

Desh Bandhu Gupta vs N.L.Anand & Rajinder Singh on 17 September, 1993

Equivalent citations: 1994 SCC (1) 131, JT 1993 (5) 313, 1993 AIR SCW 3458, 1994 (1) SCC 131, (1994) 1 MAD LW 49, (1994) 1 BANKCAS 45, 1994 ALL CJ 1 367, (1994) 1 CIVLJ 220, (1994) 1 MAD LJ 78, (1993) 2 RENTLR 577, (1993) 3 RRR 600, 1993 SCFBRC 460, 1994 BOMCJ 350, (1993) 2 CURLJ(CCR) 677, (1993) 3 CURCC 737, (1994) 1 MAHLR 670, (1993) 2 RENCJ 628, (1993) 5 JT 313 (SC)

Author: K. Ramaswamy

Bench: K. Ramaswamy, R.M. Sahai

PETITIONER:

DESH BANDHU GUPTA

Vs.

RESPONDENT:

N.L.ANAND & RAJINDER SINGH

DATE OF JUDGMENT 17/09/1993

BENCH:

RAMASWAMY, K.

BENCH:

RAMASWAMY, K.

SAHAI, R.M. (J)

CITATION:

1994 SCC (1) 131 JT 1993 (5) 313

1993 SCALE (3) 791

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by K.RAMASWAMY, J.- The appellant judgment-debtor, was a tenant of Smt Shanti Devi, who applied on September 28, 1974 for eviction of him for

committing default in paying the rent. On September 30, 1974, she sold it to the first respondent who got impleaded himself in the pending proceedings and also independently sought for eviction. Pending the proceedings the appellant deposited rent in the name of Shanti Devi which now is ultimately found to be Rs 13,440. The decree for eviction made against him was ultimately confirmed by this Court. The suit of the first respondent for the affairs of rent was decreed for a sum of Rs 6,419.98. Pending eviction proceedings, in the Writ Petition No. 830 of 1978 of the appellant, the High Court of Delhi directed on September 6, 1979, after hearing both the parties, and without prejudice to the contentions of the respondent, that the amount deposited by him may be credited to the account of the respondent. The first respondent filed E.P. No. 1974 of 1978 in the court of the Addl. Sub-Judge, Ist Class for sale of the appellant's plot of land bearing plot No. 31/35, Punjabi Bagh, New Delhi, a commercial area of an extent of 550 square yards to recover Rs 7780.33 which includes costs. On November 4, 1978 warrant of its attachment was issued under Order 21 Rule 54 in Form 24 of Appendix 'E' of the Schedule to CPC. On becoming aware of that the appellant filed an objection petition contending that since he had already deposited in the Rent Control case Rs 13,440, more than the decretal amount, in the Rent Control Court, the decree stands satisfied and became inexecutable. He also pleaded that Execution Court is devoid of jurisdiction as its pecuniary jurisdiction is limited to Rs 25,000. Arguments were heard thereon. Ultimately on April 20, 1979 the Court passed the order thus:

"Order dictated on this date. The decree- holder has moved an application under Order 21 Rule 66, CPC for warrant of proclamation of sale by public auction of the property of JD- I. Accordingly allow the application of the decree-holder for sale of the property of the J.D. as per the following programmes:

Court door 3 May, 1979 Spot 17 May, 1979 Auction 6 July, 1979 Report 13 July, 1979."

(original records were called for and this was the only order found from the record)

2. Admittedly the appellant was neither given notice nor was he present, nor aware of passing of that order. On May 2, 1979 sale warrant under Order 21 Rule 66, CPC was issued. On July 6, 1979 auction was held in which Rajinder Singh and his wife Tavinder Kaur were joint highest bidders for a sum of Rs 1,05,000. On becoming aware of the sale on August 10, 1979 the appellant immediately filed a petition under Order 21 Rule 90 CPC raising objection to the validity of the sale. On inspection of the record he later on filed an application, which was allowed on payment of costs, to impugn the sale under Sections 47 and 15 1, CPC. He pleaded that the sale was collusive and fraudulent. The value of the site was Rs 3,50,000. It was sold for inadequate price. He was not served with any notice either under Order 21 Rule 54 or under Order 21 Rule 66. There is no sale proclamation. No notice was issued before settling the terms of the proclamation of sale. The sale proclamation neither specified the place or time at which the sale was to be conducted, nor was it published in the locality. He reiterated his plea of his prior deposit of more than the E.P. amount, and the Execution Court's lack of pecuniary jurisdiction and that absence of wide publicity led to fetching of less price. The so-called bidders were not genuine persons nor had the capacity to purchase the property. Only the second respondent and his brother were the participants and the bid was, therefore, a collusive one. The Execution Court held that due procedure was followed in

bringing the property to sale. In view of Order 21 Rule 90(3) the objections raised to the validity of the sale cannot be gone into. The price fetched was an adequate one. The attachment order was served by affixing it on the site and there was no collusion. Accordingly the application was rejected and the sale confirmed. The appellate court, without going into all the contentions, considered the scope of Order 21 Rule 90(3) and held that by its operation pre-sale illegalities or irregularities do not vitiate the sale and dismissed the appeal. The High Court dismissed the revision in limine. Thus this appeal by special leave.

3. Mr Gupta, the appellant, an Advocate argued in person. The first respondent, the decree-holder, is also an Advocate, but appeared through Mr Gujral, learned senior counsel. The auction-purchaser was represented by Mr K. Madhava Reddy, the learned senior counsel. The contention of Mr Gupta that the Execution Court having been conferred with pecuniary jurisdiction up to Rs 25,000, had no jurisdiction to execute the decree against the property whose value is Rs 3,50,000, is devoid of substance. Under Order 21 Rule 10 of CPC an application for execution should be made to the court "which passed the decree". Therefore, the value of the property sold at the execution is more than Rs 25,000 does not take away the jurisdiction of the trial court. In *Banwar Lal v. Prem Latal* this Court held that the value of the property sold in execution is not relevant to determine the jurisdiction of the execution court. Admittedly the decree in execution for Rs 7780.33 is within the jurisdiction of the trial court, which passed the decree. Equally the contention of Shri Madhava Reddy that the mode of payment of money decree envisaged under Order 21 Rule 1 (1) must be by deposit of the decree amount into the court is equally devoid of force. Undoubtedly, literal reading of Order 21 Rule 1(1) provides that the mode of paying decretal money is either by depositing in the Executing Court or sending to the court by postal order or through bank draft or out of court to the decree-holder by postal order or bank draft or any other mode where the payment is evidenced in writing or as the court which made the decree otherwise directs. The other sub-rules are not relevant for the purpose of this case. By amending the rule in 1976 a right has been given to the judgment-debtor to pay the decree debt either by depositing into the Executing Court or to send it by other modes of payment with intimation to the decree-holder in latter cases so that the liability to pay interest ceases from that date. It is an enabling provision for the benefit of judgment-debtor. Though by literal construction the appellant should deposit the decretal amount into the Executing Court for claiming the benefit of the discharge but anterior to it, in the Rent Controller proceedings, the decree-holder had knowledge of undoubted deposit of the amount made by the appellant. The liberty of "without prejudice" given to the respondent by the High Court in the writ petition was for the purpose of his defence, that the deposit in Shanti Devi's name was not payment to him, after knowledge of his purchase, for the purpose of default. But the parties being Advocates 1 (1990) 1 SCC 353 : AIR 1990 SC 623 adopted legalistic stands. The substance is that even before execution was laid the amount was available towards satisfaction of the decree. The court should have directed its attachment and payment made or directed the appellant to withdraw that amount and deposit into the court, instead of launching the tardy process of execution by sale of immovable property. When the factum of deposit was disputed, this Court called for a report and the Addl. Dist. Judge, had in his report, stated that the appellant deposited about Rs 13,000 and odd and it was lying in credit in the Rent Controller proceedings. The further contention that there were other liabilities which the appellant had not discharged, bears no foundation. Even otherwise there was no order of attachment of that amount by any court. The finding of the appellate court that the deposit was not

to the credit of the suit is also not legal. In our considered view neither the stand of the first respondent nor the reasoning of the courts below are tenable. When the arrears of rent for which the decree was made was already in deposit to the knowledge of Anand in his eviction case and when the appellant objected to the execution, the Executing Court either should have directed the appellant to withdraw the money and credit the same to the suit account before its attachment was made or it should have passed an order under Order 21 Rule 23(2) which postulates thus: "Where such person offers any objection to the execution of the decree, the court shall consider such objection and make such order as it thinks fit". It is, therefore, the mandatory duty of the Executing Court to consider such objection and to make an order in that behalf. No such order has been made. It is true that in the contempt application filed by the appellant against the first respondent, an order was passed rejecting the appellant's contention that he had already deposited the decretal amount. Objection should independently be considered under Order 21 Rule 23. The order in the contempt petition is not a substitute to an order under Order 21 Rule 23(2), CPC. The objections, therefore, are still open to the appellant for being raised impugning the validity of the sale. The procedure is the handmaid to justice. The substance of the matter, in the given circumstances is that the deposit made in the eviction case be considered to be one made under Order 21 Rule 1 (1)(a) into the suit out of which the execution arose.

4. The further contention of Shri Madhava Reddy that the appellant should have filed an appeal against an action of the Execution Court in not considering the objections is also devoid of substance. Had the court considered the objections and passed an order under Order 21 Rule 23(2), it would be incumbent upon the appellant to carry the order in an appeal. The omission to consider the objections is not appealable. Had an order been made on the objections and was allowed to become final, perhaps Order 21 Rule 90(3) would operate against the objector. So the objection would still be open to the appellant to reiterate in his petition after the sale under Section 47 or Order 21 Rule 90.

5. The further contention of Shri Madhava Reddy that the objection petition and the appeal are not maintainable as the wife of Rajinder Singh, joint purchaser was not impleaded eo nomine as respondent, too is devoid of force. The application to set aside the execution sale is primarily against the decree-holder since he is a person at whose instance and benefit the execution proceedings were initiated and the sale was held to discharge his decree debt. Therefore, primarily he is the person entitled to be heard and since he is in-charge of publishing the notices and to conduct the sale, it is he that lays before the court the steps taken or the procedure followed in service of notice or conducting the sale and to establish that they have been done properly, regularly and in accordance with the law. The auction-purchaser gets a right only on confirmation of sale and till then his right is nebulous and has only right to consideration for confirmation of sale. If the sale is set aside, apart from the auction-purchaser, the decree-holder is affected since the realisation of his decree debt is put off and he would be obligated to initiate execution proceedings afresh to recover the decree debt. Therefore, in the proceedings under Section 47 or Order 21 Rule 90, the decree-holder is the affected necessary party. Though the auction-purchasers need to be impleaded eo nomine as respondent as the property was purchased jointly at the court sale, it is enough that one among them had been impleaded as a party. It is not necessary to implead all the joint purchasers.

6. The contention of Mr Gupta that as Form 29 of Appendix 'E' prescribes that when an auction-purchaser participated in the bid on behalf of a third party, he should file his power or authority to bid at the auction on behalf of the third party, and in its absence the sale itself is a nullity, is devoid of substance. The rigour of the need to obtain power or authority arises only when he acts as an agent but not when he had, per himself and other's behalf, participated in the bid. Prudence requires that the sale officer should satisfy himself whether the participant is a real or proxy bidder. It should exclude the proxy unless he places before him the authority that in the event of the sale being knocked down, he would be bound by the sale and terms thereof. The second respondent admittedly participated and purchased the property not only on his behalf but also on behalf of his wife. Therefore, the need to obtain such power from his wife to bid on her behalf also is obviated.

7. Mr Gupta contended *that under Order 21 Rule 54 the appellant had not been served with the order of attachment. Either the appellant or the inmates of his house were always available at his residence. It was said to have been affixed at the site and his enquiries revealed that no such affixation at the site was made. It is an admitted position that no personal service on the appellant was effected but nonetheless evidence discloses that it was affixed at the site. The purpose of attachment under Rule 54 is to make the judgment-debtor aware that attachment has been effected and that he should not make any transfer or encumber the property thereafter. It is in the interest of the decree- holder to have the notice of attachment served personally on the judgment-debtor. Nevertheless the sale is not void, though the omission to serve the copy of the order of attachment is an irregularity. Since no encumbrance thereafter was created on the attached property, non-

service of the copy of the order of attachment on the judgment-debtor does not render the sale invalid.

8. It is further contended that the property was not fully described except for mentioning the plot number and the extent which is not consistent with the Form No. 24 of Appendix 'E' which postulates that the property should be fully described. It is seen that in the execution petition a plan with full description was attached. The evidence is not clear whether the plan was attached to the order of attachment or a copy thereof was attached to it. It was for the benefit of the intending purchasers to inspect the property before deciding to participate in the auction. Nevertheless so long as the property is identifiable, the omission of full description of the plot also is only an irregularity. In any event the bidders were not misled.

9. However, there is considerable force in the contention of the appellant that the procedure prescribed under Order 21 Rule 66 was flagrantly violated by the Executing Court. We have already noted the order of the court, to conduct the sale. For judging its legality and validity, it would be desirable to have a bird's eye view of the procedure for sale of immovable property in execution. On an application for execution filed under Order 21 Rule 5 the court shall ascertain the compliance of the prerequisites contemplated under Rule 17 and on finding the application in order, it should be admitted and so to make an order, thereon to issue notice under Rule 22, subject to the conditions specified therein. If a notice was served on the judgment-debtor as enjoined under Order 5 but he did not appear or had not shown cause to the satisfaction of the court, under Rule 23 the court "shall

order the decree to be executed". If an objection is raised to the execution of the decree, by operation of sub-rule (2) thereof, "the court shall consider such objections and make such order as it thinks fit". Thereafter in the case of a decree for execution against immovable property an attachment under Rule 54 should be made by an order prohibiting the judgment-debtor from transferring or creating encumbrances on the property. Under Rule 64 the court may order sale of the said property. Under Rule 66(2) proclamation of sale by public auction shall be drawn up in the language of the court and it should be done after notice to the decree-holder and the judgment-debtor and should state "the time and place of sale" and "specify as fairly and accurately as possible" the details specified in clauses (a) to (d) of sub-rule (2) thereof. The Civil Rules of Practice in Part L in the Chapter 12 framed by the High Court of Delhi 'Sale of Property and Delivery to the Purchaser' Rule 2 provides that whenever a court makes an order for the sale of any attached property under Order 21, Rule 64, it shall fix a convenient date not being distant more than 15 days, for ascertaining the particulars specified in Order 21 Rule 66(2) and settling the proclamation of sale. Notice of the date so fixed shall be given to the parties or their pleaders. In Rule 4 captioned 'Settlement of Proclamation of Sale, Estimate of Value' it is stated that on the day so fixed, the court shall, after perusing the documents, if any, and the report referred to in the preceding paragraph, after examining the decree-holder and judgment-debtor, if present, and after making such further enquiry as it may consider necessary, settle the proclamation of sale specifying as clearly and accurately as possible the matters required by Order 21 Rule 66(2) of the Code. The specifications have been enumerated in the rule itself. The proclamation for sale is an important part of the proceedings and the details should be ascertained and noted with care. This will remove the basis for many a belated objections to the sale at a later date. It is not necessary to give at proclamation of sale the estimate of the value of the property. The proclamation when settled shall be signed by the Judge and got published in the manner prescribed by Rule 67. The court should authorise its officers to conduct the sale. Under Rule 68 the sale should be conducted at "the place and time" specified or the time may be modified with the consent in writing of the judgment-debtor. The proclamation should include the estimate, if any, given by either judgment-debtor or decree-holder or both the parties. Service of notice on judgment-debtor under Order 21 Rule 66(2), unless waived by appearance or remained ex parte, is a fundamental step in the procedure of the court in execution. Judgment-debtor should have an opportunity to give his estimate of the property. The estimate of the value of the property is a material fact to enable the purchaser to know its value. It must be verified as accurately and fairly as possible so that the intending bidders are not misled or to prevent them from offering inadequate price or to enable them to make a decision in offering adequate price. In *Gajadhar Prasad v. Babu Bhakta Ratan* 2 this Court, after noticing the conflict of judicial opinion among the High Courts, held that a review of the authorities as well as the amendments to Rule 66(2)(e) make it abundantly clear that the court, when stating the estimated value of the property to be sold, must not accept merely the ipse dixit of one side. It is certainly not necessary for it to state its own estimate. If this was required, it may, to be fair, necessitate insertion of something like a summary of a judicially considered order, giving its grounds, in the sale proclamation, which may confuse bidders. It may also be quite misleading if the court's estimate is erroneous. Moreover, Rule 66(2)(e) requires the court to state only nature of the property so that the purchaser should be left to judge the value for himself. But, the essential facts which have a bearing on the very material question of value of the property and which could assist the purchaser in forming his own opinion must be stated, i.e. the value of the property, that is, after all, the whole

object of Order 21, Rule 66(2)(e), CPC. The court has only to decide what are all these material particulars in each case. We, think that this is an obligation imposed by Rule 66(2)(e). In discharging it, the court should normally state the valuation given by both the decree-holder as well as the judgment-debtor where they both have valued the property, and it does not appear fantastic. It may usefully state other material facts, such as the area of land, nature of rights in it, municipal assessment, actual rents realised, which could reasonably and usefully be stated succinctly in a sale proclamation has to be determined on the facts of each particular case. Inflexible rules are not 2 (1973) 2 SCC 629 : (1974) 1 SCR 372 desirable on such a question. It could also be angulated from another perspective. Sub-rule (1) of Rule 66 enjoins the court that the details enumerated in sub-rule (2) shall be specified as fairly and accurately as possible. The duty to comply with it arises only after service of the notice on the judgment-debtor unless he voluntarily appears and is given opportunity in the settlement of the value of the property. The absence of notice causes irremediable injury to the judgment-debtor. Equally publication of the proclamation of sale under Rule 67 and specifying the date and place of sale of the property under Rule 66(2) are intended that the prospective bidders would know the value so as to make up their mind to offer the price and to attend at sale of the property and to secure competitive bidders and fair price to the property sold. Absence of notice to the judgment-debtor disables him to offer his estimate of the value who better knows its value and to publicise on his part, canvassing and bringing the intending bidders at the time of sale. Absence of notice prevents him to do the above and also disables him to know fraud committed in the publication and conduct of sale or other material irregularities in the conduct of sale. It would be broached from yet another angle. The compulsory sale of immovable property under Order 21 divests right, title and interest of the judgment-debtor and confers those rights, in favour of the purchaser. It thereby deals with the rights and disabilities either of the judgment-debtor or the decree- holder. A sale made, therefore, without notice to the judgment-debtor is a nullity since it divests the judgment- debtor of his right, title and interest in his property without an opportunity. The jurisdiction to sell the property would arise in a court only where the owner is given notice of the execution for attachment and sale of his property. It is very salutary that a person's property cannot be sold without his being told that it is being so sold and given an opportunity to offer his estimate as he is the person who intimately knew the value of his property and prevailing in the locality, exaggeration may at time be possible. In *Rajagopala Ayyar v. Ramachandra Ayya*³ the Full Bench held that a sale without notice under Order 21 Rule 22 is a nullity and is void and that it has not got to be set aside. If an application to set aside such a void sale is made it would fall under Section 47.

10. Above discussion indicates a discernible rule that service of notice on the judgment-debtor is a fundamental part of the procedure touching upon the jurisdiction of the Execution Court to take further steps to sell his immovable property. Therefore, notice under Order 21 Rule 66(2), unless proviso is applied (if not already issued under Order 21 Rule 22), and service is mandatory. It is made manifest by Order 21 Rule 54(1-A) brought on statute by 1976 Amendment Act with peremptory language that before settling the terms of the proclamation the judgment-debtor shall be served with a notice before settling the terms of the proclamation of sale. The omission thereof renders the further action and the sale in pursuance thereof 3 AIR 1924 Mad 431 : ILR 47 Mad 288 :46 MLJ 104 void unless the judgment-debtor appears without notice and thereby waives the service of notice.

11. In the case before us, the Execution Court had completely overlooked compliance of the mandatory procedure, accepted ipse dixit of the decree-holder even without calling Amin's report. The decree-holder in a complaint given to the Income Tax Department got the site valued with an approved valuer at Rs 3,33,333 but he valued in the E.P. at Rs 1,00,000. The Court accepted it without indicating grounds for this preference and had given a programme of sale. It did not bother even to consider the objections of the judgment-debtor raised at the earliest of the need to proceed with the execution when sufficient amount to meet the decree debt was already in deposit. It is a case of non-application of judicial mind and abdication of judicial duty. Though the insertion of an order judicially passed need not be made in the sale proclamation but the record should indicate that a judicial order has been passed showing that it had applied its mind to the need for determining all the essential particulars, which would reasonably be looked for by an intending purchaser. The relevant and material particulars should be inserted in the sale proclamation as accurately and precisely as possible. The order should show that it considered the objections, if any, of the decree-holders or the judgment-debtors, as the case may be. It should not merely accept unhesitatingly the ipse dixit of one or either side or both.

12. The contentions of S/Shri Madhava Reddy and Gujral that the appellant had not given his valuation and that, therefore, it is not open to him to raise the objections after the sale is unacceptable. Since the court had not given any notice to the appellant which is mandatory, the need to submit his valuation did not arise. Order 21 Rule 54, sub-rule (1-A) brought in by 1976 Amendment Act mandates that the court should require the judgment-debtor to attend the court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale. Form 24 of Appendix 'E' second para and the Court Rules also envisage the mandate. It is a reminder to the court that it has a statutory duty to issue notice to the judgment-debtor before settlement of the terms of proclamation of sale. Then only the proviso to Rule 66(2) comes into play dispensing with multiplicity of notices and not dispensation of mandatory compliance of notice to the judgment-debtor. Had it been a case where notice was served and the appellant lay by, without objecting to the valuation given by the decree-holder, certainly that would be put against the appellant to impugn the irregularities after the sale or the under-valuation settled by the court in the proclamation of sale. The further contentions of both the counsel that merely because there is no order under Order 21 Rule 66(2), it cannot be construed that the Execution Court had not applied its mind in settling the terms of the proclamation of sale, is one of desperation. Except giving a schedule of dates for conducting the sale the Execution Court totally abdicated its duty to scrupulously comply with the mandatory procedure and did not apply its mind to the mandatory duty cast on it by Order 21 Rule 66 to settle the terms of proclamation of sale, and proper publication under Rule 67. After April 20, 1979, the court had merely ensured its publication on the court notice board and on the site at the respective dates and no further. This Court in *Shalimar Cinema v. Bhasin Film Corpn.*⁴ held that the court has a duty to see that the requirements of Order 21 Rule 66 are properly complied with. It is incumbent on the court to be scrupulous in the extreme. No action of the court or its officer should be such as to give rise to the criticism that it was done in a casual way. Therefore, a proclamation of sale drawn casually without compliance of the mandatory requirement and a sale held in furtherance thereof is not a sale in the eye of law. We are of the considered view that the procedure adopted by the court in non-compliance of Order 21 Rules 66 and 67 is in flagrant breach of the mandatory provision. It is a nullity ab initio.

13. Yet another contention of Mr Gupta is that the sale of the plot of 550 sq. yards is in excess of the execution and the order to sell it is the result of non-application of mind touching the jurisdiction of the court rendering the sale void or manifestly illegal. Therefore, the need to invoke Order 21 Rule 90 does not arise and it can be set aside under Section 47 CPC.

14. 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 v. M. Subba Rao*¹ 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 4 (1987) 4 SCC 717 : AIR 1987 SC 2081 5 1989 Supp (2) SCC 693 : AIR 1990 SC 119 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 v. Krishna Kumar Maheshwari*² 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 *Takaseela Pedda Subba Reddy v. Pujari Padmavathamma*³ 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.To get over the difficulty, Shri Madhava Reddy has fallen back on Order 21 Rule 90(3) of the Code, which provides that "no application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date of which the proclamation of sale was drawn up". Undoubtedly, this special rule was brought on statute by 1976 Amendment Act. It is like a "caveat emptor" that the judgment debtor be vigilant and watchful to vindicate pre-sale illegalities or material irregularities. He should not stand by to procrastinate the execution proceedings. If he so does, Rule 90(3) forewarns him that he pays penalty for obduracy and contumacy. Equally it is a reminder that the court should be strict to comply with the procedural part under Rule 54(1-A) before depriving the judgment-debtor of the remedy under Order 21 Rule 90 CPC. If he had notice from court and acquiesced by taking no action before the date of sale, he would be precluded to assail its legality or correctness thereafter. It is seen that the appellant had not been served with or given notice at the time of drawing up the proclamation of sale and as a fact no proclamation of sale was drawn up by the Executing Court except accepting the ipse dixit of the decree-holder. The procedure adopted by the Executing Court bristles with several irregularities touching the jurisdiction of the court. They are not only material irregularities causing substantial injustice but are in violation of the mandatory requirements of the rules. In *Kayjay 6 1992 Supp (3) SCC 31 : AIR 1992 SC 1857 7 (1977) 3 SCC 337 : (1977) 3 SCR 692 Industries (P) Ltd. v. Asnew Drums (P) Ltd.* the sale proclamation was settled after notice to the parties and after several adjournments. The respondent adopted dilatory tactics to obstruct the sale. Therefore, the valuation in the report submitted in that behalf was accepted and the properties were sold. This Court held that if there was any material irregularities in the conduct of sale and if it causes sufficient injury to the judgment-debtor the same could be set aside where the court mechanically conducts the sale not bothering to see that the offer is too low and the better price could have been obtained. If, in fact, the price is substantially inadequate there is both material irregularity and injury. At the same time the court should not go on adjourning the sale till a good price is got as otherwise the decree-holder would never get the property of the judgment debtor sold. This Court further held that there is always considerable difference between the court sale price and the market price. The court sale is a forced sale and notwithstanding the competitive element of a public auction, the best price is not always forthcoming. The valuer's report though good as a basis, is not as good as an actual offer and there are bound to be variations within limits between such an estimate, however careful, and the real bids by the seasoned businessman. Mere inadequacy of price cannot demolish a court sale. Further, if the court sales are too frequently adjourned with a view to obtaining a still higher price, prospective bidders will lose faith in the actual sale taking place and may not attend the auction. What is expected of the court is to make a realistic appraisal of the factors in a pragmatic way and if satisfied that in the given circumstances the bid is acceptable it should conclude the sale. The court may consider the fair value of the property, the general economic trend, the large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and the possibility of litigation and several other factors depending on facts of each case. If the court has fairly applied its mind to the relevant considerations while accepting the final bid, it is not necessary to give a speaking order nor can its order be examined meticulously. In that case the judgment-debtor himself was adopting dilatory tactics and the property was sold after considerable delay and postponements. The sale was upheld.

16. In *Janak Rai v. Gurdial Singh*⁹ relied on by Shri Madhava Reddy, in execution of ex parte decree for a sum of Rs 519, the property of the judgment-debtor was brought to sale and was sold for a sum of Rs 5,100. Thereafter the judgment-debtor made an application to set aside the ex parte decree. An objection was raised to the sale on the ground that the value of the house was Rs 25,000 and it was auctioned for a sum of Rs 5000. The ex parte decree was set aside. On application made by the auction-purchaser, the sale was confirmed. It was contended that since the ex parte decree was set aside the confirmation of sale need to be set aside, which was negated by 8 (1974) 2 SCC 213 : (1974) 3 SCR 678 9 (1967) 2 SCR 77 : AIR 1967 SC 608 all the courts. In that background it was held that confirmation of the sale was not illegal and the inadequacy of the price was not a ground to set aside the sale. The ratio therein has to be considered in the light of its own scenario. The facts in this case are entirely different. The case of *Chinnammal v. P. Arumugham*¹⁰ also does not help the auction-purchaser. Therein it was found that pending appeal the money decree was executed and the properties were brought to sale. The High Court allowed the appeal and set aside the decree. Thereafter the Executing Court was moved to set aside the sale on diverse grounds including the plea of inadequacy of price. The learned Single Judge set aside the sale, but the Division Bench reversed the decision. On appeal, this Court held that the auction-purchaser was not a bona fide purchaser. The auction-sale in his favour was set aside and the restitution ordered. The court cannot lend assistance to a person to retain the property of the judgment-debtor who has since got rid of the decree. In that context it was held that the stranger auction purchaser who is not a party to the decree is protected against the vicissitudes or fortunes of the litigation and remains unaffected and does not lose title to the property by subsequent reversal or modification of the decree. The rights of bona fide purchaser who purchased the property in ignorance of the litigation should be protected. The ratio in that case would indicate that the purchaser must be a bona fide purchaser for adequate price without knowledge of the pending litigation. If it is otherwise, it is liable to be set aside. In that context it was held that the true question is whether the stranger auction purchaser had knowledge of the pending litigation about the decree under execution. If it is shown by evidence that he was aware of the pending appeal against the decree, when he purchased the property, the court cannot assume that he was a bona fide purchaser for giving him protection against restitution. His knowledge about the pending litigation would make all the difference in the case. Though he may be stranger to the suit, but he must be held to have taken a calculated risk in purchasing the property. Far from helping the auction-purchaser this goes against him. Mr Gupta contended that Rajinder Singh is not a bona fide purchaser. His brother is the adjacent owner of the site in question. The second respondent and his brother only made the bids and participated in the sale. Rest of the people had no capacity to purchase the property. The sale, therefore, is only a fraudulent and collusive one. Though we find some substance in what Mr Gupta contends, we need not to go into that question on the facts of this case. Suffice to state that all is not well. It is true that there is a distinction between irregularity and material irregularity in conducting the sale and it must be established that by reasons of illegalities or irregularities in conducting the sale, the judgment-debtor has sustained substantial injury. In *Dhirendra Nath Gorai v. Sudhir Chandra Ghosh*¹¹ this Court held that non-compliance of Section 35 of the Bengal Money Lenders Act does not render the sale void. It is only an irregularity. The judgment-

10 (1990) 1 SCC 513 11 (1964) 6 SCR 1001 : AIR 1964 SC 1300 debtor having had the knowledge did not file any objection. He did not attend the court for drawing up of the proclamation of the sale. On

those circumstances the sale was held not liable to be set aside.

17. 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.

18. The sale is set aside. The confirmation of sale is also set aside. The appellant is directed to withdraw the sum of Rs 7,780.33 paise within six weeks from today from the court of the Rent Controller and deposit it towards decree amount. The Rent Controller should order payment. The Subordinate Judge on deposit, should thereon record full satisfaction and pay over the same to the first respondent. The appellant is free to withdraw the balance amount from the court of the Rent Controller. The auction-purchaser Rajinder Singh is free to withdraw his Rs 1,05,000 and interest accrued thereon from the bank deposit as ordered by the court. The Registry should take such steps as are necessary to enable him to withdraw the said amount. The appeal is allowed, but with no costs, as the appellant argued in person.