

(2016) 11 SHI CK 0029
In the High Court Of Himachal Pradesh
Case No : OSA No. 8 of 2015

M/s. United Electronics (India) Ltd.

APPELLANT

Vs

Ajay Kumar

RESPONDENT

Date of Decision : 08-11-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 21 Rule 92

Citation : (2017) AIRCC 1475

Hon'ble Judges : Mr. Mansoor Ahmad Mir, C.J. and Mr. Tarlok Singh Chauhan, J.

Bench : Division Bench

Advocate : Mr. B.C. Negi, Senior Advocate with Mr. Raj Negi, Advocate, for the Appellants; Mr. Ramakant Sharma, Senior Advocate with Mr. Basant Thakur, Advocates, for the Respondent No. 1.; Mr. Ajay Kumar Dhiman and Mr. Balwant Kukrej, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Mansoor Ahmad Mir, C.J.—This appeal is directed against orders, dated 27th March, 2015, 28th April, 2015, and 27th July, 2015, passed by the learned Single Judge in Execution Petition No. 1 of 2005, tilted as H.P. State Industrial Development Corporation v. M/s United Electronics (India) Ltd. and others (for short "the impugned orders").

2. At the very outset, we deem it proper to record herein that the appellants have filed this appeal while invoking the jurisdiction of this Court in terms of Order 43, Rule 1 (j) of the Code of Civil Procedure (for short "CPC") and is not an appeal as per the mandate of Section 96 of the CPC, as recorded in the cause title.

3. Learned counsel for the parties argued the case at length.

4. It is profitable to give a brief resume of the facts of the case, which have given birth to the instant appeal.

5. Decree Holder Himachal Pradesh State Industrial Development Corporation

(for short "Hpsidc") earned decree in Civil Suit No. 8 of 1999, titled as Himachal Pradesh State Industrial Development Corporation Limited v. M/s United Electronics (India) Ltd. and others, was constrained to file Execution Petition in the year 2004, i.e. on 31st December, 2004. Notice was issued on 4th January, 2005, remained on the dockets of the Court without service and ultimately OMP No. 138 of 2007 was filed by the Decree Holder-HPSIDC on 9th April, 2007 for attachment of the immovable property of Judgment Debtor No. 1, i.e. M/s United Electronics (India) Ltd. (for short "Company"), as described in para 3 of the said application. Thereafter, another application, being OMP No. 451 of 2007, was filed by the Decree Holder HPSIDC under Order 21, Rule 54 read with Section 151 CPC. Warrant of attachment was ordered to be issued vide order dated 17th September, 2007.

6. OMP No. 315 of 2009 came to be filed by the Decree Holder-HPSIDC under Order 21 Rules 66 and 67 CPC read with Section 151 CPC on 9th July, 2009, for issuing advertisement qua sale of the attached property. The learned Single Judge directed to issue the proclamation vide order, dated 15th July, 2009.

7. The Judgment Debtor-Company moved OMP No. 413 of 2009 under Order 21 Rules 58 and 59 CPC read with Section 151 CPC on 18th August, 2009, for settling the process of auctioning the property afresh. It is apt to reproduce the relief sought for in the said application herein:

"That it would be in the interest of justice and fairness of law to allow the present application and settle the process of auctioning of the property afresh so that the Judgment Debtor is able to once and for all settle the alleged dues of the HPFC and PNB the other two secured creditors."

8. The learned Single Judge, vide order, dated 25th August, 2009, passed in OMP No. 413 of 2009 (supra), ordered that sale of proclamation would disclose the value of the property as assessed by the Decree Holder and details of all encumbrances attached thereto. It was also provided that the sale would be subject to confirmation by the Court.

9. The Decree Holder-HPSIDC filed reply to the said application, i.e. OMP No. 413 of 2009, on 2nd September, 2009. Rejoinder thereto came to be filed on 9th October, 2009. The application was disposed of vide order, dated 22nd October, 2009, by providing that no further orders were required to be passed in view of order, dated 25th August, 2009.

10. On 8th July, 2011, the Decree Holder-HPSIDC moved OMP No. 241 of 2011 seeking permission of the Court to carry out fresh evaluation of the assets, which was allowed by the learned Single Judge on 23rd August, 2011, and a direction was issued to the Decree Holder-HPSIDC to carry out fresh evaluation of the movable and immovable property. Fresh valuation report was ordered to be taken on record vide order, dated 19th October, 2011 in OMP No. 373 of 2011, with a further direction to sell the attached property by way of public auction after drawing the proclamation of sale. The Collector, Solan, was directed to

ensure that an officer not below the rank of Tehsildar would conduct the auction. It is profitable to reproduce relevant portion of order, dated 19th October, 2011, herein:

"Attachment of the property was ordered on 31.08.2007. The attached property, i.e. the immovable property comprised in Plots No. 12, 13, 20, 21, 22, 23 and 24, Industrial Area, Barotiwala, District Solan, Himachal Pradesh, along with building and machinery standing thereon be sold by way of public auction. Proclamation of sale be published in the Tribune (Chandigarh Edition), Amar Ujala (Chandigarh Edition) and the Economic Times (Delhi Edition). Proclamation of sale be drawn up by the Registry and proclamation be published on or before 19th December, 2011, and sale shall take place on 7th January, 2012. The Collector, Solan, shall ensure that an officer not below the rank of Tehsildar shall conduct the auction.

As per the valuation report, the total value of the land is ? 356.63 lacs and the value of the building is ? 18.19 lacs, i.e. the total value of the property is ? 374.92 lacs. It is, however, made clear that there is no upset price fixed in the auction, though, according to the Decree Holder, the distress value of the total property is 208.02 lacs. The HPSIDC shall take? necessary steps and furnish the proclamation charges within two weeks from today."

11. The said order was not complied with and on 19th December, 2011, fresh direction was issued for proclamation of the sale and the sale of the property.

12. The Decree Holder-HPSIDC filed OMP No. 62 of 2012 on 21st March, 2012, for the survey, zoning and planning of the property on the ground that no bids were received in spite of wide publicity and to explore the possibility of selling the property in question at higher price. It is worthwhile to reproduce the relief sought in the said application herein:

"In view of submissions made above the application may kindly be allowed and permission may kindly be granted to Decree Holder Corporation to get the survey, zoning and planning of the property done and direction may also be issued to the Judgement Debtors to extend necessary cooperation in the matter."

13. Vide order, dated 2nd April, 2012, OMP No. 62 of 2012 was granted with a direction to the Decree Holder-HPSIDC to go for the survey, zoning and planning of the property and the Judgment Debtors were also directed to extend necessary cooperation in view of the fact that nobody turned up for auction. Order, dated 2nd April, 2012, reads as under:

"Report of the Collector received. As per report nobody turned up for auction.

The present application has been moved for seeking permission to allow the decree holder to get survey, zoning and planning of the property. Further for seeking direction to the JDs to extend necessary cooperation in the matter. In view of the fact that no one had turned up at the time of auction, decree holder is also interested to take part in the ensuing bid as such it intends to survey the

property for the purpose of bid. As such, the application is allowed. Decree holder may get the survey, zoning and planning of the property done and JDs shall extend necessary cooperation in the matter. The application stands disposed of. Dasti copy. List on 24.5.2012."

14. Thereafter, time was sought on various dates/hearings to comply with order, dated 2nd April, 2012, quoted herein above.

15. On 1st May, 2013, an application, being OMP No. 190 of 2013, under Section 151 CPC came to be filed by the Decree Holder-HPSIDC for fixation of the date for auction of the attached property.

16. The Judgment Debtor-Company filed reply to the said application on 14th May, 2013. Rejoinder was filed on 13th June, 2013, and the application was disposed of vide order, dated 3rd July, 2013, the operative portion of which reads as under:

"In view of the above, the application is allowed and the attached property, as aforesaid, is ordered to be put to sale as per schedule of sale to be fixed by the Addl. Registrar (Judicial) and intimated to the contesting parties through their learned counsel, on taking requisite steps by the petitioner/DH within two weeks from today. It is further ordered that in order to identify the aforesaid Plot No. 42, with a view to segregate the same from the attached property, a panel of local commissioners comprising of Ms. Charu Gupta and Ms. Meena Thakur, Advocates, is appointed, who shall carry out the requisite demarcation before the attached property is put to sale, on a date to be fixed mutually in consultation with the learned counsel for the contesting parties. In this exercise, the panel of local commissioners would be assisted by the Tehsildar, Barotiwala along with the field revenue staff and the Executive Officer, Baddi Barotiwala Nalagarh Development Agency (Bbnda), Baddi at Jharmajri, or any other senior officer appointed by him for this purpose, so that there is no difficulty in identification and demarcation of the aforesaid Plot No. 42. Fee of the Members of the panel of local commissioners is fixed at Rs. 25,000/- (rupees twenty five thousand only) each, inclusive of conveyance charges etc., which shall be payable by the contesting respondents/JDs No. 1, 3 and 5. The panel of local commissioners shall submit their report to this court within 15 days from execution of the Commission, under intimation to the parties through their learned counsel. The parties through their learned counsel/authorised representatives shall be free to assist the panel of local commissioners in execution of the Commission. Let copies of this order be sent by the Registry to the Tehsildar, Barotiwala and Executive Officer, BBNDA for information and compliance.

The application stands disposed of in the above terms."

17. The warrant of sale after execution was received along with the report of the Local Commissioner and six bank drafts, the mention of which has been made in order, dated 3rd October, 2013. It is apt to reproduce the relevant portion of order, dated 3rd October, 2013, herein:

"As per report of the Registry, warrant of sale has been received back after execution along with the report of the Local Commissioner and six bank drafts, amounting to Rs. 1,13,65,000/- (one crore, thirteen lacs, sixty five thousand only), being the sale proceeds, which be invested by the Registry in a Fixed Deposit on usual terms....."

18. On the request of the learned counsel for the parties, the matter was ordered to be listed on 7th November, 2013, with a direction to the parties to file objections against the sale, if any.

19. OMP No. 4266 of 2013, filed on 24th October, 2013, under Order 21 Rules 58 and 59 CPC read with Section 151 CPC, are, in fact, objections to the sale filed by the Judgment Debtors-Company. We deem it proper to reproduce para 8 of the application/objections herein:

"8. That it would be in the interest of justice and fairness of law to allow the present application and settle the process of auctioning of the property afresh so that the Judgment Debtor is able to once and for all settle the alleged dues of the HPFC and PNB the other two secured creditors."

20. The Decree Holder-HPSIDC filed reply to the said application/objections on 26th November, 2013. It is apt to reproduce para 8 of the reply herein:

"8. In reply to para 8 is submitted that the JD's may be directed to produce better buyer as earlier the property was auctioned more than 9 times but no bids were received."

21. Thereafter, on 12th December, 2013, the auction purchaser filed OMP No. 4341 of 2013 under Order 21 Rules 94 and 95 CPC read with Section 151 CPC for issuance of sale certificate after confirmation of sale. Parties were directed to file reply vide order, dated 18th December, 2013. Both the applications, i.e. OMP No. 4266 of 2013 and 4341 of 2013, came up for consideration on 8th January, 2014, were ordered to be listed on 19th March, 2014.

22. The Execution Petition was ordered to be listed for settlement on 23rd April, 2014, in view of the agreement arrived at between the parties, as is recorded in order, dated 19th March, 2014. The case was adjourned on 23rd April, 2014, 20th May, 2014, 23rd June, 2014 and 14th July, 2014, for settlement. Thereafter, on 13th August, 2014, the Judgment Debtors-Company moved OMP No. 349 of 2014 under Section 151 CPC for settlement. It is apt to reproduce the relief sought in the said application herein:

"It is, therefore, respectfully prayed that the present application be allowed and the next documents be taken on record and appropriate orders may kindly be passed by this honourable High Court, keeping in view the facts and circumstances of the matter and direct the Judgement Holder/Corporation to settle the dispute under one time settlement, keeping in view the precedence on this issue.

b. It is humbly further prayed that any other direction or order may kindly be issued by this Hon"ble High Court keeping with the orders passed on 3rd of July 2013 on account of the legal implications of the same."

23. On 22nd October, 2014, a letter was produced before the learned Single Judge by the learned counsel for the Decree Holder-HPSIDC, in terms of which the Judgment Debtors were called upon for discussion qua one time settlement. The Judgment Debtors were directed to attend the office of the Decree Holder-HPSIDC during the course of that day with a further direction to the Decree Holder-HPSIDC to file objections in case the negotiation was not acceptable and the matter was ordered to be posted on 19th November, 2014.

24. The perusal of order, dated 19th November, 2014, does disclose that the Judgment Debtors failed to comply with the directions made by the learned Single Judge vide order, dated 22nd October, 2014, and the Judgment Debtors were directed to deposit the outstanding decretal amount within three weeks, failing which the Decree Holder-HPSIDC was directed to take appropriate steps including qua detention of the Judgment Debtors in civil imprisonment. It is profitable to reproduce order, dated 19th November, 2014, herein:

"OMP No. 349 of 2014

The affidavit filed on behalf of the petitioner-DH reveals that consequent upon the order passed on the previous date, the authorised representatives of JDs, present in the Court on the previous date, did not visit the office of the DH as directed by this Court. It being so, JDs to deposit the outstanding decretal amount within three weeks, failing which the petitioner-DH to take appropriate steps, in accordance with law, including qua detention of the JDs in civil imprisonment. List on 15th December, 2014."

25. The Judgment Debtors failed to deposit the decretal amount, but, a statement was made by the learned counsel for the Judgment Debtors before the Court on 15th December, 2014, that they intend to settle the matter. The matter was referred for mediation, which failed, as has been recorded in order, dated 13th March, 2015. In the said order, it has also been recorded that the attached property stood already sold in an open auction for the consideration of Rs.1,13,65,000/- and the parties were directed to produce a better buyer, who would be ready and willing to purchase the attached property in a sum over and above the one in which the same had been purchased by the auction purchaser.

26. In terms of order, dated 27th March, 2015 (impugned order-I), Decree Holder and Judgment Debtors had not filed the objections to the sale, but had sought one more opportunity to find out better buyer(s), if any, available, was granted with the command that in case the parties fail to do so, the sale of the property shall stand confirmed automatically in favour of the auction purchaser without reference to the Court and the matter was posted for 28th April, 2015. Order, dated 28th April, 2015, (impugned order-II) provides that the Decree Holder as well as the Judgment Debtors failed to produce the better buyer and

the execution petition was ordered to be closed in terms of order, dated 27th March, 2015.

27. Thereafter, on 26th May, 2015, Judgment Debtors filed OMP No. 156 of 2015 under Section 151 CPC for recalling orders, dated 27th March, 2015 and 28th April, 2015, which came to be dismissed vide order, dated 27th July, 2015 (impugned order-III).

28. Being dissatisfied, the Judgment Debtors have filed the instant appeal thereby calling in question the impugned orders, on the grounds taken in the memo of the appeal.

29. Learned counsel for the Judgment Debtors-appellants was asked to justify the maintainability of the appeal. It was argued that the impugned orders have been passed by the learned Single Judge on the applications in terms of Order 21, Rule 92 CPC, thus, are appealable in terms of Order 43, Rule 1 (j) CPC.

30. Learned counsel for the respondents argued that the impugned orders do not fall within the scope and ambit of Order 43, Rule 1 (j) CPC. Further argued that the appeal is not maintainable, the Judgment Debtors are caught by law of waiver and have virtually objected to the sale proceedings.

31. It is profitable to reproduce Order 21, Rule 92 CPC herein:

"ORDER XXI

Execution of Decrees and Orders

.....

92. Sale when to become absolute or be set aside. - (1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute:

Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the Court shall not confirm such sale until the final disposal of such claim or objection.

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within sixty days from the date of sale, or in cases where the amount deposited under rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the Court, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby:

Provided further that the deposit under this sub-rule may be made within sixty days in all such cases where the period of thirty days, within which the deposit had to be made, has not expired before the commencement of the Code of Civil Procedure (Amendment) Act, 2002.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

(4) Where a third party challenges the judgment-debtor's title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit.

(5) If the suit referred to in sub-rule (4) is decreed, the Court shall direct the decree-holder to refund the money to the auction-purchaser, and where such an order is passed the execution proceeding in which the sale had been held shall, unless the Court otherwise directs, be revived at the stage at which the sale was ordered."

32. The said provision of law mandates that when the application is not made under Rules 89, 90 or 91 CPC or when such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale becomes absolute.

33. The order must contain the following ingredients:

(i) that the sale can be made absolute when no application under Rules 89, 90 or 91 CPC has been filed; or

(ii) when such application is made and disallowed; and the sale has to be confirmed.

34. As discussed herein above, the Judgment Debtors, though, had moved an application, being OMP No. 413 of 2009, for settling the process of auction afresh, which was not granted, but the sale was ordered to be kept subject to the confirmation by the Court, vide order, dated 22nd October, 2009. The said order has not been questioned. Thus, the Judgment Debtors are estopped from questioning the process of attachment and auction of the property.

35. The Judgment Debtors have also not questioned the orders made by the learned Single Judge on the applications moved by the Decree Holder-HPSIDC, the details of which are given herein above, thus, cannot now question the process of attachment and auction of the property.

36. OMP No. 4266 of 2013 filed by the Judgment Debtors, are, in fact, objections to the sale, but the same have not been pressed by them by seeking adjournment for settlement and obtaining best buyer, i.e. a buyer, who would be ready to pay the price over and above the amount paid by the auction purchaser, is suggestive of the fact that the Judgment Debtors have not questioned the process of attachment or sale/auction on any grounds contained in Order 21, Rule 90 CPC or any other Rule. Thus, the Judgment Debtors are precluded from

questioning the impugned orders.

37. Order, dated 27th March, 2015 (impugned order-I) is only an order of confirmation of sale. This order nowhere discloses that any application was made and it was disallowed, thus, the same does not fall within the scope and ambit of Order 21, Rule 92 CPC and is not appealable.

38. It is profitable to record herein that the Judgment Debtors did not question order, dated 27th March, 2015, though it was a default order. They failed to take steps in terms of order, dated 27th March, 2015, and order, dated 28th April, 2015 (impugned order-II), came to be passed by the learned Single Judge in terms of which the Execution Petition was disposed of as party satisfied. In fact, the confirmation order has been made in terms of order, dated 27th March, 2015.

39. Order, dated 27th July, 2015 (impugned order-III), in terms of which OMP No. 156 of 2015 came to be dismissed, is not an order of review. No review petition was filed. The application was filed under Section 151 CPC for recalling orders, dated 27th March, 2015 and 28th April, 2015.

40. We wonder when the remedy of review was available, why application for recalling the orders was made. The dismissal of such application does not fall within the ambit and scope of Order 21, Rule 92 CPC.

41. Our this view is fortified by the judgment rendered by the High Court of Madhya Pradesh in the case titled as Gopilal and another v. Sitaram and others, reported in AIR 1968 Madhya Pradesh 196. It is apt to reproduce paras 6 and 7 of the judgment herein:

"6. No appeal lies under Order 43, Rule 1 (j) from an order dismissing an application under Order 21, Rule 90 or an order dismissing an application for restoring the application under Order 21, Rule 90 . Under Order 43, Rule 1 (j) an appeal lies from an order under Rule 92 Order 21 "setting aside or refusing to set aside a sale". Now, when no application is made under Order 21, Rule 90 or where such an application is made and disallowed, the Court is required to make an order confirming the sale. If the application made is allowed, then the Court has to make an order setting aside the sale. When no application is made under Order 21, Rule 90 , there is no question of appeal against an order confirming the sale. Clause (j) of Order 43, Rule 1 does not provide for an appeal against an order confirming the sale. Under that clause, an appeal lies against an order under Order 21, Rule 92 setting aside or refusing to set aside a sale. When an application under Order 21, Rule 90 is made, and is dismissed for default or is not pressed by the applicant, it may be taken for the purpose of Rule 92 Order 21 that it has been disallowed and the result of disallowing is that the sale is confirmed But it cannot be held that when the application is dismissed for default of appearance or when it is not pressed then there is a refusal on the part of the Court to set aside the sale The word "refusal" means "a denial or rejection of something demanded or offered" There can be no "refusal" unless there is a request or demand When, an application under Order 21. Rule 90 is dismissed

for default or when it is not pressed, there is no demand on the part of the person applying for setting aside the sale and the Court is not required to consider whether the sale should be set aside or not. Thus, when an application under Order 21, Rule 90 is dismissed for default of appearance and the sale is confirmed, there is no refusal to set aside the sale and such an order is not appealable under Order 43, Rule 1 (j). A fortiori, an order dismissing an application for restoring the application under Order 21, Rule 90 dismissed for default of appearance is also not appealable.

7. On the question whether an appeal lies from order dismissing an application under Order 21, Rule 90 for default or from an order dismissing an application for restoring the application under Order 21, Rule 90 , the decisions are conflicting. In *Kali Kanta Chuckerbutty v. Shyam Lal*, AIR 1917 Cal 815(2) it has been held that the language of Order 43, Rule 1 (j) is wide enough to cover a case of an application to have a sale set aside dismissed for default. The reasoning given in this case was that the effect of such an order is to confirm the sale under Rule 92. But, as pointed out earlier, under Clause (j) of Order 43, Rule 1 , an appeal lies against an order refusing to set aside a sale and not against an order confirming the sale. This decision was followed in *Narendra Nath v. Rakhal Das*, AIR 1925 Cal 510 where also it was ruled that the effect of the dismissal of an application under Rule 90 is to confirm the sale under Rule 92 and hence an appeal lies against the order. But in a later case, namely, *Basaratulla v. Reazuddin*, AIR 1926 Cal 773, it was held that an order of dismissal for default is not a confirmation of the sale and does not preclude the party from making a fresh application and that such an order is not appealable under Order 43, Rule 1 (j). In that case Page J. observed that :".

. . . .in dismissing the application for default when neither party appears on the case being called for hearing, the Court does not refuse to set aside the sale, but in the absence of the parties refuses to consider whether the sale should be set aside or not."

Page J. however, reached the conclusion in *Basanta Kumar v. Khirode Chandra*, AIR 1928 Cal 25 that where a person applies under Order 21. Rule 90 but the application is dismissed for his nonappearance and the opposite party is present and ready to contest, the order dismissing the application is an order under Order 43. Rule 1(j) and is, therefore appealable To us it seems that in principle there is no distinction between an order passed on an application under Order 21, Rule 90 dismissing it for default for nonappearance if one party and an order dismissing it for nonappearance of both the parties. The decision in AIR 1926 Cal 773 (supra) was not followed by the Calcutta High Court in *Ansarali v. Bhim Sankar*, AIR 1929 Cal 407(2). In that case it was held that when an application under Order 21. Rule 90 is dismissed for default, whether for nonappearance of one or for nonappearance of both the parties, it is disallowed under Rule 92 and that it is the disallowing of the application under Order 21, Rule 90 which corresponds to the order refusing to set aside a sale within the meaning of Order

43, Rule 1 (j), and, therefore, such an order is appealable. In our judgment, the expression "where such an application is made and disallowed" occurring in Rule 92 means that where such an application is made and rejected. But it is not every order of rejection that has been made appealable under Order 43, Rule 1 (i) but only that Order of rejection by which the Court on a demand being made by a person to set aside a sale refuses to set aside the sale. This stands to reason as a party who has allowed his application to be rejected by default or for nonprosecution cannot really complain that the Court has refused to set aside the sale on a prayer being made by him. The Patna High Court has in *Rampratap v. Triloknath*, AIR 1957 Pat 465, following AIR 1928 Cal25 (supra) and AIR 1929 Cal 407(2) (supra), held that an order dismissing an application under Order 21, Rule 90 for non-prosecution is appealable under Order 43, Rule 1 (j), the reason given being that if the application is disposed of on merits and is dismissed, the result is that the sale is confirmed; likewise if the application is dismissed for non-prosecution, the result is the same, namely, that the sale is confirmed. As we have stated earlier, the question of appealability under Order 43, Rule 1 (j) does not depend upon whether the order under Order 21, Rule 92 results in the confirmation of the sale but on the fact whether the order is one refusing to set aside the sale or setting aside the sale. It is not necessary to note the decisions of other High Courts which are in similar vein. The reasonings given in these decisions, with all respect to the learned Judges deciding the cases, do not appear to us to be reconcilable with one another. We would respectfully say that Page J. rightly observed in AIR 1926 Cal 773 (supra) that when an application under Order 21, Rule 90 is dismissed for default, the Court does not refuse to set aside the sale. In our view, an order dismissing an application under Order 21, Rule 90 for default or an order dismissing an application for restoring the original application under Order 21. Rule 90 is not appealable under Order 43. Rule 1 (j)."

42. The High Court of Punjab and Haryana in the case titled as *Bakhsho v. Pakhar Singh and another*, reported in AIR 1985 Punjab and Haryana 322, held that the order passed by the executing Court confirming the sale is not appealable under Clause (j) of Order 43, Rule 1 CPC in absence of the objections under Order 21, Rule 90 CPC. It is profitable to reproduce para 6 of the judgment herein:

"6. The learned counsel for the petitioner has contended that the sale in favour of the auction-purchaser was confirmed by the executing Court on 22-12-1983. The petitioner did not file objection under Section 21, R. 90, as she did not come to know about the auction for want of proclamation of sale in terms of Order 21, Rule 66 of the Code. The sale in favour of the auction-purchaser stood confirmed by the time the petitioner came to know of it. The petitioner did not approach the executing Court for relief, because the sale already stood confirmed. It is under these circumstances that the petitioner has filed the present revision wherein the prayer made is that the sale by auction in favour of Balbir Singh respondent be set aside for want of proclamation under Order 21, Rule 66 of the Code. This contention is also without any merit. The petitioner has not sought the relief of

getting the sale set aside from the executing Court so far. It is incorrect that the petitioner could not seek relief in this respect from the executing Court, because the sale in favour of the auction-purchaser stood confirmed. If the petitioner had filed objections for getting the sale set aside, the order passed would have been appealable under Clause (j) of Order 43, Rule 1 of the Code. The present revision against the order of the executing Court, confirming the sale in favour of the auction-purchaser in the absence of objection under Order 21, Rule 90 of the Code is rather misconceived."

43. In the case titled as L. Balu v. Periasami and others, reported in AIR 1988 Madras 114, it has been held, in para 7, that an order, passed under Order 21, Rule 92 CPC, confirming the sale on the ground that no application to set aside the sale has been made, would not come within the purview of Order 43, Rule 1 (j) CPC and would not be appealable.

44. The same principle has been laid down by this Court in the case titled as Smt. Shanti Devi v. H.P. Financial Corporation and others, reported in 1997 (3) Sim. L.C. 256. It is profitable to reproduce para 3 of the judgment herein:

"3. The language in the Rule 1(j) of Order 43, is very significant. The rule talks only of an order setting aside the sale or refusing to set aside the sale. In this case, the order refusing to set aside the sale was separately passed on the application filed by the Appellant under Order 21, Rule 90 , Code of Civil Procedure, The order has become final as there is no appeal against the said order by the Appellant. The present appeal, which is now filed, is against an order confirming the sale. That is not mentioned in Rule 1(j), as set out above. This order cannot be called an order setting aside or refusing to set aside the sale. Hence, the appeal is not maintainable."

45. The sale of property on low price in view of the fact that the Decree Holder and the Judgment Debtors failed to bring a best buyer, who would have paid the amount more than what the highest auction purchaser had paid, despite granting several opportunities, cannot be said to be a material irregularity and the objections raised by way of OMP No. 4266 of 2013, which too was virtually not pressed by seeking adjournment for settlement and obtaining best buyer, are of no consequence.

46. Keeping in view the facts of the case, the appellants Judgment Debtors are caught by estoppel and waiver.

47. Our this view is fortified by the judgment rendered by the Privy Council in the case titled Raja Shyam Sunder Singh and others v. Kaluram Agarala and others, reported in AIR 1938 Privy Council 230, the relevant portion of which reads as under:

"As regards the appellants" objection to the sale proclamation, their Lordships consider that the waiver of the necessity for a fresh proclamation necessarily implied a waiver of objection to any defect appearing on the face of the sale

proclamation, as appellant 1 must have been fully aware of its terms in view of his miscellaneous appeal to the High Court. The facts in this case are stronger against the said appellant than those in *Girdhari Singh v. Hurdeo Narain Singh*, 1876 3 Ind-App 230 in which this Board held that the waiver covered any objection to an error in the statement of the Government revenue, as the judgment debtor must have had the opportunity of seeing the copy affixed in the Court House. This objection of the appellants accordingly fails.

As regards the appellants' three objections to the attachment, their Lordships find it unnecessary to consider the correctness of the findings of the Subordinate Judge, and they have not heard the respondents on this question. Their Lordships do not consider that the waiver of any necessity for a fresh sale proclamation would imply a waiver of the right to object to any of the three irregularities in the attachment found by the Subordinate Judge."

48. In the case titled as *Vidya Bhan Prakash v. The Second Additional District Judge, Mathura and others*, reported in AIR 1988 Allahabad 204, it has been held that unless there is nexus between the inadequacy of price fetched and the irregularity or fraud in conducting the sale, the sale cannot be set aside. Further held that where the inadequacy of price was the result of factors other than material irregularities or fraud, proviso to Order 21 CPC did not come into force. It is apt to reproduce paras 17 and 18 of the judgment herein:

"17. Sri S.R. Misra, Advocate appearing for the judgment-debtor, has during the course of his arguments relied upon a decision of the Andhra Pradesh High Court in the case of *Satyanarayana Soni v. State of Andhra Pradesh* (1987) 2 Cur CC 118. It has been held in this case that unless there is nexus between the inadequacy of price fetched and the, irregularity or fraud in conducting the sale, the sale cannot be set aside. It has further been held that,

"Therefore, if a party, who has an interest in the property sold in execution of the decree is affected by such sale, he has to establish on facts proved to the satisfaction of the executing court that by reason of irregularity or fraud he sustained substantial injury and that injury has been resulted on grounds of material irregularity or fraud either in publishing the sale proclamation or conducting the sale."

During the course of its judgment, the Andhra Pradesh High Court has relied upon the aforesaid earlier decision of its own Court in *Ramdasjee's case* AIR 1965 Andh Pra 334. It has held that any material irregularities per se will not invalidate a sale. Such irregularities will have the effect of a voiding the sale only if the connection is established between them and the inadequacy of price realised at the sale". It was further held that inadequacy of price proprio vigore would not result in avoiding the sales. There must be correlation between the damage suffered by the judgment-debtor and the material irregularity complained of if the inadequacy of the price is the result of factors other than the material irregularities complained of the proviso to Order 21, Rule 90 (1) cannot

come into operation." As stated earlier the same is also the view taken by the Supreme Court in the case of Radhey Shyam (AIR 1971 SC 2337) (supra).

18. On the findings recorded in the present case by the courts below, the decision cited on behalf of the respondents in the case of Satyanarayana Soni (19872 Cur CC 118) (Andh Pra) (supra), in my opinion does support the case of the petitioner. In our case, the execution court had dismissed the objections of the judgment-debtor and the lower appellate court had recorded a finding that no substantial injury had occurred to the judgment-debtor by reason of irregularity or fraud contemplated by the provisions of Sub-clause (2) of Order 21, Rule 90 of the Code of Civil Procedure."

49. The same principle has been laid down by the Apex Court in the case titled as Jaswantlal Natvarlal Thakkar v. Sushilaben Manilal Dangarwala and others, reported in AIR 1991 Supreme Court 770.

50. Keeping in view the merits of the case and the orders passed from time to time, the mention of which has been made herein above, we are of the opinion that the impugned orders are the best orders, which could have been passed by the learned Single Judge.

51. Our this opinion is supported by the judgment rendered by the Apex Court in the case titled as Janak Raj v. Gurdial Singh and another, reported in AIR 1967 Supreme Court 608. It is apt to reproduce para 4, relevant portion of para 8 and para 24 of the judgment herein:

"4. Before referring to the various decisions cited at the Bar and noted in judgment appealed from, it may be useful to take into consideration n the relevant provisions of the Code of Civil Procedure. So far as sales of immovable property are concerned there are some specie provisions in O. XXI beginning with R. 82 and ending with R. 103. If a sale had been validly held, an application for setting the same aside can only be made under the provisions of Rr. 89 to 91 of O. XXI. As is well known, R. 89 gives a judgment-debtor the right to have the sale set aside on his depositing in Court a sum equal to five per cent of the purchase money fetched at the sale besides the amount specified in the proclamation of sale as that for the recovery which the sale was ordered, less any amount which may, since the date of sale, have been received by the decree holder. Under subr. (2) of R.92 the Court is obliged to make an order setting aside the sale if a proper application under R. 89 is made accompanied by a deposit within 30 days from the date of sale. Apart from the provision of R. 89, the judgment-debtor has the right to apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it provided he can satisfy the Court that he has sustained substantial injury by reason of such irregularity or fraud. Under R. 91 it is open to the purchaser to apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. Rule 92 provides that where no application is made under any of the rules just now mentioned or where such

application is made and disallowed the Court shall make an order confirming the sale and thereupon the sale shall become absolute. Rule 94 provides that where the sale of immovable property has become absolute, the Court must grant a certificate specifying the property sold and the name of the person who at the time of sale was declared to be the purchaser. Such certificate is to bear date the day on which the sale becomes absolute. Section 65 of the Code of Civil Procedure lays down that where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when it is sold and not from the time when the sale becomes absolute. The result is that the purchaser's title relates back to the date of sale and not the confirmation of sale. There is no provision in the Code of Civil Procedure of 1908 either under O. XXI or elsewhere which provides that the sale is not to be confirmed if it be found that the decree under which the sale as ordered has been reversed before the confirmation of sale. It does not seem ever to have been doubted that once the sale is confirmed the judgment-debtor is not entitled to get back the property even if he succeeds thereafter in having the decree against him reversed. The question is, whether the same result ought to follow when the reversal of the decree takes place before the confirmation of sale.

5.

6.

7.

8. Nothing has been urged before us which would lead us to take a contrary view. Under the present Code of Civil Procedure, the Court is bound to confirm the sale and direct the grant of a certificate vesting the title in the purchaser as from the date of sale when no application as is referred to in R. 92 is made or when such application is made and disallowed.

xxx xxx xxx

24. For the reasons already given and the decisions noticed, it must be held that the appellant-auction purchaser was entitled to a confirmation of the sale notwithstanding the fact that after the holding of the sale the decree had been set aside. The policy of the Legislature seems to be that unless a stranger auction purchaser is protected against the vicissitudes of the fortunes of the suit, sales in execution would not attract customers and it would be to the detriment of the interest of the borrower and the credition alike if sales were allowed to be impugned merely because the decree was ultimately set aside or modified. The Code of Civil Procedure of 1908 make ample provision for the protection of the interest of the judgment-debtor who feels that the decree ought not to have been passed against him. On the facts of this case, it is difficult to see why the judgment debtor did not take resort to the provision of O. XXI, R. 89. The decree was for small amount and he could have easily deposited the decretal amount besides 5 per cent of the purchase money and thus have the sale set aside. For

reasons which are not known to us he did not do so."

52. The same principle has been laid down by the Apex Court in the case titled as *Hukumchand v. Bansilal and others*, reported in AIR 1968 Supreme Court 86. It is worthwhile to reproduce paras 8 and 9 of the judgment herein:

"8. It is on these principles that we have to decide whether the trial court was correct. We have already indicated that the sale was held on April 7, 1958, and in the normal course it would have been confirmed after 30 days unless an application under R. 89, R. 90 or Rule 91 Order 21 was made. Besides this case is, as we have already assumed, analogous to the case of a final mortgage decree. The judgment-debtor mortgagor had the right to deposit the amount at any time before confirmation of sale within 30 days after the sale or even more than 30 days after the sale under Order 34, Rule 5 (1) so long as the sale was not confirmed. If the amount had been deposited before the confirmation of sale, the judgment-debtors had the right to ask for an order in terms of Order 34, Rule 5 (1) in their favour. In this case an application under O.XXI R. 90 had been made and therefore the sale could not be confirmed immediately after 30 days which would be the normal course; the confirmation had to await the disposal of the application under Order 21, Rule 90 . That application was disposed of on October 7, 1958 and was dismissed. It is obvious from the order sheet of October 7, 1938 that an oral compromise was arrived at between the parties in court on that day. By that compromise time was granted to the respondents to deposit the entire amount due to the decree holder and the auction-purchaser by November 21, 1958. Obviously, the basis of the compromise was that the respondents withdrew their application under O. XXI, Rule 90 while the decree holder society and the auction-purchaser appellant agreed that time might be given to deposit the amount upto November 21, 1958. If this agreement had not been arrived at and if the application under Order 21, Rule 90 had been dismissed (for example, on merits) on October 7, 1958, the court was bound under O. XXI, Rule 92 (1) to confirm the sale at once. But because of the compromise between the parties by which the respondents were given time upto November 21, 1958 the court rightly postponed the question of confirmation of sale till that date by consent of parties. But the fact remains that the application under Order 21, Rule 90 had been dismissed on October 7, 1958 and thereafter, the court was bound to confirm the sale but for the compromise between the parties giving time upto November 21, 1958.

9. Now let us see what happened about November 21, 1958. On November 20, 1958, an application was made by the respondents praying that they might be given one day more as November 21, 1958 was holiday. No order was passed on that date, but it is remarkable that no money was deposited on November 20, 1958. When the matter came up before the court on November 22, 1958 no money was deposited even on that day. Now under Order 34, Rule 5 it was open to the respondents to deposit the entire amount on November 22, 1958 before the sale was confirmed, but no such deposit was made on November 22, 1958.

On the other hand, counsel for the respondents prayed to the executing court for extension of time by 14 days. The executing court refused that holding that time upto November 21, 1958 had been granted by consent and it was no longer open to it to extend that time. The executing court has not referred to Order 21, Rule 92 in its order, but it is obvious that the executing court held that it could not grant time in the absence of an agreement between the parties, because Order 21, Rule 92 required that as the application under Order 21, R. 90 had been dismissed the sale must be confirmed. We are of the view that in the circumstances it was not open to the executing court to extend time without consent of parties, for time between October 7, 1958 to November 21, 1958 was granted by consent of parties. Section 148 of the Code of Civil Procedure would not apply in these circumstances, and the executing court was right in holding that it could not extend time. Thereafter it rightly confirmed the sale as required under Order 21, Rule 92 there being no question of the application of Order 34, Rule 5 for the money had not been deposited on November 22, 1958 before the order of confirmation was passed. In this view of the matter, we are of opinion that the order of the executing court refusing grant of time and confirming the sale was correct."

53. In the case titled as M/s. Kayjay Industries (P) Ltd. v. M/s. Asnew Drums (P) Ltd. and others, reported in (1974) 2 Supreme Court Cases 213, the Apex Court has held that the Courts are not bound to adjourn the sale till a good price is got, it being a notorious fact that court sales and market prices are distant neighbours. Further held that mere inadequacy of price cannot demolish every court sale. It is apt to reproduce paras 7, 9 and 10 of the judgment herein:

"7. Certain salient facts may be highlighted in this context. A Court sale is a forced sale and, notwithstanding the competitive element of a public auction, the best price is not often forthcoming. The judge must make a certain margin for this factor. A valuer's report, good as a basis, is not as good as an actual offer and variations within limits between such an estimate, however careful, and real bids by seasoned businessmen before the auctioneer are quite on cards. More so, when the subject matter is a specialised industrial plant, which has been out of commission for a few years, as in this case, and buyers for cash are bound to be limited. The brooding fear of something out of the imported machinery going out of gear, the vague apprehensions of possible claims by the Dena Bank which had a huge claim and was not a party, and the litigious sequel at the judgment debtor's instance, have "scare" value in inhibiting intending buyers from coming forward with the best offers. Businessmen make uncanny calculations before striking a bargain and that circumstances must enter the judicial verdict before deciding whether a better price could be had by a postponement of the sale. Indeed, in the present case, the executing Court had admittedly declined to affirm the highest bids made on 1651969, June 5, 1969 and August 28, 1969, its anxiety to secure a better price being the main reason. If Court sales are too frequently adjourned with a view to obtaining a still higher price it may prove a selfdefeating exercise, for industrialists will lose faith in the actual sale taking

place and may not care to travel up to the place of auction being uncertain that the sale would at all go through. The judgment debtor's plea for postponement in the expectation of a higher price in the future may strain the credibility of the Court sale itself and may yield diminishing returns as was proved in this very case.

8.

9. The first respondent's counsel, Shri Parekh, drew our attention to condition No. 3 in the present proclamation of sale which is as follows :

The highest bidders for the two lots shall be declared to be the purchasers of the respective lots, provided always that he or they are legally qualified to bid, and provided that it shall be in the discretion of the undersigned Receiver holding the sale to decline acceptance of the highest bid for any lot when the price offered for any of the two lots appears so manifestly inadequate, as to make its acceptance inadvisable. The highest bid offered by any bidders for any of the two lots shall be subject to the sanction and approval of the District Judge, Thana.

Form 29 prescribed in Appendix E to the Code contains condition No. 3 which is in like terms. The Court's activist obligation to exercise a discretion to make a fair sale out of a Court auction and avert a distress sale is underscored by this provision. In all public sales the authority must protect the interests of the parties and the rule is stated by this Court in *Navalkha and Sons. v. Ramanya Das*, (1970) 3 SCR 1 = (AIR 1970 SC 2037) thus :"

The principles which should govern confirmation of sales are well established. Where the acceptance of the offer by the Commissioners is subject to confirmation of the Court the offerer does not by mere acceptance get any vested right in the property so that he may demand automatic confirmation of his offer. The condition of confirmation by the Court operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the Court to satisfy itself that having regard to the market value of the property the price offered is unreasonable. Unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion."

Be it by a receiver, commissioner, liquidator or Court this principle must govern. This proposition has been propounded in many rulings cited before us and summed up by the High Courts. The expressions "material irregularity in the conduct of the sale" must be benignantly construed to cover the climax act of the Court accepting the highest bid. Indeed, under the Civil Procedure Code, it is the Court which conducts the sale its duty to apply its mind to the material factors bearing its mind to the material factors bearing on the reasonableness of the price offered is part of the process of obtaining a proper price in the course of the sale. Therefore, failure to apply its mind to this aspect of the conduct of the sale may amount to material irregularity Mere, substantial injury without

material irregularity is not enough even as material irregularity not linked directly to inadequacy of the price is insufficient. And where a Court mechanically conducts the sale or routinely signs assent to the sale papers, not bothering to see if the offer is too low and a better price could have been obtained, and in fact the price is substantially inadequate, there is the presence of both the elements of irregularity and injury. But it is not as if the Court should go on adjourning the sale till a good price is got, it being a notorious fact that Court sales and market prices are distant neighbours. Otherwise, decree holders can never get the property of the debtor sold. Nor is it right to judge the unfairness of the price by hindsight wisdom. May be, subsequent events, not within the ken of the executing Court when holding the sale, may prove that had the sale been adjourned a better price could have been had. What is expected of the Judge is not to be a prophet but a pragmatist and merely to make a realistic appraisal of the factors, and, if satisfied that, in the given circumstances, the bid is acceptable, conclude the sale. The Court may consider the fair value of the property, the general economic trends, the large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and the possibility of litigation, and several other factors dependent on the facts of each case. Once that is done, the matter ends there. No speaking order is called for and no meticulous post mortem is proper. If the Court has fairly, even if silently, applied its mind to the relevant considerations before it while accepting the final bid, no probe in retrospect is permissible. Otherwise, a new threat to certainty of Court sales will be introduced.

10. So viewed we are satisfied that the district Court had exercised a conscientious and lively discretion in concluding the sale at Rs. 11.5 lakhs. If the market value was over 17 lakhs, it is unfortunate that a lesser price was fetched. Mere inadequacy of price cannot demolish every Court sale. Here, the Court tried its best, time after time, to raise the price. Well known industrialists in the public and private sectors knew about it and turned up. Offers reached a stationary off indefinitely in recovering its dues on baseless expectations and distant, prospects. The judgment-debtor himself, by his litigious exercises, would have contributed to the possible buyers being afraid of hurdles ahead. After all, producing around Rs. 11.4 lakhs openly to buy an industry is not easy even for apparently affluent businessmen. The sale proceedings had been pending too long and the first respondent could not, even when given the opportunity, produce buyers by private negotiation. Not even a valuer's report was produced by him. We are satisfied that the District Judge had committed no material irregularity in the conduct of the sale in accepting the highest offer of the appellant on September 3, 1969."

54. We have gone through the entire record and the proceedings drawn by the learned Single Judge/executing Court and are of the view that no irregularity has been committed in attaching the property, conducting the auction proceedings and confirming the sale.

55. Having said so, the appeal, on the face of it, is not maintainable. Even otherwise, on merits also, as discussed herein above, the appeal deserves to be dismissed and is dismissed accordingly along with all pending applications.