

IN THE HIGH COURT OF KARNATAKA DHARWAD BENCH

DATED THIS THE 16TH DAY OF NOVEMBER, 2023

BEFORE

THE HON'BLE MR JUSTICE C. M. POONACHA

C.R.P. NO.846 OF 2005

BETWEEN

- 1 . SHOUKATALI BANKAPURE
S/O KHADERSAHEB
SINCE DEAD BY HIS LRS
- 1(A) NOORJAHANBEG
W/O. SHOUKATALI
AGED ABOUT 50 YEARS,
MAHADWAR ROAD,
BELGAUM - 590 001
- 1(B) MAHATABALI BANKAPURE
AGED ABOUT 28 YEARS
S/O SHOUKATALI
MAHADWAR ROAD
BELGAUM - 590 001
- 1(C) AFTABALI BANKAPURE
AGED ABOUT 24 YEARS
MAHADWAR ROAD
BELGAUM - 590 001
- 1(D) ASIF ALI BANKAPURE
AGE ABOUT 26 YEARS
MAHADWAR ROAD
BELGUAM - 590 001
- 1(E) ANJUM DALAYAT
W/O MUSTAKAHAMED
AGED ABOUT 22 YEARS

STATION ROAD
BELAGAVI 587101.

2. SHRATALI BANKAPURE
S/O KHADERSAHEB
SINCE DEAD BY HIS LR'S

2(A) JABEEN BANKAPURE
AGED ABOUT 53 YEARS
S/O SEETATALI
MAHADWAR ROAD,
BELAGAVI 590001.

2(B) RAMEEZ BANKAPURE
AGED ABOUT 31 YEARS
S/O SEETATALI
MAHADWAR ROAD
BELAGAVI 590001.

2(C) RAMEEZ BANKAPURE
AGED ABOUT 31 YEARS
S/O SEETATALI
MAHADWAR ROAD
BELAGAVI 590001.

2(D) RAMEEZ BANKAPURE
AGED ABOUT 31 YEARS
S/O SEETATALI
MAHADWAR ROAD
BELAGAVI 590001.

3. JAINABI BANKAPURE
W/O KHADERSAHEB
SINCE DEAD BY HER LRS

3(A) FATIMABI RAJAGOLI
W/O. KHATALAHAMAD
AGED ABOUT 67 YEARS
R/O. MOMINGALLI
BELGUAM - 590 001

3(B) GOUSIYA FARAS

AGED ABOUT 60 YEARS
KHADE BAZAAR, SHAHAPUR
BELAGAVI 590001.

3(C) SHABIRA SANGOLI
W/O MOHAMMADALI
SINCE DEAD BY HIS LR'S

3C(i) SAIFULLA SANGOLI
S/O MOHAMMADALI
SINCE DEAD BY HIS LR'S

3C(i)(a) KAUSAR SANGOLI
AGED ABOUT 44 YEARS
W/O SAIFULLA

3C(i)(b) MEHARNAAZ SANGOLI
AGED ABOUT 15 YEARS
D/O SAIFULLA

3C(i)(c) MOHAMMED LUKAMMAN
AGED ABOUT 13 YEARS
S/O SAIFULLA SANGOLI

3C(i)(d) ARFNAAZ SANGOLI
AGED ABOUT 8 YEARS
S/O SAIFULLA

PETITIONER - 3C(1)(B) TO 3C(1)(D)
BEING MINOR REPRESENTED BY
THEIR NATURAL MOTHER, I.E.,
PETITIONER - 3C(1).
ALL ARE RESIDENT OF WARD NO. 1
BAILHONGAL 591 102, BELAGAVI.

3C(ii) IRFAN SANGOLI,
AGED ABOUT 41 YEARS,
S/O. MOHAMMADALI,
BAILHONGAL 591 102,
BELAGAVI.

3C(iii) MASABBI @ AFHRIN,
AGED ABOUT 39 YEARS,

W/O. MASTAK RESHAMAWALE,
DHARWAD 580 001.

3C(iv) SHAHIN GORI,
AGED ABOUT 37 YEARS,
W/O. SALIM,
RAMNAGAR, BELAGAVI 590 001.
(LR'S OF JUDGMENT DEBTOR - 3,
JUDGMENT DEBTOR - 4
LR'S OF JUDGMENT DEBTOR - 5
IN EXECUTING COURT AND
APPELLANTS BEFORE THE
II ADDITIONAL DISTRICT JUDGE'S COURT)

3(D) ZEENATBEGUM ABDUL KHADER
BHAIKAR
AGED ABOUT 40 YEARS
RESIDENT OF JAINPET
BAGALKOT 587101.

... PETITIONERS

(BY SRI HARSH DESAI, ADVOCATE)

AND

1 . THE UNITED WESTERN BANK LTD
BELGAUM, H.O. AT SATARA
MAHARASHTRA STATE,
REP BY ITS POWER OF ATTORNEY HOLDER
MANAGER, KADOLKAR GAI
BELGAUM - 590 001

(DECREE HOLDER IN EXECUTING COURT
AND RESPONDENT -1 BEFORE THE
II ADDITIONAL DISTRICT JUDGE'S COURT)

2 . M/S BANKAPURE AND COMPANY
A PARTNERSHIP FIRM
REP BY ITS PARTNER
MOHAMMADALI,
S/O. KHADERSAHEB BANKAPURE
AGED ABOUT 55 YEARS
MUMUPURA,
GULBARGA - 585 101

(JUDGMENT DEBTOR -1 IN THE EXECUTING COURT
AND RESPONDENT -2 BEFORE THE
II ADDITIONAL DISTRICT JUDGE'S COURT)

3 . MAHAMMADALI BANKAPURE
S/O. KHADERSAHEB
SINCE DEAD BY HIS LR's

3(A) BADARSHABERA,
AGED ABOUT 80 YEARS,
W/O. MAHAMMADALI BANKAPURE,
GULBARGA 585 101.

3(B) SHAKERA PRAVEEN,
50 YEARS,
W/O. KHAJA PASHA,
H. NO. 4-629/T, DARGA ROAD,
NEAR BHAMIN CHOWK MAKHTAMPURA,
GULBARGA 585 101.

(JUDGMENT DEBTOR 2 IN THE EXECUTING COURT AND
RESPONDENT-3 BEFORE THE II ADDITIONAL
DISTRICT JUDGE'S COURT)

4 . VEERABHADRAPPA TELAGADI
S/O. MUDAKAPPA
SINCE DEAD REPRESENTED
BY RESPONDENT -5
JAGADISH S/O. VEERABHADRAPPA TELAGADI

(JUDGMENT DEBTOR - 6 IN THE EXECUTING COURT AND
RESPONDENT-4 BEFORE THE II ADDITIONAL
DISTRICT JUDGE'S COURT)

5 . JAGADISH TELAGADI
AGED ABOUT 41 YEARS
S/O. VEERABHADRAPPA
VADAGAON, BELAGAVI - 590 001

(AUCTION PURCHASER AND
RESPONDENT -5 BEFORE THE
II ADDITIONAL DISTRICT JUDGE'S COURT)

- 6 . SHAHANAZ INAMADAR
W/O MOHAMMAD SHAFI
SINCE DEAD BY HIS LR'S
- 6(A) MOHAMMAD INAMDAR,
AGED ABOUT 72 YEARS,
S/O. SHAFI, SAKAF ROZA,
VIJAYAPURA 586 101.
- 6B) ABDULQADIR,
AGED ABOUT 43 YEARS,
S/O. MOHAMMAD INAMDAR,
SAKAF ROZA, VIJAYAPURA 586 101.
- 6(C) HARISH,
AGED ABOUT 32 YEARS,
S/O. MOHAMMAD INAMDAR,
SAKAF ROZA, VIJAYAPURA 586 101.
- 6(D) NUZAT,
AGED ABOUT 38 YEARS,
W/O. WALL AHMED,
NEAR DHANAVANTARI HOSPITAL,
BAGALKOT ROAD,
VIJAYAPURA 586 101.
- 6(E) MADIYA,
AGED ABOUT 36 YEARS,
W/O. ABID PATEL,
NEAR RAHEEM KHAN MASJID,
RING ROAD, KALABURAGI 585 104.
- 7 . HASINABEGUM
W/O. ASMAT KHAN
AGED ABOUT 50 YEARS
R/O. CHOUGULEPETH, VASCO,
GOA - 403 802

(RESPONDENTS - 6 AND 7 ARE
IMPLEADED AS PER ORDERS ON
IA NO. 6 BEFORE THE

I ADDITIONAL DISTRICT JUDGE'S COURT)

...RESPONDENTS

(BY SRI UMESH V MAMADAPUR, ADVOCATE FOR R2 & R7
SRI ASHOK KALYANSHETTY, ADVOCATE FOR R6(D & E)
SRI HARSHWARDHAN M PATIL, ADVOCATE FOR R5
NOTICE TO R1, R6(A TO C) R3 (A &B) IS SERVED
R5 IS LR'S OF DECEASED R4

THIS CRP IS FILED U/S 115 CPC AGAINST THE JUDGMENT AND ORDER DATED:27.9.2005 PASSED IN MA.NO.36/2001 ON THE FILE OF THE II ADDL.DISTRICT JUDGE, BELGAUM, DISMISSING THE APPEAL FILED AGAINST THE ORDER DATED:23.11.2001 PASSED ON IA NO.3 IN EXECUTION CASE NO.268/1985 ON THE FILE OF THE II ADDL.CIVIL JUDGE (SR.DN.), BELGAUM, DISMISSING I.A. NO.3 FILED U/O 21 R 90 CPC TO SET ASIDE THE AUCTION SALE HELD ON 12.1.1990 AND ETC.

THIS PETITION HAVING BEEN HEARD AND RESERVED ON 10.10.2023, COMING ON FOR PRONOUNCEMENT OF ORDERS, THIS DAY, THIS COURT PRONOUNCED THE FOLLOWING:

ORDER

The present Revision Petition is filed under Section 115 of the Code of Civil Procedure (hereinafter referred to 'CPC') challenging the order dated 27.09.2005 passed in MA No.36/2001 by the II Additional District Judge, Belgaum (hereinafter referred to as 'First Appellate Court') confirming the order dated 23.11.2001 passed on I.A.No.3 in Execution Case No.268/1985 by the II Additional Civil Judge (Sr.Dn.), Belagavi (hereinafter referred to as 'the Executing Court').

2. The relevant facts necessary for consideration of the present petition are that Respondent No.1 - Bank filed O.S. No.262/1980 for recovery of a sum of Rs.60,280.50 which suit was decreed on 30.06.1984. The suit for recovery of money was based on a mortgage transaction and the suit was decreed directing to draw a preliminary decree. It is further forthcoming from the record that there is no final decree drawn.

3. The first respondent/deGREE holder (DHR)-Bank filed execution case No.268/1985. Respondent No.1/judgment debtor No.1 (JDR No.1) is a partnership firm. JDRs-2 to 5 are its partners. JDR Nos.1 to 5 are the borrowers from the DHR - bank who had also mortgaged their properties. JDR No.6 is the guarantor. The present petition is filed by the legal representatives of JDR Nos.3, 4 and 5. Respondent No.4 is the JDR No.6 and his son is Respondent No.5, the auction purchaser.

4. The properties of the petitioners which were mortgaged to the DHR - bank was brought to sale. Vide

order dated 12.1.1990 passed by the Executing Court, JDR No.6 was permitted to participate in the auction sale. However, it is forthcoming that the son of JDR No.6/Respondent No.5 participated in the auction, which was conducted on 12.1.1990 and offered the highest bid of ₹80,000/-. The auction purchaser deposited 1/4th of the sale price of ₹20,000/- on the date of the auction and thereafter deposited the balance amount of ₹60,000/- within 15 days. The case was adjourned for confirmation of sale.

5. On 27.1.1990 JDR-5 filed IA.3 under Order XXI Rule 90 of the CPC to set aside the auction sale held on 12.1.1990. Vide the said application, JDR No.5 has set out various grounds alleging that the procedure required to be followed to bring the properties to sale by auction was not followed. It was further alleged that without considering the objections of JDR No.5, the JDR No.6 who is also the guarantor to the suit loan ought not to have been permitted to participate in the auction. Further, it was alleged that JDR No.6, though sought permission from the Court to participate in the auction, which

was granted, has set up his son to bid in the auction which is done in collusion with another bidder who was the partner of JDR Nos.1 to 4 in other businesses and there were disputes between the said JDR Nos.1 to 4 and the other partners. Hence, the circumstances under which the auction sale was conducted clearly indicated that a fraud has been perpetuated to deprive JDR No.5 of the highest reasonable market value. It was further contended that the market value of the properties exceeded ₹10.00 lakhs and JDR No.6 managed to see that the bidding does not go further and that the final bid price of ₹80,000/- was a low one. It was further contended that the daughters of JDR No.5 were co-owners and ought to have been made parties before the properties could be sold.

6. Objections to the said application was filed by the decree holder on 13.2.1990. On 22.6.1990 the JDR No.5 filed an application for adjournment. The Executing Court vide its order dated 22.6.1990 dismissed the application for adjournment and further dismissed IA No.3 filed by JDR No.5

for non prosecution and consequently the sale made in favour of the auction purchaser was confirmed with a direction to issue sale certificate within 15 days subject to payment of stamp fee, etc.

7. The said order dated 22.6.1990 was challenged before this Court in CRP No.3325/1990. Vide interim order dated 3.7.1990 this Court granted stay of all further proceedings in Ex.Case No.268/1985 subject to deposit of ₹50,000/- on or before 25.7.1990 which deposit was made as ordered. Subsequently, by order dated 5.3.1990 this Court dismissed the said petition as not maintainable and liberty was given to the revision Petitioners to prefer an appeal before the appropriate forum.

8. Accordingly, JDR Nos.1 to 5 preferred MA.No.32/1990 before the I Additional District Judge, Belgaum. Vide order dated 7.9.1992, the District Judge allowed the appeal, set aside the order dated 22.6.1990 and remanded the matter to the Executing Court to dispose of

IA.No.3 in accordance with law by giving fresh opportunity to both the parties.

9. Subsequent to the order of remand, the auction purchaser filed objections to IA.No.3 on 19.3.1994. Evidence was adduced and one Yashwanth, an Architect was examined as DW.1 on 20.11.1995 on behalf of the JDRs who has deposed that valuation of the entire building is about ₹14,25,453/- and the valuation certificate issued by DW.1 was marked as Ex.D1. One Manohar who is a registered valuer and a Civil Engineer was examined on 2.3.1996 as witness for auction purchaser and the valuation report given by him has been marked as Ex.A1, which discloses that the value of the building is Rs.1,31,119.50 and the value of the property is 40% of the total value.

10. The Executing Court by order dated 23.11.2001 dismissed IA.No.3. Being aggrieved, the JDRs-3 to 5 preferred MA No.36/2001. The respondent Nos.1, 4 and 5 who are the DHRs, JDR No.6 and the auction purchaser entered appearance in the said appeal. The first appellate

Court by order dated 27.9.2005 dismissed the appeal. Being aggrieved the present revision petition is filed.

11. Sri. Harsh Desai, learned counsel for the Petitioners assailing the judgment passed by the First Appellate Court and the order of the trial Court contends:

- i) That admittedly, Respondent No.1 – Bank has not initiated any proceedings for drawing up of final decree though Preliminary Decree was passed on 30.06.1984. Hence, in the absence of final decree, Respondent No.1 – Bank did not have the *locus standi* to initiate execution proceedings;
- ii) That the trial Court and the first Appellate Court erred in not considering the fact that during the pendency of the proceedings the Petitioners have paid more than of ₹2.00 lakhs which has not been taken into consideration by the Executing Court and the

first Appellate Court while adjudicating IA.No.3;

- iii) Having regard to the fact that the amount due to Respondent No.1 – Bank has been paid, it is not open to the Bank to seek for sale of the mortgaged property in execution of the decree;
- iv) That in view of the fact that the entire claim of the Bank has stood satisfied, the Executing Court ought to have revoked the proclamation of sale issued for sale of the mortgaged property;
- v) The value of the property was more than 10 to 12 lakhs and it was the duty of the Executing Court to ascertain the claim of the Decree Holder before confirmation of sale;
- vi) There was an error in the description of the property in the sale certificate which aspect

has not been considered by the Executing Court as well as the first Appellate Court;

- vii) The proclamation of sale was not in Kannada and it was not published in accordance with law and that the valuation of the property was also not mentioned and on these grounds also the sale was required to be set aside;
- viii) The trial Court and the first Appellate Court considering the aspect that merely because the auction purchaser had invested ₹80,000/- and purchased the stamp paper, ought not to have rejected the case of the Judgment Debtor on the said ground;
- ix) The trial Court and the first Appellate Court erred in proceeding on the erroneous assumption that on the ground of

inadequacy of price, the sale cannot be set aside;

- x) That the provisions of Order XXI Rule 66 having not been complied with, the process in which the sale was conducted is irregular;

12. In support of his contentions, he relies on the following judgments:

- i) *Manjamma Vs. Suryanarayana Rao*¹;**
- ii) *Ambati Narasayya Vs. M. Subba Rao and another*²;**
- iii) *M/s. Annapurna Industries Vs. Syndicate Bank*³;**
- iv) *Desh Bandhu Gupta Vs. N.L. Anand & Rajinder Singh*⁴;**
- v) *Seethammal Vs. Senthil Finance and another*⁵;**
- vi) *Kharaiti Lal Vs. Raminder Kaur and others*⁶;**

¹ ILR 1986 Kar 912

² AIR 1990 SC 119

³ ILR 1993 KAR 1081

⁴ (1994) 1 SCC 131

⁵ AIR 1996 SC 1551

**vii) The Vyavasaya Seva
Sahakara Sangha
Niyamitha Nagenahalli V.
N. Yariswamy & Others⁷;**

**viii) Balakrishnan Vs.
Malaiyandi Konar⁸.**

13. Learned Counsel for respondent No.5/auction purchaser Sri Harshavardhan Malipatil, submits that the auction purchaser has participated in the auction and being the highest bidder has deposited the bid amount of ₹80,000/- within the time stipulated and if the relief sought in IA.No.3 filed by JDR No.5 is granted he will be put to great hardship as he has deposited valuable sale consideration which is lying in deposit before the Executing Court for more than 33 years. He further submits that the Executing Court and the first Appellate Court have considered the contentions putforth by the Petitioners and have dismissed the application, which order ought not to be interfered with by this Court in the present Revision Petition.

⁶ AIR 2000 SC 1148

⁷ 1990 (2) KLJ 173

⁸ AIR 2008 SC 1458

14. The contentions putforth have been considered and the records have been perused. The questions that arise for consideration are:

- i) *Whether the orders dated 23.11.2001 passed in Ex.Case No.268/1985 and 27.9.2005 passed in MA.No.36/2001 are liable to be interfered with?*
- ii) *Whether IA.3 filed in Ex.Case No.268/1985 is liable to be allowed?*

15. The relevant facts with regard to the suit in OS No.262/1980 having been decreed for a sum of ₹60,280.05 and Ex.Case No.268/1985 having been filed to execute the said decree in OS No.262/1980 are a matter of record. It is forthcoming that vide order dated 12.1.1990 the JDR No.6 was permitted to participate in the Court auction and on the said date the auction was conducted, wherein the son of JDR no.6 was declared as the highest bidder and his bid of ₹80,000/- was accepted. It is further undisputed that a sum of ₹20,000/- was paid towards 1/4th of the bid amount and the balance sum of ₹60,000/- being 3/4th of the bid amount

was also deposited on 19.1.1990. Thereafter, IA.No.3 was filed on 27.1.1990. Objections to the said application was filed by the decree holder on 13.2.1990. On 22.6.1990, the Executing Court rejected the request for grant of time and dismissed IA.No.3 for non-prosecution. Pursuant to the order dated 7.9.1992 passed in MA No.32/1990 wherein the order dated 22.6.1990 was set aside and the matter was remanded to the Executing Court for fresh disposal of IA.No.3, the auction purchaser filed objections on 19.3.1994. Evidence was adduced by both the parties with regard to the value of the property as has been noticed above.

16. The Executing Court by its order dated 23.11.2001 while dismissing IA.No.3 has recorded the following findings:

- i. Having regard to Order XXI Rule 90 of the CPC the sale could be set aside on the ground of material irregularity or fraud in publishing and conducting the sale and substantial injury ought to have resulted as a result of same. JDR No.5

(applicant in IA.No.3) has not placed any material or evidence to believe that there is a fraud or irregularity in publishing or conducting the sale and he has suffered substantial injury;

- ii. The judgment debtors who were served with notices under Order XXI Rule 66 of the CPC had a opportunity to raise objections if there were any defects in the proclamation. However, they remained silent and did not raise proper objections before the Court under Order XXI Rule 66 of the CPC.
- iii. The sale proclamation was published in Kannada language and it was duly published in accordance with law;
- iv. Even after several adjournments the JDRs could not get better purchasers than the auction purchaser;

- v. The auction purchaser has deposited the bid amount of Rs.80,000/- and has invested his hard earned money which is lying in the Court and he has also purchased the stamp paper for issuance of the Sale Certificate;
- vi. The JDRs not having raised objections at the appropriate time, their objections have deemed to have been waived and they are estopped from raising objections after the sale and the present case is hit by the doctrine of *constructive res judicata*;
- vii. Mere inadequacy of price is not a ground to set aside the sale;
- viii. There is no evidence of irregularity or fraud in the present case. Hence, the question of setting aside the sale on the ground of inadequacy of price does not arise;

- ix. The evidence led by JDR No.5 (DW.1 & Ex.D1) will not help the JDR No.5 in getting the sale set aside.

17. The first Appellate Court by order dated 27.9.2005 while dismissing MA.No.36/2001 has held as follows:

- i. The JDR No.5 has not placed any material or evidence to believe that there is fraud or irregularity in publishing or conducting the sale and that he has suffered substantial injury on these grounds;
- ii. JDRs did not raise any objections to the proclamation drawn and sale conducted;
- iii. The JDRs are estopped from raising objections after the sale and the present application is hit by principle of *res judicata*.

18. It is relevant to note that a memo is filed by the decree holder on 30.1.1993 wherein it has been placed on record that the JDR No.5 has deposited Rs.19,500/- in the bank on 4.12.1992 and Rs.90,000/- in the Court as per the orders of the High Court and the District Court and after the amounts deposited in the Court are paid to the decree holder the claim in the execution petition will be satisfied. It is forthcoming that vide the application dated 5.12.1992 filed by the decree holder, it is placed on record that the JDR No.5 has deposited a sum of Rs.20,000/- on 19.3.1980, ₹50,000/- on 18.7.1990 and ₹20,000/- on 31.5.1991, which totally amounts to ₹90,000/-.

19. It is forthcoming from the objections filed by the JDR Nos.3, 4 and 5 to the application filed by the auction purchaser for delivery of possession that the following amounts have been deposited by the JDRs: (i) ₹10,000/- on 3.6.1986; (ii) ₹33,000/- on 3.7.1986; (iii) ₹8,000/- on 29.11.1988; (iv) ₹3,000/- on 3.1.1987; (v) ₹2,000/- on 18.2.1987; (vi) ₹1,500/- on 28.3.1987; (vii) ₹3,000/- on

10.3.1988; (viii) ₹20,000/- on 19.3.1990; (ix) ₹50,000/- on 18.7.1990; (x) ₹20,000/- on 31.5.1991; and (xi) ₹19,500/- on 4.12.1992. The same totally amounts to ₹1,70,000/-.

20. It is further forthcoming that vide application dated 1.1.2002 filed by the JDRs., permission was sought to deposit a sum of ₹60,000/- in compliance of the condition imposed in the order dated 11.12.2001 passed by this court in CRP No.5153/2001, which was permitted to be deposited by the Executing Court vide order dated 1.1.2002. Hence, it is clear and forthcoming that the JDRs., have totally deposited a sum of ₹2,30,000/-.

21. It is relevant to note that neither the trial Court nor the first Appellate Court have taken note of the various amounts deposited by the JDRs., during the pendency of IA.No.3 and the said aspect is not even referred to in the impugned orders.

22. It is also relevant to note that both the Courts have not appreciated the evidence adduced by the parties

with regard to the valuation made in respect of the property. It is forthcoming that on 20.11.1995 on behalf of the JDRs., DW.1 was examined who is an Architect. In his examination in chief he has given details as to the kind of construction and he has placed on record that as on 1990 the age of the building was 45 years. He has deposed that he has given valuation of the separate blocks and the total valuation of the building comes to ₹14,25,453/-. He has further placed on record that the building is situated in the heart of the city and is in a fully developed area and he has issued the valuation certificate at Ex.P1. In the cross-examination he has stated that he has not verified the documents at the sub-registrar's office regarding the valuation of the properties. He has further stated that he has taken the market value at Rs.1815/- per sq.mtr. He has further stated that on his personal experience, he has valued the building at Rs.3450/- per sq.mtr. That the valuation is made as per the cost of construction on the date of the valuation and the valuation of building will be added to the cost of construction.

23. The auction purchaser has adduced the testimony of one Venkatesh Kulkarni, who is a registered valuer and Civil Engineer. He has stated that the building is aged about 60 years and he has given the valuation report where the value of the building would be ₹1,31,119.50 and he has given depreciation on the total value of the property at 40%. In his cross-examination he has stated that he has visited the property 2 days prior to the date of the report. However, he has admitted that he cannot say the number of blocks on the ground floor as well as first floor and he cannot give measurements of the each block. He has given details of the property. He has given his valuation report, which is marked as Ex.A1. He further states that he has added the land value at ₹225.00 per sq.ft., and he has adopted the land and building method for valuation. However, he has stated that he has done the valuation at the request made by JDR No.6 and he was aware that the properties were auctioned for ₹80,000/-.

24. It is forthcoming from the valuation report given by one B.Jagtap – Ex.D1 that the value of the building was taken as ₹2150/- per sq.mtr., and the said value amounts to ₹21,74,116/-. It is also forthcoming from the valuation report issued by one M.V.Kulkarni dated 11.10.1995 at Ex.A1 that the valuation of the property is ₹Rs.2,18,532/- and after deducting a depreciation of 40% at ₹87,413/-, the valuation is taken as Rs.1,31,119.50.

25. Despite various valuation reports being available on record as noticed above, the trial Court and first Appellate Court have not appreciated the oral and documentary evidence adduced by the parties with regard to the valuation. It is further forthcoming from the order passed by the first appellate Court that the details of the case of the parties have not been independently appreciated.

26. Ordinarily, the order passed by the first Appellate Court as well as the Executing Court would have been required to be set aside and the matter remanded for an adequate adjudication of the matter. However, having

regard to the fact the auction was conducted on 12.1.1990 and more than 33 years have passed and the present petition is pending for nearly 18 years before this Court, it is expedient to appreciate the relevant aspects so as to adjudicate upon the issue that arises for consideration.

27. The trial Court and the first Appellate Court have refused to entertain IA.No.3 since no substantial injury has been made out as a result of any material irregularity or fraud. It is relevant to note Order XXI Rule 90 of the CPC, which reads as under:

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

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

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

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

(emphasis supplied)

28. In IA.No.3 it is specifically averred that although JDR No.6 had sought for permission, which was granted by the Executing Court to participate in the auction, he did not participate in the same and the auction purchaser was the son of JDR No.6. Further, it was specifically averred that the other bidders were the business partners of JDR Nos.1 to 4 in the other businesses and they have colluded with one another and played fraud so that the property of JDR No.5 is sold at a very lower price. In the objections dated 19.3.1994 filed by the auction purchaser to IA.No.3 the allegations of fraud have been denied. In the said objections, the auction purchaser has merely stated that all the necessary processes for conducting the sale have been complied with. However, the said aspect of the matter was not even considered by the Executing Court and first Appellate Court.

29. As noticed above, neither the Executing Court nor the first Appellate Court have considered the amounts deposited by the judgment debtor during the pendency of IA.No.3 as well as the memo filed by the decree holder that if the said amounts are released in favour of the decree holder the said decree would be satisfied. It is further relevant to note that subsequent to the remand made in MA No.36/2001 the decree holder has not participated in the enquiry before the Executing Court.

30. Another aspect which has been putforth by the learned counsel for the Petitioners is whether sale of a portion of the property would satisfy the decretal amount. This aspect of the matter has also not been considered by the Executing Court and the first Appellate Court. However it is relevant to note that when 3 times the properties were brought to sale there was no bidder and hence, the auction could not have taken place.

31. The Executing Court as well as the first Appellate Court has recorded a finding that the sale proclamation was

published in Kannada language. However, there is nothing on record which is forthcoming that wide publicity has been given to the sale that was conducted and the number of places where the publication was made.

32. The judgments relied upon by the learned counsel for the petitioners are considered as follows:

(i) In the case of ***Manjamma***¹, a Co-ordinate Bench of this Court was considering a case where an application filed under Order XXI Rule 90 of the CPC challenging the sale proclamation was rejected by the trial Court. In the appeal filed against the said order, this Court held that proclamation published in English language instead of Kannada language was bad in law and in the absence of a wide publication of the sale notice, the same would not satisfy the mandatory provisions under Order XXI Rule 54(2) r/w 67 of the CPC.

(ii) In the case of ***Amtati Narasayya***², the Hon'ble Supreme Court was considering a fact situation where

consequent to the confirmation of sale made by the Executing Court, an application under Order XXI Rule 90 was filed, which was rejected by the Executing Court and the appeal challenging the order was also dismissed by the Appellate Court as also the revision filed before the High Court. The Hon'ble Supreme Court while considering the aspect as to whether only a portion of the property that is necessary to satisfy the decree is required to be sold, has held as follows:

"The appellate court has stated that the land being one, could not have been divided. Shri Ganesh, learned counsel for the respondent sought to justify that view. But we find it difficult to appreciate that reason. It seems to be against common sense. The land is not indivisible. Nor division is impracticable or undesirable. Out of 10 acres, the Court could have conveniently demarcated a portion and sold it. Unfortunately, no such attempt was made and it was not even thought of. The Court has blind fold sold the entire property. This is a usual feature which we have noticed in most of the execution cases. We must deprecate this tendency. There is a duty cast upon the Court to sell only such property or a portion thereof as necessary to satisfy the decree. It is a mandate of the legislature which cannot be ignored. We cannot, therefore, sustain the impugned sale. It must be set aside being in contravention of the provisions of Rule 64, Order XXI CPC."

(emphasis supplied)

(iii) In the case of ***M/s Annapurna Industries***³, a Co-ordinate Bench of this Court was considering a fact situation where the Executing Court had rejected an application filed under Order XXI Rule 90 of CPC and confirmed the sale under Order XXI Rule 92 of the CPC. This Court considering a challenge made to the order of the Executing Court and considering the facts of the said case as to whether the aspect as to whether wide publicity was given for the sale proclamation held as follows:

"The provision in Order 21 Rule 67(2) is enacted for the benefit of the parties to give wide publicity to the sale proclamation with a view to secure purchaser offering the best price for the property. It was the duty of the Court to have availed of this provision and directed publication of the sale proclamation in the Official Gazettee or in a local newspaper, but the one having larger circulation or in both. The trial Court has failed to discharge its duty of giving wide publicity to the sale proclamation and this circumstance has resulted in paltry price or inadequate price to the property put to sale in the auction.

The Court owes a duty to the judgment-debtor to secure a fair price for his property put to sale. It is towards securing a fair price, the provisions of Order 21, Rule 67 (2) CPC are to be geared up. The trial court in the instant case has ignored its duty and the provisions contained in Order 21, Rule 67(2) CPC and has mechanically ordered to issue proclamation for selling the property only to conform to the letter of law and ignoring its spirit.

The trial court committed a material irregularity in accepting the inadequate publicity of the proclamations as sufficient and it further compounded its omission by observing that no enquiry was called for because the appellants had merely reproduced the wording of Order 21, Rule 90 CPC. This approach of the trial Court has resulted in securing a very low price and these facts eloquently proclaim that prejudice is caused to the judgment-debtors who are the appellants before this Court. If these facts are not to be heeded and the sale held in contravention of the law stated above is confirmed, then there will be patent failure of justice and it is the duty of this Court to prevent such failure of justice by annulling the sale."

(iv) In the case of ***Desh Bandhu Gupta***⁴, the Hon'ble Supreme Court was considering a fact situation where an application under Order XXI Rule 90 of the CPC was rejected since the objection as to the validity of the sale cannot be called into having regard to Order XXI Rule 90(3) of the CPC. The Appellate Court considering the scope of Order XXI Rule 90(3) of the CPC held that by its operation, pre-sale illegalities and irregularities do not vitiate the sale and dismissed the appeal. The revision is also dismissed by the High Court. The Hon'ble Supreme Court, considering the

aspect regarding whether a sale of part of the property would satisfy the decree has held as follows:

"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."

(iv)(a) Further, with regard to the right of the auction purchaser, it was held as follows:

"5. 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."

(emphasis supplied)

(v) In the case of **Seethammal⁵**, the Hon'ble Supreme Court considering a fact situation where the property was brought to sale at Rs.75,000/- and it was subsequently reduced to Rs.50,000/- and at an auction the property was sold for Rs.15,100/- and the upset price was Rs.15,000/-. The Hon'ble Supreme Court noticing that there was no bidder coming forward to purchase the property and the respondent himself purchased the said property for Rs.15,100/- held that the sale to be illegal. It further noticed that the appellant had already deposited the entire decretal amount which was withdrawn. Considering the said fact situation the Hon'ble Supreme Court allowed the appeal filed by the judgment debtor questioning the sale of the property.

(vi) In the case of **Kharaiti Lal⁶**, the Hon'ble Supreme Court considering a fact situation where consequent to a preliminary and final decree passed in a suit for foreclosure of mortgage in the execution proceedings, the property was auctioned which was challenged in an application filed under Order XXI Rule 90, which was rejected by the Executing

Court and the auction sale was confirmed. During the pendency of the appeals before the High Court, various amounts were deposited and the learned Single Judge of the High Court noticing the deposit of the amounts, allowed the appeals and set aside the confirmation of sale. The order passed by the learned Single Judge was challenged before the Division Bench, which allowed the appeal and set aside the order passed by the learned single judge. Considering the said case, the Hon'ble Supreme Court considering the scope of Order XXXIV Rule 5 of the CPC did not interfere with the order passed by the High Court.

(vii) In the case of ***Vyavasaya Seva Sahakara Sangha Niyamitha***⁷, a Co-ordinate Bench of this Court was considering a case of a Society which initiated a recovery proceedings under the Karnataka Co-operative Societies Act and during the pendency of the same, the amount having been repaid and held that if amount is repaid the property is required to be returned.

(viii) In the case of **Balakrishna**⁸, the Hon'ble Supreme Court was considering a fact situation where in execution of a decree, a property was brought to sale and the sale was confirmed by the Executing Court. Thereafter, an application was filed under Order XXI Rule 95 of the CPC by the auction purchaser for delivery of possession which was opposed. The Hon'ble Supreme Court considering the wording under Order XXI Rule 64 of CPC held that the requirement of bringing to sale only a portion of the property sufficient to satisfy the decree is an obligation on the Court and held the sale held without examining the said aspect is illegal.

33. It is relevant to note that the order dated 12.1.1990 whereunder the sale of the property in favour of the auction purchaser was confirmed has been set aside by order dated 7.9.1992 passed in MA.No.32/1990. Hence, the order confirming the bid of the auction purchaser being the highest bid having been set aside, it is expedient that an

opportunity is required to be afforded to the JDRs., to save the property that was mortgaged.

34. The Hon'ble Supreme Court in the case of ***Narandas Karsondas v. S.A.Kamtam***⁹ considering the relevant provisions of the Transfer of Property Act, 1882, vis-à-vis the right of the mortgagor to redeem the mortgage, has held as follows:

"34. The right of redemption which is embodied in Section 60 of the Transfer of Property Act is available to the mortgagor unless it has been extinguished by the act of parties. The combined effect of Section 54 of the Transfer of Property Act and Section 17 of the Indian Registration Act is that a contract for sale in respect of immovable property of the value of more than one hundred rupees without registration cannot extinguish the equity of redemption. In India it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption will be extinguished. The conferment of power to sell without intervention of the Court in a mortgage deed by itself will not deprive the mortgagor of his right to redemption. The extinction of the right of redemption has to be subsequent to the deed conferring such power. The right of redemption is not extinguished at the expiry of the period. The equity of redemption is not extinguished by mere contract for sale.

35. The mortgagor's right to redeem will survive until there has been completion of sale by the mortgagee by a registered deed. In England a sale of property takes place by agreement but it is not so in our country. The power to sell shall not be exercised unless and until notice in writing

⁹ (1977) 3 SCC 247

requiring payment of the principal money has been served on the mortgagor. Further Section 69(3) of the Transfer of Property Act shows that when a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale. Therefore, until the sale is complete by registration the mortgagor does not lose right of redemption."

(emphasis supplied)

35. In the case of **Valji Khimji and Company v. Official Liquidator of Hindustan Nitro Product (Gujarat) Limited¹⁰**, the Hon'ble Supreme Court was considering the auction sale conducted by the Official Liquidator in the process of liquidation of a company and held as under:

"30. In the first case mentioned above i.e. where the auction is not subject to confirmation by any authority, the auction is complete on the fall of the hammer, and certain rights accrue in favour of the auction-purchaser. However, where the auction is subject to subsequent confirmation by some authority (under a statute or terms of the auction) the auction is not complete and no rights accrue until the sale is confirmed by the said authority. Once, however, the sale is confirmed by that authority, certain rights accrue in favour of the auction-purchaser, and these rights cannot be extinguished except in exceptional cases such as fraud."

(emphasis supplied)

36. It is clear that the Hon'ble Supreme Court has categorically held that the right of the mortgagor for

¹⁰ (2008) 9 SCC 299

redemption is not extinguished until the sale is completed by registration. In the present case, as noticed hereinabove, the order dated 12.1.1990 whereunder the sale in favour of the auction purchaser was confirmed has been set aside by order dated 7.9.1992 passed in MA No.32/1990. JDR No.5 is entitled to redeem the mortgage so as to save the mortgaged property.

37. Learned Counsel for the Petitioners has vehemently contended that the entire process whereunder, initially JDR No.6 sought permission of the Executing Court to participate in the auction purchase, which permission was granted and thereafter, he did not participate in the auction, but instead the son of the JDR No.6 participated in the auction and having regard to the fact that the liability of JDR No.6 is co-extensive along with JDR No.5 to pay the decretal amount, the manner in which the property has been sold in the auction and that the auction purchaser being the son of JDR No.6 having participated, is irregular and fraudulent and is liable to be interfered with by this Court.

38. Without going into the allegation made by JDR No.5, it is clear from the aforementioned that the Petitioner/JDR No.5 having deposited the amount which is in excess of the decretal amount, the right of redemption is available to JDR No.5 and he is entitled to prevent the sale of his property in execution of the decree. Despite the fact that the Petitioners have deposited the entire amount before the Executing Court, if IA.No.3 is not favourably considered and sale made in favour of the auction purchaser is confirmed, it would undoubtedly cause substantial hardship and injury to the Petitioners and hence, the Petitioners have made out sufficient grounds to favourably consider IA.No.3 as contemplated under Order XXI Rule 90(2) of the CPC.

39. Various grounds have been urged by the learned counsel for the Petitioners with regard to the value of the property as also the fact that sufficient publicity is not given for the sale proclamation and as to whether the entire property could be sold without considering whether a portion of the property is sufficient to satisfy the decree, as already

noticed hereinabove. The Executing Court while considering IA No.3 has not even referred to enquiry conducted by the parties to the said application wherein oral and documentary evidence has been adduced with regard to the value of the property. Since the auction was conducted, without going into the various contentions putforth by the JDRs/applicants in IA No.3, the Executing Court has dismissed the said application and confirmed the sale made in the auction. The first Appellate Court has also not independently re-appreciated the matter in a proper perspective. There is no requirement to go into each of the grounds urged by the petitioners in view of the fact that having regard to the discussion made above, a finding is recorded that IA No.3 is required to be favourably considered. Hence, the relief sought for in the present petition is liable to be granted.

40. Counsel for the petitioners has contended that the Execution Petition is not maintainable in view of the fact that the final decree proceedings have not been initiated consequent to the decree dated 30.6.1984 passed in OS

No.262/1980. It is noticed that the said contention has not been putforth by the petitioners either before the trial Court or before the first Appellate Court. Hence, it is not open for the petitioners to putforth the said contention for the first time in the present petition. However, consideration of the same is left open for the petitioners to urge the said contention before the Executing Court.

41. With regard to the contention of the learned counsel for respondent No.5 that the auction purchaser will be put to irreparable hardship since he deposited the auction amount within the time stipulated and has parted with the sale consideration more than 20 years ago and he does not have the benefit of either the property or the money, it is relevant to note that the right of the auction purchaser, as held by the Hon'ble Supreme Court in the case of ***Desh Bandhu Gupta***⁴ would arise for consideration only once the sale is confirmed. In the present case, the order dated 12.1.1990 confirming the sale has been set aside by order dated 7.9.1992 passed in MA No.32/1990. Hence, it cannot

be said that the right of the auction purchaser could be considered to the derogation of the right of the JDRs. It is also relevant to note that the auction purchaser is none other than the son of JDR No.6 and serious allegations of fraud have been alleged in the manner in which the property has been purchased by the auction purchaser in the auction.

42. It is pertinent to note that although JDR No.5 has deposited various moneys and the DHR – bank has also made a request for payment of the said moneys, nothing is forthcoming from the record that order for payment of money has been made by the Executing Court.

43. In view of the discussion made above, IA No.3 is required to be favourably considered and the matter be remanded to the Executing Court for conducting all further proceedings in accordance with law. Hence, the question Nos.(i) and (ii) framed for consideration are answered in the affirmative.

44. In view of the aforementioned, the following order is passed:

ORDER

- i. The above petition is allowed;
- ii. The order dated 27.09.2005 passed in MA No.36/2001 by the II Additional District Judge, Belgaum, is set aside;
- iii. The order dated 23.11.2001 passed on IA.No.3 in Execution Case No.268/2005 by the II Additional Civil Judge (Sr.Dn), Belagavi, is set aside;
- iv. IA.No.3 filed by JDR No.5 in Execution Case No.268/2005 on the file of II Additional Civil Judge (Sr.Dn), Belagavi, is allowed and the auction sale held on 12.1.1990 is set aside;
- v. The parties shall appear before the Executing Court on 15.12.2023;

vi. The Executing Court shall conduct further proceedings in accordance with law;

No costs.

**Sd/-
JUDGE**

nd