

(1963) 07 KL CK 0025
In the High Court Of Kerala
Case No : A.S. No. 456 of 1960

Malathy Amma and Another	Vs	APPELLANT
Jos, son or Kattukkaru Varu and Others		RESPONDENT

Date of Decision : 02-07-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 84, Order 21 Rule 85, 47, 9
Limitation Act, 1908 — Article 181

Citation : AIR 1964 Ker 68

Hon'ble Judges : M.S. Menon, C.J; M. Madhavan Nair, J; K.K. Mathew, J

Bench : Full Bench

Advocate : V.K.K. Menon, C.S. Padmanabha Iyer and M. Ramachandran, for the Appellant; K.M. Krishna Iyer and R. Krishnaswamy, for the Respondent

Final Decision : Dismissed

Judgement

Mathew, J.—This appeal has been referred to the Full Bench on account of a supposed conflict between the dicta in Cheria Chacko Vs. Kumaran Kesavan and Others, and Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another, . The plaintiffs are the appellants. The suit was to recover possession of the plaint A schedule properties and for other reliefs. The plaint A schedule properties belonged to the tarwad of the plaintiffs and defendants 11 to 16. On the 4th Makaram 1104 the tarwad executed a mortgage in respect of these properties to the father of the 17th defendant On the basis of that mortgage the 17th defendant obtained a decree In O. S. 67/1107 on the file of the District Court, Trichur. The father of defendants 1 to 4, one Varoo, took an assignment of that decree and executed it. The properties were brought to sale and purchased by Varoo after obtaining the permission of the Court for Rs. 7,200/, and he took delivery of the same in execution in the year 1113 M.E.

The decree and the execution proceedings were challenged in the plaint as not binding on the plaintiffs or their tarwad. Several allegations attacking the validity of the decree were made in the plaint, but it is not necessary to go into those

details, as the question in this appeal turns upon a narrow point. The plaintiffs also challenged the validity of the execution proceedings on several grounds. For the purpose of this appeal the most material allegation was that the execution sale was void on the ground that the decree-holder, auction-purchaser did not deposit the balance of the purchase money after setting off the decree amount in accordance with the provision of Order 21, Rules 84 and 85. The plaintiffs therefore prayed for a declaration that the decree and the sale in execution were void, and for recovery of possession of the properties on the strength of their title and other incidental reliefs.

2. It may be observed that the 11th defendant, a member of the tarwad, had filed an application to set aside the sale on identical grounds and that was dismissed by the execution Court. From that order an appeal was preferred in C. M.A. 12/1121 and that was dismissed on the ground that the application was barred under Article 181 of the Limitation Act. That case is reported in 37 Cochin 541. The present suit has been filed in forma pauperis on 18-12-1952 by a daughter and a grandson of the appellant in C. M. A. 12/1121.

3. The substantial contentions in defence were that the decree was valid and that even if the sale in execution were void on the grounds mentioned in the plaint, a separate suit was not maintainable as the question raised in the suit related to the execution, discharge or satisfaction of the decree in O. S. 67/1107, and that if the suit was treated as an application in execution it was barred by time, having been filed more than three years from the date of delivery of possession of the properties to the decree-holder-auction-purchaser.

4. The Court below upheld the contention that the decree was valid and binding and that the suit for declaration that the execution sale was void, and for recovery of possession of the properties, was not maintainable u/s 47 as the questions raised in the suit related to execution, discharge or satisfaction of the decree in O. S. 67/1107, and that even if the suit was treated as an application in execution it was barred as more than 3 years have elapsed from the date of the delivery of possession of the properties to the decree-holder-auction-purchaser in O. S. 67/1107. The correctness of the finding of the Court below as regards the validity of the decree, was not challenged in this appeal by counsel for the appellant.

5. The only point urged by him was that since the execution sale was a nullity that sale need not be set aside and that Section 47 was not a bar to the maintainability of the suit.

6. Ext. P-26 shows that the decree amount in O.S. 67/1107 on the date of the execution sale came to Rs. 7,079-13-5. The purchase money, as I have stated, was Rs. 7,200/-. After setting off the decree amount against the purchase money the decree-holder-auction-purchaser was bound to deposit the balance of the purchase money within the time specified in Order 21, Rules 84 and 85. The amount was not deposited as enjoined by these rules, but without anybody

noticing it, the sale was confirmed and the Court ordered delivery of possession of the properties to the decree-holder-auction-purchaser.

7. In *Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another*, , It was held:

"Having examined the language of the relevant rules and the judicial decisions bearing upon the subject we are of opinion that the provisions of the rules requiring the deposit of 25 per cent of the purchase money immediately, on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and upon non-compliance with these provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25 per cent of the purchase money in the first instance and the balance within 15 days. When there is no sale within the contemplation of these rules, there can be no question of material irregularity in the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the Court is bound to re-sell the property in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law. We hold, therefore, that in the circumstances of the present case there was no sale and the purchasers acquired no rights at all."

8. On the strength of this ruling it was urged that since the sale was a nullity a suit for recovery of possession on the basis of title, was maintainable. The general proposition that if the sale is a nullity a party can disregard it and seek for reliefs as if no sale had taken place cannot be disputed. But here, a sale having taken place in execution of the decree in O. S. 67/1107 all questions regarding the validity of that sale have to be decided in execution of the decree. u/s 47 party to the suit or a representative of a party is precluded from instituting a suit on the basis of title also. The point is covered by the ruling of this Court reported in *Cheria Chacko Vs. Kumaran Kesavan and Others*, . That was case where a suit was instituted for a declaration that a sale in execution was null and void on the ground that the judgment-debtor had died before the property was sold in Court auction and for redemption. It was held that such a suit was barred u/s 47 of the CPC as it raised a question relating to execution, discharge or satisfaction of the decree, and the question whether the execution sale was void or voidable is immaterial for deciding the point whether the matter relates to execution, discharge or satisfaction. I see no reason to doubt the correctness of that ruling.

9. It was argued for the appellants that if the sale was a nullity, Section 47 would not be attracted. I do not think so. A party to a suit approaches the Court alleging that a sale in execution of the decree in the suit is void and claims redelivery of the property. The Court has to decide the question whether that sale is void on the basis of the facts alleged and proved by applying the law. A party can at best make only a prophecy of what the Court will decide. It is only by a Judicial Investigation, however inarticulate that process may be, that the

Court can arrive at the conclusion whether the sale is void or not. An ascertainment of the events which took place in execution and an evaluation of those events in the light of the applicable law would be the nature of the judicial process, which the Court has to perform in passing upon the relief for declaration.

10. In this case there is a prayer in the plaint for declaration that the execution said was void. In *Cheria Chacko Vs. Kumaran Kesavan and Others*, , the Court was called upon to adjudicate the question whether the judgment debtor had died before or after the execution sale and also the legal effect of his death at one point of time or other for granting the prayer made in a suit for declaration that the sale in execution was void. This Court declined to do so on the ground that it raised a question relating to execution, discharge or satisfaction of the decree. A sale operates as a satisfaction of the decree, either in whole or in part as the case may be and any declaration as to its voidable or void character touches a matter relating to the satisfaction of the decree. If the sale is void, the satisfaction of the decree entered in the records in execution will have no effect and the decree-holder will be entitled to take out execution again. How can a decree-holder take out execution again, if on the records in execution his decree has been satisfied by the sale of the property unless there is a declaration or decision by the Court that that sale is void and therefore non-est? This declaration or decision has to be made by the execution Court as the question to be decided is one relating to the discharge or satisfaction of the decree.

11. It was argued that the prayer for declaration in the suit that the execution sale was void was unnecessary and ought to be disregarded as a superfluity. It was submitted that a party has a right to disregard a void sale as a nullity and sue for recovery of possession on the strength of title. That submission involves an assumption that if there is no prayer for declaration in a suit the Court can dispense with the necessity for the declaration in adjudicating the question raised before the Court. A party suing on the basis of his title without any reference to the execution sale, will have to dislodge the title created by the issue of sale certificate to the auction purchaser by the execution Court.

"Certificates of sales are documents of title, which ought not to be lightly regarded." (See *Ramabhadra Naidu v. Kadiriyasami Naicker* 48 I.A 155 : AIR 1922 PC 252.)

The plaintiff will have to prove, on the basis of facts or of law or both that the sale certificate is inoperative to convey the title. In other words, even if the suit be on the basis of title, treating the auction purchaser as a trespasser, the plaintiff will have still to prove and the Court to come to a finding that the sale certificate is inoperative to convey the title. A sale certificate normally divests the title of the judgment-debtor to the property covered by it and vests the title in the auction-purchaser. If the judgment-debtor, after the issue of sale certificate to the auction purchaser, wants to prove a still subsisting title in him, he must displace the title created by the sale certificate by proof that it is void and inoperative. Therefore the conclusion seems to be clear that a Court cannot avoid

the adjudication of the void character of the execution sale, even if the suit be on title. An assertion by a plaintiff that because of the existence of certain facts or because of the state of law, an execution sale is void and inoperative, is not conclusive as it involves the assumption that the Court will decide the facts In the same way as the plaintiff has assumed them to be or that the law as applicable to the facts is always certain and is as assumed by the plaintiff.

12. It is settled by authorities that voidable sales in execution other than those specified in O. 21, R. 92 (1) have to be avoided u/s 47 of the Code of Civil Procedure as the question raised is one relating to execution, discharge or satisfaction of the decree. The Court in adjudging the voidable character of a sale is really making a declaration on the basis of facts of law that the sale is liable to be annulled. There is no difference in the nature of the judicial process when a Court adjudges a sale to be void and when a Court decides that a sale is only voidable. The essential character of the judicial function which the Court is performing in both cases is the same. A declaration that a sale is void involves a judicial process similar in character to that in a declaration that a sale is voidable, and therefore liable to be set aside; the only difference being that in the latter case there is a command of the Court setting aside the sale. In the judgment in *Cheria Chacko Vs. Kumaran Kesavan and Others*, , I quoted a passage from "Judicial Relief for peril and Insecurity" by Edwin Borchard (45 *Harvard Law Review* 793) in support of this proposition. In this classical work on "Declaratory Judgments" at page 8 Borchard has observed:

"A judgment, as Mr. Black points out has in general "nothing whatever to do with the means of enforcing the liability which it declares." Its declaratory, determinative, and adjudicatory function is its distinctive characteristic it is the fact that it constitutes an official, final, binding, and unchallengeable declaration of the rights of the parties, constituting "res judicata", which gives it its character in the judicial process."

At page 10 it is stated :

"The adjudication, not the command, is the essence of judicial power;"

At page 20 it is observed:

"When a Court decides that A is guilty of fraud, that A owes B 1,000, that A is the owner of disputed property and not B, that A is entitled to a fee simple under a will, that B must specifically perform a contract made with A, that a deed on the record creates a cloud on A's title and shall be cancelled, that A's marriage to B is void -- in all these cases the Court's judgment performs the function of determining, establishing, fixing, and declaring the existence of a legal relation. This is true, whether or not the judgment is followed by a decree ordering the defendant to do something -- to pay the judgment, to rescind the contract, to perform the contract, to cancel the deed. That is an Independent direction, an implementation, collateral to the main determination that the obligation exists All these judgments perform declaratory function, whether or not they

carry on order of execution, a so-called coercive decree."

and then he quotes from the judgment of the Supreme Court of Florida a passage with approval. That passage is as follows:

"Except for the coercive element in the Judgment or decree, we understand that there is no difference between a declaratory judgment or decree and any other judgment between opposing parties."

I am citing these passages to show that when the Court makes an order declaring that a sale in execution is void and when the Court adjudges that a sale in execution is voidable and sets aside the sale, the essential character of the function which the Court is performing is the same. If in the latter case it is a matter relating to execution discharge, or satisfaction of the decree, as it admittedly is on the authorities, there is no reason to think that in the former case it does not so relate.

13. So much for the matter of principle. Now for authorities.

14. In *Prosunno Kumar Sanyal v. Kali Das Sanyal* 19 I.A 166, Lord Macnaghten said at page 169:

"It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of Section 244".

15. Section 47 of the CPC confers exclusive jurisdiction upon the execution Court to decide all questions relating to execution discharge or satisfaction of the decree and a separate suit for that purpose is barred. So, if a question could be agitated u/s 47 suit for the same would not lie. The test, if I may say so, is whether the matter could be adjudicated in execution.

16. In *Lakhu Motiram and Others Vs. Radhabai Mulchand Ramnarayan, , Bhagathathy and Chainani, JJ.*, have, said :

"The words "all questions arising" used in Section 47 do not mean only such questions as are actually raised in the execution proceedings, or otherwise a party by not raising a question in execution proceedings, which then ought to have been raised, would be able to circumvent the provisions of Section 47, which provides that all questions of the kind mentioned therein shall be determined by the Court executing the decree and not by a separate suit. In our opinion the words "all questions arising" mean all questions which could properly arise or which could properly have been raised in the execution proceedings between the parties to the suit or their representatives." If that be so, the only question is whether the facts making the sale void could have been brought to the notice of the Court and appropriate reliefs sought u/s 47, and if the reliefs could be so obtained, a suit would be barred.

17. In *Seshagiri v. Sreenivasa* AIR 1920 Mad 402, It was held by Seshagiri Iyer

and Moore JJ., that if the sale is void, that question has to be agitated and appropriate relief sought u/s 47 and that Article 181 of the Limitation Act would apply and that a suit would be barred. In that case a suit was filed for declaration that an execution sale was void and for consequential reliefs. The High Court in appeal remanded the suit to the trial Court with a direction to treat the suit as a proceeding u/s 47 without deciding the question of limitation. The lower Court thereafter treating the suit as an application, dismissed it as barred by time under Article 166. It was in the course of disposing of the appeal from this order that the following observations were made: At p. 403 it is observed :

"It is not disputed that, under the terms of the decree, the Court had no power to sell the appellants' three-fourths share in the properties. The sale was void for want of jurisdiction If an execution sale to a nullity, i.e., is made without jurisdiction or is void "ab initio", Article 166 has, in our view, no application and the residuary Article 181 should be applied." This decision is therefore authority for the proposition that if the execution sale is void an application under Section 47 is maintainable for a declaration that the sale is void and for redelivery of the property sold in execution of the decree and delivered, and that that application would be governed by Article 181 of the Limitation Act.

18. In *Rajagopala Aiyar by guardian Ramachandra Aiyar Vs. Ramanujachariar and Another*, a Full Bench of the Madras High Court has held that if the sale is void the judgment-debtor must seek his relief by an application u/s 47 and that a separate suit would be barred. At page 436 *Schwabe C. J.*, quoted the following observation of the Privy Council in *Khiaramal v. Daim* ILR 32 Cal 296 :

"As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded, without any proceeding to set them aside. It is authority be desired for these elementary propositions, it may be found in the judgment of Sir Barnes Peacock, in *Kishen Chunder Ghose v. Mt. Ashoorun* (1863) 1 Marsh 647."

and then he went on,

"That is direct authority for the proposition that, in such a case, it is not necessary to apply to the Court to set aside the sale. If it is possible for the petitioner in this case to proceed without applying to set aside the sale, he could avoid the harsh limitation imposed by Article 166. In my judgment, he can do so. He could but for the provisions of Section 47 of the CPC of 1908, bring a suit for possession of the property sold, and the purchaser would not be able to rely upon the Court-sale as a defence, because that sale is a nullity, and the Privy Council has held that it is not necessary to take any steps to set it aside. By reason of Section 47, all questions arising between parties to the suit relating to execution ought to be determined by the Court executing the decree, and not by a separate suit; and it has been held that the fact that a Court purchaser is a necessary party would not prevent the application of this rule. But this is only a question of procedure and the Court may treat the proceeding under this section

as a suit, subject to any objection as to limitation."

19. In that case there was a definite finding that the sale in execution was void as notice under Order 21, Rule 22 was not issued. It was on the basis of that finding the Court proceeded to consider the question of the maintainability of the suit and the applicability of Article 166.

20. In Chengalraya Reddy and Others Vs. Kollapuri Reddi, , Ananthakrishna Iyer J., had to consider this question, and this is what he says :

"Therefore the Court had no jurisdiction to sell his property in execution of the decree. The sale was thus ultra vires and void, being in excess of the Court's Jurisdiction, the jurisdiction of the Court being limited to execute the decree against Murugappa Pillai, against whom only the decree had been passed. It does not follow from what I have said that if in execution proceedings in connexion with a suit to which a person was a party anything happened which affected his rights, that he need not proceed u/s 47. The words of Section 47 are wider and under that section even persons against whom no decrees have been passed but who are parties to the suit, have to come u/s 47, if any of their rights be intruded in execution proceedings by the decree-holder. The procedure ordinarily available by way of suits is substituted by one of applying to the executing Court by means of a petition. This is the only effect of Section 47 of the Code. The legal rights of the parties have to be considered and adjusted upon."

This again is authority for the proposition that a void execution sale does not give a party to the suit a right to institute a fresh suit either for declaration of title or for recovery of possession.

21. In Monmatha Nath Ghose Vs. Mt. Luchmi Debi and Others, , Page and Graham JJ., held that when a sale is void on account of the omission of the Court to issue a notice to the judgment-debtor as required by Order 21, Rule 22 the remedy of the judgment-debtor is by way of an application u/s 47 for a declaration that the sale is void, and for consequential reliefs; and that Article 181 would apply to such an application.

22. In Nirode Kali Roy Choudhury and Another Vs. Rai Harendra Nath Choudhury and Another, , a Bench of the Calcutta High Court of which B.K. Mukherjea, J., was a member, considered this question. There, in a suit against A and B a decree was passed against A only. The properties of B were attached and B raised an objection to the attachment. On the objection being dismissed, he brought a suit under Order 21, Rule 63. It was contended by the decree-holder that Section 47 was a bar to the maintainability of the suit. It was held that although no decree was passed against B, the question raised in the suit related to execution, discharge or satisfaction of the decree between the parties within the meaning of Section 47 and that the only remedy was to file an application u/s 47 for declaring the sale to be void and that Article 181 would apply. The learned Judges therefore treated the suit as an application u/s 47 and granted the relief. In the course of his judgment B.K. Mukherjea, J., observed:

"But, if the property was really not the property or the judgment-debtors, the attachment must be held to be void and the attachment and sale must go as a nullity out and out having no foundation to rest upon. Article 166, as my learned brother has pointed out, must be confined to cases where the sale is voidable only and not void and when the execution sale is a nullity, if a party files an application u/s 47 to have it pronounced a nullity or for setting it aside for safety's sake to avoid future difficulties, the proper Article would be Article 181 and not Article 166, Limitation Act. This principle has been applied in cases where the execution sale has been impeached as void ab initio on the ground of want of notice under Order 21, Rule 22, Civil P. C. and it has been held uniformly that if the sale is a nullity, it is not really an application to set aside the sale as contemplated by Article 166 but it comes under the residuary Article I am not impressed by the argument of Mr. Gupta that the sale in this case cannot be said to be a nullity, because there are express provisions in Section 47 which oblige the party to a suit to make an objection within the proper time u/s 47, Civil P. C. The same argument could have been undoubtedly advanced in the case just now mentioned where the sale was held to be a nullity for absence of notice under Order 21, Rule 22, Civil P. C. "Apart from that it seems that if there was no Section 47 the plaintiffs could have simply ignored the sale and instituted a suit for recovery of possession of the property on establishment of their title to it. Because of Section 47, they are obliged to bring the matter to the notice of the executing Court"; but I cannot agree with Mr. Gupta that the executing Court had no jurisdiction to make an order of a declaratory character and the order must be one to set aside the sale. In these circumstances I agree with my learned brother that the suit must be treated as an application u/s 47, Clause (2), Civil P. C."

That, if I may say so with respect, puts the matter beyond doubt. The observations of the learned Judge are clear and definite that because of Section 47 a plaintiff could not maintain a suit on the basis of his title even though the sale in execution is a nullity.

23. In *Ma We Gyan v. Maung Than Byu* AIR 1937 Rang 126, Leach, J., dealt with this point. In that case the learned Judge held that the Court had no jurisdiction to order the sale of the property sold and that the sale was therefore void. After coming to that conclusion he considered the question whether relief could be had u/s 47 and whether Article 181 or 166 would apply to an application u/s 47. This is what is stated at page 128 of the judgment:

"There being no jurisdiction in the Township Court to sell, it could give no title to the property to the respondent and there being no valid sale, it is not necessary for the appellant to apply to have the sale set aside."

Then after noting the conflict of opinion on the question of the applicability of the Article 181, the learned Judge proceeded:

"But it is obvious that Article 166 can only apply where it is necessary to have a

formal order setting aside the sale. It is clearly not necessary here as the sale was a nullity. It was only necessary for the appellant to ask the Court to order the respondent to deliver back to her the property on the ground that he had obtained no title to it and this is what she asked for in her application. It is true that she also asked that the sale be set aside, but this prayer was not required and does not affect the real nature of the application."

In my opinion this ruling would go to show that the proper remedy of the plaintiffs was an application to the execution Court for redelivery of the property and that within the period as specified in Article 181 of the Limitation Act.

If an application in execution would lie for that purpose a suit for recovery of possession would be clearly barred by Section 47.

24. In *Merla Ramanna Vs. Nallaparaju and Others*, *Venkatarama Ayyar J.*, has made a comprehensive review of all the above cited cases and has come to the following conclusion:

"We are in agreement with these decisions, and hold that when a sale in execution is inoperative and void, an application by a judgment-debtor to have it declared void and for appropriate reliefs is governed by Article 181 and not Article 166."

That was a case where the sale in execution was impugned in a suit on the ground that it was not warranted by the terms of the decree and therefore void. *Satyanarayana Rao J.*, refused to entertain the objection that the suit was barred by Section 47 on the ground that that contention was not taken in the written statement and granted a decree for partition and recovery of the property. It was against this judgment that the appeal was preferred to the Supreme Court. The Supreme Court found that the suit was not maintainable and converted it into an application u/s 47, after finding that it was not barred under Article 181 as the suit was filed within three years of the date of the dispossession of the judgment-debtor: it is stated in the judgment,

"Therefore, there is no legal impediment to the plaint filed on 7-8-1939 being treated as an application u/s 47, on the ground that it is barred by limitation."

This decision by the Supreme Court is direct authority which ought to conclude this question.

25. Subsequent to the Supreme Court's Decision in *Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another*, the Allahabad High Court considered this question in *Nand Lal Vs. Mt. Siddiquan and Others*. The facts in that case were more or less similar to those in the present case. The question raised was whether an appeal would lie against an order declaring the sale to be void and in the course of the judgment after quoting the decision of the Supreme Court in *Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another*, it was observed in paragraph 9 of the judgment:

"There is another reason why I think it is only the executing court in such cases which can declare a sale a nullity. In other cases of sale being declared a nullity some questions may arise which may need investigation, and it may be that a separate suit is the proper remedy. But in a case where an auction purchaser fails to deposit the money within fifteen days, there is an imperative duty cast upon the executing Court itself to set aside that sale and to order resale of the property. If this could be done by a separate suit only, how would the property be put to resale again? Reading Rules 85 and 86 of the Code of Civil Procedure, it is clear that if the sale is to be declared as a nullity or is to be set aside on the ground of the want to de-posit the 75 per cent under R. 85 it is only the executing Court which can do it, not by a separate suit."

In *Dada Narayan Thakre Vs. Jaichand Nagorao and Another*, Mudholker J., as he then was, dealt with this question and he made the following observation :

"A sale without notice to the judgment-debtor goes to the root of the jurisdiction of the Court and that such a sale being a nullity an application for setting it aside would fall u/s 47 of the Code and not under O. 21 R. 90 thereof."

In *Bansi Sao and Another Vs. Debi Prasad and Others*, , Ramaswami C. J., and Untwalia J., have held :

"It is well settled that a judgment-debtor applying for setting aside the sale or for declaring it a nullity on grounds other than those mentioned in O. 21, R. 90 of the Code has to do it u/s 47 and not by a separate suit This is so irrespective of the question as to whether the sale is void or voidable."

Siri Bhan v. Jit Singh AIR 1956 P&h 77 is a decision directly in point. The ground alleged for setting aside the sale in that case was that the auction-purchaser did not deposit the one-fourth of the sale amount immediately and the remaining three-fourths within the prescribed period *Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another*, was followed. The observation relevant to the present case occurs at page 77:

"The sale being ab initio void, it could altogether be ignored and no effect could be given to it. The matter surely relates to execution, discharge or satisfaction of the decree and can, therefore, be gone into and decided by the executing Court."

If such a matter can be gone into and decided by the executing Court, I think, a suit for the same purport would be barred. *Balwant Rai Kumar Vs. Smt. Amrit Kaur*, also holds the view that if the execution sale is a nullity Section 47 would be attracted and a party cannot institute a suit for a relief which he could obtain u/s 47.

26. In *Mohan Lal Mahto Vs. Shibdhari Chaube and Another*, Harries C. J., went into this question in connection with an objection as to the maintainability of an appeal and it was held that an application to set aside a void sale is an application which the Court can and must entertain u/s 47. This is what is stated at page 147:

"It is urged on their behalf that their application was an application under Order 21 R. 90, Civil P. C., and if that were so, no appeal would lie to this Court from the order of the learned District Judge. It is, however, clear from the terms of the application that what is complained of is not irregularity or illegality in the publication or conduct of the sale but rather that the sale was conducted wholly without jurisdiction; In short that the sale took place when the Court of the Munsif was prohibited from selling. As I have stated, the application in terms purports to be made u/s 47, Civil P. C., but it is true that applicants should not be tied down to the heading which they give in an application. Here, however, the terms of the application make it clear that it was not an application under Order 21 R. 90, Civil P. C., and was an application which could only have been dealt with under the provisions of Section 47, Civil P. C. The learned District Judge treated the appeal to him as an appeal against an order passed under Section 47, Civil P. C., and in my view it was an order passed under that section, and that being so, a second appeal lies to this Court."

But in *Durga Singh and Others Vs. Sugambar Singh*, it was held that where a sale was conducted without the issue of notice under Order 21 R. 22 the judgment-debtor can bring a suit for a declaration that the sale is void, and for recovery of possession of the property. There is no discussion of the question with reference to Section 47. The point was not raised or argued. It was assumed that a suit would lie. This decision cannot therefore be regarded as an authority for the proposition that a suit would lie when the sale in execution is a nullity. So also is the following observation of the Supreme Court in *Nanni Bai and Others Vs. Gita Bai*, on which the appellants relied:

"The plaintiff Gundi's daughter, not being affected in any way by the sale aforesaid, it is not necessary for her to sue for setting aside the sale. She was entitled, as she has done, to ignore those execution proceedings and to proceed on the assumption, justified in law, that the sale had not affected her inheritance. The suit is, therefore, not barred by Article 12 of the Limitation Act"

There is no discussion of the question whether a suit was maintainable u/s 47 of the C. P. C. The question considered was whether u/s 12 of the limitation Act the suit was barred or not. The application of Section 47 to the facts was not considered or decided. I do not therefore consider it as authority for the proposition contended for by counsel for the appellants. I rely upon the decision of the Supreme Court in *Merla Ramanna Vs. Nallaparaju and Others*, and the decisions cited therein with approval by Venkatarama Iyer J., for coming to the conclusion that even if a sale in execution is a nullity the only remedy of a party to the suit is to apply for a declaration that the sale is void or claim other appropriate reliefs u/s 47. The fact that Article 181 would apply to such an application is indicative of the fact, that such an application could be made in execution u/s 47, and if an application in execution would lie, a suit for that purpose would clearly be barred. (27) It may be stated that in *Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another*, the

identical point namely the question of the void character of the sale in execution for non-deposit of the purchase money as required by Order 21, Rr. 84 and 85, was adjudicated, on an application tiled by the judgment-debtor, and that presumably u/s 47. That would show that the question relates to one of the matters specified in Section 47 and that a separate suit would be barred.

28. I therefore agree with the conclusion of the Court below, and hold that the suit was incompetent and that it cannot be treated as an application in execution u/s 47 as more than three years have elapsed from the date of delivery of the property to the auction purchaser.

29. In these circumstances, I would dismiss the appeal with costs to the contesting respondents.

M. S. Menon, C. J.

30. Sub-section (1) of Section 47 of the Code at Civil Procedure, 1908, provides 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".

The sub-section makes it quite clear that two conditions, and two conditions only, are necessary to attract the Inhibition against a separate suit

31. The two conditions are:

(1) The questions must arise between the parties to the suit in which the decree was passed, or their representatives; and

(2) The questions must relate to the execution, discharge or satisfaction of the decree,

32. It is not disputed that condition No. (1) is satisfied in this case. The only question for determination is whether the second condition also is satisfied or not.

33. The issue for adjudication In the suit from which this appeal arises was whether the sales which took place on 4-7-1112 in execution of the decree in O. S. No. 67 of 1107 of the Trichur District Court (Ext. P-29); and confirmed by that Court on 7-3-1113 (Ext D-7) should be deemed to be a nullity In view of the non-compliance with the provisions of Order 21, Rules 84 and 85. On the facts the correct conclusion will be that there was a non-compliance with the provisions of Order 21, Rules 84 and 85; and on the law that those provision being mandatory--as laid down by the Supreme Court in Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another, the execution sale in pursuance of which the sale certificate was issued should be considered as void and of no effect

34. Both these are apparently questions which relate to the "execution, discharge

or satisfaction of the decree", and such being the case it must necessarily follow that the only remedy open is u/s 47 and not by a separate suit. In AIR 1956 P&h 77 the controversy arose in similar circumstances: and execution sale of land belonging to the judgment-debtors, a purchase by the decree-holder, a non-compliance with the provisions of Order 21, Rules 84 and 85, and a confirmation in-spite of that non-compliance. Chopra, J., was quite categorical. He said:

"The matter, surely, relates to execution, discharge or satisfaction of the decree.

That the answers to the questions involved are simple and should be in favour of the judgment-debtor does not mean that the questions themselves are not question relating to the "execution, discharge or satisfaction of the decree". The object of Section 47 is to preclude the un-necessary expense and delay that fresh trials entail, and such a provision must naturally be construed aa liberally as the language would permit.

35. I am in agreement with Mathew, J., that the appeal should be dismissed with the costs of the contesting respondents.

Madhavak Nair, J.

36. I am inclined to take a different view and hold that Section 47, C. P. C. is no bar to this suit

37. The plaintiffs and defendants 11 to 16 belong to a tarwad, which executed the mortgage, Ext P-2, of the suit properties to Chathappan, the late father of the 17th defendant The 17th defendant sued to enforce that mortgage in O. S. No. 67 of 1107 on the file of the District Court, Trichur, obtained decree and assigned it to Varu who executed the same and purchased the properties in court sale on Kunbhom 4, 1112 (February 15, 1937) for Rs. 7200. Varu had the permission of Court to set off his decree amount, Rs. 7079 odd, against the price. But tie did not deposit the balance. Without noticing that, the sale was confirmed by the executing Court on Thulem 7, 1113 (October 23, 1937) and the properties delivered to him on Vrischikam 22, 1113 (December 7, 1937).

Treating the court sale as a nullity and the possession professed to be taken thereunder as unlawful, the plaintiffs have Instituted the present suit to recover the properties with mesne profits from defendants 1 to 5, who are the children and widow of Varu. The 1st defendant asserting the court sale to be binding on the plaintiffs, contended "inter alia" that the suit was barred by Section 47, C. P. C. The Subordinate Judge found the court sale void for non-compliance with Rule 85 of Order 21, C. P. C. but held the suit barred by Section 47, C. P. C. read with Article 181 Limitation Act, and therefore dismissed it with costs. This appeal is by the plaintiffs against that decree.

38. The finding of bar by Section 47, C. P. C. has apparently the support of Cheria Chacko Vs. Kumaran Kesavan and Others, . When this appeal was heard on a prior occasion I felt the decision of the Supreme Court in Nanni Bai and Others Vs. Gita Bai, must govern the case and the dictum in 1962 Ker LT 848 :

Cheria Chacko Vs. Kumaran Kesavan and Others, , needs reconsideration. On my expressing the same to the learned Chief Justice, his Lordship directed the case to be heard by a Full Bench.

39. That Varu, the auction-purchaser, had not deposited the excess of the parties bid at the court auction over the decree amount allowed to be set off against it is found by the Court below and is not in dispute before us. The legal effect of such non-deposit has been pronounced: by the Supreme Court in Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another, , thus:

"The full amount of the purchase money must be paid within fifteen days from the date of the sale but the decree-holder is entitled to the advantage of a set off. The provision for payment is, however, mandatory (Rule 85). If the payment is not made within the period of fifteen days, the Court has the discretion to forfeit the deposit and there the discretion ends, but the obligation of the Court to re-sell the property is imperative Referring to Rules 84, 85 and 86 of Order 21, C. P.O.) These provisions leave no doubt that unless the deposit and the payment are made as required by the mandatory provisions of the rules, "there is no sale in the eye of law in favour of the defaulting purchaser and no right to own and possess the property accrues to him"..... When there is no sale within the contemplation of these rules, there can be no question of material irregularity In the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the Court is bound to resell the property in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law. We hold, therefore, that in the circumstances of the present case "there was no sale and the purchasers acquired no rights at all". (The underlining (here in " ") If by me).

The court sale had on February 15, 1937, must therefore be held null and void, in the words of the Supreme Court, there was no sale and the purchaser acquired no rights at all" -- "no right to own and possess the property". That Court sale has therefore to be ignored or forgotten in the adjudication of the rights of the parties concerned. If then there was no court sale, Varu's taking possession of the property, though with the aid of Court, was without any right thereto and therefore an act of trespass, and the plaintiffs have to be found entitled to recover the property with mesne profits on behalf of their tarwad.

40. My learned brother Mathew, J. thinks

"A sale having taken place in execution of the decree in O. S. No. 67 of 1107 all questions regarding the validity of that sale have to be decided in execution of the decree".

I am afraid that the dicta of the Supreme Court quoted above compels me to assume that "there was no sale" In circumstances like the present. His Lordship feels

"if the sale is void, the satisfaction of the decree entered in the records in execution will have no effect and the decree-holder will be entitled to take out execution again".

I am not sure of It. Under Order 21, Rule 91, C.P. C. read with Article 166. of the Limitation Act, the decree holder who brought about an execution sale of property In which the judgment-debtor has no saleable interest at all, and purchased it in satisfaction of his decree cannot be relieved of the dire consequences of his error unless he got the sale set aside by the executing Court through an application moved within 30 days of the sale. Nor can I agree that the judicial process involved in the cancellation of a voidable sale is identical with that involved in the declaration of nullity of a purported sale that was really "non est" in law. A voidable sale would remain valid till it is avoided, and the judicial process moved is to strike it down. But in the other case the enquiry is only to check the truth of an averment that a purported court sale was really "non est" and therefore created no rights at all in the so-called auction-purchaser. I do not think that in a case where there was no sale" In law, the issue of a certificate of sale can be of any consequence. A void thing is "non est" for all purposes and cannot be the foundation of any legal right or obligation. It can never be regarded as existent or subsisting to affect the rights or remedies of anybody.

41. The question then arises whether delivery taken by any auction purchaser under pretext of a "non est" sale is a proceeding in execution, satisfaction or discharge of the decree in the case. Execution connotes the steps leading to the satisfaction of the decree; and under Order 21, R. 72(2), C. P. C. the satisfaction of a money decree takes place on confirmation of the execution sale. I would therefore think that delivery of property to an auction purchaser "whether he be the decree-holder or a stranger to the decree" is a process subsequent to the satisfaction of the decree and therefore does not come within the ambit of the expression "the execution, satisfaction or discharge of the decree" In Section 47, C. P.C. It was held so by a Full Bench of five learned Judges in Tribeni Prasad Singh and Others Vs. Ramasray Prasad Chaudhari and Others, . Jwalaprasad, J., delivering the leading judgment In the case, observed:

"Now there Is a distinction between the execution of a decree which directs the delivery of "any property specifically decreed" and the execution of a decree for sale under a mortgage or a simple money decree.

In the former case the delivery of possession is an Integral part of the execution of the decree. and the decree is not satisfied until possession is delivered to the decree-holder under Rule 35 or 36 of Order 21 and as such it would relate to the execution, discharge or satisfaction of the decree u/s 47 and a separate suit for possession by the decree-holder would be barred.

In the latter case when the decree-holder applies for execution of the decree by sale of property the Court directs the sale under Order 21, Rule 64, in order to "satisfy the decree," and pays the "proceeds of the sale" or a "sufficient

portion thereof "to the party entitled under the decree". Upon the sale of the property the decree is "ipso facto" satisfied by the sale proceeds. In case the decree-holder purchases with leave of the Court under Clause (1) of Rule 72, the purchase money is set off against the amount due under the decree and Clause (2) of the rule directs that

"the Court executing the decree shall enter up- satisfaction of the decree in whole or in part accordingly.

If a third party purchases the property the purchase money is deposited in Court under Rules 84 and 85 and is paid to the decree-holder in satisfaction of his decree. The very object of the sale is "to satisfy the decree" by the "proceeds of such sale" as is expressly stated in Rule 64. If the sale is not set aside under Rules 89 to 91, it is confirmed and becomes absolute under Rule 92. Upon sale of property and satisfaction of the decree as aforesaid the execution case is finally disposed of and satisfaction is entered up in the order-sheet and in the register or suits, as was done in the present case Thus ends the execution of the decree.

The delivery of possession to the purchaser has nothing to do with the execution, discharge or satisfaction of the decree. After the sale is confirmed the property vests in him u/s 65 retrospectively from the time when the property is sold and he acquires a right to possession of the property. He had no existence as a purchaser until the execution had terminated with the sale, and until he had paid the full purchase-money where with to satisfy the decree the property was liable to be resold : vide Order 21, Rule 86. If the decree-holder purchases without the leave of the Court the property is liable to be resold. It is only when he purchases with the leave of the Court that the sale proceeds are set off against the decree and the decree is satisfied.

Thus, the right of the purchaser arises only after the decree is satisfied. In asking for possession he does not ask for or raise any question relating to the satisfaction of the decree. His success or failure in obtaining possession does not affect in the least degree the execution, discharge or satisfaction of the decree. So long as the sale remains good, the decree will be deemed to have been satisfied whether the purchaser gets possession of the property or not, or whether the decree-holder withdraws the sale proceeds from the Court or obtains set off or not. The test is : suppose the decree-holder is the purchaser and his application for possession is refused or he fails to obtain possession, can he execute his decree again upon the ground that it is not satisfied? The answer is obviously in the negative. So long as the sale stands good he cannot execute the decree and have the order of set off in satisfaction passed under Clause (2) of Rule 72 set aside. A third party purchaser cannot obtain repayment of the purchase money so long as the sale is not set aside on the ground that he has not obtained delivery of possession. The failure to obtain possession would not invalidate the sale or nullify the satisfaction of the decree. The obtaining of possession will not give greater validity to the sale or the confirmation thereof than what it possessed. Therefore, whereas the title of the purchaser arises from

the sale of the property in execution of a decree, the delivery of possession does not relate to the execution, discharge or satisfaction of the decree. In order to obtain possession, whether by an application under Order 21, Rule 95 or 96, or by a separate suit, it is sufficient for him to show whether and what he has purchased at the Court sale. He need not raise any question relating to the execution, discharge or satisfaction of the decree in which the sale took place. If no question relating to the execution, discharge or satisfaction of the decree is raised, the right of the decree-holder purchaser to obtain possession by a suit against the judgment-debtor is not barred by Section 47."

42. The argument that satisfaction of the decree cannot be said to be had until the decree-holder gets possession as purchaser was met by Banerji J. in *Bhagwati v. Banwari Lal* ILR 31 All 82 at p. 101 (FB) thus:

"I am also unable to hold that if the decree-holder happens to be the auction-purchaser the property purchased by him may be regarded as the proceeds of the sale or the fruits of the decree. The proceeds of the sale consist of the purchase money for which the property was sold, and it is the amount of this purchase money which the decree-holder obtains as the fruits of the decree. If he purchases the property he does not get it as an equivalent of the amount of his decree but he has to pay the purchase money, and he may do so, either in cash or by setting it off against the amount of his decree, In the present case the property was sold for Rs. 400, whereas the amount of the decree was Rs. 87 only. The purchaser had to pay the purchase money in cash and she got the property, not in lieu of the amount of her decree But for a much larger sum. The purchase of the property can, therefore, in no sense be regarded as acquisition of the fruits of the decree, and failure to obtain possession of the property cannot affect the decree itself. Even if the decree be one for sale upon a mortgage, and a sale takes place in pursuance of it, delivery of possession to the purchaser is not made under the decree."

43. The same view has been expressed by the Bombay High Court in *Hargovind Fulchand v. Bhudar Raoji* ILR 43 Bom 550 : AIR 1924 Bom 429 (FB) and *Savlaram Gangaram Vs. Vishwanath Anant*, and by the Punjab High Court in *Firm Ram Singh Gopal Singh v. Firm Abdullah Habib Ullah* AIR 1944 Lah 402 (FB) I am aware that the contrary view prevails in the Madras and Calcutta High Courts. But, in view of the wording of Rule 72 (2) of Order 21, C. P. C., I prefer to adopt the view of the Allahabad, Bombay, Punjab and Patna High Courts, and hold that a proceeding in delivery of property to an auction purchaser is a proceeding subsequent to the satisfaction or discharge" of the decree and therefore not one relating to the execution, satisfaction or discharge of the decree, it is only a summary proceeding allowed by law to a purchaser on the basis of his title conferred by the court sale.

44. In the Patna case the learned Judges seem to have assumed that if the validity of an execution sale is involved the question would relate to execution, satisfaction or discharge of the decree within the meaning of Section 47, C. P. C.

That can have no relevance here where the circumstances are such that there was no sale at all, as per the pronouncement of the Supreme Court cited supra; but can apply to cases of invalid Court sales which require avoidance by executing Court.

45. 1962 Ker LT 848 : Cheria Chacko Vs. Kumaran Kesavan and Others, , has observed :

"Learned counsel for the appellant contended that if the sale is a nullity the plaintiff suing for redemption can ignore it. The prayer in the plaint was for setting aside the execution sale held in O.S. 4/1098, and for redemption. It is common knowledge that if, in law, a sale is void and therefore non est, the prayer to set aside the sale is a superfluity which 3 Court is entitled to ignore and to proceed as if it is a prayer for a declaration that the sale is void. We are perfectly in agreement with the submission of counsel when he argues that 3 void sale need not be set aside and that even without the sale being set aside, a suit for redemption will lie. It is because we agree with his submission on this point, that we do not refer to the several rulings cited by him";

but it held that an adjudication of nullity of the court sale by the executing Court is necessary before the judgment-debtor's heirs can ignore the same and claim title to redeem the property from the mortgagee thereof, and cited (5) Merla Ramanna Vs. Nallaparaju and Others, , as authority for that view. That decision of the Supreme Court concerned a case of excessive execution, the decree having directed realisation of a sum out of a mortgage right but the sale in execution having been of the absolute rights in the property. The Supreme Court held;

"Mr. Somayya for the appellant does not challenge the finding of the District Court confirmed by the High Court that the decree directed only the sale of the mortgage rights of Achutaramaraju under Ext. A, but he contends that the sale in execution of that decree of not merely the mortgage rights under Ext. A, but of the properties themselves was excessive execution against which the judgment-debtor was entitled to obtain relief by application to the execution Court, and that a separate suit with reference thereto would be barred u/s 47, Civil P. C.

It is well settled that when a sale in execution of a decree is impugned on the ground that it is not warranted by the terms thereof, that question could be agitated, when it arises between parties to the decree, only by an application u/s 47, Civil P. C. and not in a separate suit."

Their Lordships then observed that an application for setting aside a void sale and for recovery of the property from the auction-purchaser is in the eye of law an application merely for redelivery of the property and held that such an application moved before the executing Court should be within the time allowed by Article 181, Limitation Act, the starting point of limitation being the date of the erroneous delivery by Court. Though the impugnement of the court sale there was a process of "excessive execution" (which has necessarily to be moved

before the executing Court) there occurs a general observation by their Lordships "When a sale in execution is inoperative and void, an application by a judgment-debtor to have it declared void and for appropriate reliefs is governed by Article 181".

But, a reading of the decision side by side with that in AIR 1958 S C 706, clearly indicates that the dictum in the former decision has to be related to the facts of that case or to facts similar to those and cannot be taken as of general application. If two decisions of the Supreme Court appear inconsistent with each other, the High Courts are not to follow one and overlook the other, but should try to reconcile and respect them both; and the only way to do so is to adopt the wise suggestion of Lord Halsbury given in *Quinn v. Leathern* 1901 AC 495 at p. 506 and reiterated by the Privy Council in (1940) 8 ITR 635 (Privy Council) :

"..... every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions, which may be found there, are not intended to be expositions of the whole law, but governed or qualified by the particular facts of the case in which such expressions are to be found."

and follow that decision whose facts appear more in accord with those of the case at hand.

46. The facts of the case *Nanni Bai and Others Vs. Gita Bai*, , are in my view similar to those in the present case. Pending execution of a money decree against a mortgagor, he died, and was substituted by his brother Sadashiv, who was really divided off from him, and the equity of redemption sold in execution. Ignoring the court sale, the heir of the mortgagor sued to redeem the mortgage, and the contention came that after the court sale she had no title to redeem. The suit was decreed by the Bombay High Court, and on appeal by the mortgagee, the Supreme Court Held:

"If Sadashiv could not be the representative-in-interest of Gundi, as will presently appear, he could not have represented Gundi's estate, and, therefore, the sale as against him, would be of no effect as against the plaintiff The plaintiff, Gundi's daughter, not being affected in any way by the sale aforesaid, it is not necessary for her to sue for setting aside the sale. She was entitled, as she has done, to ignore those execution proceedings and to proceed on the assumption, justified in law, that the sale had not affected her inheritance."

47. The above dictum shows that if the court sale be a nullity the judgment-debtor can ignore it as not affecting his rights in the property. No declaration to that effect by the executing Court concerned, u/s 47, C. P. C., is needed therefor. It then follows that the court sale concerned in the present case being an absolute nullity, the plaintiffs' rights in the property are not affected by it and they are entitled to win.

48. In view of the authorities *Manilal Mohanlal Shah and Others Vs. Sardar Sayed*

Ahmed Sayed Mahamad and Another, and Nanni Bai and Others Vs. Gita Bai, which are by the Supreme Court I do not refer to the decisions of High Courts cited at the Bar.

49. In the result, I hold that the dictum in 1962 Ker L T 848 : Cheria Chacko Vs. Kumaran Kesavan and Others, that even if the court sale is a nullity the judgment-debtor or his representative cannot ignore it and institute a suit to recover the property without securing a declaration of nullity of the court sale from the execution Court u/s 47, C. P. C. has to be overruled; and that it is open in such cases to the judgment-debtor or his representative to recover the property from the auction purchaser by a regular suit instituted within 12 years of its delivery to the latter. Counsel for the appellants stated that his clients are prepared to deposit Rs. 7079-13-5 (the amount in realisation of which the court sale was purported to be held) before they took delivery of the property from. the defendants 1 to 5. That offer sounds quite fair. I would therefore allow the appeal and decree the suit, directing the plaintiffs to keep up their offer to deposit Rs. 7079.84 nP. for payment to defendants 1 to 5 before, they take possession of the property, and not to claim mesne profits till the date of such deposit.

50. The appellants will have their costs of this appeal from defendants 1 to 5; and all parties will suffer their respective costs in the Court below.

BY COURT :

51. In view of the opinion of the majority the appeal is dismissed with costs to the contesting respondents.