

# VERDICTUM.IN

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

&

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

WEDNESDAY, THE 2<sup>ND</sup> DAY OF AUGUST 2023 / 11TH SRAVANA, 1945

FAO NO. 55 OF 2015

AGAINST THE ORDER IN EA.NO.77/2014 IN E.P.NO.8/2008 IN

OS.NO.82/2004 OF PRINCIPAL SUB COURT, ATTINGAL

APPELLANTS/LRs OF PETITIONER:

- 1 NIRMALA  
AGED 68 YEARS  
W/O.GOPINATHAN, 'SHEEJA BHAVAN', VAKKOM DESOM,  
VAKKOM VILLAGE, THIRUVANANTHAPURAM DIST, PIN-  
695308.
- 2 SHEEJA  
AGED 47 YEARS  
D/O.GOPINATHAN, 'SHEEJA BHAVAN', VAKKOM DESOM,  
VAKKOM VILLAGE, THIRUVANANTHAPURAM DIST, PIN-  
695308.
- 3 HIRAN GOPI  
AGED 44 YEARS  
S/O.GOPINATHAN, 'SHEEJA BHAVAN', VAKKOM DESOM,  
VAKKOM VILLAGE, THIRUVANANTHAPURAM DIST,  
PIN-695308.  
BY ADVS.  
SRI.M.R.RAJESH  
SMT.E.S.SANDHYA

RESPONDENTS/DECREE HOLDER AND JUDGMENT DEBTORS:

- 1 SUNDARESAN (DECEASED) \*  
S/O.KOCHU VELU, THUNDATHIL VEEDU, VAKKOM DESOM,  
VAKKOM VILLAGE, THIRUVANANTHAPURAM DIST., PIN-  
695308  
(IMPLEADED THE LEGAL REPRESENTATIVES OF THE  
DECEASED FIRST RESPONDENT AS ADDITIONAL  
RESPONDENTS 5 AND 6 AS PER THE ORDER DATED  
17/11/2021 IN IA 1/2021)
- 2 SOBHA  
W/O.PUSHPARAJAN, "S R NIVAS", KADAKKAVOOR DESOM,  
KADAKKAVOOR VILLAGE, THIRUVANANTHAPURAM DIST,  
PIN-695306.

3 SILPA  
D/O.PUSHPARAJAN, "S R NIVAS", KADAKKAVOOR DESOM,  
KADAKKAVOOR VILLAGE, THIRUVANANTHAPURAM DIST,  
PIN-695306

4 ABI  
S/O.PUSHPARAJAN, "S R NIVAS", KADAKKAVOOR DESOM,  
KADAKKAVOOR VILLAGE, THIRUVANANTHAPURAM DIST,  
PIN-695306.

\*ADDL.5 BINDU BABU  
AGED 53 YEARS  
D/O SUDARSANAN, THUNDATHIL HOUSE, VAKKOM P.O.,  
THIRUVANANTHAPURAM - 695308.

\*ADDL.6 SHEELA ASOKAN  
AGED 51 YEARS  
D/O SUNDARESAN, UDIYANVILAKAM HOUSE, VAKKOM P.O.,  
THIRUVANANTHAPURAM - 695308.

(\*IMPLEADED THE LEGAL REPRESENTATIVES OF THE  
DECEASED FIRST RESPONDENT AS ADDITIONAL  
RESPONDENTS 5 AND 6 AS PER THE ORDER DATED  
17/11/2021 IN IA 1/2021)

BY ADVS.  
P.ANIYAN  
K.JAGADEESH  
PRIYA NAIR  
V.RENJU  
VAKKOM N.VIJAYAN

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY  
HEARD ON 27.07.2023, THE COURT ON 02.08.2023 DELIVERED THE  
FOLLOWING:

**“C.R”**

***ANIL K. NARENDRAN & A. BADHARUDEEN, JJ.***

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*F.A.O.No.55 of 2015*

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*Dated this the 2<sup>nd</sup> day of August, 2023*

**J U D G M E N T**

**A.BADHARUDEEN, J.**

This appeal sprang up from the order in E.A.No.77/2014 in E.P.No.8/2008 in O.S.82/2004 on the files of the Sub Court, Attingal. The appellants are the legal representatives of one Gopinathan, S/o.Padmanabhan, who originally filed E.A.No.77/2014 as a third party seeking the relief to set aside the sale conducted in E.P.No.8/2008 in O.S.No.82/2004 on 14.06.2010 and confirmed on 16.08.2010.

2. The respondents herein are the decree holder/auction purchaser and the judgment debtors in the above E.P. During pendency of this appeal, the 1<sup>st</sup> respondent died and his legal heirs

got impleaded as additional respondents 5 and 6.

3. Heard the learned counsel for the appellants as well as the learned counsel appearing for the 1<sup>st</sup> respondent in detail. Perused the lower court records and the relevant decisions on the point, including the decisions placed by both sides.

4. Shown off unnecessary embellishments, the facts of the case are as under:

Sundareshan, the 1<sup>st</sup> respondent herein filed Suit - O.S.No.82/2004, before the Sub Court, Attingal and obtained decree to realise an amount of Rs.1,44,450/- with 6% interest from respondents 2 to 4 herein on 31.05.2007. The property having an extent of 3.74 Ares in Survey No.1856 of Keezhattinkara Village, sold in auction in E.P.No.8/2008, which is under challenge in this appeal, was attached and a charge decree was passed. The predecessor of the appellants herein, Sri Gopinathan filed O.S.No.83/2004 against respondents 2 to 4 herein and he obtained a decree for realisation of an amount of Rs.1,45,000/- as per decree dated 09.02.2007. Sundareshan filed E.P.No.8/2008 and Gopinathan filed E.P.No.63/2009. While so,

the proceedings in E.P.No.8/2008 continued and the same culminated in the sale of the property where both parties obtained charge decrees. Gopinathan filed E.A.No.77/2014 in E.P.No.8/2008 on 14.03.2011, a copy of the same is produced as Annexure-A, to set aside the sale, in fact, conducted on 14.06.2010 and confirmed on 16.08.2010, to be borne out from the proceedings before the execution court. (It is submitted by the learned counsel for the appellants that the date of sale is wrongly mentioned in the petition as 10.06.2010, instead of 14.06.2010). After confirmation of sale, Gopinathan filed E.A.No.77/2014 under Order XXI Rule 90 of the Code of Civil Procedure ('the CPC' for short hereinafter), challenging the same alleging 'fraud'. The sum and substance of the contention raised by Gopinathan is that the 1<sup>st</sup> respondent obtained false encumbrance certificate without showing 3 more attachments subsisting at the time of sale and produced the same before the court to substantiate that the property is free from encumbrance, except the attachment effected in O.S.No.82/2003 as well as a mortgage in favour of a co-operative bank. The further contention is that

the decree holder in O.S.No.82/2003 and the judgment debtors therein colluded together and thereby sold the property in court auction and the decree holder himself auctioned the property with permission of the court for a lesser price. According to Gopinathan the property would fetch Rs.1 lakh per cent as on 14.3.2011, but the sale was proceeded and confirmed, when E.P.No.63/2009 filed by Gopinathan to execute decree in O.S.No.83/2011 also has been pending.

5. While assailing the sale on the ground of fraud, it is submitted by the learned counsel for the appellants that though Gopinathan filed E.A.No.77/2014 on 14.03.2011, after expiry of 60 days, the petition is not barred by limitation in view of operation of Section 17 of the Limitation Act, 1963. According to the learned counsel for the appellants, when fraud is alleged, time would start to run only from the date of notice of fraud. Therefore, dismissal of E.A.No.77/2011 by the lower court mainly on the ground that the petition was barred by limitation is unsustainable.

6. The learned counsel for the appellants would submit

that Annexures C & D are the encumbrance certificates produced by Sundareshan while proceeding with sale of the property and as per Annexure C dated 22.05.2009, covering the period from 01.01.1991 to 20.05.2009, the one and only liability shown is that of a co-operative bank. Further as per Annexure D, encumbrance certificate for the period from 20.03.2009 to 06.11.2009, attachment effected by Sundareshan in O.S.No.82/2004 alone was shown. The thrust of the argument of the learned counsel for the appellants is that Annexure-C encumbrance certificate produced by the Sundareshan is one fraudulently obtained, after suppressing the other attachments in the property and therefore, the sale is vitiated by fraud. As such the sale is liable to be set aside.

7. In order to buttress this point the learned counsel for the appellants placed much reliance on the encumbrance certificate obtained by the appellants and a copy of which is produced as Annexure B. It is relevant to note that Annexure C was obtained on 22.05.2009 and Annexure-D, the latter encumbrance certificate was obtained on 07.11.2009; whereas

Annexure B encumbrance to which the appellants' counsel has given much emphasis was one obtained on 02.12.2009. In Annexure B encumbrance certificate, altogether 5 encumbrances are shown with respect to the property sold, having an extent of 3.74 Ares in Sy.No.1856 of Keezhattingal village. The encumbrances are (i) court attachment dated 02.08.2004 in O.S.No.83/2004 for Rs.1,45,000/-, (ii) court attachment for Rs.60,000/- in O.S.No.233/2004, (iii) court attachment along with another item of property on 17.5.2004 in I.A.No.1110/2004 and (iv) court attachment dated 17.05.2004 (the details of suit number etc. are not there in relation to item No.(iii) & (iv). The 5<sup>th</sup> item is the attachment in the present suit at the instance of Sundareshan. The main plank of attack at the instance of the appellants is that Annexure C encumbrance certificate was obtained by the decree holder by playing fraud after colluding with the judgment debtors, excluding 4 attachments subsisted, as herein above detailed. Therefore, the sale conducted is vitiated by 'fraud'.

8. It is argued by the learned counsel for the appellants further that since the property was sold by playing fraud on court,



Sundareshan denied opportunity to Gopinathan to file petition for distribution of assets held by the predecessor of respondents 2 to 4, as provided under Section 73 of the CPC. Concluding the arguments, the learned counsel for the appellants would submit that the sale in this case, which was obtained by playing fraud, is liable to be set aside holding that E.A.No.77/2014 was filed in time, since the date of knowledge was only on 10.03.2011, and as such E.A.No.77/2014 is not barred by limitation.

9. In order to substantiate the contention of the petitioner to the effect that fraud in execution of sale continues so long as the judgment debtor does not come to know about the sale and the conclusion which the court can arrive at is that if the judgment debtor was kept back from knowledge of sale by fraud, limitation would start only from the date of judgment debtor's knowledge. The decision of a learned Single Judge of this Court in *Pailee v. Krishna Panicker* [AIR 1971 Kerala 331], has been given much emphasis in this regard, wherein a learned Single Judge of this Court held as under:

*“Thus the point to be remembered is whether fraud has actually been practised by the decree-holder so as to keep the judgment-*

*debtor in the dark as to the proceedings which resulted in the sale. Absence of averments of fraud is not material. The petition is, therefore, to be considered on its merits. The appellate court also has not troubled itself while considering the petition on its merits.*

*I would therefore, set aside the judgment and order of the courts below and remand the case to the learned Munsiff for consideration of the petition under Order 21 Rule 90, on its merits and disposal according to law. The revision petition is thus allowed. Costs will abide the final result.”*

10. It is also pointed out by the learned counsel for the appellants that insofar as the competence of Sundareshan to challenge the sale is concerned, the law is well settled as a Division Bench of this Court has held in ***Unnikrishnan & others v. Kunhibeevi & others*** [2011 (1) KHC 352] that any person referred in Order XXI Rule 97 of the CPC includes strangers to the suit and persons other than the judgment debtor or those who claim derivative title from the judgment debtor.

11. Whereas it is submitted by the learned counsel for the legal heirs of Sundareshan that no fraud as alleged was played by Sundareshan while executing the decree. It is submitted that Sundareshan duly applied before the Sub Registrar's Office and obtained Annexures C & D encumbrance certificates showing

attachment of property of Sundareshan and the liability of the Co-operative bank. It is also submitted that the property was purchased by Sundareshan himself, being the decree holder, covered by decree debt due to Sundareshan and the co-operative bank. According to the learned counsel for the legal heirs of Sundareshan, in order to sustain a petition under Order XXI Rule 90 of the CPC, the same should have been filed within 60 days from the date of sale and it has been provided in Rule 90(3) 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 on which the proclamation of sale was drawn up. Therefore, the petition is barred by limitation and also the same is hit by Order XXI Rule 90(3) of the CPC.

12. In view of the rival arguments, the following questions emerge for consideration:

- (i) Whether a stranger to the suit, person other than the judgment debtor and those who claim derivative title from the judgment debtor are competent to challenge a court sale by resorting to Order XXI Rule 90 of the CPC?*
- (ii) Can it be held that when fraud is alleged in the*

*matter of publishing and conducting sale in an execution proceedings, the date of knowledge of the fraud to be treated as the starting date to count the period of limitation, in view of operation of Section 17 of the Limitation Act?*

13. While addressing the first question as to whether the predecessor of the appellants herein is competent to file a petition under Order XXI Rule 90 of the CPC, it is apposite to extract the said provision. Order XXI Rule 90 of the CPC provides as under:

*“90. Application to set aside sale on ground of irregularity or fraud:- 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, 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. “*

The categories covered by Order XXI Rule 90 of the CPC are (i) the decree holder, (ii) the purchaser, (iii) any other person entitled to share in a rateable distribution of assets and (iv) the person whose interest is affected by the sale. In *Unnikrishnan's* case (*supra*), the Division Bench of this Court considered the scope of the term 'any person' with reference to Order XXI Rule 97 of the CPC and held that any person under the said provision includes strangers to suit and person other than the judgment debtor or those who claim derivative title from the judgment debtor. Indubitably Order XXI Rule 97 deals with resistance or possession of immovable property; whereas Order XXI Rule 90 provides the procedure to file application to set aside sale on ground of irregularity or fraud and as such the persons entitled to file applications under these provisions are different. Therefore, the ratio in *Unnikrishnan's* case (*supra*) has no bearing on this question.

14. Therefore, this question required to be addressed within the mandate of Order XXI Rule 90 of the CPC. Here, Sundareshan, in fact, obtained decree in O.S.No.82/2004 and he

also had filed E.P.No.63/2009 before the Sub Court, Attingal and laid foundation to claim rateable distribution of assets of the judgment debtor/debtors. Therefore, Order XXI Rule 90 of the CPC very well covers Sundareshan also as a person who is entitled to share in a rateable distribution of assets. This Court had occasion to consider the conditions necessary to apply for rateable distribution of assets in ***Boban v. Sajith Kumar & another*** [2004 (1) KLJ 153 : ILR 2004 (1) Ker. 113] held that *the object of Section 73 is to prevent unnecessary multiplicity of execution proceedings, to obviate, in a case where there are many decree holders, each competent to execute his decree by attachment and sale of particular property, the necessity of each and every one separately attaching and separately selling that property. In order to enable the decree holder to participate in the assets of a judgment debtor the following conditions have to be satisfied by the decree-holder; (i) decree holder claiming to share in the rateable distribution should have applied for execution of his decree to the appropriate Court, (ii) such application should have been made prior to the receipt of the*

*assets by the Court, (iii) the assets of which a rateable distribution is claimed must be assets held by the Court, (iv) the attaching creditor as well as the decree holder claiming to participate in the assets should be holders of decrees for the payment of money, and (v) such decrees should have been obtained against the same judgment debtor. It is well settled that no rateable distribution should be claimed unless all the above mentioned conditions are fulfilled. Appellant herein has not satisfied any of the conditions enumerated above. Facts would show that appellant has not filed any application for rateable distribution prior to the receipts of assets by the Court.*

15. Going by the facts of the case with particular mention with regard to status of Sundareshan as a person, who obtained decree and applied for execution of the decree, he could very well challenge the sale by filing application under Order XXI Rule 90 of the CPC and his stature is that of “any other person entitled to share in a rateable distribution of assets”. This position has been clarified by this Court in ***Govindan Master v. Janaki V. & others*** [2011 (3) KHC 581 : 2011 (3) KLT 837]. Therefore, it has to be

held that a person, who could claim rateable distribution of assets of the judgment debtor/s, has competence to challenge the sale by invoking Order XXI Rule 90 of the CPC, though he is not a party to the Suit.

16. Coming to the second question, as per the statutory wordings of Order XXI Rule 90 of the CPC, the grounds on which a sale can be set aside are *(i) material irregularity and (ii) fraud in publishing and conducting the same*. It is pertinent to note that Order XXI Rule 90 of the CPC very well used the word 'fraud' as second reason to set aside the sale by invoking the said provision. Indubitably, Order XXI Rule 90 deals with pre-sale material irregularity and fraud in publishing and conducting sale, as grounds to set aside sale. It is pertinent to note that the legislature in its wisdom after incorporating 2 grounds, viz., (i) material irregularity and (ii) fraud in publishing and conducting sale, as reasons for setting aside the sale at the instance of the category of people mentioned in Order XXI Rule 90, incorporated Article 127 in the schedule of the Limitation Act, prescribing sixty days from the date of sale as the period of limitation. To put



it differently, as per the mandate of Article 127 of the Limitation Act, a petition to set aside sale by invoking Order XXI Rule 90 shall be filed within 60 days from the date of the sale. As per Section 2(j) of the Limitation Act, “period of limitation” is defined as ‘the period of limitation prescribed for any suit, appeal, or application by the schedule’, and “prescribed period” means the period of limitation computed in accordance with the provisions of the Limitation Act.

17. Thus it is necessary to give effect to the legislative mandate in the matter of limitation counting the same from the date of sale in a petition filed under Order XXI Rule 90 of the CPC. However, the ratio in *Pailee's* case (*supra*), where the learned Single Judge considered an application under Order XXI Rule 90 of the CPC, is that fraud in execution of sale continues so long as judgment debtor does not come to know about the sale and till then only conclusion to which courts can come is that if the judgment debtor was kept back from knowledge of sale by fraud and in such cases, limitation would start only from the date of judgment debtors’ knowledge.

18. At this juncture two more decisions on this point require reference. In the decision rendered by another learned Single Judge in *Thomas v. Devassy* [1998 (2) KLT 1078], this Court considered a case where the contention was that the judgment debtor did not have any knowledge of the execution proceedings. It was held that when the judgment debtor did not have any knowledge of the proceedings and such a case would fall under Section 17 of the Limitation Act to count the period of limitation from the date of knowledge. In the decision in *A.A.Joseph v. Varghese George* [1986 KLT 351 : 1986 KLJ 132] another learned Single Judge of this Court dealt with a petition filed under Order XXI Rule 91 of the CPC by the decree holder beyond the period of limitation, it was held in para.9 that *the ground for exclusion of time based on the plea of mistake is specifically raised only in the memorandum of civil revision petition. Both the execution court and the lower appellate court did not examine that question. Learned counsel for the decree holder submitted that in case there is a mistake in the court sale, for filing a petition to set aside the sale, the decree holder is*

*entitled to exclude the period from the date of sale till he discovered the mistake. Learned counsel for the judgment debtor submitted that the mistake must be a mutual mistake as required in Sections 20 and 21 of the Indian Contract Act. According to learned counsel, if the mistake is that of the decree holder he will not be entitled to exclude any period and make the judgment debtor liable. There is no indication in Section 17 of the Limitation Act, warranting such a restricted meaning to the word 'mistake'. In clause (a) of sub-section (1) of Section 17 it is specifically provided that the fraud must be of the defendant or respondent or his agent. In clause (c) there is no such restriction, the words used being only "the suit or application for relief from the consequences of a mistake." Therefore if the court is satisfied that there is a mistake in the court sale and the decree holder could not have discovered with reasonable diligence, the decree holder is entitled to exclude the period till he discovers the mistake. The burden is on the decree holder to prove the mistake in the first instance. Thereupon it will be for the judgment debtor to show that the decree holder had either actually discovered the*

*mistake or could have done so with reasonable diligence even prior to the period of limitation.*

19. In ***Thomas*** (*supra*), the learned Single Judge relied on a Division Bench decision of this Court in ***Gnan Das v. Paulin Moraes*** [1998 (2) KLT 88] to emphasise the point that even if a contention was not raised by the petitioner in a petition under Order XXI Rule 90 of the CPC that he came to know of the irregularity or fraud at a later stage, if any material irregularity or fraud has been committed, it is the duty of the Court to step into and remove the irregularity or fraud.

20. Similarly, as provided under Order XXI Rule 90(3) of the CPC, no application to set aside the sale under this Rule shall be entertained upon any ground on which the applicant could have taken on or before the date on which the proclamation of sale was drawn up. In ***P.K.Kuruvila v. Corporation Bank*** [2008 (1) KHC 258 : 2008 (1) KLT 604] this Court held that where the sale was held in violation of mandatory requirements of the rule or is vitiated by material irregularity, Order XXI Rule 90(3) of the CPC would not be applicable. Notably, in the decision in ***Nani***

***Gopal Paul v. T.Prasad Singh & others*** [AIR 1995 SC 1971] the Apex Court held that normally an application to set aside the sale has to be filed within the period of limitation and the said procedure need not be insisted upon when obvious and manifest illegality was committed in conducting court sale.

21. It is the settled legal position that a court sale can be challenged by invoking Order XXI Rule 90 as well as under Section 47 of the CPC on the ground of irregularities/illegality and fraud. However, the distinction between Order XXI Rule 90 and Section 47 is vivid and separable. That is to say, pre-sale irregularities, including fraud committed in the execution proceedings, are amenable to the remedy under Section 47 (not covered by Order XXI Rule 90) and post sale irregularities or fraud in publishing or conducting the sale, causing substantial injury to the judgment debtor, are covered under Order XXI Rule 90 of the CPC. Decision of the Apex Court in ***Desh Bandhu Gupta v. N.L.Anand & Rajinder Singh*** [1994] 1 SCC 131] is on this point.

22. In ***Nani Gopal Paul's*** case (*supra*), the Apex Court

considered the view taken by a learned Single Judge of the High Court in the matter of sale conducted by court receiver on 29<sup>th</sup> August, 1990, where a Division Bench of the High Court found that *it would be sufficient for this Court, if we make our observations to deprecate the way his Lordship took up the matter on various dates subsequent to the passing of the decree and sought to pass various orders relating to sale of the property in favour of the intending purchaser Nani Gopal Paul and others at a price of Rs.60 lakhs, when there were other offers on the field of a higher denomination and magnitude. Judicial property prevents us from making further comments in respect of the matter. His Lordship directed Mrs.Gour Roychoudhury, the Receiver to make the choice relating to the intending purchaser with full rights to make a contract with the intending purchaser in the manner it was so done. If there were other offers on the field, the court would have been vigilant enough to scrutinise such offers whatever they were worth and there ought to have been a due application of mind in this particular perspective. In the said case it was held that though, as contended by Sri. Ganesh that*

normally an application under Order XXI, Rule 89 or 90 or under Section 47 of the C.P.C need to be filed within limitation to have the sale conducted by the court set aside and that procedure need to be insisted upon, we are of the view that this court or appellate court would not remain a mute or helpless spectator to obvious and manifest illegality committed in conducting court sales. We are informed and it is not disputed that the appellant had deposited only Rs.5 lakhs and balance amount was assured to be deposited only after delivery of possession. That also would be illegal.

23. In fact, the decision in **Nani Gopal Paul's case** (*supra*) is one in deviation from the general principles dealing with procedure for setting aside a court sale apart from one under Order XXI Rule 90 and under Section 47 of the CPC. This Court in **Jayarajan K. & others v. Sambasivan** [2022 (1) KLJ 789 : 2022 (2) KLT 624] considered the scope of Order XXI Rule 90 and Section 47 of the CPC and held that *in fact, the period of limitation to set aside a sale under Order XXI Rule 90 of the CPC is governed by Article 127 of the Limitation Act. The period*

*provided is 60 days from the date of sale. Similarly, while filing an application under Section 47 of the CPC, then also Article 137 governs the period of limitation and the same is three years. The observation in paragraph 17 of the judgment is as under:*

*“17. Thus the law emerges is that it is the material irregularity or fraud which affects the method and manner of publishing the proclamation and the actual conduct of the sale that clothes the Court with a jurisdiction to set aside the sale under Order XXI Rule 90 of the CPC, where Order XXI Rule 90 applies, Section 47 is not available. However, where there is inherent illegality in the execution application, the same is a matter arising in execution, outside the purview of Order XXI Rule 90 and thus within the scope of Section 47 of the Code. To put it otherwise, when a judgment debtor makes an application under Order XXI Rule 90 of the CPC, he accepts the factum of the sale and seeks to challenge it on the ground that the sale is vitiated by material irregularity or fraud in publishing or conducting the sale. When an application under Section 47 is made, by a judgment debtor challenging the sale, he claims the sale to be void for illegality or in any event voidable on grounds other than those referred in Order XXI Rule 90 of the CPC and in a case where the judgment debtor invokes Section 47 of the CPC, order XXI Rule 90 of the CPC could not be applied. Errors committed in settling the sale proclamation which are mere irregularities cannot be described as errors which render a sale void and hence, the application made in that case could not be treated as one under Section 47 of the CPC.”*



24. A Division Bench of this Court considered the impact of Article 127 of the Limitation Act in ***Sreenath v. Nedungadi Bank Ltd. & others*** [AIR 2022 Kerala 40] and held that the period of limitation for an application under Order XXI Rule 90 is 60 days as per Article 127 of the Limitation Act and hence the petition filed under Order XXI Rule 90 beyond the period of 60 days, is time barred.

25. ***Nani Gopal Paul's*** case (*supra*) was considered by the Apex Court in ***Siddagangaiah (D) Thr. Lrs. v. N.K.Giriraja Shetty (D) Thr. Lrs.***, [AIR 2018 SC 3080 : 2018 (7) SCC 278], and many principles embodied therein and it was held in para.25 that *when the auction purchaser is the decree holder himself and when an application is made to set aside the sale on a ground other than that covered by Rule 90 and no application has been made under Rule 89, the case would fall under Section 47 as has been laid down in Superior Bank Ltd. v. Budh Singh [1924 (22) ALL LJ 413]; Akshia v. Govindarajulu [(1924) 47 MLJ 549]. Thus, it would depend upon the grounds which are urged in the application. It is permissible to join a claim to set aside a sale on*

*the ground of material irregularity under Order XXI, Rule 90 with a claim under Section 47 for a declaration that the sale is a nullity as the decree was passed after the death of the judgment debtor. Objection by legal representatives of deceased judgment debtor that suit land was ancestral property and sale was not binding on them can be raised under Section 47 read with Order XXI Rule 90. However, it would depend upon the nature of the objection whether it was covered under Rule 90 of Order XXI CPC or not. There can be restoration of the petition dismissed for default filed under Order XXI Rule 90 and thereafter if sale has been confirmed, it is provided under Order XXI Rule 92(3) that no suit to set aside an order made under Rule 92(1) shall be brought by any person against whom such an order is made. Order XXI Rule 92(1) provides that where an application has been filed under Order XXI Rule 89, 90 or 91, same has been disallowed, the court shall make an order confirming the sale and thereupon the sale shall become absolute, and no suit shall lie as per the mandate of sub-rule (3) of Rule 92 of Order XXI of the CPC against whom such an order is made. The order confirming the sale may be*

*made either where no application is made at all to set aside the sale or where an application is made and disallowed may be that it is dismissed for default. No suit shall lie in either case to set aside the order confirming the sale. The refusal to set aside a sale is an order appealable. In case the court has set aside or refused to set aside a sale that would include a case where an application under Order XXI Rule 89, 90 or 91 has been dismissed for default.*

26. In the decision in ***Rattan Singh & others v. Nirmal Gill & others*** [AIR 2021 SC 899], the Apex Court held that *for invoking Section 17 of the 1963 Act, two ingredients have to be pleaded and duly proved. One is existence of a fraud and the other is discovery of such fraud.*

27. In this matter the appellants herein canvass exception provided under Section 17 of the Limitation Act on the ground that Gopinathan came to know about the sale only on 10.03.2011 when he reached the village office. In view of the same, it is necessary to extract Section 17 of the Limitation Act and it reads as follows:

“17. *Effect of fraud or mistake.— (1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,—*

*(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or*

*(b) The knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or*

*(c) the suit or application is for relief from the consequences of a mistake; or*

*(d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him, the period of limitation shall not begin to run until plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production: Provided that nothing in this section shall enable any suit to be instituted or application to be made to recover or enforce any charge against, or set aside any transaction affecting, any property which-*

*(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been committed, or*

*(ii) in the case of mistake, has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or*

*(iii) in the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.*

*(2) Where a judgment-debtor has, by fraud or force, prevented the execution of a decree or order within the period of limitation, the court*

*may, on the application of the judgment-creditor made after the expiry of the said period extend the period for execution of the decree or order: Provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be.*“

28. What is 'fraud' meant under Section 17 of the Limitation Act is a matter of discussion starting from the early days of its introduction in the Statute Book. According to decisions of English Courts, 'fraud' does not necessarily involve any moral turpitude. To constitute 'fraud' it is sufficient if what was done was unconscionable. But it must be established that the nature of the underlying cause of action is based on fraud and that the fraud was not discoverable. Fraud is used in the equitable sense to denote conduct by the defendant or his agent such that it would be against his conscience for him to avail himself of the lapse of time. Whenever the conduct of the defendant or his agent has been such as to hide from the plaintiff the existence of his right of action in such circumstances that it would be inequitable to allow the defendant to rely on the lapse of time as a bar to the claim, it would amount to fraud. Thus, when the right of action is concealed by 'fraud' used in Section 17, the period of limitation

would start to run from the date of its knowledge. Fraud affecting limitation to be forecasted only where it prevented a person from knowing of his right or the title on which the right was grounded in.

29. While summarising the principles, it is to be held that, a petition under Order XXI Rule 90 of the CPC alleging material irregularity or fraud in publishing and conducting sale shall be filed within 60 days from the date of sale, as provided under Article 127 of the Limitation Act. Similarly, it is the well settled law, as we have already observed, that, apart from Order XXI Rule 90 of the CPC, Section 47 of the CPC can also be invoked to set aside a sale either on the ground that it is void or that it is fatal on ground of illegality not covered by Order XXI Rule 90 of the CPC and the period of limitation for filing such an application is three years from the date when the right to apply accrues. *However, when a sale in execution has been brought about by the fraud played by one of the parties to the suit, the period of limitation for an application to set aside the sale whether such sale has been confirmed or not, may be computed from the time*

*when the fraud by which the sale was kept concealed becomes known to the applicant; and likewise if an irregularity vitiating a sale is fraudulently kept concealed from the knowledge of the applicant he may be entitled to file an application under Order XXI Rule 90 of the CPC within 60 days from the time when he becomes aware of the sale and a person invoking the aid of this section must establish three things (i) that there has been fraud, (ii) that by means of such fraud "he was kept away from the knowledge of his right to sue or apply or of the title on which such right is founded and (iii) time will be extended under the section only as against the person guilty of fraud, or who is accessory thereto or who claims through the person guilty of fraud otherwise than in good faith and for valuable consideration.*

30. Holding the legal principles as above, in the instant case, the questions to be considered are (i) whether the appellants established 'fraud' as alleged?; (ii) in view of the 'fraud' committed by the decree holder after colluding with the judgment debtor, was Gopinathan prevented from knowing the sale

proceedings?; and (iii) was the property sold by producing an encumbrance certificate excluding the other entries of attachment?

31. It is true that as per the order impugned and as submitted by the learned counsel for the appellants, the first challenge raised before the execution court was that the property was sold for a lesser price. In *Siddagangaiah (D) Thr. Lrs.*'s case (*supra*), the Apex Court categorically held that mere inadequacy of sale price is not sufficient for setting aside the court sale unless the applicant fails to prove that he had suffered substantial injury or consequential injustice. It is pertinent to note further that even though Gopinathan obtained decree in his favour in O.S.No.82/2003, the said aspect also was not pointed out before the execution court.

32. The second challenge raised before the execution court was that the attachment obtained by the petitioner in O.S.No.83/2004 was not shown in the sale proclamation and the same is a material irregularity and fraud in conducting the sale. The execution court negated this contention holding that a mere



attachment by itself would not create any encumbrance. The said legal position is not in dispute. In the decision in ***Jayan Kuttichakk v. Common Man Chitties and Loan (Pvt.) Ltd.***, [2007 (1) KLT 932] a learned Single Judge of this Court held that *attachments, by themselves, do not amount to creation of charges and are therefore not encumbrances*. An attachment does not create any title and that it does not result in an encumbrance on the property which is liable to be specified in the proclamation under Order XXI Rule 66(2) of the CPC. An attachment only interdicts any private transfer or delivery of the property or of any interest thereof and that it does not create any encumbrance on the property. In this decision, the learned Single Judge relied on decision of the Apex Court in ***S.Noorden v. Thiru Venkita Reddiar***, [(1996) 3 SCC 289] wherein it was held that *an attachment before judgment would prevent the owner of the property to create encumbrance, sale or create charge thereof. But an attachment before judgment does not create any right, title or interest, but it disables the judgment debtor to create any encumbrance on the property*. Further it was held that *the decree*

*holder is entitled to proceed against attached properties to be sold as integral part of the decree, and the properties do not form part of the schedule would also become part of the decree.*

Similarly, attachment effected after creation of mortgage of the property would stand effaced. Division Bench decision in ***Secretary, Keechery Service Co-operative Bank Ltd. & others v. Sajith Nizar @ Sajith P.M & others*** [2020 (5) KHC 231] lays the said ratio.

33. Going by the order impugned, Gopinathan alone got examined as PW1 and Exts.A1 and A2, 2 encumbrance certificates for the period from 20.05.2009 to 07.11.2009 and Encumbrance Certificate dated 02.12.2009 were produced to substantiate `fraud`, but nobody was examined from the Sub Registrar's office to prove that the encumbrance certificate produced as Annexure-C in this case is the outcome of `fraud`. When a person applies for encumbrance certificate, the same will be issued by the Sub Registrar and therefore, primarily the entries therein should be considered as correct unless it is established that the same was the outcome of `fraud'. A party alleging `fraud' of

such a nature shall not only to plead the same but also to prove the same. In fact, nothing is available in this case to see any 'fraud' as alleged since the same is not established by convincing evidence. Thus it appears that the 'fraud' alleged by Gopinathan on the ground that a false encumbrance certificate, without recording the other attachments, was produced before the court by the decree holders in collusion with the judgment debtors and conducted the sale, is not at all established in the instant case.

34. Therefore, even holding that the appellants' case is to be dealt by applying the principles laid down hereinabove, whereby applying the ratio of the decision in *Nani Gopal Paul's* case (*supra*), no 'fraud' as alleged is established in any manner.

35. The upshot of the above discussion is that the order under challenge does not require any interference at the hands of this Court, for the reasons herein above stated. Therefore, the order impugned stands confirmed.

36. Therefore, the appeal must fail and is accordingly dismissed. There shall be no order as to costs.

Since the facts of the case would go to show that Gopinathan obtained a charge decree in O.S.No.83/2004 on 09.02.2007, which prior to decree in O.S.No.82/2004 dated 31.05.2007, dismissal of this appeal shall not be a bar for the appellants to proceed with the charge decree in accordance with law.

*Sd/-*

**(ANIL K. NARENDRAN, JUDGE)**

*Sd/-*

**(A. BADHARUDEEN, JUDGE)**

*rtr/*

*A P P E N D I X*

*APPELLANTS' EXHIBITS*

*ANNEXURE A: A TRUE COPY OF THE E.A.NO.77/2014 IN E.P.NO.08/2008 IN O.S.NO.82/2004 ON THE FILE OF SUB COURT, ATTINGAL.*

*ANNEXURE B: A TRUE COPY OF THE ENCUMBRANCE CERTIFICATE NO.2335/2009 DATED 02.12.2009.*

*ANNEXURE C: A TRUE COPY OF THE ENCUMBRANCE CERTIFICATE NO.924/2009 DATED 22.05.2009.*

*ANNEXURE D: A TRUE COPY OF THE ENCUMBRANCE CERTIFICATE NO.2136/2009 DATED 21.11.2009.*

*ANNEXURE E: TRUE COPY OF THE SALE KAICHEET DATED 10.06.2010 IN E.P.NO.8/2009 IN O.S.NO.82/2004 OF SUB COURT, ATTINGAL.*

*ANNEXURE F: CERTIFIED COPY OF THE ORDER DATED 23.01.2015 IN E.A.NO.11/2014 IN E.P.NO.8/2008 IN O.S.NO.82/2004 OF THE SUB COURT ATTINGAL.*