindu  
R/o.D.No.47-9-28,  
Dwarakanagar,  
Visakhapatnam.
4. Madireddy Bala Nagi Reddy, S/o. China Koti Reddy, aged 40 years,  
business, R/o. D. No.30-10-15, Pidarthivari Street, Dabagarden,  
Visakhapatnam.  
to implead the respondent as R3 vide court Order dated 16.04.2018 in  
CMAMP No.2411 of 2012 in CMA No.954 of 2006.
5. Gajjala Thirupathi Reddy, S/o. Late Rama Chandra Reddy, aged 63  
years, business, D.No.33-12-7/A, Devangula Street, Allipuram,  
Visakhaatnam - 530004.
6. Sri Gandham Anki Reddy, S/o. Late Okki Reddy, aged 41 years,  
business, D.No.33-12-5, Devangula Street, Allipuram, Visakhapatnam -  
530004.
7. Sri Gajjala Pedda Yogi Reddy, S/o. Late Narayana Reddy aged 63 years,  
business, D.No.33-12-17/1, Devangula Street, Allipuram, Visakhapatnam  
- 530004.
8. Sri Gajjala Nagamuni Reddy, S/o. Late Nagi Reddy, aged 64 years,  
business, D.No.1-18, Vemula Valasa Village, Anandapuram Mandal,  
Visakhapatnam District.
9. Smt Gujju Bhuvanewari, W/o. Rajesekhara Reddy aged 43 years,  
business, R/o. D.No.45-44-22, Akkayya Palem, Old Post Office Street,  
Visakhapatnam - 16.  
(RR 4 to 8 to implead the proposed respondents vide court Order dated  
16.04.2018 in IA No.1 of 2018 in CMA No.954 of 2006.)



10. Madireddy Mahalaxmamma, Mother of Late M. Bala Nagi Reddy, W/o 2022:APHC:1923  
Chinna koti Reddy, aged 82 years, Rio D.no.31-30-3512, Narayana Street,  
Dabagarden,  
Visakhapatnam.
11. Madireddy Nagamma, W/o M. Bala Nagi Reddy, aged 48 years, R/o D.NO.  
31-30-35/2. Narayana Street, Dabagarden, Visakhapatnam.
12. Ms M. Shanthi D/o Late Bala Nagi Reddi, aged 27 years, R/o D.No. 31-30-  
35/2, Narayana Street, Dabagarden, Visakhapatnam.
13. M. Sandeep Reddy S/o Late Bala Nagi Reddy, aged 25 years, Rio  
D.Mp131 -30-352. Narayana Street, Dabagarden, Visakhapatnam.

**...RESPONDENTS**

**Counsel for the Petitioner(s): N SUBBA RAO**

**Counsel for the Respondents: D KASIM SAHEB**

**The Court made the following: ORDER**

**THE HON'BLE SRI JUSTICE A.V.SESHA SAI****CIVIL REVISION PETITION No.921 of 2019****ORDER :**

Judgment debtors in E.P.No.104 of 2003 in O.S.No.933 of 1997 on the file of the Court of the Principal Senior Civil Judge, Visakhapatnam, are the petitioners in the present Civil Revision Petition. The present Revision challenges the order dated 30.01.2006 passed by the Court of the Principal Senior Civil Judge, Visakhapatnam, in E.A.No.293 of 2004 in E.P.No.104 of 2003 in O.S.No.933 of 1997. Respondent No.1 herein is the Decree Holder and respondent No.1 herein instituted O.S.No.933 of 1997 on the file of the Court of the Principal Senior Civil Judge, Visakhapatnam, against (1) Sri Bonda Nageswara Rao, S/o.Atchannaidu, (2) Sri Bonda Raghunath, S/o.Nageswara Rao and (3) Smt. Bonda Mary, W/o.Nageswara Rao, for recovery of a sum of Rs.1,77,713/- on the foot of a chit fund transaction, wherein defendant No.1 joined as a member and defendant Nos.2 and 3 stood as guarantors. Pending O.S.No.933 of 1997, plaintiff/deGREE holder/respondent No.1 herein filed I.A.No.1004 of 1997 under the provisions of Order 38 Rules 5 and 6 of the Code of Civil Procedure, 1908 (C.P.C.), and the trial Court on 13.11.1997, passed a conditional order of attachment and the same was made absolute on 16.07.1997. Pending the suit, defendant No.1, Sri Bonda Nageswara Rao, passed away and the said suit was decreed on 30.10.2000 against defendant Nos.2 and 3 jointly and severally for a sum of



Rs.1,77,713/- together with subsequent interest @12% per annum on Rs.1,40,000/- from 13.11.1997, i.e., the date of suit, till the date of realisation and the trial Court also awarded costs of Rs.9,442/-. Respondent No.1 herein filed E.P.No.104 of 2003 under Order 21 Rule 11 of C.P.C. against defendant Nos.2 and 3, who are the petitioners herein, seeking enforcement of the decree by way of the sale of the attached schedule property. The schedule property is a house bearing D.No.2-292, Old Dairy Farm Post, Chinagadili village, Indiranagar, Visakhapatnam Municipal Corporation Limits. The boundaries of the said property shown in E.P.No.104 of 2003 are as follows:

East	-	Municipal Road
South	-	House bearing D.No.2-293
West	-	Compound wall and vacant site belonging to Sri Pratap.
North	-	House bearing D.No.2-291

2. Sale notice was published on 22.10.2002, proposing the sale on 14.11.2002, and on which date, sale was conducted and respondent No.2 herein, Mr. Kata Venkata Reddy stood as highest bidder and the bid was knocked down in his favour for Rs.14,50,000/- and the sale was confirmed on 30.01.2006 and the sale certificate was also issued on 19.04.2006. Pending E.P.No.104 of 2003 (Old E.P.No.573 of 2000), M/s. Kalyani Constructions, represented by its Managing Partner Smt. Rajamudili Sujatha filed E.A.No.674 of 2002 (New E.A.No.29 of 2003) on 08.11.2002 against the decree holder, judgment debtors (petitioners herein) under Section 47 of the C.P.C. on the



ground that the petitioners herein sold two items of the property by way of registered sale agreement-cum-general power of attorney on 12.01.2001. Schedule of the said E.A.No.674 of 2002 (New E.A.No.29 of 2003) is as follows:-

"Item No.1:-

Visakhapatnam District, Visakhapatnam Sub-Registry, Visakhapatnam Municipal Corporation, Pedagadili village & Panchayat, Chinagadili village bearing S.No.110/2part, undivided and unspecified share of 372.4 Sq.yds or 311.326 Sq.mts. together with a 130 Sft.A.C.Sheets shed thereon bearing Door No.2-293/1, Assessment No.108306, Ward No.25 out of total area of 532.4 Sq.yds with 150 Sft.A.C.Sheet shed and bounded by:

East	:	Road	88 feet or 26.82 mts
South	:	Property belongs to Dr.N.Venkata Rao	62 feet or 18.90 mts
West	:	Property belongs to T.Vijayalakshmi	74 feet or 22.56 mts
North	:	Walkway lane	62 feet or 18.90 mts

Item No.II:-

All that site measuring 721.20 Sq.yds or 602.923 Sq.mts out of 871.20 Sq.yds or 720.436Sq.mts and with a plinth area of 300 Sft. Out of 400 Sft. In R.C.C.Building bearing Dr.No.2-293, assessment No.108305 situated in Adarshnagar area, covered by S.No.110/2 part of Chinagadili village within the limits of Visakhapatnam Sub-Registry and Municipal limits and bounded by:

(1st item No.726Sq.yds or 607.031Sq.mts.

East	:	Property belonging to the heirs of late Bonda Nageswara Rao	75 feet or 22.86 mts
South	:	Property belonging to Dr. Venkata Rao	86 feet or 26.21mts
West	:	Item No.II of this property	70 feet or 21.33 mts
North	:	Property belonging to Sri Raghavareddy Rajashri and Sri Rama Murthy	110 feet or 33.53 mts

(2<sup>nd</sup> item No.145.20 Sq.yds or 121.407 Sq.mts.

East	:	I st item property partly and	70 ft or 24.60mts
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property belonging to Sri Raghavareddy

West : Property belonging to the heirs of late Bonda Nageswara Rao 70 ft. or 3.0 mts

South: Property belonging to D.Venkatarao 10 ft. or 3.0 mts

North: Property belonging to the heirs of late Bonda Nageswara Rao." 10 feet or 3.0 mts

3. The decree holder/respondent No.1 herein contested the said E.A.No.674 of 2002 by way of filing counter. The said E.A.No.674 of 2002 was dismissed as not pressed on 16.09.2004. One day after the dismissal of E.A.No.674 of 2002 as not pressed, i.e., on 17.09.2004, one Smt. Thota Vijayalakshmi, represented by her general power of attorney-cum-sale agreement holder, M/s. Kalyani Constructions, represented by its Managing Partner, Smt. Rajamudili Sujatha filed E.A.No.367 of 2004 under the provisions of Order 21 Rule 58 C.P.C. against the decree holder, auction purchaser (respondent No.2 herein) and the petitioners herein. In this context, it may be pertinent to note that Smt. Thota Vijayalakshmi is a daughter of defendant No.1, late Sri Bonda Nageswara Rao and petitioner No.1 herein. The said E.A.No.367 of 2004 was contested by the decree holder by way of filing counter. The learned Principal Senior Civil Judge, Visakhapatnam, by way of an order dated 03.08.2005, dismissed the said E.A.No.367 of 2004. Petitioners herein represented by their general power of attorney-cum-sale agreement holder, M/s. Kalyani Constructions, represented by its Managing Partner, Smt. Rajamudili Sujatha, on 16.09.2004, filed E.A.No.293 of 2004 under Section 47 of the C.P.C. against



the decree holder and the auction purchaser, arraying them as respondent Nos.1 and 2 in the said application for the following reliefs:-

"The petitioners therefore pray that the Honourable Court may be pleased to pass an order in favour of the petitioners and against the respondents:-

- a) declaring that item Nos.1 and 2 of the Petition schedule properties and described as CDMJ and IJKL of the rough plan said to be covered under attachment order in I.A.No.1004/97 cannot be brought to sale in view of a personal decree passed against the petitioners 1 and 3 and not against the assets of late Bonda Nageswara Rao lying in the hands of petitioners 1 and 2 in O.S.933/97;
- b) by declaring that the items 3 to 5 of the petition schedule property and shown as ABHICD in the rough plan are not covered under the attachment order in I.A.No.1004/97 in O.S.No.933/97 on the file of Prl.Sr.Civil Judge Court, Visakhapatnam, by setting aside the sale conducted on 14-11-2002 in the above E.P. and knocked down in favour of 2<sup>nd</sup> respondent;
- c) decide all necessary questions involving and arising out of the execution and for costs;
- d) for such other relief or reliefs as the Honourable Court deems fit and proper in the circumstances of the case."

4. Vide order dated 30.01.2006, the learned Principal Senior Civil Judge, Visakhapatnam, dismissed E.A.No.293 of 2006, and on the same date, sale was confirmed and thereafter,



on 19.04.2006, sale certificate was issued in favour of the auction purchaser. Against the said order dated 30.01.2006 passed in E.A.No.293 of 2006, initially, the petitioners herein filed C.M.A.No.954 of 2006 and thereafter, after the conversion, the same came to be numbered as present C.R.P.No.921 of 2019.

5. Heard Sri N.Subba Rao, learned counsel for the petitioners, Sri D.Kasim Saheb, learned counsel for respondent No.1, Sri G.Venkateswarlu, learned counsel for respondent No.2, Sri O.Manohar Reddy, learned counsel for respondent No.4, Sri P.Sriraghuram, learned senior counsel representing Sri E.V.S.S.Ravi Kumar, learned counsel for respondent Nos.5, 6 and 8, Sri Chakkilam Venkateswarlu, learned counsel for respondent No.7, and Sri Virupaksha Dathathreya Gouda, learned counsel for respondent Nos.9 to 12, apart from perusing the entire material available on record.

6. Contentions/submissions of Sri N.Subba Rao, learned counsel for the petitioners:-

(1) The order of the Court below is erroneous, contrary to law and opposed to the very spirit and object of the provisions of Section 47 of the C.P.C.

(2) The conclusion of the learned Senior Civil Judge, that while executing personal decree, passed against the petitioners, who are the legal heirs of the deceased principal borrower-defendant No.1, their assets can also be sold, is contrary to law.

(3) The Court below failed to notice that the petition schedule property in I.A.No.1004 of 1997 does not disclose the





extent or the measurements and that the schedule shown in the Execution Petition does not match with the property attached, as such, the learned Senior Civil Judge should have refused to execute the decree.

(4) The Court below ought to have seen that items 1, 2 and 3 of the petition schedule property, which were brought to sale, were bequeathed in favour of the petitioners long prior to the attachment made in I.A.No.1004 of 1997 and that defendant No.1 died during the pendency of the suit in the year 1999 and with the result, the petitioners herein became the lawful owners of the said items of the property and that when the said items were brought to sale, defendant No.1 had no saleable interest in the said properties.

(5) The Court below did not properly appreciate the law relating to attachment and sale of properties in execution of a personal decree and the case laws cited were not properly considered.

(6) The conclusion of the Court below that the boundaries will prevail over the extent is not only irrelevant for the case on hand, but also erroneous in the facts and circumstances of the case, since the very extent and measurements were not furnished by the decree holder at the time of seeking attachment before judgment.

(7) Learned Senior Civil Judge grossly erred in not adhering to the mandatory provisions of Order 21 Rules 64 and 66 of the C.P.C.



(8) Learned Senior Civil Judge did not record a definite finding that the property attached and the property brought to sale is one and the same.

In support of his submissions and contentions, learned counsel places reliance on the following judgments:

- (1) *Ambati Narasayya Vs. M.Subba Rao and others*<sup>1</sup> (Paragraph-4).
- (2) *Bhavan Vaja and others Vs. Solanki Hanuji Khodaji Mansang and others*<sup>2</sup> (Paragraph-19).
- (3) *Kamireddy Sumathi and others Vs. C.Mallikarjuna Reddy and others*<sup>3</sup> (Paragraphs-8 to 10).
- (4) *Takkaseela Pedda Subba Reddi Vs. Pujari Padmavathamma and others*<sup>4</sup> (Paragraph-3).
- (5) *Gajadhar Prasad and others Vs. Babu Bhakta Ratan and others*<sup>5</sup>.

7. Submissions/contentions of the learned counsel for the decree holder/respondent No.1:-

(1) There is no error nor there exists any infirmity in the impugned order, as such, the same is not amenable for any judicial review under Section 115 of the C.P.C.

(2) The contentions/submissions of the learned counsel for the petitioners are neither sustainable nor tenable in the eye of law.

(3) The present E.A. and the C.R.P. are only an attempt to drag on the litigation to a maximum possible extent of time.

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<sup>1</sup> AIR 1990 SC 119

<sup>2</sup> AIR 1972 SC 1371

<sup>3</sup> 2016(3) ALD 311

<sup>4</sup> AIR 1977 SC 1789

<sup>5</sup> AIR 1973 SC 2593



(4) The Court below, after meticulously and elaborately considering all the issues, passed the impugned order.

8. Submissions/contentions of Sri D.Kasim Saheb, learned counsel for respondent No.1 and Sri Virupaksha Dathathreya Gouda, learned counsel for respondent Nos.9 to 12:-

(1) There is no illegality nor there exists any infirmity in the impugned order and in the absence of the same, no interference of this Court is warranted under Section 115 of the C.P.C.

(2) After the issuance of sale certificate on 19.04.2006 and delivery of possession on 21.04.2006, respondent No.2 herein/ auction purchaser, out of the total extent of 2606.22 square yards, sold 1793.45 square yards in favour of respondent No.3/ one Sri M.Bala Nagireddy, by executing sale agreement-cum-general power of attorney on 03.03.2003.

(3) Petitioners herein stood as guarantors to the suit debt, as such, they are jointly and severally liable to discharge the debt and the original Court decreed the suit accordingly.

(4) The property attached, property brought to sale, property proclaimed for sale and property actually sold is one and the same, but the petitioners herein divided the property into five times to suit their convenience.

(5) General power of attorney holder filed E.A.No.367 of 2004 under Order 21 Rule 58 of the C.P.C., admitting the attachment before judgment of the entire property as prayed for and that the learned Senior Civil Judge recorded a categorical



finding that the entire property was attached and sold in the auction conducted in the Court.

(6) Law does not require to mention extent or measurements in the attachment petition and the provisions of Order 7 Rule 3 and Order 21 Rule 13 read with Form No.6 of the Appendix-E of the First Schedule of the C.P.C. do mandate that the plaint schedule or the attachment petition schedule shall contain only boundaries or description of property sufficient to identify the same.

(7) The contention, touching the provisions of Order 21 Rules 64 and 66 C.P.C., was neither pleaded nor agitated before the Executing Court, as such, the same cannot be raised for the first time before this Court.

(8) The objections now sought to be pressed into service by the petitioners herein are available only in an application filed under the provisions of Order 21 Rule 90 of the C.P.C., but not in an application filed under Section 47 of the C.P.C.

(9) E.A.No.293 of 2004 is also barred under Order 9 Rule 9 and Order 2 Rule 2 read with Section 12 of the C.P.C. in view of the dismissal of E.A.No.29 of 2003 as not pressed and without any liberty to file another application.

In support of his submissions and contentions, learned counsel places reliance on the following judgments:

- (1) *Kunwar Jung Bahadur Vs. Lala Gur Prasad*<sup>6</sup> (Head Note).
- (2) *Andhra Bank Ltd., Vs. R.Srinivasan and others*<sup>7</sup>.

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<sup>6</sup> AIR 1925 Oudh 113

<sup>7</sup> AIR 1962 SC 232



- (3) *SHEO PRASAD (JUDGMENT-DEBTOR) Vs. HIRA LAL (DECREE-HOLDER)*<sup>8</sup>.
- (4) *Hardeya Devi Vs. Fiddan and others*<sup>9</sup>.
- (5) *Sheodhyan Singh and others Vs. Mst. Sanichara Kuer and others*<sup>10</sup>.
- (6) *P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao and another*<sup>11</sup>.
- (7) *Chebolu Nooka Raju Vs. Kesam Rama Swamy and another*<sup>12</sup>.
- (8) *Vepa Satyanarayanamurthy Vs. Chekka Bhavanarayana and others*<sup>13</sup>.
- (9) *K.Swaminatha Iyer and another Vs. K.G.Krishnaswami Iyer and others*<sup>14</sup>.
- (10) *Haji Rahim Bux and Sons and others Vs. Firm Samiullah and Son*<sup>15</sup>.
- (11) *Zarif Ahmad (D) Thr. LRs and another Vs. Mohd. Farooq*<sup>16</sup>.
- (12) *M.Rajagopal Reddy Vs. State Bank of India and others*<sup>17</sup>.
- (13) *K.Venkateswaramma @ Hema Laltha KUmari and another Vs. Y.Ravindranath Reddy and another*<sup>18</sup>.
- (14) *Saminathan Vs. Manager, State Bank of India*<sup>19</sup>.
- (15) *Balakrishnan Vs. Malaiyandi Konar*<sup>20</sup>.
- (16) *Vummethala Somamma Vs. Thameeru Balanagamma*<sup>21</sup>.
- (17) *Kamireddy Sumathi and others Vs. C.Mallikarjuna Reddy and others*<sup>22</sup> (Paragraphs-8 to 10).
- (18) *Dhirendra Nath Gorai and others Vs. Sudhir Chandra Ghosh and others*<sup>23</sup>.
- (19) *S.A.Sundararajan Vs. A.P.V.Rajendran*<sup>24</sup>.

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<sup>8</sup> ILR 12 Allahabad 440 (F.B.)

<sup>9</sup> AIR 1962 Allahabad 125

<sup>10</sup> AIR 1963 SC 1879

<sup>11</sup> AIR 1995 SC 1357

<sup>12</sup> 2002 Suppl.(2) ALD 619

<sup>13</sup> AIR 1957 A.P. 185 (F.B.)

<sup>14</sup> AIR 1947 Madras 213

<sup>15</sup> AIR 1963 Allahabad 320

<sup>16</sup> AIR 2015 SC 1236

<sup>17</sup> 2006(2) ALT 717

<sup>18</sup> 2018(2) ALD 389

<sup>19</sup> LAWS (MAD) 2009 (10) 532

<sup>20</sup> AIR 2006 SC 1458

<sup>21</sup> AIR 2003 Andhra Pradesh 45

<sup>22</sup> 2016(3) ALD 311

<sup>23</sup> AIR 1964 SC 1300



(20) *Jagati Thimmaraju Vs. Uppuluri Brahmanna*<sup>25</sup>.

(21) *Smt. Pushpmala Jain Vs. Bank of Baroda and others*<sup>26</sup>.

9. Submissions/contentions of Sri O.Manohara Reddy, learned counsel for respondent No.4:-

(1) The very application filed under Section 47 of the C.P.C. is not maintainable in view of the provisions of Order 21 Rule 90 of C.P.C., which enable the Court to set aside the sale for the contingencies mentioned therein.

(2) Period of limitation for filing application under Order 21 Rule 90 C.P.C. is 60 days from the date of sale as per the Article 127 of the Limitation Act, and in the instant case, the sale was held on 14.11.2002 and the sale certificate was issued on 19.04.2006, but the present E.A.No.293 of 2004 was filed on 16.09.2004, as such, the present application is disguised one and cannot be entertained, as it is a deliberate attempt to circumvent the mandatory provisions of the Limitation Act.

(3) Section 47 of the C.P.C. is applicable only in respect of the events which take place during the pendency of the suit and Order 21 Rule 90 of C.P.C. applies for the events that occur posterior to the sale.

(4) The contention that E.A.No.264 of 2004 was dismissed with a liberty is not correct and is contrary to the record.

(5) In support of his contentions and submissions, learned counsel places reliance on a judgment of the Hon'ble Supreme Court in the case of *S.A.Sundararajan Vs. A.P.V.Rajendran*<sup>27</sup>.

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<sup>24</sup> AIR 1981 SC 693

<sup>25</sup> 1998(3) ALT 266

<sup>26</sup> AIR 1990 Punjab and Haryana 28



10. Submissions/contentions of Sri P.Sriraghuram, learned Senior Counsel, representing Sri E.V.S.S.Ravi Kumar, learned counsel for respondent Nos.5, 6 and 8:

(1) The contention, touching the provisions of Order 21 Rules 64 and 66 of the C.P.C. can be taken only at the time of settlement of proclamation and the petitioners herein should have filed an application under Order 21 Rules 89 and 90 of the C.P.C.

(2) In E.A.No.293 of 2004, the petitioners did not take the plea of sufficiency nor raised the said plea in the present revision before this Court.

(3) Since the petitioners did not avail the remedy under Order 21 Rules 89 and 90 C.P.C., they are not entitled for any relief from this Court under Section 115 of the C.P.C.

(4) Application under Section 47 C.P.C. is not maintainable for the alleged irregularities, if any, for the period posterior to the decree.

(5) The finding of the learned Senior Civil Judge that the schedule property is one and not many is a finding of fact which cannot be verified under Section 115 of the C.P.C.

To bolster his submissions and contentions, learned counsel places reliance on the following judgments:

(1) *Pandurang Dhondi Chougule and others Vs. Maruti Hari Jadhav and others*<sup>28</sup> (Paragraph-13).

(2) *N.Ramaiah Vs. Nagaraj S*<sup>29</sup> (Paragraph-12).

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<sup>27</sup> AIR 1981 SC 693

<sup>28</sup> AIR 1966 SC 153

<sup>29</sup> AIR 2001 Karnataka 395



- (3) *Daya Ram and others Vs. Shyam Sundari and others*<sup>30</sup> (Paragraph-11).
- (4) *Kunwar Jung Bahadur Vs. Lala Gur Prasad*<sup>31</sup>.
- (5) *P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao and another*<sup>32</sup> (Paragraph-10).
- (6) *K.Swaminatha Iyer Vs. K.G.Krishnaswami Iyer*<sup>33</sup> (Paragraph-7).
- (7) *Vepa Satyanarayanamurthy Vs. Chekka Bhavanarayana and others*<sup>34</sup> (Paragraph-9).
- (8) *Zarif Ahmad (D) LRs Vs. Mohd. Farooq*<sup>35</sup> (Paragraphs-11 and 12).
- (9) *M.Rajagopal Reddy Vs. State Bank of India and others*<sup>36</sup> (Paragraphs-12 and 13).
- (10) *T.R.Arunachellam Chetti Vs. V.R.R.M.A.R.Arunachellam Chetti and another*<sup>37</sup>.
- (11) *Dhirendra Nath Gorai Vs. Sudhir Chandra Ghosh and others*<sup>38</sup> (Paragraphs-4 to 6).
- (12) *S.A.Sundararajan Vs. A.P.V.Rajendran*<sup>39</sup> (Paragraphs-5 and 6).
- (13) *R.N.Bhuva Vs. S.V.Rangaswamy and another*<sup>40</sup> (Paragraphs-12 and 17).
- (14) *Giri P.L.V. Vs. A.Subramaniam and others*<sup>41</sup> (Paragraphs-13, 20 and 29).
- (15) *Desh Bandhu Gupta Vs. N.L.Anand and another*<sup>42</sup> (Paragraph-16).
- (16) *Jagati Thimmaraju Vs. Uppuluri Brahmanna*<sup>43</sup> (Paragraphs-8 to 14).

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<sup>30</sup> AIR 1965 SC 1049

<sup>31</sup> AIR 1925 OUDH 113

<sup>32</sup> AIR 1995 SC 1357

<sup>33</sup> AIR 1947 Madras 213

<sup>34</sup> AIR 1957 Andhra Pradesh 185 (F.B.)

<sup>35</sup> AIR 2015 SC 1236

<sup>36</sup> AIR 2006 Andhra Pradesh 264

<sup>37</sup> (1888) 15 IA 171 (PC) Madras (FB)

<sup>38</sup> AIR 1964 SC 1300

<sup>39</sup> AIR 1981 SC 693

<sup>40</sup> (1991) 1 Madras L.W. 575 (FB)

<sup>41</sup> (1992) 2 Madras L.W. 237

<sup>42</sup> 1993 AIR SCW 3458

<sup>43</sup> 1998(3) ALD 404





(17) *A.G.M.Constructions Private Limited Vs. S.Shibu Kumar and others*<sup>44</sup> (Paragraphs-1, 19, 25 and 30).

(18) *K.Venkateswaramma @ Hema Laltha Kumari and another Vs. Y.Ravindranath Reddy and another*<sup>45</sup> (Paragraph-19).

11. Submissions/contentions of Sri Venkateswarlu Chakkilam, learned counsel for respondent No.7:

(1) Petitioners herein did not raise any objection prior to the judgment as per Order 38 Rule 12 of the C.P.C., as such, it is not open for the petitioners herein to raise the issues by way of application under Section 47 of the C.P.C.

(2) The suit was instituted not only against the principal borrower but also against the petitioners, who are his wife and son and they are also the legal heirs of defendant No.1.

In support of his submissions and contentions, learned counsel places reliance on the following judgments:

(1) *Daya Ram and others Vs. Shyam Sundari and others*<sup>46</sup> (Paragraph-4).

(2) *Vepa Satyanarayanamurthy Vs. Chekka Bhavanarayana and others*<sup>47</sup>.

(3) *P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao and another*<sup>48</sup>.

(4) *S.A.Sundararajan Vs. A.P.V.Rajendran*<sup>49</sup>.

(5) *M.Rajagopal Reddy Vs. State Bank of India and others*<sup>50</sup>.

(6) *Dhirendra Nath Gorai Vs. Sudhir Chandra Ghosh and others*<sup>51</sup> (Paragraphs-4 to 6).

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<sup>44</sup> 2010 ICO 1246

<sup>45</sup> 2018(2) ALD 389

<sup>46</sup> AIR 1965 SC 1049

<sup>47</sup> AIR 1957 Andhra Pradesh 185

<sup>48</sup> AIR 1995 SC 1357

<sup>49</sup> AIR 1981 SC 693

<sup>50</sup> AIR 2006 Andhra Pradesh 264

<sup>51</sup> AIR 1964 SC 1300



- (7) *R.N.Bhuva Vs. S.V.Rangaswamy and another*<sup>52</sup>  
(Paragraphs-12 and 17).
- (8) *Dipali Biswas and others Vs. Nirmalendu Mukherjee and others*<sup>53</sup> (Paragraph-37).

12. In the above background, now, the issues which this Court is called upon to examine and adjudicate in the present revision are as follows:-

- (1) Whether the order impugned in the present revision, in the facts and circumstances of the case, is sustainable and tenable?
- (2) Whether the questioned order warrants any interference of this Court under Section 115 of the C.P.C.?

13. The information available on record shows that broadly, there are four contentions/objections raised by the learned counsel for the petitioners/judgment debtors. They are:

- (1) The extent of the property and its linear measurements are not mentioned in the attachment petition and the E.P. schedule, but are noted only in sale proclamation and sale publication.
- (2) Items 3 to 5 properties are not covered under the attachment before judgment, but the entire items 1 to 5 were sold in the Court auction.
- (3) Trial Court did not pass any decree against the estate of defendant No.1, late Sri Bonda Nageswara Rao, but passed only a personal decree against the petitioners.

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<sup>52</sup> (1991) 1 Madras L.W. 575 (FB)

<sup>53</sup> Civil Appeal No.4557 of 2012 dated 05.10.2021 Supreme Court



(4) The Executing Court, in violation of the provisions of Order 21 Rules 64 and 66 of the C.P.C., sold the entire property and ought to have sold a portion of the attached property which would be sufficient to satisfy the decree.

Therefore, this Court proposes to deal with the issues contention/objection-wise in the following manner:-

14. The first and foremost objection taken by the petitioners is that no linear measurements nor extents were mentioned either in the attachment petition or in the E.P. schedule, but for the first time, extent was mentioned in the sale proclamation. In order to consider and examine the sustainability of the said objection, it would be highly essential to refer to the relevant provisions of the C.P.C. The said provisions are Order 7 Rule 3, Order 21 Rule 13 and Form No.6 of Appendix-E of the C.P.C. and they read as follows:-

**"Order 7**

**Rule 3. Where the subject-matter of the suit is immovable property.**—Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

**Order 21**

**Rule 13. Application for attachment of immovable property to contain certain particulars.**—Where an application is made for the attachment of any immovable property belonging to a judgment-debtor, it shall contain at the foot—

(a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or



numbers in a record of settlement or survey, a specification of such boundaries or numbers; and

(b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

Form No. 6 of APPENDIX-E

APPLICATION FOR EXECUTION OF DECREE (O.21,  
R.11.)

In the Court of

I, ..... decree-holder, hereby apply for execution of the decree herein-below set forth:—

1	2	3	4	5	6	7	8	9	10
No. of suit	Name of parties	Date of decree	Whether any appeal preferred from decree	Payment or adjustment made, if any	Previous application, if any with date and result	Amount with interest due upon the decree of other relief granted thereby together with particulars, of any cross decree	Amount of costs, if any awarded	Against whom to be executed	Mode in which the assistance of the Court is required.
789 of 1897	A.B---Plaintiff C.D-----Defendant	October 11, 1897	No.	None	Rs.72-4-0 recorded on application, dated the 4 <sup>th</sup> March, 1899	Rs.314-8-2 principal [interest at 6 per cent, per annum, from date of decree till payment]	As awarded in the decree subsequently incurred Rs . a. p. 47 10 4 8 2 0 ----- Total 55 12 4	Against the defendant C.D.	[When attachment and sale of movable property is sought.]  I pray that the total amount of Rs..... [together with interest on the personal sum upto date of payment] and the costs of taking out this execution, be realised by attachment and sale of defendant's movable property as per annexed list and paid to me.  [When attachment and sale of immovable property is sought.]  I, pray that the total amount of Rs.... [together with interest on the principal sum upto date of payment] and the costs of taking out this execution, be realised by the attachment and sale of defendant's immovable property specified at the foot of this application and paid to me.



I ..... declare that what is stated herein is true to the best of my knowledge and belief.

Signed, decree-holder.

Dated the ..... day of ..... 19 .

[When attachment and sale of immovable property is sought.]

Description and Specification of Property.

The undivided one-third share of the judgment-debtor in a house situated in the village of ....., value Rs. 40, and bounded as follows:—

East by G's house; west by H's house; south by public road; north by private lane and J's house.

I ..... declare that what is stated in the above description is true to the best of my knowledge and belief, and so far as I have been able to ascertain the interest of the defendant in the property therein specified.

Signed, decree-holder.

15. In this context, it is appropriate and apposite to refer to the following judgments of the Hon'ble Supreme Court and the composite High Court of Andhra Pradesh:

(1) In *Zarif Ahmad's* case (16 supra), the Hon'ble Supreme Court at paragraph Nos.11 and 12 held as follows:

"11. Order VII Rule 3 of the Code of Civil Procedure, 1908 (for short "CPC"), which pertains to



the requirement of description of immovable property, reads as under:

“Where the subject matter of the suit is immovable property:-

Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property, sufficient to identify it, and in case such property can be identified by boundaries in a record of settlement or survey, the plaint shall specify such boundaries or numbers.”

12. The object of the above provision is that the description of the property must be sufficient to identify it. The property can be identifiable by boundaries, or by number in a public record of settlement or survey. Even by plaint map showing the location of the disputed immovable property, it can be described. Since in the present case, the suit property has been described by the plaintiff in the plaint not only by the boundaries but also by the municipal number, and by giving its description in the plaint map, from no stretch of imagination, it can be said that the suit property was not identifiable in the present case. In our opinion, the High Court has rightly held that the first Appellate Court has erred in law in dismissing the suit by holding that the land is not identifiable. It appears that the first Appellate Court has wrongly framed the additional issue as to whether the property in dispute is identifiable or not particularly when there was no such plea in the written statement. We are in agreement with the High Court that there was no need on the part of the first Appellate Court to remit the matter to the trial court as contended by the defendants before it (High Court) to allow the parties to adduce evidence on the additional issue, as neither issue on identifiability of



land arises from the pleadings nor the evidence was lacking on record."

(2) In the case of *M.Rajagopal Reddy* (17 supra), the composite High Court at paragraph Nos.12 and 13 held as follows:

"12. There cannot be any serious controversy relating to the proposition of law laid down by the Apex Court in this regard. Reliance also was placed on *M. Veera Raghavaiah's* case (5 supra) in relation to the excessive execution and mis-description of the property. It is no doubt true that by mere quoting the wrong provision of law if the Court is satisfied that the other provision may be made applicable, the relief can be granted. On the aspect of excessive execution reliance also was placed on *Merla Ramanna's* case (3 supra). As far as the applicability of Section 47 of the Code is concerned this Court is satisfied that in the peculiar facts and circumstances, the revision petitioner had not availed the proper remedy specified under the Code. It is needless to say that if it is a case of non-showing of the house or mis-description of the property, the same would fall within the provisions of Order XXI Rule 90 of the Code. Even on a reading of the language of Order XXI Rule 90 of the Code, this objection cannot be permitted to be raised at this stage. Even otherwise, it is needles to say that by adopting the method of circumvention, the revision petitioner cannot be permitted to invoke Section 151 of the Code.

13. Reliance was placed on *Jagati Thimmaraju's* case (6 supra), *P. Bharati's* case (7 supra) and *P.K.Vijayan's* case (8 supra) and *Zilludumudi Appa Rao's* case (9 supra). In relation to the fact that the construction in question would run along with the land



reliance was placed on M/s. Boda Narayana Murthy and Sons's case (10 supra) and MohammedKhan's case (12 supra). Yet another decision of the Apex Court in Sadhana Lodh's case (14 supra) and Smt. Kishori Devi's case (15 supra) also had been relied upon. It is not in serious controversy that within the time specified under Article 127 of the Limitation Act, 1963, the application was not moved. When a specific remedy is provided for, the general remedy cannot be resorted to and in the light of what had been recorded by this Court supra, inasmuch as Sections 47 and 151 of the Code cannot be invoked since it would amount to circumventing the regular provision of Order XXI Rule 90 of the Code."

16. A reading of the above referred provisions of the C.P.C. and the law laid down in the aforesaid judgments would clearly demonstrate that the objection taken by the petitioners in the instant revision cannot be sustained.

17. Objection No.2, which is sought to be pressed into service by the petitioners is that only items 1 and 2 schedule were attached before judgment and items 3 to 5 were not covered under the attachment before judgment, but the entire items 1 to 5 were brought to sale, as such, the entire sale is null and void. The contention of the respondents is that the property brought to sale and the property sold in the Court auction is one and the same and is a single property, but the petitioners are making an attempt to show the said property as 5 items. The schedule in the attachment petition, execution petition and sale proclamation are identical and the same are as follows:-





	ATTACHMENT PETITION SCHEDULE	E.P. SCHEDULE	SALE PROCLAMATION SCHEDULE	SALE PUBLICATION SCHEDULE
	Visakhapatnam District Visakhapatnam Municipal Corporation limits, China Gadili village, Indira Nagar, House bearing D.No.2-292 bounded as follows:	The schedule property is situated in Visakhapatnam Municipal Corporation limits, China Gadili village, Indira Nagar, House bearing D.No.2-292, Old Diary Form Post, Visakhapatnam and bounded as follows:	The schedule property is situated in Visakhapatnam Municipal Corporation limits, China Gadili Village, Indira Nagar, House bearing D.No.2-292, Old Diary Form Post, Visakhapatnam-40 and bounded as follows:	Visakhapatnam Municipal Corporation limits, China Gadili Village, Division No.25B, House (RCC Building with up-stair) bearing D.No.2-241 (Old House No.2-292) Assessment No.108301, in an extent of 2,606.22 sq.yards bounded as follows:
EAST:	Municipal Road	Municipal Road	Municipal Road	Municipal Road
WEST:	Compound Wall and Vacant site belonging to Mr. Pratap	Compound Wall of vacant site belonging to Sri Pratap	Compound Wall of vacant site belonging to Sri Pratap	Compound Wall of vacant site belonging to Sri Pratap
SOUTH:	House bearing D.No.2-292	House bearing D.No.2-293	House bearing D.No.2-293	House bearing D.No.2-293
NORTH:	House bearing D.No.2-291	House bearing D.No.2-291	House bearing D.No.2-293	House bearing D.No.2-293
EXTEMT	--	--	2,606.22 sq.yds	2606.22 sq.yds

18. A perusal of the above schedules indicates that the same are identical, containing the same boundaries. It is also required to be noted that the Executing Court, in the impugned



order, categorically recorded a finding that the property alone that was attached before judgment was sold in auction. It may be appropriate to refer to paragraph Nos.11 and 20 to 22 of the impugned order, which read as follows:

"11. The E.P. schedule and the sale would disclose that the property is not sold to five names as shown in the claim petition schedule. The entire property within the boundaries mentioned in the E.P. schedule was sold on 14.11.2002 and the entire property was attached before judgment on 13.11.1997, even before the alleged transaction by the claim petitioner or her principal.

xxxxx

20. Lastly it is contended by the J.Drs. that the property that is sold in the sale is wrongly described and the entire property of deceased Nageswara Rao was sold by giving wrong boundaries without actual measurements of the said property. As already stated by me, it was always open for the J.Drs. in challenge the decree in a regular appeal and also the attachment. It is pertinent to note that the attachment was made absolute in I.A.1004/97 before judgment on 16.07.99 and the said attachment petition was closed. The suit was decreed on 30.10.2000. The attachment was made even during the life time of the deceased Nageswara Rao on 22.01.99. Therefore, it was open for the J.Drs. to challenge the attachment before the disposal of the suit soon after it was made absolute, but for the reasons best known, they remained silent. When the liability of the J.Drs. as guarantors in co-extensive and is joint and several, the decree that has been passed is valid and it can never be said to be a nullity. What



is attachment before the judgment that property alone was brought to sale. These J.Drs. have received summons but they remained silent and were set exparte on 04.10.2001. The E.P. was filed on 29.11.2002. The sale was held on 14.11.2002.

21. It is settled law by the Hon'ble Supreme Court in a case P.Udayani Devi Vs. V.V.Rajeswara Prasad Rao and another reported in A.I.R. 1995 SC 1357 that where boundaries of property sold in execution mentioned in sale certificate, it has to be construed that the entire property falling within the boundaries was sold. Their lordships held that in those set of facts that a property comprising of a terraced building and a building having room on first floor and open land property sold cannot be split into two portions and it should be held that it is only part of the property sold.

Similarly, in a case Sheodhyan Singh Vs. Mussammat Sanichandra Kuer reported in A.I.R. 1963 SC 1879 also it was held that where there is a conflict between boundaries and Khata Number and Plot Number, Khata Number and boundaries held prevailed. The mistake in the plot number must be treated as a mis-description which did not affect the identity of the property sold.

Similarly, in a case Chebolu Nooka Raju Vs. Kesam Ramaswamy and another reported in 2001(5) ALT 460 Their Lordships of Justice P.S.Narayana held that where specific boundaries are given by which the property can be identified and it is sufficient identification. Their Lordships falling the Division Bench of our Hon'ble High Court in a case Subba Rao Vs. Azizunnisa Begum reported in 1985(2) A.P.L.J. 149 which held as follows:



“The law is well settled that if a property is described by distinct boundaries, which can be identified, any mistake in the survey number of the land has to be ignored. The “maximum false demonstration non-nocet” has been applied in such a situation.”

22. Therefore, viewed any angle for the reasons discussed supra the claim made by the judgment debtor is not valid under law and they are not entitled for declaration as prayed for in this application. The sale held on 14.11.2002 is valid and cannot be set aside as pleaded by the judgment debtor. The petition is therefore not maintainable. The point is answered accordingly.

In the result, the petition is dismissed with costs."

19. By any stretch of imagination, it cannot be said that the said finding of fact recorded by the learned Senior Civil Judge is perverse, warranting interference of this Court under Section 115 of the C.P.C. In this connection, it may be apt to refer to the judgment of the Hon'ble Supreme Court in *P.Udayani Devi's* case (11 supra), wherein the Hon'ble Supreme Court at paragraph No.10 held as follows:

"10. Moreover, it is settled law that the question as to what was sold in execution of the decree is a question of fact. [See :S.M. Jakati & Anr. v. S.M. Borkar & Ors., 1959 SCR 138, at p. 1401 1. In the present case, the Subordinate Judge, after an examination of the sale certificate and other documents, has recorded a finding that the entire property falling within the boundaries mentioned in the sale certificate has been sold. That



was a finding of fact. The High Court, in exercise of its revisional jurisdiction, was not justified in reopening the finding of fact recorded by the Subordinate Judge. The judgment of the high Court cannot, therefore, be upheld and must be set aside."

20. In this context, the relief portion of the Claim Petition, E.A.No.367 of 2004, filed by the daughter of defendant No.1 for items 1 and 2 under Order 2 Rule 58 C.P.C. gains significance and it reads as follows:

"III.(g) It is submitted that the claim petitioner came to know that 2<sup>nd</sup> Respondent who is the henchman of the 1<sup>st</sup> Respondent participated in the auction and the sale was knocked down in favour of the 2<sup>nd</sup> Respondent. Hence the said sale is illegal and liable to be set aside as the properties of the claim petitioner mentioned as Item Nos: 1 & 2 of Petition Schedule Property and ½ undivided share shown as Item No:3 to 5 in the petition schedule properties are brought to sale. The said auction was conducted without knowledge of the claim petitioner and as the claim petitioner's properties are involved, the same has to be set aside. Hence the claim petition is filed by the petitioner to set aside the sale by declaring the right of the claim petitioner in respect of petition schedule property which is said to be forming part of the property shown as item Nos 1 to 5 brought to sale in EP No: 104/2003. Hence the claim petition.

xxx

V. The claim petitioner therefore pray that the Honourable Court may be pleased to:

a) declaring the claim petitioner's right as absolute owner in petition schedule properties said to be forming part of the property attached and auctioned



in E.P. No.104/2003 in O.S.No.933/1997 by allowing the claim of the petition and release the petition schedule properties from attachment;

b) to set aside the sale held on 14-11-2002 as a personal decree passed in O.S. 933/97 against respondents 3 & 4 only instead of passing of a decree against the assets of late Bonda Nageswara Rao;

c) for costs

d) for such other relief or reliefs as the Honourable Court deems fit and proper in the circumstances of the case."

The said E.A.No.367 of 2004 came to be dismissed on 03.08.2005, as such, it cannot be permitted to be contended that there was no attachment in respect of the entire property. In view of the above reasons, objection No.2 is also liable to be rejected as not tenable.

21. Objection No.3 taken by the petitioners is that the trial Court passed the personal decree only against them and did not pass a decree against the estate of late defendant No.1, as such, items 1 and 2 properties cannot be brought to sale and due to the death of defendant No.1, the attachment lost its significance and cannot be enforced. The said objection taken by the petitioners at paragraph No.III (g) and (j) of E.A.No.293 of 2004 reads as infra:

"III. (g) As matter stood thus during the pendency of the suit Bonda Nageswara died and ultimately on 30.10.2000 a personal decree was passed against the Petitioners and not a decree



against the assets of late Bonda Nageswara Rao. Hence the personal decree passed against the Petitioners will not in any way bind and effect the properties of deceased Bonda Nageswara Rao and hence the attached property in I.A.No.1004/1997 cannot be brought to sale in view of the personal decree against petitioners 1 and 2. The daughter of Bonda Nageswara Rao by name T.Vijayalakshmi is not added as party to the suit after the death of deceased Nageswararao. Hence, the attachment made in I.A.No.1004/1997 has become infructuous and cannot be enforced by the Decree holder/respondent No.1.

III. (j) As a personal decree was passed against petitioners, the item No.1 and 2 schedule properties cannot be brought to sale as the decree is not passed against the assets of late Bonda Nageswara Rao lying in the lands of petitioners 1 and 2. Knowing fully well, that the item Nos.3 to 5 of petition schedule properties are not covered under attachment, the 1<sup>st</sup> respondent brought the entire property for sale and any such sale is null and void and it is nothing but playing fraud on the court."

22. It is absolutely not in controversy that when defendant No.1 was alive, suit was instituted not only against defendant No.1 but also against defendant Nos.2 and 3 (petitioners herein) in their individual capacity as guarantors for realisation of the amount jointly and severally and defendant No.1 died pending the suit and the decree rendered on 30.10.2000 in O.S.No.933 of 1997 reads as follows:



" D E C R E E

- i) that the defendants 2 and 3 jointly and severally do pay to the plaintiff a sum of Rs.1,77,713-00 together with subsequent interest at 12% per annum on Rs.1,40,000-00 from 12-11-1997 the date of suit till the date of realization; and
- ii) that the defendants 2 and 3 jointly and severally do also pay to the plaintiff a sum of Rs.9,442-00 towards costs of this suit;"

23. This Court finds sufficient force in the contention of the respondents that the petitioners have taken dual status in the suit as both guarantors and legal representatives of defendant No.1. The attachment was made admittedly during the lifetime of defendant No.1 and after his death in the said dual capacity, defendant Nos.2 and 3, representing defendant No.1 also, contested the suit, as such, it cannot be said that with the death of defendant No.1, the attachment ordered earlier ceased to exist. In this context, it may be appropriate to refer to the following judgments:

(1) In the case of *N.Ramaiah Vs. Nagaraj S* (29 supra), the Karnataka High Court at paragraph No.12 held as follows:

"12. The differences between a transfer and a Will are well-recognised. A transfer is a conveyance of an existing property by one living person to another (that is transfer inter vivos). On the other hand, a Will does not involve any transfer, nor effect any transfer inter vivos, but is a legal expression of the wishes and intention of a person in regard to his properties which he desires to be carried into effect after his death. In





other words, a Will regulates succession and provides for succession as declared by it (testamentary succession) instead of succession as per personal law (non-testamentary succession). The concept of transfer by a living person is wholly alien to a Will. When a person makes a Will, he provides for testamentary succession and does not transfer any property. While a transfer is irrevocable and comes into effect either immediately or on the happening of a specified contingency, a Will is revocable and comes into operation only after the death of the testator. Thus to treat a devise under a Will as a transfer of an existing property in future, is contrary to all known principles relating to transfer of property and testamentary succession."

(2) In the case of *Daya Ram and others Vs. Shyam Sundari and others* (30 supra), the Hon'ble Supreme Court at paragraph No.11 held as follows:

"11. The case before us is entirely different. There was a decree in favour of Shyam Sundari-and that is the subject- matter of this appeal. The question is whether there has been abatement of the appeal against Shyam Sundari. Shyam Sundari's heirs have been brought on record within the time allowed by law and the only question is whether the fact that two of the legal representatives of Shyam Sundari have been omitted to be brought on record would render the appeal incompetent. This turns on the proper interpretation of O. 22, r. 4 of the Civil Procedure Code :

"4. (1) Where..... a sole defendant or sole surviving defendant dies and the right to sue-survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased



defendant to be made a party and shall proceed with the suit.

4. (3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."

When this provision speaks of "legal representatives" is it the intention of the legislature that unless each and every- one of the legal representatives of the deceased defendants, where these are several, is brought on record there is no proper constitution of the suit or appeal, with the result that the suit or appeal would abate?

The almost universal consensus of opinion of all the High Courts is that where a plaintiff or an appellant after diligent and bona fide enquiry ascertains who the legal representatives of a deceased defendant or respondent are and brings them on record within the time limited by law, there is no abatement of the suit or appeal, that the impleaded legal representatives sufficiently represent the estate of the deceased and the decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record. The principle of this rule of law was thus explained in an early decision of the Madras High Court in *Kadir v. Muthukrishna Ayyar*(1). The facts of that case were that when the defendant died the first defendant before the Court was impleaded as his legal representative. The impleaded person raised no objection that he was not the sole legal representative of the deceased defendant and that there were others who had also to be joined. In these circumstances, the Court observed:

"In our opinion a person whom the plaintiff alleges to be the legal representative of the deceased defendant



and whose name the Court enters on the record in the place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit and in the absence of any fraud or collusion the decree passed in such suit will bind such estate ..... If this were not the law, it would, in no few cases, be practically impossible to secure a complete representation of a party dying pending a suit and it would be specially so in the case of a Muhammadan party and there can be no hardship in a provision of law by which a party dying during the pendency of a suit, is fully represented for the purpose of the suit, but only for that purpose, by a person whose name is entered on the record in place of the deceased party under sections 365, 367 and 368 of the Civil Procedure Code, though such person may be only one of several legal representative's or may not be the true legal representative."

This, in our opinion, correctly represents the law. It is unnecessary, here, to consider the question whether the same principle would apply when the person added is not the true legal representative at all. In a case where the person brought on record is a legal representative we consider that it would be consonant with justice and principle that in the absence of fraud or collusion the bringing on record of such a legal representative is sufficient to prevent the suit or the appeal from abating. We have not been referred to any principle of construction of O. 22, r. 4 or of the law which would militate against this view. This view of the law was approved and followed by Sulaiman, Acting C.J. in *Muhammiad Zafaryab Khan v. Abdul Razzaq Khan* ILR 50 All 837 : (AIR 1928 All 532). A similar view of the law has been taken in *Bombay-See Jehrabi Sadullakhan Mokasi v. Bismillabi Sadruddin Kaji*, AIR 1924 Bom 420 -as also in *Patna-See Lilo Sonar v.*



Jhagru Sahu ILR 3 Pat 853, and Shib Dutta Singh v. Sheikh Karim Bakhsiz (AIR 1925 Pat 551) as well as. in Nagpur- Abdul Baki v. R. D. Bansilal Abirchand Firm, Nagpur ILR (1944) Nag 577 : (AIR 1945 Nag 53). The Lahore High Court has also accepted the same view of the law-See Mst. Umrao Begum v. Rehmat Ilahi (1939) 20 Lah 433 : (AIR 1939 Lah 439). We are, therefore, clearly of the opinion that the appeal has not abated."

(3) In the case of *Kunwar Jung Bahadur Vs. Lala Gur Prasad* (6 supra), at paragraph No.3 it was held as follows:

"In my judgment the learned Judge has missed the whole point of the case. It is admitted that the debt in respect of which this decree was obtained was due not from the judgment-debtor but from his deceased father and it is further admitted that the appellant was sued for that debt for the reason of his being the legal representative of his deceased father. On those facts the question is not whether the decree was personal or otherwise. The real question for determination is whether in execution of the decree any property other than that of the deceased can be proceeded against in satisfaction of the decree. It is certainly a personal decree in the sense that proceedings taken for the satisfaction of the decree must be taken as against the judgment-debtor but the question still remains as to what property would be liable for the satisfaction of a decree passed in relation to a debt of the nature of the present debt. The word "legal representative" is defined in clause (ii) of S.2 of the Code of Civil Procedure, 1908, and means a person who in law represents the estate of a deceased person. The appellant, therefore, when appearing as a judgment-debtor under the decree in question merely



represents the estate of his deceased father and the execution can, therefore, proceed against the estate alone. The conclusion at which I have reached is supported by a decision of a Bench of the Patna High Court in the case of Bujhawam Prasad Singh v. Sam Narayan [(1922) 65 I.C. 224]."

24. In fact, the Executing Court at paragraph Nos.13 to 17 dealt with this issue in an extensive and elaborate manner and held against the petitioners herein and having regard to the said reasons and the principle laid down in the aforesaid judgments, objection No.3 of the petitioners herein also cannot be sustained.

25. The judgment of the Hon'ble Supreme Court in the case of *Kamireddy Sumathi and others Vs. C.Mallikarjuna Reddy and others* (3 supra) cited by the learned counsel for the petitioners would not render any assistance to the case of the petitioners in view of the valid and convincing reasons and the meticulous consideration of various issues by the Executing Court in the impugned order.

26. Objection No.4 is with regard to the alleged violation of Order 21 Rules 64 and 66 of the C.P.C. and the said provisions of law read as follows:

"Order 21

Rule 64: Power to order property attached to be sold and proceeds to be paid to person entitled.—

Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may see 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.

Rule 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 : 2[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."

27. According to the learned counsel for the petitioners, sale of a part of the properties would have satisfied the decree in its entirety and instead the Executing Court sold the entire property which resulted in miscarriage of justice and irreparable loss and injury to the petitioners herein. Admittedly, as rightly pointed out by the learned advocates for the respondents, this contention, touching the provisions of Order 21 Rules 64 and 66 of the C.P.C. is sought to be pressed into service for the first time at the time of arguments in the instant revision. Refuting this objection, learned advocates for the respondents contend that the petitioners did not raise this objection during the entire execution proceedings and that the property is a house with appurtenant site and is a single unit and its division is impracticable and undesirable and if it is divisible and desirable, petitioners should have suggested terms regarding sale of a portion of the property instead of entire property. It is further submitted that the division of property is not feasible because if the front side portion is sold, the frontage of the property would be blocked and there would be no access to the rest of the



property and if the sale is for a portion of property, the rest would be rendered valueless. It is further submitted that there are electrical HT lines across the property. It is also submitted that the same property was attached in another suit in O.S.No.930 of 1997 and the State Bank of India also filed O.S.No.280 of 1997 on the foot of a mortgage of the same property. It is further submitted that the contention that the sale is contrary to Order 21 Rules 64 and 66(2)(a) of C.P.C. would not fall within the purview of Section 47 of the C.P.C., since the sale is not a nullity and such ground is available for setting aside the sale under Order 21 Rule 89 or 90 of C.P.C.

28. In the case of *Ambati Narasayya Vs. M.Subba Rao and others* (1 supra), the Hon'ble Supreme Court at paragraph Nos.4, 6 and 7 held as under:-

"4. On appraisal of the evidence, the executing court-the Principal District Munsif, Kovvur, rejected the application of the appellant. He held that the sale was not vitiated by fraud or irregularity. The appeal against that order was dismissed by learned Subordinate Judge at Kovvur. Before the appellate court, one other contention was argued on behalf of the appellant. It was contended that the executing court ought to have sold only such portion of the land as would satisfy the decretal dues and the sale of the entire 10 acres was illegal and without authority. The appellate court rejected that contention for the reason that it is a single piece of land and could not have been divided into parcels. The High Court of Andhra Pradesh also dismissed the appellant's revision, but expressed no opinion as to whether a portion of the land could have been sold to satisfy the decree.





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.2,395.50. 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."

29. In the case of *Takkaseela Pedda Subba Reddi Vs. Pujari Padmavathamma and others* (4 supra), the Hon'ble Supreme Court at paragraph No.3 held as follows:

"3. In this appeal the facts are more or less undisputed and the only serious point argued by the appellant is that the High Court was in error in setting aside the sale because even if the entire decretal amount was not mentioned in the sale proclamation, that was at best an irregularity which did not cause any prejudice to the judgment-debtor. It was also argued by learned counsel for the appellant that the judgment debtor did not raise any objection before the Executing Court against continuing the sale of other proper- ties situated in village Gudipadu. It was next submitted that the 5th respondent/decree holder had obtained another decree in O.S 19 of 1953 and the total amount under the two decrees fully justified the selling of the properties in village Gudipadu also, particularly when the decree-holder had taken an order from the Executing Court for rateable distribution of the sale proceeds. It is true that the High Court has not considered this aspect of the matter, but in our opinion the contentions raised by the appellant are wholly untenable. It is not disputed that the warrant of sale was prepared long after the 5<sup>th</sup> respondent/decree holder had obtained the second decree in O.S. 19 of 1953 and yet no attempt was made by the decree-holder to approach the Court for amending the decretal amount mentioned in the sale proclamation, so as to



include the decretal amount not only of the decree in the first suit No. O.S. 15 of 1949 but also of the decree in the second suit in O.S. 19 of 1953. In these circumstances, therefore, under the provisions of O.21 r. 64 of the Code when the amount as specified in the sale proclamation was fully satisfied by the sale of the properties in village Devanoor, the Court should have stopped the sale of further items of the properties. It is manifest that where the amount specified in the proclamation of sale for the recovery of which the sale was ordered is realised by sale of certain items, the sale of further items should be stopped. This, in our opinion, is the logical corollary which flows from O.21 r. 64. of the Code which may be extracted thus:

"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."

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. In the instant case, we have already indicated that the sale of lands in village Devanoor alone fetched a sum of Rs.16880 which was more than sufficient to satisfy the amount of Rs,16,715-8-0 mentioned in the sale



proclamation. It is true that the decree-holder had obtained another decree in O.S. No. 19 of 1953, but there is nothing to show that the decree-holder had approached the Court for including the second decretal amount in the proclamation of sale. In these circumstances, therefore, we are clearly of the opinion that the Executing Court was not justified, in the facts and circumstances of the present case, in selling the properties situated in village Gudipadu. The fact that the judgment-debtor did not raise an objection on this ground before the Executing Court is not sufficient to put him out of Court because this was a matter which went to the very root of the jurisdiction of the Executing Court to sell the properties and the non-compliance with the provisions of O. 21 r. 64 of the Code was sufficient to vitiate the same so far as the properties situated in village Gudipadu were concerned. For these reasons the contentions raised by counsel for the appellant must be overruled."

30. In the aforesaid decisions, as rightly pointed out by the learned counsel for the respondents, the Hon'ble Supreme Court never held that the sale held in contravention of Order 21 Rules 64 and 66(2)(a) of the C.P.C. would attract Section 47 of the C.P.C.

31. In the case of *Kamireddy Sumathi and others Vs. C.Mallikarjuna Reddy and others* (3 supra), the composite High Court at paragraph Nos.8 to 10 held as follows:

"8. Learned Counsel for the petitioners submitted that the property worth more than four times of the auction value was put in auction when the decretal amount was only Rs.52,500/-. The auction by the



lower Court without looking into the provisions contained in Order 21 Rule 64 of CPC would make the auction invalid. He relied on *Desh Bandhu Gupta v. N.L.Anand & Rajinder Singh* [(1994) 1 SCC 131], *S.Mariyappa v. Siddappa* [(2005) 10 SCC 235], *Balakrishnan v. Malaiyandi Konar* [(2006) 3 SCC 49], *Sai Enterprises v. Bhimreddy Laxmaiah* [(2007) 13 SCC 576] and *Akula Veerraju v. Karumuru Rukmabai* [2011 (3) ALD 581].

9. Learned Counsel for the third respondent auction purchaser, tried to support the auction by submitting that the petitioners made several attempts for stalling the sale proceedings without depositing any amount and now it is not open to them to raise the contention based on Order 21 Rule 64 of CPC.

10. He further submitted that the application filed, which resulted in the impugned order, is beyond the period of limitation prescribed under Order 21 Rule 89 of CPC read with Article 127 of the Limitation Act. He submitted that the present application is filed under 151 of CPC without mentioning the correct provision of law so as to conveniently take a different stand at different points of time. He, thus submits that the application filed under Order 21 Rule 89 of CPC is not maintainable, as it was filed beyond the prescribed period of limitation, the application under Order 21 Rule 58 of CPC is not maintainable after sale of the property and the last ground that is pleaded by the learned Counsel on the basis of Order 21 Rule 64 of CPC is also not maintainable as the same was never pleaded before the trial Court. Learned Counsel relied on *Penugonda Varalakshmi v. Nallamala Lakshymi Tayeru* [2014(2) ALD 319], *Mohan Lal v. Hari Prasad Yadav* [(1994) 4 SCC 177], *Annapurna v. Mallikarjun* [(2014) 6 SCC 397], *Ram Karan Gupta v. J.S.Exim*



Limited [(2012) 13 SCC 568], Dadi Jagannadham v. Jammulu Ramulu [(2001) 7 SCC 71] and Bachhaj Nahar v. Nilima Mandal [(2008) 17 SCC 491]."

32. Coming to the judgments cited by the learned counsel for the respondents—

(1) In the case of *K.Venkateswaramma @ Hema Laltha KUmari and another Vs. Y.Ravindranath Reddy and another* (18 supra), the composite High Court at paragraph No.19 held as follows:

"19. Learned counsel for the petitioners raised another ground i.e non service of notice as required under Order 21 Rule 66 C.P.C. and it is a serious irregularity. In support of his contention, he placed reliance in Mannem Peda Narisi Reddys case referred supra. No doubt, notice under Order 21 Rule 66 is mandatory before sale of the immovable property, but no such plea was raised before the executing Court in the entire affidavit questioning the sale of property on the ground of non-service of notice under Order 21 Rule 66 C.P.C. When no plea was raised, the 2nd respondent is not required to file any counter disputing such questions raised for the first time during enquiry or hearing. The pleading in a civil suit is vital and when no plea is raised in the pleading and no amount of evidence, if any, adduced cannot be received since object of pleading is that to give fair notice to each party of what the opponents cause is, and to ascertain, with precision, the points on which the parties agree and those on which they differ, and thus to bring the parties to a definite issue. The purpose of pleading is also to eradicate irrelevancy. In order to have a fair trial it is imperative that the party should state the essential facts



so that other party may not be taken by surprise. The parties thus themselves know what are matters left in dispute and what facts they have to prove at the proceeding and are thus given an opportunity to bring forward such evidence as may be appropriate. The main object of pleadings is to find out and narrow down the controversy between the parties. Contentions which are not based on the pleadings cannot be permitted to be raised either at the time of arguments or at the appellate stage as held in *The New India Assurance Co Ltd. V Surender Singh and others*. In the same judgment, the Court held that the Court cannot travel beyond the pleadings as no party can lead the evidence on an issue not raised in the pleadings and in case, such evidence has been adduced or a finding of fact has been recorded by the Court, it is just to be ignored. If this principle is applied to the present facts of the case, in the absence of any plea about non-compliance of Order 21 Rule 66 C.P.C. is raised, no amount of evidence need be looked into to decide the real controversy involved in the petition. When no plea was raised regarding non-compliance of Order 21 Rule 66 C.P.C., the respondent had no opportunity to meet the contention by filing his counter and marking documents. Thus, in the absence of plea, the Court cannot rely on the plea raised during enquiry or at the appellate stage for the first time without affording opportunity to the respondents."

(2) In the case of *Dhirendra Nath Gorai and others Vs. Sudhir Chandra Ghosh and others* (23 supra), the Hon'ble Supreme Court at paragraph Nos.4 to 6 held as follows:

"4. Mr. Sen, learned counsel for the appellants in both the appeals, contends that whether s. 35 of the Act is mandatory or directory the sale held in violation of the



said provision is only illegal but not a nullity and, therefore, it can be set aside only in the manner and for the reasons prescribed in O. XXI, r. 90 of the Code of Civil Procedure, and further that, as the respondents did not attend at the drawing up of the proclamation of sale, the sale cannot be set aside at their instance.

5. To appreciate the argument it is necessary and convenient to read at the outset the relevant provisions of the Act and the Code of Civil Procedure.

Section 35 of the Act.

"Notwithstanding anything contained in any other law for the time being in force, the proclamation of the intended sale of property in execution of a decree passed in respect of a loan shall specify only so much of the property of the judgment-debtor as the Court considers to be saleable at a price sufficient to satisfy the decree, and the property so specified shall not be sold at a price which is less than the price specified in such proclamation:

Provided that, if the highest amount bid for the property so specified is less than the price so specified, the Court may sell such property for such amount, if the decree-holder consents in writing to forego so much of the amount decreed as is equal to the difference between the highest amount bid and the price so specified."

CODE OF CIVIL PROCEDURE Order XXI, r. 64 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.

Order XXI, r. 66.

(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;

Order XXI, r. 90.

(1) Where any immovable property has been sold in execution of a decree. the decree- holder, or any person entitled to share in a rateable distribution of assets or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it or on the ground of failure to issue notice to him as required by rule 22 of this Order :

Provided (i) that no sale shall be set aside on the ground of such irregularity, fraud or failure unless. upon the facts proved. the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity, fraud or failure.

(ii) that no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up, unless objection was made by him at the time in respect of the defect relied upon.

Under O. XXI. r. 64 of the Code of Civil Procedure, the executing court 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. Under r. 66 of the said Order of the Code when a property is ordered to be sold in public auction in execution of a decree the court shall cause a proclamation of the intended sale to be made and such proclamation shall specify as fairly



and accurately as possible, among others, the property to be sold and such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor: under sub-r. (4) thereof, the court may summon and examine any person or require him to produce any document in his possession or power relating thereto. Under the said provisions the court has power to direct the sale of the entire property attached or a part thereof sufficient to satisfy the decree and it shall also specify the said property directed to be sold in the proclamation fixed after giving notice to both the decree-holder and the judgment-debtor. Under s. 35 of the Act a duty is cast upon the court in settling the proclamation of the intended sale of property in execution of a decree passed in respect of a loan to which the Act applies to specify only so much of the property of the judgment-debtor as the court considers to be saleable at a price sufficient to satisfy the decree and not to sell the property so specified at a price which is less than the price so specified in such proclamation. This provision is in effect a statutory addition to O. XXI, r. 66 of the Code of Civil Procedure. Indeed, this provision could have been added as another clause to the said rule. This statutory provision pertains to the field of proclamation. The rule says so in terms. The said two conditions are also steps to be taken by the court in the matter of publishing or conducting the sale. If a sale is held without complying with the said conditions, what is the remedy open to a party affected thereby to get the sale set aside? Order XXI, r. 90 of the Code in terms provides for the remedy. It says that a person whose interests are affected by the sale may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it or on the ground of failure to issue notice to him as required by r. 22 of the Order. As the non-compliance with the said conditions is a material irregularity in publishing or conducting the sale the



court under the first proviso to O. XXI, r. 90 of the Code cannot set aside the sale unless it is satisfied that the applicant had sustained substantial injury by reason of such irregularity. That apart, under the second proviso to the said rule, no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person, who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up unless objection was made by him at the time of drawing up of the proclamation in respect of the defect relied upon. Shortly stated, the noncompliance with the provisions of s. 35 of the Act is a defect or a irregularity in publishing or conducting the sale. A party who received the notice of the proclamation but did not attend at the drawing up of the proclamation or did not object to the said defect cannot maintain an application under O. XXI, r. 90 of the Code of Civil Procedure. Even if he could, the sale cannot be set aside unless by reason of the said defect or irregularity he had sustained substantial injury.

6. On this question a divergence of views is reflected in the decisions cited at the Bar. Mukherjea and Pal, JJ., in *Asharam Thikadar v. Bijay Singh Chopra*(1) set aside the order of the executing court and sent the case back to that court, as the said court inserted in the proclamation the valuation of the property given by the judgment-debtor as well as that given by the decree-holder and did not, as it should do under s. 35 of the Act, determine the price of the property which was to be put up for sale on proper evidence. This decision has no relevance to the question raised before us, as the appeal before the High Court was against the order made by the executing court dismissing the application filed by the judgment-debtor requesting the court to demarcate the property to be sold pursuant to the provisions of s. 35 of the Act. The



question whether a sale held in non-compliance with the said provisions could be set aside de hors the provisions of O. XXI, r. 90 of the Code of Civil Procedure did not arise for consideration therein. The question now posed before us directly arose for decision before a Division Bench of the Calcutta High Court, consisting of Akram and Chakravarti, JJ., in *Manindra Chandra v. Jagadish Chandra (2) Chakaravarti, J.*, met the objection raised by the judgment-debtor who sought to set aside the sale on the ground of non-compliance with the provisions of s. 35 of the Act, thus :

(1) I.I.R. [1944] 1 Cal. 166.

134-159 S.C.-64 (2) (1945) 50 C.W.N. 266,270.

"It (s. 35 of the Act) is a provision relating to the contents of the sale proclamation and its effect, to my mind, is to amend or supplement Or. 21, r. 66 (2) (a) which directs the Court to specify in the sale proclamation "the property to be sold". Any objection regarding non-compliance with sec. 35 in specifying the property to be sold is, in my view, a defect in the sale proclamation within the meaning of the second proviso to Or. 21, r. 90, C.P.C. It follows that an objection that the sale proclamation did not conform to sec. 35 of the Bengal MoneyLenders Act cannot avail a judgment-debtor in an application under Or. 21, r. 90, if he was present at the drawing up of the sale proclamation and did not raise any such objection at the time, nor can it avail a judgment-debtor who, after receiving notice did not attend at the drawing up of the sale proclamation at all."

We agree with this reasoning. Another Division Bench of the Calcutta High Court, consisting of Guha and Banerjee, JJ., in *Maniruddin Ahmed v. Umapasanna(1)*, considered the entire case law on the subject, including the decision now under appeal, and differed from the



view expressed by S. R. Das Gupta and Mallick, JJ., in the decision now under appeal and agreed with the view expressed by Akram and Chakravartii, JJ., in *Manidra Chandra v. Jagdish Chandra* (2). The said decisions are in accord with the view we have expressed earlier. The contrary view is sustained by the High Court in the present case on the principle that the sale held in contravention of the provisions of s. 35 of the Act was a nullity and, therefore, no question of setting aside the sale within the meaning of O. XXI, r. 90 of the Code of Civil Procedure would arise. This raises the question whether such a sale is a nullity. If a provision of a statute is only directory, an act done in contravention of the provision is manifestly not a nullity. Section 35 of the Act is couched in a mandatory form and it casts in terms a duty on the court to comply with its (1) (1959) 64 C.W.N. 20.

(2) (1945) 50 C.W.N. 266, 270.

provisions before a sale is held. Prima facie the provision is mandatory; at any rate, we shall assume it to be so for the purpose of these appeals."

(3) In the case of *S.A.Sundararajan Vs. A.P.V.Rajendran* (24 supra), the Hon'ble Supreme Court at paragraph Nos.5 and 6 held as follows:

"5. It seems to us that the High Court is right. It is plain that the errors complained of by the appellant amount to mere irregularities committed in settling the sale proclamation. They cannot be described as errors which render the sale void. The difference between an error which makes the proceeding void and one which makes it merely irregular has been pointed out by this Court in *Dhirendra Nath Gorai and Subal Chandra Shaw*



and Others v. Sudhir Chandra Ghosh and Others. The requirements which were not complied with in this case when settling the sale proclamation were intended for the benefit of the appellant and could be waived by him. They were not matters which went to the root of the court's jurisdiction and constituted the foundation or authority for the proceeding or where public interest was involved. Clearly, they were mere irregularities. Consequently, they fall within the scope of rule 90 of Order XXI.

6. It may be pointed out that when rule 90 of Order XXI employs the expression "in publishing or conducting the sale", it envisages the proceeding commencing after the order for sale made under rule 64 of Order XXI. The provisions after rule 64 are provisions relating to publishing and conducting the sale. Settling the proclamation of sale is part of the proceedings for publishing the sale. Rule 65 of Order XXI declares that every sale in execution of a decree shall be conducted by an officer of the court or a person nominated by the court, and shall be made by public auction in the manner prescribed. How the sale will be published relates to the manner in which the sale is made. Rule 66 of Order XXI is the first step in that behalf. It provides for a proclamation of sale. When drawing up a sale proclamation, sub-rule (2) of rule 66 requires that the several matters specified therein be taken into account. Other particulars relating to the sale are prescribed in the succeeding rules of Order XXI. In our view, the settling of the sale proclamation is part of the integral process of publishing the sale, and irregularities committed in the process of settling the sale proclamation are irregularities which fall within the amplitude of rule 90 of Order XXI. It may be observed that in Dhirendra Nath Gorai's case (supra) the question which this Court was called upon to consider was



whether non-compliance with s. 35 of the Bengal Money Lenders Act, 1940 when drawing up the sale proclamation was a mere irregularity. Having held that it was, the Court then considered it in the light of rule 90 of Order XXI."

(4) In the case of *Giri P.L.V. Vs. A.Subramaniam and others* (41 supra), the Madras High Court at paragraph Nos.13, 20 and 29 held as follows:

"13. Learned Counsel appearing for the appellant/Judgment-debtor pressed the following points for consideration:

(1) The failure on the part of the Court below to comply with the salutary provisions adumbrated under Order 21, Rules 64 and 66(2)(a), C.P.C., in the sense of not bringing in such portion of the property, as may seem necessary to satisfy the decree; by bringing the entirety of the property to sale, renders the very sale itself invalid, as being illegal and without jurisdiction, and in any event, the said sale has got to be set aside as having caused substantial and irreparable injury to the judgment-debtor, attracting the provisions of Order 21, Rule 90, C.P.C.;

(2) The failure to issue fresh proclamation for the sale held on 28.9.1983, which is beyond thirty days of the date of sale originally fixed, i.e., on 17.8.1983, vitiates the very sale itself, by reason on non-compliance of the provisions adumbrated in Sub-rule (2) of Rule 69 of Order 21, C.P.C.; and

(3) The failure to publish a proper proclamation as respects the correct description of the property to be brought for sale is a material irregularity, rendering the sale a nullity.



20. The latter two decisions did not at all refer to the former decision in the case of *Dhirendra Nath v. Sudhir Chandra* . Worthy it is to note at this juncture, that the latter two decisions of the Supreme Court were decided by two learned Judges, whereas the former decision of the apex Court happened to be decided by a larger Bench comprising of three learned Judges.

29. Even otherwise, the so-called misdescription of the property as well as bringing more extent of property, than what is required, for purposes of satisfying the decree, to say, offending respectively Rules 64 and 66 of Order 21, C.P.C. cannot at all be construed as vitiating or nullifying circumstances rendering the sale itself invalid and if at all such factors can be termed as irregularities, which would be taken into consideration, in an application filed for setting aside the sale under Order 21, Rule 90, C.P.C., on the fact of the decision of the Supreme Court in the case of *Dhirendra Nath v. Sudhir Chandra* ."

(5) In the case of *Desh Bandhu Gupta Vs. N.L.Anand and another* (42 supra), the Hon'ble Supreme Court at paragraph No.16 held as follows:

"16. In *Janak Rai v. Gurdial Singh*<sup>9</sup> relied on by Shri Madhava Reddy, in execution of ex parte decree for a sum of Rs 519, the property of the judgment-debtor was brought to sale and was sold for a sum of Rs 5,100. Thereafter the judgment-debtor made an application to set aside the ex parte decree. An objection was raised to the sale on the ground that the value of the house was Rs 25,000 and it was auctioned for a sum of Rs 5000. The ex parte decree was set aside. On application made by the auction-purchaser,





the sale was confirmed. It was contended that since the ex parte decree was set aside the confirmation of sale need to be set aside, which was negated by 8 (1974) 2 SCC 213 : (1974) 3 SCR 678 9 (1967) 2 SCR 77 : AIR 1967 SC 608 all the courts. In that background it was held that confirmation of the sale was not illegal and the inadequacy of the price was not a ground to set aside the sale. The ratio therein has to be considered in the light of its own scenario. The facts in this case are entirely different. The case of Chinnammal v. P. Arumugham also does not help the auction-purchaser. Therein it was found that pending appeal the money decree was executed and the properties were brought to sale. The High Court allowed the appeal and set aside the decree. Thereafter the Executing Court was moved to set aside the sale on diverse grounds including the plea of inadequacy of price. The learned Single Judge set aside the sale, but the Division Bench reversed the decision. On appeal, this Court held that the auction-purchaser was not a bona fide purchaser. The auction-sale in his favour was set aside and the restitution ordered. The court cannot lend assistance to a person to retain the property of the judgment-debtor who has since got rid of the decree. In that context it was held that the stranger auction purchaser who is not a party to the decree is protected against the vicissitudes or fortunes of the litigation and remains unaffected and does not lose title to the property by subsequent reversal or modification of the decree. The rights of bona fide purchaser who purchased the property in ignorance of the litigation should be protected. The ratio in that case would indicate that the purchaser must be a bona fide purchaser for adequate price without knowledge of the pending litigation. If it is otherwise, it is liable to be set aside. In that context it was held that the true question is whether the stranger auction purchaser had knowledge of the pending



litigation about the decree under execution. If it is shown by evidence that he was aware of the pending appeal against the decree, when he purchased the property, the court cannot assume that he was a bona fide purchaser for giving him protection against restitution. His knowledge about the pending litigation would make all the difference in the case. Though he may be stranger to the suit, but he must be held to have taken a calculated risk in purchasing the property. Far from helping the auction-purchaser this goes against him. Mr Gupta contended that Rajinder Singh is not a bona fide purchaser. His brother is the adjacent owner of the site in question. The second respondent and his brother only made the bids and participated in the sale. Rest of the people had no capacity to purchase the property. The sale, therefore, is only a fraudulent and collusive one. Though we find some substance in what Mr Gupta contends, we need not to go into that question on the facts of this case. Suffice to state that all is not well. It is true that there is a distinction between irregularity and material irregularity in conducting the sale and it must be established that by reasons of illegalities or irregularities in conducting the sale, the judgment-debtor has sustained substantial injury. In *Dhirendra Nath Gorai v. Sudhir Chandra Ghosh*<sup>11</sup> this Court held that non-compliance of Section 35 of the Bengal Money Lenders Act does not render the sale void. It is only an irregularity. The judgment-debtor having had the knowledge did not file any objection. He did not attend the court for drawing up of the proclamation of the sale. On those circumstances the sale was held not liable to be set aside. Under Section 47 all questions relating to execution, discharge or satisfaction of the decree should be determined by the Executing Court alone. The pre-sale illegalities committed in the execution are amenable to the remedy under Section



47. Post-sale illegalities or irregularities causing substantial injury to the judgment-debtor are covered under Order 21 Rule 90. Sub-rule (1) thereof covers the field of material irregularities or fraud in publicity or conducting the sale. Sub-rule (2) enjoins proof thereof and the court should find that by reason thereof the applicant sustained substantial injury. The total absence of drawing up of the proclamation of sale and settlement of its term by judicial application of mind renders the sale a nullity being void. It is covered by Section 47. The non- application of mind whether sale of a part of the property would satisfy the decree debt is a material irregularity doing substantial injury to the appellant attracting Order 21 Rule 90. In either case the sale is liable to be set aside. It is true that there is distinction between mere irregularity and material irregularities and the sale is not liable to be set aside on proof of mere irregularity. It must be material irregularity and the court must be satisfied that on account thereof substantial injury was sustained by the appellant. The sale of 550 sq. yards for recovery of a paltry sum of Rs 7,780.33, without selling a portion thereof, caused substantial injury to the appellant."

(6) In the case of *Jagati Thimmaraju Vs. Uppuluri Brahmanna* (43 supra), the composite High Court at paragraph Nos.8 to 14 held as follows:

"8. Order 21, Rule 66(2)(a) has been amended as "or where a part of the property would be sufficient to satisfy the decree, such part" and as per the proceedings of the Court, the petitioner had the opportunity to raise objection when notice of attachment was served and on subsequent date, the statement of proclamation of sale was ordered in the



E.P. but, for the reasons best known to him, the petitioner's Advocate stated that he is not riling any counter or raised objections. In such circumstances the sale of the entire property was settled, and the property was put to sale on 24-6-1987.

9. Mr, N.V. Suryanarayana Murthy submits that the Apex Court while holding that when the decretal amount could be met by the sale of a portion of the property, the entire property should not be sold and it is the obligation of the Court to put the judgment-debtor's property for sale, for it was not brought to the notice of the learned Judges the provisions of Order 21, Rule 90 C.P.C. where it is open for the petitioner to raise objection for sale of the property with regard to the illegality or irregularity or fraud. Having not done so, the petitioner cannot press in aid the said judgment of the Apex Court. Next he contends that petitioner cannot avail the benefit of Section 47 of C.P.C., which is in general when a specific provision is provided under Order 21, Rule 90 C.P.C.

10. He relies on a Division Bench Judgment of Kerala High Court in K.P.M.Saheed v. Aluminium Fabricating Co., wherein their Lordships, in para 25 of the judgment, have held as under:

"It is the material irregularity or fraud which affects the method and manner of publishing the proclamation and the actual conduct of the sale that clothes the Court with a jurisdiction to set aside the sale under Order 21 Rule 90 C.P.C. where Order 21 Rule 90 applies, Section 47 is not available."

11. Apart from this, he also states that the petitioner has preferred this application at the fag end of three years i.e., 23-6-1990, whereas the sale of the property was effected on 24-6-1987. To file an



application raising objections to sale of the property, Article 127 of the Limitation Act is applicable. Article 127 of the Limitation Act, 1963 reads as under:

Description of suits - To set aside in execution of a decree, including any such application by a judgment-debtor.

Period of limitation Time – Sixty Days

Time from which period begins to run – The date of sale.

12. Under this Article, the petitioner has to raise any objection with regard to the sale within sixty days from the date of the sale, but in the instant case, the petitioner has not raised the objections within the stipulated time, as such, the petition filed by the petitioner itself is barred by limitation.

13. Next, Mr. N.V. Suryanarayana Murthy, learned Counsel for the respondent relies on another three Judge-Bench Judgment of Apex Court in Dhirendra Nath v. Sudhir Chandra, wherein their Lordships have considered the provisions of Order 21, Rule 90 C.P.C. and also the Bengal Money Lenders Act (10 of 1940) Section 35, where it was contended that whether Section 35 of the Act is mandatory or directory the sale held in violation of the said provision is only illegal but not a nullity and therefore, it can be set aside only in the manner and the reasons prescribed in Order 21, Rule 90 of the Code of Civil Procedure and further when the respondents did not attend at the drawing up of the proclamation of sale, the sale cannot be set aside at their instance. Their Lordships in para 5 of the judgment, have considered the effect of Section 35 of Bengal Money Lenders Act (10 of 1940), Order 21 Rule 64 and Order 21 Rule 66. But, ultimately their



Lordships agreed with the views expressed by the Division Bench of the Calcutta High Court consisting of Akram and Chakravarti, JJ., in *Mahindra Chandra v. Jagadish Chandra*, 1950 Cal. WN 266.

14. In view of the above contextual facts of the case and following the ratio decided by the Larger Bench in *Dhirendra Nath Gorai v. Sudhir Chandra* (supra) I hold that the judgment in *Ambali Narasayya v. M. Subba Rao* (supra) consisting of two Judge-Bench no longer holds good for the Larger Bench (Three Judge-Bench) Judgment governs the field, though earlier in time and also that the petition is barred by limitation under Article 127 of the Limitation Act, 1963."

33. In view of the law laid down in the aforesaid judgments and in the absence of any pleading, as held in the judgment of the composite High Court in *K.Venkateswaramma @ Hema Laltha KUmari and another Vs. Y.Ravindranath Reddy and another* (18 supra), this objection No.4/contention raised by the petitioners herein for the first time before this Court in this Revision cannot be sustained and is not permissible and is accordingly rejected.

34. For the aforesaid reasons, this Court does not find any reason to meddle with the well-articulated and well-reasoned order passed by the learned Senior Civil Judge, which is impugned in the present revision.

35. Accordingly, the Civil Revision Petition is dismissed. There shall be no order as to costs of the Civil Revision Petition.



As a sequel, interlocutory applications pending, if any, in this Civil Revision Petition shall stand closed.

27.01.2021

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**A.V.SESHA SAI, J**



**THE HON'BLE SRI JUSTICE A.V.SESHA SAI**

**C.R.P. No.921 of 2019**

27.01.2021

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