

*Before R.P. Nagrath, J*

**ARVIND GUPTA AND COMPANY—Petitioners**

*versus*

**M/S INDIAN OIL CORPORATION  
AND ANOTHER—Respondents**

**CR No. 6340 of 2011**

January 14, 2015

*Code of Civil Procedure, 1908 - O. 21, R.66, 85, 89, 90 & 92 - Limitation Act, 1963 - Art. 127 - Judgment debtor - Public auction - Executing Court passed decree for recovery of money against Respondent No. 2 - Respondent No. 1 was decree-holder - Petitioner was auction-purchaser in Court auction - Application was filed by Respondent No. 2 judgment-debtor for setting aside ex parte order as well as application for setting aside sale - Executing Court allowed said applications - Application of Petitioner-auction purchaser for confirmation of sale and delivery of possession was also dismissed by Executing Court - Petitioner invoked revisional jurisdiction of High Court seeking to set aside order passed by Executing Court - Held, that sale of property was held on 09.08.2004 but amount was actually deposited by Petitioner in Government treasury in State Bank of India on 25.08.2004 - There is, thus, a clear violation of mandatory requirement of rule of payment within 15 days - Further, Respondent No. 2 judgment-debtor was residing in USA at the time of execution petition and process of service on application under O. XXI RI. 66 CPC was defective - Jurisdiction to sell property would arise in a Court only where owner is given notice of execution for attachment and sale of his property - Therefore, not only ex parte proceedings against Respondent No. 2 judgment-debtor were liable to be set aside but consequential auction sale made without service of proper notice upon judgment debtor would be void - Further, auction of property in question was ordered despite there being stay of dispossession in favour of Respondent No. 2 judgment-debtor, which was in operation when auction sale was held - It was also observed that due to orders staying dispossession of Respondent No.2 judgment-debtor, execution was adjourned sine die - Looking into said factors, there was no scope of upholding auction which had not been confirmed.*

*Held*, that the sale of property was held on 9-8-2004 and there is

no dispute of the fact that close of the fifteenth day in the instant case would fall on 24-8-2004. No doubt, the treasury challan is dated 23.8.2004 upon which orders of executing court were obtained for deposit of the amount on 24-8-2004 but the amount was actually deposited by the petitioner in the Government treasury in the State Bank of India admittedly on 25-8-2004. There is, thus, a clear violation of the aforesaid mandatory requirement of the rule.

(Para 22)

*Further held*, that it was stated that respondent No. 2-JD was residing in USA at the time of execution petition and, therefore, process of service on application under Order XXI Rule 66 CPC was defective. It was stated that respondent No. 1-DH very well knew that respondent No. 2-JD was out of India. In reply thereto, respondent No. 1-DH stated that it complied with the orders of executing court for effecting service upon respondent No. 2-JD at his last known address.

(Para 28)

*Further held*, that in *Desh Bandhu Gupta v. N.L. Anand & Rajinder Singh* 1994 (1) SCC 131, Supreme Court held that a sale made without notice to JD is nullity since it divests the JD of his rights, 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.

(Para 31)

*Further held*, that in the circumstances, therefore, not only the ex parte proceedings against respondent No. 2-JD was liable to be set aside but the consequences would be that the auction sale made without service of proper notice upon JD would be void.

(Para 32)

*Further held*, that there is another important aspect that the auction of the property in question was ordered despite there being stay of dispossession in favour of respondent No. 2JD since the year 1990 which was in operation when the auction sale was held the Senior Counsel for petitioner, however, contended that there was no stay of recovery nor of the execution proceedings I am of the Considered view

that say was obvious because the suit for recovery was filed by respondent No. 1-DH in the year 1991 during the period when the stay was in force. The auction purchaser moved an application on 5-6-2009 before the executing court for confirmation of the sale. This application was filed much after the settlement between respondent No. 1-DH and respondent No. 2-JD in LPA No. 201 of 2007. In the application of auction purchaser prayed for handing over possession of the property to him on the basis of auction sale LPA was disposed of on 12-2-2009. It was observed in LPA No. 201 of 2007 that the Counsel for the respondent No. 1-DH stated that on payment of the amount as discussed on the previous date, the Corporation shall not pursue the execution proceedings. The respondent No. 2-DH undertook to deposit the amount of ₹5,15,968.57 in Faridabad office of Corporation towards the payment as agreed to between the parties, within 15 days from the date of receiving copy of the order. Therefore, LPA was disposed of. It may also be observed that due to the orders staying dispossession of respondent No. 2-JD, the execution was adjourned since die on 9-12-2006.

(Para 33)

*Further held*, looking into the aforesaid factors, there was no scope of upholding the auction which had not been confirmed.

(Para 35)

*Further held*, that in view of aforesaid discussion find that the executing Court has proceeded quite correctly in the instant case by way of setting aside the impugned action and also directing respondent No. 2-JD to pay the amount so as to compensate the auction purchaser which also stands deposited. I do not find any illegality or perversity in the order requiring interference by this Court in exercise of revisional jurisdiction.

(Para 37)

Akshay Bhan, Senior Advocate with Santosh Sharma, Advocate,  
*for the petitioners.*

Harpriya Khaneka, Advocate for respondent No. 1.

Akshay Jain, Advocate for respondent No. 2.

**R.P. NAGRATH, J.**

(1) Petitioner is the auction purchaser of House No. 1490, Sector 9, Faridabad in the Court auction held on 09.08.2004 under the orders

of Executing Court for a decree for recovery of money passed against respondent no. 2. Respondent no. 1-M/s Indian Oil Corporation is the decree-holder (DH). Petitioner has invoked the revisional jurisdiction of this Court under Article 227 of the Constitution of India seeking to set aside the order dated 15.06.2011 (Annexure P-7) passed by the executing court whereby applications filed by respondent no. 2-judgment debtor for setting aside *ex parte* order dated 04.05.2004 as well as application under Order XXI Rule 89 read with Rule 92 (though mentioned as Section 92) of the Code of Civil Procedure (CPC) for setting aside the sale, were allowed and the application of petitioner-auction purchaser for confirmation of the sale and delivery of possession was dismissed.

(2) The facts, briefly stated, are that respondent no. 1 filed suit no. 721 of 1991 against respondent no. 2 for recovery of the amount of two loans which he obtained from his employer, namely; respondent no. 1. The amounts were borrowed by respondent no. 2-Judgment Debtor (JD) from his employer towards car loan and house building loan. The suit was decreed on 11.12.1996 by Civil Judge (Sr. Division), Faridabad for recovery of ₹ 2,77,297.79 ps. with interest @ 2.5% per annum. Respondent no. 2-JD filed appeal against the judgment and decree in which respondent no. 1-DH also filed cross-objections. Appeal filed by respondent no. 2-JD was rejected for non-deposit of court fee whereas the cross-objections filed by respondent no. 1-DH were allowed partly and it was held that on the amount of house building loan respondent no. 1-DH would be entitled to interest @ 6% per annum and interest @ 2.5% per annum on the outstanding amount of car loan vide judgment and decree of the appellate court dated 15.01.2001.

(3) Execution for recovery of the amount was filed by respondent no. 1-DH on 11.05.2001 praying for attachment and sale of house in question which was mortgaged in favour of respondent no. 1-DH.

(4) Perusal of record of Execution No. 39 of 2001 would show that warrants of attachment of the house of respondent no. 2-JD were issued for 09.02.2002 and the bailiff made the report dated 02.02.2002 to the effect that house was lying locked for the past about three years and the attachment was proclaimed by beat of drum. It was directed that no one would be able to sell, mortgage or create any kind of incumbrance over the property. Since Presiding Officer of the executing court was on leave on the said date fresh warrants of

attachment were again issued for 28.09.2002 and similar report was received proclaiming the attachment. That report is dated 26.09.2002 to the effect that the house was lying locked and the attachment was made by proclamation by beat of drum.

(5) Thereafter, on application made under Order XXI Rule 66 CPC the executing court issued proclamation for sale of the house which was conducted by the court auctioneer on 09.08.2004. The court auctioneer submitted report to the effect that the petitioner was highest bidder and his bid for ₹ 15.70 lacs was accepted. An amount of ₹ 4 lacs being 25% of the auction money was received by the court auctioneer on the fall of hammer and the court auctioneer issued receipt (Annexure -C) to the auction purchaser. The court auctioneer moved application to the executing court on 10.08.2004 and the amount of ₹ 4 lacs was deposited in the Government treasury in State Bank of India, Faridabad vide treasury challan dated 11.08.2004. According to the petitioner-auction purchaser, rest of the amount of auction money was also deposited on time.

(6) It may also be noticed that respondent no. 2-JD had already filed CWP No. 13866 of 1990 under Articles 226 and 227 of the Constitution of India for declaring the impugned action of respondent no. 1-DH by issuing order dated 13.09.1990 dispensing with services of respondent no. 2-JD without issuing show cause notice or following the procedure laid down by the rules applicable, as illegal, arbitrary, mala fide and unconstitutional. When CWP No. 13866 of 1990 was listed on 31.10.1990, notice was directed to be issued and in the meantime dispossession of respondent no. 2-JD from the house in question was stayed. Copy of the order dated 31.10.1990 is Annexure P-1.

(7) There was also an averment in the writ petition that respondent no. 2-JD had not only been removed from service but he had also been threatened to recover the house building advance. That petition was dismissed on 08.08.2007 and respondent no. 2-JD preferred LPA No. 201 of 2007 to challenge the order dated 08.08.2007 passed by learned Single Judge. Perusal of record of the executing court would further reveal that LPA was admitted on 11.10.2007. On behalf of respondent no. 2-JD contention was also raised in the LPA that it was admitted that respondent no. 2-JD has raised construction of the house in his own plot after taking loan from respondent no. 1-DH and that he may not be dispossessed from the house. Notice of motion in this regard was issued to respondent no. 1-DH and in the meanwhile

it was directed that respondent no. 2-JD be not dispossessed.

(8) Since dispossession of respondent no. 2-JD from the house was already stayed in the year 1990, respondent no. 2-JD also filed contempt petition i.e. COCP No. 801 of 2006 which was admitted on 26.02.2008 to be listed after decision of LPA No. 201 of 2007. The order was passed while admitting COCP that in the meanwhile having regard to the fact that respondent no. 2-JD has already deposited the entire decretal amount, the interim order dated 11.07.2006 was made absolute. In other words, it was further observed that neither respondent no. 2-JD shall be dispossessed from House no. 1490, Sector 9, Faridabad nor the alleged sale by way of auction shall be confirmed.

(9) The matter having been settled between the respondents *inter se* i.e. decree-holder and judgment debtor, LPA No. 201 of 2007 was disposed of on 12.02.2009 and the following order was passed:-

“On 05.02.2009, we passed the following order:-

“Shri R.K. Chibbar, learned senior counsel, placed on record a demand letter from Indian Oil Corporation Ltd., for a sum of ₹5,15,968.57, which learned counsel for appellant readily agreed to pay, subject to the condition that the respondent-Corporation would withdraw the pending execution proceedings. At this stage, Shri Chibbar, prays for and is granted a week's time to seek instructions and ensure presence of a senior officer of the Corporation, who could be in a position to take decision in the Court in case of reconciliation between the parties. List this matter on 12.02.2009.”

Pursuant to the above order, Sh. Uliyan Baath, Sr. H.R. Manager, Indian Oil Corporation Limited, is present in Court. On his instructions, Sh. R.K. Chibbar, learned senior counsel states that on the payment of aforesaid amount the corporation shall not pursue the execution proceedings. At this stage, learned counsel for appellant undertakes to deposit the demanded amount of ₹5,15,968.57 in the Faridabad office of corporation towards the payment as agreed to between the parties, within 15 days from the date of receiving a copy of this order.

In view of the statement of learned senior counsel for respondent-corporation and undertaking to pay given by learned counsel for appellant, nothing further survives for the adjudication in this L.P.A. It is disposed of, accordingly.”

(10) Thereafter, the contempt petition i.e. COCP No. 801 of 2006 was also dismissed as withdrawn on 23.11.2010 vide order Annexure P-2, with liberty to respondent no. 2-JD to continue with the objections in respect of the auction conducted in the execution in such a manner as the petitioner may consider proper.

(11) Respondent no.2-JD had filed application dated 29.01.2005 (Annexure P-4) before the executing court for setting aside *ex parte* order. It was stated that respondent no. 2-JD left the country during pendency of appeal. That application was filed by respondent no. 2-JD through his general power of attorney. Power of attorney was executed on 25.01.2005 from Consulate General of India, San Francisco (USA). When the attorney holder visited on 26.01.2005, he came to know about the auction of the house through the court auctioneer. It was stated that respondent no. 2-JD was never served in the execution and therefore, service through publication could not have been ordered as respondent no. 2-JD was residing in USA. In this application it was prayed that respondent no. 2-JD is still ready and willing to pay the decretal amount alongwith interest and costs. It was further pleaded that value of the property was in fact more than 25 lacs but it has been sold for quite a lesser amount of ₹ 15.70 lacs.

(12) Respondent no. 2-JD had also filed application under Order XXI Rules 89 and 92 CPC which is also dated 29.01.2005 as per trial court record but copy of the same has not been attached with the instant petition. Apart from grounds taken in the application for setting aside *ex parte* order, it was further stated that auction was conducted by the court auctioneer in collusion with decree-holder. It was stated that bid was offered by 4-5 advocates which would reflect upon the auction being not genuine.

(13) There was also application dated 29.04.2005 (Annexure P-5) under Order XXI Rule 90 CPC filed by one Rajesh Kumar Panchal seeking to set aside the auction on the ground that period for which the court auctioneer was appointed as such by the High Court, had expired much prior to the date of auction. This aspect of the matter, however, is not of much significance as learned counsel appearing for the parties have not raised an issue on the said question during arguments. That application filed by Rajesh Kumar aforesaid was, however, not pressed later on.

(14) In the reply to application under Order XXI Rule 89 read with Rule 92 CPC it was stated that respondent no. 2-JD was served at

his last available address. If he had disappeared from the country he was liable for consequences for his absence. It was further stated that respondent no. 2-JD could not be permitted to pay the decretal amount alongwith costs and expenses as the entire auction money has been deposited by the petitioner-auction purchaser. It was further stated that a large number of people were present at the time of the auction and if some of the bidders happened to be lawyers, the auction does not become suspicious.

(15) It would be seen that in terms of the order passed in LPA No. 201 of 2007, respondent no. 2-JD tendered the amount to respondent no. 1-DH on 14.05.2005 and the same was accepted by respondent no. 1-DH by making a statement in that regard. However, the objection was raised by the auction purchaser to this kind of deal and therefore, the amount was returned to respondent no. 2-JD for which statements of the parties were again recorded on 04.06.2005.

(16) I have heard learned senior counsel for the petitioner and learned counsel for both the respondents. It is mainly respondent no. 2-JD, who has contested the instant petition.

(17) Learned senior counsel for the petitioner, vehemently, contended that an application for setting aside the sale could be made within a period of sixty days of the date of sale in terms of Article 127 of the Limitation Act, but the application under Order XXI Rule 89 CPC was made on 29.01.2005 much beyond sixty days period from the date of sale which was held on 09.08.2004. Such an application could be entertained if it was accompanied by deposits as required by clauses (a) and (b) of Rule 89 of Order XXI CPC, which was not done. Such deposit is also required to be made within sixty days in terms of sub-rule (3) of Order XXI Rule 92 CPC.

(18) Sub Rule (1) of Rule 89 of Order XXI CPC says that where immovable property has been sold in execution of a decree, [any person claiming an interest in the property sold at the time of the sale or at the time of making the application, or acting for or in the interest of such person,] may apply to have the sale set aside on his depositing in Court,—

- (a) for payment to the purchaser, a sum equal to five per cent of the purchase-money, and
- (b) for payment, to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date



of such proclamation of sale, have been received by the decree- holder.

(19) It is further submitted that in case where the sale is challenged on the ground of irregularity or fraud in conducting the sale, application is required to be made under Rule 90 of Order XXI CPC. As is apparent from sub-rule (2) of Rule 92 of Order XXI CPC and Article 127 of the Limitation Act, the period of making an application to set aside the sale has to be made under Rule 89 or Rule 90 of Order XXI CPC. That application can be made within a period of 60 days from the date of sale and since the application was moved in the instant case beyond the limitation period, the executing court should have straightway confirmed the sale.

(20) In *Ram Karan Gupta versus J.S. Exim Ltd. and others*<sup>1</sup>, Hon'ble Supreme Court held as under:-

“19. We notice, in this case, there was no reference at all to the provisions of Order XXI Rule 89 in the application filed by the appellant on 01.12.2010. Be that it may, even then the appellant had not complied with the mandatory requirements of depositing the amount. Clause (a) of Sub- rule (1) of Rule 89 of Order XXI requires the applicant to deposit in Court 5 per cent of the purchase money for payment to the auction purchaser. Deposit of the requisite amount in the Court is a condition precedent or a sine qua non to an application for setting aside the execution of sale and such a amount must be paid within a period specified in the rule and if the deposit is made after the time limit, the application must be dismissed. The deposit made under Rule 89 of Order XXI CPC should be unconditional and unqualified and the decree holder or the auction purchaser should be able to get the amount at once.

20. We have already indicated that the rule is in the nature of a concession shown to the judgment debtor, so he has to strictly comply with the requirements thereof and a sale will not be set aside unless the entire amount specified in sub-rule (1) is deposited within 60 days from the date of the sale and, if it is beyond 60 days, the Court cannot allow the application. We have already found that the appellant-judgment debtor did not pay the amount within the stipulated time and he only made an

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<sup>1</sup> (2012) 13 SCC 568

application on 01.12.2010 without depositing the amount and hence the Court cannot entertain such an application and bound to confirm the sale which, in this case, the Court did on 23.10.2010.”

(21) Learned counsel for respondent no. 2, however, contended that 75% of the amount of auction money was not deposited within the mandatory period of 15 days of the date of sale, therefore, the auction sale would be void. So far as the deposit of 25% of the amount of auction sale at the fall of hammer is concerned, there is no dispute that an amount of ₹ 4 lacs was paid by the petitioner-auction purchaser to the court auctioneer at the spot and the court auctioneer obtained order from the executing court and deposited the amount vide challan dated 11.08.2004. The requirement of Rule 84 of Order XXI is thus fulfilled.

(22) However, the question would be whether rest of the 75% of the amount was deposited within 15 days from the sale of property. Rule 85 of Order XXI CPC says that full amount of purchase money payable shall be paid by the purchaser into court before the court closes on the fifteenth day from the sale of the property. The sale of the property was held on 09.08.2004 and there is no dispute of the fact that close of the fifteenth day in the instant case would fall on 24.08.2004. No doubt, the treasury challan is dated 23.08.2004 upon which orders of executing court were obtained for deposit of the amount on 24.08.2004 but the amount was actually deposited by the petitioner in the Government treasury in the State Bank of India admittedly on 25.08.2004. There is, thus, a clear violation of the aforesaid mandatory requirement of the rule.

(23) Learned senior counsel for the petitioner, vehemently, contended that no such specific objection was taken by respondent no. 2-JD in his application filed under Order XXI Rule 89 read with Rule 92 CPC nor in his application for setting aside the *ex parte* order. I do not think such a specific stand was required to be taken in the application because the petitioner himself in his application dated 18.08.2011, filed in the record of executing court where under the petitioner furnished the calculation of the amount of interest, stated clearly that the amounts were deposited by the auction purchaser on 11.08.2004 and 23.08.2004, but the record admittedly reveal that the challan for deposit of 75% of the auction money shows the deposit was made in the bank on 25.08.2004. In separate replies filed by the petitioner-auction purchaser to application of respondent no. 2-JD for

setting aside *ex parte* order dated 04.05.2004 and also application under Order XXI Rule 89 read with Rule 92 CPC, there was no specific averment about the date of deposit of the balance amount of 75% of the auction money. Both these replies are dated 04.06.2005. Even in the application of the petitioner dated 05.06.2009, filed before the executing court for confirmation of the sale and handing over possession of the property in question, the date of deposit of 75% of the amount was still not mentioned.

(24) In *Gangabai Gopaldas Mohata versus Fulchand and others*<sup>2</sup>, Hon'ble Supreme Court observed that rules relating to court sale provided in Order XXI Rules 84 & 85 are analogous. These rules require the purchaser to make deposit of 1/4<sup>th</sup> of the purchase money immediately after sale and the balance shall be deposited within 15 days. Hon'ble Supreme Court by referring to *Manilal Mohanlal Shah & ors versus Sardar Sayed Ahmed Sayed Mahmud & another*<sup>3</sup>, held that non-compliance with Rules 84 & 85 of Order 21 would render the sale void in the eye of law. The contention in the said case, that non-compliance with the aforesaid rule only renders the sale irregular, was repelled.

(25) In *Gangabai Gopaldas Mohata's case (supra)*, the public sale was conducted on 27.02.1984. The bidder made his initial deposit of ₹ 25,000 but did not pay the balance amount within the period of 15 days i.e. 13.03.1984. Instead the payment was made only on 09.11.1990. It was held that whatever is the excuse the fact remains that first respondent did not pay the balance sale amount within 15 days of sale. It was held that the sale of 27.02.1984 would, therefore, stand annulled *ipso jure* without anything more.

(26) The facts before the Hon'ble Supreme Court in *Manilal Mohanlal Shah's case (supra)* were as under:-

“6. One of the auction-purchasers, who is a pleader, has himself argued the appeal before us. The principal question which falls to be considered is whether the failure to make the deposit under Order XXI, Rules 84 and 85, is only a material irregularity in the sale which can only be set aside under rule 90 or whether it is wholly void. It is argued that the case falls within the former category and the application under rule 90 being barred by

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<sup>2</sup> AIR 1997 SC 1812

<sup>3</sup> AIR 1954 SC 349

limitation, the sale cannot be set aside. It is also contended that the Court having once allowed the set-off and condoned the failure to deposit, the mistake of the Court should not be allowed to prejudice the purchasers who would certainly have deposited the purchase price but for the mistake. We are of opinion that both the contentions are devoid of substance. In order to resolve this controversy a reference to the relevant rules of Order XXI of the Civil Procedure Code will be necessary. These rules are 72, 84, 85 and 86:

"72. (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

(2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on, the decree may, subject to the provisions of section 73, be set off against one another.

(3) Where a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale.

"84. (1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be resold.

(2) Where the decree-holder is the purchaser and is entitled to set off the purchase-money under rule 72, the Court may dispense with the requirement of this rule.

85. The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property :

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72.

86. In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after

defraying the expenses of the sale, be forfeited to the Government, and the, property shall be re- sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold."

(27) Hon'ble Supreme Court in Manilal Mohanlal Shah's case (supra) held as under:-

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

(28) There was also a separate application for setting aside the *ex parte* order passed against respondent no. 2-JD. It was stated that respondent no. 2-JD was residing in USA at the time of execution petition and, therefore, process of service on application under Order XXI Rule 66 CPC was defective. It was stated that respondent no. 1-DH very well knew that respondent no. 2-JD was out of India. In reply thereto, respondent no. 1-DH stated that it complied with the orders of executing court for effecting service upon respondent no. 2-JD at his last known address.

(29) Record of execution would reveal that respondent no. 1-DH moved an application under Order XXI Rule 66 CPC on 28-09-2002 and the executing court ordered the issuance of notice to respondent no. 2-JD for 08.02.2003. The notice dated 05.02.2003 was received with the

report that respondent no. 2-JD did not meet and the house was lying closed. On the next date, however, respondent no. 1-DH moved an application under Order XXI Rule 66 CPC with a prayer for service of notice through publication. The executing court allowed it for publication in "Daily Mewat" without even asking respondent no. 1-DH to furnish latest/correct address of respondent no. 2-JD. Thereafter, publication having been effected in the newspaper, the proclamation for sale was issued on 04.05.2004 with court notice for 07.06.2004, proclamation at the spot on 12.07.2004, auction to be held on 09.08.2004 and report to the court on 14.09.2004.

(30) Hon'ble Supreme Court in *Mahakal Automobiles and another versus Kishan Swaroop Sharma*<sup>4</sup>, held as under:-

"11. When a property is put up for auction to satisfy a decree of the Court, it is mandatory for the Court executing the Decree, to comply with the following stages before a property is sold in execution of a particular decree:-

- (a) Attachment of the Immovable Property;
- (b) Proclamation of Sale by Public Auction;
- (c) Sale by Public Auction.

Each stage of the sale is governed by the provisions of the Code. For the purposes of the present case, the relevant provisions are Order XXI Rule 54 and Order XXI Rule 66. At each stage of the execution of the decree, when a property is sold, it is mandatory that notice shall be served upon the person whose property is being sold in execution of the decree, and any property which is sold, without notice to the person whose property is being sold is a nullity, and all actions pursuant thereto are liable to be struck down/quashed.

15. The records do not reveal that the appellant-judgment debtor was served with a notice as required under Order XXI Rule 54(1)(A) of the Code in the appendix B Forms 23, 24 and 29. It is to be noted that the records reveal that the address of the appellant as contained in the sale deed was different from the address at which the process server purportedly affixed the notice on the door and in open court and at the chorah only. It has also to be noted that under Order XXI Rule 66(2) the service of the notice has to be personally affected on the judgment debtor. That also does not appear to have been done.

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<sup>4</sup> (2008) 13 SCC 113

Interestingly, the valuation of the property as required to be done under the proviso to sub-rule (2) of Rule 66 of Order XXI of the Code has not been done. The same appears to have been valued on the spot at ₹ 9,00,000/- and it was not done by the Court. There are admittedly other non-compliance with certain requirements. We do not think it necessary to deal with those aspects in detail in view of the order proposed to be passed. From the records it is revealed that ₹ 14,38,893/- and ₹ 4,46,926/- have been deposited by the appellant purportedly for satisfaction of the Execution Court, Ujjain and Indore respectively. The appellant shall further deposit a sum of ₹ 15,00,000/- within 4 months from today. The respondent No.1 shall be entitled to withdraw the amount deposited in the bank with accrued interest. The appellant shall be responsible for payment of the property tax of the property from the date of execution of sale deed i.e. 5.12.1986 till date and the same shall be paid deposited with the concerned authority within the aforesaid period of four months. On payment of the amounts, the title to the property described in the registered sale deed will vest free of all encumbrances on the appellant.” (emphasis supplied)

(31) In *Desh Bandhu Gupta versus N.L. Anand and Rajinder Singh*<sup>5</sup>, Hon'ble Supreme Court held that a sale made without notice to JD is nullity since it divests the JD 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. Hon'ble Supreme Court further held as under:-

“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-

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<sup>5</sup> (1994) 1 SCC 131

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 ₹ 7,780.33, without selling a portion thereof, caused substantial injury to the appellant.”

If that be so, the application/objection could be filed within a period of 3 years of sale.

(32) In the circumstances, therefore, not only the *ex parte* proceedings against respondent no. 2-JD was liable to be set aside but the consequences would be that the auction sale made without service of proper notice upon JD would be void.

(33) There is another important aspect that the auction of the property in question was ordered despite there being stay of dispossession in favour of respondent no. 2-JD since the year 1990 which was in operation when the auction sale was held. Learned senior counsel for the petitioner, however, contended that there was no stay of recovery nor of the execution proceedings. I am of the considered view that stay was obvious because the suit for recovery was filed by respondent no. 1-DH in the year 1991 during the period when the stay was in force. The auction purchaser moved an application on 05.06.2009 before the executing court for confirmation of the sale. This application was filed much after the settlement between respondent no. 1-DH and respondent no. 2-JD in LPA No. 201 of 2007. In the application of auction purchaser prayer for handing over possession of the property to him on the basis of auction sale LPA was disposed of on 12.02.2009. It was observed in LPA No. 201 of 2007 that the counsel



for respondent no. 1-DH stated that on payment of the amount as discussed on the previous date, the Corporation shall not pursue the execution proceedings. The counsel for respondent no. 2-DH undertook to deposit the amount of ₹ 5,15,968.57 in Faridabad office of Corporation towards the payment as agreed to between the parties, within 15 days from the date of receiving copy of the order. Therefore, LPA was disposed of. It may also be observed that due to the orders staying dispossession of respondent no. 2-JD, the execution was adjourned *sine die* on 09.12.2006.

(34) It is pertinent to mention that in the application under Order XXI Rule 66 CPC respondent no. 1-DH did not disclose that there was stay of dispossession of respondent no. 2-JD from the house in question, granted in CWP No. 13866 of 1990. It was rather stated that so far as decree holder knows there was no encumbrance on the property. It was also stated in the application under Order XXI Rule 66 CPC that the decree was passed by the Court for recovery by sale of mortgaged property though it was simple decree of recovery of the amount.

(35) Looking into the aforesaid factors, there was no scope of upholding the auction which had not been confirmed. All the necessary precautions which are required in such kind of dispute were taken by the learned executing court in the impugned order. The executing court observed as under:-

“..... As it is already discussed that vide order dated 31.10.1990, the dispossession of judgment debtor from the house in dispute was stayed by the Hon'ble High Court but even then the house in dispute was put to auction by Executing Court. Decree Holder had not intimated this fact to the Executing Court and got an order for auction of property in dispute. The said order dated 04.05.2004 for auction is in violation of the order dated 31.10.1990 passed by Hon'ble High Court. Judgment Debtor has already made the payment of decretal amount to the Decree Holder. As the auction proceedings were in violation of the order dated 31.10.1990 passed by the Hon'ble High Court, therefore, the order of auction of the property of Judgment Debtor is liable to be set aside in view of order XXI Rule 90 CPC as well as under Order XXI Rule 89 CPC. Moreover, no proper service was effected upon Judgment Debtor prior to the auction of the property in dispute as at the time of issuing of notice to the

Judgment Debtor, he was abroad and as such the service of Judgment Debtor through publication was not a proper service, therefore, ex parte order dated 04.05.2004 is also liable to be set aside. As the auction proceedings were conducted in violation of the order passed by the Hon'ble High Court, therefore, sale cannot be confirmed and possession of the property in dispute cannot be handed over to the auction purchaser. However, the auction purchaser can be compensated by way of interest on amount which he had deposited in treasury in pursuance of auction. The auction purchaser is entitled to 12% interest per annum on the said amount from the date of depositing the amount till its realization. The auction purchaser is directed to give calculation on the next date of hearing and Judgment Debtor is directed to make payment of the interest to the auction purchaser within a period of one month after giving calculation by the auction purchaser in the Court. Liberty is granted to the auction purchaser to withdraw the amount, which is lying deposited in the treasury.”

(36) In terms of the aforesaid order, the executing court directed the auction purchaser to file calculation taking interest @ 12% per annum on the amount lying deposited in the treasury on 28.07.2011 and respondent no. 2-JD was directed to make payment of interest to the auction purchaser within a period of one month after giving calculation by the auction purchaser in the court. The calculation was filed by the auction purchaser on 18.08.2011. Respondent no. 2-JD had already deposited an amount of ₹9,83,300/- in the treasury and made a statement that he has no objection for the auction purchaser to withdraw the aforesaid amount. Ultimately, the executing court passed the following order:

“Counsel for judgment debtor has produce the draft of ₹ 31,863/- in view of the direction given to him in order to make the payment to the objector Counsel for objector has made a statement that the objector wants to file revision petition in the Hon'ble High Court against the order dated 15.06.2011 and the objector do not want to accept the demand draft from the judgment debtor. Heard. Vide order dated 15.06.2011, the judgment debtor was directed to make the payment of interest at the rate of 12% to the objector on the amount which was deposited by the objector in the court during the proceeding. The objector is not willing to accept the amount from the judgment debtor and he wants to file the revision petition in the Hon'ble High Court against the order

dated 15.06.2011. In these circumstances, there is nothing left to decide by this Court in the present petition. Hence, the present petition be consigned to the record room. File shall be taken up again if any order will be received from the Hon'ble High Court.”

(37) In view of the aforesaid discussion I find that the executing court has proceeded quite correctly in the instant case by way of setting aside the impugned action and also directing respondent no. 2-JD to pay the amount so as to compensate the auction purchaser which also stands deposited. I do not find any illegality or perversity in the order requiring interference by this Court in exercise of revisional jurisdiction.

(38) Finding no merit in the instant petition, the same is dismissed.

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***S. Gupta***