

(2010) 09 MAD CK 0126

In the Madras High Court

Case No : C.R.P. (NPD) No. 3755 of 2008 and M.P. No. 1 of 2008

M. Palanisamy

APPELLANT

Vs

Sri Lakshmi Financiers and M. Shanmugam

RESPONDENT

Date of Decision : 02-09-2010

Acts Referred:

Civil Procedure Code, 1882 — Section 294
Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 136
Limitation Act, 1908 — Article 180
Limitation Act, 1963 — Section 2
Registration Act, 1908 — Section 17(2)
Trusts Act, 1882 — Section 62

Citation : (2010) 09 MAD CK 0126

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : V. Raghavachari, for B. Dyaneswaran, for the Appellant; E. Sampathkumar, for R1 and D. Krishnakumar, for R2, for the Respondent

Final Decision : Dismissed

Judgement

M. Venugopal, J.—The Revision Petitioner/Judgment Debtor/Defendant has filed this Civil Revision Petitioner as against the order dated

13.10.2008 in E.A. No. 54 of 2008 in E.P. No. 214 of 1994 in O.S. No. 344 of 1990 passed by the Learned Subordinate Judge, Tiruppur.

2. The Executing Court viz., the Learned Subordinate Judge, Tiruppur in the order dated 13.10.2008 in E.A. No. 54 of 2008 in E.P. No. 214 of

1994 in O.S. No. 344 of 1990 has among other things observed that "E.A. No. 472 of 1996 filed by the Revision Petitioner/Petitioner has been

dismissed and later, to set aside the order passed in E.A. No. 472 of 1996, E.A. No. 126 of 2004 has been filed and the same has been

dismissed and later, the Appeal preferred before the Honourable High Court has been dismissed and as such, the plea that the second Respondent

with the help of the First Respondent has taken a higher value of petition mentioned property through an auction for a lesser price and further, the

two properties in S. No. 325/1C, 326 have been shown as one property and the same have been put in court auction and that the procedures

envisaged in Order 21, Rule 64 of the CPC have not been followed or not acceptable and since the reasons mentioned by the Revision

Petitioner/Petitioner in his sworn Affidavit are not good enough to allow the Application, the order being passed to dismiss the said Application is

not a wrong one, as opined by this Court and resultantly, dismissed the Application without costs."

3. According to the Learned Counsel for the Revision Petitioner/Judgment Debtor/Defendant, the trial Court has failed to consider the bonafide

intention of the Petitioner to deposit the entire debts with subsequent interest due to the Execution Petitioner and any costs that may be imposed by

the Court and also, it has not appreciated that the schedule mentioned properties is two properties and it is intentionally described as single

property by the Auction Purchaser and by the Decree Holder to deprive the Petitioner of his valuable property thereby has unlawfully gained.

4. It is the further contention of the Learned Counsel for the Revision Petitioner/Defendant that the Auction Purchaser is one of the Partners in the

Decree Holder Firm and the Auction Purchase is a collusive one and the sale itself offends Order 21 Rule 72 of the Civil Procedure Code.

5. That apart, the Executing Court has failed to exercise its powers under Order 21, Rule 64 and Section 151 of the Civil Procedure Code, when

one of the properties is sufficient enough to satisfy the entire debts with interest. The Learned Counsel for the Revision Petitioner/Defendant

submits that the fraudulent sale has been the subject matter of challenge throughout and therefore, mere confirmation of sale will not take away the

power of a Court of Law as per Order 34 Rule 5 of C.P.C. And therefore, it is void-ab-initio.

6. In short, the contention of the Learned Counsel for the Revision Petitioner is that the Executing Court has failed to exercise its inherent powers

by dismissing the Application filed by the Petitioner and therefore, this Court can interfere as per Article 227 of the Constitution of India.

7. The Learned Counsel for the Revision Petitioner/Defendant urges before this Court that Order 21 of C.P.C. Or Order 34, Rule 5 of C.P.C. can be invoked till sale is completed.

8. The Learned Counsel for the Revision Petitioner/Defendant submits that the Auction Purchaser is one of the Partners in the Decree Holder Firm

and without permission of the Court, the said purchased property is a void one and to lend support to this contention, he relies on the decision of

this Court K. Suresh Babu Vs. K. Balasubramaniam and Another, , wherein it is held as follows:

Order 21, Rule 72(1) uses the word ""shall"" and not ""may"". That means, the obtaining of the permission of the Court is mandatory before a decree-

holder can bid at the auction and purchase the property himself or benami for his benefit and if the decree-holder without obtaining such permission

or inspite of refusal of such permission bids at the auction and purchases the property, certainly be contravenes a mandatory provision of law.

Further, the statute has deliberately used the word ""express"" before ""permission"" thereby indicating the stringency of the provision it is making.

Such a person cannot be allowed to take advantage of his own illegality by calling upon the judgment-debtor or any other person interested in the

property who applies for setting aside the sale to prove that by reason of his illegality, the applicant has suffered substantial injury. (para 14)

An application to set aside a sale made under Order 21, Rule 72(3) is an independent application-independent in the sense that it is different from

the application contemplated under Order 21, Rule 90 C.P. Code. When the two sets of provisions provide for two different applications, in the

absence of any statutory compulsion, there is no justification whatever to equate the two and import into one set of provisions, the restrictions or

limitations imposed in the other set of provisions. Order 21, Rule 90 C.P. Code does refer to it and makes the proof thereof as a condition

precedent for setting aside the sale. Therefore the considerations applicable to an application under Order 21, Rule 90 C.P. Code, should not be

applied to an application under Order 21, Rule 72(3) of the Code. ILR (1955) Mad 675, Overruled. Case law discussed. (Para 13)

He also relies on the decision of this Court Mohanaram Chettiar v. K.V. Santhanam and Anr. 1995 MLJ 554, wherein it is held thus:

It is seen that in this case, even if as a result of the earlier unsuccessful proceedings taken out by the 1st respondent and others, the court auction

sale in favour of the petitioner should be regarded as having been confirmed, such confirmation had been clearly set at naught by the decision in

Neelambal and Another Vs. Mohanram Chettiar and Others, . This would, therefore, be a case where though the sale had been confirmed earlier,

such confirmation had been set aside and that too at a point of time when the application under Order 34, Rule 5 of the Code filed by the 1st

respondent was pending. The resulting position, therefore, is that the court sale had remained unconfirmed as the earlier confirmation had been set

aside and the application for setting aside the court sale under Order 34, Rule 5 of the Code was already there in regard to an unconfirmed court

sale, consequently, the deposit made by the first respondent was in consonance with the requirements of Order 34, Rule 5 of the Code.

9. To lend support to the contention that if a bidding Decree Holder in an Auction sale has not obtained the permission to take part, then such sale

conducted is clearly in violation of Order 21, Rule 72, the Learned Counsel for the Revision Petitioner/Defendant cites the decision of the Hon"ble

Supreme Court Lal Chand Vs. VIIIth Addl. District Judge and others, , wherein it is observed as follows:

6. In the counter-affidavit filed by the respondent, he has not specifically denied in that behalf except stating that it is a matter of record. The

proceedings of the auction do indicate that if he was really the person permitted to participate in the bid, one would necessarily expect an active

participation in the auction. But the proceedings do show that after one Bali Ram Prasad, had bid, earlier, for Rs. 10,000/- but later offered Rs.

11,500/- and one Srinath had offered a sum of Rs. 11,000/-, as a last bid, the respondent offered Rs. 12,000/- so as to be within the outer limit of

valuation fixed by the court to ward off future onslaught on court sale. Since there was no further offer made by anybody thereafter out of the five

participants in the bid, the bid was knocked down in favour of the respondent decree-holder. Under the teeth of the mandatory language of Order

XXI, Rule 72 CPC, he has no right to bid in the auction without obtaining prior permission of the court. As a consequence, the sale conducted was

clearly in flagrant violation of Order XXI, Rule 72 CPC.

7. It is also to be seen that the sale was conducted without there being any proper notice and publicity as is evident from the report submitted by

the Court Amin. After the bid was started, sale was notified in the village by beat of drum and thereafter people started coming and five persons

including the respondent participated in the bid. This part of the procedure adopted is clearly illegal and caused great prejudice to the interest of the

appellant. In *Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh*, , this Court had pointed out the mandatory requirements of the procedure,

as indicated therein, thus: (Para 12 of AIR)

The contentions of S/Shri Madhava Reddy and Gujral that the appellant had not given his valuation and that, therefore, it is not open to him to raise

the objections after the sale is unacceptable. Since the court had not given any notice to the appellant which is mandatory, the need to submit his

valuation did not arise. Order 21, Rule 54, Sub-rule (1-A) brought in by 1976 Amendment Act mandates that the court should require the

judgment-debtor to attend the court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale.

Form 24 of Appendix "E" second para and the Court Rules also envisage the mandate. It is a reminder to the court that it has a statutory duty to

issue notice to the judgment-debtor before settlement of the terms of proclamation of sale. Then only the proviso to Rule 66(2) comes into play

dispensing with multiplicity of notices and not dispensation of mandatory compliance of notice to the judgment-debtor. Had it been a case where

notice was served and the appellant lay by, without objecting to the valuation given by the decree-holder, certainly that would be put against the

appellant to impugn the irregularities after the sale or the undervaluation settled by the court in the proclamation of sale. The further contentions of

both the counsel that merely because there is no order under Order 21, Rule 66(2), it cannot be construed that the Execution Court had not

applied its mind in settling the terms of the proclamation of sale, is one of desperation. Except giving a schedule of dates for conducting the sale the

Execution Court totally abdicated its duty to scrupulously comply with the mandatory procedure and did not apply its mind to the mandatory duty

cast on it by Order 21, Rule 66 to settle the terms of proclamation of sale, and proper publication under Rule 67. After April 20, 1979, the court

had merely ensured its publication on the court notice board and on the site at the respective dates and no further. This Court in *Shalimar Cinema*

Vs. Bhasin Film Corporation and Another, held that the court has a duty to see that the requirements of Order 21, Rule 66 are properly complied

with. It is incumbent on the court to be scrupulous in the extreme. No action of the court or its officer should be such as to give rise to the criticism

that it was done in a casual way. Therefore, a proclamation of sale drawn casually without compliance of the mandatory requirement and a sale

held in furtherance thereof is not a sale in the eye of law. We are of the considered view that the procedure adopted by the court in non-

compliance of Order 21, Rules 66 and 67 is in flagrant breach of the mandatory provision. It is a nullity ab initio.

10. Besides the above, the Learned Counsel for the Revision Petitioner brings to the notice of this Court the decision of the Hon"ble Supreme

Court *Sai Enterprises v. Bhimreddy Laxmaiah and Anr.* (2007) 13 SCC 576 at page 579, wherein the Supreme Court has laid down as follows:

9. The provision contains some significant words. They are "'necessary to satisfy the decree'". Use of the said expression clearly indicates the

legislative intent that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. See *Takkaseela Pedda Subba Reddi*

Vs. Pujari Padmavathamma and Others, . In all execution proceedings, Court has to first decide whether it is necessary to bring the entire property

to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small the court

must bring only such portion of the property the proceeds of which would be sufficient to satisfy the claim of the decree-holder. It is immaterial

whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only

such portion of the property should be sold. This is not just a discretion but an obligation imposed on the court. The sale held without examining

this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction. See *Ambati Narasayya Vs. M. Subba*

Rao and another, . The duty cast upon the court to sell only such portion or portion thereof as is necessary to satisfy the decree is a mandate of the

legislature which cannot be ignored. Similar view has been expressed in *S. Mariyappa (Dead) by Lrs. and Others Vs. Siddappa and Another*, .

The position was also highlighted in Balakrishnan Vs. Malaiyandi Konar, .

11. As regards the plea of the Revision Petitioner/Defendant that a portion of the property alone is to be sold which is necessary to satisfy the

decree and any sale in contravention of Order 21 Rule 64 and 66(2)(a) of C.P.C. cannot be sustained, the Learned Counsel for the Revision

Petitioner cites the decision of this Court K.J. Prakash Kumar and Ors. v. Rasheeda Yasin and Anr. 2009 2 L.W. 376, wherein it is held as

follows:

Rule 66(2)(a) of Order 21 of C.P.C., mandates the Executing Court to consider the value of the property in entirety and if it finds that sale of a

portion of the property would be adequate to satisfy the decree without deviation from the rules and procedures, it shall bring such portion of the

property to sale. In case, if the Executing Court does not advert to the said rule and the entire property is brought to auction and the same was

sold then the sale would get vitiated by material irregularity. (Para 12)

12. The Learned Counsel for the Revision Petitioner/Defendant submits that when the property is sold far in excess of amount due then, the excess

sale of such share in both the properties is to be held as void for non compliance of the provisions of Order 21, Rule 64 of the CPC and to

support his said contention, he relies on the decision Abdul Hafeez Khan @ Chakkan (deceased by L.RS.) v. Civil Judge, Pilibhit and Ors. AIR

2009 All 162 at page 163 at para 10, wherein it is held as follows:

9. The provision contains some significant words. They are ""necessary to satisfy the decree"". Use of the said expression clearly indicates the

legislative intent that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. See Takkaseela Pedda Subba Reddi

Vs. Pujari Padmavathamma and Others, . In all execution proceedings, Court has to first decide whether it is necessary to bring the entire property

to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small the court

must bring only such portion of the property the proceeds of which would be sufficient to satisfy the claim of the decree-holder. It is immaterial

whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only

such portion of the property should be sold. This is not just a discretion but an

obligation imposed on the court. The sale held without examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction. See *Ambati Narasayya Vs. M. Subba Rao and another*, . The duty cast upon the court to sell only such portion or portion thereof as is necessary to satisfy the decree is a mandate of the legislature which cannot be ignored. Similar view has been expressed in *S. Mariyappa (Dead) by Lrs. and Others Vs. Siddappa and Another*, . The position was also highlighted in *Balakrishnan Vs. Malaiyandi Konar*, .

13. Added further, the Learned Counsel for the Revision Petitioner/Defendant has relied on the following decisions:

(a) In the decision *Balu v. Periasami and Ors.* AIR 1988 Mad 114, this Court has held that "to satisfy the decretal amount, the sale of other items

of properties would amount to excessive execution and would be invalid as being in violation of Order 21, Rule 64. *Takkaseela Pedda Subba*

Reddi Vs. Pujari Padmavathamma and Others, and (1985) 98 Mad LW 352. Rel on.

(b) In *Ambati Narasayya Vs. M. Subba Rao and another*, , the Hon"ble Supreme Court has observed thus:

Order XXI Rule 64 CPC enjoins 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 is not just a discretion, but an obligation imposed on the court. The sale held without

examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction. (para 7)

Takkaseela Pedda Subba Reddi Vs. Pujari Padmavathamma and Others, , relied on.

In the present case the amount claimed in the execution petition was about Rs. 2400. To realize that amount the land measuring 10 acres was sold

for Rs. 17,000. The contention that the land being one, could not have been

divided is against commonsense and cannot be accepted. Out of 10

acres, the court have conveniently demarcated a portion and sold it. But the court had blindfold sold the entire property. This is a usual feature

noticeable in most of the execution cases. This tendency is to be highly deprecated. Therefore, the impugned sale cannot be sustained.

(c) In *Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh*, it is held that "Service of notice on Judgment-Debtor is mandatory and that the

sale without notice is a nullity and a Court should apply its mind to the need for furnishing the relevant and material particulars in the sale

proclamation and the Record should indicate application of judicial mind". In the aforesaid decision, at page No. 150 in paragraphs 17 and 18, the

Hon"ble Supreme Court has held as follows:

17. u/s 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 u/s 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.

18. The sale is set aside. The confirmation of sale is also set aside. The appellant is directed to withdraw the sum of Rs. 7,780.33 paise within six

weeks from today from the court of the Rent Controller and deposit it towards

decree amount. The Rent Controller should order payment. The Subordinate Judge on deposit, should thereon record full satisfaction and pay over the same to the first respondent. The appellant is free to withdraw the balance amount from the court of the Rent Controller. The auction-purchaser Rajinder Singh is free to withdraw his Rs. 1,05,000/- and interest accrued thereon from the bank deposit as ordered by the court. The Registry should take such steps as are necessary to enable him to withdraw the said amount. The appeal is allowed, but with no costs, as the appellant argued in person.

(d) In Lal Chand Vs. VIIIth Addl. District Judge and others, , it is held that Order 21 Rule 72 of C.P.C. Is mandatory and so no decree-holder

has any right to bid in the auction without prior permission of the Court." In the aforesaid decision, at pages 359 and 360, the Hon''ble Supreme

Court in para 8 has observed as follows:

There is yet another infirmity which goes to the root of the matter. It is seen that the respondent, in fact, had a contract to purchase 43 decimals of

land and in the execution, managed to give the list of all other lands totalling 1 acre 52-1/2 decimals and the decree for Rs. 10,000 and odd was

sought to be put to execution, and purchased the land for Rs. 12,000. In other words, he had overreached his original agreement which he failed in

the suit itself by participating and getting the sale in his favour. There is no attempt made for sale of a reasonable portion of the property for

realisation of the decree-debt. Order 21, Rule 64 expressly mandates as under:

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 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.

This part of the case was also considered in Desh Bandhu Gupta case thus: (SCC pp. 146-47, paras 13-14)

Yet another contention of Mr. Gupta is that the sale of the plot of 550 sq. yards is in excess of the execution and the order to sell it is the result of

non-application of mind touching the jurisdiction of the court rendering the sale void or manifestly illegal. Therefore, the need to invoke Order 21

Rule 90 does not arise and it can be set aside u/s 47 CPC.

Proviso to Sub-rule (4) of Rule 17 of Order 21 provides the procedure to receive the application for execution of the decree. In the case of a

decree for payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

Rule 64 of Order 21 charges the Executing Court that it may order attaching of any property to the extent that "such portion thereof as may seem

necessary to satisfy the decree would be sold". It is also enjoined under Sub-rule (2)(a) of Rule 66 of Order 21 that where a part of the property

would be sufficient to satisfy the decree the same be sold by public auction. Form 27 of Appendix E of the schedule also directs the court

auctioneer to sell so much of the said property as shall realise the sum in the said decree and costs. The Code, therefore, has taken special care

charging the duty on the Executing Court and it has a salutary duty and a legislative mandate to apply its mind before settling the terms of

proclamation and satisfy that if part of such property as seems necessary to satisfy the decree should be sold if the sale proceeds or portion thereof

is sufficient for payment to the decree-holder or the person entitled under the decree to receive the amount and so much of that property alone

should be ordered to be sold in execution. In *Ambati Narasayya Vs. M. Subba Rao and another*, this Court held that it is the duty cast upon the

court under Order 21 Rule 64 to sell only such property or a portion thereof as may be necessary to satisfy the decree. It is a mandate of the

legislature which cannot be ignored. Therein for execution of a decree of a sum of Rs. 2000 and costs, the appellant's 10 acres land was brought

to sale which was purchased for a sum of Rs. 17,000, subject to discharge of a prior mortgage of Rs. 2000. This Court held that without the

court's examining whether a portion of the property could be sold, the sale held was not in conformity with the requirement of Order 21 Rule 64

and it was held to be illegal and without jurisdiction. The sale was set aside and the court was directed to put the judgment-debtor in possession of

the land and to refund the sale amount to the auction-purchaser, etc.

(e) In the decision *Thomas Joseph v. Catholic Syrian Bank* 1998 (1) KLT 986 and 988, it is held that "as long as there is no proper notice under

Order XXI Rule 66(2) of C.P.C., the sale of immovable property is vitiated by

material irregularity" and moreover, as per Order XXII, Rule 64 of

C.P.C., if the property is to be sold in auction is large and the decree to be satisfied is small, such portion of the property required to satisfy the

claim of the decree alone should be sold in auction." In the aforesaid decision, at pages 1000 and 1001 in paragraph No. 7, it is observed as

follows:

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.

After observing thus, the Court went on to hold as follows:

9. ...The Court has blind fold sold the entire property. This is an usual feature which we have noticed in most of the execution cases. We must

deprecate this tendency. There is a duty cast upon the Court to sell only such property or a portion thereof as necessary to satisfy the decree. It is

a mandate of the Legislature which cannot be ignored. We cannot, therefore, sustain the impugned sale. It must be set aside being in contravention

of the provisions of Rule 64, Order XXI, C.P.C.

14. The desirability and necessity to avoid a distress sale has been stressed by the decision of this Court reported in Padiyath Raghavan v. P.K.

Krishnan Nambiar 1992(2) KLJ 519 wherein it has been held that the Court has a duty to ensure that the property in excess of what is required to

release the amount necessary to satisfy the decree is not put to sale. Clause (a) of Sub-rule (2) of Rule 66 of Order XXI of the Code stipulates

that the proclamation must set out the property to be sold or where a part of the

property would be sufficient to satisfy the decree, such part. In the light of the aforesaid decisions, we have no hesitation to hold that the sale held without considering whether a part of the property can satisfy the decree will be one without jurisdiction.

14. An endeavour of Court of law is to obtain an adequate price for the property put in for sale, the Learned Counsel for the Revision Petitioner

cites the decision Regi George v. Bhaskaran Nair 1998 (2) KLT 640, wherein it is held as follows:

When the Supreme Court mandates that equal endeavour should be made to fetch adequate price it is imperative on the part of the court below to

probe into the question whether the fraud or irregularity alleged has resulted in obtaining inadequate price. The fact that the sale is subject to the

confirmation of the court does not mean that the court shall refuse to accept the highest bid because at a later stage some one on second thought

says that he is willing to pay more. The above condition is only to safeguard against the irregularity or fraud in connection with the sale and against

the property being sold at an inadequate price. Therefore, throughout the entire process of sale it shall be the endeavour of the Court to obtain the

adequate price for the property put in for sale. That the obtaining of inadequate price in auction sale no doubt amounts to "substantial injury"

contemplated under Sub-rule (2) of Rule 90. The onus of proving the substantial injury is on the applicant who seeks to set aside the sale. (Para 8)

Also in the aforesaid decision, it is held that as per Order XXI, Rule 64, Rule 64 of C.P.C., "Court has no jurisdiction under this Rule to order a

sale unless the property is "liable to sale". Further more, in the said decision, it is held that "as per Order XXI, Rule 66(2)(a) and 64 of C.P.C., a

Court has a duty to ascertain definitely the property or such portion thereof required to be sold before entering it in the sale proclamation." He also

relies on the decision Parvathy Antherjanam and Anr. v. Indian Bank, Ernakulam R.F.A. No. 23 of 1995 dated 05.01.1996, wherein it is held that

"Right is available to judgment debtor under Order 21, Rule 64 to bring to sale only such portion of attached property, proceeds of which would

be sufficient to satisfy claim of decree holder and a Judgment debtor, even at appellate stage can move Executing Court to exercise his right.

15. Proceeding further, The Learned Counsel for the Revision Petitioner/

Defendant invites the attention of this Court to the decision of the Hon^{ble} Supreme Court Smt. Arati Daw v. Pradip Roy Chowdhury AIR 2003 Calcutta 218, at page 224, wherein in paragraph 44, it is observed as follows:

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

In the aforesaid decision, at pages 225 and 226, paragraphs 46 to 51, it is observed as follows:

...46. From the records of the case it appears that the Executing Court was very much careless in conducting the auction sale of the property in question in execution of the decree. The Court never ensured the service of the sale proclamation upon the real owner. Scrutinising the orders passed by the learned Judge of the Executing Court in course of conducting the said auction sale of the house property it does not appear that any attempt was made for publication of the sale in the newspaper.

47. Most sorry state of affairs has emerged from the orders passed by the learned Judge of the Executing Court on 12th July, 1969. Both the order Nos. 10 and 11 were passed by the learned Judge of the Executing Court admittedly, on 12th July, 1969 wherefrom it is established that the entire sale process was allowed to be completed starting from the checking of sale proclamation to conclusion of the sale on the same date.

48. Checking and finalisation of Sale Proclamation cannot be a mechanical process. A learned Judge executing the decree is required to exercise minimum degree of care and caution before passing an order one cannot approve a Sale Proclamation when on the face of the documents available before him it clearly appears that the valuation sought was so low that the same would not be anything but fraudulent and the Court should have been alert enough to ensure that all the requirements of sale have been complied with. In any event, when a fraud practiced on a Court is detected

subsequently and the same is brought to the attention of the Court and the Court will certainly ensure that the persons perpetrating such fraud could not be benefited by its fraudulent action and give protection to the victim.

49. The learned Judge of the Executing Court did not record any finding about the service of the publication of the proposed sale as was required

under Order 21, Rule 66(2) of the CPC nor the application of the decree holder for permission to bid at the sale was served on the judgment

debtor. It also does not appear that the sale proclamation was settled or finalised upon notice to the judgment debtor as is required under Order

21, Rule 66(2) of the Civil Procedure Code. The object of drawing up of the sale proclamation upon notice to the decree holder is very clear. It

was not necessary to sell the entire property if the decretal dues can be made up by selling a part of the property as will appear from Order 21,

Rule 66(2)(a). It is also necessary under the proviso to Order 21, Rule 66(2) that the sale proclamation should include the estimates given by both

the parties which was not done in this case since the required notice was not served on the judgment debtor in terms of Order 21, Rule 54 of the

Civil Procedure Code.

50. The infirmities mentioned above go to the root of the matter and leave no option to this Court but to hold that the irregularities were serious

enough amounting to practising fraud on the Court. In any view of the matter no one should suffer due to the act of the Court. Act of Court should

not prejudice anyone but in this case serious injury has been caused to the Judgment debtor in the manner the sale has been proceeded with and

conducted.

51. It is true that it is not necessary for the Court to state its own estimate of the value of the property as has been observed by the Supreme Court

in *Gajadhar Prasad and Others Vs. Babu Bhakta Ratan and Others*, . But the Supreme Court has made it clear that all material facts have to be

mentioned by the Court when stating its estimate of the value of the property to be sold and Court must not accept the ipse dixit of one side. The

Court should have invited objections to the valuation from the judgment debtor and should have considered the same after applying its mind as has

been laid down by the Supreme Court in the case reported in *Gajadhar Prasad and Others Vs. Babu Bhakta Ratan and Others*, .

16. The Learned Counsel for the Revision Petitioner seeks in aid of the decision of the Hon"ble Supreme Court S. Mariyappa (Dead) by Lrs. and

Others Vs. Siddappa and Another, , wherein it is held that "it is the duty of Executing Court to consider whether sale of only a part of the property

would be sufficient to meet the decretal debt and where the Execution Court did not observe the said duty and one acre of agricultural land was

sold in execution for a paltry sum of Rs. 1500 plus a prior mortgage debt of Rs. 7000/- while the decretal amount was Rs. 8000/- only, the sale

deserves to be set aside and further, liberty is granted to judgment debtor to seek execution of his decree in accordance with law."

17. Continuing further, the Learned Counsel for the Revision Petitioner/Defendant relies on the decision Balakrishnan Vs. Malaiyandi Konar, ,

wherein the Hon"ble Supreme Court has held that "the Expression ""necessary to satisfy the decree"" as used in Order 21 Rule 64 clearly indicates

the legislative intent that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation and a court must enquire whether

sale consideration of a portion of the property is sufficient to satisfy the decree and if so put only that portion to sale and the sale made in violation

of the said mandatory requirement would be illegal and without jurisdiction and on facts, auction-sale did not meet the requirements of law but,

since question as to legality of sale attained finality, no interference is called for. Further at page 155 in paragraphs 12 to 16, it is held as follows:

12. The residual question is the effect of Article 134 of the Limitation Act, as appearing in the Schedule to the Limitation Act relatable to Sections

2(j) and 3 providing for periods of limitation. Article 134 reads as follows:

Description of suit Period of limitation Time from which
period begins to run

134. For delivery One year When the sale

of possession by

becomes absolute.

a purchaser of

immovable property

at a sale in execution

of a decree.

13. The limitation for the purpose of Article 134 starts from the date of confirmation of sale. See Ganpat Singh v. Kailash Shankar. In Pattam

Khader Khan v. Pattam Sardar Khan this Court held that it is not from the date when sale certificate is issued that the limitation starts running. The

sale becomes absolute on confirmation under Order 21 Rule 92 of the Code effectively passing title. It cannot be said to attain finality only when

sale certificate is issued under Order 21 Rule 94. There can be variety of factors conceivable for which delay can be caused in issuing a sale

certificate. The period of one-year limitation now prescribed under Article 134 of the Limitation Act in substitution of a three-year period

prescribed under Article 180 of the Limitation Act, 1908 is reflective of the legislative policy of finalising proceedings in execution as quickly as

possible by providing a quick forum to the auction-purchaser to ask for the delivery of possession of the property purchased within that period

from the date of the sale becoming absolute rather than from the date of issuance of the sale certificate. On his failure to avail such a quick remedy

the law relegates him to the remedy of a regular suit for possession based on title, subject again to limitation.

14. Though it was submitted by learned Counsel for the appellant that the respondent was responsible for the delay caused as he had filed the civil

revision before the High Court, the plea is clearly untenable. The civil revision petition was dismissed on 10-9-1987.

15. Above being the position, we are not inclined to interfere in the matter. Though the question of applicability of Order 21 Rule 64 of the Code

should not have been considered by the High Court in view of the dismissal of earlier civil revision petition, even otherwise no relief could have

been granted to the appellant in view of Article 134 of the Limitation Act. Substantive justice can be done to the parties if the order passed by the

High Court remitting the matter is maintained. But the question that has to be considered will not be the validity of the sale, but the maintainability of

the application for delivery of the property.

16. The appeal is accordingly dismissed. No costs.

18. According to the Learned Counsel for the Second Respondent, Order 21, Rule

64 of C.P.C. Provides "for a sale of a attached property in execution proceedings and the said provision neither deals with setting aside of a sale nor to a property which has been mortgaged and as such, E.A. No. 54 of 2008 filed as per Order 21, Rule 64 of C.P.C. is not at all maintainable in law.

19. Expatiating his arguments, the Learned Counsel for the Second Respondent contends that the Revision Petitioner/Defendant filed E.A.472/1996 in E.P.214/1992 in O.S.344/1990 on the file of the Executing Court as per Section 47 read with Order 21, Rule 66(2)(a) and 67(3) and Section 151 of C.P.C. praying for an issuance of an order to set aside the sale held on 27.03.1996 in respect of petition mentioned properties and the same has been dismissed on 19.04.2004 and later, the Revision Petitioner projected E.A.126/2004 in E.A.472/1996 to set aside the order passed in E.A.472/1996 in dismissing the Execution Application for the default of the petitioner and the same has been dismissed on 08.12.2005 and subsequently, the Revision Petitioner filed CRP (NPD) 311 of 2006 before this Court challenging the order passed by the Execution Court in E.A.126/2004 in E.A 472/1996 in E.P.214/1992 and this Court on 30.08.2006 has dismissed the Civil Revision Petition inter alia observing that "...as per Order XXI, Rule 106 of C.P.C., the Applicant against two main order is made under Order 21 Sub-rule 2 shall make an application to set aside the order within 30 days from the date of order as far as the case on hand is concerned, E.A.472/96 was dismissed on 19.04.2004. But the petitioner has filed EA126/2004 only on 25.10.2004, which is clearly barred by the above said provision of law. As such, E.A. No. 126 of 2004 is not maintainable. The Learned Counsel for the Second Respondent has also relied on the Judgment of the Supreme Court reported in 2006-2-L.W. 47 (Damodaran Pillai and Ors. v. South Indian Bank Ltd.) in support of his contention" and resultantly dismissed the Civil Revision Petition without costs.

20. The Learned Counsel for the Second Respondent submits that the Petitioner has not preferred any Appeal as against the order passed by this Court in CRP (NPD) 311 of 2006 dated 30.8.2006 and this has become final and the Revision Petitioner has once again projected E.A.54 of 2008 for setting aside the sale and hence, the present Application is barred by

the principle of Res Judicata and estoppel and in short, E.A.54 of 2008 have been projected by the Civil Revision Petitioner to circumvent the order passed by this Court in CRP NPD 311 of 2006 which is nothing but a futile one.

21. The Learned Counsel for the Second Respondent urges before this Court that the Second Respondent has not been a Partner of the First

Respondent Partnership Firm and the Petitioner has not produced any Partnership Deed to sustain his plea that the Second Respondent is a

Partner of the First Respondent Firm.

22. The Learned Counsel for the Second Respondent raises a legal plea that the Revision Petitioner ought to have raised his objection before the

issuance of proclamation for sale and ought to have deposited the entire Decree amount within 60 days from the date of confirmation of sale and

indeed Order 21, Rule 64 of C.P.C. will only apply to the property attached by the Court and will not apply to the sale of a property which has

been mortgaged and therefore, the Civil Revision Petition is devoid of merits and the same is liable to be dismissed.

23. The Learned Counsel for the Second Respondent cites the decision of the Hon'ble Supreme Court Damadoran Pillai and Ors. v. South Indian

Bank Ltd. 2006-2-L.W. 47, wherein the Honourable Supreme Court has held as follows:

It is not in dispute that the Execution Petition was dismissed in terms of the provisions of Rule 105 of Order XXI of the Code of Civil Procedure.

The Learned Executing Court allowed application of restoration filed by the Respondent herein on the ground that it acquired the knowledge about

the dismissal of the Execution Petition only on 25.03.1998. The Learned Judge, however, while arriving at the said finding failed and/or neglected

to consider the effect of Sub-rule (3) of Rule 106. A bare perusal of the aforementioned Rule will clearly go to show that when an application is

dismissed for default in terms of Rule 105, the starting period of limitation for filing of a restoration application would be the date of the order and

not the knowledge thereof. As the applicant is represented in the proceeding through his Advocate, his knowledge of the order is presume. The

starting point of limitation being knowledge about the disposal of the execution petition would arise only in a case where ex-parte order was

passed and that too without proper notice upon the Judgment Debtor and not otherwise. Thus, if an order has been passed dismissing an application

for default, the Application for restoration thereof must be filed only within a period of 30 days from the date of the said order and not thereafter.

In that view of the matter, the date when the decree holder acquired the knowledge of the order of dismissal of the execution petition was,

therefore, wholly irrelevant. The impugned Judgment of Kerala High Court is to be set aside.

Furthermore, at page 50, in para 10, it is mentioned as follows:

The Learned Judge, however, while arriving at the said finding failed and/or neglected to consider the effect of Sub-rule (3) of Rule 10. A bare

perusal of the aforementioned rule will clearly go to show that when an application is dismissed for default in terms of Rule 105, the starting period

of limitation for filing of a restoration application would be the date of the order and not the knowledge thereof. As the Applicant is represented

in the proceeding through his Advocate, his knowledge of the order is presumed. The starting point of limitation being knowledge about the

disposal of the execution petition would arise only in a case where an ex-parte order was passed and that too without proper notice upon the

Judgment Debtor and not otherwise. Thus, if an order has been passed dismissing an application for default, the application for restoration thereof

must be filed only within a period of 30 days from the date of the said order and not thereafter. In that view of the matter, the date when the

Decree Holder acquired the knowledge of the order of dismissal of the execution petition was, therefore, wholly irrelevant.

Added further, the Hon'ble Supreme Court at page 51 in para 15 has observed as follows:

An application u/s 5 of the Limitation Act is not maintainable in a proceeding arising under Order XXI of the Code. Application of the said

provision has, thus expressly been excluded in a proceeding under Order XXI of the Code. In that view of the matter, even an application u/s 5 of

the Limitation Act was not maintainable. A fortiori for the said purpose, inherent power of the Court cannot be invoked.

He also relies on the decision of the Hon'ble Supreme Court P.K. Unni Vs. Nirmala Industries and others [OVERRULED], wherein the Hon'ble

Supreme Court has laid down as follows:

The correct construction of Rule 92(2) of Order XXI of CPC leads to the irresistible conclusion that the time for making a deposit in terms of Rule

89 of Order XXI is 30 days, and Article 127 of the Limitation Act, 1963 prescribing the period for making an application under Rule 89 has no

relevance to the prescribed time for making the deposit. Neither provision has any effect on the other as to time. (1987) 2 Mad LJ 3, Reversed.

Thangammal and Others Vs. K. Dhanalakshmi and Another, and Basavantappa Vs. Gangadhar Narayan Dharwadkar and Another, Overruled.

24. The Learned Counsel for the Second Respondent brings to the notice of this Court the decision of the Hon^{ble} Supreme Court Dadi

Jaganndham v. Jammulu Ramulu and Ors. 2001 (4) CTC 314, wherein it is held that "Order 21, Rule 92(2) does not prescribe any period of

limitation for deposit of decretal amount and it only states that if such deposit is made within 30 days sale shall be set aside and thereby taken away

discretion of court to refuse to set aside sale if decretal amount had been deposited within 30 days from date of sale and this does not mean that if

deposit of decretal amount is made after 30 days but before 60 days court could not entertain application to set aside sale and if such deposit is

made beyond 30 days but within 60 days then Court has discretion either to accept application or reject the same and an Application to set aside

sale made along with deposit of decretal amount made within 60 days can be entertained and allowed and such an order of Executing Court was

upheld as legal and valid."

25. The Learned Counsel for the Second Respondent invites the attention of this Court to the decision Sri Kala Traders v. Central Bank of India

1995 2 CTC 394, wherein it is held that "An Executing Court has no power to condone the delay beyond 60 days prescribed under Article 127

of the Limitation Act."

26. In support of the contention that an objection as to Execution of Decree can be made only once and not repeatedly and when the title of the

original owner having once been negatived and has become final cannot be raised again and further, the objection as to excess valuation having not

been raised earlier to proclamation of sale cannot be raised after title had been lost and has become final, the Learned Counsel for the Second

Respondent relies on the decision of the Hon''ble Supreme Court R.P.A. Valliammal Vs. R. Palanichami Nadar and others, , wherein it is held as

follows:

Section 47 postulates that all questions arising between the parties to the suit in which the decree was passed, or their representatives and relating

to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

Explanation 1 added thereto by the Amendment Act, 1976 postulates that for the purposes of this Section, a plaintiff whose suit has been

dismissed and a Defendant against whom a suit has been dismissed, are parties to the suit. The opportunity to object to executability of the decree

could be taken only once and repeated applications appear to be unwarranted. It is not in dispute that the petitioner's mother had already agitated

the right title to the property and claimed that to the extent of her right, the execution was not valid in law. That right having been negated and

having become final, the petitioner cannot have any higher right than the mother herself had. The petitioner having allowed the orders to become

final, it would not be open to the petitioner to raise the contentions thereafter. Even otherwise also, as held by the High Court, the objection as to

excess execution has not been raised. Though Order 21, Rule 90(3) CPC may not be strictly construed so as to put a fetter on the court, due to

non-raising of the objection before proclamation of sale and the objection could be raised even at a later stage, but since the title has already been

lost and has become final, the petitioner cannot agitate the executability of the decree in the absence of any legal title to question the correctness of

the execution. Under these circumstance, we do not think that we would be justified to exercise the power under Article 136 of the Constitution.

27. The Learned Counsel for the Second Respondent has relied on the decision of the Hon''ble Supreme Court B. Arvind Kumar Vs. Government

of India and Others, , wherein the Hon''ble Supreme Court has held that "When a property was sold by public auction in pursuance of an Order of

the Court and the bid was accepted and the sale was confirmed by the Court in favour of the purchaser, the sale becomes absolute and the title

vests in the purchaser and the Sale Certificate was issued to the purchaser only when the sale becomes absolute and the Sale Certificate was

merely the evidence of such title." Also, it is further held that "in the present case, the Sale Certificate itself was registered as per Section 17(2)(Xii)

of the Act which specifically provides that a Certificate of Sale granted to any purchaser of any property sold by a public auction by a Civil or

Revenue Officer did not fall under the category of non testamentary documents require Registration and hence, the High Court committed serious

error in holding that the Sale Certificate did not convey any right, title or interest to Plaintiff's Father for want of Registered deed of transfer" and

resultantly, allowed the Appeal.

28. That apart, the Learned Counsel for the Second Respondent has relied on the following citations and they are as follows:

(i) In the decision M. Rangasamy Vs. R.C. Ramasamy and S.A. Jaganathan, , this Court has held that "Except the orders made in petition filed

under Order 21, Rules 72 and 92, C.P.C., no appeal could be entertained either under Order 43, Rule 1(j) or Order 41, Rule 1, C.P.C.

(ii) In the decision K. Chidambara Manickam v. Shakeena 2008 (1) CTC 660, at page 661, this Court has held that "a Sale Certificate granted

pursuant to sale held in public auction by Authorised Officer under SARFAESI Act does not require registration in view of Section 17(2)(Xii) of

Registration Act.

(iii) In the decision Rajender Singh v. Ramdhar Singh and Ors. 2001 (2) CTC 617, the Hon"ble Supreme Court has held that "Mere inadequacy

of price is not ground for setting aside sale in execution of decree."

(iv) In the decision Marimuthammal, D. Venkatachalam, Saraswathi and Ratinam @ Susheela Vs. Vaithi and Others, , this Court has held that

"When there is no collusion between parties or suppression of facts and the Judgment Debtors have also not raised any objection regarding the

upset price fixed by the Court, the Court auction sale cannot be set aside on the ground of any irregularity in conducting the sale."

(v) In the decision A.P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.rs. and Ors. 1994 1 L.W.21, the Hon"ble Supreme

Court has held that "A person whose case is based on falsehood has no right to approach the Court and he can be summarily thrown out at any

stage of the litigation."

(vi) In U.P. State Road Transport Corporation Vs. State of U.P. and Another, , the

Hon"ble Supreme Court has held as follows:

The principle of Res Judicata is based on the need of giving a finality to judicial decisions. The principle which prevents the same case being twice

litigated is of general application and is not limited by the specific words of Section 11 of CPC in this respect. Res Judicata applies also as between

two stages in the same litigation to this extent that a Court, whether the trial Court or a higher Court having at an earlier stage decided a matter in

one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.

(vii) In Ganpat Singh (Dead) by Lrs. Vs. Kailash Shankar and Others, , the Hon"ble Supreme Court has observed as follows:

Article 134, Limitation Act, would be applicable to an application under Order 21 Rule 95 by the auction-purchaser for delivery of possession of

the property sold in execution of a decree. The periods of limitation prescribed by Articles 136 and 134 are for two different purposes, the former

being for the execution of a decree for possession in respect of which decree is passed and the latter for an application for delivery of possession

of immovable property which is purchased in the course of execution of a decree. The two articles have nothing in common for their operation. The

two articles are not in conflict with each other. An application for delivery of possession of immovable property purchased in execution cannot be

construed as an application for execution of a decree for possession of property so as to invoke the provision of Article 136, Limitation Act.

Merely because the auction-purchaser would be deemed to be a party in the suit in which the decree has been passed, as provided in Clause (a)

of Explanation II to Section 47 of the Code, and by virtue of Clause (b) of Explanation II all questions relating to delivery of possession of the

property shall be deemed to be questions relating to execution, discharge or satisfaction of the decree within the meaning of Section 47, an

application for delivery of possession under Order 21 Rule 95 cannot be equated with an application for the execution of a decree for possession

so as to apply 12 years" period of limitation as prescribed by Article 136, Limitation Act. Civil Revn. No. 11 of 1981, D/-9-4-1986 (Raj.)

Reversed. (Paras 9, 11)

29. The Revision Petitioner/Defendant in his Affidavit in E.A. No. 54 of 2008 has

among other things averred that the First Respondent/Plaintiff has filed a suit against him for recovery of Rs. 1,00,000/- with 22% interest based on the mortgage deed executed by himself to the First Respondent/Plaintiff.

30. Further, the Revision Petitioner/Defendant in his Affidavit in E.A. No. 54 of 2008 has also stated that the preliminary decree amount including the costs awarded and the interest accrued till the date of Decree is Rs. 1,81,786.25p and ordered subsequent interest at 18% p.a. For a sum of Rs. 86,950/- and due to his financial crisis, he has not been in a position to pay the decree amount within the time specified and a Final Decree has been passed on 26.10.1992.

31. According to the Revision Petitioner/Defendant, the Respondents projected the Execution Petition E.P. No. 214 of 1994 and on 27.03.1996, the suit property has been brought in auction and one Shanmugham who is also a Partner of the Judgment Holder Firm viz., Sri Lakshmi Financiers, Moolanur has taken the property in auction for a sum of Rs. 5,51,000/- and has become the Auction Purchaser.

32. It is the stand of the Revision Petitioner/Defendant that the property is a Cinema Theatre, a valuable one and it is not a vacant site and his income is derived from the Cinema Theatre.

33. A plea is taken on behalf of the Revision Petitioner/Defendant that the Decree Holder with a view to deprive him of his property and to gain unlawful profit from his disadvantageous position as Judgment Debtor has operated hand in glove with one of its Partner N.Shanmugham and purchased the property in an auction for Rs. 5,51,000/-. The Revision Petitioner/Defendant has pleaded in E.A. No. 54 of 2008 that he filed a Petition to set aside the sale in E.A. No. 472 of 1996 in E.P. No. 214 of 1994 in O.S. No. 344 of 1990 on the ground that the two properties in S.F. Nos. 325/1 and 326 are shown as single property and also the present auction purchased restricted the other persons to participate in the auction and bidded the property for a very low value.

34. The Revision Petitioner/Defendant takes a stand that in the year 1998, it has been represented that P. Marimuthu who has been representing Sri Lakshmi Financier till then has expired and the Execution Petitioner sought time to file a petition for amendment and nearly two years have been

elapsed for amending the cause title substituting Tamil Arasan in the place of Marimuthu and on 19.04.2004, due to the fact that the

communication letter sent by his Advocate has not reached in time, he has not attended the hearing in view of his lack of knowledge of the same

and that E.A. No. 472 of 1996 has been dismissed in his absence.

35. Added further, the Revision Petitioner has taken immediate steps to file Restoration Petition and sign the Affidavit on 24.09.2004 but his

previous Counsel has not filed the petition for the reasons known to him and filed the petition only on 25.10.2004 and that too without the condone

delay petition when the date of filing is clearly after the elapse of 30 days time limit determined under Order 21, Sub-rule 2 of Rule 105 of C.P.C.

Moreover, this Court has also dismissed the CRP (NPD) No. 311 of 2006 preferred against the order passed in E.A.126 of 2004 in E.A. No.

472 of 1996 in E.P.214 of 1992 in O.S.344 of 1990.

36. The gist of the contention of the Revision Petitioner/Defendant is that the market value of the Cinema Theatre alone is more than Rs. 50 Lakhs

and the non application of the principles enunciated under Order 21 Rule 64 of C.P.C. has caused a very great miscarriage of justice as well as

hardship to the petitioner and the Auction Purchaser/Second Respondent has gained several lakhs unlawfully and hence, prayed for setting aside

the sale and release of the suit property and dispose of the E.P.214 of 1992 in O.S.344 of 1990 in view of his payment in accordance to the order

of the Court and to dispose of any subsequent applications thereof.

37. In the counter of E.A.54 of 2008 filed by the First Respondent/Decree Holder, it is among other things stated that "the Revision Petitioner has

not filed any Application at the time of sale or at the time of confirmation of sale as per Order 21, Rule 64 of C.P.C. And further that as far as

Order 21, Rule 64 of C.P.C. is concerned, only attached property alone is sold in public auction and the proceeds payable to the person

concerned and in the present case on hand, the suit property/petition mentioned property is a mortgaged one and measuring P.Ac.1.00 comprised

in S.F. Nos. 326 and 325/1C is not a separate property and as such, the properties undivided and treated as single property and that apart, the

petitioner has filed an Application for appointment of Commissioner and that has been dismissed for default.

38. It is to be borne in mind that the petition mentioned property has been brought in auction on 27.03.1996 and that the second Respondent has

been the highest bidder in public auction and he has deposited the amount as per the order of the Court and finally on 02.11.2006, the sale has

been confirmed in favour of the Second Respondent/Auction Purchaser and also a Sale Certificate has been issued to the Second

Respondent/Auction Purchaser as per registered Document No. 6114 of 2007 before the Sub Registrar, Palladam.

39. It is to be noted that the Second Respondent/Auction Purchaser has filed E.A. No. 215 of 2007 for delivery of the petition mentioned

property and on 14.11.2007, delivery of the petition mentioned property to the Auction Purchaser has been ordered and since the Petitioner has

obstructed the delivery of the petition mentioned property, the Respondent has filed an Application to move the obstructor and to break open and

for ordering police aid to facilitate the Auction Purchaser to take delivery of the property.

40. The Second Respondent/Auction Purchaser has filed a Counter to E.A.54/2008 inter alia stating that the Revision

Petitioner/Defendant/Judgment Debtor has not contested the suit O.S.344/90 filed by the Plaintiffs and obtain a consent Decree with bonafide

intention to repay the suit amount and in fact, the Court has ordered the Petitioner/Defendant to pay the Decree amount but he is not in a position

to pay the said amount.

41. It is also to be made mention of that a Preliminary Decree in O.S.344/90 has been passed on 10.07.1991 and a Final Decree has also been

passed on 26.10.1992.

42. At this stage, this Court worth recalls the decision of this Court (Karnam) (Karnam) Venkataseshyya Vs. (Karnam) Ramaraju and Another, ,

wherein it is held that "an Order passed on an Application under Order 21, Rule 64 and 66, C.P.C. Is not judicial order from which an appeal can

be preferred but merely an administrative order concerned with the minutia of the sale proceedings." In the aforesaid decision at pages 714, 715, it

is also held thus:

...There is nothing in the Code which entitles a party as of right to have it declared by the Executing Court that the properties liable to be sold are to

be sold in any particular order. That is a matter of administration and it does not affect the real rights of the parties so far as the decree is

concerned, for, under the decree ex hypothesi, all the properties brought to sale are liable to be sold, and no one can question as a matter of right

the order in which properties are to be sold; and it does not appear that this can be questioned in appeal, merely because the Court directs the sale

to take place in a certain order. No rights are infringed as all the properties are liable to be sold under the Decree, and the question is really not a

question relating to the execution of the decree. Questions of this kind are generally as between the two parties to a Decree, namely the Decree-

Holder and the Judgment-Debtor, and any dispute between co-Judgment-Debtors alone is prima facie not a matter in which it may be said that it

relates to the execution of the decree.

43. This Court aptly points out the decision *Kotta Govindarajulu Chettiar v. Sivarama Krishnan Minor* by Guardian *Lakshmi Ammal and Ors.* AIR

1953 Mad 822 (Vol. 40 C.N. 311), wherein it is held hereunder:

Where the Judgment-Debtors elect to affirm the sale or have lost their right to set aside the same for any reason, there is no further independent

right available to them on the basis of anterior fiduciary relationship. They cannot, therefore, obtain a declaration on the basis of the principle

embodied in Section 62, Trusts Act, 1882. (Para 9).

44. Further, in the decision *Smt. Hirabai v. Hanumath Krishnaji Bhide and Ors.* 1996 AIHC 5388, it is held as follows:

Where the Judgment-Debtor suggests any terms regarding the value of the property or regarding the sale of portion of the property then only there

is a duty cast on the Court to apply its mind and decide whether a portion of the property is to be sold or the entire property is to be sold in order

to satisfy the decree. Where the Judgment-Debtor has not suggested any of his terms before issuing the sale proclamation, it is not open for him to

contend that the value of the property should have been mentioned in the sale proclamation or the Court should have applied its mind in order to

ascertain whether the entire property to be sold or a portion of it to be sold for the purpose of satisfying the decree. Just because the property sold

in the execution had fetched more value than that of the decretal amount, it cannot be said that the Executing Court has committed any illegality or

irregularity. Further, it cannot also be said that the Court has not applied its mind regarding sale of portion of the property since what has been sold

is one item of the property out of the three items which were attached in the proceedings. Moreover, when opportunity was given to the Judgment

Debtor to give evidence to prove either fraud or irregularity and he had not availed of that opportunity and proved the fraud or irregularity as

alleged in his application, the sale cannot be set aside on the ground of any irregularity or fraud in publishing or conducting the sale.

45. To prevent an aberration of justice, this Court quotes the decision V.S. Balasubramanian v. A. Mariammal and Anr. 1992 (1) MLJ 271, at

page 272, at paras 3 and 4, wherein it is held as follows:

3. It is seen from the records that though the application was not numbered formally, both sides were heard by the court below. Even when the

application was filed, a copy was served on the Advocate for the first respondent/decree-holder, who made an endorsement acknowledging

receipt of copy and prayed for time to file counter. The application was filed on 12.09.1990. Thereafter, it was being adjourned from time to time

and ultimately it was heard on 1.7.1991 and the Court passed orders after hearing both sides. Hence, there is no substance in the contention that the

application not having been numbered by the Court below, the order passed by the court below is a revisable one and not appealable under Order

43, Rule 1(j) of the Code of Civil Procedure.

4. The other contention that Section 47 of the CPC was invoked by the petitioner has no merit whatever. I have gone through the petition filed by

the petitioner to set aside the sale. There is no averment whatever in the petition to bring it u/s 47 of the Code of Civil Procedure. Merely quoting

Section 47 of the CPC at the top will not help the petitioner to say that the matter as governed by Section 47 of the Code. Though contentions are

raised that the sale was in violation of the provisions of Order 21, Rule 72-A of the Code of Civil Procedure, even that provision was not quoted

by the petitioner in the petition.

46. In the decision Kamala Kanta Mohapatra and Another Vs. Debarchan Seth and Another, , it is laid down as follows:

The Orissa High Court amendment, as contained in Clause (b) of the proviso to Sub-rule (1) of Rule 90 imperates deposit, and the proviso itself

indicates that an application shall not be admitted unless the deposit is made. There is, therefore, sufficient expression of legislative intent that the

application shall not be admitted for consideration and disposal unless the deposit is made. It is also provided that the Court in its discretion may

dispense with the deposit or direct security to be furnished. The deposit is mandated to be made before the petition is admitted for consideration. It

is not necessary that the deposit is to be made along with the petition or within time prescribed for its filing. Therefore, where before the petition

was taken up for consideration the deposit as prescribed was made, there was nothing illegal in the Executing Court considering the petition made.

47. In *Mohini Mohan Chakravarty Vs. State of West Bengal and Another*, , the Hon"ble Supreme Court has observed as follows:

In a case of this nature what has to be ascertained is what is the nature of the right, title and interest which was really intended to be sold in

execution of the decree. Any misapprehension in that behalf on the part of the Court or the purchaser cannot affect the true legal effect of the sale.

It is a mixed question of fact and law to be determined in each case. A conspectus of all the facts and circumstances of the case, especially the

application for execution of the decree, the schedule attached to the sale notice, the prohibitory order of the Court passed under Order 21, Rule

54, the application for sale of the attached property, and the paltry sum of about Rs. 600 paid for the property-all these show that the sale

certificate did not confer any right, title or interest on the appellant with respect to the permanent tenancy rights in the suit land which was

underneath and appurtenant to the structures. (Paras 5 to 9)

48. In the decision of the Hon"ble Supreme Court *D. Basavana Gowda and Anr. v. Deputy Registrar of Cooperative Societies, Bellary and Ors.*

2002 AIHC 1768, it is observed that "When a sale is conducted after giving sufficient publicity and subsequent objection by society after

confirmation of sale regarding defective notice in favour of its Secretary cannot be said to be material irregularity causing any substantial injury in

terms of the Rules and as such, setting aside of sale is improper."

49. In *A. Parvatham Vs. Bank of Baroda and 4 others*, , this Court has held as follows:

It is clear from Order 21 Rule 90 that on the ground of material irregularity or

fraud in publishing or conducting the sale the person affected can approach the court to set aside the sale. However, as per Clause (2) of Rule 90 he has to establish that the sustained substantial injury by reason of such irregularity or fraud. Likewise as per Clause (3) if such person and occasion to raise objections before the date of proclamation and failed to raise the same, he cannot be allowed to raise such objection after proclamation of sale was drawn up.

50. Coming to the aspect of Order 21, Rule 64 of the Civil Procedure Code, it is quite relevant for this Court to make a pertinent mention that "an objection in regard to the saleability of the property against an execution ordered must be raised before the order of execution is made under Rule 23". However, if the objection is raised then it will be deemed to have decided and will operate as constructive Res Judicata as per decision

Chandra Choor Deo and Another Vs. Smt. Krishnawati, .

51. As regards Order 21, Rule 72 of C.P.C., it is to be mentioned that Order 21, Rule 72(3) of C.P.C. enjoins "the Judgment-Debtor or any other person whose interests are affected by the sale to apply to the Court to set aside the sale if the Decree-Holder purchases the property by himself without permission of the Court". In the decision Mohammed Khan and Another Vs. Graceamma Philip and Others, , it is held that "the objectors cannot be allowed to raise this objection nearly after 10 years of the sale".

52. In the decision Rai Radha Krishna v. Bisheshar Sahay AIR 1922 PC 336, it is held that (Corresponding Section 294 of the Code of 1882)

"Upon the construction of this Section, it is evident that a purchaser by a Decree-Holder who has not obtained permission is not void nor a nullity, but is only to be avoided on the application of the Judgment-Debtor or some other person interested. It would be injurious to those interested in the sale if a Decree-Holder who had been forced up in the binding to give a large sum of money could escape fulfilling his contract by getting the sale declared a nullity and it would make all titles under such sales insecure if at later periods they were liable to be treated as nullities. A sale is to be set aside upon application and upon cause shown".

53. In the decision Jaswantlal Natvarlal Thakkar Vs. Sushilaben Manilal Dangarwala and others, , it is held that "in setting aside a sale, mere

illegality or irregularity in the conduct of sale is not enough as the lack of notice to Judgment-Debtor, the Applicant must also show substantial injury."

54. Indeed Order 21, Rule 89 of C.P.C. provides only the means by which a Judgment-Debtor can get rid of a sale which has been duly carried out as per decision Janak Raj Vs. Gurdial Singh and Another, . In short, the Rule postulates a valid sale as against a sale which suffers from a material irregularity as contemplated by Rule 90. Order 21, Rule 89 of C.P.C. applies to a sale of an immovable property.

55. As per the ingredients of Order 21, Rule 90 of C.P.C., a material irregularity and a fraud alone will confer the jurisdiction on the Executing Court to set aside the sale. In the decision Kadiyala Rama Rao v. Gutala Kahna Rao (2000) 3 SCC 87, the Hon"ble Supreme Court has held that "the question of saleable interest does not come within the ambit of Order 21, Rule 90 of C.P.C. and as such the Judgment-Debtor had no locus standi to apply to the Court for setting aside the sale."

56. Also, "Once an Application is made under Order 21, Rule 90 of C.P.C. to set aside the sale, a Second Application against confirmation of sale under Order 21, Rule 92 is not maintainable" as per decision Harbans Lal Vs. Ram Jawai Devi and Others, .

57. In the decision Mst. Mangno and others Vs. 1st Addl. District Judge, Muzaffarnagar and another, , it is held that "where the earlier application under Order 21, Rule 90 to set aside auction sale was rejected, subsequent application to set aside sale u/s 151 of C.P.C. invoking inherent power is not maintainable."

58. In the decision Kolay Iron and Steel Co. Ltd. (In Liquidator) and another Vs. Official Liquidator, High Court, Calcutta and others, , it is held that " mere inadequacy of price is no ground to set aside sale". In the decision Valivety Ramakrishnaiah Vs. Totakura Rangarao, , the Hon"ble Supreme Court has held that "drawing up the sale proclamation and putting up the property for sale in two lots, as per order of the Court is not an irregularity."

59. In Damodar Das Vs. Gadadhar Mallik and Others, , it is held that "the Applicant could have raised the objections (i) on the issue of a show cause notice under Order 21, Rule 22, or ii) when the Court directed attachment

under Order 21, Rule 54 or iii) at the time of proclamation of the sale or sale itself or iv) at the time of its confirmation, but he failed to do so and therefore, it must be deemed that the Court decided that the property, was liable to sale and it should proceed and that the objection was, therefore, barred by Res Judicata."

60. In the decision Kamala Bala Mustaphy Vs. Debabrata Ghosh and Another, , it is held that "where the auction sale was confirmed by Division

Bench in appeal but the plea that the property would fetch higher price was not raised in Appellate Court, the same point cannot be reopened as it

is hit by the principle of Res Judicata."

61. In the decision P.L. Lakhanpal Vs. Union of India (UOI) and Others, , it is held that ""When the Petitioner's earlier Writ Petition impugning his

detention dismissed and his contentions challenging validity of detention rejected then in a subsequent Writ Petition, the Petitioner cannot be

permitted to reagitate same contentions when no new circumstances have arisen justifying their re-agitation.

62. In the decision Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others, , it is held that "the principle of constructive ""Res Judicata" is

applicable to execution proceedings is no longer open to doubt. Annada Kumar Roy and Another Vs. Sheikh Madan and Others, and Mahadeo

Prasad Bhagat Vs. Bhagwat Narain Singh, , Rel. on; case law referred.

63. In the decision Bhaurao Dagdu Paralkar Vs. State of Maharashtra and Others, , the Hon"ble Supreme Court has observed as follows:

Fraud"" and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. Fraud and justice never dwell together. An

act of fraud on Court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property

would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud,

fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable

doctrine including Res Judicata. (Paras 12 and 11)

64. A plea of Res Judicata is a question of fact and law. It ought to be categorically pleaded and parties relying on the principle of Res Judicata

must place before a Court of law and the material particulars which will be

sufficient to render a finding whether a certain case is barred by the principle of Res Judicata. A plea of Res Judicata is one which might be, and should be, raised as a defence and established in order to operate as a bar in the exercise of jurisdiction to try and dispose of the matter subsequently.

65. The burden of proof is on the individual who raises the plea of Res Judicata to establish it he ought to place all the materials before the Court to

enable it to consider whether the said plea has been established or not. The doctrine of Res Judicata has to be interpreted and it must be applied in

liberal terms. The application of the said principle should be influenced by no technical consideration as to form, but by matter of substance within

the limits allotted by law. Section 11 of C.P.C. encompasses a matter judged with an object that a final Judgment delivered by a competent Court

of jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent

action involving the same claim, demand or cause of action as per decision of the Hon"ble Supreme Court Escorts Farms Ltd., Previously known

as Escorts Farms (Ramgarh) Ltd. Vs. The Commissioner, Kumaon Division, Nainital, U.P. and Others, . A court of law has to delve into the

aspect of Res Judicata like any other legal plea and then to decide whether the issue or the claim is barred or not, in the considered opinion of this

Court.

66. The principles of Res Judicata is based on the need to give finality to judicial decision and to avoid plurality.

67. In the decision of the Hon"ble Supreme Court M.C. Mehta Vs. Kamal Nath and Others, , the Hon"ble Supreme Court has observed that ""the

findings given in a petition at one stage, later held final cannot be challenged at a later stage in the same petition.

68. I n the decision Ghanshyamdas Vs. Gambhir Mal and Others, , it is held that "Where the Judgment Debtor despite of notice under Order 21,

Rule 66 of C.P.C. absence himself and this does not raise any objection to the sale then he would be barred at a later stage to raise such

objections against the sale which were available to him and which he might and should have raised. As a matter of fact, the principle of Res

Judicata including constructive Res Judicata will come into operative play in execution proceedings also".

69. In the decision *Barkat Ali and Others Vs. Badrinarain*, , it is held that "in a notice under Order 21, Rule 22 of C.P.C. if the Judgment Debtor

has not raised objection, subsequently cannot raise objection that execution proceedings are not maintainable."

70. The principle of Might and ought to have been raised under Explanation 4 of Section 11 of C.P.C. is that the final adjudication after hearing of

the matter between the parties in earlier suits/proceedings must be mandatory as per decision *Konda Lakshmana Bapuji Vs. Government of*

Andhra Pradesh and Others, .

71. The acceptance of the highest bid by the Sales Officer is subject to the affirmation by the Court as per decision *Ratnasami Pillai Vs. Sabapathy*

Pillai and Others, and *A. Poongavana Naicker Vs. S. Muthurama Naidu and Others*, .

72. A perusal of the Preliminary Decree in O.S.344 of 1990 dated 10.07.1991 passed by the Learned Subordinate Judge, Tiruppur indicates that

"the Revision Petitioner/Defendant has been directed to pay to the First Respondent/Plaintiff a sum of Rs. 1,55,425/- with subsequent interest at

18% p.a. on Rs. 86,950/- from the date of suit till the date of payment and for costs. The Revision Petitioner/Defendant has been granted 9

months time to pay the amount mentioned in the Preliminary Decree. In the Decree, it is also made clear that if the Revision Petitioner/Defendant

fails to pay the amounts within the time fixed by the trial Court then a direction has been issued for the sale of hypotheca in Court auction and for

the realisation of the decree amount from the amount realised therefrom. In fact, the Preliminary Decree enjoins the Revision Petitioner/Defendant

to pay the decretal amount into Court on or before 10th March 1992 or in later date upto which time for payment may be extended by the Court,

the said sum of Rs. 1,81,786.25p with interest on Rs. 86,950/- at 18% from 11.07.1991 till realisation, etc., in the Preliminary Decree dated

10.07.1989 in O.S.344/1990 in the description of the properties, it is mentioned as in Tiruppur Registration District Palladam Sub Registration

District, Pongalur Panchayat, Pongalur Village in S.F. No. 326, Punjai Acre 6.54 Cents 0.68 Acres, within the boundaries stated therein. Also, it

is stated that in Pongalur Village in Government Survey No. 325/1, 0.32 Acres aggregating 1 Acre of land, in the Cinema Theatre known as

Lakshmi Theatre including all upper tenants thereon with compound wall, Electricity Service, Furnitures, Projector, Fire Bucket Nos. 33, Fire

Instrument No. 7, Water Tank Nos. 2, Microne Projector, No. 658/3994 Rectifier Microne Technical Torenno, 1410-1 and Devi Amplifier-1, Oil

Generator -1 and all machineries and all belongings of Lakshmi Theatre are all described.

73. In E.P.214 of 1994 in O.S. No. 344 of 1990 on the file of the Learned Subordinate Judge, Tiruppur, a Sale Certificate has been issued in

favour of the Second Respondent/Auction Purchaser. The Second Respondent in the Sale Certificate has been mentioned as an individual who has

been declared to be the Auction Purchaser of the properties mentioned in the Preliminary Decree sold in Court Auction held on 27.03.1996 for

Rs. 5,51,000/- and the sale has been duly confirmed by the trial Court on 02.11.2006.

74. The Sub Court Ameen Thiru R. Shankara Narayanan in his special Report dated 19.11.2007 to the Principal Sub Court Tiruppur has stated in

English as follows:

Possession not delivered as third party obstructed for want of break open and police aid. The said Report has also been signed by the Deputy

Nazir on 19.11.2007 and seen by the Learned Subordinate Judge, Tiruppur, who has affixed his short initials thereto.

75. The Advocate Commissioner in his Report E.A.27 of 1997 on E.P.214 of 1994 in O.S.344 of 1990 on the file of the Learned Subordinate

Judge, Tiruppur has stated as follows:

It is submitted that in pursuance of warrant of commission issued to me, I visited the petition properties twice along with the surveyor. At the time

of my visit, both the parties along with their counsel were present. But, the surveyor's report has not been received. In the meantime, another

intimation has been served on me on 3-7-2000 by the Hon'ble Court and as per the order, a nearby PAP channel's boundary is to be fixed by the

surveyor. But, after that the petitioner has not arranged for the surveyor's assistance. Therefore, I could not visit the property again. But, the case

is posted on 27-2-2003 for filing my report as last chance. Therefore, I have filed this report as per physical features of the suit property.

In the petition property, a Cinema Theatre is situated. The name of the Cinema

Theatre is Sri Lakshmi Theatre. During my visit, the Theatre was in running condition and Cinema show was going on. This Cinema Theatre is situated in the south of the east-west Pongalur main road. In the west of the Cinema theatre, PAP channel runs north-south. In the south of the Cinema Theatre, third party's land is situated. In the east of the Cinema Theatre and vacant space, third party's land is situated. In front of the Cinema Theatre, there is a vacant space in between the main road and the Theatre. By these observation, I returned the warrant of commission issued to me after duly executed by me.

I have also received my remuneration directly from the petitioner's counsel.

76. In the Final Decree passed in O.S.344 of 1990 on 26.10.1992, the Revision Petitioner/Defendant has been granted 6 months time for making payment.

77. A Decree Holder is to enjoy the fruits of Decree passed. Also, the Second Respondent/Auction Purchaser is to derive the benefits by means of his Auction purchase of the suit property.

78. The Learned Counsel for the Revision Petitioner/Judgment Debtor/Defendant submits that if the property is large and the Decree to be satisfied is small, a Court of law must bring only such portion of the property. The sale proceeds of which would be sufficient to satisfy the claim of the Decree Holder and that it is the duty of a Court to sell a portion of the property thereof as is necessary to satisfy the Decree and in short, an Act of Court ought not to prejudice anyone.

79. However, the Learned Counsel for the Second Respondent submits that in the public auction conducted on 27.03.1996, four persons participated and the auction was conducted in accordance with the procedures laid down and the Second Respondent's bid amount Rs.

5,51,000/- was the highest one and he has been declared to be the successful bidder and till 30.10.1996, the Revision Petitioner/Defendant kept

quiet and later projected E.A.472 of 1996 u/s 47 read with Order 21, Rule 66(2) (a) and Rule 67(3) and Section 151 of C.P.C. praying for

issuance of an order to set aside the sale held on 27.03.1996 in respect of the petition mentioned property on 31.10.1996 and the said E.A.472 of

1996 has been dismissed for default on 19.04.2004 and filed E.A.126 of 2004 to restore E.A.472 of 1996 to file which has been dismissed for

default on 19.04.2004 and the same has been dismissed by the Executing Court on 08.12.2005 on merits and on 02.11.2006, the Executing Court has proceeded with the matter.

80. Earlier, CRP NPD 311 of 2006 filed by the Revision Petitioner against the orders passed in E.A.126 of 2004 dated 08.12.2005 has been dismissed by this Court on 30.08.2006 and after lapse of one year, the Second Respondent filed E.A.250 of 2007 seeking delivery of possession which has been ordered on 14.11.2007 and on 07.03.2008, E.A. No. 54 of 2008 has been filed by the Revision Petitioner/Defendant once again praying before the Executing Court to set aside the sale and release the suit property, etc.

81. The Learned Counsel for the Second Respondent submits that in fact, the Revision Petitioner/Defendant has not proved that the Second Respondent is a Partner of the First Respondent and all the more, that no Partnership Deed has been produced by the Revision Petitioner/Defendant to show that the Second Respondent is a Partner of the First Respondent and since the order passed in E.A.472 of 1996 dated 30.10.1996 has become final and further the order passed in CRP NPD 311 of 2006 dated 30.08.2006 has become final as against the order passed in E.A.126 of 2004 dated 08.12.2005, the Revision Petitioner has no locus standi to project E.A.54 of 2008 and the grounds in E.A.54 of 2008 are nothing but repetition of the grounds mentioned in E.A.472 of 1996 and therefore prays for dismissal of the Civil Revision Petition to prevent an aberration of justice.

82. As far as the present case is concerned, the First Respondent/Plaintiff has obtained a Mortgage Preliminary Decree and the Final Decree against the Revision Petitioner/Defendant. The First Respondent/Decree Holder is entitled to bring the subject matter of mortgage properties for sale. In this connection, this Court pertinently points out that the Revision Petitioner/Defendant has not filed any application before the Executing Court to bring a particular item of the mortgage property alone for sale. It cannot be gain said that the CRP NPD 311 of 2006 the Order dated 30.08.2006 filed against the Order passed in E.A.126 of 2004 in E.A.472 of 1996 in O.S.214 of 1994 has become final between the parties.

83. Though on the side of the Revision Petitioner/Defendant a plea has been

taken that the Second Respondent/Auction Purchaser is a Partner of the First Respondent and therefore, he has participated in the auction without obtaining permission of the Court and he being the successful bidder in the auction, sale in his favour is not valid in the eye of law, it is to be pointed out that the Second Respondent has denied in categorical terms that it is for the Revision Petitioner/Defendant to establish that he is the Partner of the First Defendant and in the instant case, no Partnership Deed has been produced to show that the Second Respondent is a Partner of the First Respondent and one cannot ignore an important fact that the Preliminary Decree and the Final Decree passed in the suit in O.S.344 of 1990 refers to both the properties mentioned in the said Decrees and since both the Decrees are in entirety in respect of the subject matter of the properties mortgaged, then this Court is of the considered opinion that the First Respondent/Decree Holder/Plaintiff is entitled to bring both the properties for sale since these two properties are secured under mortgage and there is no impediment for these two properties to be brought for sale. Further more, in the present case, the sale has been confirmed and the Sale Certificate has been issued in favour of the Second Respondent on 02.11.2006 and as such the title vests with him and in any event, the second Execution Application 54 of 2008 is per se not maintainable and the Revision Petitioner is not entitled to reagitate the same contentions which have been rejected earlier and looking at from any angle, the Civil Revision Petition filed by the Revision Petitioner/Defendant suffers from lack of bonafides and also sans merits and consequently fails.

84. In the result, the Civil Revision Petition is dismissed leaving the parties to bear their own costs. Resultantly, the order passed in E.A.54 of 2008 in E.P.214 of 1994 in O.S.344 of 1990 dated 30.10.2008 on the file of the Sub Court, Tiruppur is affirmed by this Court for the reasons assigned in this Civil Revision Petition. The connected miscellaneous petition is closed.