**(2014) 09 MAD CK 0134**

**In the Madras High Court**

**Case No :** Civil Miscellaneous Appeal No. 342 of 2003 and C.M.P. No. 783 of 2013

Pavayammal APPELLANT

Vs

Thangammal RESPONDENT

**Date of Decision :** 25-09-2014

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 17, Order 21 Rule 64, Order 21 Rule 66, Order 21 Rule 90, Order 38 Rule 5

**Citation :** (2015) 2 CTC 285 : (2014) 5 LW 29 : (2015) 1 MLJ 267

**Hon'ble Judges :** R. Subbiah, J

**Bench :** Single Bench

## Judgement

R. Subbiah, J.—The present appeal has been filed as against the fair and decretal order dated 03.01.2003 in R.E.A. No. 1408 of 1996 in R.E.P. No. 340 of 1994 in O.S. No. 255 of 1989 on the file of the Sub-Court, Namakkal, dismissing the application filed by the appellant herein under Order 21 Rule 90 of CPC r/w Section 151 of CPC, to set aside the auction sale of the ancestral property of the appellant''s husband conducted on 18.09.1996.

2. The deceased 1st appellant herein-Pavayammal, who is the mother of the deceased 3rd respondent herein, is a third party in the execution proceedings filed in R.E.P. No. 340 of 1994 in the Original Suit No. 255 of 1989. Originally this appeal was filed by the 1st appellant-Pavayammal as against the respondents 1 to 3 herein. Pending the appeal, since the 1st appellant-Pavayammal died on 23.03.2005, her legal heir Selvarani was brought on record as 2nd appellant. Since the 1st respondent died, his legal heirs were brought on record as respondents 4 to 6. Similarly, since the 3rd respondent died, his legal heirs were brought on record as respondents 7 & 8.

3. The 1st respondent herein-Thangammal (deceased) had filed a suit in O.S. No. 255 of 1989 on the file of the Sub-Court, Namakkal, for recovery of a sum of Rs. 35,430/- as against the deceased 3rd respondent herein viz., T.N. Seeragarayan and one Natarajan, husband of the 2nd respondent herein and the said suit was

decreed on 22.02.1994 as against the said Natarajan (husband of the 2nd respondent herein) and the 3rd respondent herein (son of the 1st appellant Pavayammal).

4. Subsequently, the 1st respondent herein filed execution petition in R.E.P. No. 340 of 1984 seeking to bring four items of immovable property belonging to the 3rd respondent herein/judgment debtor for sale. The Executing Court had ordered for bringing Item-2 property measuring 20 acres alone for sale and deleted the other three items of properties. Subsequently, in the auction sale conducted on 18.09.1996, the 2nd respondent herein ie., the wife of another Judgment debtor viz. Natarajan, has purchased the property for a sum of Rs. 3,20,000/-.

5. Thereafter, as a third party, the deceased 1st appellant herein Pavayammmal, mother of the deceased 3rd respondent/judgment debtor filed an application on 15.10.1996, i.e., within a month''s time from the date of the auction sale, under Order 21 Rule 90 of CPC, in R.E.A. No. 1408 of 1996 to set aside the auction sale dated 18.09.1996, contending that the suit property is not exclusive property of the 3rd respondent/Judgment debtor alone and the suit property is an ancestral property. It is the case of the deceased 1st appellant that she and her two daughters along with the 3rd respondent/her son are having equal shares in the suit property and each one is having 1/4th share in the suit property. The 3rd respondent/Judgment Debtor has no right or salable interest in respect of whole suit property. The property which was sold in the auction sale conducted on 18.09.1996 is a land measuring to an extend of 20.5 acres worth about Rs. 25 lakhs. But, the said property was brought for sale for the lesser amount of Rs. 56,998.75/- claimed in the execution petition. The respondents have colluded together and brought the property for sale including the share of the deceased 1st appellant/third party, with a view to cheat her. The suit property was already mortgaged with the Canara Bank by the deceased 3rd respondent/judgment debtor towards the loan availed by him. Since the deceased 3rd respondent/ judgment debtor failed to pay the loan amount, a suit in O.S. No. 337 of 1988 came to be filed by the Canara Bank and pursuant to the decree passed in the said suit, the Canara Bank filed an execution petition in R.E.P. No. 278 of 1992. When the deceased 1st appellant came to know about these facts, she had filed a suit for partition in O.S. No. 186/1993 before the District Munsif, Rasipuram, as against her son (deceased 3rd respondent/judgment debtor) and her two daughters, for partition of the suit property and allotment of her 1/4th share in the property; she had impleaded the Canara Bank as 4th defendant in the said partition suit. Pending the said partition suit, the deceased 1st appellant had also obtained interim injunction order on 14.12.1993 as against the Canara Bank in I.A. No. 1112 of 1993, restraining them from bringing the property for sale. In such circumstances only, the property was sold in R.E.P. No. 340 of 1994 which was filed by the deceased 1st respondent herein, pursuant to the decree passed in O.S. No. 255 of 1989 as against the deceased 3rd respondent herein (son of the 1st appellant herein) and one Natarajan (husband of the 2nd respondent

 

herein).

6. When the deceased 1st appellant came to know about the auction sale of the property through one Kumarasan S/o. Venkatarajan, she had filed an application in R.E.A. No. 1408 of 1996 seeking to set aside the auction sale dated 18.09.1996 stating that the judgment debtor/3rd respondent has no salable right in respect of her 1/4th share in the suit property.

7. The said application was opposed by the deceased 1st respondent/decree holder by filing a counter, which was adopted by the auction purchaser / 2nd respondent, inter alia, stating that the 1st appellant/third party has no right in the suit property, which was sold under the auction sale. Further, in the counter affidavit, they have also denied that the value of the property is Rs. 25 lakhs. Thus, they sought for dismissal of the application.

8. Before the Executing Court, on the side of the deceased 1st appellant/third party, she examined herself as P.W.1 and marked seven documents as Ex.A.1 to Ex.A.7. On the side of the deceased 1st respondent/decree holder, two witnesses were examined as R.W.1 & R.W.2 and one document was marked as Ex.B.1.

9. The Executing Court, after analysing the entire evidence and the submissions made on either side, had dismissed the application filed by the deceased 1st appellant/third party, mainly on the reasoning that only if there is any material irregularity or fraud in the auction sale conducted by the Court, the third party can seek for the relief of setting aside the sale under Order 21 Rule 90 of CPC; but, in the instant case there was no fraud or material irregularity in the auction sale, as alleged by the deceased 1st appellant/third party. The Executing Court has further observed that though the execution petition was filed to bring four items of property for sale by the decree holder, by order dated 3.4.1996, three items of the suit properties were deleted and 2nd item of property alone was ordered to be brought for auction sale; the 1st appellant/third party has not raised any objection till the auction sale was completed on 18.09.1996. Thus, the Execution Court has come to the conclusion that there is no collusion between the decree holder and the auction purchaser and thus, dismissed the application filed by the deceased 1st appellant/third party. Aggrieved over the same, the present appeal has been filed by the deceased 1st appellant/third party.

10. Now, it is the main submission of the learned counsel for the appellants that the property which was sold in the auction on 18.09.1996 is their ancestral property and the deceased 1st appellant and her two daughters along with the deceased 3rd respondent (son) are having equal share in the said property. The deceased 3rd respondent/judgment debtor is having salable interest only in respect of his 1/4th share in the property. In fact, the deceased 3rd respondent had mortgaged the suit property with the Canara Bank and since he failed to repay the loan amount, the Canara Bank had filed a suit in O.S. No. 337 of 1988 and pursuant to the decree passed in O.S. No. 337 of 1988, the Canara Bank had filed an execution petition R.E.P. No. 278 of 1992 to bring the property for sale;

 

at that juncture, the deceased 1st appellant/third party had filed a suit for partition in O.S. No. 186 of 1993 and the said partition suit was decreed in favour of the deceased 1st appellant on 17.04.1997 and the decree passed in O.S.185 of 1993 itself confers the right on the deceased 1st appellant/third party in respect of her 1/4th share in the suit property. Therefore, she is entitled to file the application under Order 21 Rule 90 of CPC to set aside the auction sale conducted on 18.09.1996.

11. The learned counsel for the appellants further submitted that the total extent of the land, which was sold in the auction on 18.09.1996 was 20.5 acres and the value of the land is Rs. 25 lakhs; whereas the execution petition was filed for recovery of Rs. 48,575/- along with cost amount of Rs. 4,684.25. The said property was sold for only for a sum of Rs. 3,20,000/-. Therefore, there is an excessive execution of the decree. As per Order 21 Rule 64 of CPC, only a portion of the property, which would be sufficient to meet the decretal debt alone could be sold. In the instant case, even as per the admission of R.W.2, who is the husband of the auction purchaser, the market value of the property is Rs. 15,000/- per acre on the date of sale. The claim made under the execution petition is only for a sum of Rs. 53,259.25 (including the costs). Thus, the learned counsel for the appellants submitted that even as per the statement of R.W.2 in his evidence, selling a portion of the property itself would be sufficient to meet the decretal debt. But the Court below has sold the property of 20.5 acres worth about Rs. 25 lakhs for a decretal amount of Rs. 48,575/-. Therefore, there is a material irregularity in selling the property in the auction conducted on 18.09.1996 and therefore, on this ground alone, the impugned order is liable to be set aside. In this regard, the learned counsel for the appellant has relied upon the judgments reported in_ (i) Ambati Narasayya Vs. M. Subba Rao and another, , (ii) Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh, , (iii) Balakrishnan Vs. Malaiyandi Konar, and (iv) Subramaniyan and Others Vs. Sadaya Padayachi and Others,

12. Per contra, countering the submissions made by the learned counsel for the appellants, the learned counsel appearing for the respondents 4 to 6, LRs of the decree holder, submitted that the 1st appellant/third party has no locus standi to file the application under Order 21 Rule 90 of CPC. Under Order 21 Rule 90, only if interest of a person in the property is affected by the sale, the said person can apply to the Court to set aside the sale on the ground of material irregularity or fraud in the public auction for sale conducted by the Court. But, in the instant case, the deceased 1st appellant/third party was claiming 1/4th share in the property, only pursuant to the decree passed in the partition suit filed by her in O.S. No. 186 of 1993 and the said partition suit was filed by her claiming 1/4th share in respect of the property situated in S. No. 152/2 measuring to an extent of 0.45.0 hectares alone, whereas in the execution proceedings, in the schedule of the properties in R.E.P. No. 340 of 1994, item No. 2 contains eight survey numbers, including S. No. 152/2, and total extent of the property is 8.37 hectares, but only 20.5 acres alone was sold in the auction sale on 18.09.1996.

 

The appellant has not obtained any decree in her favour in the partition suit in respect of the other survey numbers, which would show that she has no interest in the property. Further more, in the partition suit, only the Canara Bank alone was the contesting party and her two daughters and son remained exparte in the said partition suit. The decree obtained in the said partition suit is only an collusive decree obtained by the 1st appellant/third party. More over, neither the decree holder (1st respondent herein) nor the auction purchaser (2nd respondent herein) was added as a party in the said partition suit filed by the 1st appellant/third party. Therefore, the said decree has no binding effect against the decree holder and auction purchaser in the present proceedings.

13. In this regard, the learned counsel for the respondents 4 to 6 relied on the judgment reported in Khetrabasi Biswal Vs. Ajaya Kumar Baral and Others, , wherein it has been held that in the absence of necessary party, the decree passed is nullity and does not have a binding effect. It is further submission of the learned counsel for the respondents 4 to 6 that except S. No. 152/2, no other properties have been added in the partition suit in O.S. No. 186/1993 filed by the 1st appellant/third party. Since the said partition suit was filed for partial partition, the decree passed in the said partition suit itself is a non est in the eye of law. In support of this contention, the learned counsel for the respondents 4 to 6 relied on the judgment reported in Kenchegowda (Since Deceased) by Legal representatives Vs. Siddegowda alias Motegowda, .

14. Thus, it is the submission of the learned counsel for the respondents 4 to 6 that though the partition suit in O.S. No. 186 of 1993 had been filed by the 1st appellant herein as against her son (deceased 3rd respondent herein/Judgment debtor), two daughters and Canara Bank, the appellant''s son and daughters remained exparte and Canara Bank alone contested the said partition suit. The decree obtained by the 1st appellant in the said partition suit is only a collusive decree obtained by playing fraud and it is non est in the eyes of law. Therefore, according to the learned counsel for the respondents 4 to 6, the 1st appellant cannot claim any right over the suit property based on the said decree. When that being so, she is not entitled to file the application under Order 21 Rule 90 of CPC to set aside the sale.

15. As next fold of submission, the learned counsel for the respondents 4 to 6 submitted that under Order 21 Rule 90 CPC, a sale could be set aside only if there is any material irregularity or fraud in the public auction conducted by the Court. In the application filed under Order 21 Rule 90 of CPC, the question as to whether the judgment debtor was having a salable right/interest in the property cannot be gone into. In the instant case, the application under Order 21 Rule 90 of CPC was filed by the 1st appellant/third party stating that the 3rd respondent/ Judgment Debtor has no salable interest in the property. Further, if a third party seeks to set aside the sale under Order 21 Rule 90 of CPC, on the ground of material irregularity or fraud, he/she must specifically plead the material irregularity or fraud in the application filed under Order 21 Rule 90 of CPC. But,

 

in the instant case, there is no specific pleading made by the 1st appellant with regard to the material irregularity or fraud in the auction sale conducted on 18.09.1996. In this regard, the learned counsel for the respondents 4 to 6 relied upon the judgment reported in Saheb Khan Vs. Mohd. Yusufuddin and Others, , wherein it has been held that a charge of fraud or material irregularity under Order 21 Rule 90 of CPC must be specifically made with sufficient particulars.

16. Further, the learned counsel for the respondents submitted that Executing Court by order dated 03.04.1996 deleted three items of properties and ordered for sale of 2nd item of property alone. At that time itself, the appellants could have raised her objection. Having failed to raise objection at the earliest point of time itself, the appellants cannot now come and say that there is excessive execution. In this regard, the learned counsel for the respondents 4 to 6 relied on the judgment reported in Kadiyala Rama Rao Vs. Gutala Kahna Rao (Dead) By Lrs. and Others, , wherein it has been held that no application would be entertained upon a ground which the applicant could have taken on or before the date of drawing up of the proclamation of sale.

17. Further, the learned counsel for the respondents 4 to 6 submitted that the subject suit was filed by the 1st respondent herein as against the 3rd respondent herein and one Natarajan in the year 1989 and pending the suit, the property was under attachment under Order 38 Rule 5 of CPC; therefore, the deceased 3rd respondent is well aware of the attachment of the property as early as in the year 1989 itself; hence, deceased 1st appellant who is the mother of the deceased 3rd respondent/judgment debtor could have raised her objection with regard to her share in the suit property, even before the bringing the property for sale.

18. The learned counsel for the respondents 4 to 6 submitted that apart from the decree passed in the subject suit viz., O.S. No. 255 of 1989, there was another money decree as against the deceased 3rd respondent, who was the son of the deceased 1st appellant, in O.S. No. 150 of 1992. Pursuant to the decree passed in the said suit also the property of 3rd respondent was attached by the decree holder in the said suit. In this regard, the learned counsel has also invited the attention of this Court to the execution petition filed in O.S. No. 150 of 1992 marked as Ex.A.6 before the trial Court. Thus, it is submitted by the learned counsel for the respondents 4 to 6 that considering all these aspects only, the Executing Court has sold the property measuring to an extent of 20.5 acres. Therefore, it is incorrect to state that there is an excessive execution of decree. Thus, the learned counsel sought for dismissal of the appeal.

19. In view of the submissions made on either side, now the following questions fall for consideration:

(1) Whether the 1st appellant/third party has no locus standi to file application under Order 21 Rule 90 of CPC?

(2) Whether there is any material irregularity or fraud in the auction sale

 

conducted by the Court on 18.09.1996, warranting this Court to set aside the sale?

20(1) Question No. (1): Originally the suit in O.S. No. 255 of 1989 was filed for recovery of money by the deceased 1st respondent herein as against the deceased 3rd respondent herein (son of the deceased 1st appellant herein) and one Natarajan (husband of the auction purchaser/2nd respondent). The decree was passed in the said suit on 22.02.1994, but the 1st respondent had chosen to execute the decree only as against the deceased 3rd respondent herein/ judgment debtor. Pursuant to the order passed by the Executing Court, the property measuring to an extent of 20.5 acres was sold in the public auction on 18.09.1996 and thereafter, the deceased 1st appellant herein, who is the mother of the deceased judgment debtor/3rd respondent herein, has filed the application under Order 21 Rule 90 of CPC to set aside the said auction sale.

20(2)It is the case of the appellants that the suit property is their ancestral property. The deceased 1st appellant, her two daughters and son (deceased 3rd respondent /judgment debtor) are equally entitled to 1/4th share in the suit property. In fact, the suit property was also mortgaged by the deceased 3rd respondent/Judgment Debtor in the Canara Bank and the Canara Bank has also filed a suit in O.S. No. 337 of 1988 as against the deceased 3rd respondent for recovery of loan amount and pursuant to the decree passed in O.S. No. 337 of 1988, an execution petition in R.E.P. 278 of 1992 was filed by the Canara Bank. At that juncture, the deceased 1st appellant filed a suit for partition suit in O.S. No. 185 of 1993 as against her son, daughters and Canara Bank and in that suit, a decree was passed in favour of the deceased 1st appellant, declaring her right over the 1/4th share in the suit property. Now, according to the learned counsel for the respondents 4 to 6, in the said partition suit daughters and son of the 1st appellant remained exparte and Canara Bank only contested the said partition suit and it is only a collusive suit and hence, the decree passed in the said partition suit is non est in the eye of law and the said decree will not have any force on the decree holder and auction purchaser in the subject suit.

20(3)Further, it is the submission of the learned counsel for the respondents 4 to 6 that the deceased 1st appellant herein had not included most of the properties in the said partition suit filed by her and therefore, the suit filed by her for partial partition is not maintainable. Therefore, based on the said decree, the deceased 1st appellant cannot file the application under Order 21 Rule 90 of CPC claiming that she is entitled to 1/4th share in the suit property.

20(4)Before entering into the discussion on the submissions made by the learned counsel on both sides, it would be appropriate to extract Order 21 Rule 90 of CPC, which reads as follows

?Application to set aside sale on ground of irregularity or fraud_ (1)Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

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

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

Explanation: The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this Rule.?

A reading of the above said provision would show that a sale may be set aside on the ground of material irregularity or fraud in publishing and conducting the auction to sell the property of the judgment debtor.

20(5) Now, according to the learned counsel for the appellants, there is a material irregularity in conducting the auction sale which had resulted in affecting the interest of the appellants in the suit property and therefore, they can maintain the application under Order 21 Rule 90 of CPC.

20(6) According to the learned counsel for the respondents 4 to 6, the deceased 1st appellant is claiming right over the suit property only based on a decree passed in a partition suit filed by her, since the decree passed in the said suit is a nullity, now the appellants cannot claim that their interest is affected by the auction sale. Therefore, they cannot maintain the application under Order 21 Rule 90 of CPC.

20(7) But, it could be seen that the deceased 1st appellant has filed the partition suit in O.S. No. 185 of 1993 claiming that the subject property is the ancestral property of her husband. Considering the case of the deceased 1st appellant, the said partition suit was decreed in her favour by allotting 1/4th share to her. Therefore, it is clear that the deceased 1st appellant was claiming right over the subject property not only based on the decree passed in the partition suit filed by her in O.S. No. 185 of 1993, but also on the fact that the subject property is the ancestral property of her husband; Hence, it was the specific case of the deceased 1st appellant that since the suit property is an ancestral property of her husband, she and her daughter and son(R3) are having equal right over the suit property. This fact was also not denied by the respondents 4 to 6.

20(8) Therefore, in my considered opinion, the appellants can very well maintain the application under Order 21 Rule 90 CPC and they have locus standi to file application under Order 21 Rule 90 of CPC, since their interest in the property would get affected, if the entire property is sold in the execution proceedings. In the instant case, in respect of the money decree passed against the deceased 3rd respondent, the shares of the deceased 1st appellant and other appellants were seized in execution proceedings.

20(9) It is yet another submission of the learned counsel for the respondents 4 to 6 that since the salable interest of a person cannot be decided in the application filed under Order 21 Rule 90 of CPC, the application filed by the 1st appellant under Order 21 Rule 90 of CPC is not maintainable as she has filed the same questioning the salable right of her son, 3rd respondent herein/judgment debtor. But, on perusal of the affidavit filed in support of the application, I find that only as a passing reference, it has been stated by the 1st appellant that the 3rd respondent/Judgment Debtor is having no salable interest over the suit property, in view of her right over 1/4th share in the suit property. In all other aspects, I find that the said application was filed by the deceased 1st appellant only on the ground that her interest in the property was affected by the sale of the suit property and therefore, I am not inclined to accept the submission made by the learned counsel for the respondents 4 to 6 that the application filed under Order 21 Rule 90 of CPC filed by the 1st appellant is not maintainable.

21(1) Question No. (2)_ It is the contention of the learned counsel for the respondents 4 to 6 that the suit was filed by the 1st respondent as against the 3rd respondent and one Natarajan for recovery of a sum of Rs. 35,430/- and the suit was decreed on 22.02.1994 and execution petition was filed for a sum of Rs. 53,259.25 (including interest and costs) and for said the claim amount made in the execution petition, the land measuring to an extent of 20.5 acres was sold. According to the learned counsel for the appellants, the value of the property on the date of sale is Rs. 25 lakhs and for the recovery of Rs. 53,259.25, the property worth about Rs. 25 lakhs was sold and therefore, there is an excessive execution of the decree.

21(2) Under Order 21 Rule 64 of CPC, only a portion of property which would suffice to meet the claim amount made in the execution petition alone should be sold. For better appreciation, it would be appropriate to extract Order 21 Rule 64 of CPC, which reads as follows:

Power to order property attached to be sold and proceeds to be paid to person entitled. Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

A reading of the said provision of law would show that if a portion of the property would itself suffice to satisfy the claim made in the execution petition, then that portion of the property alone should be sold.

21(3) In the instant case, it was the specific case of the deceased 1st appellant/third party that the property measuring an extent of 20.5 acres, worth about Rs. 25 lakhs, was sold for a recovery of a sum of Rs. 53,259.25. Further, I find that even in the cross-examination, R.W.2, husband of the auction purchaser, admitted that at the time of sale, the market value of the property was Rs.

 

15,000/- per acre, but the entire property of 20.5 acres was sold for a sum of Rs. 3,20,000/-. As per Order 21 Rule 64 of Civil Procedure Court, the Executing Court is under obligation to consider the fact as to whether the sale of only a portion of the properties would be sufficient to meet the total debt or not? But, in the instant case, before ordering for sale, the Executing Court has not considered the fact as to whether the sale of a portion of the property would suffice to satisfy the claim made in the execution petition or not. On the other hand, it has ordered for sale of the entire extent of the land in Item No. 2 of property. Hence, it is apparent that there is a clear material irregularity in the auction sale conducted by the Court below, since the sale conducted by the Court is not in accordance with Order 21 Rule 64 of C.P.C. In this regard, it would be appropriate to refer some of the decision.

In Ambati Narasayya Vs. M. Subba Rao and another, wherein it has been held by the Hon''ble Apex Court as follows:

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

In Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh, , it has been held as follows:

"12.Proviso to sub-rule (4) of Rule 17 of Order 21 provides the procedure to receive the application for execution of the decree. In the case of a decree for payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree. Rule 64 of Order 21 charges the Executing Court that it may order attaching of any property to the extent that "such portion thereof as may seem necessary to satisfy the decree would be sold". It is also enjoined under sub-rule (2)(a) of Rule 66 of Order 21 that where a part of the property would be sufficient to satisfy the decree the same be sold by public auction. Form 27 of Appendix of the schedule also directs the court auctioneer to sell so much of the said property as shall realise the sum in the said decree and costs. The Code, therefore, has taken special care charging the duty on the Executing Court and it has a salutary duty and a legislative mandate to apply its mind before settling the terms of proclamation and satisfy that if part of such property as seems necessary to satisfy the decree should be sold if the sale proceeds or portion thereof is sufficient for payment to the decree-holder or the person entitled under the decree to receive the amount and so much of that property alone should be ordered to be sold in execution. In Ambati Narasayya Vs. M. Subba Rao and another, this Court held that it is the duty cast upon the court under Order 21 Rule 64 to sell only such property or a portion thereof as may be necessary to satisfy the decree. It is a mandate of the legislature which cannot be ignored. Therein for execution of a decree of a sum of Rs 2,000 and costs, the appellant''s 10 acres land was brought to sale which was purchased for a sum of Rs 17,000, subject to discharge of a prior mortgage of Rs 2,000. This Court held that without the court''s examining whether a portion of the property could be sold, the sale held was not in conformity with the requirement of Order 21 Rule 64 and it was held to be illegal and without jurisdiction. The sale was set aside and the court was directed to put the judgment-debtor in possession of the land and to refund the sale amount to the auction-purchaser. Further direction was given to execute the decree in accordance with law. In Mangal Prasad (dead) by LRs. and another Vs. Krishna Kumar Maheshwari and others, a shop was sold to realise a decree debt of about Rs 29,000 and the sale price at the auction was Rs. one lakh and odd. This Court finding that it is excessive execution, set aside the sale and directed return of the sale amount to the auction-purchaser with interest @ 12%. In Takkaseela Pedda Subba Reddi Vs. Pujari Padmavathamma and Others, to recover the decree debt in two decrees, the properties situated in two different villages were brought to sale. In the first instance the property in ''D'' village fetched a sum of Rs 16,880, which was sufficient to satisfy the decretal amount. The property in ''G'' village was also sold which fetched a sum of Rs 12,000. This Court set aside the sale of ''G'' village. Admittedly the site in sale is to the extent of 550 sq. yards, situated in a commercial area around which the petroleum installations are established. Though, as contended by Shri Madhava Reddy, that there may be building regulation for division of the property into portions, but the court made no attempt to sell a portion of the property, maybe 100 yards or 150 yards out of it, or whether undivided portion thereof would have satisfied the decree debt. It could be legitimately concluded that the court did not apply its mind at all to this aspect as well...........

15. Under Section 47 all questions relating to execution, discharge or satisfaction of the decree should be determined by the Executing Court alone. The pre-sale illegalities committed in the execution are amenable to the remedy under Section 47. Post-sale illegalities or irregularities causing substantial injury to the judgment-debtor are covered under Order 21 Rule 90. Sub-rule (1) thereof covers the field of material irregularities or fraud in publicity or conducting the sale. Sub-rule (2) enjoins proof thereof and the court should find that by reason thereof the applicant sustained substantial injury. The total absence of drawing up of the proclamation of sale and settlement of its term by judicial application of mind renders the sale a nullity being void. It is covered by Section 47. The non-application of mind whether sale of a part of the property would satisfy the

decree debt is a material irregularity doing substantial injury to the appellant attracting Order 21 Rule 90. In either case the sale is liable to be set aside. It is true that there is distinction between mere irregularity and material irregularities and the sale is not liable to be set aside on proof of mere irregularity. It must be material irregularity and the court must be satisfied that on account thereof substantial injury was sustained by the appellant. The sale of 550 sq. yards for recovery of a paltry sum of Rs 7,780.33, without selling a portion thereof, caused substantial injury to the appellant."

In Balakrishnan Vs. Malaiyandi Konar, it has been held as follows:

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

A reading of the above judgments would show that in the execution proceedings in respect of a simple money decree, to bring the property for sale, the Executing Court is under obligation to consider the fact as to whether sale of a portion of the property is sufficient to meet the claim made in the execution petition or not? If Executing Court, without considering the same, ordered for sale of the whole property, definitely it would result in material irregularity in conducting the sale.

21(4)Further, in the case reported in Subramaniyan and Others Vs. Sadaya Padayachi and Others, , when a ground was raised that the property is one block and the same has to be sold as such, this Court has held that the view of the Executing Court that since the property is one block and the same has to be sold as such, is illegal and without understanding of legal position. Therefore, in my considered opinion, if sale of the property is ordered by the Executing Court, without considering the fact as to whether only a portion of the property would suffice to meet the claim made in the execution petition, it is against Order 21 Rule 64 of CPC and therefore, the sale is liable to be set aside on the ground of material irregularity.

21(5) It is the submission of the learned counsel for the respondents 4 to 6 that if a person seeks to set aside the sale on the ground of material irregularity, he/she has to specifically plead the same in the application filed under Order 21 Rule 90 of CPC; but, in the instant case, there is no specific pleading in the application filed by the 1st appellant with the regard to the material irregularity in the auction sale and as such, the application is liable to be dismissed. In this regard, the learned counsel for the respondents 4 to 6 relied on the judgment reported in Saheb Khan Vs. Mohd. Yusufuddin and Others, .

21(6) But, I find that in the application, the 1st appellant had clearly stated that the property measuring 20.5 acres worth about Rs. 25 lakhs was sold for a simple money decree of Rs. 35,430/-, including the share of the 1st appellant. Further, she had stated that she was 73 years old widow and she was finding it difficult to carry on her livelihood. The sale of her share in the property put her into irreparable loss. Therefore, I find that the material irregularity committed by the Execution Court was specifically stated by the 1st appellant in her application. Under such circumstances, I am of the opinion that when the sale is not in conformity with Order 21 Rule 64 of CPC, that itself would suffice to set aside the sale on the ground of material irregularity.

21(7) It is further submission of the leaned counsel for the respondents 4 to 6 that by order dated 03.04.1996, the Executing Court has deleted three items of property and ordered for sale of 2nd item of property alone; if the 1st appellant was aggrieved, she should have raised her objection at the relevant point of time itself.

21(8) But, it was the specific case of the 1st appellant that the 1st appellant had knowledge about the sale of the property only through one Kumaresan S/o. Venkatarajan on 14.10.1996. The 1st appellant had further stated that her son (3rd respondent) is living separately. Therefore, I am of the opinion that the 1st appellant has clearly explained the delay in filing the application under Order 21 Rule 90 of C.P.C.

21(9) It is another submission of the learned counsel for the respondents 4 to 6 that the property was under attachment pending the suit, which was filed in the year 1989; therefore, it cannot be said that the 1st appellant/third party had no knowledge about the auction sale. But, I find that the attachment was not communicated to the Registering Officer. If the order of attachment was not communicated to the Registering Officer, it has no force. In fact, the appellants had also produced two Encumbrance Certificates for the period from 01.01.1976 to 31.12.1989 and in the said ECs the order of attachment passed by the Court below was not reflected. Therefore, the submission made by the learned counsel for the respondents 4 to 6 that since there was an order of attachment, the appellants ought to have had the knowledge about the sale, cannot be accepted. When the order of attachment was not communicated to the Registering Officer, absolutely it has no force in the eyes of law. Therefore, the submission made by the learned counsel for the respondents 4 to 6 based on the order of attachment, cannot be accepted.

21(10) It is further submission of the learned counsel for the respondents 4 to 6 that from the proclamation, it could be seen that the subject property was attached by the other decree holder also. Therefore, the entire property was sold. But, I find, this submission made by the learned counsel for the respondents 4 to 6 is not the pleading before the Executing Court. Even the Execution Court has not stated anything about the decree obtained by the other decree holder in the impugned order. Hence, the submission made by the learned counsel for the respondents 4 to 6 in this aspect cannot be accepted.

21(11) In a simple money decree, if the property is attached and to be sold, the Execution Court is under the obligation to consider the fact as to whether the sale of a portion of the property itself would be sufficient to meet the claim under execution petition or not? If the same is not considered by the Executing Court and if the property is sold, which value is more than that of the claim made in the execution petition, it is nothing, but the material irregularity in conducting the sale and against the Order 21 Rule 64 of CPC. If such sale is questioned by a person whose interest in the property was affected, then the said sale is liable to be set aside on the ground of material irregularity. In the instant case, auction sale was conducted not in accordance with Order 21 Rule 64 of C.P.C. Hence, the auction sale is liable to be set aside on the ground of material irregularity.

For the foregoing reasons, the impugned order passed by the Court below is set aside and the Civil Miscellaneous Appeal is allowed as prayed for. Consequently, connected Miscellaneous Petition is closed. No costs. However, the respondents 4 to 6 who are the legal heirs of the decree holder are at liberty to work out their remedy to realise the decree amount before the Executing Court in accordance with law.

 