134-146

IN THE HIGH COURT OF DELHI AT NEW DELHI

No. _____/DHC/Gaz.IB/G-2/SC-Judgment/2026 Dated: 09 .01.2026

From :

The Registrar General,
High Court of Delhi,
New Delhi.

To

1. The Principal District & Sessions Judge (HQ), Tis Hazari Courts Complex, Delhi.
2. The Principal District & Sessions Judge (New Delhi), Patiala House Courts Complex, New Delhi.
3. The Principal District & Sessions Judge (South), Saket Courts Complex, New Delhi
4. The Principal District & Sessions Judge (South-East), Saket Courts complex, Delhi.
5. The Principal District & Sessions Judge (East), Karkardooma Courts Complex, Delhi.
6. The Principal District & Sessions Judge (North-West), Rohini Courts Complex, Delhi.
7. The Principal District & Sessions Judge (North-East), Karkardooma Courts Complex, Delhi.
8. The Principal District & Sessions Judge (Shahdara), Karkardooma Courts Complex, Delhi.
9. The Principal District & Sessions Judge (South-West), Dwarka Courts Complex, New Delhi.
10. The Principal District & Sessions Judge (West), Tis Hazari Courts Complex, Delhi.
11. The Principal District & Sessions Judge (North), Rohini Courts Complex, Delhi.
12. The Principal District & Sessions Judge-cum-Special Judge (PC Act) (CBI), RACC, New Delhi.
13. The Principal Judge (HQ), Family Courts, Dwarka, New Delhi.

Sub : **Judgment dated 15.12.2025 passed by Hon'ble Supreme Court of India in Civil Appeal No. 14761 of 2025 (@ SLP(Civil.) No. 14461 of 2019) titled as "Danesh Singh And Ors. vs. Har Pyari (Dead) Thr. Lrs. and Ors."**

Sir/ Madam,

I am directed to forward herewith a copy of Judgment dated 15.12.2025 passed by Hon'ble Supreme Court of India in Civil Appeal No. 14761 of 2025 (@ SLP(Civil.) No. 14461 of 2019) titled as "Danesh Singh And Ors. vs. Har Pyari (Dead) Thr. Lrs. and Ors." through email and to request you to download the same and circulate amongst all the Judicial Officers working under your respective control for information and necessary compliance.

Yours faithfully,

(Ashok Sharma)
Assistant Registrar (Gazette-IB)
For Registrar General.

OFFICE OF THE PRINCIPAL DISTRICT & SESSIONS JUDGE: ROHINI COURTS, DELHI

No. 1326-1401 .....Genl.I/F. 3(A)/N-W&N/RC/2026 Dated ..12/01/2026

Copy forwarded, alongwith its enclosures **(through electronic mode)** for information & necessary action, to :-

1. All Ld. Judicial Officers posted at **N/W & North**, Rohini Courts, Delhi.
2. Dealing Official, Computer Branch, Rohini Courts for uploading the same on WEBSITE.
3. The Dealing Official, R & I Branch, Rohini Courts, Delhi for uploading the same on LAYERS.

(SUSHIL KUMAR)
Link Officer In-Charge, General Branch-I
North-West & North District
Rohini Court Complex, Delhi

2025 INSC 1434

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 14761 of 2025
(Arising out of SLP(C) No. 14461 of 2019)

DANESH SINGH & ORS. ...APPELLANT(S)

VERSUS

HAR PYARI (DEAD) THR. LRS. ...RESPONDENT(S)

J U D G M E N T

J.B. PARDIWALA, J:

For the convenience of exposition, this judgment is divided into the following parts:-

INDEX

A. FACTUAL MATRIX 3

B. THE JUDGMENT & DECREE OF THE TRIAL COURT 8

I. Ownership and possession of the respondent nos. 1 and 2 respectively 8

II. Knowledge of both the auction sale and the existence of the mortgage in favour of the respondent no. 6-bank on part of the plaintiffs-respondent nos. 1 and 2 respectively. 9

III. Manner in which the auction was conducted. 10

IV. Maintainability of the suit instituted by the respondent nos. 1 and 2 respectively 11

V. Relief granted 11

C. THE IMPUGNED JUDGMENT 12

D. SUBMISSIONS ON BEHALF OF THE PARTIES 13

I. Submissions on behalf of the appellants 13

II. Submissions on behalf of the respondent nos. 1 & 2 respectively 16

E. ISSUES FOR DETERMINATION 19

F. ANALYSIS 21

I. Whether the transfer of the suit property is hit by Section 52 of the 1882 Act and the doctrine of Lis Pendens? 21

***a. Whether the suit property was "directly and specifically in question" in the suit instituted by the respondent no.6-bank and the import of the words "any suit" along with "any right" occurring in Section 58 of the 1882 Act*..... 24**

II. Whether the respondent nos. 1 and 2, respectively, could have sought for any relief under Rule(s) 89 or 90 of Order XXI CPC, respectively? 38

a. Scope and application of Rule 89 of Order XXI CPC, with specific reference to whether pendente lite transferees can maintain such an application **39**

b. Scope and application of Rule 90 of Order XXI CPC **48**

i. The maintainability of an application under Rule 90 vis-á-vis fraud or irregularities pertaining to stages prior to the proclamation of sale i.e., at the stage of attachment. 50

ii. Questions on whether the judgment-debtor had any "saleable interest" over the attached/sold property cannot be brought under the ambit of Rule 90 64

III. Whether the respondent nos. 1 and 2 respectively, could have maintained a separate suit in light of the bar envisaged under Rule 92(3) of Order XXI CPC and Section 47 CPC respectively, and whether they are "third parties" as referred to under Rule 92(4) of Order XXI CPC? **71**

a. Scope and application of Rule 92 of Order XXI CPC **71**

b. The bar to a separate suit envisaged under sub-rule (3) of Rule 92. ..... **74**

c. The interplay between the bar to a separate suit as provided in Rule 92(3) of Order XXI CPC and the bar to a separate suit referred to under Section 47 CPC. **86**

d. The scope and meaning of the term "third party" under Rule 92(4), the option of filing a separate suit being made available to such third parties and its interplay with Rule 58 of Order XXI CPC. **95**

IV. Whether the respondent nos. 1 and 2 respectively could have obtained any relief under Rule 99 of Order XXI CPC and in the absence of availing such remedy, could their suit be said to be not maintainable? **112**

a. Essential ingredients for the invocation of Rule 99 ..... **114**

b. The scheme underlying Rules 100 to 104 respectively and the availability of the remedy of filing a separate suit as an alternative to an application under Rule 99 of Order XXI CPC **124**

V. Delineating when a third party could file an application under Order XXI CPC and when he could resort to a separate suit in order to assert his right, title and interest in the said property..... 149

VI. The decision of this Court in T. Vijendradas (supra)..... 158

G. CONCLUSION 163

1. Leave granted.

2. This appeal arises from the judgment and order dated 29.01.2019 (hereinafter, the "**Impugned Judgment**") passed by the High Court of Punjab and Haryana in RSA. No. 2518 of 2004 (O&M) (hereinafter, the "**High Court**"), by which the second appeal filed by the appellants herein came to be dismissed, thereby affirming the judgment and order dated 12.05.2004 passed by the Court of District Judge, Faridabad (hereinafter, the "**Appellate Court**") holding the suit instituted by the respondent nos. 1 and 2 respectively herein to be maintainable.

A. FACTUAL MATRIX

3. The description of the parties before this Court, the High Court, the Appellate Court, and before the Trial Court is tabulated as follows:-

BEFORE THIS COURT	BEFORE THE HIGH COURT	BEFORE THE APPELLATE COURT	BEFORE THE TRIAL COURT	PARTICULARS
Appellants	Appellants	Appellants	Defendant Nos. 1-3	Auction Purchasers and sons of one of

				the judgment-debtors i.e., the respondent no.4.
Respondent Nos. 1-2	Respondent Nos. 1-2	Respondent Nos. 1-2	Plaintiffs	Wife and husband, respectively through their LRs, who purchased the suit property from respondent no. 3.
Respondent No. 3	Respondent No. 3	Respondent No. 3	Defendant No. 4	One of the judgment-debtors and vendor of the suit property.
Respondent No. 4	Respondent No. 4	Respondent No. 4	Defendant No. 5	One of the judgment-debtors and father of the appellants.
Respondent No. 5	Respondent No. 5	Respondent No. 5	Defendant No. 6	One of the judgment-debtors and sister of the respondent nos. 4 & 5.
Respondent No. 6	Respondent No. 6	Respondent No. 6	Defendant No. 7	Decree-holder bank.

4. In the year 1970, Duli Chand had availed a loan of Rs. 20,000/- from New Bank of India, i.e., the respondent no. 6, to purchase a tractor, and in *lieu* thereof he had mortgaged his property admeasuring 116 Kanals 13 marlas (hereinafter, "**the mortgaged property**"), *vide* a registered Mortgage Deed dated 06.06.1970. However, it is to be noted that this appeal pertains to only a portion of the aforesaid mortgaged property, more particularly, a parcel of land admeasuring 24 Kanals 11 marlas (hereinafter, "**the suit property**").

5. Owing to his failure in repaying the entire loan amount, on 04.06.1982, the respondent no. 6-bank instituted a suit before the Sub-Judge, 1st Class, Faridabad, being Suit No. 151 of 1982, for recovery of the due amount of Rs. 15,529/- and in the event of default in repayment, the respondent no. 6-bank prayed for foreclosure and sale of the aforesaid mortgaged property.

6. On 12.11.1984, the suit instituted by the respondent no. 6-bank was decreed *ex-parte* against the respondent nos. 3 to 5 respectively, as the original borrower had passed away during the pendency of the suit (hereinafter, the "**original decree**"). The decree ordered the recovery of the due amount alongwith costs and interest amounting to Rs. 22,753/- (hereinafter, "**the decretal amount**"). No appeal was preferred against the original decree and the same had, therefore, attained finality.

7. It is only subsequent to the passing of the original decree that, on 13.05.1985, the respondent no. 1 purchased 17 Kanals 2 marlas of the mortgaged property for Rs. 45,000/- from the respondent no. 3, i.e., one of the judgment debtors and son of the original borrower.

8. Shortly thereafter, on 25.05.1985, the respondent no. 6-bank moved for execution of the decree and prayed that the decretal amount be paid, alongwith costs and interest by way of attachment and sale of the mortgaged property.

9. Again, on 24.06.1985, the respondent no. 2 (husband of the respondent no. 1) purchased another 7 Kanals 9 marlas of the

mortgaged property for Rs. 25,000/- from the same respondent no. 3. Thus, in totality the respondent nos. 1 and 2 respectively, purchased 24 Kanals 11 marlas of the mortgaged property (which constitutes the present suit property) for an amount of Rs. 70,000/- from the respondent no.3. The first purchase was effected before the execution petition came to be instituted by the respondent no. 6-Bank and the second purchase occurred after its institution.

10. Thereafter, the respondent nos. 1 and 2 respectively, are also said to have mortgaged the suit property or a portion thereof with the Ballabgarh Primary Co-op Agricultural and Rural Development Bank for the purpose of availing a loan.

11. Meanwhile, the Executing Court, *vide* order dated 08.10.1985, attached the entire mortgaged property, i.e., 116 Kanals 13 marlas, as the judgment-debtors failed to make the payment to the respondent no.6-bank. Consequently, an auction of the mortgaged property came to be held on 20.06.1988. In the said auction, the appellants, who are the sons of one of the judgment debtors, i.e., respondent no. 4, were declared as the highest bidders. The appellants' bid for a sum of Rs. 35,000/- for the entire mortgaged property, was accepted.

12. On 30.08.1988, the Executing Court confirmed the auction sale. The delivery of possession in favour of the appellants is also said to have been completed on 24.06.1989. Later, after a month, on 28.07.1989, the Executing Court had disposed of the execution proceedings after recording its satisfaction as regards the fulfillment of the

decretal amount and delivery of possession to the appellant-auction-purchasers.

13. It is the case of the respondent nos. 1 and 2 respectively that on 05.07.1989, i.e., on a date after the delivery of possession to the appellant-auction-purchasers, they were denied access to the suit property. This denial, according to them, gave rise to the cause of action to file a separate suit, being Suit No. 353 of 1989, before the Civil Judge (Jr. Division), Faridabad (hereinafter, the "**Trial Court**"). This suit is the genesis of the appeal before us.

14. In the suit, the plaintiffs-respondent nos. 1 and 2 respectively, prayed for a declaration to the effect that the sale in respect of the suit property is void and not binding upon their right, title and interest, and that they continue to be owners in possession. As a consequential relief, a decree for permanent injunction against the appellants was also prayed for, and in the alternative, a decree for possession *qua* the suit property was sought.

15. In the aforesaid suit, the Trial Court passed a decree declaring that the sale in respect of the suit property was void, illegal and not binding upon the plaintiffs-respondent nos. 1 and 2 respectively, and that the plaintiffs are the owners of the suit property. Further, a decree for joint possession was passed in favour of the plaintiffs-respondent nos. 1 and 2 respectively.

16. Aggrieved by the decree, the appellants-auction-purchasers, preferred an appeal before the Appellate Court. The Appellate

Court dismissed their appeal and held that the vendor of the plaintiffs-respondent nos. 1 and 2 respectively (i.e., respondent no. 3) being the joint owner of the mortgaged property was competent to sell the same and that the plaintiffs-respondent nos. 1 and 2 respectively, are lawful owners of the suit property.

17. Being aggrieved by the aforesaid, the appellants preferred Regular Second Appeal No. 2518 of 2004 before the High Court. The High Court had also dismissed the second appeal.

18. In such circumstances referred to above, the appellants are here before this Court with the present appeal. *Vide* order dated 15.07.2019, while issuing notice, this Court had directed that the parties shall maintain *status quo.*

B. THE JUDGMENT & DECREE OF THE TRIAL COURT

I. Ownership and possession of the respondent nos. 1 and 2 respectively

19. In order to ascertain the ownership of the respondent nos. 1 and 2 respectively to the suit property, the Trial Court found it necessary to determine whether the respondent no. 3 possessed any subsisting right to the suit property at the time of transfer in favour of the plaintiffs-respondent nos. 1 and 2 respectively. While answering this issue in the affirmative, the Trial Court observed that the original decree in the suit instituted by the respondent no. 6-bank was passed only on 12.11.1986, whereas, the respondent no. 3 executed the sale deed on 24.06.1985. Therefore, since the suit

property was purchased before the passing of the original decree, it could not be said that the respondent no. 3 lacked any right to transfer the property. It further held that the attachment of the property by the Executing Court would not affect the rights of those parties who had purchased the property prior to such attachment.

20. However, on the issue of possession, the Trial Court observed that no evidence had been adduced by the respondent nos. 1 and 2 respectively to establish that they still remained in possession over the suit property. Hence, it concluded that although plaintiffs were the owners of the suit property, yet they were not in continuing possession.

II. <u>Knowledge of both the auction sale and the existence of the mortgage in favour of the respondent no. 6-bank on part of the plaintiffs-respondent nos. 1 and 2 respectively.</u>

21. The Trial Court recorded that the plaintiffs-respondent nos. 1 and 2 respectively had purchased the suit property with due diligence as they had obtained a No Encumbrance Certificate from the Tehsildar before entering into the sale with the respondent no. 3, and their names were also mutated in the revenue records. It further observed that, owing to the subsequent mortgage of a part of the suit property by the plaintiff-respondent no. 1 with the Ballabgarh Primary Co-op Agricultural and Rural Development Bank and its reflection in the revenue records, there was sufficient material before the respondent no. 6-bank to ascertain that the plaintiffs-respondent nos. 1 and 2 respectively had a right, title and interest in the suit

property and thereby give notice of the proclamation of sale to them. However, the respondent no. 6-Bank failed to give such notice and also failed to indicate the same in its affidavit filed under Rule 66 of Order XXI CPC.

22. In such circumstances, the plaintiffs-respondent nos. 1 and 2 respectively could not have reasonably had any notice of the auction sale or the mortgage that was created by Duli Chand in favour of the respondent no. 6-bank. It was only much later, i.e., on 05.07.1989, when the plaintiffs-respondent nos. 1 and 2 respectively were not allowed to plough their land did they know about the auction sale and the transfer of the property in favour of the appellants.

III. <u>Manner in which the auction was conducted.</u>

23. The Trial Court found that the manner of conducting the auction of the mortgaged property *in camera*, where only the appellants herein were the bidders along with the auctioning of the entire property instead of a portion thereof, was contrary to the provisions of law and that it left little room for doubt that the sale of the suit property was illegal, void, and not binding upon the plaintiffs-respondent nos. 1 and 2 respectively. The Court further found that the respondent nos. 3 to 5 respectively, i.e., the judgment debtors were specifically debarred from participating in the bidding process by the Executing Court and that the same was clear from the conditions of sale. However, in order to circumvent the said restriction, the appellants, being the sons of one of the judgment debtors, had participated in the auction on their behalf. Thus, the Trial Court held

that the manner in which the auction was conducted was not permissible, either in law or in equity.

IV. Maintainability of the suit instituted by the respondent nos. 1 and 2 respectively

24. The Trial Court noted that the appellants-defendant nos. 1 to 3 respectively failed to make good their case as to how the suit was not maintainable. It held that the appellants failed to show why the plaintiffs-respondent nos. 1 and 2 respectively were estopped from instituting the said suit. Accordingly, the Court answered the issue of maintainability in favour of the respondent nos. 1 and 2 respectively. It must be noted that the argument that the suit would be barred on account of Rules 99 to 103 of Order XXI respectively, was not raised by the appellants before the Trial Court.

V. Relief granted

25. The Trial Court held the suit to be maintainable and passed a decree in favour of the plaintiffs-respondent nos. 1 and 2 respectively. It declared that the auction sale only insofar as the suit property was concerned, was void, and did not affect the right, title and interest of the respondent nos. 1 and 2 respectively. The Trial Court further held that the respondent nos. 1 and 2 respectively were the lawful owners of the suit property and granted them the relief of joint possession of the entire mortgaged property along with the appellants.

26. In the first appeal, the Appellate Court affirmed the judgment and decree passed by the Trial Court, and held that the respondent no. 3, being the joint-owner of the mortgaged property, was competent to sell the land to the respondent nos. 1 and 2 respectively.

C. THE IMPUGNED JUDGMENT

27. The High Court, in its impugned judgment, also took note of the fact that the auction had taken place *in camera* at the residence of the Village Sarpanch. It further observed that the proclamation of the sale issued by the Executing Court specifically barred the judgment-debtors from offering any bid or participating in the said auction. Despite such a prohibition, the appellants had participated in the auction without obtaining any express permission of the Executing Court. It further lamented that not only were the plaintiffs-respondent nos. 1 and 2 respectively kept uninformed about the auction, the fact of the transfer of the property in favour of the plaintiffs-respondent nos. 1 and 2 respectively was also not disclosed before the Executing Court.

28. The High Court expressed its concern over the validity of the auction sale by noting that the suit property admeasuring 24 Kanals 11 marlas, which constitutes merely 1/4th of the entire mortgaged property, admeasuring 116 Kanals and 13 marlas, was sold for Rs. 70,000/- to the plaintiffs-respondent nos. 1 and 2 respectively. Whereas the entire mortgaged property was sold in auction only for a meagre amount of Rs. 35,000/-. It further observed that although the amount sought to be recovered by the respondent no.6-Bank

was only Rs. 22,753/- and that such amount stood satisfied yet the plaintiffs-respondent nos. 1 and 2 respectively had been put in a very precarious position on account of the auction sale.

29. On the question of maintainability of the suit, the High Court held that the respondent nos. 1 and 2 respectively could be said to be "representatives" of the judgment debtor (respondent no. 3) as per Section 47 of the Code of Civil Procedure, 1908 (for short, "**the CPC**"). It held that despite such status, the suit would be maintainable owing to the fact that the auction sale in the execution proceedings was a result of fraud, thereby vitiating the entire proceedings. The Court arrived at the finding that the respondent nos. 1 and 2 respectively were *bona fide* vendees, and that a decree or sale obtained through fraud must not cause any prejudice to them. The High Court held that despite the auction sale being confirmed by the Executing Court, a separate suit would be maintainable, and, stating so, it upheld the decision of the courts below, although for different reasons, and consequently, dismissed the appeal preferred by the appellants.

D. SUBMISSIONS ON BEHALF OF THE PARTIES

I. Submissions on behalf of the appellants

30. Mr. Vikas Singh, the learned Senior Counsel appearing for the appellants would argue that since the decree obtained by the respondent no. 6-bank had attained finality as no appeal had been preferred against it, the judgment-debtor(s) had no subsisting right,

title and interest in the mortgaged property for the purpose of selling a portion of it to the respondent nos. 1 and 2 respectively. It is well-settled law that a vendor cannot transfer a title to the vendee better than what he himself possesses. He submitted that the respondent nos. 1 and 2 respectively could be said to have attained a derivative title from the respondent no. 3 and accordingly, stepped into his shoes.

31. Further, relying on the decision of this Court in ***M/s Siddamsetty Infra Projects Pvt. Ltd.* v. *Katta Sujatha Reddy & Ors.***, reported in **2024 INSC 861**, he submitted that the transfer of the suit property by the respondent no. 3 in favour of the respondent nos. 1 and 2 respectively would be hit by Section 52 of the Transfer of Property Act, 1882 (for short, "**the 1882 Act**"), as the principle of *lis pendens* continues till the satisfaction of the decree. By placing reliance on another decision of this Court in ***Sanjay Verma* v. *Manik Roy***, reported in **(2006) 13 SCC 608**, he submitted that no question of good faith or *bona fides* arise as the principle of *lis pendens* is a principle of public policy. He urged that this Court must not encourage *pendente lite* transactions and regularize the conduct of such transferees by showing equity in their favour.

32. He further submitted that the respondent nos. 1 and 2 respectively were fully aware of the possession being handed over to the auction purchasers-appellants on 24.06.1986, i.e., during the pendency of the execution proceedings. At that stage they could have availed themselves of the remedy available under Order XXI Rules 99 and

100 respectively but could not have instituted a separate suit. Such a suit, in his opinion, would also be barred under Section 47 of the CPC.

33. He relied on the decision of this Court in ***Harnandrai Badridas* v. *Debidutt Bhagwati Prasad & Ors.***, reported in **(1973) 2 SCC 467**, ***N.S.S. Narayana Sarma & Ors.* v. *Goldstone Exports (P) Ltd.***, reported in **(2002) 1 SCC 662**, ***Asgar & Ors.* v. *Mohan Varma***, reported in **(2020) 16 SCC 230**, and ***Shamsher Singh & Anr.* v. *Lt. Col. Nahar Singh (D) Thr. Lrs.***, reported in **2019 SCC OnLine SC 938**, to submit that it is a settled position of law that all questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the executing court and not by a separate suit. Such is also the mandate reflected under Section 47 CPC.

34. Mr. Singh further submitted that no material facts regarding fraud were pleaded in the plaint by the respondent nos. 1 and 2 respectively as required under Order VI Rules 2 and 4 of the CPC respectively, hence, no issue regarding fraud was framed by the Trial Court. He stated that allegation of fraud was raised for the first time before the High Court.

35. Furthermore, Mr. Singh submitted that as regards the alleged irregularities in the auction sale, the respondent nos. 1 and 2 respectively could have preferred an application under Order XXI

Rule 90. However, even if they had preferred such an application, they would have still remained unsuccessful since no sale is liable to be set aside solely on the ground of fraud or irregularity as regards the price at which the property was sold. He submitted that an auction sale cannot be reversed solely on the ground of inadequacy of price. In this regard, he placed reliance on the decision of this Court in ***Siddagangaiah* v. *N.K. Giriraja Shetty***, reported in **(2018) 7 SCC 278**. He also submitted that due sanctity must be attached to the auction sale conducted by the executing court and to make this argument good, he placed reliance on the decision of this Court in ***M/s Al-Can Export Pvt. Ltd.* v. *Prestige HM Polycontainers Ltd. & Ors.***, as reported in **(2024) 9 SCC 94**. He further submitted that a separate suit cannot be allowed to be filed by the respondent nos. 1 and 2 respectively to overcome the limitation period which has been prescribed for an application under Rule 90.

36. In such circumstances referred to above, the learned Senior Counsel appearing for the appellants-auction purchasers would submit that there being merit in his appeal, the same may be allowed and the impugned judgment passed by the High Court be set aside.

II. <u>Submissions on behalf of the respondent nos. 1 and 2 respectively</u>

37. *Per contra*, Ms. Aparajita Singh, the learned Senior Counsel appearing for the respondent nos. 1 and 2 respectively would submit that no error, not to speak of any error of law, could be said

to have been committed by the High Court in passing the impugned judgment.

38. She submitted that the separate suit was not barred by Section 47 of the CPC as the respondent nos. 1 and 2 respectively were "*third parties*" as contemplated under Order XXI Rule 92(4). The said provision permits a third party to challenge the title of a judgment-debtor by filing a suit against the auction purchaser wherein the decree-holder and the judgment-debtor would be necessary parties. She further submitted that the essentials of Order XXI Rule 92(4) stood satisfied, and therefore, the question of maintainability assumes no relevance.

39. To fortify her submission on the question of maintainability, reliance was placed on the decision of this Court in ***T. Vijendradas* v. *M. Subramanian***, as reported in **(2007) 8 SCC 751**, wherein in an almost-identical factual situation, the property was fraudulently auctioned in execution of a decree without notice to the actual owner. She submitted that the court took note of the fraudulent conduct of the vendor and held that a judgment or an order obtained by fraud is a nullity and *non-est*, and could thereby be challenged even in a collateral proceeding. Therefore, it was her view that the High Court rightly arrived at the finding that the appellants had indulged in fraudulent transactions as a consequence of which the respondent nos. 1 and 2 respectively could have challenged the validity of the auction sale even in

collateral proceedings. Thus, the separate suit in no manner suffered from the want of maintainability as per Section 47 of the CPC.

40. To indicate the *bona fides* of the respondent nos. 1 and 2 respectively, Ms. Singh submitted that the respondent no. 3 was competent and had a proper title in law to transfer the suit property also because the warrant of attachment of the mortgaged property came to be issued only on 08.10.1985, i.e., much after the sale in their favour. The respondent nos. 1 and 2 respectively had also obtained a No Encumbrance Certificate from the Office of the Sub-Registrar before their purchase. The certificate reflected no charge over the property. After obtaining these certificates, the respondent nos. 1 and 2 respectively took another loan over the suit property which would not have been possible if there were encumbrances over the property.

41. She further submitted that given the mandate of Order XXI Rule 66(2)(a), it belies credence that there was a need to sell the entire mortgaged property for a paltry amount of Rs. 22,753/-, when just four years before the auction, the respondent nos. 1 and 2 respectively had paid Rs. 70,000/- for the suit property which constituted 1/4th of the total extent of the mortgaged property. Order XXI Rule 66(2)(a) states that where the mortgaged property is large and more valuable than the decretal amount, it would be incumbent upon the Executing Court to order the sale of only such portion of the mortgaged property which would satisfy the decree. Ms. Singh contended that the nature of Order XXI Rule 66 is

mandatory and not directory. To fortify her submission, she relied upon the decision in the case of ***Lal Chand* v. *VIIIth Additional Judge & Ors.***, reported in **(1997) 4 SCC 356**.

42. Ms. Singh alluded to the deceitful conduct of the auction purchasers-appellants by pointing out that, on the date of the auction, they had purchased the entire mortgaged property for meagre amount of Rs. 35,000/- in spite of the fact that they were proscribed from participating in the auction without the permission of the Executing Court. On the other hand, the respondent nos. 1 and 2 respectively have registered sale deeds in their favour, along with their names mutated in the revenue record.

43. In the last, she submitted that the suit property was lawfully transferred to the respondent nos. 1 and 2 respectively. The Trial Court had rightly declared the auction sale to be void on the grounds of fraud and irregularities in and during the auction proceedings. The two appellate courts below could not be said to have committed any error in refusing to disturb the said findings.

44. In such circumstances referred to above, the learned Senior Counsel prayed that there being no merit in the appeal, the same may be dismissed.

E. <u>ISSUES FOR DETERMINATION</u>

45. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration: -

I. Whether the transfer of the suit property in favour of the respondent nos. 1 and 2 respectively, is hit by Section 52 of the 1882 Act and the doctrine of *Lis Pendens*?

II. Whether the respondent nos. 1 and 2 respectively, could have sought any relief under Rule(s) 89 or 90 of Order XXI CPC respectively before the Executing Court?

III. Whether the respondent nos. 1 and 2 respectively, were "third parties" who could have instituted a separate suit as per sub-rule (4) of Rule 92 Order XXI CPC?

IV. Whether the respondent nos. 1 and 2 respectively, were "representatives of the judgment-debtor" upon whom the bar to a separate suit as envisaged under Section 47 CPC could be said to be applicable?

V. Whether the respondent nos. 1 and 2 respectively, should have sought the remedy made available to a dispossessed third party under Rule 99 read with Rules 100 to 102 of Order XXI of the CPC respectively? If yes, whether the failure to do so would affect the maintainability of a separate suit for the same relief(s)?

F. ANALYSIS

I. Whether the transfer of the suit property is hit by Section 52 of the 1882 Act and the doctrine of *Lis Pendens*?

46. It was submitted on behalf of the appellants that the decree obtained by the respondent no. 6-bank had attained finality owing to no appeal being filed against the same. Therefore, the judgment debtor-respondent no. 3 could not be said to have any subsisting right, title, or interest in the suit property to transfer the same to the respondent nos. 1 and 2 respectively, after the passing of the original decree. Moreover, it was submitted that the suit instituted by the respondent nos. 1 and 2 respectively was hit by the doctrine of *lis pendens*, and therefore, that the respondent nos. 1 and 2 respectively could be said to suffer the same legal rights and obligations as that of their vendor.

47. Whereas on the other hand, it was canvassed on behalf of the respondent nos. 1 and 2 respectively that although the respondent no.6-bank, in their plaint, prayed for the payment of the due amount either in cash or by way of sale of the mortgaged property, the original decree had only provided for the recovery of the due amount without specifically directing that the mortgaged property be sold. In other words, the original decree was a simple money decree. It was only subsequent to the aforesaid decree that the mortgaged property came to be attached by the Executing Court *vide* its order dated 08.10.1985 due to the failure of the judgment-debtors in making the payment to the decree-holder bank.

Therefore, in the suit instituted by the bank for recovery of money, the right, title or interest of the mortgaged property was not directly in question, and the transfer of the suit property, after the passing of the original decree, would not be hit by the doctrine of *lis pendens,* especially considering that the order of attachment was made much later in time. To reiterate, she would submit that the sale deeds in favour of the respondent nos. 1 and 2 respectively, were executed on 13.05.1985 and 24.06.1985 respectively, whereas, the suit property was attached only much later, on 08.10.1985.

48. To address this issue, we shall look into Section 52 of the 1882 Act. It reads thus:-

> "**52. *Transfer of property pending suit relating thereto.*** – *During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government, of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.*
>
> *Explanation.* – *For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order, has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.*"

49. Section 52 of the 1882 Act stipulates that during the pendency of any suit in a court of competent jurisdiction in which any right to the immovable property is directly and specifically in question, such property cannot be transferred or otherwise be dealt with by any party to the suit or proceedings with a view to affect or defeat the rights of any other party under any decree or order. The only exception that the provision carves out is with regard to a situation where the transfer of the property is made permissible under the authority of the court and in accordance with the terms imposed by the court.

50. The explanation to the section further elaborates that the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint and would continue until the suit is disposed of by a final decree, and the "*complete satisfaction or discharge of such decree*" has been obtained, unless the same cannot be obtained due to the expiry of the prescribed limitation period.

51. This Court in ***Celir LLP* v. *Sumati Prasad Bafna***, reported in **2024 SCC OnLine SC 3727**, where one of us (J.B. Pardiwala, J.) was part of the Bench had the occasion to elucidate the essentials of Section 52 of the 1882 Act. The relevant observations read as under:-

> "*158. The following conditions ought to be fulfilled for the doctrine of lis pendens to apply:—*
> *i. There must be a pending suit or proceeding;*
> *ii. The suit or proceeding must be pending in a competent court;*
> *iii. The suit or proceeding must not be collusive;*

iv. The right to immovable property must be directly and specifically in question in the suit or proceeding;
v. The property must be transferred by a party to the litigation; and
vi. The alienation must affect the rights of any other party to the dispute.

159. In short, the doctrine of lis pendens, which Section 52 of the TPA encapsulates, bars the transfer of a suit property during the pendency of litigation. The only exception to the principle is when it is transferred under the authority of the court and on terms imposed by it. Where one of the parties to the suit transfers the suit property (or a part of it) to a third-party, the latter is bound by the result of the proceedings even if he did not have notice of the suit or proceeding."

(Emphasis supplied)

52. This Court in ***Celir LLP*** *(supra)* had also emphasized that such a *pendente lite transferee* would be bound by the result of the proceedings irrespective of whether they had notice of the pending suit or not. In other words, that the lack of knowledge of the proceedings would not be a valid defence against the application of the doctrine of *lis pendens*.

a. Whether the suit property was "*directly and specifically in question*" in the suit instituted by the respondent no.6-bank and the import of the words "*any suit*" along with "*any right*" occurring in Section 58 of the 1882 Act.

53. The principal contention canvassed on behalf of the respondent nos. 1 and 2 respectively was that Section 52 of 1882 Act will not apply to the facts of the present case as the suit property was not "*directly and specifically in question*" in the suit instituted by the respondent no. 6-bank which was only for the recovery of money. The

submission although seemingly lucrative yet is flawed in our considered opinion for the reasons elaborated hereinbelow.

54. The Transfer of Property (Amendment) Act, 1929 had brought certain significant changes by way of which the present Section 52 has come into existence. It had substituted the words "*active prosecution*" occurring at the beginning of the provision with the word "*pendency*" and the words "*a contentious suit or proceedings*" was replaced with the words "*any suit or proceedings*". Along with this, an explanation was also inserted in order to clarify that the pendency of a *lis* would continue till the satisfaction or discharge of the decree, or until the satisfaction or discharge of the decree has become unobtainable by reason of the expiration of the prescribed limitation period.

55. There is no gainsaying that by the substitution of the words "*a contentious*" with "*any*", the scope of the provision has been widened. We say so because, *first*, the dictionary meaning of the word "*contentious*" would be - an adversary, or a litigation between adverse or contending parties, or a judicial proceeding comprising of an attack and defense as between opposing parties. By the use of the expression "*a contentious suit or proceeding*", the application of the doctrine may have been confined only to those proceedings in which both the parties were present and actively contesting the matter. In other words, the provision may have had no application on *ex-parte* proceedings where one of the parties had chosen not to participate.

56. It was recognised that such a restricted view would defeat the purpose of the provision. Section 52 casts an embargo on the parties to the suit from transferring the property in question, in order to preserve the subject matter of the *lis* and to prevent the rights of the parties from being defeated by alienations *pendente lite*. If the doctrine were made inapplicable to *ex-parte* proceedings, a party would deliberately abstain from appearing before the court, transfer the property during the pendency of the suit, and thus, render the adjudication of rights in the said suit, infructuous.

57. *Secondly*, the words "*any suit or proceeding*" has to be read in conjunction with the expression "*in which any right to immovable property is directly and specifically in question*". Careful attention must be paid to the words "*any* right" along with the words "*directly and specifically*". While the former indicates the intention of the legislature to afford some expansiveness to Section 58, the latter narrows down its scope. To elaborate, this indicates, on the one hand, that the scope of the provision is not confined to suits wherein the <u>same right</u> to the property is in question, while indicating on the other hand that, that it also cannot be expanded to all suits wherein any right to the suit property is <u>not directly and specifically</u> considered by the court.

58. What then holistically emerges from the amendment is that, under the pre-amended provision, the suit was required to be actively contested *in relation to* any right in the immovable property. However, after the amendment, the pendency of any suit, whether

contentious or not, is enough. Moreover, even where the suit is not solely one relating to the same right in the immovable property, if any right, title or interest as regards such immovable property is directly and specifically forming part of the subject-matter of the suit, Section 52 and the doctrine of *lis pendens* would stand attracted. In other words, the amendment, considered cumulatively, has widened the application of Section 52 of the 1882 Act.

59. In this regard, we may refer to the decision of the Full Bench of the Allahabad High Court in ***Mahesh Prasad & Ors.* v. *Musammat Mundar***, reported in **1950 SCC OnLine All 16**, wherein the plaintiff had filed a suit for maintenance, and prayed that it be charged on the whole or a sufficient portion of the ancestral property specified in the plaint. The suit was dismissed by the trial court, however, in appeal, the appellate court fixed an amount as maintenance by creating a charge on the property *vide* its decree dated 21.02.1917. Sometime on or after 01.04.1930, the property had been sold to the transferees. Thereafter, the plaintiff-appellant filed an application for execution of the decree against the defendants as well as the transferees. As a result, the executing court had directed the sale of the properties in execution. The transferees claimed that they were transferees for consideration and without notice of the charge. One of the main issues before the High Court was whether the doctrine of *lis pendens* would apply to the facts of the case. The Court held that the want of notice would be immaterial to the application of Section 52 of the 1882 Act, and the plaintiff would be entitled to enforce the decree against the property in the hands of the

transferees, even if the transferees had purchased the property for consideration and without notice of the original suit. The Court concluded that the right to be maintained out of the income of the immovable property was a "*right to immovable property*" which was directly and specifically in question, thereby attracting the doctrine of *lis pendens*. The relevant observations read thus:-

> *"The next point for consideration is whether section 52 of the Transfer of Property Act applied. <u>If section 52 applied then want of notice would be immaterial and the widow would be entitled to enforce the decree against the property in the hands of the transferee from her judgment-debtors even if the transferee had purchased the property for valuable consideration and without notice.</u>*
>
> *xxx*
>
> *Section 52, as amended by Act XX of 1929, is in these terms –*
>
> > *"During the pendency in any court having authority in British India, or established beyond the limits of British India by the Governor-General in Council of any suit or proceeding which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.*
> >
> > *Explanation – For the purposes of this section the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by*

reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

The section has been amended in certain material particulars. The word 'pendency' has been substituted for the words 'active prosecution'. The words 'any suit or proceeding which is not collusive' have been substituted for the words 'a contentious suit or proceeding', and the Explanation has been added. These amendments were not with the object of changing the law of lis pendens, but to remove certain doubts and conflicts which had arisen in the decisions of the High Courts in India. There is no doubt that the amended section will apply to the transfers which have taken place after the amendment came into force. The only question is whether in a suit filed by a Hindu widow, claiming that she was entitled to be maintained out of the income of the properties mentioned in the plaint, which she claimed were joint family properties in which her husband had a share and asking for a charge to be created on the said property, any right to immoveable property is directly and specifically in question. The right to be maintained out of the income of immoveable property is no doubt right to immoveable property. It may be mentioned that the words are not 'right in the immoveable property', but 'right to immoveable property'. The fact that the Hindu widow claimed that this was property belonging to her husband, that she was entitled to be maintained out of the income of that property, and that she was entitled to have a charge created on the property, all raise questions relating to right to immoveable property. The point, however, is whether 'right, to such property' is 'directly and specifically in question' or the main claim is for maintenance and it is only collaterally that the property has been brought in. There is some difference of opinion on this point, but I am inclined to the view that in such a case it can be said that right to immoveable property is directly and specifically in question. Any doubts that one may have had on the point must be deemed to have been set at rest by the decision of their Lordships of the Judicial Committee in Syud Bazayet Hossein v. Dooli Chund [(1879) I.L.R. 1 Cal. 402.] . In that case a Mohammedan widow had claimed a right to be

maintained out of certain properties detailed in the plaint and had also claimed that a charge be created, and when the property was transferred in disregard of the charge created in favour of the widow by the decree their Lordships of the Judicial Committee held that the doctrine of lis pendens applied. It is not for me to examine whether a Mohammedan widow is entitled to the maintained out of certain properties in the absence of agreement merely on the ground that she is a Mohammedan widow. It is also not for me to consider whether the charge was rightly created, but that being the nature of the suit and a decree creating a charge having been passed their Lordships held that it operated as lis pendens, and that, to my mind, must set this point at rest.[…]"

(Emphasis supplied)

60. In ***Siddagangaiah*** *(supra)*, the plaintiff had filed a suit against her defendant-husband for the grant of maintenance and the creation of a charge on certain properties. After the filing of the suit and before it came to be decreed, the defendant executed a sale deed *qua* some of those properties. This Court by relying on the decision in the case of ***Nagubai Ammal & Ors.* v. *Shama Rao & Ors.***, reported in **(1956) 1 SCC 698**, held that when a prayer in the suit seeks to create a charge on a specific property, it is a suit in which the right to immovable property is directly in question. Further, the *lis* is said to commence on the date of the presentation of the plaint and not on the date of the decree. The relevant observations read thus:-

"28. Coming to the question of lis pendens, Smt Thopamma had filed the suit in 1968 for the creation of charge of maintenance, inter alia, on the properties in question. Explanation to Section 52 of the TP Act makes it clear that pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint. Thus, on the

date of execution of the sale deed on 9-11-1974, the suit filed by Thopamma was pending. Thus, the provisions contained in Section 52 would clearly apply to the case. In Nagubai Ammal v. B. Shama Rao [Nagubai Ammal v. B. Shama Rao, AIR 1956 SC 593] this Court observed: (AIR p. 597, para 9) "9. On this question, as the plaint in OS No. 100 of 1919-20 praying for a charge was presented on 6-6-1919, the sale to Dr Nanjunda Rao subsequent thereto on 30-1-1920 would prima facie fall within the mischief of Section 52 of the Transfer of Property Act, and would be hit by the purchase by Devamma on 2-8-1928 in the execution of the charge decree.

Sri K.S. Krishnaswami Ayyangar, learned counsel for the appellants, did not press before us the contention urged by them in the courts below that when a plaint is presented in forma pauperis the lis commences only after it is admitted and registered as a suit, which was in this case on 17-6-1920, subsequent to the sale under Ext. VI — a contention directly opposed to the plain language of the Explanation to Section 52. And he also conceded and quite rightly, that when a suit is filed for maintenance and there is a prayer that it be charged on specified properties, it is a suit in which right to immovable property is directly in question, and the lis commences on the date of the plaint and not on the date of the decree, which creates the charge.[…]"

(Emphasis supplied)

61. One could argue that the decree in ***Mahesh Prasad*** *(supra)* had specifically mentioned that a charge be created on the property and the property was alienated after the passing of such a specific decree, and it was therefore held that the transaction would be hit by the doctrine of *lis pendens*. Whereas in the facts of the present case, the decree was silent on whether the mortgaged property must be directed to be sold and hence, the transfer in favour of the respondent nos. 1 and 2 respectively would not be covered by

Section 52. In other words, that the decree in the present case was simply a money decree. This is, more or less, the argument canvassed by the counsel for the respondent nos. 1 and 2 respectively.

62. This line of reasoning is plainly defeated by the decision in ***Siddagangaiah*** *(supra)* wherein the court had applied the doctrine underlying Section 52 even in a situation where the plaint had prayed that a charge be created on the properties and some of the properties were sold off before the decree creating a charge came to be passed. Therefore, one must also look carefully at the prayers sought for in the plaint to ascertain the application of the doctrine of *lis pendens*.

63. To substantiate our reasoning, we may also look into the decision of the High Court of Madras in ***Annakkili* v. *Murugan & Anr.***, reported in **2021 SCC OnLine Mad 1673**, wherein the plaintiff had filed a suit for the recovery of money, and also sought for a direction to be given to the judgment-debtor to furnish security for the suit claim, failing which the court must direct that the properties mentioned in the plaint, be attached. Before any direction could be passed, the appellant therein purchased one of the properties mentioned in the plaint. It was then argued that Section 52 of the 1882 Act cannot be invoked in case of a simple money suit. The Court held that Section 52 does not state that it is not applicable to suits for recovery of money, and the provision would not say so, because the Explanation to the provision states that the pendency of any suit

continues until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained. It was further held that the parties must not create new rights in the property till the execution proceedings are discharged. The Court underscored that if Section 52 was read as always excluding money suits, despite a specific prayer in the plaint as regards the attachment of the property, a decree passed therein would be rendered meaningless, since the party would be free to alienate the property and there would be no property available to execute the money decree. The relevant observations read thus:-

> *"7. […]In this context only, the Supreme Court in the case of Vidur Impex & Traders Pvt. Ltd. v. Tosh Apartments Pvt. Ltd., CDJ 2012 SC 560 has clearly ruled that the transfer of any right, title or interest in the suit property or the consequential acquisition of any right, title or interest during the pendency of the suit will be subject to the decision in the suit. The reason being that the operation of bar under Section 52 is subject to the power of the Court to exempt the suit property from the operation of Section 52.[…]"*
>
> *xxx*
>
> *9. A close reading of the Explanation given under Section 52 makes it abundantly clear and comes to the aid of the first respondent/decree holder that for the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction. As highlighted above, when the plaintiff/decree holder had filed the suit and also the I.A. No. 1513 of 2009 on 29.9.2009, it goes without saying that the interest on the immovable property was directly and specifically in question, therefore, the suit properties ought not to have been sold in*

favour of the appellant on 8.10.2009, who is the brother's wife of the second respondent/judgment debtor.

10. Further, Section 52 does not say that the doctrine of lis pendens will not apply to any money suit, because this section cannot say so, since the Explanation given in Section 52 is conspicuous and explicit that for the purpose of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained. Therefore the true intent of Section 52 with Explanation is vividly clear that the Defendant or Judgment Debtor cannot transfer the suit property from the date of initiation of proceeding for attachment before judgment in a pending money suit and moreover, till the execution proceeding of decree or order obtained is completely satisfied or discharged, the mischief of Section 52 with Explanation and Section 53 will operate against the Defendant, irrespective of the fact whether it is a money suit or suit for immovable property, inasmuch as Section 52 with Explanation does not bar application of the principle of lis pendens to money suit. Law maker of the Transfer of Property Act were careful enough to mention in the Explanation that the pendency of a suit or proceeding shall be deemed to commence from the date of presentation of the plaint or the institution of the proceeding, namely, filing of an Interlocutory Application for Attachment Before Judgment. Moreover, if Section 52 is excluded to money suit, then the money decree obtained after a long contest from a Court of competent jurisdiction will become meaningless, if there is no property available for execution of money decree, as a result, the decree holder of money suit will go remediless.[…]"

(Emphasis supplied)

64. In a simple mortgage, the property is encumbered with the mortgagee's interest in it, which means that any purchaser of the property would receive an interest in the property subject to the

mortgagee's rights, irrespective of whether the transfer is with or without notice of the mortgage, unless there is anything to the contrary to this effect in the mortgage agreement. It is in the same breath that we say that a transferee of a mortgaged property will have only such interest which the mortgagor himself had at the time of transferring the property.

65. In the present case, the suit property purchased by the respondent nos. 1 and 2 respectively, was a parcel of land forming part of the mortgaged property that the original borrower had mortgaged with the respondent no. 6-bank in *lieu* of the loan availed by him. When the bank instituted the suit and described the mortgaged property in its material particulars along with seeking that the property be sold in the event of default, the Trial Court could be said to have been in *seisin* of a dispute wherein the right or interest in the suit property was directly in play.

66. When the respondent nos. 1 and 2 respectively purchased the suit property, it was a property which was "*directly and specifically in question*" in the pending proceedings and hence, stood squarely covered by Section 52 of the 1882 Act and the principle of *lis pendens*. By purchasing a mortgaged property during the pendency of the suit instituted by the respondent no.6-bank, the respondent nos. 1 and 2 respectively could be said to have agreed to be bound by the outcome of such proceedings. Their contentions regarding the lack of knowledge of the proceedings and the procurement of a No Encumbrance Certificate respectively, to say that they were *bona fide*

purchasers, cannot be countenanced as the doctrine of *lis pendens* applies to an alienation during the pendency of the suit irrespective of whether the transferee had notice of the pending proceedings or not. [*See*: ***Sanjay Verma* v. *Manik Roy*, (2006) 13 SCC 608**; ***Usha Sinha* v. *Dina Ram*, (2008) 7 SCC 144**]

67. Further, once the decree itself recorded the existence of the mortgage, and the plaint contained a joint prayer for recovery of money alongwith the sale of the mortgage property, the implication would naturally be that if the decretal amount remained unpaid, the amount was to be realized by proceeding against the mortgaged property in execution. In other words, the mortgage created an interest in the property in favour of the respondent no. 6-bank, and the decree also recognized that the property would answer the debt in the event of default. The decree read thus:-

> *"2. The plaintiff is a banking company incorporated under the banking companies (Acquisition and transfer of Undertakings) Act, 1980, having its head office at New Delhi and a branch at Nehru Ground Faridabad Sh. V.P. Gupta is the Manager and Principal Officer of the plaintiff bank. He is conversant with the fact of the case and is authorized and competent to institute the present suit vide power of attorney dt.29.4.71. The defendant No.1 was given a loan of Rs. 20,000 /- against hypothecation of his tractor bearing No.HRG884 7 and the personal guarantee of defendant no.2 and mortgage of movable property by defendant no. 1. The defendant no. 1 executed several documents in favour of the bank enumerated in para no. 4 of the plaint. The said amount was disbursed to defendant no. 1 on 31.7.70. Besides execution of the documents given above, the defendant no.1 mortgaged his agricultural land with the plaintiff vide registered mortgage deed dt. 6.6. 70 and the details of the mortgage can be found in para no. 6 of the plaint. The amount*

of loan was to carry interest @ 2 o/o over the R.B.I. rate with a minimum of 91;20;0 which was subsequently raised to 15112% The said amount as to be repaid in six half yearly in statements. The defendants remained irregular in payment of the amount. They acknowledged their liability by signing acknowledgment in favour of the plaintiff on various dates, last of which is 5.6.79. The defendant No 1 &2 died and the defendants no. 1a to 1c and defendant no. 2(a) are their legal heirs. Various demands were made on them to do so and hence the present suit.

3. The defendants did not appear despite service and they were proceeded against exparte.

4. In exparte evidence, Sh. S.C. Gupta Assistant Manager of the plaintiff bank appeared as PW1 and he has supported the plaintiffs case in all material particulars. The on oath statement of this witness which goes un rebutted, goes to prove the plaintiffs case. Hence, the suit of the plaintiff for recovery of Rs. 15529.35p. is decreed exparte against the defendants with costs. Interest @ 15°/o P.a. is allowed to the plaintiff on the decretal amount from the date of institution of the suit till the date of 3ealization of the decretal amount. Decree sheet be prepared and file be consigned.

Announced.
Dated: 12.11.84"

(Emphasis supplied)

68. Therefore, there exists no doubt that the respondent nos. 1 and 2 respectively were *pendente lite transferees* of the judgment-debtor(s).

69. We would also like to point out at this juncture, that the Trial Court had unfortunately misdirected itself in recording that the transaction in favour of the respondent nos. 1 and 2 respectively was made on a date prior to the passing of the original decree, when in actuality, it was made in two tranches i.e., one, after the decree came

to be passed and another, after the execution petition came to be filed by the respondent no.6-bank. To put it simply, both tranches of the transaction in favour of the respondent nos. 1 and 2 respectively were made well after the original decree was passed.

70. Even going by the Trial Court's understanding of when the transactions in favour of the respondent nos. 1 and 2 respectively were made, for the reasons we have assigned hereinabove, we are of the view that they would still be hit by the doctrine of *lis pendens* since the transactions were made after the institution of the original suit by the respondent no.6-bank in which the right and interest to the mortgaged property was directly and specifically in question.

II. <u>Whether the respondent nos. 1 and 2, respectively, could have sought for any relief under Rule(s) 89 or 90 of Order XXI CPC, respectively?</u>

71. Before directly addressing the rival contentions as regards the maintainability of the suit instituted by the respondent nos. 1 and 2 respectively, we must first look into Order XXI, more particularly, the various kinds of remedies that are contemplated under Rules 89 to 92 thereunder. We find it necessary to do so because – *first,* the counsel appearing for the appellant seems to have made an argument before the High Court that the plaintiffs-respondent nos. 1 and 2 respectively, should have preferred an application under Rule 89 of Order XXI CPC before the confirmation of the auction-sale and upon failing to do so, and allowing the sale to be confirmed, they would have no remedy.

72. *Secondly,* Mr. Vikas Singh would submit that a sale made during execution by the executing court must be accorded some sanctity and not be left vulnerable to general claims of irregularity or fraud. He would argue that the respondent nos. 1 and 2 respectively must have preferred an application under Rule 90 immediately after they got to know of the alleged irregularities. However, even in such a scenario, several essentials must have been fulfilled for them to successfully set-aside the sale. Having not fulfilled those essentials, it is his view that their application under Rule 90 would have also been unsuccessful.

73. *Thirdly,* Ms. Aparajita Singh would submit that the separate suit instituted by the respondent nos. 1 and 2 respectively, would be maintainable by virtue of Rule 92(4) which comes into play once the sale is confirmed.

74. Before we specifically address ourselves to these submissions, let us look into the scope of these provisions.

a. Scope and application of Rule 89 of Order XXI CPC, with specific reference to whether *pendente lite transferees* can maintain such an application

75. Order XXI Rule 89 reads thus:-

> *"**89. Application to set aside sale on deposit.—***
> *(1) 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.

(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale."

76. The rule stipulates the procedure for setting aside the sale made in execution of a decree by (a) any person claiming an interest in the auctioned property, either at the time of the sale or at the time of making the application under Rule 89 or; (b) by a person acting for or in the interest of such person. However, such an application under Rule 89 must mandatorily be accompanied by a deposit which contains two components – (a) a sum equal to five per cent of the purchase money paid in the auction sale, which is to be given to the auction purchaser, and; (b) the amount specified in the proclamation of sale, less any amount which may have already been received by the decree-holder since the date of such proclamation, which is to be given to the decree-holder.

77. What can be discerned from the aforesaid is that the heart of the provision lies in the expression, "*apply to have the sale set aside on depositing in Court*". The strict nature of the rule is reflected by the necessary condition stipulated by the legislature that the sale would be set-aside only upon the payment of a deposit of the prescribed amount. In other words, the deposit of the amount stipulated in sub-rule (1) of Rule 89 is *sine qua non* for an application seeking to set aside the execution sale under this rule.

78. A careful perusal of the rule indicates that it gives the judgment debtor another opportunity to retain his property, even after the property is sold, by paying the decretal amount to the decree-holder and compensating the auction purchaser with five percent of the purchase money. In ***Challamane Huchha Gowda* v. *M.R. Tirumala***, reported in **(2004) 1 SCC 453**, this Court held that Rule 89 provides the judgment-debtor a final opportunity to put an end to the dispute and prevent his dispossession from the property, before the sale is confirmed by the court. If the conditions prescribed under this rule are satisfied, then the executing court would be obligated to make an order setting aside the sale, provided that notice is given to all persons affected thereby, as stipulated under the proviso to Rule 92(2). The relevant observations read thus:-

> "*9. Execution is the enforcement by the process of the court of its orders and decrees. This is in furtherance of the inherent power of the court to carry out its orders or decrees. Order 21 CPC deals with the elaborate procedure pertaining to the execution of orders and decrees. Sale is one of the methods employed for execution. Rule 89 of Order 21 is the only means by which a judgment-debtor can escape from a sale that has been validly carried out. The object of the rule is to*

> *provide a last opportunity to put an end to the dispute at the instance of the judgment-debtor before the sale is confirmed by the court and also to save his property from dispossession. Rule 89 postulates two conditions: they are depositing: (1) of sum equal to five per cent of the purchase money to be paid to the purchaser, (2) of the amount specified in the proclamation of sale less any amount received by the decree-holder since the date of such proclamation, in the court. If these two conditions are satisfied the court shall make an order for setting aside the sale under Rule 92(2) of Order 21 CPC on an application made to it. In other words, then there will be compliance with the court's order or decree that is sought to be executed. Because the purpose of Rule 21 is to ensure the carrying out of the orders and decrees of the court, once the judgment-debtor carries out the order or decree of the court, the execution proceedings will correspondingly come to an end. It is to be noted that the Rule does not provide that the application in a particular form shall be filed to set aside the sale. Even a memo with prayer for setting aside sale is sufficient compliance with the said Rule. Therefore, upon the satisfaction of the compliance with conditions as provided under Rule 89, it is mandatory upon the court to set aside the sale under Rule 92. And the court shall set aside the sale after giving notice under Rule 92(2) to all affected persons.*
>
> (Emphasis supplied)

79. The question which would then arise is whether a *transferee pendente lite* of the judgment-debtor would also fall within the scope of the words "*any person claiming an interest in the auctioned property*". There remains very little reason for the courts to extend the benefit of Rule 89 to the judgment-debtor himself but not to a *transferee pendente lite* of the judgment-debtor.

80. A perusal of the amendment to Rule 89 made by the Amendment Act of 1976 would prove beneficial in the answering the aforesaid question. Through the amendment, the words, "*any person, either*

owning such property or holding an interest therein by virtue of a title acquired before such sale" was replaced with "*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*".

81. The Andhra Pradesh High Court in ***Pallepu Poleswari v. Tammisetty Nageswarao Rao and Others*** reported in **2011 SCC OnLine AP 601** had looked into what had prompted the legislature to amend Rule 89 and stated that the impetus was given by the decision of a Full Bench of the Patna High Court in ***Onkar Nath Jalan v. Ramanand Prasad*** reported in **AIR 1970 Patna 368**. In the said decision, the Full Bench had suggested a change to Rule 89 along the lines of what it thought would truly be in consonance with the intent of the provision. The amendment was also suggested with a view to prevent an unnecessary investigation into the nature of interest that an applicant may have. This suggestion is what has been *verbatim* adopted by the Amending Act of 1976. The relevant observations are thus:

> *"17. <u>What prompted the Parliament to amend Rule 89 of Order XXICPC in 1976 appears to be certain administrative and judicial steps taken by the Patna High Court.</u> Even when the Rule remained in its unamended form, the Patna High Court introduced a State amendment to that Rule, in its application to the State of Bihar, substituting the following text:*
>
> > *"a judgment-debtor or any person deriving title through the judgment-debtor, or any person holding an interest in the property at the date of the application under this rule."*
> > *(in the place of the words underlined portion at page 535)*

18. The said provision has fallen for interpretation before a Full Bench of the Patna High Court in Onkar Nath Jalan's case (supra). The Full Bench took note of the background in which the Patna High Court substituted a different provision and the division of opinion among various High Courts. Ultimately, it held that provision as it applied to the State of Bihar did not warrant that an applicant must prove his title to the property, before he can seek the relief of setting aside the sale. After holding so, the Full Bench made the following observation:

> *"I may, however, state before parting with the case that the most comprehensive wording and the one which is not only consonant with the underlying policy of the amendments but has besides it, the advantage of avoiding unnecessary investigation of the nature of interest is that of the High Court of Lahore, prior to partition and that of the Nagpur High Court and should be adopted in our High Court as well. The amendment stands thus:*
>
> > *"**any person claiming any interest in the property sold at the time of the sale or at the time of making the application under this rule or acting for or in the interest of such a person**." The decree-holder is interested in getting his dues. The auction-purchaser while bidding knows the provision of Order XXI, Rule 89. and receives the compensation and thereby can have no grudge as to why the amount of purchase money is deposited and sale set aside. No one suffers by the procedure adopted in the above amendment and it may be reaffirmed that no prudent man is likely to waste his good money in depositing it for the benefit of the judgment-debtor merely in a gratuitous manner."*

19. It is indeed gratifying that the text suggested by the Full Bench were adopted verbatim, by the Parliament and it was incorporated in Rule 89, in the year 1976."

(Emphasis supplied)

82. On a bare reading of the aforesaid amendment, it is lucid that the legislature had consciously widened the ambit of the rule by undertaking two major changes – *first,* doing away with the requirement that an applicant under Rule 89 must either own the property or hold an interest by virtue of a title, and *secondly,* expanding the period during which such an interest could have been acquired from 'before the occurrence of the sale' to 'at the time of making the application under Rule 89'. Therefore, the legislature very consciously did away with the requirement of having an applicant under Rule 89 prove his title or absolute right in the property. Presently, it is sufficient if the applicant claims an "interest" in the property sold, either at the time of the auction or at the time of making the application under Rule 89 or, is acting for or on behalf of the persons having such interest.

83. We have had the benefit of looking into a decision of the Madras High Court in ***Vootla Viriah and Others v. Tadepalli Subba Rao and others*** reported in **1948 SCC OnLine Mad 287**, wherein it was emphasized that the word "interest" occurring in Rule 89 must be construed quite liberally. Such an interest which is referred to under Rule 89 may not be sufficient to enforce any claim to the detriment of the auction-purchaser or the decree-holder and this is probably why the interest referred to in this rule, may not be successfully used to prevent the attachment of the property and defeat the rights of the decree-holder. However, the object of this rule is very different - what Rule 89 seeks to achieve is to provide the decree-holder the amount that he is owed and also compensate the auction-

purchaser in the course of setting-aside the sale – i.e., to set-aside the sale while not detrimentally affecting the rights of the decree-holder or the auction-purchaser. In other words, the decree-holder is relegated to the same position as if the sale of the property was not interfered with at all and the auction-purchaser, in whose favour the sale has not yet been confirmed and rights are not crystallized, is instead compensated. Therefore, even an inchoate right which a party may have over the property may be enough to constitute an "interest" under Rule 89. The relevant observations are thus:

> *"[…] O. 21, R. 89 should be liberally construed and a restricted interpretation should not be put upon the words of that rule.[…]*
>
> *[…] It may be that the interest may not be sufficient to be put forward as a shield against the decree-holder's claim, and that was the-reason why the properties were attached and sold in execution of the decree. The word "interest" in O. 21. R. 89 has got a very wide import and should be construed very liberally, as Venkatasubba Rao, J. observed in the case abovementioned. Any inchoate right which a party may have over a property may be sufficient "interest" to enable him to apply under O. 21, R. 89.[…]"*
>
> (Emphasis supplied)

84. The mandate of this rule is further strengthened by the time limit stipulated by the legislature under sub-rule (2) of Rule 92, wherein the deposit required under Rule 89 has to be made within sixty days from the date of sale. This time-limit also flows from Article 127 of the Limitation Act, 1963. A relaxation of this sixty-day period is only contemplated if, the amount already deposited within this period of sixty days is found to be deficient for the reason that the depositor made a clerical or arithmetical mistake. In such a scenario, the court

fixes an additional time within which the depositor shall make good that deficiency.

85. Furthermore, sub-rule (2) goes on to indicate that an application under Rule 89 cannot be made when the same person has already applied under rule 90 for setting aside the sale on the ground of irregularity or fraud. One cannot allege material fraud or irregularity to set-aside the sale while simultaneously also wanting to pay a deposit to set it aside.

86. On a complete reading, what then becomes obvious is that the provision is in the nature of a concession. It is intended to provide the person claiming an interest in the property sold, or a person acting for or on behalf of the persons having such an interest, a last opportunity to receive the property, by getting the auction sale set aside and depositing the amount as stipulated. The payment of the deposit by such persons, by itself, is reason enough to stop the sale of the property from being confirmed. We say so because of two reasons, *first*, the deposit is in *lieu* of the execution of the decree which is the sole concern of the executing court in such cases, and *secondly*, as a *sequitur,* the deposit of the amount is couched in mandatory terms alongwith the time limit prescribed, reinforcing that the sale cannot be set-aside without the deposit, and within prescribed timeline.

87. Having explained the scope of Rule 89 in the aforesaid manner and having arrived at the conclusion that a *pendente lite transferee* of the

judgment-debtor would also be eligible to make an application under this rule, we are of the view that even if the respondent nos. 1 and 2 respectively were willing to make the deposit and set-aside the sale as contemplated under Rule 89 of Order XXI, they were not in a position to move an application under this rule. This is because they were put to knowledge about the auction of the mortgaged property much after the date of confirmation of sale. The sixty-day time limit which starts running from the date of the sale, had long lapsed. In other words, the stage of the execution proceedings during which they could have preferred an application under Rule 89 had already passed.

b. Scope and application of Rule 90 of Order XXI CPC

88. We may now examine the parameters provided for under Rule 90 and whether the respondent nos. 1 and 2 respectively could have preferred an application under the said rule. Rule 90 reads thus:-

> *"**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."*

89. The aforesaid rule contemplates that an application can be made under Rule 90 by four categories of individuals – (a) the decree-holder, (b) the purchaser in such sale, (c) any other person entitled to share in a rateable distribution of assets, or (d) any person whose interests are affected by the sale. The Amendment Act of 1976 had inserted the words "*or the purchaser*" under Rule 90 and thereby, clarified that the purchasers in the sale made in execution of a decree could also prefer an application under this rule.

90. Moving further, the rule states that the aforesaid individuals can apply to the executing court to set-aside a sale that has already been conducted on the ground that a "*material irregularity or fraud in publishing or conducting it*" has occurred. Careful attention must be paid to two aspects herein – *First,* what constitutes "*material*" irregularity or fraud would depend on the facts and circumstances of each case, and *secondly,* such material irregularity or fraud must be as regards the manner of "*publishing or conducting*" the sale in execution of a decree.

91. Along with the aforesaid two-pronged requirement, by virtue of sub-rule (2) the court must also be satisfied, upon the facts proved, that the applicant praying for such sale to be set-aside has sustained

a "*substantial injury*" "*by reason of*" such material irregularity or fraud. This sub-rule, apart from indicating that the injury must be substantial, also denotes that the injury claimed to be suffered by the applicant must have a direct nexus with the publishing or the manner in which the sale was conducted.

92. The respondent nos. 1 and 2 respectively, have made several allegations as regards the manner in which the sale was conducted including that of the sale being conducted *in camera,* the auction price being inadequate etc. However, they are also of the opinion that the suit property should not have been attached by the Executing Court in the first place. Therefore, we find it necessary to examine whether an application under Rule 90 could have been made to address any grievances pertaining to attachment.

i. The maintainability of an application under Rule 90 vis-á-vis fraud or irregularities pertaining to stages prior to the proclamation of sale i.e., at the stage of attachment.

93. In order to make an application under Rule 90, the applicant must ensure that the ground which they have taken is not one that they could have raised on or before the date on which the proclamation of sale was drawn up. This comes as a caution from sub-rule(3) of Rule 90. Sub-rule (3) must, however, not be read to mean that the ground sought to be raised must only be related to a stage which arrives after the date of drawing up the proclamation of sale. One must pay careful attention to the words "*grounds which the applicant could have taken*". This refers directly to the ability of the applicant to

take the same ground on a prior occasion. Necessary context as to why the legislature felt the need to incorporate this sub-rule can be derived from the ***14th Report*** of the Law Commission of India (Vol 1. Pg 454-455) which is reproduced thus:

> *"**50. Proclamation of sale.** Rules 64 to 73 contain provisions for the sale of property generally. We have dealt with the notice of the proclamation of sale to be given to the judgment-debtor under Rule 66. The proclamation which is drawn up under sub-rule (2) of Rule 66 must contain several particulars relating to the description of the property. Under clause (e) of sub-rule (2) the court is required to state in the proclamation everything material for a purchaser to know in order to judge of the nature and value of the property. The court has to make an approximate estimate of the market value of the property to be stated in the proclamation. This requirement has been known to cause much trouble and delay. Under the present law, an omission to state the correct market value of the property or an undervaluation of it has been regarded as a material irregularity affecting the sale under Rule 90. In practice, a judgment-debtor who is intent upon postponing the sale of property allows the sale to be held knowing that the particulars as regards the valuation in the proclamation are defective and thereafter makes an application under Rule 90 for setting aside the sale on the ground of a material irregularity in publishing or conducting the sale. These proceedings involve delays which may well be avoided by omitting the item of the court's estimate of the price. The Patna High Court has made what is in our view a very wholesome and salutary amendment by adding a proviso to clause (e) of sub-rule (2) of Rule 66 as follows:*
>
> > *"Provided that no estimate of the value of the property other than those, if any, made by the decree- holder and the judgment-debtor respectively together with the statement that the court does not vouch for the accuracy of either shall be inserted in the sale proclamation."*

Similar amendments have also been made by the High Courts of Calcutta, Madras, Orissa and Punjab. We are of the view that clause (e) may itself be amended on these lines.

51. Setting aside of sale. *Under Rule 90 a sale of immovable property in execution of a decree can be set aside on the ground of material irregularity or fraud in publishing or conducting the sale. The right to apply under this Rule is given to the decree-holder or to any person entitled to a share in the rateable distribution of assets or whose interests are affected by the sale. It is generally accepted that a large percentage of applications made by the judgment-debtors to set aside, sales under this Rule are frivolous and are filed with the object of delaying the delivery of possession. It is therefore necessary to make an amendment in Rule 90 by providing that no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person who did not attend, though given notice to appear at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up, unless an objection was taken by him before the sale was held. Following the recommendations of the Uttar Pradesh Judicial Reforms Committee the High Court of Allahabad has added sub-rule (2) to Rule 90 providing for an award of costs to the decree-holder or auction-purchaser or both as against the party whose application under Rule 90 has been rejected. Another useful amendment made by the Allahabad High Court in sub-rule (1) is to the effect that the application to set aside a sale shall not be entertained unless the applicant deposits such amount not exceeding 12 per cent of the sum realized at the sale or furnishes such security as may be fixed by the court, except when the court for reasons to be recorded dispenses with the requirements of this clause. This provision is presumably made in order to compensate the purchaser. Under Rule 89 the applicant at whose instance the sale is set aside has to deposit 5 per cent of the purchase money for payment to the purchaser. We recommend that a provision similar to that in the Allahabad amendment be inserted in Rule 90. An amendment of the Rule on these lines would, in our opinion, serve to control the filing of frivolous applications."*

(Emphasis supplied)

94. A reading of the aforesaid would indicate that, an omission to state the correct market value of the property or its undervaluation in the proclamation of sale was earlier considered to constitute a material irregularity in publishing or conducting the sale under Rule 90. Therefore, a cunning judgment-debtor, who was already aware that the particulars in the proclamation of sale as regards the valuation of the property are wrong/defective, could allow the sale to be conducted without raising an issue and thereafter, make an application under Rule 90 with an intent to set-aside the sale and postpone the process. Furthermore, it was also suggested that an allegation regarding a defect that has occurred in the proclamation of sale must not be made in an application under Rule 90 at the instance of those persons who did not attend the drawing up of the proclamation of sale despite a notice being served upon them, or by those persons who were present during the drawing up of the proclamation, unless an objection was taken before the sale was conducted.

95. These issues which were identified in the ***14th Report*** were remedied by the insertion of sub-rule (3) in Rule 90 which stated that the objections which could have been taken on or before the date on which the proclamation of sale was drawn up, cannot be brought under Rule 90. The reason behind clarifying this was to fend off such individuals who may unnecessarily and with a view to prevent the sale from being confirmed, prefer an application under Rule 90,

when they could have very-well raised their objection at the appropriate time and stage.

96. A recent decision of this Court in ***G.R. Selvaraj (Dead), through LRs v. K.J. Prakash Kumar and Others*** reported in **2025 INSC 1353** emphasized that as per the mandate of sub-rule (3) of Rule 90, an applicant cannot, at a belated stage, seek to assail an auction sale, particularly when there existed a prior opportunity to raise the same objection before the proclamation of sale was drawn up. Therein, the applicant had ample opportunity to raise the ground that the entire property need not be sold to satisfy the decree even before the date of the last proclamation of sale. Therefore, it was held that one who has acquiesced despite being put to notice would be precluded from assailing the legality or correctness of the same thereafter. The relevant observations are thus:

> *"17. Given the insertion of Order XXI Rule 90(3) in the statute book with effect from 01.02.1977, it would be incumbent upon a judgment debtor or any other interested person who applies for setting aside an execution sale, held thereafter, to satisfy the executing Court that the ground upon which the application was made could not have been taken on or before the date on which the proclamation of sale was drawn up. In effect, if such a ground could have been taken by that applicant who seeks setting aside of the sale but he failed to do so at the appropriate stage, he would stand barred, by Order XXI Rule 90(3) CPC, from doing so at a subsequent stage. It is in this context that the aforementioned observations made by this Court in Desh Bandhu Gupta (supra) gain significance as that was a case involving an execution sale held after the insertion of Order XXI Rule 90(3) CPC and this Court made it clear that, even in the context of a material irregularity under Order XXI Rule 66(2)(a) CPC, if the judgment debtor had been put on notice*

by the executing Court but had acquiesced, by taking no action before the date of the sale, he would be precluded from assailing its legality or correctness thereafter. In a given case, where a judgment debtor is not given notice prior to the sale, as was the situation in Desh Bandhu Gupta (supra), Order XXI Rule 90(3) CPC obviously cannot posit a bar to his raising a ground thereafter.

18. However, on the facts obtaining presently, we are convinced that not only were the judgment debtors in the case on hand put on notice at every stage during the exercises undertaken by the executing Court to reduce the upset price from one unsuccessful sale to the other, they also participated to an extent and then chose to refrain from doing so. Therefore, they do not have the right to claim that they were not put on notice, though they feebly contended to such effect. The record clearly negates their claim in that regard. Having failed to raise a material irregularity in the context of Order XXI Rule 66(2)(a) CPC at the appropriate stage, i.e., with regard to sale of a part of the property being sufficient to satisfy the decree, it is not open to them to now raise such a belated plea and blithely place the burden on the executing Court, so as to seek setting aside of a sale held as long back as in the year 2002. Unfortunately, the High Court, having noted the bar postulated by Order XXI Rule 90(3) CPC in para 31 of the impugned judgment, failed to give effect to it assuming that the obligation under Order XXI Rule 66(2)(a) CPC would operate independently upon the executing Court, irrespective of the lapse on the part of the judgment debtors."

(Emphasis supplied)

97. Finally, the Explanation to Rule 90 also takes forward this underlying theme that an irregularity or fraud pertaining to stages prior to the drawing up of the proclamation of sale could also be brought within the ambit of Rule 90, provided an opportunity to raise the same did not exist earlier. It states that "*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". It is necessary for us to understand the import and rationale behind this Explanation to ascertain whether grievances which specifically relate to attachment can be brought within the ambit of Rule 90. If yes, then what kind?

98. The ***27th Report*** of the Law Commission (Vol 1, pg 206-207) had made some observations regarding the explanation which came to be added to Rule 90. They are as follows:

> " ***Order XXI, rule 90 and absence of attachment***
> *The question whether absence of, or irregularity in attachment is, a defect in the "publication or conduct of the sale" has been discussed in several decisions. At one extreme is the view that attachment is not necessary at all before sale. At the other extreme stands the view that sale without attachment is void. A third view is, that attachment is an irregularity, but not in publishing or conducting the sale. According to the fourth view, a sale is not a nullity because of a defect in the attachment or want thereof, but if it causes "substantial injury", it can be set aside under rule 90. The last view seems to be the correct one. The object of attachment is to bring the property under the control of the court, and in the case of immovable property one of the requirements is that the order of attachment should be publicly proclaimed. The main object of the proclamation is to give publicity to the fact that the sale of the proclaimed property is in contemplation. The publication of the attachment is thus a step leading up to the proclamation of the sale.*
>
> *The question whether it is necessary to insert a provision to clarify the position on the subject, has been considered. In the draft Report which had been circulated, an Explanation had been proposed to rule 90 to the effect that absence of or defect in attachment shall be regarded as an irregularity under this rule. After some consideration, it has been decided that no such provision need be inserted."*
>
> (Emphasis supplied)

99. The ***27th Report*** pointed out that, prior to the insertion of the Explanation, several courts were faced with the issue of whether the absence of, or irregularity in the attachment of a property would constitute a defect in the "*publication or conduct of the sale*". Several decisions gave divergent opinions. Some operated in extremes i.e., the first view was that an attachment is not necessary at all for conducting a sale and the second view was that a sale conducted without an order of attachment is void and a nullity. A third view was that matters pertaining to attachment would constitute an irregularity but would, however, remain outside the scope of Rule 90 since they would not amount to an irregularity in "publishing or conducting the sale". The Law Commission found merit in an alternate fourth view which stated that a sale which has been conducted in the absence of attachment or a defect in attachment must not automatically be considered as null and void. Such a defect in the attachment or the want thereof, must cause substantial injury for Rule 90 to be applicable to it.

100. Therefore, the Law Commission subscribed to the idea that irregularities pertaining to attachment must not completely be taken away from the purview of Rule 90. This is plainly evident from its implicit disagreement with the third view taken by a few decisions, as aforementioned. However, it was emphasized that a sale would be set-aside, only if the defect in the attachment or the absence of attachment, causes "*substantial injury*" to an applicant under Rule 90. Meaning thereby, that if the process involved in publishing or conducting the attachment of a property is riddled with a material

irregularity or fraud, interference can be justified under Rule 90 if substantial injury is proved. The intention was that, just the mere pointing out of the absence of attachment or a defect in attachment, by itself, must not be construed as nullifying the entire sale and thereby, giving rise to substantial injury as a very natural consequence. In other words, substantial injury is not automatic or implicit in these scenarios. If it were assumed so, then all applications under Rule 90 pertaining to such facts and circumstances would always be allowed and the sale would be set-aside. That would be a very extreme position to take. Due emphasis must be placed on the words "*mere*" present in the Explanation to reconcile the wording of the Explanation with the aforesaid intention of the Law Commission. This indicates that, apart from pointing out the defect in the process of attachment or the absence of attachment itself, one must move a step forward and also specifically plead as to how substantial injury has been caused, similar to what has already been mandated under sub-rule (2) of Rule 90. This Explanation only clarifies and takes forward the intent already evident from Rule 90 and sub-rule (2) thereof.

101. The fourth alternate view endorsed by the ***27th Report*** is the decision of the Madras High Court in ***K. Swaminatha Iyer v. K.G. Krishnaswami Iyer and Others*** reported in **1946 SCC OnLine Mad 189**, wherein emphasis was placed on "whether substantial injury was caused" due to the absence of a subsisting attachment order for interference to be justified under Rule 90. The relevant observations are thus:

"As regards the second contention that the Court had no jurisdiction to sell the house as the attachment had ceased, it is to be observed that this Court has held in a series of cases that a sale of immoveable property without previous attachment is not null and void and that the omission to attach before the sale is only an irregularity which renders the sale liable to be set aside if substantial injury is proved. […]

[…]The position therefore is this: Attachment is a necessary preliminary to a judicial sale, but a sale without attachment is not a nullity. Omission to attach is a material irregularity which renders the sale liable to be set aside under O. 21, R. 90 if substantial injury is proved.

Are the plaintiffs then entitled to avoid the sale to Sundararaja Pillai so far as their shares are concerned? Their father, the first defendant, failed to take any steps to have the sale set aside under O. 21, R. 90 on account of the irregularity, presumably because no substantial injury had resulted. Nor did they avail themselves of that remedy which was open to them also as "persons whose interests are affected by the sale." [See Bubaneshwar Prasad Narayan Singh v. Biharilal]. Even in the present proceedings they have not attempted to prove any substantial injury by reason of the attachment having ceased to be in force at the time of the order for sale.

If omission to attach does not affect the jurisdiction of the Court to sell and is a mere irregularity, the purchaser's title cannot, as it seems to us, be displaced by any antecedent irregularity in publishing or conducting the sale except by resort to the statutory remedy provided by O. 21, R. 90. That remedy not having been availed of, the purchaser's title has become unassailable and the appeals must fail."

(Emphasis supplied)

102. The ***54th Report*** of the **Law Commission of India** (Vol 1, pg 186) took the discussion made in the ***27th Report*** forward and suggested

that the Explanation, as we see it today, be inserted in Rule 90 in order to put the matter to rest and obviate any further confusion.

103. That rule 90 concerns itself with material irregularities and fraud occurring in the process of sale and those causing substantial injury, at any stage of the sale, even prior to the proclamation of sale, is also brought forth from the decision of this Court in ***Satyanarain Bajoria and Another v. Ramnarain Tibrewal and Another*** reported in **(1993) 4 SCC 414.** Therein, after the decree was passed, the judgment-debtor deposited the decree amount in satisfaction of his debt. However, after about three years, the decree-holder had filed an application before the executing court claiming an additional amount. In execution of this application, the property of the judgment-debtor came to be sold. It was of note that the decree-holder himself had purchased the property in the auction sale. Furthermore, before the expiry of the sixty-day period as provided under Article 127 of the Limitation Act, 1963, the sale was confirmed by the executing court. In such circumstances, the judgment-debtor had preferred an application under Rule 90 within the prescribed period of limitation for setting aside the sale alleging that he had no knowledge of the sale whatsoever because no process had been served on him at any stage. The notice published in the newspaper during the time of proclamation of sale also deliberately contained incorrect particulars to misguide the judgment-debtor. Upon a detailed consideration of the evidence and the oral testimony of several witnesses, the executing court concluded that no notice was served as prescribed under Rules 22 and 54 respectively, upon the

judgment-debtor and since, "substantial injury" was caused to him, the application under Rule 90 must be allowed. The relevant observations are reproduced hereinbelow:

> *"13. […]It will be noticed that the decree was passed as far back as 1964. The present application was filed in 1968 more than 2 years after dismissal of earlier execution application and, therefore, for further proceedings in pursuance of a fresh execution application, the court was duty bound to issue notice and serve notice of the execution application on the judgment-debtor as provided for in Order 21 Rule 22 of the Code which contemplates inter alia that if an application for execution is made more than two years after the date of the decree, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. The last order made in the earlier execution application was on November 29, 1965 and the second execution application was filed more than two years thereafter i.e. in 1968. Therefore, issuing of notice under Order 21 Rule 22 was mandatory. The idea of issuing such a notice is to ascertain whether the averments as to the amount being claimed in the execution application are true or incorrect. Besides, even if the amount was due, the judgment-debtor could have paid it and he was deprived of this opportunity to clear off dues, if any, under the decree. It is only after the service of notice under Order 21 Rule 22 of the Code and failure of the judgment-debtor to pay the decretal amount, as claimed, that the decree-holder takes recourse to proceedings under Order 21 Rule 54 of the Code. […]*
>
> *14. It will be noticed that sub-rule (1) of Rule 54 of Order 21 of the Code contemplates an order of prohibition to be served on the judgment-debtor from transferring or charging the property in any way first if the property sought to be sold is immovable property. This is for the benefit of the decree-holder. Even at this stage if the judgment-debtor had notice of attachment, he could pay the balance decretal amount and thereafter attachment would either not be effected and if already effected would be vacated. Sub-rule (1-A)*

contemplates that this order shall also require the judgment-debtor to attend court on a specified date, to take notice of the date to be fixed for settling the terms of the proclamation of sale provided under Rule 66 of Order 21 of the Code. There was no evidence that the judgment-debtor was personally served with such a notice. Though sale proclamation after settlement of terms of proclamation ex parte was published in local newspaper Dalit Mitra but that gave wrong case number and wrong name of the court. There was also no evidence that any notice was affixed on a conspicuous part of the court-house or that the provisions of sub-rules (1-A) and (2) of Rule 54 of Order 21 of the Code were complied with. Rule 54 is again for safeguarding the right of the decree-holder as well as the judgment-debtor. By the notice the judgment-debtor is put on notice that his property is attached and would be sold unless he pays off to the decree-holder. The trial court observed that this notice is required to be affixed on a conspicuous part of the property. We do not mean that merely if it is not being affixed on the conspicuous part, the sale would be liable to be set aside but we are only emphasising the requirement of it being affixed on a conspicuous part of the property and on court house. All these stages give an opportunity to the judgment-debtor to pay off dues, if any under the decree. The proclamation of sale in this case was thus settled without notice to the judgment-debtor. The judgment-debtor had the right to participate in the proceedings for settlement of terms of proclamation of sale and atleast to know the date of sale. This is necessary since Order 21 Rule 89 of the Code confers again a right on any person having interest in the property sold, to file an application to set aside sale on making deposit as contemplated by Rule 89.

15. The lower appellate court after assuming that there was no proper service of notice under Order 21 Rule 54 of the Code of Civil Procedure went on to the question of judgment-debtor's having not pleaded any substantial loss or injury. It will be noticed that it was a case of typical money lender who has evil-eye to grab the property of the judgment-debtor somehow or the other. He allows the first application for execution to be dismissed; waits for practically three years to file another execution application claiming a sum of Rs 350

only; sees to it that judgment-debtor is kept ignorant of the proceedings in court; obtains permission to himself buy the property; gets the property sold for recovery of petty amount of Rs 649.45ps and buys the property himself. This again is a typical illustration of fraudulent conduct of decree-holder. In such cases the court will even presume loss and substantial injury to the judgment-debtor. In the present case there was evidence of value of the property and both the parties had led evidence in this behalf and it was too late for the lower appellate court to blame the executing court for recording evidence as to the valuation at that stage. The fraud permeates the whole proceedings. At no stage was the judgment-debtor made aware of the pending execution application till even the confirmation of sale and purchase of the property by the decree-holder himself.

17. […] It is true that now it has been specifically clarified by the Explanation to Rule 90 of Order 21 of the Code that "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". But if the judgment-debtor is kept totally ignorant of the execution proceedings right from the date of execution application till sale, it cannot be merely called a mere irregularity in attachment and thus of no consequence.

18. The facts of the case show that the lower appellate court totally missed the points which were required to be determined and merely by assuming that even if notice under Order 21 Rule 54 of the Code is not served, by virtue of explanation to Rule 90 of Order 21 of the Code it is not a material irregularity or illegality to auction sale. The lower appellate court totally misunderstood the importance and efficacy of notices being served in execution proceedings under Order 21 Rule 22; Order 21 Rule 54(1-A) notice for settlement of terms of proclamation in the presence of the judgment-debtor which led to the finding recorded by it and the finding on fact in the circumstances is totally vitiated."

(Emphasis supplied)

104. In ***Satyanarain Bajoria*** *(supra)*, this Court has specifically stated that the Explanation to Rule 90 must be understood in the right manner and courts must be cognizant of differentiating between a "*mere irregularity or defect*" from one that causes "*substantial injury*". In its only in the latter scenario that one can press an application under Rule 90.

105. Having now understood the scope and intent underlying sub-rule(3) of Rule 90 and the Explanation thereto, it can be said without any cavil of doubt that although any fraud or irregularity in the process of publication of an order of attachment or the lack thereof is broadly covered within the scope of Rule 90, yet an applicant must be able to prove that he has suffered substantial injury as a consequence of it. At the very least, the facts must be able to convince that substantial injury has been caused. Only then can it fall within the ambit of Rule 90.

ii. Questions on whether the judgment-debtor had any "saleable interest" over the attached/sold property cannot be brought under the ambit of Rule 90

106. However, the scope of Rule 90 as elaborated in the aforesaid paragraphs must, by no means, be read to mean that a grievance that the judgment-debtor did not have any title to the attached property, can be raised by an applicant under Rule 90. This would squarely fall within the scope of Rule 58 wherein one is entitled to make a claim or raise objections "*on the ground that such property was not liable to attachment*". The same would be beyond the purview of

Rule 90 also for the reason that under this rule the executing court, unlike Rule 58, does not have the expanded scope to decide all questions relating to the right, title, or interest arising between the parties to the proceeding.

107. There exists a fine but pertinent distinction between the questions – whether the attachment and/or sale of the immovable property could have been ordered by the executing court and whether the manner in which such attachment and/or sale has taken place, was proper or not. The former directly refers to a dispute pertaining to whether the immovable property could be attached or sold for the purpose of satisfaction of decree, whereas the latter refers to 'how' such attachment or sale is effected for the purpose of satisfying the decree. It is only the latter which is covered by Rule 90.

108. To buttress the aforesaid, we may look into the decision of High Court of Allahabad in ***Ch. Syed Iqbal Husain* v. *Rameshwar Dayal***, reported in **1972 SCC OnLine All 288**, wherein the Court held that the question as to whether the property was saleable in execution of the decree or in other words, whether the judgment-debtor had a saleable right in the immovable property was neither a question of fraud nor a question of material irregularity, and hence, would be beyond the scope of Order XXI Rule 90. The relevant observations read thus:-

> *"7. The next question which was pressed in this appeal was that the plea now raised by Iqbal Husain is barred by constructive res judicata. <u>In so far as the plea that the property in dispute was not saleable, was not taken by Iqbal Husain in his objection which he filed under Order 21, Rule</u>*

90 of the CPC is concerned, the reply to this question would come round the fact as to whether such an objection is covered under Order 21, Rule 90 of the CPC or under Section 47 of the CPC Order 21, Rule 90 of the CPC relates to setting aside of a sale on the ground of a material irregularity or fraud in publishing or conducting if. Does the question about the saleability of the property relate to a question of material irregularity or fraud in publishing or conducting a sale? My reply to this question would be in the negative. There are a number of authorities to the effect that where the decree is against the asset of a deceased debtor, an objection by the judgment-debtor that the property belongs to him personally is one covered under Section 47 of the CPC. Such a person cannot file a regular suit or raise such an objection under Order 21, Rule 58 of the CPC. The question as to whether the property was saleable in execution of the decree is neither a question of fraud nor a question of material irregularity. In the instant case, the only question was as to whether the property was the asset of the deceased debtor against whose asset the decree has been passed or it was the personal property of Iqbal Husain. Such a question, in my opinion, is beyond the ambit of Order 21, Rule 90 of the CPC."

(Emphasis supplied)

109. This Court in ***Kadiyala Rama Rao v. Gutala Kahna Rao and Others*** reported in **(2000) 3 SCC 87** had similarly emphasized that the issue of absence of a saleable interest cannot be introduced as a ground under Rule 90. The relevant observations are as follows:

"10. The provisions of Order 21 Rule 90 thus categorically envisage that material irregularity and fraud alone would confer jurisdiction on to the executing court to set aside the same. […] Needless to record here that there is no evidence of fraud or material irregularity, neither even an allegation in regard thereto. The only issue was of saleable interest for a period of 15 years since the deed of sale as executed by the Municipality of Rajamundhry in favour of the judgment-debtor, contained a condition that the property cannot be alienated by the judgment-debtor for a period of 15 years. It

is to be noticed at this juncture that question of saleable interest does not come within the ambit of Order 21 Rule 90 and as such the judgment-debtor had no locus standi to apply to the court for setting aside the sale. In the present factual context, statute recognises such a locus standi only in the event of material irregularity or fraud and not otherwise. Apart therefrom, saleable interest can only be challenged by the purchaser and not by the judgment-debtor since the purchaser's right would otherwise be clouded therewith by reason of there being no saleable interest in the property so far as the judgment-debtor is concerned. Order 21 Rule 91 is specific on this score and a right has been conferred on to the purchaser only.

14. […] The learned Single Judge erroneously proceeded on a certain misconception of facts as also of law by reason of the factum of challenge of sale being on the ground of saleability. Order 21 Rule 90 does not envisage the issue of saleability and the learned Single Judge was in error in introducing such a concept under Order 21 Rule 90 of the Code. In any event as noticed above the issue of "saleable interest" can only be agitated by the purchaser in terms of Order 21 Rule 91 and not in any event by the judgment-debtor. The ground of challenge is specific in the provision itself, namely, material irregularity or fraud and in the absence of any evidence or even an allegation in regard thereto in the petition under Order 21 Rule 90, question of introduction of the concept of no saleable interest or another opportunity to the judgment-debtor does not and cannot arise."

(Emphasis supplied)

110. One of the principal contentions of the respondent nos. 1 and 2 respectively is that, since the suit property had been sold to them by one of the judgment-debtors, prior to the attachment of the property by the Executing Court, the said property could not have been attached and consequently, made a subject-matter in the execution proceedings for the satisfaction of the original decree. This is because, according to them, the judgement-debtor had ceased to be

the lawful title-holder of the suit property on the date of the order of attachment i.e., on 08.10.1985 owing to the transfer of the suit property in their favour by way of the two sale deeds dated 13.05.1985 and 24.06.1985 respectively. It is to be noted that the respondent nos. 1 and 2 respectively, wish to set-aside the sale conducted by the Executing Court only insofar their share is concerned i.e., only as regards a portion of the entire mortgaged property sold by way of auction and confirmed in favour of the appellants herein.

111. Although much has been canvassed on behalf of the respondent nos. 1 and 2 respectively that the auction was conducted in an irregular manner inasmuch, as the auction process was conducted in secrecy, the property was undervalued and was eventually sold off to the relatives of the judgment debtor, yet these reasons do not constitute the actual grievance of the respondent nos. 1 and 2 respectively. In other words, there was no "*substantial injury*" which was caused to them <u>by reason</u> of these alleged irregularities.

112. Why an application under this rule could not have been maintained may be better understood from one another angle. Had the auction in the present case been conducted in the prescribed manner, in accordance with Order XXI, even then, the respondent nos. 1 and 2 respectively would have been aggrieved. We say so because the source of their grievance is the attachment and sale of the suit property; the source is not the manner in which the sale was conducted. In other words, the injury that may have been sustained

by the respondent nos. 1 and 2 respectively cannot be said to stem from the aforesaid alleged irregularities in the sale, but rather by the deceptive manner in which the judgment-debtors allowed the suit property to be attached by the Executing Court under Rule 54 of Order XXI, despite the fact that one of them had already sold the same to the respondents nos. 1 and 2 respectively. However, we have already explained that an issue regarding the saleability of the property or the title of the judgment-debtor to the property, could not be brought within the ambit of Rule 90.

113. The respondent nos. 1 and 2 respectively have also made averments that, at all stages of the execution proceedings they were deliberately kept in the dark. Therefore, it was not just the secretive nature of the auction sale, the undervaluation of the property and the relationship of the auction-purchasers with the judgment-debtors that rendered the entire process doubtful, but that notices even during prior stages of the execution proceedings were also not served upon them. Hence, the auction sale was entirely bad for having been done at their back and expense. We have explained that irregularities pertaining to stages prior to the proclamation of sale could also very well be brought within the scope of Rule 90.

114. Let us now ascertain whether in the entire process of execution there was any other irregularity, *for example,* whether the respondent nos. 1 and 2 were entitled to receive some notice which was not served upon them. The notices under Rules 22 and 66 respectively, only pertain either to the judgment-debtor alone (or the persons against whom execution is applied for) or to the judgment-debtor and the

decree-holder. On the other hand, the notices mentioned under Rules 54 (pertaining to order of attachment) and 67 (pertaining to order of proclamation of sale) respectively, are required to be proclaimed by the beat of drum or any other customary mode at some place on or adjacent to the concerned property. Further, a copy of such order is to be affixed on a conspicuous part of the property, courthouse and the office of the Collector/Gram Panchayat.

115. It is not the case of the respondent nos. 1 and 2 respectively, that the aforesaid Rules 54 and 67 respectively were not complied with or that there were any irregularities as regards the issuance and publishing of notices under these rules. They have not specifically pleaded that there were material irregularities in the aforesaid context and that therefore, that they were put to any substantial injury. In the absence of such a specific pleading, it would not be open to the executing court or for us to assume the contrary. [*See*: ***Ram Maurya* v. *Kailash Nath and Others*, (1999) 9 SCC 276**]

116. No specific pleading is evident from the record especially as regards non-compliance with Rules 54 and 67 respectively and insofar as the other alleged irregularities specifically mentioned in the plaint are concerned, we have already explained as to how they could not have caused substantial injury to the respondent nos. 1 and 2 respectively. Therefore, the twin conditions for setting aside any sale under Rule 90, i.e., (i) material irregularity or fraud in publishing or conducting the sale **AND** (ii) substantial injury being sustained by reason of such irregularity or fraud, cannot be said to

have been fulfilled. In light of the aforesaid, we are of the view that the respondent nos. 1 and 2 respectively could not have maintained an application under Rule 90 of Order XXI CPC.

117. Another aspect of the matter is also that, the order of sale declaring the appellants as the highest bidders was issued on 20.06.1998 and as per Article 127 of the Limitation Act, 1963, the time-limit to prefer an application under Rule 90 would be sixty days from the date of the sale. The same would have lapsed on 20.08.1998 and any delay could not have been condoned. Therefore, limitation would have also come in the way of any application under Rule 90 that the respondent nos. 1 and 2 respectively may have preferred. [*See*: ***Aarifaben Yunusbhai Patel and Others* v. *Mukul Thakorebhai Amin and Others*, (2020) 5 SCC 449**]

III. <u>Whether the respondent nos. 1 and 2 respectively, could have maintained a separate suit in light of the bar envisaged under Rule 92(3) of Order XXI CPC and Section 47 CPC respectively, and whether they are "*third parties*" as referred to under Rule 92(4) of Order XXI CPC?</u>

a. **Scope and application of Rule 92 of Order XXI CPC**

118. Order XXI Rule 92 reads thus:-

> *"92. Sale when to become absolute or be set aside. – (1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute:*

Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the Court shall not confirm such sale until the final disposal of such claim or objection.

(2) Where such application is made and allowed, and where, in the case of an application-under rule 89, the deposit required by that rule is made within sixty days from the date of sale, or in cases where the amount deposited under rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the Court, the Court shall make an order setting aside the sale: Provided that no order shall be made unless notice of the application has been given to all persons affected thereby:

Provided further that the deposit under this sub-rule may be made within sixty days in all such cases where the period of thirty days, within which the deposit had to be made, has not expired before the commencement of the Code of Civil Procedure (Amendment) Act, 2002.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

(4) Where a third party challenges the judgment-debtor's title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit.

(5) If the suit referred to in sub-rule (4) is decreed, the Court shall direct the decree-holder to refund the money to the auction-purchaser, and where such an order is passed the execution proceeding in which the sale had been held shall, unless the Court otherwise directs, be revived at the stage at which the sale was ordered."

119. Order XXI Rule 92 governs the circumstances in which the sale of an immovable property attains finality and becomes absolute or,

conversely, stands set-aside by the executing court. No separate application is required to be made to the executing court for this purpose.

120. Sub-rule (1) of Rule 92 clearly states that where no application is filed under Rules 89, 90, or 91 respectively within the prescribed period of limitation, or where any such application is filed but disallowed, the executing court shall proceed to pass an order confirming the sale, upon which the sale shall become absolute. In other words, where the remedies under Rules 89 to 91 respectively are not invoked or do not succeed, the sale stands confirmed.

121. The proviso to sub-rule (1) of Rule 92 takes care of a situation where the order of sale has been passed while an application under Rule 58 raising a claim or an objection as regards the attachment of the property sold, is still pending adjudication. While the process of sale by itself does not come to a halt solely owing to an application being filed under Rule 58, the executing court stands barred from confirming the sale until such an application under Rule 58 is finally disposed. This is also due to the fact that upon an order of confirmation of sale being passed, the same becomes absolute and immune from being assailed under any rule preceding rule 92. Therefore, it becomes the duty of the executing court to ensure that no application remains pending or undecided when it is making its decision under Rule 92(1).

122. Rule 92(1) being couched in a mandatory language reflects that the executing court is cast with an obligation to pass an order

confirming the sale when the requisites mentioned therein stand fulfilled. When the sale becomes absolute, the executing court proceeds to grant a certificate under Rule 94, specifying the particulars of the property and the name of the purchaser.

123. On the contrary, under Rule 92(2), where an application under Rules 89, 90, or 91 respectively, as the case may be, is made within the prescribed period of limitation and allowed, the court must proceed to pass an order setting aside the sale.

b. The bar to a separate suit envisaged under sub-rule (3) of Rule 92.

124. Rule 93(3) prohibits any person against whom an order under sub-rule (1) or sub-rule (2) respectively has been passed, from instituting a separate suit to set-aside that order. Thus, what Rule 92(3) seeks to achieve is to prevent the institution of separate suit by those persons who are already bound by the order of confirmation/setting aside made under sub-rule (1) or (2) of Rule 92 respectively. They simply must not be allowed to rehash their grievance by way of a separate suit. The object is to accord some finality to the order passed under sub-rule (1) of Rule 92 (subject to an appeal against the order disallowing an application under 89, 90 or 91 respectively or confirming a sale under Rule 92(1)). Moreover, this sub-rule to Rule 90 also fortifies that there should be some sanctity granted to a sale which has been conducted in execution of a decree in case it comes to be confirmed and it indirectly reinforces

the weight of the words "*the sale shall become absolute*" occurring in sub-rule (1) of Rule 92.

125. On the other hand, when an order setting aside the sale has been passed under sub-rule (2) of Rule 92, some finality is, again, required to be accorded to it (subject to an appeal against the order allowing an application under 89, 90 or 91 respectively or setting-aside the sale under Rule 92(2)). It is ensured that such an order setting aside the sale is not subject to further litigation by way of a separate suit and there remains no unnecessary delay in moving ahead with or resuming the execution process to enable the decree-holder obtain the fruits of his decree. To put it simply, seeking to either set aside an order confirming the sale under sub-rule (1), or to set-aside an order setting aside a sale under sub-rule (2), both, by instituting a separate suit, is barred.

126. Sub-rule (3) only foists this bar on "*any person against whom such an order is made*". The breath of this bar to filing a separate suit is, therefore, only applied to those persons against whom an order either confirming or setting-aside the sale, operates. The decisions of several High Courts have interpreted the extent of the operation of this bar based on the unique grounds which have been raised in the facts and circumstances of each case, and rightly so.

127. However, what appears to be the general rule is that - **(a)** any person who has already filed an application under Rules 89, 90 and 91 respectively, and the same has been disallowed, cannot re-agitate their grievances by instituting collateral proceedings once the sale

has been confirmed; and **(b)** any grievance pertaining to grounds which are covered under Rules 89, 90 and 91 respectively, cannot be brought in by way of a separate suit after the sale has been confirmed, especially when such a person instituting the suit was competent to maintain an application under Rules 89, 90 or 91 respectively, had they preferred it within the time stipulated under Article 127 of the Limitation Act, 1963.

128. With a view to elaborate on (a), it is obvious that it embodies the well-entrenched principle of *res judicata*. However, one must particularly look closely into how or why the application under Rule 90 was disallowed to contextualize when a separate suit filed after the confirmation of the sale, could be said to be maintainable. Let us look at a few illustrations in this regard:

i. *Illustration 1:* Say, the application under Rule 90 was regarding certain alleged irregularities or fraud in publishing or conducting the sale which did not cause substantial injury to the applicant and for this reason, his application was disallowed. In such a scenario, the bar under sub-rule (3) of Rule 93 would apply to a suit which is brought by the same applicant to set-aside the order confirming the sale made under Rule 92, upon the same or similar grounds.

ii. *Illustration 2:* Say, the application under Rule 90 was dismissed for the reason that, although the alleged irregularities or fraud in publishing or conducting the sale may have caused substantial injury to the applicant yet it was not maintainable because it was not preferred within the prescribed period of

limitation i.e., it was preferred after the sale was confirmed. In such a situation, the bar under sub-rule (3) of Rule 92 would squarely apply to a separate suit preferred by the same applicant seeking to set-aside the order confirming the sale by alleging irregularities or fraud in publishing or conducting the sale.

iii. *Illustration 3*: Say, the application under Rule 90 was dismissed because the applicant sought to raise the issue that the judgment-debtor did not have any saleable interest in the property. This application came to be disallowed for the reason that such questions cannot be gone into by the executing court under Rule 90. Here, the bar under sub-rule (3) of Rule 92 would not apply to a separate suit instituted by the same applicant challenging the title of the judgment-debtor. This is because the question of saleable interest was raised under the misapprehension that Rule 90 would cover an adjudication of the same. Such an applicant must not be prevented from raising his grievance before a competent forum, even after the sale is confirmed.

129. We have emphasized on placing the scenario covered under the third illustration beyond the bar under sub-rule (3) of Rule 92, in light of our exposition of law as regards Rule 90 of Order XXI CPC. Under the scenario mentioned in third illustration, the maintainability of a separate suit would also depend on whether the applicant under Rule 90 was a party to the original decree or his representative (as understood under Section 47 CPC) or whether they were a third party. It is only in the latter case where, the party

is a third party, can one maintain a separate suit in that regard. We would further elaborate on the reasoning behind holding so, in the subsequent paragraphs of this judgment by discussing the scope of Section 47 and also the meaning of the words "third party" occurring in sub-rule (4) of Section 92.

130. On the aspect referred to in (b), we say that someone who was competent to prefer an application under Rules 89, 90 or 91 respectively, but did not raise it at the appropriate time i.e., within the limitation period prescribed under Article 127 of the Limitation Act, 1963, would also be covered by the bar under sub-rule (3) of Rule 92. This is because the relief envisaged under the aforesaid rules are strictly time-bound and according to Article 127 of the Limitation Act, 1963, the prescribed period of limitation would start running "*from the date of the sale*" and not from the "*date of knowledge of the sale*" or "*the date of knowledge of the grounds covered under those rules*". The decision to have the limitation period tethered to the date of sale itself and not making it dependent on the knowledge of any prospective applicant, seems to have been conscious on part of the legislature. It was designed to ensure that the execution proceedings do not take forever to grant the decree-holder the amount that he is entitled to and that they also not make the auction-purchaser endlessly wait for the sale certificate to be issued to him. Therefore, it would be of no avail for one to say that they didn't have the requisite knowledge to file an application under Rules 89, 90 or 91 respectively and that they must be allowed to institute a separate suit for the same grounds envisaged under those rules. This plea is

especially rampant in relation to grounds envisaged under Rule 90 and the same must be curbed. However, we must emphasize that if a separate suit is allowed for grounds which could be raised under Rule 90, this would, in effect, render the limitation period laid out under Article 127, meaningless.

131. In addition to the aforesaid, it must be noted that sub-rule (1) of Rule 93 states that "*where no application is made under rule 89, rule 90, or rule 91*", the sale would be confirmed. If it was the intention of the legislature to allow grounds or grievances which could have very-well been brought under Rules 89, 90 or 91 respectively, to also be brought under a separate suit, then there would have been no reason for such a phrase to be inserted in the first place. If such a phrase was omitted by the legislature, then there may have been some scope for an individual to state that they could not prefer an application under Rules 89, 90 or 91 respectively, for the want of knowledge of the proceedings, and that therefore, they must be allowed to institute a separate suit in that regard; that otherwise great prejudice must be cause to such a plaintiff. However, it is almost as if the legislature had foreseen such a defence and therefore, deemed it fit to clarify that even if such an application under Rules 89, 90 or 91 was not preferred, the sale would be confirmed, and the clock would not be turned back. Having acknowledged that this phrase has been inserted with a specific purpose, we must not render it otiose by allowing the same grounds to be raised under a separate suit and dilute the intent that is manifest from a combined reading of this phrase with sub-rule (3)

of Rule 92 i.e., that there is only a small window of time within which such grounds falling under Rules 89, 90 or 91 respectively, can be taken. In this regard, Mr. Vikas Singh would be right in submitting that an aggrieved party must not be able to circumvent or indirectly overcome the limitation prescribed for an application under Rule 90 and be allowed to institute a separate suit on the same grounds.

132. To further buttress the aforesaid, we may look at the decision of the Punjab and Haryana High Court in ***Basanta Mal v. Behari Lal and Another*** reported in **1952 SCC OnLine Punj 115**. Therein, no application was made under Rules 89, 90 or 91 respectively and consequentially, the auction sale was confirmed. After more than 10 years, the appellant instituted a suit, which amongst other reliefs, prayed that the auction be set-aside for being fraudulent. The respondent took recourse to sub-rule (3) of Rule 92 to submit that the suit was barred. Finding merit in the said submission, it was observed that the objections which were raised in the suit fell within the ambit of Rule 90 and therefore, a suit in that regard would be barred. The relevant observations are thus:

> "*From paragraph 9 of the plaint it appears that the right of redemption was sold on the 19th of April, 1935 and that the sale was confirmed within rule 92 of Order 21 of the Code of Civil Procedure on the 14th of May, 1935. In paragraphs Nos. 10, 11 and 12 of the plaint it is stated that there was fraud in the matter of publishing the sale. Clearly the objections on which the auction sale is sought to be set aside, fall within rule 90 of Order 21 of the Code of Civil Procedure. If so, rule 92(3) of Order 21 bars the suit.*

> *[…] Article 166 of the Limitation Act provides that the period of limitation for an application to set aside an auction-sale is 30 days from the date of the sale.*
>
> *Now, the sale which is sought to be set aside took place on the 19th of April, 1935, while the suit was brought on the 27th of March, 1946. […]"*

(Emphasis supplied)

133. To the same effect, is the decision of the Bombay High Court in ***Nagindas Chhotalal v. Kunversha Hormasji and Others*** reported in **1946 SCC OnLine Bom 20** wherein it was observed that when all the grounds set out in the plaint fell under the scope of Rule 90, and having failed to prefer the said application before the sale was confirmed, the suit would be barred under sub-rule(3) of Rule 92. The relevant observations are thus:

> *"[…] If the plaintiffs wanted to have the sale set aside on the ground of such an irregularity, the only course open to them was to make an application under O. XXI, r. 90, of the Civil Procedure Code. But they failed to make such an application and allowed the sale to be confirmed by the Collector under O. XXI, r. 90 [sic r. 92], sub-r. (1). There is no ground set out in the plaint which is not covered by O. XXI, r. 90 of the Civil Procedure Code. Hence the present suit is barred under O. XXI, r. 92, sub-r. (3) of the Civil Procedure Code and the learned District Judge was wrong in setting aside the dismissal of the suit and remanding it for further hearing."*

(Emphasis supplied)

134. In ***Siddagangaiah*** *(supra)* as well, one of the issues pertained to whether the dismissal of an application under Rule 90 for default of appearance, could operate as a bar to the filing of a separate suit by the same applicant. This Court answered in the affirmative, and observed thus:

"23. Where an application has been filed under Rule 90 Order 21 CPC to set aside a sale on the ground of material irregularity, and the sale is confirmed under Rule 92(1) of Order 21, the objector is precluded by virtue of the provisions under Order 21 Rule 92(3) from bringing a suit to set aside the sale on the same grounds as held in Kalianadhahotla Brahmayya v. Maria Appayya Sastri [Kalianadhahotla Brahmayya v. Maria Appayya Sastri, 1920 SCC OnLine Mad 212 : ILR (1921) 44 Mad 351 : AIR 1921 Mad 121 : 62 IC 203] , Ma Saw v. Maung Kyaw Gaung [Ma Saw v. Maung Kyaw Gaung, 1927 SCC OnLine Rang 58 : AIR 1928 Rang 18] and Nand Kishore v. Sultan Singh [Nand Kishore v. Sultan Singh, 1925 SCC OnLine Lah 293 : AIR 1926 Lah 165] .

24. […] There can be restoration of the petition dismissed for default filed under Order 21 Rule 90 and thereafter if sale has been confirmed, it is provided under Order 21 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 21 Rule 92(1) provides that where an application has been filed under Order 21 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 21 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 21 Rule 89, 90 or 91 has been dismissed for default.

25. In the instant case admittedly an application was filed by the original plaintiff under Order 21 Rule 90 read with Section 47, on the ground that he was the owner of the land in question purchased by a sale deed dated 9-11-1974 for a sum of Rs 10,000 and was placed in possession. He was not aware of the court sale. There was no beat of drums before the

auction was held. He was not aware of the execution proceedings. He was a purchaser for value. The property was not correctly valued. There were material irregularities in the conduct of the sale. Hardship would be caused in case auction was confirmed. Thus, prayer was made to set aside the auction-sale. The aforesaid application had been dismissed. Thus, Order 21 Rule 92(3) CPC would operate as a bar for the entertainment of the fresh suit on the ground so urged.

26. The plaintiff has totally suppressed the factum of court auction-sale and confirmation in the plaint and did not make any averment that he had filed an application under Order 21 Rule 90(1) CPC and it was dismissed on 31-3-1978 whereas the suit was filed on 19-4-1978 after 19 days of the dismissal of the objection and confirmation of the sale. The plaintiff has not questioned the auction so held by the court on the ground of fraud or any material irregularity. He has claimed himself to be a bona fide purchaser. That plea was also raised in the application filed under Order 21 Rule 90 CPC. Dismissal of the same would preclude him to file a fresh suit[…]"

(Emphasis supplied)

135. When no application has been made under Rule 90 and a suit is preferred directly to assail an auction sale conducted in execution of a decree, courts have attempted to adopt a balanced approach in deciding whether the suit was maintainable or not. While, on the one hand, courts have taken a strict approach in situations where the grounds which fall under Rules 89, 90 or 91 are being raised in a separate suit; on the other hand, in cases where the executing court did not have jurisdiction to sell the properties in the first place and therefore, the sale as a whole was rendered, a nullity, several decisions have leaned in favour of holding the separate suit maintainable. To curb any misuse of this leeway granted in the latter situation, over the period of time, the discussions reflected in the various law commission reports and the coming into force of the

1976 amendment respectively, have shown us that several grounds which were earlier interpreted as rending the whole sale a nullity were clarified as only being irregularities which would fall under the scope of Rule 90 instead. As a result, this progressively narrowed down the already small scope which existed for the filing of a separate suit.

136. An example of allowing the filing of a separate suit on the ground of the sale as a whole being rendered a nullity (as understood in the present narrow manner) would be the decision of the Bombay High Court in ***Smt. Savitri Poto Gaonkar & Ors. v. Jaganath Cau Bhomkar & Ors.*** reported in **2005 SCC OnLine Bom 904**. Therein, certain properties which were neither the subject-matter of the execution application or the attachment nor the proclamation of sale, in fact a property which was not auctioned at all in reality, was included, for the first time, in the certificate of sale issued at the time of the sale confirmation under Rule 92. In other words, the executing court did not have any jurisdiction to sell such property at all and the confirmation of sale against it was *void* and *non-est*. The question was whether a suit as regards the setting-aside of auction *vis*-à-*vis* the said property would be barred due to the operation of sub-rule (3) of Rule 92. Holding the suit to be maintainable, it was observed as thus:

> "21. […] *Both the lower courts, not having followed the said procedure, in my view, have committed a grave error in deciding the suit pertaining to the property described in 2(f) on the preliminary issue by holding that it is not maintainable in view of the bar under Rule 92(3) of Order*

XXI of the Civil Procedure Code. While deciding the issue regarding the maintainability of the suit the trial court ought to have first considered whether the provisions of Order XXI, Rules 92 sub-clause (3) were applicable to the property in question. If there is prima facie evidence to indicate that the said property was not the subject matter of the auction which was held, in that case, the provisions of order XXI Rule 89, 90, 91 and 92 would not apply at all and the Executing Court, therefore, would not be justified in including the property which is not auctioned or sold in auction and include such property in its order of confirmation of sale. In my view, therefore, it the sale itself had not taken place in respect of a particular property the confirmation of the sale of such property need not arise. Such an order could be challenged in the second suit on the ground that it is non est. All these questions, therefore, ought to have been decided by the trial court along with other issues which were raised by the parties in respect of the property described in 2(f). The submission of the learned Counsel appearing on behalf of the respondents that the issue whether the suit is barred under the provisions of Order XXI, Rule 92(3) is a pure question of law and, therefore, it would be decided by the trial court as a preliminary issue cannot be accepted. In a given case, if the plaintiffs are in a position to show that the property which is not sold in auction is referred in the final confirmation of sale under Order XXI, Rule 92(1) then the said issue would become a mixed question of fact and law and the Court would be required to decide the issue after considering the factual aspect of the case and the oral and documentary evidence which is brought on record and, thereafter, decide whether the bar under the aforesaid section should be made applicable or not. If such a question which is a mixed question of fact and law is to be decided by the trial court then, in my view, it would be appropriate to decide all other issues which have been raised and framed by the trial court. For the aforesaid reasons, in my view, both the lower Courts have committed an error in not deciding the preliminary issue in respect of the property described in para 2(f) along with other issues and, on that ground also, the finding of both the courts below that the suit is not maintainable in respect of the property described in 2(f) is clearly illegal and the said finding will

have to be set aside, and the matter will have to be remanded back to the trial court for deciding the maintainability of the suit vis-a-vis the property described in 2(f) along with other issues which have arisen in the matter."

(Emphasis supplied)

137. In a situation akin to that of ***Savitri Poto Gaonkar*** *(supra),* where the entire sale is alleged to have been without jurisdiction and therefore, a nullity or *non-est,* if the persons seeking to assail the sale are either the parties themselves or their representatives, the appropriate course of action would be to file an application under Section 47 CPC before the executing court itself, rather than preferring a separate suit.

138. This is because several decisions have, time and again, emphasized that the recourse under Section 47 CPC could be availed in a situation where the execution proceedings were itself without jurisdiction and a nullity. Therefore, in holding a separate suit maintainable, along with ensuring that it is not hit by the bar under Rule 92(3), one must also be mindful of the fact that the words "*and not by a separate suit*" finds mention under Section 47 as well. Therefore, courts have to consider the interplay between allowing the filing of a suit and the possibility of raising such an issue under Section 47 CPC.

c. The interplay between the bar to a separate suit as provided in Rule 92(3) of Order XXI CPC and the bar to a separate suit referred to under Section 47 CPC.

139. Mr. Vikas Singh would submit that the Trial Court also lacked jurisdiction to entertain the suit filed by the respondent nos. 1 and 2 respectively, in light of the bar to the filing of a separate suit envisaged under Section 47 CPC. The questions raised in the suit, according to him, directly related to the execution of the original decree which lies under the exclusive domain of the executing court. He further submitted that the impugned decision had clearly declared the respondent nos. 1 and 2 respectively to be representatives of the judgment-debtor and therefore, the bar under Section 47 would squarely apply to them.

140. Section 47 CPC reads as follows:

> "***47. Questions to be determined by the Court executing decree.—*** *(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.*
>
> * * * *
>
> *(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court. 2*
>
> *Explanation I.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.*
> *Explanation II.—(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and*
> *(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be*

deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section."

141. A bare perusal of Section 47 makes it clear that all the questions which arise between (a) the parties to the original suit in which the decree was passed, or (b) their representatives, which relate to the execution, discharge or satisfaction of the decree, shall be determined by the executing court and not by way of a separate suit. Therefore, Section 47 also envisages a bar to the filing of a separate suit under certain circumstances. Our attempt is to understand how the bar envisaged under Section 47 interacts with the bar envisaged under Rules 92(3) of Order XXI CPC; whether they are one and the same or whether there is a nuanced distinction between the two?

142. In our opinion, there is indeed a difference, although admittedly small, between the bar to the filing of a separate suit as mentioned under the aforesaid two provisions. On the one hand, Rule 92(3) states that no suit to set aside an order made under Rule 92 shall be filed by a person against whom such an order is made. Meaning thereby that, the person must, *first,* somehow be prevented by an order made under Rule 92 from filing a separate suit. We have explained in sufficient detail as to when and how the bar under Rule 92(3) would apply to a separate suit. On the other hand, Section 47 envisages a bar which is wider in scope and states that any (other) question pertaining to the execution, discharge or satisfaction of a decree which is arising between the parties to the original suit or their representatives, must not be raised in a separate suit. This

enlarged scope of application of Section 47 is probably why parties, on several instances, file simpliciter applications under Section 47.

143. What we are trying to say is that there may also arise unique situations where the party cannot file a separate suit to set-aside the order of confirmation of sale owing to the bar under Rule 92(3), yet they may be able to prefer an application under Section 47 to allege that the entire sale was without jurisdiction or a nullity. To put it simply, although someone could be covered under the bar to a separate suit referred to in Rule 92(3), yet they may very well maintain an application under Section 47 CPC. *For example,* consider a scenario where a judgment-debtor has already paid the decretal amount but his property is nevertheless sold in the auction sale and the auction sale is also confirmed – he would not be able to file a separate suit owing to him being a person against whom the order confirming the sale was passed under Rule 92(1) and thereby, he would fall under the bar specified in Rule 92(3). However, he would be able to prefer an application under Section 47 CPC <u>on the ground that the entire sale was a nullity</u>. In such a situation, both the bars to a suit i.e., the bar under Rule 92(3) and the bar under Section 47 CPC, would interact and prevent the filing of a separate suit while making the option of preferring a simpliciter application under Section 47 CPC available to him. In such cases, the appropriate course of action would be to prefer an application under Section 47 and not institute a separate suit.

144. However, the aforesaid must not be construed to mean that when a party is unable to raise the grounds mentioned under Rules 89, 90 or 91 respectively within the limitation as prescribed under Article 127 of the Act, 1963, they can file an application under Section 47 CPC after the sale has been confirmed by reiterating those same grounds falling under Rules 89, 90 or 91 respectively. In such cases, the executing court would look at the averments made in the application and the grounds raised therein. Where upon an examination of the same, the executing court is of the opinion that the application under Section 47 CPC directly relates to a specific rule i.e., either Rules 89, 90 or 91 respectively, then the section 47 application would be treated as an application under Rules 89, 90 or 91 respectively as the case may be, and it will be decided according to the law settled under those rules. This settled law would then have the consequence of such a Section 47 application being dismissed, for the reason that the limitation period under Rules 89, 90 or 91 respectively has long lapsed.

145. To put it simply, one cannot overcome the limitation period prescribed under Rules 89, 90 or 91 respectively by filing a simpliciter application under Section 47 and demanding that the same be allowed. Only in situations wherein a party to the original suit or their representative wants to assail the auction sale for the reason that the entire auction sale was without jurisdiction and a nullity, can a simpliciter application under Section 47 be allowed after the order of confirmation of sale has been passed under Rule 92. As we have already elaborated previously, the grounds on

which the execution sale could as a whole be rendered a nullity have been narrowed over the period of time and grounds which may, say, fall under Rule 90, could not be camouflaged as those rendering the entire sale a nullity or *non-est.*

146. The reason we have endeavored to explain the aforesaid is simple - that in order to maintain a separate suit, merely overcoming the bar under Rule 92(3) would not be enough, one must also satisfy the court that the bar under Section 47 does not apply to the separate suit which has been instituted.

147. The grounds which are urged in the plaint would give an idea as to whether it is only a material irregularity or fraud in publishing or conducting the sale which is sought to be raised as a ground (in which case the bar under Rule 92(3) would apply) or whether it is alleged that the entire sale was rendered a nullity. For the latter ground, depending on whether such a plaintiff was a party to the original decree or their representative, or not, the bar under Section 47 would then apply. If such a plaintiff was indeed a party to the original suit in which the decree was passed or their representative, then the bar under Section 47 would operate against the filing of a separate suit. However, if the plaintiff can establish that they do not fall within the meaning of the phrase "*parties to the suit in which the decree was passed*" or "*their representatives*" and if they allege that the auction sale was a nullity and was done without jurisdiction, then they may be able to maintain a separate suit. One of these instances where the sale could be rendered a nullity and be held to be without jurisdiction is, if a "third party", obtaining knowledge that his

property was sold in execution of a decree after the sale was confirmed, asserts that the judgment-debtor never possessed any title over the concerned property. This aspect shall be dealt with in more detail in the subsequent parts of our judgment, more particularly in the part relating to Rule 92(4) of Order XXI CPC.

148. In ***Ameena Bi v. Kuppuswami Naidu and Others*** reported in **(1993) 2 SCC 405**, this was precisely the reason behind holding the suit filed by the plaintiff to not be barred by Section 47. Therein, the plaintiff was neither a party to the original suit nor a representative and she alleged that the sale was a nullity and not binding on her. Therein, the appellant-plaintiff and her uncle were amongst the heirs to her father's estate. The uncle, upon being appointed as a receiver by the High Court in the partition suit, had leased some properties belonging to the estate in favour of the respondent no. 1 and had obtained an advance for the same. Before the partition suit came to be decreed, the respondent no. 1 filed a suit for recovery of the advance amount paid by him to the uncle. This money suit filed against the uncle was decreed with a direction that such advance amount be adjusted from the uncle's share to the deceased estate upon partition. However, the respondent no. 1, in execution of his money decree, got attached and sold the properties which were allotted to the plaintiff in the partition suit. All the while, the plaintiff was kept in the dark about the said execution proceedings. Thus, the plaintiff had instituted a separate suit for possession by stating that the sale was a nullity and not binding on her.

149. In ***Ameena Bi*** *(supra)*, amongst several questions, the question whether the money decree was the personal liability of the uncle or a liability against the estate as a whole, was crucial to the issue of whether the separate suit was hit by Section 47. This was because in the former situation, the plaintiff would not be a representative and in the latter she would be. If the money decree created a liability as against the estate, then the appropriate course of action would have been to prefer an application under Section 47. However, it was held that the liability was the personal liability of the uncle. In light of the same, the plaintiff neither being a party to the money suit nor a representative of the uncle, the separate suit was held to be maintainable. The relevant observations are reproduced hereinbelow:

> *"15. We have given our anxious considerations to the submissions made on behalf of the appellant and find lot of merit in the same. It is clear from the extract of the decree of the suit register (Ext. A-7) that the decree was personally against the second defendant, Mohammad Sheriff only and also against defendant 1 to the extent of second defendant's family properties in the hands of the Receiver. It is thus clear that no decree had been passed against the estate of deceased S.M. Sheriff. The plaintiff/appellant, Ameena Bi, got her rights from her father. She never got any right from Mohammad Sheriff in the partition decree. At the stage when the execution was applied for, the court Receiver had ceased to exist and the final decree had been passed in the partition suit allotting the disputed properties to Ameena Bi. Ameena Bi was never a party to the suit filed by Kuppuswami Naidu. Even the decree which was passed against defendant 1 was to the extent of the family properties of Mohammad Sheriff in the hands of the Receiver and not the properties of the deceased S.M. Sheriff in the hands of the Receiver.*
>
> *16. We are thus of the view that the High Court erred in construing as if the money decree had been passed against the*

estate of deceased S.M. Sheriff. Admittedly Ameena Bi was not a party to the suit. Since Ameena Bi was neither a party to the suit nor any decree was passed against the estate of deceased S.M. Sheriff, no question arose of Ameena Bi taking proceedings under Section 47 of the Code of Civil Procedure in the suit filed by Kuppuswami Naidu (O.S. No. 208 of 1955). We thus set aside the finding of the High Court on the construction of Ext. A-7, and uphold the construction placed by the trial court and the lower appellate court."

(Emphasis supplied)

150. In the present case, Mr. Vikas Singh would be right in submitting that the respondent nos. 1 and 2 respectively, have been identified as being "representatives" of the judgment-debtors by the impugned decision owing to them being *pendente lite transferees* of the judgment-debtor. In other words, the respondent nos. 1 and 2 respectively, had stepped into the shoes of their vendor who was a judgment-debtor. The relevant observations by the High Court are reproduced as follows:

"Let us now examine as to whether plaintiffs are representatives of the Judgment Debtor or not.

Section 47 of the Code of Civil Procedure lays down that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court, executing the decree and not by a separate suit. The subsequent purchasers after the decree passed are representative of the Judgment Debtor. Plaintiffs have stepped into the shoes of Judgment Debtors. Counsel for the plaintiffs-respondent is not correct in contending that the plaintiffs are not representatives of the Judgment Debtor."

(Emphasis supplied)

151. In view of the above finding of the High Court, it is difficult to reject the contention of Mr. Vikas Singh, that the separate suit would be hit by the bar envisaged under Section 47 as well.

152. To get more clarity as regards the position of law pertaining to who can prefer a separate suit by alleging that the entire sale was without jurisdiction and a nullity, after the confirmation of sale, we must necessarily explain the scope and ambit of Rules 92(4) and 92(5) respectively, with special focus on who is a "third party" as referred to in Rule 92(4).

d. The scope and meaning of the term "third party" under Rule 92(4), the option of filing a separate suit being made available to such third parties and its interplay with Rule 58 of Order XXI CPC.

153. It was submitted on behalf of the respondent nos. 1 and 2 respectively, that Rule 92(4) permits a "third party" to challenge the title of a judgment-debtor by filing a suit against the auction-purchaser, and joining the decree-holder along with the judgment-debtor as necessary parties in such suit. It was stated that since the respondent nos. 1 and 2 respectively fall within the term "third parties" as given under Rule 92(4) of Order XXI, and the essentials of this provision are fulfilled, their suit would be maintainable. We find ourselves, yet again, unable to agree with this submission of the learned Senior Counsel for the respondents for the reasons that we shall assign hereinafter.

154. To understand the import of the term "*third party*" let us look at a pertinent observation made by the **Law Commission** in its ***54th Report*** (Vol 1, pg. 172) which reads that – "*Attachment may be followed by an application for its removal by a **third party**, and the present rules require a summary inquiry and order, which may be followed by a suit to establish the right denied in the summary proceedings*". This referred to the scheme of Rule 58 as it existed prior to the 1976 Amendment. However, the reason behind our drawing attention to this observation is the acknowledgment that a third party asserting their title would be able to raise the grievance that his property has been wrongly attached in the execution proceedings under Rule 58. The third party referred herein, in the context of Rule 58, has some significance as regards how the same term must be interpreted under Rule 92(4) as well.

155. With particular reference to Rule 92, the ***54th Report*** of the **Law Commission of India**, had recommended the insertion of sub-rules (4) and (5) respectively, to address a situation where a sale conducted by the executing court is subsequently found to be a nullity for want of title, more particularly, where the defect in title is discovered after confirmation of the sale in a suit instituted by a "third party". The objective of sub-rule (5) is to reimburse the auction purchaser, and the liability for such reimbursement is placed upon the decree-holder because it was at his instance that the sale was held. The Report reads thus:-

> "*21.48-D. Recommendation.—Whatever be the correct view on the existing language, it appears to us that something should be done to improve the position. No doubt, to permit the auction-purchaser to sue for refund from the decree-*

holder, is to add to the troubles of the decree-holder and thus to delay execution. But that seems to be the only possible alternative. As between the decree-holder and the auction-purchaser, if someone has to suffer, the former should suffer.

It may not be feasible for the court to inquire into the title of the judgment-debtor (at the time of the proclamation), in an elaborate manner; but that does not answer the basic question, namely, when a sale held by a Court and culminating in a certificate issued by the court is held to be a nullity for want of title, by reason of a defect discovered after expiry of the period for making objections under R. 91 etc. is it justice to dispose of the purchaser's grievance by saying that the purchaser purchased the property at his peril? The decree-holder should reimburse him for the loss suffered by him, because it is the decree-holder at whose instance the sale was held. The abstract principle that there is no warranty at court sales fails to yield a just result in this case.

The auction-purchaser should have a right to sue the decree-holder. Where a third party challenges the judgment-debtor's title by filing a suit against the auction-purchaser the decree-holder and judgment-debtor should be necessary parties and in that suit the court shall direct the decree-holder to refund the money to the auction-purchaser.

If such a decree is passed, the original execution proceedings shall be revived at the stage where the sale was ordered, unless the court otherwise directs. This provision is necessary to avoid complications as to limitation.

***21.49. Recommendation**. – We, therefore, recommend that the following sub-rules should be added to Or. 21 R. 92:*

> *"(5) Where a third party challenges the judgment-debtor's title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit;*
>
> *(6) If the suit referred to in sub-r. (5) is decreed, the court shall, direct the decree-holder to refund the money to the auction-purchaser and where such an order is passed, the execution proceedings in which the sale had*

been held shall, unless the court otherwise directs, be revived at the stage at which the sale was ordered."

(Emphasis supplied)

156. No doubt, the aforesaid discussion of the Law Commission as regards Rule 92 stemmed from a different lacunae in law that they were trying to cure. However, in the aforesaid observations too, it is very clear that only upon a suit for title instituted by a "third party" which comes to be decreed in the third party's favour, would the auction-purchaser be entitled to a refund of his purchase money and the execution proceedings would be revived at the stage at which the sale was ordered, unless otherwise directed. While the refund of money to the auction-purchaser is mandatory, the revival of the execution proceedings is subject to any other direction from the court. This recommendation is what has been adopted *verbatim* and have become Rules 92(4) and 92(5) respectively, as we see them today.

157. We may, with a view to obviate any confusion, clarify that Rule 92(4) does not create or confer a right to challenge the judgment debtor's title. It only prescribes a mandatory procedural requirement i.e., where a third party files a suit asserting his title over the property, he must necessarily implead the auction-purchaser, the decree-holder, and the judgment-debtor as parties to the suit. The sub-rule is couched in mandatory terms because once the sale has attained finality under Rule 92(1), any decree passed in a separate suit without the presence of all the affected parties would be ineffective. To put it simply, Rule 94(4) is not a jurisdiction-

conferring provision; it merely lays down the condition as to who must be made parties to such a separate suit.

158. The interplay of Rules 92(1) and 92(2) respectively, indicates that such a suit under Rule 92(4) can arise only after an order confirming the sale under Rule 92(1) has been passed. We say so because a third party would otherwise be able to challenge the title of the judgment-debtor under Rule 58 instead, by raising a claim or an objection as regards the attachment of the property in the execution proceedings. In other words, the option to assert his title over the attached property is available to the third party under Rule 58 until the sale comes to be confirmed. If knowledge that his property has been attached and sold in an unrelated execution proceeding, has been acquired by a third party after the sale has been confirmed under Rule 92(1), then the only remedy available to him would be to file a suit challenging the judgment-debtor's title to the property, alleging the sale to be a nullity. Here, although he is challenging the title of the judgment-debtor to the property in question, yet his suit would be instituted against the auction-purchaser because the sale has become absolute in favour of the auction purchaser. Conversely, if the sale is set-aside under Rule 92(2), there would be no reason for a third party to institute a separate suit to assert his title, since the remedy to file an objection under Rule 58 would be re-opened to him.

159. Therefore, what then becomes obvious is that, a third party referred to in Rule 92(4) has no other option to challenge the judgment-

debtor's title to the property sold, within the realm of the execution proceedings, owing to the sale being confirmed. This is the reason behind allowing such a person to institute a separate suit for the same. The general principle is that all matters pertaining to the execution, discharge and satisfaction of the decree be kept under the umbrella of the executing court. A deviation from the above is justified when the legislative scheme does not envisage an adequate and proper remedy within the scheme of Order XXI and Section 47 CPC respectively. We have already emphasized that Rule 92(4) is not a jurisdiction conferring provision. It is merely a reflection of the right to institute a suit which exists with the third party who is unable to address his grievances before the executing court.

160. With a view to demarcate when such a right of a third party to file a separate suit would arise with respect to the property which is the subject matter of execution proceedings, we find it necessary to briefly discuss the scheme underlying Rule 58 of Order XXI CPC which reads as follows:

> *"58. **Adjudication of claims to or objections to attachment of, property.** – (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained:*
>
> *Provided that no such, claim or objection shall be entertained –*
> *(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or*

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in sub-rule (2), the Court shall, in accordance with such determination, – (a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or (b) disallow the claim or objection; or (c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or (d) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this rule, order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (I), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive. "

161. What is relevant from the aforesaid, for the purposes of our discussion is that, Rule 58 uses the words "*where <u>any</u> claim is preferred to, or <u>any</u> objection is made to the attachment*" along with the words "*on the ground that such property is not liable to such attachment*" respectively. This would indicate that a third party, i.e., a party who was alien to the proceedings in the original suit in which the decree

was passed, could also prefer a claim or file an objection under Rule 58 against the attachment of the property by stating that the judgment-debtor does not have title to such property. By virtue of Rule 58(2) (in its amended form), all questions including those relating to the right, title or interest in the property attached could be looked into by the executing court. A separate suit in this regard, at this stage of the execution proceeding, is barred and this is indicated from the words "*and not by a separate suit*" occurring in Rule 58(2).

162. The proviso to Rule 58(1) states that no claim or objection under Rule 58 shall be entertained by the executing court under two circumstances – (a) where the property attached has already been sold before the claim is made or the objection is preferred under Rule 58, or (b) where the executing court considers that the claim or objection preferred was designedly or unnecessarily delayed. The use of the word "*shall*" in the proviso indicates that at least insofar as (a) is concerned i.e., when the attached property has already been sold, the executing court has to mandatorily dismiss the application made under Section 58. When the executing court disallows an application under Rule 58 by invoking clause (a) of the proviso to Rule 58(1), Rule 58(5) comes into the picture.

163. Rule 58(5) states that when a claim or an objection is not entertained owing to the mandatory nature of clause (a) of the proviso to Rule 58(1), then such a party against whom this order under Rule 58 was made, may institute a separate suit to establish the right which he claims to the property that is the subject matter of attachment in the

execution proceedings. However, during the period in which such a separate suit, if any, is being decided by the court of competent jurisdiction, the order refusing to entertain the claim or objection made under Rule 58 would be conclusive insofar as the progress of the execution proceedings are concerned.

164. What is evident from the aforesaid reading is that the executing cannot entertain an application under Rule 58 once the stage of sale has already passed. In other words, it would only be competent to decide an application under Rule 58, at stages prior to the occurrence of the sale. The moment the property comes to be sold, the recourse available to any third party would be to institute a separate suit, as so specifically elaborated under Rule 58(5).

165. Having said so, the words "*the property attached has already been sold*" under clause (a) of the proviso to Rule 58 could give rise to some interpretational ambiguity. In other words, it is unclear as to whether the legislature intended this to refer to a stage when the order of sale has been passed or whether it refers to a stage when the order of confirmation of sale has been passed under Rule 92(1). There is, otherwise, a very stark distinction between these two orders - the former refers to the order which creates an opportunity to resort to Rules 89, 90 and 91 respectively to set-aside the sale, and the latter refers to the order which arises after the applications made under Rules 89, 90 and 91 respectively have been decided or when the time for making those applications has lapsed. Therefore, there is a significant gap between these two orders, which is, at the least

a minimum of 60 days as prescribed under Article 127 of the Limitation Act, 1963.

166. Let us understand why a conscientious and careful interpretation of the words "*the property attached has already been sold*" is of utmost importance here. One possible way of interpreting it would be to say that it refers to the order of sale which is passed once the property has been auctioned and the auction-purchaser has been chosen. To be more specific, it is that order after the passing of which the recourse to Rules 89, 90 and 91 respectively would become available. However, with such an interpretation, the consequence would be that, if an application under Rule 58 is preferred even one day after the order of sale has been made, then such an application would come to be rejected in accordance with clause (a) of the proviso to Rule 58(1) and Rule 58(5) would be set in motion, whereby the said applicant could institute a separate suit. To put it simply, this would mean that the option to institute a suit for a third party arises from the moment the order of sale has been passed and he needn't wait until the sale has been confirmed. Therefore, in that period between the order of sale and the order confirming sale, which can be 60 days or more (as we had stated previously), any third party would be able to file a separate suit for a claim or objection which he could otherwise agitate under Rule 58.

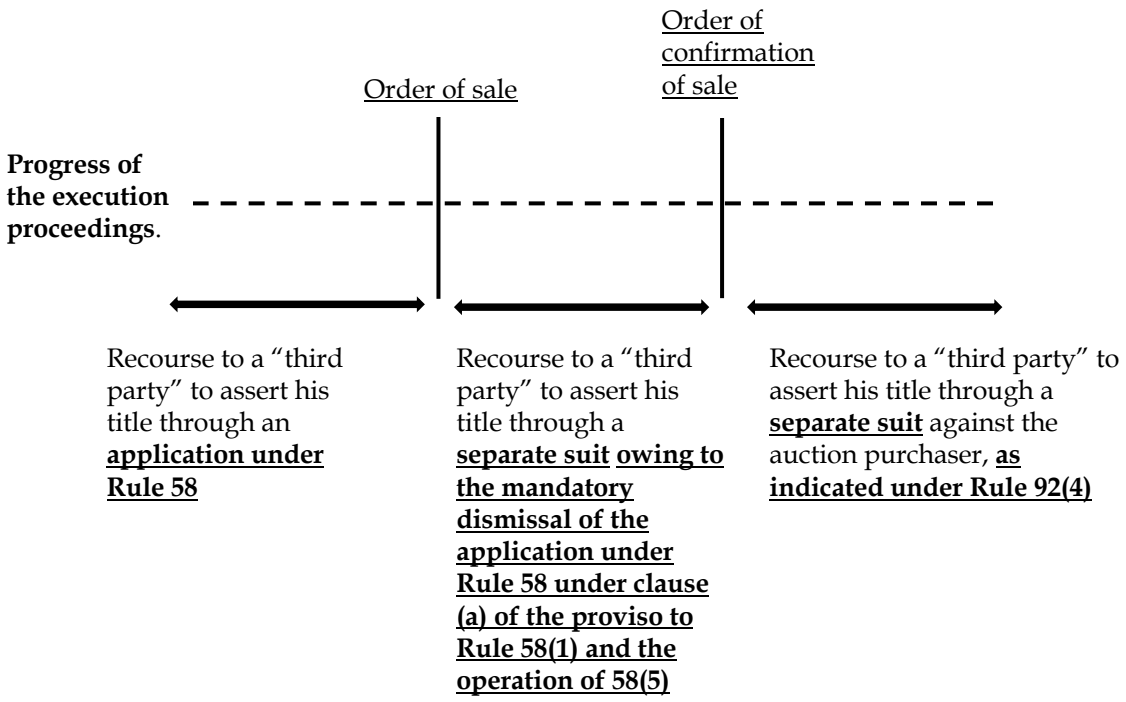
167. Another possible way of interpreting the aforesaid phrase would be to understand it to mean an order of confirmation of sale as referred to in Rule 92(1). Reading it in such a manner would mean that the option of filing a suit would be activated or, to be precise, re-

activated for a third party, the moment the sale has been confirmed under Rule 92(1). The benefit of this view would be that, during the period between the order of sale and the order confirming the sale, the third party asserting that the judgment-debtor does not have title to the attached property could still move the executing court in that regard under Rule 58. This view would also be in consonance with the plain reading of Rule 92(4) which states that when a "third party" challenges the judgment-debtor's title, after the sale has been confirmed, he must institute the same against the auction-purchaser and must implead the decree-holder and judgment-debtor as necessary parties. This would cohesively tie the rationale in Rule 58(5) with that in Rule 92(4) and infer that they allude to the same underlying suit which is instituted after the sale has been confirmed under Rule 92(1), wherein a third party asserts his title amongst other rights.

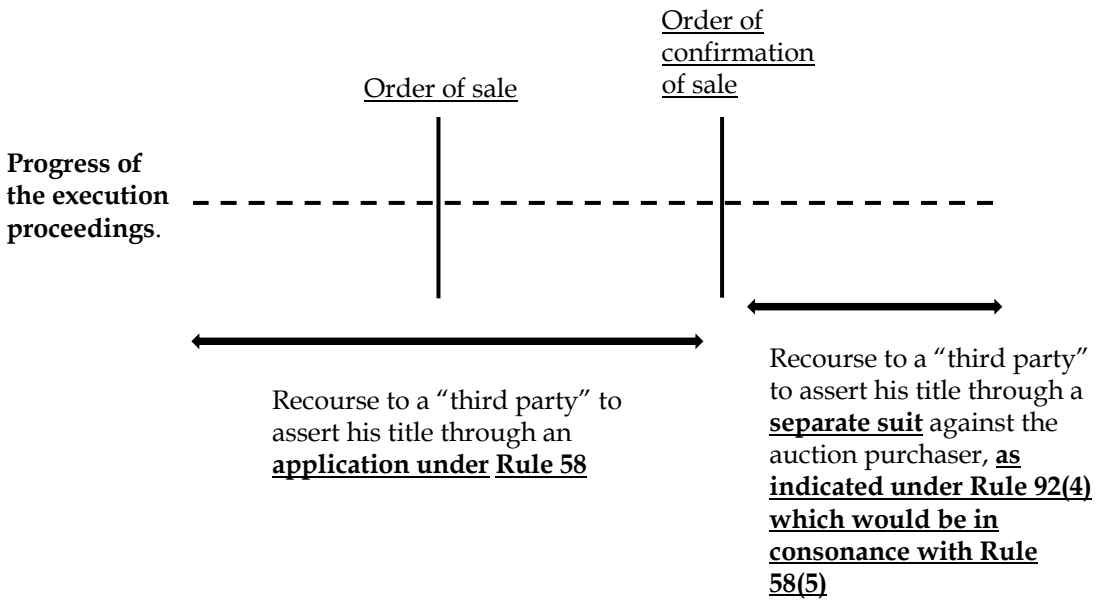
168. Furthermore, Rule 92(1) also requires the executing court to halt the confirmation of sale if an application under Rule 58 is pending. This should ideally be inferred as also referring to any application under Rule 58 which has been instituted after the order of sale has been passed and is pending adjudication before the executing court, unless any contrary intention is apparent. We do not see any reason why we must deviate from this view.

169. The following visualizes the consequences of the two interpretations:

(i) Interpretation (A)



(ii) Interpretation (B)



170. What the aforesaid further makes clear is that, in the former interpretation, the effect would be that the recourse to file a separate suit would be made available to a third party at a relatively earlier stage of the execution proceedings and in the latter interpretation, it would be available at a later stage. We are of the opinion that the latter interpretation of the words "*the property attached has already been sold*" i.e., to understand it as referring to the order confirming the sale under Rule 92(1) would ensure better coherence and synergy in the overall scheme of Order XXI CPC.

171. Such a view insofar as Rule 58(1) and its proviso are concerned, has also been taken by the decision of this Court in ***Kancherla Lakshminarayana v. Mattaparthi Syamala and Others*** reported in **(2008) 14 SCC 258** wherein it was held that the word "sold" used in Rule 58(1) proviso (a) would mean complete sale including the confirmation of auction as under Rule 92(1). Therefore, objections made under Rule 58 before the date on which the sale was confirmed, would be tenable. The relevant observations are reproduced as thus:

> *4. […] The High Court has thus considered the question of the stage at which the objection could be raised and has dealt with that such objection would not be tenable on the backdrop of the language of clause (a) of the proviso to Order 21 Rule 58. The stress is thus on the stage at which the objection could be raised (or the time when the objection is raised). These concurrent orders are now in challenge before us.*
>
> *-xxx-*

> *16. […] It is our considered opinion that in this case the sale was not confirmed and that made a substantial difference. The word "sold" in clause (a) of the proviso to Rule 58 has to be read meaning thereby a complete sale including the confirmation of the auction. That not having taken place, it cannot be said that the objection by the appellant was ill-founded or untenable as has been held by the High Court and the trial court.*
>
> (Emphasis supplied)

172. Therefore, the decision in ***Kancherla Lakshminarayana*** *(supra)* supports the view that the words "sold" under Rule 58(1) proviso (a) must be understood to mean confirmation of sale under Rule 92(1). This decision is key in clarifying the "time factor" in challenging the sale i.e., what remedy would be available to a third party at what time.

173. Having arrived at the aforesaid interpretation of the word "sold" under Rule 58(1) proviso (a) and having held that the underlying suit referred to in Rule 58(5) and Rule 92(4) respectively is one and the same, the interpretation of the term "third party" under Rule 92(4) must also be in consonance with Rule 58.

174. Therefore, the term "third party" under Rule 92(4) would mean a party other than the judgment-debtor, decree-holder or the auction-purchaser and would refer to a party who has not had his right, title or interest *vis-à-vis* the property in question adjudicated under Rule 58, Rule 97 or Rule 99 of Order XXI CPC respectively or has not had the opportunity to do so.

175. The reason why we have included Rules 97 and 99 respectively within this ambit will become more apparent after the discussion we have undertaken in the subsequent paragraphs of this judgment on Rules 99 to 104 respectively. For a specific kind of third parties i.e., third parties who are in possession and who come to be dispossessed, Order XXI CPC, through Rule 99 has already envisaged a remedy, which will be shortly elaborated upon. Therefore, there might be no need for such third parties in possession who are able to avail a remedy under Rules 97 or 99 to also be allowed to institute a separate suit as indicated under Rule 92(4).

176. However, to put it very simply, the term "third party" under Rule 92(4) would refer to a party who is extraneous to the original suit proceedings and the proceedings under Order XXI CPC, and who either has not had his right, title or interest adjudicated or having the opportunity to have his right, title or interest adjudicated, has not availed such a remedy within the required time.

177. A few High Courts have taken the view that the words "third party" under Rule 92(4) must be read to mean any third person who is asserting an independent title to the property. However, such a reading would keep at bay those persons who have bought the property from the judgment-debtor but before the institution of the suit i.e., bona fide purchasers for value who are not hit by the doctrine of *lis pendens*. The unintentional bar to the filing of a suit by such purchasers who wish to establish their right, title and interest to the property must not be a by-product of the interpretation of the

term "third party" in Rule 92(4). The legislature has consciously used the term "party" instead of "person" to reinforce that those individuals who have not been party to the original suit proceedings or party to the execution proceedings and have not had the opportunity to avail any remedy both in the original suit and in the execution proceedings, must be given the option of filing a separate suit.

178. Such an interpretation of the term "third party" would also naturally refer to those parties who are not covered under Section 47 CPC. In other words, parties to the original proceedings in which the decree was passed and their representatives could never fall under the aforesaid interpretation of the term "third party". As a consequence, synergy would also be established between Section 47 CPC and Rule 92(4), especially the words "*and not by a separate suit*" occurring in Section 47. The third parties referred to under Rule 92(4) could never be said to comprise those persons who could prefer an application under Section 47 CPC. To put it simply, the suit referred to in Rule 92(4) cannot be resorted to by someone to overcome the bar to a suit under Section 47 CPC for the reason that such persons falling within the scope of Section 47 CPC could never be "third parties".

179. To recapitulate, once the sale is confirmed, if a party seeks to set the sale aside on grounds that they could have taken under Rules 89, 90 or 91 respectively, the defence that they didn't obtain knowledge of the grounds falling under those rules at a time before the sale came to be confirmed would not be reason enough to allow the filing of a

separate suit. Such a suit would be hit by the bar to a suit under Rule 92(3). However, there is some leeway, albeit very small, for a party to assail the sale which was made in execution of a decree even after the sale comes to be confirmed. If it is their case that the entire sale was without jurisdiction and a nullity and the person taking such an objection is either a party to the original decree or their representatives, then their remedy would ideally exist under Section 47 CPC. They would not be able to prefer a separate suit owing to the bar to a separate suit under Section 47 CPC. On the other hand, if they are neither parties to the original decree nor their representatives, then the bar to a suit under Section 47 would also not operate against them and they would be able to file a separate suit alleging that the entire sale was a nullity. One of those predominant grounds wherein such a person not falling with the scope of Section 47 CPC can claim that the entire sale was without jurisdiction or a nullity is that the judgment-debtor did not have any title over the property which came to be sold. Such a specific situation has been addressed under Rule 92(4) where guidance is given as to whom such a suit must be filed against and who would be the necessary parties under such proceedings. It is of utmost importance to ensure that such a third party who has instituted the separate suit could not get his rights adjudicated under Rule 58 for the want of knowledge of the execution proceedings at the relevant time. Otherwise, third parties could derail the outcome of the execution proceedings by simply waiting to institute collateral proceedings when they very well had an opportunity to file an application under Rule 58.

180. From the above exposition of law, it is limpid that the respondent nos. 1 and 2 respectively were not "*third parties*" under Rule 92(4). This is because they were representatives of the judgment-debtor as envisaged under Section 47 CPC having purchased the suit property during the pendency of the proceedings. Although the respondent nos. 1 and 2 respectively had instituted a suit against the auction purchaser-appellants, the decree holder-bank, and the judgment-debtors respectively yet owing to the reason that they are not third parties, their suit could not be said to be maintainable.

IV. **Whether the respondent nos. 1 and 2 respectively could have obtained any relief under Rule 99 of Order XXI CPC and in the absence of availing such remedy, could their suit be said to be not maintainable?**

181. It was submitted on behalf of the appellants that the respondent nos. 1 and 2 respectively could have raised their objections regarding the alleged irregularities in the auction sale during the execution proceedings itself by filing an application under Rule 99 r/w Rule 101 of Order XXI CPC. Further, it was submitted that in preferring not to do so, the filing of a separate suit must also be disallowed. We shall now discuss whether the respondent nos. 1 and 2 respectively could have filed such an application.

182. At the outset, we must clarify that any irregularity or fraud in the publishing or conducting of the auction sale cannot be raised even in a proceeding under Rule 99, as such grounds lie within the exclusive domain of the application under Rule 90. However, in an

application under Rule 99, a dispossessed person could allege that the entire sale conducted by the executing court was a nullity for the reason that the judgment-debtor did not have any title over the said property.

183. Rule 99 of Order XXI of the CPC reads thus:

> *"**99. Dispossession by decree-holder or purchaser.** – (1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.*
>
> *(2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained."*

184. We also find it apposite to reproduce Rules 100, 101 and 102 of Order XXI CPC respectively, since they are closely connected with Rule 99 referred to hereinabove. These rules read thus:

> *"**100. Order to be passed upon application complaining of dispossession.** – Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination, –*
> *(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or*
> *(b) pass such other order as, in the circumstances of the case, it may deem fit.*
>
> ***101. Question to be determined.** – All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an*

application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

102. Rules not applicable to transferee lite pendente. – *Nothing in rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgement-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person. Explanation.—In this rule, "transfer" includes a transfer by operation of law."*

a. Essential ingredients for the invocation of Rule 99

185. On a reading of the aforesaid, it can be seen that the necessary requirements for the purpose of invoking Rule 99 of Order XXI are as follows:

- **i.** The person making an application, i.e., the applicant under Rule 99, must be 'any person' other than the judgment debtor;
- **ii.** Such an applicant must be 'dispossessed' from the immovable property;
- **iii.** The dispossession of such a person must be caused by:
  - **a.** the holder of a decree for the possession of such an immovable property; or
  - **b.** the purchaser, in case the immovable property is sold pursuant to the execution of the decree.

186. The condition precedent for making an application under Rule 99 maintainable is that the person preferring such an application must be dispossessed from the immovable property, and that he must be someone other than the judgment debtor. This dispossession must occur as a direct consequence of or in the course of execution of said original decree. Thus, an applicant under Rule 99 needs to establish two things: *first*, that he had possession prior to the execution of the decree; and *secondly*, that he was dispossessed by the decree holder, or the auction purchaser, as the case may be, during the execution of the decree. When such an application complaining of his dispossession is made, all questions including the questions relating to the right, title and interest of the property can be decided by an executing court.

187. Insofar as Rule 99 of Order XXI CPC is concerned, the decision of this Court in ***Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal and Another*** reported in **(1997) 3 SCC 694** observed that if a stranger to the original decree is dispossessed of the suit property relating to which he claims any right, title or interest, then his remedy would lie in filing an application under Rule 99 of Order XXI CPC. In deciding such an application, the executing court would then determine whether his dispossession was illegal and whether possession must be restored to such an applicant by way of an order under Rule 100. The relevant observations are reproduced hereinbelow:

> *"8. A conjoint reading of Order 21, Rules 97, 98, 99 and 101 projects the following picture:*

[…]

(2) If for any reason a stranger to the decree is already dispossessed of the suit property relating to which he claims any right, title or interest before his getting any opportunity to resist or offer obstruction on the spot on account of his absence from the place or for any other valid reason then his remedy would lie in filing an application under Order 21, Rule 99 CPC claiming that his dispossession was illegal and that possession deserves to be restored to him. If such an application is allowed after adjudication then as enjoined by Order 21, Rule 98 [sic Rule 100], sub-rule (1) CPC the executing court can direct the stranger applicant under Order 21, Rule 99 to be put in possession of the property or if his application is found to be substance-less, it has to be dismissed. Such an order passed by the executing court disposing of the application one way or the other under Order 21, Rule 98 [sic Rule 100], sub-rule (1) would be deemed to be a decree as laid down by Order 21, Rule 103 and would be appealable before appropriate appellate forum. But no separate suit would lie against such orders as clearly enjoined by Order 21, Rule 101."

(Emphasis supplied)

188. In ***H. Seshadri v. K.R. Natarajan and Another*** reported in **(2003) 10 SCC 449,** this Court was concerned with an application under Rule 99 of Order XXI CPC filed by a tenant who claimed a title independent to that of the judgment-debtor and was dispossessed in the course of the execution of an eviction decree. In holding that such a person can maintain an application under Rule 99, it was observed thus:

"13. For the purpose of considering an application under Order 21 Rules 99 and 100 of the Code of Civil Procedure what was required to be considered was as to whether the applicant herein claimed a right independent of the judgment-debtor or not.[…]"

(Emphasis supplied)

189. In order to better understand who can maintain an application under Rule 99, the words "any person" other than the judgment-debtor used therein must be further clarified. This is more so because the decision in ***Brahmdeo Chaudhary*** *(supra)* has employed the phrase "*a stranger to the decree*" as analogous to the words "*any person other than the judgment debtor*"

190. A "*stranger to the decree*" must necessarily be someone other than the person who is the judgment-debtor and of course, other than someone who is the decree-holder. Meaning thereby that, they must be unconnected to the original *lis* which decree is sought to be executed by the executing court. It is only logical that a decree-holder can never be an applicant under Rule 99 since he is the dispossessor. In that sense, the terms "*stranger to the decree*" and "*any person other than the judgment debtor*" are synonymous and they may be used interchangeably, insofar as Rule 99 is concerned.

191. The words "any *person other than the judgment debtor*" in Rule 99 is of a wider import. It must be read to mean *any person* other than the judgment-debtor or his legal representatives. To put it simply, it may include a person asserting his own independent title and it may also include persons who are subsequent transferees of the judgment-debtor but were not made parties to the original suit. Although the latter group of persons would be deriving their title or interest from the judgment-debtor, the phrasing of Rule 99 is such that, in the event of their dispossession, they would be able to prefer an application under the said provision. Whether they would be able to obtain any order under Rule 100 is another question

altogether. However, if the intention was to prevent even such persons from falling within the purview of Rule 99, then the provision would have read as "*any person other than the judgment debtor or those claiming through or under the judgment-debtor*".

192. Furthermore, reading the phrase "*any person other than the judgment-debtor*" widely and the words "*judgment-debtor*" narrowly also makes sense for the simple reason that it is only the judgment-debtor who has been dispossessed by virtue of execution of the original decree, by the decree-holder or the auction purchaser, who must not reagitate what he has already agitated or had the opportunity to agitate in the original suit. If that were allowed, then it would virtually create an endless loop in favour of the unsuccessful judgment-debtor when the decree against him has already attained finality.

193. We subscribe to the aforesaid wider reading of the phrase for yet another reason. It is only afterwards, that in Rule 102 of Order XXI CPC, it is stated that a *transferee pendente lite* of the judgment-debtor or to put it simply, a person to whom the judgment-debtor has transferred the suit property <u>after the original suit was instituted</u>, would not be able to avail the remedy available under both Rules 97 and 99 respectively, by way of an order under Rules 98 and 100 respectively. There was no reason for Rule 102 to explicitly exclude such *transferees pendente lite* if the words "*any person other than the judgment debtor*" employed in Rule 99 had not already included them.

194. The net effect of the phrase "*any person other than the judgment debtor*" used in Rule 99 and the bar under Rule 102 is that, it is only the judgment-debtors themselves or the pendente lite transferees of the judgment debtor who would not be able to take the cumulative benefit of Rules 99 and 100 of Order XXI CPC in the event of their dispossession. A person who has bought the property from the judgment-debtor but before the institution of the suit i.e., a bona fide purchaser for value who is not hit by the doctrine of *lis pendens*, would then be able to prefer an application under Rule 99 and may obtain an order under Rule 100 in the event of his dispossession by the auction-purchaser, without the bar under Rule 102 operating against him.

195. The decision of this Court in ***Ashan Devi and Another v. Phulwasi Devi and Others*** reported in **(2003) 12 SCC 219** discussed the maintainability of an application under Rule 99 of Order XXI and contextualized the meaning of the terms "possession" and "dispossession". It was stated that the term must not always be relegated to a restricted understanding i.e., as the ouster from actual and physical possession. Rather, its legal meaning must necessarily be understood from the context that it is subject to. In the context of an open vacant land, it was stated that such a land is generally possessed by someone who can exercise control over it to the exclusion of others. Therefore, dispossession must also be understood as occurring when such a general control to put the land to their own use, is lost. The relevant observations are thus:

"22. The word "dispossessed" as used in Order 21 Rule 99 of the Code has been narrowly construed to be an ouster from actual and physical possession of the property by several High Courts. See Pera Naidu v. Soundaravalli Ammal [AIR 1954 Mad 516 : (1954) 1 MLJ 179] AIR at p. 519; Rajendra N. Das v. Minatunnisa Bibi [(1966) 32 Cut LT 972 : ILR 1966 Cut 611] and Emerciano Leonardo Dias (Dr.) v. Ganexama B. Naique Vaingancar [AIR 1978 Goa 48] .

23.Salmond on Jurisprudence explains that the word "possession" is a word of "open texture". Its legal meaning has to be ascertained from the context. The property involved in the present case is open vacant land. Such property is possessed by a person who has control over the same. This "control" over the property means "power to exclude all others". The test then for determining whether a man is in possession of anything is whether he is in "general control" of it — maybe, that he is not in actual and physical possession or using the same.

24. The objectors have laid evidence before the executing court to show that after obtaining by recitals in the sale deeds delivery of possession of the property, the names of purchasers were also mutated in the municipal records. Merely because at the time of execution of the decree through Court Nazir, the objectors were not physically present on the property, it cannot be said that the delivery of possession to the decree-holder by the court does not amount to the objectors' legal ouster or "dispossession". The word "possession", therefore, has to be given contextual meaning on facts of a particular case and the nature of the property involved.

(Emphasis supplied)

196. Several decisions have laid down that the dispossession of the applicant who was in possession of the suit property is a *sine-qua non* for the maintainability of an application under Rule 99 of Order XXI CPC. Without referring to all those decisions in detail, we refer

with profit to the decision of this Court in ***Sriram Housing Finance and Investment India Limited v. Omesh Mishra Memorial Charitable Trust*** reported in **(2022) 15 SCC 176,** wherein it was held that since the appellant continued to remain in possession, the application under Rule 99 could not have been entertained. The relevant observations are as thus:

> *"24. […] Further, Rule 99 pertains to making a complaint to the Court against "dispossession" of the immovable property by the person in "possession" of the property by the holder of a decree or purchaser thereof.*
>
> *25. It is factually not in dispute that the appellant purchased the said property from Mr Yogesh Mishra vide sale deed dated 12-4-2004 and has been in vacant and physical possession of the property since then. Had it been the case that the appellant was dispossessed by the respondent Trust in execution of decree dated 2-9-2003, the appellant would have been well within the ambit of Rule 99 to make an application seeking appropriate relief to be put back in possession. On the contrary, the appellant in the instant case was never dispossessed from the property in question and till date, as contended and unrefuted, the possession of same rests with the appellant. Considering the aforesaid, the appellant cannot be said to be entitled to make an application under Rule 99 raising objections in execution proceedings since he has never been dispossessed as required under Rule 99."*
>
> (Emphasis supplied)

197. On a combined reading of ***Ashan Devi*** *(supra)* and ***Sriram Housing*** *(supra),* what possession and dispossession would mean in the facts and circumstances of each case must be adequately and conscientiously contextualized. In the present matter, there seems to be some confusion regarding whether the respondent nos. 1 and 2 respectively were dispossessed or not. In the SLP before us, the

appellants have contended that they have been in possession of the suit land for the past 20 years or so. Meaning thereby, that the respondent nos. 1 and 2 respectively were successfully dispossessed during the execution of the original decree. In this context, certain averments made by the respondent nos. 1 and 2 respectively in their plaint need to be reproduced:

> *"7. That the plaintiffs were not aware of the above-said proceedings and they continued to be in possession of the land mentioned in para No. 1 above of the plaint.*
>
> *8. That a week ago, the plaintiffs went to the land for ploughing it, but they were prevented by defendant No. 1 to 3, who asserted that they have purchased the whole land including the suit land in court auction and that they have alleged to have taken possession on 14-6-1989 of the same, on the basis of warrant of possession having been issued by the Civil Courts.*
>
> *-xxx-*
>
> *11. That the defendants No. 1 to 3 alleged to have taken possession of the land including of the land of the plaintiffs on 24-6-1989, vide Rapat Roznamcha No. 400. This entry is a paper entry so far as the plaintiffs are concerned. No notice, whatsoever, was given to the plaintiffs while making the alleged delivery of possession and writing of the Rapat Roznamcha entry by the revenue officials. The plaintiffs still continue to be in possession of the suit land. In the alternative, if for any reason, the plaintiffs are proved to have been dispossessed from the suit land, they are entitled to a decree for possession of the suit land."*
>
> (Emphasis supplied)

198. We have also had the benefit of looking into the 'Possession Mauja' which records that the possession was successfully handed over to the appellants in execution of the warrant of possession issued by

the executing court on 24.06.1989. The relevant portions of the same read thus:

> *"Thereafter, I called the opposite party namely Sh. Sumer Singh and Smt. Harpyari through Chowkidar who flatly refused to come at the spot. Now after reaching at the spot, the above said land has been inspected and there is small crops of Jawar and Arhad over the land bearing Rect. No. 30, Killa Nos. 10, 11/1, 11/3, 20/1, 20/2; ,Rect. No. 31, Killa Nos. 4/2, 7/2, 14/1, 14/2, which has not been possessed by opposite party. The said land has been owned and possessed by the applicant whereas the remaining land is lying vacant. Therefore, the possession of above said entire land was given to the applicant by using Phawra. The aforesaid fact of completion of auction and delivery of possession was announced through Narangi Chowkidar the receipt of which is enclosed. Now the entry has been made in the Daily Diary with Patwari vide Rapat No. 400. At the same time the Patwari has been directed to make mutation entry No 929. This mutation entry be produced before C.R.O. Accordingly, the present report is being submitted."*
>
> (Emphasis supplied)

199. The Trial Court *vide* its judgment and decree dated 22.02.2001 also observed that the respondent nos. 1 and 2 respectively were no longer in possession of the suit land and observed as follows:

> *"However, I am agreed with the contention of counsel for defendants that plaintiffs could not prove the fact by leading any cogent and reliable material that he is still in possession of the suit property. […] It is therefore, held that though plaintiffs are owners of the suit property but not in possession of the same."*
>
> (Emphasis supplied)

200. On a consideration of all the above, it could be said that, having fulfilled all the necessary conditions underlying Rule 99, the respondent nos. 1 and 2 respectively could have preferred an

application under Rule 99 instead of instituting a separate suit. However, we have already explained in sufficient detail in the preceding parts of this judgment as to why the respondent nos. 1 and 2 respectively are *transferees pendente lite* of the judgment-debtor. The consequence of this would be that even if they had chosen to prefer an application under Rule 99, Rule 102 would have stood in their way. Therefore, in light of the bar against *transferees pendente lite* of the judgment-debtor in obtaining any relief under Rule 99 read with rule 100, we must further examine whether this by itself would make a separate suit instituted by such *transferees pendente lite* maintainable.

201. It is at this juncture that we must look into the import of the words "*and not by a separate suit*" occurring in Rule 101 of Order XXI CPC with a view to understand what this means for any general applicant under Rule 99 and also for an applicant who may be a *transferee pendente lite* of the judgment debtor, especially in the context of the availability of the option of filing a separate suit. The answer to this question would also help in understanding whether the separate suit filed by the respondent nos. 1 and 2 respectively, could said to be maintainable.

b. The scheme underlying Rules 100 to 104 respectively and the availability of the remedy of filing a separate suit as an alternative to an application under Rule 99 of Order XXI CPC

202. There are two possible views that one can take with regard to the aforesaid – i.e., *First,* subscribe to the interpretation that the scheme underlying Rules 99 to 102 respectively only bar the filing of a separate suit when an application under Rule 99 has already been preferred before the executing court. To put it simply, Rule 101 would be interpreted quite literally herein. This would imply that a person dispossessed in the course of execution of a decree, either by the decree-holder or the auction purchaser, has an option to either (a) to prefer an application under Rule 99; or (b) to file a separate suit. Therefore, it is only when one of these options are already adopted that the other would be barred. Several High Courts seem to have adopted this approach.

203. *Secondly,* on the other hand, one could also adopt the view that, even in a scenario where the dispossessed person has not preferred an application under Rule 99 and has instead, alternatively filed a separate suit, such a separate suit would not be maintainable since the executing court exercising its jurisdiction afforded under Rule 99 would be the only appropriate forum for adjudicating such a dispute. In other words, that the dispossessed person cannot be said to have options that he could exercise simultaneously.

204. Before we lay down which interpretation is more plausible, we must look into the provisions which existed prior to the Amendment Act of 1976. The same are reproduced as under:

> "***97. Resistance or obstruction to possession of immovable property -*** *(1) Where the holder of a decree for the possession of immovable property or the purchaser of any*

such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction.

(2) The court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

98. Resistance or obstruction by judgment debtor - *Where the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days.*

99. Resistance or obstruction by bona fide claimant - *Where the court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the court shall make an order dismissing the application.*

100. Dispossession by decree-holder or purchaser - *(1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the court complaining of such dispossession.*

(2) The court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

> ***101. Bona fide claimant to be restored to possession -*** *Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.*
>
> ***102. Rules not applicable to transferee lite pendente -*** *Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immoveable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.*
>
> ***103. Orders conclusive subject to regular suit -*** *Any party not being a judgment-debtor against whom an order is made under Rule 98, Rule 99 or Rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any), the order shall be conclusive."*

205. We also deem it necessary to reproduce some pertinent observations made by the **Law Commission of India** in several of its reports. In its ***14th Report*** (Vol I, pg. 454), it was suggested that the executing court under Rules 97 and 99 respectively, must themselves indulge in a full inquiry as regards the ultimate right and title of the parties and must not keep it restricted to a summary inquiry leaving it open for the aggrieved party to again file a suit under the old Rule 103. This suggestion was whole-heartedly accepted by way of the Amendment Act of 1976. The relevant excerpts from the report are thus:

> *"**49. Suits under Rules 63 and 103 to be barred. –** In regard to suits under Rule 63 or 103 we have no hesitation in accepting the suggestion which has been made by a number of persons including some eminent members of the judiciary that <u>the executing court itself should make a full inquiry into</u>*

the ultimate right and title of the parties and not merely a summary inquiry into possession leaving it open to the aggrieved party to file a suit. Such a recommendation has been made by us in our report on the Limitation Act. The order passed in such inquiries should be deemed to be a decree within the meaning of section 2, sub-section (2) as in the case of orders under section 47 and be subject to such appeals as are allowed by the law relating to appeals from decrees. We recommend that the law be amended in this manner and the provisions saving or enabling suit to be filed in Rules 63 and 103 be omitted."

(Emphasis supplied)

206. Thereafter, in its ***27th Report*** (Vol 1, pg 18-20), the **Law Commission of India** gave further necessary context as to why the aforesaid old provisions came to be amended and it agreed with the recommendations of the ***14th Report*** in view of giving expedited relief to the litigants. The excerpts are as under:

*"41. **Delay in execution – Order 21, Rule 58 and 97.** Delay in execution proceedings is mainly due to certain dilatory tactics adopted by judgment-debtors. When in execution proceedings any property is attached, there is generally a claim filed under Order XXI, rule 58. If this claim is rejected, a suit is filled under rule 63 of that Order. If the attachment of the property is finally upheld, there are obstruction proceedings under rule 97, followed by a suit under rule 103. The Fourteenth Report, contains a recommendation that claim proceedings or obstruction proceedings should be finally determined by the execution court, and that where they are so determined, there should be no right of suit. This recommendation has been made with a view to eliminating delay in execution proceedings. Unfortunately, we have no statistics to indicate in what percentage of cases a suit is filed under rule 63 or rule 103. We are, however, in agreement with the recommendation in the Fourteenth Report, which is based upon certain evidence recorded by the Commission.*

-xxx-

> *45.* ***Other changes suggested in Order 21 to avoid delay.*** *Apart from these principal amendment, we have suggested some other amendments in Order XXI, which in our opinion, will expedite execution proceedings."*
>
> (Emphasis supplied)

207. Although the aforesaid observations allude only to the mischief which was being caused under the old rule 97, where undue obstruction would be caused either by the judgment-debtor or by persons colluding with him and thereafter, the same persons would resort to the filing a separate suit under the old Rule 103 in order to delay giving finality to the proceedings, yet it must be remembered that under the new regime, the option of filing a separate suit has been done away with for both rules 97 and 99 respectively. Therefore, it would only be reasonable for us to infer that the same or at least a similar mischief was sought to be curtailed even under Rule 99 and thereby, it was included within the ambit of the new Rule 101 which bars the filing of a separate suit.

208. In ***Ghasi Ram v. Chait Ram Saini*** reported in **(1998) 6 SCC 200**, this Court made some important observations as regards the regime that existed pre-amendment and that which exists post-amendment. It was stated that under the pre-amendment scheme, an order which was made under the old Rules 98, 99 and 101 respectively could be the subject of a separate suit by virtue of the old Rule 103. In other words, since an order under the rules as aforesaid did not always involve a full and final adjudication on the questions of right, title or interest of the competing parties, the old provisions collectively

envisaged that the any party not being a judgment-debtor would have the option of file a separate suit to decide those questions in case an order adverse to him is rendered by the executing court under the old Rules 98, 99 and 101 respectively. Therefore, the order passed by the executive court would be final subject to a separate suit being filed by the aggrieved person under the old Rule 103. The relevant observations are as thus:

> *"7. A perusal of the aforesaid provisions would show that the scheme commencing under Rule 97 and onwards before the enactment of the Amendment Act, 1976 was that where a decree-holder or the purchaser at the court sale of property was obstructed in obtaining possession of such property by any person, he was entitled to apply to the court complaining of such resistance or obstruction. […]If an order was passed under Rule 98 allowing the application under Rule 97 CPC, such an order was conclusive between the parties except that a party other than the judgment-debtor against whom the order was passed was entitled to file a fresh suit under Rule 103 to establish his right to the possession. […] <u>However, the position has changed after amendment of the Code of Civil Procedure by the Amendment Act of 1976. Now, under the amended provisions, all questions, including right, title, interests in the property arising between the parties to the proceedings under Rule 97, have to be adjudicated by the executing court itself and not left to be decided by way of a fresh suit.</u>*
>
> *8. The word "conclusive" appearing in Rule 103 indicates that it creates a presumption in favour of facts relating to rights to property as well as legality of the matter stated in the order. <u>Such an order passed under Rule 98 is not subject to any further enquiry in any other proceeding, except by bringing a fresh suit under Rule 103.</u> Thus, in view of the conclusiveness attached to the order passed by the executing court on an application filed under Rule 97, which is subject to result of a suit, if any, filed under Rule 103, is not assailable in any other proceedings. <u>In case no suit is filed</u>*

under Rule 103, the order passed under Rule 98 is final between the parties.[…]"

(Emphasis supplied)

209. Hence, the filing of a separate suit, even under the old regime, was available as a remedy only because of the inability of the executing court to look into the questions of right, title or interest of the competing parties. So, in that sense, there was a distinct and very specific reason why the remedy of filing a separate suit was kept open. When the legislature has consciously done away with the old Rule 103 and instead, empowered the executing court itself to look into these questions, then logic would demand that there is now no need for providing the remedy of filing a suit in the same regard.

210. In ***Noorduddin v. K.L. Anand*** reported in **(1995) 1 SCC 242**, this Court elaborated on the nature of determination envisaged under the Rules 98, 100 and 101 of Order XXI respectively, as follows:

i. ***First,*** a comparison was drawn between the position which existed prior to the Amendment Act of 1976 to state that the old Rule 103 allowed the filing of a separate suit, however, that this right has been explicitly taken away post the amendment. This combined with the change brought through the new Rule 101 would mean that the legislature has relegated the parties to an adjudication of right, title or interest in the immovable property in the execution proceedings itself and finality is also accorded to it.

ii. ***Secondly,*** the change made *vide* the amendment was said to have been enacted with the object of putting an end to the

protraction of execution and in order to shorten the litigation between all persons claiming a right, title or interest in the immovable property which is the subject of execution.

iii. ***Thirdly***, it was stated that although the right, title or interest are substantive rights, yet the right to adjudication in that behalf is a procedural right to which no person can claim to have a vested right. It was emphasized that the judicial process should not be interpreted such that it becomes an instrument of abuse or a means to subvert justice. Courts must, therefore, evolve processes that aid expeditious adjudication.

The relevant observations are reproduced as under:

> *"8. Thus, the scheme of the Code clearly adumbrates that when an application has been made under Order 21, Rule 97, the court is enjoined to adjudicate upon the right, title and interest claimed in the property arising between the parties to a proceeding or between the decree-holder and the person claiming independent right, title or interest in the immovable property and an order in that behalf be made. The determination shall be conclusive between the parties as if it was a decree subject to right of appeal and not a matter to be agitated by a separate suit. In other words, no other proceedings were allowed to be taken. It has to be remembered that preceding Civil Procedure Code Amendment Act, 1976, right of suit under Order 21, Rule 103 of 1908 Code was available which has been now taken away. By necessary implication, the legislature relegated the parties to an adjudication of right, title or interest in the immovable property under execution and finality has been accorded to it. Thus, the scheme of the Code appears to be to put an end to the protraction of the execution and to shorten the litigation between the parties or persons claiming right, title and interest in the immovable property in execution.*

> *9. Adjudication before execution is an efficacious remedy to prevent fraud, oppression, abuse of the process of the court or miscarriage of justice. The object of law is to mete out justice. Right to the right, title or interest of a party in the immovable property is a substantive right. But the right to an adjudication of the dispute in that behalf is a procedural right to which no one has a vested right. The faith of the people in the efficacy of law is the saviour and succour for the sustenance of the rule of law. Any weakening like (sic) in the judicial process would rip apart the edifice of justice and create a feeling of disillusionment in the minds of the people of the very law and courts. The rules of procedure have been devised as a channel or a means to render substantive or at best substantial justice which is the highest interest of man and almameter (sic) for the mankind. It is a foundation for orderly human relations. Equally the judicial process should never become an instrument of oppression or abuse or a means in the process of the court to subvert justice. The court has, therefore, to wisely evolve its process to aid expeditious adjudication and would preserve the possession of the property in the interregnum based on factual situation. Adjudication under Order 21, Rules 98, 100 and 101 and its successive rules is sine qua non to a finality of the adjudication of the right, title or interest in the immovable property under execution."*
>
> (Emphasis supplied)

211. In the aforesaid context, in ***Noorduddin*** *(supra)* it was observed that "*Adjudication under Order 21, Rules 98, 100 and 101 and its successive rules is sine qua non to a finality of the adjudication of the right, title or interest in the immovable property under execution.*" This observation, read in light of the change brought in post-amendment can only mean that, with a view to accord finality to the dispute pertaining to the subject property, even a third party asserting a right, title or

interest ought to agitate his grievances only under Rule 99 in the event his dispossession is caused by the execution of the decree.

212. In ***Babulal v. Rak Kumar*** reported in **(1996) 3 SCC 154**, this Court made an observation that the procedure prescribed under Rules 98 to 103 is a complete code in itself and observed thus:

> *"6. […] Thus, the procedure prescribed is a complete code in itself. Therefore, the executing court is required to determine the question, when the appellants had objected to the execution of the decree as against the appellants who were not parties to the decree for specific performance."*
>
> (Emphasis supplied)

213. This Court in ***Sameer Singh and Another v. Abdul Rab and Others*** reported in **(2015) 1 SCC 379,** while deciding what would constitute an 'adjudication' under Rules 97, 99 and 101 of Order XXI CPC respectively, shed some light on how the scheme underlying the said rules must be appreciated. It was reiterated that rules 97 to 103 respectively is a self-contained code which empowers the executing court to adjudicate the entire *lis* and any order passed would be deemed to be a decree. The relevant observations are thus:

> *"20. The submission of the learned counsel for the appellants is that if the scheme underlying the said Rules is appositely appreciated, it is clear as crystal that the legislature in order to avoid multiplicity of proceedings has empowered the executing court to conduct necessary enquiry and adjudicate by permitting the parties to adduce evidence, both oral and documentary, and to determine the right, title and interest of the parties and, therefore, such an order has been given the status of a decree. As has been put forth by him, a proceeding in terms of Rule 97 or Rule 99 is in the nature of a suit and the adjudication is similar to that of a suit […]*

-xxx-

> *26. The aforesaid authorities clearly spell out that the court has the authority to adjudicate all the questions pertaining to right, title or interest in the property arising between the parties. It also includes the claim of a stranger who apprehends dispossession or has already been dispossessed from the immovable property. The self-contained code, as has been emphasised by this Court, enjoins the executing court to adjudicate the lis and the purpose is to avoid multiplicity of proceedings. It is also so because prior to 1976 amendment the grievance was required to be agitated by filing a suit but after the amendment the entire enquiry has to be conducted by the executing court. Order 21 Rule 101 provides for the determination of necessary issues. Rule 103 clearly stipulates that when an application is adjudicated upon under Rule 98 or Rule 100 the said order shall have the same force as if it were a decree. Thus, it is a deemed decree. […]*
>
> (Emphasis supplied)

214. Giving an order made under Rules 98 and 100 of Order XXI CPC respectively, the status of a 'deemed decree' for the purpose of an appeal has effectively given the parties more reason to agitate everything that they would in a separate suit before the executing court itself. In light of this, it would be absurd to still say that the right to file a separate suit in so far as matters pertaining to Rules 97 and 99 respectively would still remain alive. There would be no purpose in holding so. On the contrary, it would only defeat the reasons due to which the legislature thought fit to expand the jurisdiction of the executing court under Rule 101 by way of the amendment.

215. It was very aptly pointed out by this Court in ***Sreenath v Rajesh*** reported in **(1998) 4 SCC 543** that the courts, within their own limitations, have been interpreting the procedural laws so as to

conclude all possible disputes pertaining to the decretal property within the execution proceeding itself, i.e., including what may be raised later by way of another bout of litigations through a fresh suit. Similarly legislatures equally are also endeavouring by amendments to achieve the same objective. Therefore, in interpreting any procedural law, where more than one interpretation is possible, the one which curtails the procedure without eluding justice is to be adopted. The procedural law is always subservient to and is in the aid of justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. So, under Order XXI Rule 101 all disputes between the decree-holder and any such person is to be adjudicated by the executing court. A party is not thrown out to relegate itself to the long-drawn-out arduous procedure of a fresh suit. This is to salvage the possible hardship both to the decree-holder and the other person claiming title on their own right to get it adjudicated in the very execution proceedings.

216. This Court in ***N.S.S. Narayana Sarma and Others v. Goldstone Exports (P) Ltd. and Others*** reported in **(2002) 1 SCC 662** also observed that, by way of the Amendment Act of 1976, the legislature has vested wide powers in the executing court to deal with "all issues" relating to the suit property. This, in the opinion of the court, may have been brought to allay the apprehension in the minds of the litigant public that it takes years before the decree-holder can enjoy the fruits of the decree. The relevant observations are thus:

"15. […] From the provisions in these Rules which have been quoted earlier the scheme is clear that the legislature has vested wide powers in the executing court to deal with "all issues" relating to such matters. It is a general impression prevailing amongst the litigant public that difficulties of a litigant are by no means over on his getting a decree for immovable property in his favour. Indeed, his difficulties in real and practical sense, arise after getting the decree. Presumably, to tackle such a situation and to allay the apprehension in the minds of litigant public that it takes years and years for the decree-holder to enjoy fruits of the decree, the legislature made drastic amendments in provisions in the aforementioned Rules, particularly, the provision in Rule 101 in which it is categorically declared that all questions including questions relating to right, title or interest in the property arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application shall be determined by the court dealing with the application and not by a separate suit and for this purpose, the court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions. On a fair reading of the Rule it is manifest that the legislature has enacted the provision with a view to remove, as far as possible, technical objections to an application filed by the aggrieved party whether he is the decree-holder or any other person in possession of the immovable property under execution and has vested the power in the executing court to deal with all questions arising in the matter irrespective of whether the court otherwise has jurisdiction to entertain a dispute of the nature. This clear statutory mandate and the object and purpose of the provisions should not be lost sight of by the courts seized of an execution proceeding. The court cannot shirk its responsibility by skirting the relevant issues arising in the case."

(Emphasis supplied)

217. In ***Sriram Housing*** *(supra),* it was finally buttressed that rule 101 effectively does away with the requirement of filing a fresh suit for the adjudication of a dispute which could be dealt with under rules 97 or 99, as the case may be and it was observed as thus:

> *"26. Now, as stated above, applications under Rule 97 and Rule 99 are subject to Rule 101 which provides for determination of questions relating to disputes as to right, title or interest in the property arising between the parties to the proceedings or their representatives on an application made under Rule 97 or Rule 99. Effectively, the said Rule does away with the requirement of filing of fresh suit for adjudication of disputes as mentioned above.[…]"*
>
> (Emphasis supplied)

218. In addition to all the decisions discussed above, a three-judge bench of this Court in ***Silverline Forum Pvt. Ltd. v. Rajiv Trust and Another*** reported in **(1998) 3 SCC 723** discussed the scope of adjudication that is envisioned under Rule 101 and stated that the executing court would be obligated to decide such questions that (a) have legally arisen between the parties and (b) are relevant for consideration and determination between the parties. The observations are thus:

> *12. The words "all questions arising between the parties to a proceeding on an application under Rule 97" would envelop only such questions as would legally arise for determination between those parties. In other words, the court is not obliged to determine a question merely because the resister raised it. The questions which the executing court is obliged to determine under Rule 101, must possess two adjuncts. First is that such questions should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties […]*
>
> (Emphasis supplied)

This observation can be looked at from a different perspective for the purpose of the question that we are presently faced with i.e., - when the executing court under Rule 101 is anyway required to looked at such questions, by way of a strict obligation, then there is no reason for a person who can very well fall under the scope of Rules 97 or 99, to prefer a separate suit for the adjudication of the same claims which the executing court is competent to look into.

219. In ***Shamsher Singh*** *(supra)*, the application filed under Rule 99 was ultimately dismissed after conducting the exercise of determining whether the applicant had a right, title or interest in the decretal property by way of adverse possession. This Court rejected the contention of the applicant that mere prior bona fide possession, would require the executing court to restore the possession of the applicant. This Court had acknowledged the sea-change brought to the Rules 99 to 101 respectively and stated that post the amendment, the executing court could only direct that possession be given to the applicant under Rule 99 if it is satisfied that he has established his right, title or interest and not otherwise. In that context, it was observed that "*What was earlier to be adjudicated in a suit under unamended Rule 103 is now to be adjudicated in Rule 101 itself*".

220. In light of all the aforesaid, we are of the view that there exists no option of filing a separate suit for a person who may very well prefer an application under Rule 99 of Order XXI CPC. To put it simply, one cannot file a separate suit as an alternative to an application under Rule 99. If such a suit is preferred, it could be said to be non-

maintainable for the reason that the appropriate course of action would have been to prefer an application under Rule 99 instead. Hence, amongst the two alternate interpretations to which we had alluded at the beginning of our discussion on this aspect, we are inclined to adopt the latter.

221. As a consequence, a question that then arises is whether *transferees pendente lite* of the judgment debtor would have the remedy of filing a separate suit considering the bar placed upon them by virtue of Rule 102? We are also inclined to answer this in the negative.

222. Before proceeding further, at the outset, we would like to clarify the scope of Rule 102 of Order XXI CPC. A recent decision of this Court in ***Tahir V. Isani v. Madan Waman Chodankar*** reported in **2020 SCC OnLine SC 1962** observed that the bar under Rule 102 applies only to a person to whom the judgment-debtor has transferred the suit property pendente lite. In other words, if the person has received the property from anyone other than the judgment-debtor, even pendente lite, then he would be entitled to the benefit under Rules 98 and 100 respectively. It was also stated that the object underlying Rule 102 is to protect the interest of the decree-holder against the attempts of unscrupulous judgment-debtors and their subsequent transferees who deprive the decree-holders from taking any benefit of the decree passed in their favour. In delineating the ingredients that are required to be fulfilled for the application of Rule 102, it was stated that it is absolutely necessary for the transfer to have been made by the judgment-debtor after the institution of the original suit in which the decree was passed. Only then, can the

protection afforded under Rules 97 to 101 respectively, be denied. The relevant observations are thus:

> *"9. […] In a suit pending between a plaintiff and a defendant as to the right to a particular estate, the decision of the court in that case shall be binding not only on the litigating parties, but also on those who derive title under them by alienations (transfer) made while the suit was pending, whether such alienees, i.e. transferees, had or had not notice of the pending proceedings. […]*
>
> *Therefore, Rule 102 of Order XXI intends to protect the interests of the decree-holder against the attempts of unscrupulous judgment-debtors and their subsequent transferees who indulge in activities and leave no stone unturned to deprive the decree-holders from reaping the benefits of the decree granted in their favour. The Rule being equitable in nature, therefore, estops further creation of rights as it explicitly states that nothing in Rules 98 and 100 shall apply to the resistance or obstruction being made by the transferee pendente lite of judgment-debtor.*
>
> *-xxx-*
>
> *11. While it is important to protect the interests of decree-holders, who hold an enforceable decree in their favour, it cannot be gainsaid that such interests cannot be blanketly protected. Rule 102 of Order XXI expressly lays down the ingredients as to when it can be applied. For a case to fall under Rule 102, it is condition precedent that there exists a decree for the possession of immovable property. Secondly, there must be a resistance or an obstruction in the execution of the said decree. Thirdly, such obstruction or resistance must be made by a person to whom the judgment-debtor has transferred the property. Fourthly, such transfer must have occurred after the institution of the original suit, i.e. the one in which the decree was passed. If the aforesaid ingredients are made out, Rule 102 prohibits the protection of Rules 98 and 101 to such errant transferee of judgment-debtor.*

> *13. However, Rule 102 of Order XXI applies only to a person to whom the judgment-debtor has transferred the immovable property which was subject matter of that suit pendente lite. If the person who is resisting or obstructing the execution of the decree for possession of such property, is not the transferee of judgment-debtor, i.e. he does not trace his title from judgment-debtor, bar of Rule 102 does not apply to him. That is to say that if the person who is resisting or obstructing the decree for possession has received the property from person other than the judgment-debtor, such person is competent to gain the benefit of Rules 97 to 101 of Order XXI. In fact, he is entitled to such benefit even if he had been transferred the immovable property pendente lite, i.e. during the pendency of the suit, in which the decree was passed.*"
>
> (Emphasis supplied)

223. Therefore, the bar under Rule 102 must be read correctly; it is very specific and must not be unduly expanded.

224. However, what must be carefully noticed is that Rule 102 does not say that such a *transferee pendente lite* of the judgment-debtor would not be entitled to even file an application under Rules 97 or 99 respectively, as the case may be. It reads that "*Nothing in rules 98 and 100 shall apply*". This leads us to arrive at the interference that it is not the filing of the application under Rules 97 or 99 respectively, per say, which is barred under Rule 102. The bar under Rule 102 is with regard to the orders which would come to be passed as a consequence of the adjudication of the applications under Rules 97 or 99, as the case may be. Therefore, it is a bar placed on the executing court's power to afford any relief to the applicant rather than a bar on the applicant themselves.

225. In their natural course, the executing court would necessarily have to adjudicate the application before them, whether it was made by a *transferee pendente lite* of the judgment-debtor or not. However, when an objection is raised that the applicant is barred from obtaining any relief under Order 102, then such an adjudication would be confined to whether he is a *transferee pendente lite* of the judgment-debtor or not. If yes, then the executing court would be barred from making any further orders under rules 98 and 100 respectively.

226. The aforesaid is supported by the decision in ***Silverline Forum*** *(supra),* wherein it was observed in the context of Rule 97 that, if the resistance is being offered by a *transferee pendente lite* of the judgment-debtor as defined in Rule 102, then the scope of the adjudication under Rule 101 would be shrunk to the limited question of whether the applicant under Rule 97 is such a *pendente lite transferee*. If answered in the affirmative, then such an applicant would be held to not be entitled to offer such a resistance based on the salutary principle underlying Section 52 of the Transfer of Property Act. The relevant observations are thus:

> *"10. It is true that Rule 99 of Order 21 is not available to any person until he is dispossessed of immovable property by the decree-holder. Rule 101 stipulates that all questions "arising between the parties to a proceeding on an application under Rule 97 or Rule 99" shall be determined by the executing court, if such questions are "relevant to the adjudication of the application". A third party to the decree who offers resistance would thus fall within the ambit of Rule 101 if an adjudication is warranted as a consequence of the resistance or obstruction made by him to the execution of the decree. No doubt if the resistance was made by a transferee pendente lite*

> *of the judgment-debtor, the scope of the adjudication would be shrunk to the limited question whether he is such a transferee and on a finding in the affirmative regarding that point the execution court has to hold that he has no right to resist in view of the clear language contained in Rule 102. Exclusion of such a transferee from raising further contentions is based on the salutary principle adumbrated in Section 52 of the Transfer of Property Act.*"
>
> (Emphasis supplied)

227. One might question, what is the reason behind adjudicating an application under Rules 97 or 99 respectively, if the passing of an order under Rules 98 and 100 respectively is anyway barred? The simple reason would be that some judicial forum must arrive at the finding that the person(s) in question is a *transferee pendente lite* of the judgment-debtor so as to determine his right, title or interest to the suit property or the lack thereof.

228. Again, it is with this background that one must look at the ratio of the decision of this Court in ***Renjith K.G. and Others v. Sheeba*** reported in **2024 SCC OnLine SC 2821**, authored by one of us, R. Mahadevan, J. Therein, it was stated that an applicant under Rule 99, who is a stranger to the decree, can very well adjudicate his claim of right, title and interest in the decretal property. It was further held that this term i.e., "stranger to the decree" would include a pendente lite transferee who has not been impleaded in the original suit. The relevant observations are thus:

> *"13. It was the specific plea of the appellants that the predecessor of the respondents being a pendente lite transferee, is not entitled to file an application under Order XXI Rule 99 CPC and raise the question of limitation*

of the Execution Petition, so as to deprive the right of the appellants to enjoy the fruits of the decree.

14. On a reading of Order XXI Rule 99 CPC, it is lucid that where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property, or where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession. It also means that a third party to the decree has a right to approach the Court even after dispossession of the immovable property, which he was occupying. In the case on hand, the predecessor of the respondents was not a party to the suit and he was dispossessed from the property, in execution of the decree passed in the suit and therefore, he who is purported to be a stranger to the decree, can very well adjudicate his claim of independent right, title and interest in the decretal property as per Order XXI Rule 99 CPC.

15. In so far as the claim of appellants that the predecessor of the respondents, namely Mr. Raghuthaman, being pendent lite transferee and hence would have no locus to file the application seeking re-delivery, we have already held that "any person" not a party to the suit or in other words a stranger to the suit can seek re-delivery, after he has been dispossessed. The term "Stranger" would cover within its ambit, a pendent lite transferee, who has not been impleaded. […] The pendent lite purchaser has every right to defend his right, title, interest and possession. […]

-xxx-

19. […] the High Court rightly set aside the order passed in the Execution Petition and remanded the matter to the trial court for fresh consideration, leaving all the issues including the independent right, title or interest claimed by the respondents in the property in question, to be adjudicated therein. Therefore, we do not find any infirmity or illegality in the judgment so rendered by the High Court, warranting our interference.

(Emphasis supplied)

229. In ***Renjith*** *(supra),* the applicant under Rule 99 was a pendente lite transferee of one of the judgement-debtors but was not impleaded in the original suit. Although he was not a party to the original suit and a stranger to the decree yet, since he derives his right through a transfer made by judgment-debtor during the course of the suit proceedings, ultimately, the law would not look at him favorably even under an application under Rule 99. This is reflected in Rule 102.

230. Having said so, the conclusion reached in ***Renjith*** *(supra)* would still hold good because, in light of the decision in ***Silverline Forum*** *(supra)*, the application under Rule 99 could still be filed by such a person for the adjudication of his right, title or interest since he would be a stranger to the decree. It is just that the adjudication of the same would then be limited to whether he would be a transferee pendente lite of the judgment-debtor or not in order to determine whether the bar envisaged under Rule 102 would apply to him. Therein, the matter was ultimately remanded to the trial court leaving all questions under Rule 99 read with 101 open for fresh consideration. Therefore, it was implicit that the trial was to proceed in light of the decision given in ***Silverline Forum*** *(supra)* and if the auction-purchaser or the decree-holder raised a preliminary issue that the applicant is a transferee pendente lite of the judgment-debtor and hence he cannot be given the benefit of an order under Rule 100, that issue would be decided first as a preliminary issue in the course of the said proceedings.

231. We have now explained in sufficient detail the scope of the bar under Rule 102 and the scope of adjudication under Rule 101 if a *transferee pendente lite* of the judgment-debtor prefers an application under Rule 99. This position now begs the question whether such a *transferee pendente lite* of the judgment-debtor would be allowed to file a separate suit, in case he does not prefer an application under Rule 99 in view of the bar imposed by Rule 102? As we had mentioned at the beginning of our discussion on this aspect, the answer must necessarily be an emphatic 'No'. The same reasoning that we had adopted to observe that other persons falling under the scope of Rules 97 or 99 would not be able to prefer a separate suit, would apply here as well. When the executing court is vested with the same power as the court before which a separate suit would be filed and Rule 102 bars any relief to a *transferee pendente lite* of the judgment debtor, why should a separate suit wherein an adjudication which is akin to that under Rule 101 would be conducted, be allowed? One must remember that it is the avowed object of Section 52 of the Transfer of Property Act which has given rise to Rule 102. The same section 52 would bar any relief being accorded to the *transferee pendente lite* of the judgment-debtor in the separate suit as well. To put it simply, the fate of a *transferee pendente lite* of the judgment-debtor in the separate suit would be the same as that of his fate under Rule 101. Therefore, there exists no special reason to carve out an exception and allow the filing of a separate suit for persons falling within the bar under Rule 102 when the end result would be the same.

232. Before we close the discussion on this aspect, with a view to obviate any confusion as regards the position of law expounded by us above, we wish to advert to Rule 104 which we reproduce as under:

> "***104. Orders under rule 101 or rule 103 to be subject to the result or pending suit.—*** *Every order made under rule 101 or rule 103 shall subject to the result of any suit that may be pending on the date of commencement of the proceeding in which such order, is made if in such suit the party against whom the order under rule 101 or rule 103 is made has sought to establish a right which he claims to the present possession of the property."*

233. Rule 104 begins with the phrase "*every order made under rule 101 or rule 103*". This, in a way, substantiates the discussion made by us hereinabove that the determination of the questions referred to in Rule 101 may not always lead to an order being passed under Rules 98 or 100 respectively and a classic example of this scenario would be determining these questions in relation to a *pendente lite transferee* of a judgment-debtor. In other words, sometimes an order may be passed under rule 101 and it may not be followed with an order under rules 98 or 100. This is probably why Rule 104 brings both the order under Rule 101 and those under Rule 103 (which collectively includes orders under Rules 98 or 100) respectively, within its ambit.

234. Rule 104 then proceeds to say that an order under both Rule 101 and 103 respectively shall be subject to the result of any suit that may be pending on the date of the commencement of the proceeding in which such an order is made, i.e., the institution of an application under rule 97 or 99 as the case may be, if in such a suit that is pending, the party against whom an order is made under Rules 101

or 103 has sought to establish a right which he claims to the present possession of the property. To put it simply, if a person has already filed a suit seeking to establish his right over the concerned property including that of possession, before the actual institution of an application under rules 97 or 99 or before the cause of action to file an application under rules 97 or 99 arose, it is only then that the orders which come as a consequence of the application under Rule 97 or 99, would be made subject to the result of such a previously instituted suit.

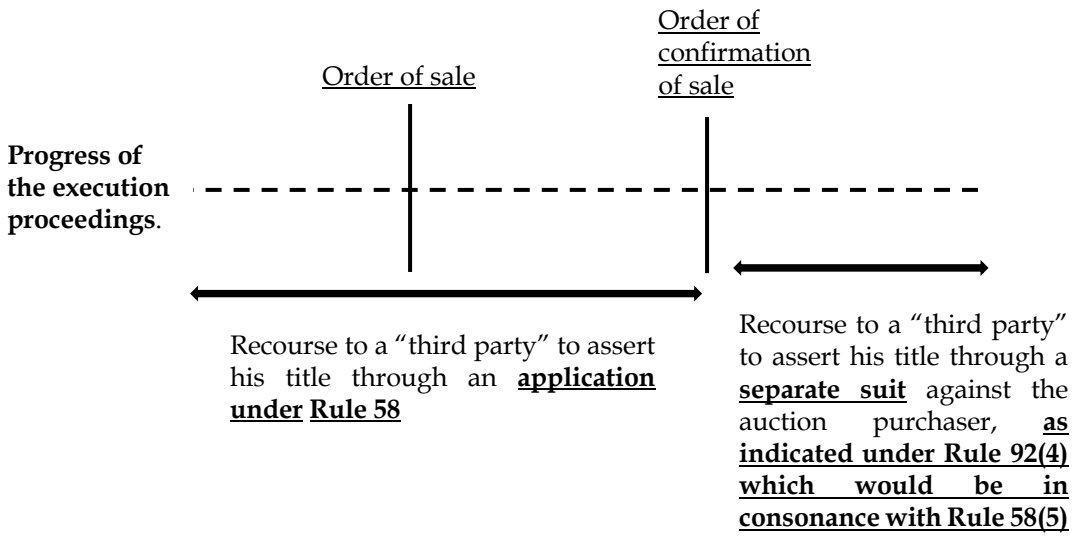
235. Such was the situation in ***Shamsher Singh*** *(supra).* The applicant under Rule 99 who was dispossessed by way of execution of the decree had already filed a suit over the same property in which he claimed title on the basis of adverse possession.

236. This rule must not be read to mean that once the cause of action to file an application under rule 99 has arisen, a party can resort to the remedy of a separate suit instead.

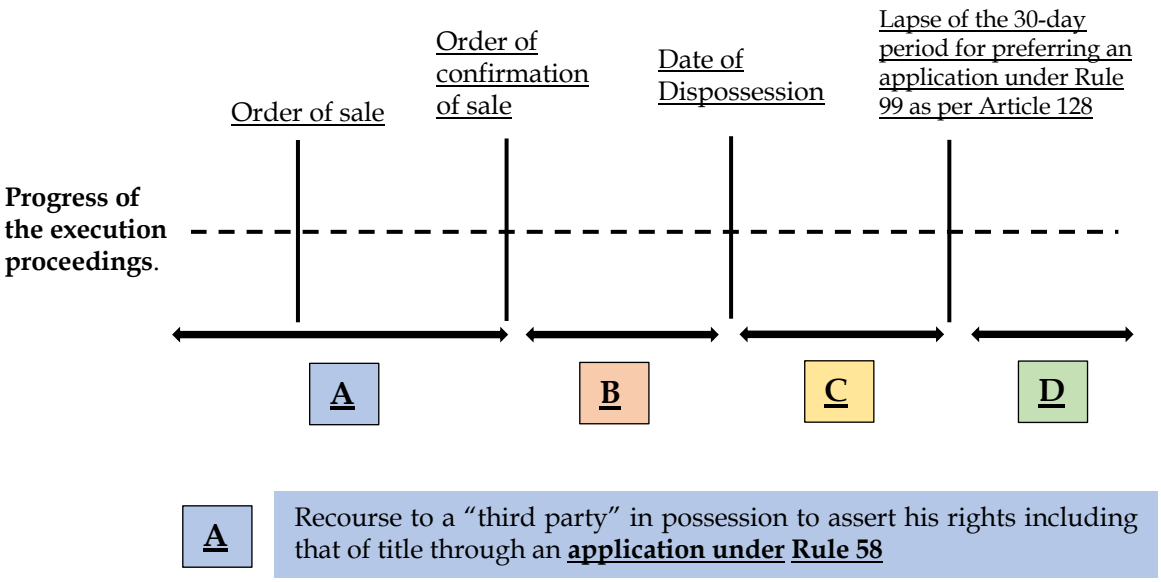
V. Delineating when a third party could file an application under Order XXI CPC and when he could resort to a separate suit in order to assert his right, title and interest in the said property.

237. Having discussed rules 58, 89 to 92 and 99 to 104 respectively in great detail, to avoid any confusion and to provide a more holistic picture of when a separate suit praying for the relief of title, amongst others, can be filed by a third party, when the property is sold in execution of a decree, is elaborated as follows:

i. *Scenario 1* - When Rule 99 is not involved, i.e. when the third party filing the separate suit is not a person who has been in possession and subsequently, dispossessed in the course of execution of the decree:



ii. *Scenario 2* - When Rule 99 is involved and the third party in possession is one who has been dispossessed as a consequence of the execution proceedings:



B	Recourse to a "third party" in possession to assert his rights including that of title through a **separate suit** against the auction purchaser, **as indicated under Rule 92(4) which would be in consonance with Rule 58(5)**
C	Recourse to a "third party" in possession who is dispossessed to assert his rights including that of title through an **application under Rule 99**.
D	No recourse to a "third party" in possession who is dispossessed to assert his rights including that of title, either through an **application under Rule 99 or by way of a separate suit due to the expiry of limitation under Article 128 of the Limitation Act, 1963.**

238. A pertinent clarification in Scenario 2, especially as regards the period referred to as "B" would be that, if a third party who is in possession of the property which is the subject-matter of the auction sale, obtains knowledge of the auction sale, after the confirmation of sale, he needn't wait until he eventually comes to be dispossessed by the auction-purchaser to file an application under Rule 99. Before any cause of action to file an application under Rule 97 or 99 arises, he may choose to file a separate suit, if he wishes to, in accordance with Rule 92(4). However, once there arises an opportunity for such third party possessor to obtain appropriate redressal of his grievances through an application under Rule 97 or Rule 99, he must not be allowed to file a separate suit.

239. We say so also because we are cognizant of the differing views as regards whether a third party can make an application under Rule 97 taken by the decisions of this Court in ***Brahmdeo Choudhary*** *(supra)* and ***Sriram Housing*** *(supra)* respectively. Another coordinate bench of this Court in ***P. Sumathi v. K. Krishna Gounder & Ors*** in **SLP(C) No. 14092 of 2025** has already taken *seisin* of such conflicting

views while issuing notice *vide* its order dated 16.05.2025. Without delving into which interpretation of Rule 97 may be right, we only wish to point out that in case the view taken by ***Sriram Housing*** *(supra)* is held to be the correct view, then the interests of justice would demand that a third party in possession who obtains knowledge of the confirmation of sale and wishes to assert his right, title or interest in the same, must not be allowed to be remediless until he comes to be dispossessed, which dispossession is an essential ingredient under Rule 99. Therefore, the option of filing a separate suit must be made available to him.

240. Another reason why we have taken the view that in the time period falling in "B", the recourse to a separate suit may be available to a third party in possession is because of the language employed in Rule 104. Rule 104, basically, makes any order under Rules 98, 100 or 101 subject to the result of any pending suit (which was instituted before the commencement of the proceedings under Rules 97 or 99) wherein the party against whom the order under Rules 98, 100 or 101 is made has already sought to establish a right through which he claims possession to the property in question. Therefore, Rule 104 itself indicates that a suit may be instituted by a person in possession of the property but before the commencement of the proceedings under Rules 97 or 99, with a view to not compel him to needlessly wait and agitate his rights only under these rules. In other words, Rule 104 also substantiates that in the period referred to as "B" in Scenario 2, the third party in possession may choose to file a separate suit.

241. However, we must point out that we have come across several decisions that refuse to hear the third parties in possession, in an application under Rule 97 or 99, merely owing to the fact that a separate suit has already been instituted by them for adjudication of the same rights. This would not be the right approach. If the third party who is offering resistance to delivery of possession or who has been dispossessed has chosen to participate in the proceedings under Rule 97 or 99, the executing court would be obligated to decide all questions including those of their right, title and interest in the concerned property. The fact that Rule 104 would make such an order under Rules 98, 100 or 101 subject to the result of the previously instituted suit would not be reason enough for the executing court to refuse to hear the third party in possession or the third party who is dispossessed under Rules 97 or 99, as the case may be.

242. One may question as to why there is a stricter treatment under the period referred to as 'D' in Scenario 2 i.e., why both the option of filing a separate suit or an application under Rule 99 becomes unavailable upon the lapse of the limitation period as prescribed under Article 128 of the Limitation Act, 1963. Such a treatment, in our opinion, would not be onerous. Let us look at Scenario 1 to substantiate this rationale better. As we have already explained previously, the progress of the execution proceedings, at least between the order of sale and the order of confirmation of sale is continuous and starts running from the date of the order of sale. In other words, the cause of action to file an application under Rule 89,

90 or 91 is not dependent on when a prospective applicant would acquire the knowledge of the order of sale. The mere fact that a person acquired knowledge of his property being attached and sold, after the confirmation of the sale under Rule 92(1), would not turn the clock back in his favour and make available the option to file an application under Rules 89, 90 or 91 respectively. Therefore, under Scenario 1, the third party's option to file separate suit after the sale is confirmed (albeit on narrower grounds i.e., that the sale was a nullity etc.) would be dependent on when he obtains the knowledge of his property having been sold and this suit would be governed by the general provisions of limitation which would be applicable to such suits.

243. On the other hand, the limitation period for filing an application under Rule 99 i.e., Article 128 of the Limitation Act, 1963, which is 30-days from the date of dispossession is deliberately short because it takes into consideration the fact that the date of dispossession comes to the immediate knowledge of the dispossessed party. In other words, the cause of action to file an application under Rule 99 and the date of his knowledge that he is dispossessed, is one and the same. Even according to the interpretation to dispossession given in ***Ashan Devi*** *(supra)*, the loss of control over the property which gives rise to the cause of action to file an application under Rule 99 would be the same date on which the applicant under Rule 99 would obtain knowledge of his dispossession. Therefore, although Article 128 of the Limitation Act, 1962 uses the words "*the date of the dispossession*", it is implicit that it alludes to the date of the knowledge of

dispossession considering the nature of the relief envisaged under Rule 99 and also considering that it is at the instance of a dispossessed party that the proceedings under Rule 99 come to life. It is under such circumstances, that a stricter standard is placed on such a dispossessed party to move the executing court within the limitation period as given under Article 128 and the option of filing a suit after the lapse of the said period is made impermissible under the period referred to in 'D'. Once knowledge of dispossession is obtained, the applicant under Rule 99 must act promptly. Furthermore, when Rule 99 has been specifically created for the purpose of addressing such a situation and is bound by a strict time-limit, it would not be appropriate to allow the filing of a separate suit for the same relief that the executing court would be competent to provide, while also by-passing the limitation prescribed under Article 128.

244. In light of the expanded scope given to an adjudication under Rule 101 by the 1976 amendment, it is our view that once an application under Rule 99 comes to be allowed and the person dispossessed by the auction-purchaser is put back into possession by the executing court through an order under Rule 100, Rule 92(5) or at least its underlying intent must be carried forward by the executing court such that the auction-purchaser, against whom the order under Rule 100 would operate is able to take back the purchase-money he paid at the auction-sale, with or without interest. This is because after the right, title or interest to the property is decided in favour of the dispossessed applicant under Rule 99, an auction-purchaser

would be subjected to a similar, if not an identical hardship insofar as getting back his purchase-money is concerned. Especially having elaborated that the jurisdiction afforded to the executing court under Rule 101 is wide and all questions relevant to the adjudication of the dispute would be decided just as it would be in a separate suit and the order passed would be deemed to be a decree, such a measure is all the more necessary to alleviate the concerns of the auction-purchaser.

245. However, one impediment in seamlessly carrying the intent of the Rule 92(5) forward, would be the potential non-impleadment of the decree-holder in the proceedings under Rule 99. In a situation where the auction-purchaser is the one who is dispossessing the third party, the application under Rule 99 may or may not include the decree-holder as a party. In case, the decree-holder is not impleaded, it would not be possible for the executing court to direct the decree-holder to return the purchase money to the auction-purchaser. It is suggested that a necessary amendment be brought in this regard regarding the impleadment of the decree-holder as a necessary party under Rule 99, even in cases where the auction-purchaser is the one who is dispossessing the applicant under Rule 99. This would also enable to decree-holder to resume or revive the execution proceedings at the stage at which the sale was ordered, unless the executing court directs otherwise.

246. In the present factual scenario, where the respondent nos. 1 and 2 respectively are *transferees pendente lite* of the judgment-debtor who

were kept completely unaware of the execution proceedings, as a result of which the sale came to be confirmed under Rule 92(1) and the possession was also handed over to the auction-purchaser appellants by the executing court, the respondent nos. 1 and 2 respectively must have preferred an application under Rule 99 within 30 days of their dispossession i.e., before 24.07.1989. They could have raised all their contentions regarding the title that they had over the suit property in such a proceeding under Rule 99. The fact that no order could have been passed under Rule 100 owing to the bar under Rule 102 was, by itself, no reason to allow the filing of a separate suit in that regard. This is also because in case the filing of such a separate suit praying for the relief of title and possession was allowed, that would have also been dismissed for the sole reason that the respondent nos. 1 and 2 respectively are *transferees pendente lite* of the judgment-debtor. In simple terms, their fate in the separate suit would also have been the same as under an application under Rule 99.

247. To summarize – the relief for declaration of title and possession prayed for by the *pendente lite transferees* of the judgment-debtor i.e., the respondent nos. 1 and 2 respectively, could not have been granted in their favour whether it was made in an application under Rule 99, in an application under Section 47 CPC or in a separate suit. Apart from the nuances relating to all these provisions which we have elaborated in detail, the very reason that their vendor was one of the judgment-debtors, would have disentitled them to the aforesaid reliefs. In short, since the relief(s) which they would be

entitled to could only include the recovery of money, irrespective of the provision they invoked, their prayer for the reliefs of declaration of title and/or possession could not have been granted to them.

VI. The decision of this Court in *T. Vijendradas (supra).*

248. Ms. Aparajita Singh, in her submissions, placed heavy reliance on the decision of this Court in ***T. Vijendradas*** *(supra)* and stated that the said decision would squarely cover the issue as regards the maintainability of the suit instituted by the respondent nos. 1 and 2 respectively.

249. In ***T. Vijendradas*** *(supra)*, this Court was directly concerned with the interpretation of Rule 92(4) of Order XXI CPC. Therein, one 'V' who was the owner of the suit property had transferred his right, title and interest in the property in favour of the plaintiff. The factum of this sale was not intimated to the Municipal authorities and the plaintiff's name was also not mutated in the revenue records. Property tax had not been paid in respect of the said property for a period of three years, both by V before transfer to the plaintiff and by the plaintiff after the transfer in her favour. With a view to enforce a statutory charge on the property, the Municipality instituted a suit under the relevant legislation against 'V'. The plaintiff was not made a party therein. The said suit was decreed and in execution, the property was put up for auction. Initially, since no buyer was available, the upset price was reduced twice and subsequently, the property was sold to the auction-purchaser, who was the wife of 'V'. The sale was also confirmed. It was alleged that,

during the first instance of reduction of the upset price, notice was not issued to the judgment-debtor in accordance with Rule 66 of Order XXI CPC and during the second instance, no order for reduction of upset price was even passed. It was only after the confirmation of sale that the plaintiff obtained knowledge of the execution proceedings and the resultant sale thereof. Therefore, she filed a suit for declaration and possession against 'V' and the auction-purchaser respectively. During the pendency of this suit, the auction-purchaser further sold the said property to one 'R' who then sold it in favour of the appellants therein. Both 'R' and the appellants, were impleaded in the said suit. However, the decree-holder-Municipality being a necessary party as per Rule 92(4), was not impleaded. Despite the same, the said suit was decreed in favour of the plaintiff.

250. In the plaint, the plaintiff alleged that 'V' had committed fraud i.e., (a) he had not intimated the transfer of the property in favour of the plaintiff while initially appearing in the suit instituted by the Municipality, (b) the notice which was eventually sent to the plaintiff was deliberately made to the wrong address, (c) 'V' had voluntarily suffered an *ex-parte* decree, (d) 'V' did not object to the reduction of the upset price during the sale in execution of the decree, (e) 'V' participated in the auction sale through his wife and subsequently, sold it to 'R' who in turn, sold it to the appellants.

251. What we understand to be the essence of the plaintiff's case in ***T. Vijendradas*** *(supra)* is that the original decree which was directly concerned with her property was not binding on her inasmuch as

the same was a nullity and without jurisdiction, having been passed without impleading her as a party despite the fact that the property had already been transferred in her favour before the institution of the suit by the Municipality. In other words, she was not a *pendente lite transferee* of the judgment-debtor-'V' but was a bona fide purchaser for value who was not hit by the doctrine of *lis pendens*. Therefore, not having an opportunity to assert her title either in the original suit or in an application under Rule 58 of Order XXI CPC for the want of knowledge, she was a "third party" as indicated under Rule 92(4). Being neither a party to the original suit, nor a representative of the judgment-debtor-'V', her suit would not be hit by Section 47 CPC either.

252. We are aware that the plaintiff therein seems to have raised several contentions as regards the reduction of the upset price, non-service of notice etc. as well. However, for reasons that we have elaborated upon in the preceding parts of this judgment, those are grounds that could only be raised in an application under Rule 90 within the prescribed limitation period under Article 127 of the Limitation Act, 1963. Therefore, even in ***T. Vijendradas*** *(supra)* these grounds falling with the scope of Rule 90, referred to by the plaintiff, must not be understood to have motivated this Court in holding the suit maintainable. The crux of the arguments of the plaintiff was only that the original decree was without jurisdiction and not binding on her.

253. A crucial question in ***T. Vijendradas*** *(supra)* was whether the non-impleadedment of the decree-holder-municipality would be

detrimental to the suit instituted by the plaintiff. When there was enough material to infer that the original decree was a nullity, this Court did not wish to non-suit the plaintiff only based on the ground that the decree-holder-municipality was not made a party to the suit instituted by her as per Rule 92(4). Moreover, it was not the Municipality themselves who had raised the issue of their non-impleadment; such an issue was raised by the appellants who were *pendente lite transferees*. It was in such a background that this Court had exercised its jurisdiction under Article 142 of the Constitution of India with a view to do complete justice between the parties and the suit was held to be maintainable. The relevant observations are thus:

> *"Conclusion*
> *33. The appellants and their predecessors, therefore, are also guilty of suppressio veri. Ordinarily a statute shall prevail over the common law principle. However, in a case of this nature, in the event of any conflicting interest, this Court in exercise of its equity jurisdiction under Article 142 of the Constitution of India is to weigh the effect of a fraud and the consequence of non-impleadment of a necessary party. We would hold that the scale of justice weighs in favour of the person who is a victim of fraud and, thus, we should not refuse any relief in his favour, only because he might have been wrongly advised. The purport and object for which Order 21 Rule 92(5) was enacted furthermore would be better subserved if it is directed that the respondents shall pay the amount which the court paid to the Municipality out of the amount of auction.*
>
> *34. We have noticed hereinbefore that one of the objects sought to be achieved in amending Order 21 Rule 92 was to do complete justice to the parties so as to enable the auction-purchaser to get back the amount from the decree-holder and revive the execution proceedings so that the decree-holder may proceed against the judgment-debtor for realisation of*

the decretal amount. In this case, the plaintiff-respondents had not claimed any relief against the Municipality. The Municipality's right to realise the amount of property tax together with interest, if any, is not in dispute. Although the liability of Venugopal in terms of the 1920 Act to pay the property tax continued, it has been accepted at the Bar that the plaintiff-respondents were also liable to pay the amount of property tax after the date of sale. In a case of this nature, therefore, the plaintiff-respondents can be directed to pay the amount of property tax by way of redemption of mortgage in favour of the Municipality.

35. If any amount is available with the court out of the amount received from the auction-sale, the same may be paid to the appellants. The appellants would also be otherwise entitled to file an appropriate suit as against Manickam and others."

254. The aforesaid decision in ***T. Vijendradas*** *(supra)* would not help the case of the respondent nos. 1 and 2 respectively herein. As opposed to the respondent nos. 1 and 2 respectively herein, the plaintiff in ***T. Vijendradas*** *(supra)* was a "third party" who was not a *transferee pendente lite* of the judgment-debtor and whose suit was not hit by the bar under Section 47 CPC. Furthermore, not having been dispossessed in the course of the execution proceedings, there was no question of availing the remedy under Rule 99 either. Hence, the suit instituted by the plaintiff therein fell under Scenario 1 (as we have illustrated above). Her suit was otherwise maintainable, and the only impediment in her way was the non-impleadment of the original decree-holder-municipality. In the unique facts and circumstances of case therein, this Court had exercised its plenary powers to only overcome the non-impleadment of such a necessary party in the separate suit. Along with that, with a view to keep the

intent underlying Rule 92(5) intact, the plaintiff therein was directed to pay the property tax to the decree-holder Municipality and the appellants were held to be entitled to any amount remaining from the auction-sale, along with the filing an appropriate suit for recovery of money against their vendors.

255. The facts and circumstances that we are faced with are entirely different and goes to the very root of the maintainability of the suit instituted by the respondent nos. 1 and 2 respectively. Their suit is non-maintainable not merely because of the failure to implead a necessary party but owing to the bar to a suit under Section 47 CPC and Rule 99 of Order XXI CPC respectively. Moreover, they are *transferees pendente lite* of the judgment-debtor, which fact, by itself, renders them ineligible to obtain any relief of declaration of title and/or possession.

G. CONCLUSION

256. A conspectus of the aforesaid detailed discussion on the position of law as regards the doctrine of *lis pendens* along with Rules 58, 89 to 92, 99 to 104 of Order XXI CPC respectively and Section 47 CPC is as follows:

(i.) Section 52 of the 1882 Act embodying the doctrine of *lis pendens* would apply to suits where *any* right to the property in question is *directly and specifically* in issue. Whether any right in the property was directly and specifically in question in the suit would depend on the facts and

circumstances of each case. The doctrine cannot blindly be made inapplicable to suits in which the plaint contains a specific averment that the mortgaged property be attached and sold in *lieu* of the decree or a charge be created on the property. If interpreted so, any judgment-debtor can render the decree incapable of execution by transferring his interest in the property during the pendency of such a suit.

(ii.) Rule 89 of Order XXI CPC provides an opportunity to any person claiming an interest in the property sold or a person acting for or on behalf of the persons having such interest, another opportunity to save the property from the clutches of the sale. A *sine qua non* for setting aside the sale under this rule would be the payment of the deposit as prescribed therein within a period of sixty days from the date of the sale. For the purposes of this rule, a *pendente lite transferee* of the judgment-debtor would also fall under the ambit of the phrase "*person claiming an interest in the property sold*".

(iii.) Rule 90 of Order XXI CPC provides that the sale shall be set-aside if there exists any material irregularity or fraud in publishing or conducting the sale. Furthermore, such material irregularity or fraud must cause a substantial injury to the applicant under Rule 90. In other words, there must be a direct nexus between the material irregularity or fraud and the substantial injury caused to the applicant.

(iv.) The words "*material irregularity in publishing or conducting it*" in Rule 90 would include any material irregularity or fraud occurring at a stage prior to the proclamation of sale as well, provided that the applicant did not have an opportunity to raise or could not have raised such a grievance at the appropriate time. Furthermore, the *mere* absence of or any defect in the attachment, by itself, cannot be a ground for setting aside the sale under Rule 90, unless substantial injury is proved. The applicant must make specific averments as regards the alleged irregularities or fraud, and convince the executing court that a substantial injury has been caused to him as a consequence.

(v.) The absence of a saleable interest on the part of the judgment-debtor to the suit property cannot be brought in as a ground under Rule 90 of Order XXI CPC. Such a ground would squarely fall within the ambit of Rule 58 of Order XXI CPC, if the sale is yet to be confirmed.

(vi.) Rule 92(3) of Order XXI CPC states that no person against whom an order under Rule 92 is made (either confirming the sale under Rule 92(1) or setting it aside under Rule 92(2)) can institute a separate suit in that regard. However, there is a very narrow scope for a person to file a separate suit despite the bar under Rule 92(3). The reason for such a separate suit must be that the execution proceedings and the

sale was without jurisdiction and therefore, a nullity and not binding on the plaintiff who has instituted a separate suit.

(vii.) Having said so, before holding such a separate suit instituted by a plaintiff alleging that the entire execution proceedings was without jurisdiction and therefore, the sale was a nullity, maintainable, courts must be vigilant in ensuring that the plaintiff was not a party to the original decree or a representative of a party to the original decree, as stated in Section 47 CPC. If so, instead of filing a separate suit, such persons must prefer an application under Section 47 CPC. Upon any failure to do so, their separate suit would be hit by the bar contained in Section 47 CPC which specifically uses the words "*and not by a separate suit*".

(viii.) The term "third party" under Rule 92(4) would mean a party other than the judgment-debtor, decree-holder or the auction-purchaser and would refer to a party who has not had his right, title or interest *vis-à-vis* the property in question adjudicated under Rule 58, Rule 97 or Rule 99 of Order XXI CPC respectively. To put it very simply, the term "third party" under Rule 92(4) would refer to a party who is extraneous to the original suit proceedings and the proceedings under Order XXI CPC, and who either has not had his right, title or interest adjudicated or having the opportunity to have his right, title or interest adjudicated, has not availed such a remedy within the required time.

Such a "third party" would also be someone who falls outside the scope of Section 47 CPC.

(ix.) Rule 92(4) is not a provision which confers any right to the third party to institute a suit for challenging the title of the judgment-debtor to the property which is subject to the execution proceedings. It is merely a procedural provision which states that such a suit must be instituted against the auction-purchaser, where the decree-holder and judgment-debtor would be necessary parties.

(x.) When a party other than the judgment-debtor, including a third party, is dispossessed during the course of execution of a decree, the only remedy for such a dispossessed party would lie in filing an application under Rule 99 complaining of its dispossession. In such an application, all questions including that of the right, title and interest of the parties in the proceeding, to the property, would be examined by the executing court.

(xi.) The words "*may*" used in Rule 99 along with the words "*and not by a separate suit*" used in Rule 101, must not be read to mean that a party who has been dispossessed has two options i.e., to either prefer an application under Rule 99 or to file a separate suit, the moment they are dispossessed. This would defeat the underlying object of the amendment made to the scheme of Rules 99 to 104 respectively wherein

the executing court has been specifically empowered to look into the questions relating to the right, title and interest of the parties, quite akin to that which would have been done by way of a separate suit. Once the period of limitation for preferring an application under Rule 99 lapses, the person who has been dispossessed in the course of the execution of the decree, including a third party, cannot file a separate suit to circumvent or by-pass the said prescribed period of limitation.

(xii.) Rule 102 prevents the executing court from passing any order under Rule 100 if it is found that the applicant under Rule 99 is a *transferee pendente lite* of the judgment-debtor. This again, cannot be construed as giving leeway to such a person to institute a separate suit. We say so for the simple reason that, even in the separate suit, the law would not look favorably upon a *pendente lite transferee*, and no relief of declaration of title and/or possession would be granted to him. His fate would be the same as under an application under Rule 99.

(xiii.) Therefore, - *First,* the separate suit instituted by the respondent nos. 1 and 2 respectively would be non-maintainable because they are representatives of the judgment-debtor and the bar envisaged under Section 47 CPC would squarely apply to their case. *Secondly*, having not availed the remedy under Rule 99 of Order XXI CPC

within time, the separate suit instituted for the same relief(s) would be barred. *Thirdly*, even if the aforesaid two reasons assigned by us could be said to not affect the suit instituted by the respondent nos. 1 and 2 respectively, they would still not be entitled to the reliefs claimed owing to them being *pendente lite transferees* of the judgment-debtor whose transaction would be hit by the doctrine of *lis pendens.*

257. In light of the aforesaid, the High Court in its impugned judgment could be said to have committed an error by preoccupying itself with the allegations of fraud made by the respondents nos. 1 and 2 respectively and ignoring the true essence of the provisions under Section 47 and Order XXI CPC respectively, in holding the suit to be maintainable. If the approach taken by the impugned decision i.e., that fraud vitiates everything, is endorsed, especially in the context of an auction sale conducted by the executing court, then Rule 90 of Order XXI CPC which is time-bound and which deals with the very same aspect i.e., material irregularities or fraud in conducting or publishing the sale, would be rendered obsolete. Courts must be vigilant as to when the plaintiff is invoking grounds which otherwise could be said to fall under the scope of Rule 90 of Order XXI CPC and when the grounds raised by the plaintiff are such that the entire execution proceedings and the consequent sale suffered from the want of jurisdiction and/or was a nullity.

258. The impugned judgment also seems to have missed the key aspect that the respondent nos. 1 and 2 respectively are *transferees pendente lite* of one of the judgment debtors.

259. In the result, the appeal succeeds and is hereby allowed.

260. Before we close the present matter, we consider it apposite to point out that the peculiarity of the facts and circumstances of this case has not escaped our attention. We have given a considerable amount of thought and we believe that we should put all the disputes between the parties herein to rest, once and for all. We seriously considered whether we could grant any other relief to the respondent nos. 1 and 2 respectively, at this stage.

261. What has predominantly weighed with us is that the sale deeds in favour of the respondent nos. 1 and 2 respectively were executed by their vendor in the year 1985. We are now in the year 2025. More than 40 years have passed by. It would be a long and taxing battle for respondent nos. 1 and 2 respectively to recover the sale consideration paid by them to the respondent no. 3.

262. We have taken note of the fact that the original vendor i.e. respondent no. 3 before us, was one of the judgment-debtors. We are also cognizant of the fact that appellants-auction purchasers before us are none other than the nephews of the original vendor i.e., respondent no. 3. Amongst assigning several other reasons, we have already indicated that the factum of such a relationship between the auction-purchasers and judgment-debtor(s) could not

have been raised as a ground to make the separate suit instituted by the respondent nos. 1 and 2 respectively, maintainable. All such allegations may constitute material irregularity or fraud in publishing or conducting the sale, which would instead fall within the purview of Rule 90 of Order XXI CPC and such an application has to be made in a timely manner before the executing court. However, in the course of assessing whether we could direct the payment of any amount from the respondent no.3-vendor, the counsel for the appellants-auction purchasers fairly conceded that since his clients are the nephews of the vendor, they would be willing to pay a fair amount to the respondent nos. 1 and 2 respectively.

263. In such circumstances referred to above, we do not wish to subject the respondent nos. 1 and 2 respectively to a fresh yet arduous round of litigation for the limited relief of recovery of money from the original vendor i.e., respondent no.3.

264. In the peculiar facts and circumstances of the present case and with a view to do substantial justice, we direct that the appellants pay a sum of Rs. 75,00,000/- to the respondent nos. 1 and 2 respectively, within a period of 6 months from the date of this judgment. The failure to pay the aforesaid sum within such a period would attract an interest at the rate of 12% per annum till the date of payment.

265. In the event of any default by the appellants herein in complying with the aforesaid directions, the respondent nos. 1 and 2 respectively, would be at liberty to move to this Court.

266. Pending applications, if any, shall stand disposed of.

267. Registry shall circulate one copy each of this judgment to all the High Courts.

…….J.
(J. B. PARDIWALA)

……..J.
(R. MAHADEVAN)

New Delhi,
15th December, 2025.