

(2003) 04 CAL CK 0053
In the Calcutta High Court
Case No : C.O. No. 2944 of 2001

Smt. Arati Daw

APPELLANT

Vs

Pradip Roy Chowdhury and Others

RESPONDENT

Date of Decision : 08-04-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 33, Order 21 Rule 66, Order 21 Rule 67, 115

Citation : AIR 2003 Cal 218 : (2003) 3 CALLT 298 : 107 CWN 740 : 107 CWN 1069

Hon'ble Judges : Pranab Kumar Chattopadhyay, J

Bench : Single Bench

Advocate : A.C. Kar and S. Chakraborty, for the Appellant; Tapan Dutta and P. Saha, for the Respondent

Final Decision : Dismissed

Judgement

Pranab Kumar Chattopadhyay, J.—This revisional application is directed against the judgment and order dated 16th July 2001 passed by the learned Additional District Judge, 13th Court, South 24 -- Parganas, Alipore in Misc. Appeal No. 417 of 2000. The facts of the case disclose a shocking state of affairs amounting to fraud on Court resulting in the purported sale of a valuable three-storied building in a posh area of the city of Calcutta for a paltry sum of Rs. 12,000/- only to the decree holder who also happened to be the lone bidder.

2. The learned Additional District Judge by the said impugned order dated 16th July 2001 condoned the delay in filing the application and sent the matter back on remand to the trial Court with the specific direction to re-hear the case on merits and to dispose of the same as expeditiously as possible after giving opportunity of hearing to the respective parties.

3. Certain relevant facts in relation to this proceeding are briefly summarised as hereunder :

The mother of the respondent/opposite party Nos. 4 to 8, Surama Ghosh alias Dutta. since deceased, was the owner of the said house property who purchased the vacant land on 10th August 1949 from Ballygunge Estate Limited for a consideration of Rs. 22,264 and 8 annas and thereafter constructed a three-storied building thereon and started residing therein after letting out some portion of the said building to the tenants.

4. The deceased father of the said respondent/opposite party Nos. 4 to 8 and the deceased husband of Late Surama Ghosh alias Dutta took loan of Rs. 9,500/- from one Apel Roy Chowdhury, predecessor-in-interest of respondent Nos. 1 to 3 herein. For recovery of the aforesaid loan amount said Apel Roy Chowdhury, since deceased, instituted a proceeding being Money Suit No. 6 of 1967 in the Third Court of Subordinate Judge at Alipore against the predecessor-in-interest of the respondent Nos. 4 to 8 herein and ultimately obtained an ex parte decree for Rs. 11,115.83 inclusive of interest.

5. On 26th August 1968, the decree holder in the said Money Suit No. 6 of 1967 put the decree into execution for realisation of the decretal dues of Rs. 12,257.91p by filing the Execution case which was registered as Money Execution Case No. 34 of 1968.

6. It was contended on behalf of the respondent/opposite party Nos. 4 to 8 that their deceased mother who was the actual owner of the house in question, had no knowledge of the execution proceeding and she was never served with the process in connection with the execution. It has been specifically alleged that the service of all notices were suppressed by the decree holder.

7. Initially, the sale of the aforesaid house property was fixed on 12th March 1969 and as the sale proclamation and attachment was not served, it was re-issued on 12th March 1969 and after filing of the requisites on 20th March 1969 and the sale was fixed on 18th June 1969. On 17th June 1969. the judgment Debtor filed a petition for adjournment of the sale and prayed for two months time for payment of the decretal dues.

8. The sale proclamation was issued on 20th June 1969 and on 12th July 1969 the sale was held and with the leave of the Court the property was purchased by the decree holder at a sum of Rs. 12,257/- as the said bid of the decree holder for the aforesaid sum of Rs. 12,257/- was accepted by the Executing Court. On 14th August 1969 the sale was confirmed by the learned Judge of the Executing Court and on 30th December 1969 the sale certificate was issued.

9. Undisputedly the deceased father of the respondent Nos. 4 to 8 herein took loan of Rs. 9,500/- and mother was not concerned in any event in connection to the said loan although the three-storied building in Lansdowne area in South Calcutta, owned by the said deceased mother of the respondent Nos. 4 to 8 was sold in auction in execution of an ex parte decree for a sum of Rs. 12,000/- and odd.

10. Although the deceased mother of the respondent Nos. 4 to 8 who was the real owner of the aforesaid three-storied building at South Calcutta was impleaded as a party in the earlier proceedings particularly in the Money Suit and also in the execution proceedings but her husband had all along dealt with the matter and it has been alleged that the real owner was all along kept in the dark. Scrutinising the records it also appears that the written statements and all other applications were filed before the Court below by the deceased father of the respondent Nos. 4 to 8 being the husband of Late Surama Ghosh alias Dutta, the real owner of the said property.

11. In the male dominated society existing at that time, litigations are normally conducted by the male members of the family and female members are very often kept in the dark and unless compelled the details of the litigations are not disclosed to the female members in order to maintain family peace and also to avoid unnecessary tension in the family life.

12. Although the deceased father of the respondent Nos. 4 to 8 being wrongly advised by his legal advisors initiated various legal proceedings for setting aside the alleged auction sale dated 12th July 1969 in respect of the aforesaid house property but all such proceedings ultimately failed before the Court of law as the same were not appropriate legal proceedings for setting aside any auction sale held by any Court of law. Ultimately, the predecessor of the respondent Nos. 4 to 8 filed an application under Order 21 Rule 90 of the CPC for setting aside the alleged auction sale dated 12th July 1969 in Money Execution Case No. 34 of 1968 and the said application was registered as Misc. Case No. 1 of 1991.

13. After filing of the said application under Order 21 Rule 90 Rabindranath Dutta, the father of the respondent Nos. 4 to 8 and the original petitioner No. 2 died on August 9, 1991 and thereafter, the mother of the said respondent Nos. 4 to 8 and the original owner of the house property namely, Surama Ghosh alias Dutta also died. The present respondent Nos. 4 to 8 were thereafter, brought in as heirs of the original judgment debtor.

14. The aforesaid application filed under Order 21 Rule 90 was ultimately rejected by the learned Third Court of Civil Judge. (Senior Division), Alipore by the order dated 25th September 2000 on the ground that the said application was barred by limitation.

15. The present respondent Nos. 4 to 8 preferred Misc. appeal being Misc. Appeal No. 417 of 2000 against the said order and by a judgment and order dated 16-7-2001, the Misc. Appeal was allowed by the learned Additional District Judge, 13th Court at Alipore by remanding the matter to the Trial Court for hearing the application of Order 21 Rule 90 on merits, against which the present Civil Revisional Application is filed.

16. The present petitioner, Smt. Arati Das was not a decree holder. The original decree holder was Smt. Apel Roy Chowdhury who transferred the property to Smt. Rekha Dutta in the year 1982 and the present petitioner allegedly

purchased the property during the pendency of the application under Order 21 Rule 90. Admittedly, the respondent Nos. 4 to 8 herein were and are all along in possession of the said house property .

17. The petitioner has challenged the legality and/or validity of the impugned judgment and order dated 16th July 2001 passed by the learned Additional District Judge, 13th Court at Alipore in Misc. Appeal No. 417 of 2000 on the ground that the lower Appellate Court had no jurisdiction to condone the delay and to send the matter back on remand before the trial Court for hearing the application filed under Order 21 Rule 90 afresh on merits.

18. It has been submitted on behalf of the petitioner that the provision of Section 5 of the Limitation Act has no manner of application in a proceeding under Order 21 Rule 90 of the C.P.C. Learned Counsel of the petitioner further submits that in terms of Article 127 of the Limitation Act any application for setting aside the sale should be filed within 30 days from the date of sale and since in the present case the application under Order 21 Rule 90 has not been filed within the prescribed time, the lower appellate Court had no jurisdiction to entertain the said application.

19. Mr. Kar, learned Counsel of the petitioner referred to a decision of the Supreme Court reported in Rajender Singh Vs. Ramdhar Singh and Others, and submitted that sale cannot be set aside only on the ground of mere inadequacy of price although Mr. Kar did not admit that the sale price in the present case was inadequate.

20. Mr. Kar further submitted that in the sale proclamation sale price of the property was mentioned at Rs. 30,000/- and there was no wrong in mentioning the afore-said value of the property as the judgment debtor himself while entering into an agreement for sale in respect of the said property with one, Mr. Salil Pal in the year 1968 valued the property at Rs. 45,000/-. Referring to the aforesaid fact Mr. Kar further submitted that the sale price of the property cannot be considered as shockingly low.

21. Mr. Tapan Dutta, learned Counsel of the respondents further submitted that the provisions of the Limitation Act is not at all applicable in the facts of the present case as a fraud was committed on Court and furthermore there was carelessness and mistake on the part of the Court in holding the auction sale in respect of the property.

22. In support of the aforesaid contention that a fraud was committed on Court learned counsel of the respondent submitted that from the registered Kibala dated 10th August 1949 in respect of the house property in question it would appear that the price of the bare land in the year 1949 was Rs. 22,264/-.

23. The Money Suit No. 6 of 1967 was filed by one Apel Roy Chowdhury for recovery of the loan amount from the deceased father of the respondent/opposite party Nos. 4 to 8. In the schedule of the plaint of the said Money Suit

No. 6 of 1967 plaintiff described the property at Schedule "B" as land with building standing at premises No. 22/15 Manohar Pukur Road. Calcutta - 700 029. In the said plaint it was also specifically mentioned that Surama Ghosh alias Dutta i.e. the mother of the present respondent/opposite party Nos. 4 to 8 was the owner of the property and the deceased father of the said respondent/opposite party Nos. 4 to 8 took the loan.

24. In support of the aforesaid contention regarding commission of fraud learned Counsel of the respondent Nos. 4 to 8 mentioned the following undisputed facts :

a) The suit was decreed ex parte on 26-6-1968. The decree was order put in execution in Money Execution case No. 34 of 1968 on 26-8-1968.

b) A three-storied building in Lansdowne area in South Calcutta was sold in auction in execution of such decree for a sum of Rs. 12,000/- and odd. Decree Holder was the lone bidden In the sale proclamation the petitioner valued the property at Rs. 30,000/-. knowing fully well that the bare land price was Rs. 22,000/- and that too in the year 1949, i.e. 20 years before the alleged sale. Thus, according to the learned Counsel of the respondent Nos. 4 to 8, the decree holder committed fraud by suppression of real value, which was within her knowledge.

c) The decree holder purchased the property as a lone bidder at a price of Rs. 12,000/-and odd in 1969, i.e., far less what has been stated as the price of the valued property in the sale proclamation.

d) No publication of sale was made by decree holder which is mandatory under Order 21 Rule 67 of Sub-rule (2) of C.P.C. and as such there were no other participants in the auction sale and higher price could not be fetched.

25. Mr. Dutta, learned Counsel of the respondent Nos. 4 to 8 urged before this Court that the shockingly low value of the property in question itself is an ingredient of fraud. Mr. Dutta further submitted that the decree, holder in the present case was the auction purchaser and fraud should be presumed as the said decree holder was the lone bidder.

26. According to Mr. Dutta, proper publication of the sale was not done in the instant case in order to prevent the actual buyer to participate in the auction sale conducted by the Executing Court and as a result whereof the valuable house property in the posh area of the city of Calcutta was sold at a shockingly low price. The aforesaid conduct of the auction purchaser to purchase the property in question in the auction sale as a lone bidder must lead to the presumption that fraud has been committed by or at the instance of the decree holder.

27. It has been specifically submitted on behalf of the respondent Nos. 4 to 8 that no notice of attachment and/or notice of sale proclamation and/or notice of sale in respect of the said house property was ever served on the actual owner of the property i.e. the mother of the opposite party Nos. 4 to 8 in compliance with the provisions of Order 21 Rules 58 and 66 of the Code of Civil Procedure. Mr.

Dutta also urged before this Court that the question of limitation does not arise when the Court itself commits any mistake or there are laches or lapses on the part of the Court in conducting the sale process. Mr. Dutta submitted that the Court did not perform its duty as mentioned in Order 21 Rules 64, 66, 67 and 72 of the Code of Civil Procedure.

28. Mr. Dutta referred to the orders passed on 12th July 1969 by the learned Court conducting the auction sale in respect of the house property. Order Nos. 10 and 11 dated 12th July 1969 passed by the learned Civil Judge (Senior Division) Third Court at Alipore in Money Execution case No. 34 of 1968 is quoted hereunder :

"Order No. 10. dated 12-7-1969 -- Decree holder files a petition praying for permission to bid at the sale. He is to bid at the sale. Send the sale proclamation to Nazir for sale. And put up for orders after Nazir's report.

Order No. 11. dated 12-7-1969 - Seen Nazir's report. Sale held on this day. Decree Holder purchased the property of the judgment debtor for Rs. 12,257.91p. The bid is accepted. Decree holder files a petition praying for set off the sale amount to the decretal dues. The prayer is allowed pending fees. File to 14-8-1969."

29. Referring to the aforesaid orders passed by the learned Judge of the Executing Court on 12th July 1969 Mr. Dutta submitted that on the same day learned Judge of the Executing Court should not have allowed the entire sale process to be completed starting from the checking of sale proclamation to conclusion of the sale.

30. Scrutinising the aforesaid orders it appears that on the same date, application under Order 21 Rule 72 of the decree holder, was allowed permitting her to participate in the bid. No copy of such application was served on the judgment debtor and decree holder was the lone bidder. It would not appear from the Court's order whether the Court enquired as to why there were no other bidders. There was no whisper about publication of the sale. By order No. 10 the Court sent the sale proclamation to Nazir and for Nazir's report and on the same date by Order No. 11, the Court received the Nazir's report and allowed the decree holder to purchase the property at Rs. 12,257.91 p as a lone bidder. The petition of the decree holder for set off was also allowed on the same day.

31. Mr. Dutta has rightly raised the question whether all the aforesaid acts could be allowed to be performed on the same day by the learned Court. Mr. Dutta submitted that it was the duty of the Executing Court to make an endeavour to fetch maximum price in respect of the property under sale following the provisions of Order 21 Rule 66 but according to Mr. Dutta, learned Judge of the Executing Court did not even perform the mandatory obligations for assessing the correct market price of the property in question.

32. Learned Counsel of the respondent Nos. 4 to 8 referred to the valuation report of the property submitted by the valuer according to the P.W.D. Schedule of rate prevalent in the year 1969. The said valuation report has been marked as Exhibit-4 in the Order 21 Rule 90 proceeding. Mr. Dutta submitted that in view of the aforesaid facts provisions of the Limitation Act has no manner of application in the present case and it was the duty of the Court to set aside the alleged sale dated 12th July 1969 on the ground that fraud was committed on Court apart from other material irregularities in conducting the sale. The learned Counsel of the respondent Nos. 4 to 8 contended that the learned Executing Court was careless enough to conduct the alleged auction sale proceeding and the said auction sale vitiates due to various irregularities including mentioning of very low price of the property at the sale proclamation.

33. According to the learned Counsel of the aforesaid respondent Nos. 4 to 8, an application u/s 5 of the Limitation Act although was filed before the Trial Court but the Court can very well ignore such application and set aside the auction sale appreciating the various illegalities and/or irregularities in conducting the said alleged auction sale proceeding.

34. Referring to the decision of this Court reported in (1969) 71 Cal WN 649 (Prabodh Chandra Mukherjee v. Pasupati Mukherjee) Mr. Dutta submits that shockingly low value in sale proclamation is fraud on the Court and further submits that no litigant should suffer from the Court's carelessness.

35. The learned Counsel of the respondent Nos. 4 to 8 also cited the following decisions in support of his arguments :

- 1) AIR 1945 67 (Privy Council)
- 2) Manmatha Nath Chakravarty and Another Vs. Sachindra Kumar Chakravarty and Another,
- 3) Sisir Kumar Mukherjee and Others Vs. Kanyalal Jhewar and Others,
- 4) Jyotish Chandra Rakhit Vs. Smt. Parbati Bala,
- 5) Nakul Chandra Dutta Vs. Ajit Kumar Chakrabarty and Others, .
- 6) Hotel Nataraj and Others Vs. Karnataka State Financial Corporation and Others, .

36. The learned Counsel of the respondent Nos. 4 to 8 also submitted that this Court being the superior Court has every power to take suo motu judicial notice of illegality and to set aside the sale even after expiry of the limitation period. In support of the aforesaid contention learned Counsel of the respondent Nos. 4 to 8 relied upon the decision of the Supreme Court reported in Nani Gopal Paul Vs. T. Prasad Singh and others,

37. Mr. Dutta. learned Counsel of the aforesaid respondents also placed reliance on an unreported decision of the Division Bench of this Court in the case of

Satyanarayan Bari v. Smt. Protima Banerjee, (F.M.A. No. 1045 of 1992) (1995) 2 Cal LT 165 wherein this Court held that fraud on Court vitiates the proceeding apart from any question u/s 17 of the Limitation Act.

38. Mr. Kar, learned Counsel of the petitioner herein, however, submits that the time prescribed for filing application for setting aside sale in execution of a decree is 30 days in terms of Article 127 of the Limitation Act and after amendment of the afore-said provision w.e.f. 1-2-1977 the period of limitation prescribed was for 60 days from the date of sale and as such the application filed under Order 21 Rule 90 after a lapse of 22 years from the date of sale is liable to be rejected. Although the said application under Order 21 Rule 90 was filed together with an application u/s 5 of the Limitation Act for condonation of delay but according to Mr. Kar the Court has no power to condone the delay on entertaining the application filed u/s 5 of the Limitation Act as the said provision of Section 5 of the Limitation Act is not applicable in respect of any application filed under any of the provisions of Order 21 of the Code of Civil Procedure. Accordingly, Mr. Kar submitted that the impugned order of the lower appellate Court is clearly without jurisdiction and liable to be set aside.

39. In order to counter the arguments advanced by Mr. Dutta regarding sale of the property at a low price Mr. Kar submits that mere inadequacy of price in Court sale cannot be a ground for setting aside the sale. Mr. Kar referred to and relied upon the decision of the Supreme Court reported in Rajender Singh Vs. Ramdhar Singh and Others, in this regard. Mr. Kar further submits that the predecessor of the respondent Nos. 4 to 8 cannot take the benefit of Section 17 of the Limitation Act in the present case as in the said application filed under Order 21 Rule 90 it was not specifically mentioned when the alleged fraud was discovered by the predecessors of the respondent Nos. 4 to 8 herein for the purpose of proper calculation of the period of limitation in this regard as u/s 17 of the Limitation Act period of limitation shall not begin to run until the applicant has discovered the fraud.

40. To counter the aforesaid arguments of Mr. Kar it has been specifically urged by Mr. Dutta that the alleged auction sale of the property is liable to be set aside on the sole ground that the alleged auction sale is vitiated by fraud apart from other material irregularities.

41. Scrutinising the materials on record, I find that a there storied building in a posh residential area in the city of Calcutta was allowed to be sold in auction in execution of a decree for a paltry sum of Rs. 12,000/-and odd. Furthermore, the decree holder as the lone bidder in the said auction sale purchased the aforesaid valuable property at the said price of Rs. 12,000/- (Approx). The valuation of the property put by the decree holder in the sale proclamation was shockingly low and the decree holder cannot avoid its liability for putting a shockingly low valuation for the property in question covered by the proclamation of sale. From the records it also appears that the sale proclamation was never served on the real owner of the property.

42. Several other material irregularities in conducting the alleged Court sale have also surfaced in course of hearing of the present application. From the valuation report of the property in question, which has been marked as Exhibit-4, it appears that the said house property was valued at Rs. 4,80,065/- by the Chartered Engineer and Valuer following the schedule of rates approved by P.W.D.", West Bengal in the year 1969.

43. The sale was not even advertised in order to draw the notice of the actual buyer. It is surprising to note that a valuable house property comprising of a three-storied building in a very posh area in South Calcutta could not attract any bidder apart from the decree holder. Learned Judge of the Executing Court also did not follow the procedures as mentioned in Order 21 Rules 66 and 67 properly while conducting the sale of the said house property by public auction in execution of a decree.

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

45. The observations of Bijayesh Mukherjee, J. in the case of Prabodh Chandra Mukherjee (supra) (1969) 71 CWN 649 are quoted hereunder:

"10. Now, apply the principle of (5) AIR 1945 67 (Privy Council) here. The executing Court did act blindly in passing the execution-creditor's draft sale-proclamation proclaiming the valuation of some 13 cottahs of Paschim Barisa Land at Rs. 300/- on the foot of his application dated June 5, 1958, and filed on June 7, 1958 under Rule 66, Sub-rule (3) of Order 21, wherein it was stated too :

which, turned into English, reads :

"The value of the aforesaid property would be Rs. 300/- by guess."

As usual, notices did issue on the judgment-debtors (one of whom is the petitioner before me) on or about June 7, 1958 : vide Order No. 4 of that date in the order sheet. Assume, the notices were duly served -- a matter to which much labour has been devoted at the trial and in appeal and assume too that the judgment-debtors, including the petitioner, lay by. This brings forth two contentions from Mr. Ghosh, the first of which is that, by virtue of its rule-making powers u/s 122 of the Procedure Code, this Court has added to Sub-rule 2 of Rule 66 a proviso :

"Provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property, but the proclamation shall include the

estimate, if any, given by either or both of the parties" -- a provision, nothing like which is in Madras (5) Marudanyagam's case being a case from Madras and which has received full effect in the executing Court here. Why charge it then with having been blind ? This proviso permits it to be blind."

"11. Nice though such a contention looks at the first blush, in reality, it is destitute of merit. This proviso, be it emphasized, is a proviso only to Sub-rule 2 which prescribes inter alia that, in the proclamation, shall be stated the time and place of sale, and shall be specified too as fairly and accurately as possible several detail, such as (a) the property to be sold, (b) The revenue when the property to be sold pays revenue to Government, (c) any incumbrance, (d) the decretal dues, and (e) every other thing which the Court considers material for a purchaser to know in order to judge the nature and value of the property. The proviso again is an enabling provision. All it enables the Court" to do is not to give its own estimate of the value. It shall not be necessary for the Court to do so, as the proviso says. So, the Court may still give its own estimate. By doing so, the Court does not come on the proviso's edge. Again, the proviso prescribes that the proclamation shall include the estimate of either or both of the parties -- the execution-creditor and the judgment-debtor. What will the estimate be like? It shall specify as fairly and accurately as possible the detail listed in Clauses (a) to (e) of Sub-rule (2) -- a region into which the proviso makes no in road. The proviso is, therefore, that and that only, and no more, curtailing the provisions of Sub-rule (2), to which alone it is a proviso to that little. It does not relieve the Court of its duty to see that the detail listed in Rule 2 is specified in the proclamation -- which is the Court's proclamation, not the party's -- as fairly and accurately as possible. Say, an execution-creditor specifies the value of land in Rashbehari Avenue which works out at Rs. 5 a cottah, and the judgment-debtor lies by. Does the Court do its duty by allowing the proclamation to proclaim so, in spite of this proviso according to which the proclamation shall include the estimate of the execution-debtor? It does not. Because an estimate as this is the height of unfairness and the height of inaccuracy too. And the proviso does not say: the proclamation shall include the estimate, if any, of either or both of the parties, no matter how unfair or how inaccurate it is. It says instead: the proclamation shall include the estimate of either party -- an estimate which under the main provision of Sub-rule (2), not curtailed by the proviso, shall be specified as fairly and accurately as possible. To put the value of some 13 cottahs of land at Rs. 300, though its fair value is at least Rs. 6,000 is the negation of fairness and accuracy. Surely the proviso does not confer on the execution-creditor a licence to be dishonest. Nor does it tell the Court to wink at his dishonesty."

46. From the records of the case it appears that the Executing Court was very much careless in conducting the auction sale of the property in question in execution of the decree. The Court never ensured the service of the sale proclamation upon the real owner. Scrutinising the orders passed by the learned Judge of the Executing Court in course of conducting the said auction sale of the

house property it does not appear that any attempt was made for publication of the sale in the newspaper.

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

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

49. The learned Judge of the Executing Court did not record any finding about the service of the publication of the proposed sale as was required under Order 21, Rule 66 (2) of the CPC nor the application of the decree holder for permission to bid at the sale was served on the judgment debtor. It also does not appear that the sale proclamation was settled or finalised upon notice to the judgment debtor as is required under Order 21, Rule 66(2) of the Civil Procedure Code. The object of drawing up of the sale proclamation upon notice to the decree holder is very clear. It was not necessary to sell the entire property if the decretal dues can be made up by selling a part of the property as will appear from Order 21, Rule 66 (2)(a). It is also necessary under the proviso to Order 21, Rule 66 (2) that the sale proclamation should include the estimates given by BOTH the parties which was not done in this case since the required notice was not served on the judgment debtor in terms of Order 21, Rule. 54 of the CPC nor under Order 21, Rule 66 of the Civil Procedure Code.

50. The infirmities mentioned above go to the root of the matter and leave no option to this Court but to hold that the irregularities were serious enough amounting to practising fraud on the Court. In any view of the matter no one should suffer due to the act of the Court. Act of Court should not prejudice anyone but in this case serious injury has been caused to the judgment debtor in the manner the sale has been proceeded with and conducted.

51. It is true that it is not necessary for the Court to state its own estimate of the value of the property as has been observed by the Supreme Court in Gajadhar Prasad and Others Vs. Babu Bhakta Ratan and Others, , But the Supreme Court

has made it clear that all material facts have to be mentioned by the Court when stating its estimate of the value of the property to be sold and Court must not accept the ipse dixit of one side. The Court should have invited objections to the valuation from the judgment debtor and should have considered the same after applying its mind as has been laid down by the Supreme Court in the case reported in *Gajadhar Prasad and Others Vs. Babu Bhakta Ratan and Others*,

52. By Order No. 10 dated 12th July, 1969, learned Judge of the Executing Court granted permission to the decree holder to participate in the bid although no copy of such application was served upon the judgment debtor and decree holder was the lone bidder. From the records it also does not appear whether the learned Judge of the Executing Court ever enquired why no other bidder came forward to participate in the said auction sale when the property in question admittedly, was in a very posh area in the city of Calcutta. From Order No. 11 passed on the same date i.e. on 12th July, 1969 by the learned Judge of the Executing Court it appears that the Court received the Nazir's report in respect of the sale and considered the same and allowed the decree holder to purchase the property at Rs. 12,257.91p.

53. Learned Judge of the Executing Court has not only committed various irregularities in conducting the alleged auction sale in respect of the aforesaid house property in execution of the decree but his conduct in this regard also deserves serious criticism.

54. The property was valued by the decree holder at Rs. 30,000/- and in the sale proclamation also the sale price of the property was mentioned at Rs. 30,000/-. The Court approved the sale proclamation without considering the fact that the price of the bare land over which the three-storied building was constructed subsequently was Rs. 22,264/- in the year 1949. It would appear from the *Kobala* which has been exhibited as No. 1 in the proceeding under Order 21, Rule 90 that the mother of the respondents Nos. 4 to 8 herein had purchased the bare land at a price of Rs. 22,264/- in the year 1949 and thereafter a three-storied building was constructed on the said land and as such the valuation of the house property after a lapse of almost 20 years i.e. in the year 1969 can under no circumstances come down to Rs. 30,000/-.

55. The learned Judge of the Executing Court clearly failed to discharge his duties and obligations under the law and blindly approved the sale proclamation and held the auction sale on the basis of such sale proclamation.

56. It is a matter of shock and regret that the learned Judge of the Executing Court failed to realise that the valuation of the three-storied building in the year 1969 could not be Rs. 30,000/- when the bare land was purchased in the year 1949 at Rs. 22,264 and 8 annas over which subsequently the said three-storied building was constructed. After a long lapse of 20 years the valuation of the land and building in any part of the country had considerably increased and in the city like Calcutta such valuation of the property had increased considerably. The

learned Judge cannot be Ignorant of the aforesaid fact.

57. The learned Judge of the Executing Court cannot avoid criticism as he has permitted a decree holder to purchase a three-storied building of the judgment debtor in the city of Calcutta in a Court sale in the year 1969 for a sum of Rs. 12,257.91 p. without appreciating the fact that the land value alone over which the said building was constructed was Rs. 22,264/- as far back as on 10th August, 1949. Furthermore, the learned Judge not only failed to make any endeavour to fetch the best price in respect of the valuable house property of the judgment debtor by directing proper publicity in respect of the auction sale of the said property but the said learned Judge remained totally unconcerned even after realising that excepting decree holder nobody has come forward to purchase the said property in the city of Calcutta.

58. From the aforesaid facts it transpires that the Executing Court is guilty of gross carelessness in conducting the aforesaid auction sale of the house property of the judgment debtor. It has also been established before this Court beyond any reasonable doubt that fraud was committed on Court at the instance of the decree holder.

59. This Hon'ble Court in the case of Prabodh Chandra Mukherjee v. Pasupati Mukherjee reported in (1969) 71 CWN 649 considered the aforesaid aspects regarding fraud on Court and Court's carelessness in accepting low value while conducting the sale of a property. In the said judgment it was specifically held that no litigant should suffer from the Court's carelessness. It has also been held in the said judgment that limitation cannot show its head if the matter be looked at from the standpoint of fraud on Court and the standpoint of Court's inexcusable carelessness. The relevant extracts of the said judgment are quoted hereunder:

"16. Reserving my comment on the expression : any defect in the proclamation, I say now, the Court is not setting aside the sale at the instance of the petitioner. The Court sees the gross carelessness it is guilty of in the drawing up of the sale proclamation. The Court sees too the substantial injury the petitioner has sustained by reason of such inexcusable carelessness. And the Court is setting aside the sale suo motu, acting on the principle that no litigant shall suffer for the Court's mistake or carelessness. That the petition of the petitioner has brought to light the Court's mistake or carelessness is an accident. Such mistake or carelessness might have been detected by the Court in other ways too. That does not make the sale set aside at the instance of the petitioner. So, this contention fails too."

"19. Thus, the basis of the decision is here. Failure by the Court and the decree-holder to do their duty under Order 21, Rule 66 causes serious undervalue. Serious undervalue causes substantial injury to the judgment debtor. And the sale goes to induce the Court (assuming that the Court was not blind) to accept such a ridiculously low price and to issue its proclamation so,

cannot but be regarded as fraud on the Court....."

"22.....I am, however, looking at the matter from the standpoint of fraud on the Court and the standpoint of the Court's inexcusable carelessness -- in either of which case limitation cannot show its head.....":

60. A Division Bench of this Court in the case of Sisir Kumar Mukherjee and Others Vs. Kanyalal Jhewar and Others, also held that decree holder deliberately put in shockingly low valuation in proclamation of sale would amount to fraud on Court and would vitiate the sale apart from the question of any other material irregularity in the publishing and/or conducting the sale. The relevant paragraph of the said judgment is quoted hereunder :

"9. We have, therefore, before us, the picture of a property worth at least Rs. 60,000/-put in the sale proclamation as having a value of Rs. 1,500/- and upon such valuation, the sale was held at a price of Rs. 9,999/- and odd. It would, in our view, be a case where the decree holders would be guilty of deliberately putting a shockingly low valuation for the disputed property in the proclamation for sale and on the authority of the Judicial Committee in the case of AIR 1945 67 (Privy Council) , as explained in the two decisions of this Court in Prabodh Chandra Mukherjee v. Pasupati Mukherjee (1967) 71 CWN 649 and Pankaj Kumar Pakhira v. Nani Bala Pakhira ILR (1968) 1 Cal 43, this would amount to fraud on Court and would vitiate the sale apart from the question of any other material irregularity in the publishing or conducting of the sale."

61. Mr. Kar although submitted that mere inadequacy of price in respect of a property cannot be a ground for setting aside the Court sale and referred to the decision of the Supreme Court reported in Rajender Singh Vs. Ramdhar Singh and Others, but in my view the said decision is clearly distinguishable as in the said judgment it has been specifically mentioned that there had been no allegation of any fraud or material irregularity in the conduct of the Court's auction sale. In the instant case, specific allegation has been made regarding commission of fraud on Court and various other material irregularities in conducting the Court's auction sale including the serious allegation regarding Court's carelessness in conducting the said sale and as such the aforesaid decision of the Supreme Court reported in Rajender Singh Vs. Ramdhar Singh and Others, cannot be of any help to Mr. Kar.

62. Though it is the settled law that no decree holder should be allowed to make unlawful gain over a judgment debtor while disposing of his properties in execution of a decree but in the present case it has been established beyond any shadow of doubt that the decree holder sought to grab the valuable house property of the judgment debtor by committing fraud on Court and taking the advantage of the Court's carelessness in conducting the auction sale of the said house property of the judgment debtor. The decree holder is entitled to realise the decretal dues only but in the guise of realisation of the decretal dues the

decree holder sought to purchase the valuable property of the judgment debtor at a throw away price by committing serious fraud on Court and taking advantage of the Court's carelessness as has already been explained hereinabove.

63. It is settled law that no decree holder should be permitted to make unlawful gain over a judgment debtor with regard to his properties which are the subject matter of sale in execution of the decree but in the present case the said settled principle of law has been violated at the instance of the decree holder as a property which has been valued at least at Rs. 4,80,000/- in the year 1969 following the P.W.D. rates has been allowed to be sold at a sum of Rs. 12,000/- only.

64. The decree holder was very much aware that a three-storied building in the posh residential area of South Calcutta cannot be valued at Rs. 12,000/- and the said decree holder deliberately supplied a shockingly low valuation in respect of the property of the judgment debtor in the proclamation of sale and subsequently the said property was allowed to be sold even at one-third of the price mentioned in the sale proclamation i.e. at a sum of Rs. 12,000/- and odd. The aforesaid conduct of the decree holder and the Court's carelessness are bound to shock the conscience of this Court. If the aforesaid conduct of the decree holder and the Court's carelessness are over-looked and judgment debtor is allowed to suffer serious loss and prejudice then members of the public may reasonably question whether this Court has at all any conscience in the discharge of its judicial functions.

65. Although Mr. Kar learned Counsel of the petitioner urged before this Court that the sale already confirmed by the Executing Court cannot be upset after a long lapse of 22 years on the ground of limitation but in my view the aforesaid plea of limitation cannot protect the interest of the wrongdoers and save the sale from being set aside.

66. All objections raised by the petitioner to save the sale from being upset cannot be sustained as the same are bound to be vitiated on account of commission of fraud on Court.

67. Mr. D. P. Kundu, J. in the case of *Palash Sarkar v. State of West Bengal* reported in 2003 Cal WN 57, has specifically held that no judgment of a Court can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. Fraud vitiates all transactions known to the law of however high a degree of solemnity,

68. Mr. Kar has rightly argued that Section 5 of the Limitation Act has no manner of application and the learned Judge of lower Appellate Court has no jurisdiction to entertain such application and to condone the delay but the decision of the lower Appellate Court can be supported on different reasons. It has already been held by this Court in the case of *Prabodh Chandra Mukherjee v. Pasupati Mukherjee* reported in (1969) 71 Cal WN 649 that limitation cannot show its

head in the case of fraud on Court and in the case of Court's inexcusable carelessness. Accordingly, the plea of limitation as raised by the petitioner to protect this illegal under-valued sale in my view is devoid of any merits.

69. Now two options are left open before this Court at this stage. Either this Court may approve the decision of the lower Appellate Court on different grounds as indicated hereinabove or the said sale can be set aside by this Court directly on the ground of fraud on Court and Court's inexcusable carelessness in conducting the said auction sale of the property of the judgment debtor in execution of a decree. It is therefore, to be decided which option should be accepted in the present case for the ends of justice.

70. In this case learned Counsel of the respondents Nos. 4 to 8 cited a decision of Supreme Court reported in Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat, . In the said judgment Supreme Court has made the following observations :

"6. Now when the aid of the High Court is invoked on the revisional side it is done because it is a superior Court and it can interfere for the purpose of rectifying the error of the Court below. Section 115 of the CPC circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court. It is only one of the modes of exercising power conferred by the Statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense. We do not therefore, consider that the principle of merger of orders of inferior Courts in those of superior Courts would be affected or would become inapplicable by making a distinction between a petition for revision and an appeal."

71. The parties have argued the matter in fullest possible detail. All aspects of the matter have been argued and as such it is only desirable that this Court gives its considered view so that the questions and controversies between the parties may come to an end finally. As has been mentioned above the Hon"ble Supreme Court has clearly equated the revisional jurisdiction of the High Court with the general appellate jurisdiction of the High Court as a superior Court. In the circumstances there is no reason why the principles underlying Order 41, Rule 33 should not be followed or made applicable in revisional applications and particularly in the facts of this case. The provisions of Order 21, Rule 33 permit the Court to pass any order which ought to have been passed notwithstanding that the appeal is as to only part of the decree. Therefore, this Court proposes to pass such an order as ought to have been passed in the facts and circumstances of the case.

72. It is to be noted that the parties have been litigating since 1967 when the Money Suit No. 6 of 1967 was filed. Therefore, the parties have been litigating for over 36 years and it is desirable that the matter comes to an end as soon as possible. In my view, it is clear that the Revisional Court has a jurisdiction and

indeed a duty to ensure that expeditious justice is done between the parties and the Order, which I propose to pass, is in consonance, therewith.

73. In the facts and circumstances of the present case, this Court, therefore, should not hesitate to set aside the alleged auction sale which has been vitiated by fraud in order to do justice to the judgment debtor avoiding protracted litigation.

74. Thus, in my view, this Court even after detection of the serious irregularities and illegalities in holding the auction sale by the Executing Court and particularly after establishment of fraud on Court in course of holding the said auction sale of the property of the judgment debtor in execution of the decree cannot allow the party to go before the trial Court for final decision on the application filed under Order 21, Rule 90.

75. After detection of the aforesaid illegalities in conducting the auction sale this Court cannot permit the said sale to stand even for a moment as in that event the same would cause grave injustice to the judgment debtor. When fraud on Court has been established this Court cannot shut its eyes and remain as a silent spectator. The Court must come forward to undo the wrong by setting aside the illegal and irregular Court sale in order to do substantial justice. This Court being the Superior Court has the duty and obligation to rise to the occasion in order to do substantial justice to the parties.

76. For the aforementioned reasons in order to serve the best interests of justice I find no other alternative but to set aside the auction sale in respect of the property of the judgment debtor being the house property at 22/15, Monohar Pukur Road, Kolkata-700 029 which was sold by holding an auction on 12th July, 1969 by the learned Judge of the Executing Court in Money Execution Case No. 34 of 1968.

77. The present petitioner purchased the litigated property as a speculative purchaser. Unfortunately, the petitioner could not harvest any profit by her speculative deal this time as this Court is unable to extend any protection to a speculative purchaser who purchased the property being fully aware of the pending litigation in respect of the said property.

78. In the result, this revisional application fails and the same is accordingly, dismissed. The alleged sale of the building at 22/15, Manohar Pukur Road, Kolkata-700 029 by the Executing Court in Money Execution Case No. 34 of 1968 is also set aside.

79. In the facts and circumstances of this case, there will be, however, no order as to costs.

80. Urgent xerox certified copy of this judgment may be handed over to the learned Advocates of the parties, if applied for.