

SIDDAGANGAIAH (D) THR. LRS.

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v.

N.K. GIRIRAJA SHETTY (D) THR. LRS.

(Civil Appeal No. 5007 of 2018)

MAY 11, 2018

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[ARUN MISHRA AND UDAY UMESH LALIT, JJ.]

Code of Civil Procedure, 1908:

Or.XXI r.90, r/w s.47 – Suit for title and declaration filed on the basis of purchase of suit property from defendant no.1 – Defendant no. 2 who is wife of defendant no. 1 contended that defendant no. 1 could not have sold the suit property to plaintiff as she had obtained charge on the suit property in a maintenance suit – Her case was that her husband in collusion with the plaintiff orchestrated a nominal and fictitious sale deed and the said sale deed was executed during the pendency of maintenance suit and, thus, was hit by s.52 of TP Act – The said suit was finally held in her favour and she obtained decree and the property was auctioned and successfully purchased by her in court auction – Defendant no. 1 filed an application under Or.XXI, r.90 and plaintiff also filed an application under s.47 r/w Or.XXI, r.90 to set aside the sale – Application of defendant no.1 was dismissed as not pressed – Application by plaintiff for setting aside the sale was also dismissed in default of appearance and sale was confirmed – Defendant no.2 sold the suit property to appellant-defendant no.3 – Plaintiff suppressing the factum of having filed application under Or.XXI, r.90 and its dismissal filed suit for declaration of title and restoration of possession – Whether the suit was hit by principle of res judicata in view of dismissal of application under Or.XXI, r.90 r/w s.47 – Held: Where an application has been filed under Or.XXI, r.90 to set aside a sale on the ground of material irregularity, and the sale is confirmed under r.92(1) of Or.XXI, the objector is precluded by virtue of the provisions under Or.XXI, r.92(3) from bringing a suit to set aside the sale on the same grounds – The auction purchase made by defendant no.2 (decree-holder) had attained finality – Confirmation of sale was not questioned by the plaintiff – Thus, no

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- A *relief could have been granted – The earlier orders attained finality and, therefore, operated as a bar for the entertainment of the fresh suit – As regards question of lis pendens, on the date of purchase of suit property by plaintiff, the suit filed by defendant no.2 was pending – Thus, the provisions contained in s.52 would clearly apply to the case – Suit for title and declaration liable to be dismissed –*
- B *Transfer of Property Act, 1882 – s.52 – lis pendens – Doctrine of res judicata.*

Allowing the appeal, the Court

- C **HELD: 1.1 Sub-rule (1) of Order XXI Rule 90 makes it clear that when 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 ratable 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. As provided in sub-rule (2)**
- D **of Rule 90 of Order XXI merely on the ground of irregularity or fraud, the sale shall not be set aside unless the substantial injury has been caused to the objector by reason of such irregularity or fraud and such an objection should be the one which could not have been raised before the date on which the proclamation of**
- E **sale was drawn up as provided in Order XXI Rule 90 sub-rule (3) and mere defect or absence of attachment of the property shall not be a ground for setting aside a sale. It is necessary to prove the substantial injury where fraud or material irregularity has taken place whereby injustice had been suffered. In the present case, the application under Order XXI Rule 90 was filed by original**
- F **plaintiff which was dismissed for default in appearance. It was nonetheless dismissal of the application so filed. It was not a case set up that the decree passed in maintenance case was obtained by fraud and substantial injury thereby has been caused. [Para 23] [470-C-F]**

- G *Rajender Singh v. Ramdhar Singh & Ors. AIR 2001 SC 2220 – relied on.*

1.2 Where an application has been filed under Rule 90 Order XXI CPC to set aside a sale on the ground of material

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irregularity, and the sale is confirmed under Rule 92(1) of Order XXI, the objector is precluded by virtue of the provisions under Order XXI Rule 92(3) from bringing a suit to set aside the sale on the same grounds. [Para 24] [470-G] A

Brahayya v. Appayya, (1921) 44 Mad. 351 : 62 IC 203 : AIR 21 Mad. 121, *Ma Saw v. Maung Kyaw* AIR 28 Rang 18; *Nand Kishore v. Sultan* AIR 1926 Lah 165 – approved. B

1.3 When the auction purchaser is the decree-holder himself and when an application is made to set aside the sale on a ground other than that covered by Rule 90 and no application has been made under Rule 89, the case would fall under section 47. Thus, it would depend upon the grounds which are urged in the application. It is permissible to join a claim to set aside a sale on the ground of material irregularity under Order XXI, Rule 90 with a claim under section 47 for a declaration that the sale is a nullity as the decree was passed after the death of the judgment-debtor. Objection by legal representatives of deceased judgment-debtor that suit land was ancestral property and sale was not binding on them can be raised under section 47 read with Order XXI Rule 90. However, it would depend upon the nature of the objection whether it was covered under Rule 90 of Order XXI CPC or not. There can be restoration of the petition dismissed for default filed under Order XXI Rule 90 and thereafter if sale has been confirmed, it is provided under Order XXI Rule 92(3) that no suit to set aside an order made under Rule 92(1) shall be brought by any person against whom such an order is made. Order XXI Rule 92(1) provides that where an application has been filed under Order XXI Rule 89, 90 or 91, same has been disallowed, the court shall make an order confirming the sale and thereupon the sale shall become absolute, and no suit shall lie as per the mandate of sub-rule (3) of Rule 92 of Order XXI 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 C
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A sale is an order appealable. In case the court has set aside or refused to set aside a sale that would include a case where an application under Order XXI Rule 89, 90 or 91 has been dismissed for default. [Para 25] [471-A-F]

Superior Bank Ltd. v. Budh Singh, (1924) 22 All LJ 413 ; *Akshia v. Govindarajulu* (1924) 47 MLJ 549 – approved.

2.1 In the instant case admittedly an application was filed by original plaintiff under Order XXI, 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 XXI Rule 92(3) would operate as a bar for the entertainment of the fresh suit on the ground so urged. [Para 26] [471-G-H; 472-A-B]

2.2 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 XXI Rule 90(1) 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 XXI Rule 90. Dismissal of the same would preclude him to file a fresh suit, it was incumbent upon him to question the court auction on any permissible grounds necessary for the entertainment of fresh suit but that has not been done. Order VI Rule 4 CPC provides that the plea of fraud, misrepresentation, and collusion has to specifically set out in the pleadings before any finding can be given on the same. There is no evidence on record for substantiating the plea which itself was not taken, it has neither

been substantiated. Thus, the first appellate court and the High Court have committed gross illegality by giving the finding with respect to fraud and collusion of the decree-holder and judgment debtor in the court auction so held. The auction purchase made by decree-holder had attained finality. Confirmation of sale was not questioned by the plaintiff. Thus, no relief could have been granted and the earlier orders have attained finality and operate as a bar for the entertainment of the fresh suit. [Para 27, 28] [472-B-D, E-G]

2.3 Coming to the question of *lis pendens*, decree-holder 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 decree-holder was pending. Thus, the provisions contained in section 52 would clearly apply to the case. [Para 29] [472-G-H; 473-A-B]

Nagubai Ammal & Ors. v. B. Shama Rao & Ors.
AIR 1956 SC 593 – relied on.

3. Section 39 of TP Act clearly makes out that charge of maintenance can be enforced against the immovable property held by a transferee. In the instant case, the transferee was not put in possession of the property is apparent from the plaint and possession of defendant No.1. The sale also does not appear to be *bona fide*. It was clear with the intent to defeat the claim of the wife for maintenance that is why possession had not been handed over. The case of the plaintiff that though sale deed was executed in 1974, defendant No.1 again took forcible possession in 1976, is not worthy of acceptance. Apart from that it is not so pleaded in the application under Order XXI Rule 90 that he was not aware of the pendency of the suit at the time of execution of the sale deed on 9.11.1974. He was a close friend of defendant No.1 and was obviously aware of the factum of litigation pending since 1968. Thus, he could not be said to be a *bona fide* purchaser at all. Apart from that, the application under Order XXI Rule 90 read with section 47 CPC containing the said plea stood dismissed. [Para 31] [474-B-E]

- A *Sadhu Singh v. Gurdwara Sahib Narike & Ors.* (2006) 8 SCC 75 – held inapplicable.
- Nani Gopal Paul v. T. Prasad Singh & Ors.* (1995) 3 SCC 579; *Lal Chand v. VIIIth Addl. District Judge & Ors.* (1997) 4 SCC 356 – referred to.
- B 4.1 In the instant case, there is no admission after parting with the interest made in the execution proceedings *inter se* husband and wife. The auction was held by the court in accordance with law. It was not the case set up that the decree passed in the maintenance suit was based upon fraud or a collusive one. Nor
- C was such a case so set up with respect to the auction of the properties in the execution of the decree. On the contrary, the husband had preferred an appeal against the judgment and decree passed in the maintenance case, which was dismissed on merits. [Para 40] [476-G-H; 477-A]
- D 4.2 After parting with the interest, no admission with respect to the interest which has been parted away is admissible, Section 18 of Evidence Act is not attracted in the fact-situation of the instant case. The so-called settlement entered into between the husband and wife on 5.8.1978 has not been pressed into service by either and has been disowned by the husband and wife
- E both. They set up a case that no such settlement had been entered into nor any claim had been made by them on the basis thereof. Had that been the case, the provisions of section 18 of the Evidence Act would have been attracted. [Para 40] [477-F-G]
- F *V. Swarajyalaxmi & Ors. v. Authorised Officer, Land Reforms*, AIR 2003 SC 2347: [2003] 3 SCR 575 – held inapplicable.

Case Law Reference

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|---|----------------------|-------------|--------------|
| | (1995) 3 SCC 579 | referred to | Paras 21, 37 |
| G | AIR 2001 SC 2220 | relied on | Para 23 |
| | (1921) 44 Mad. 351 | approved | Para 24 |
| | AIR 1926 Lah 165 | approved | Para 24 |
| | (1924) 22 All LJ 413 | approved | Para 25 |
| | (1924) 47 MLJ 549 | approved | Para 25 |
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| AIR 1956 SC 593 | relied on | Para 29 | A |
| (2006) 8 SCC 75 | held inapplicable | Para 35 | |
| (1997) 4 SCC 356 | referred to | Para 39 | |
| [2003] 3 SCR 575 | held inapplicable | Para 41 | |

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5007 of 2018. B

From the Judgment and Order dated 18.12.2014 of the High Court of Karnataka at Bengaluru in Regular Second Appeal No. 2633 of 2011.

Raju Ram Chandran, Sr. Adv., Joseph Pookkatt, Sheshagiri Rao, Dhawesh Pahuja, M/s. Ap & J Chambers, Adv. for the Appellant. C

S. S. Nagananda, Sr. Adv., Shyam Koundinya, Ms. K. V. Bharathi Upadhyaya, Adv. for the Respondent.

The Judgment of the Court was delivered by D

ARUN MISHRA, J. 1. Leave granted.

2. The appeal has been preferred by the defendant. Backdrop facts indicate that one Thopamma wife of Siddagirigowda filed suit O.S. No.245/1968 against her husband in the Court of Munsiff, Doddaballapur for grant of maintenance allowance at the rate of Rs.300 per month and for creating a charge on 13 properties mentioned in the plaint schedule. The suit was filed on 17.1.1968. During the pendency of the said suit said Siddagirigowda husband of Thopamma executed a sale deed for a sum of Rs.10,000/- in respect of survey No.11 admeasuring 5 acres 18 guntas and survey No.68/1 admeasuring 18 guntas, item Nos. 10 and 13 in the aforesaid suit in favour of N.K.Giriraja Shetty, father of respondent No.1. On 6.2.1975, a declaration of handing over possession was executed by Siddagirigowda in favour of purchaser regarding delivery of possession of the properties. E F

3. The suit filed by Thopamma *i.e.* O.S. No.245 of 1968 was decreed on 24.6.1976 that is by granting a maintenance allowance of Rs.100/- per month recoverable from her husband from the date of filing of the plaint till realisation and charge were created on the suit schedule properties including the property which was sold to N.K. Giriraja Shetty on 9.11.1974. The first appeal against the same was dismissed on merits on 1.9.1976. G H

- A 4. As the decree was not satisfied, Thopamma, the decree-holder filed an execution petition for enforcement of the decree of maintenance passed in the aforesaid suit. On 28.9.1977, Thopamma filed an application under Order XXI Rule 72 of the Code of Civil Procedure, 1908 (for short, 'CPC') in Court to grant permission to bid at the time of auction of the properties by the court in the execution case by setting off the claim.
- B The executing court permitted Thopamma to bid with respect to item Nos.1, 7, 8 and 13 by setting off the maintenance amount. The maintenance arrears had amassed to Rs.11,600/-.
- C 5. On 5.10.1977, auction of the schedule properties was held and Thopamma purchased item Nos.1, 7, 8 and 13 for Rs.10,185/-.
- D 6. Siddagirigowda filed an application under Order XXI Rule 90 CPC on 16.11.1977. Father of respondent No.1, N.K. Giriraja Shetty also filed an application under section 47 read with Order XXI Rule 90 CPC to set aside the sale held on 5.10.1977. On 5.1.1978 settlement deed was executed between Siddagirigowda and Thopamma by which item Nos.13, 5, 10 and 12 in O.S. No.245 of 1968 and Khasra No.12 (house) were allotted to Thopamma. However, no interest being claimed on the basis of the deed, and its execution had been denied by the parties to it.
- E 7. On 31.3.1978, an application filed by Siddagirigowda was dismissed as not pressed under Order XXI Rule 90 whereas the application filed by N.K. Giriraja Shetty in execution case for setting aside the sale was dismissed in default of appearance and sale was confirmed in favour of Thopamma.
- F 8. N.K. Giriraja Shetty suppressing the factum of filing of the application under Order XXI Rule 90 read with section 47 and its dismissal filed Suit No.109 of 1978 for the declaration of title and restoration of possession in the Court of Civil Judge, (Junior Division), Nelmangala. The suit was later on renumbered as O.S. No.85 of 1989. However, sale certificate was issued by the executing court in favour of Thopamma
- G on 1.1.1979 and possession certificate on 29.1.1979 and possession was delivered to her.
- H 9. The plaintiff, N.K. Giriraja Shetty averred in O.S. No. No.85 of 1989 that he had *bona fide* purchased the property for a sum of Rs.10,000/- on 9.11.1974. Possession was also delivered, entries were made in the pahanies, he continued in possession till 1976. Thereafter,

defendant dispossessed him in the year 1976. Defendant promised to hand over the possession as such the plaintiff did not take any action. However, he entered into a deed of settlement in favour of his wife on 5.1.1978 of which he had no right. The title continued to vest with the plaintiff. He prayed for mesne profits also. Plaintiff had later on amended the plaint and averred that defendants have colluded with each other in making the plaintiff to invest heavy amount for purchasing properties by suppressing the fact that there was a charge of maintenance on the properties in O.S. No.245 of 1968. He was a *bona fide* purchaser of the property for value. Plaintiff prayed for a declaration that he was the absolute owner of the scheduled properties, prayed for restoration of possession and mesne profits also. A suit was filed with respect to survey Nos.11 and 68/1 admeasuring 5 acres 39 guntas and 18 guntas respectively.

10. In the written statement filed by Siddagirigowda, defendant No.1, it was contended that sale deed dated 9.11.1974 was a nominal sale deed executed on collateral security and that sum of Rs.10,000/- was borrowed from the plaintiff, Siddagirigowda denied execution of settlement deed dated 5.1.1978 between him and wife Thopamma. There was a charge on properties in O.S. No.245 of 1968 which was decreed and possession of the land was never given to the plaintiff.

11. Thopamma, defendant No.2 in her written statement denied plaintiff averment and contended that scheduled property belonged to the joint family of Siddagirigowda, denied the execution of settlement deed dated 5.1.1978 and that it was not binding on her. She did not claim any right in the suit schedule property under the said settlement deed. It was contended that maintenance suit O.S. No.245 of 1968 was decreed and there was a charge on the properties. The plaintiff was a friend and an associate of her husband who was fully aware of the maintenance suit and to defeat the maintenance claim, plaintiff and her husband in collusion orchestrated a nominal and fictitious sale deed dated 9.11.1974. The said sale deed was executed during the pendency of the *lis* and was hit by section 52 of the Transfer of Property Act, 1882 (for short 'TP Act'). She had purchased the property through court auction in execution. Other averments made in the plaint were also denied. On 19.10.1981 a compromise petition was filed between the plaintiff and Siddagirigowda, defendant No.1 wherein defendant No.1 sought withdrawal of the case set up against the plaintiff in the written statement.

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A 12. Defendant No.2, Thopamma, amended her written statement on 5.3.1987 contending that the plaintiff was not an agriculturist. He was a businessman dealing in cloth business, gold and silver jewellery. Thus, he was not entitled to purchase agricultural land vide sale deed dated 9.11.1974.

B 13. Thereafter, plaint was amended to set up the plea of the *bona fide* purchaser for value which fact was denied by Thopamma in her additional written statement. The plaintiff had the knowledge of the pendency of maintenance suit of 1968.

C 14. On 23.6.1995, defendant No.1 took a somersault and filed a counterclaim that sale deed was nominal and fictitious and he was ready to get the reconveyance deed executed. The plaintiff filed objections to the counterclaim that it was not maintainable, barred by limitation and plaintiff was not entitled after entering into a compromise, to file a counterclaim.

D 15. On 7.11.1996, Thopamma executed a registered deed of sale for a consideration of Rs.2,20,000/- in favour of Siddagangaiah, defendant No.3. Defendant No.1 died on 25.10.1998. Thereafter, Thopamma also died on 17.2.2000.

E 16. The purchaser Siddagangaiah, impleaded defendant No.3 filed a written statement in O.S. No.85 of 1989 contending that he was a *bona fide* purchaser for value. Thopamma had purchased the properties in the auction dated 5.10.1977. Sale certificate was issued and possession handed over on 29.1.1979. The application under section 47 read with Order XXI Rule 90 filed by the plaintiff was dismissed. Plaintiff had not challenged the auction sale held by the court in favour of Thopamma.

F Plaintiff was well aware of rejection of his application under Order XXI Rule 90. He did not file an appeal against the said dismissal order and filed a suit suppressing the fact, same was not maintainable.

G 17. The trial court by judgment and decree dated 5.1.2007 dismissed the suit. It was held that the plaintiff was not the absolute owner of the properties and the application under Order XXI Rule 90 read with section 47 was dismissed. That order remained unchallenged. The pleadings in plaint were silent with regard to the said application filed as well as its dismissal, besides the adjacent owners were not examined. Auction sale by Court was not questioned in the plaint. The

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sale was hit by section 52 of the TP Act and the suit was barred by *res* A
judicata. The plaintiff preferred an appeal being R.A. No.123 of 2009
in the first appellate court. The appeal had been allowed vide judgment
and decree dated 4.11.2011. The first appellate court held that *lis pendens*
was not applicable. There was confirmation of sale and charge was
created by fraud and collusion. The application under Order XXI Rule B
90 was dismissed in default of appearance and not on merits by a
speaking order. Against the decision of the first appellate court, a regular
second appeal was filed and the same was dismissed vide judgment and
order dated 18.12.2014, hence the present appeal.

18. Shri Raju Ram Chandran, learned senior counsel appearing C
on behalf of the appellants, urged that the suit was hit by the principle of
res judicata in view of the dismissal of the application under Order XXI
Rule 90 CPC read with section 47 CPC, it could not be said to be
maintainable. The application was dismissed on 31.3.1978 in default of
appearance. The auction sale held by the court had remained
unchallenged. It has attained finality. Separate suit for declaration and D
possession could not be said to be maintainable.

19. It was also urged that the decree in favour of defendant No.2,
Thopamma attained finality and the dismissal of the application under
Order XXI Rule 90 operates as a bar on entertainment of the suit. The
plaintiff did not come to the court with clean hands and had suppressed E
the material fact of dismissal of the application and auction held by the
court. It was however urged that the sale in 1974 was hit by *lis pendens*.
The property was purchased in 1974 whereas the suit was filed in 1968
by defendant No.2 regarding maintenance and for the creation of the
charge on the schedule properties. The sale was clearly subject to the F
provisions contained in section 52 of the TP Act. *Lis* commenced from
the date of presentation of the plaint. The plaintiff could not be said to be
a *bona fide* purchaser without notice. He was aware of the suit being a
friend of the husband of Thopamma and had also filed an application
under Order XXI Rule 90. Possession was not handed over to him under
the so-called sale deed. The High Court erred in holding that the charge G
was created on the date of the decree in the suit *i.e.*, O.S. No.245 of
1968. The High Court has not correctly interpreted the provisions of the
Hindu Adoption & Maintenance Act, 1956 (for short, "the Act") nor the
provisions of the TP Act have been appropriately considered.

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A 20. Shri S.S. Nagananda, learned senior counsel appearing on behalf of respondents, contended that the charge was created only on the date of the decree in O.S. No.245 of 1968 on 24.6.1976. There was no charge on the date of execution of sale deed in 1974. Having regard to sections 39 and 100 of the TP Act as the plaintiff was a *bona fide* purchaser, the charge could not have been enforced against the properties held by him. The absolute title was conveyed.

 21. Learned senior counsel has also relied upon sections 27 and 28 of the Act so as to contend that it is only a decree which creates a charge that too not against a *bona fide* purchaser. It was not open to Thopamma to question the sale deed executed by the plaintiff. It was further contended that the court held an auction on 5.10.1977 and confirmed it on 31.3.1978 in a mechanical manner without a speaking order, ignoring the sale deed dated 9.11.1974, decree holder was bound to disclose to the executing court the factum of execution of sale deed. The husband and wife had acted in collusion and fraudulently in order to defeat the right of the *bona fide* purchaser for consideration. The decreeholder Smt. Thopamma had selectively chosen four items of the suit property which included even the subject property purchased by the plaintiff on 9.11.1974. As the sale was never questioned it was binding. The dismissal of the suit by the trial court was illegal. The application was dismissed under Order XXI Rule 90 in default. There was no adjudication of same on merits. Thus, Smt. Thopamma failed to prove that she got a valid title to the property under the court auction dated 5.10.1977 and confirmation of sale. Judgment debtor, husband had challenged the decree in maintenance case of 1968 in appeal and stay was granted subject to deposit of Rs.5,000/- which was not deposited. Thus, auction so held could not be said to be valid. No fresh sale proclamation was issued for holding an auction sale on 5.10.1977, it was necessary to obtain fresh sale orders from the court. The sale was void. As Siddagirigowda had no saleable interest in the property for which auction was held by the court, non-compliance with the mandatory procedure can be considered by the court *suo-moto* as held in *Nani Gopal Paul v. T. Prasad Singh & Ors.* (1995) 3 SCC 579. The court cannot be a mute spectator in view of the manifest illegality committed while conducting the court sale. There are concurrent findings by the first appellate court and High Court that the sale made in the execution was fraudulent and collusive. No case for interference in the findings of

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fact is made out. Husband of the decree-holder had withdrawn the application under Order XXI Rule 90 on 31.3.1978. There were no other bidders except Thopamma. The application under Order XXI Rule 90 filed by the plaintiff was dismissed for non-prosecution. The order was not on merits. Thus, there was no bar on entertainment of the suit. The claim of the appellant was false as the husband of decree-holder Thopamma had filed a declaration in Form 7 claiming to be a tenant under N.K. Giriraja Shetty which claim was rejected vide order dated 24.8.1981 by the Land Tribunal. It was held that there was no tenancy and he had sold the property to N.K. Giriraja Shetty. Defendant No.1 husband of Thopamma had filed a compromise petition in favour of N.K. Giriraja Shetty and later on filed a counterclaim that abated due to death of Siddagirigowda and of his wife Thopamma, and none appeared to prosecute the same. Section 18 of the Indian Evidence Act, 1872 (for short, "the Evidence Act") had also been relied upon to contend that after parting with the interest, no admission could have been made, and there was non-compliance of Order XXI Rule 66 CPC, and filing of application order under Rule 90 CPC by plaintiff would not constitute admission of irregularities and they were not cured. The plaintiff was entitled to the decree that has been rightly granted. No case for interference was made out in the appeal.

22. The first question for consideration is whether owing to the dismissal of the application filed under Order XXI Rule 90 by the plaintiff, the present suit could be said to be maintainable. The fact is not in dispute that after the court has held the auction, an application under Order XXI Rule 90 was filed by the plaintiff, it was dismissed in default of appearance on 31.3.1978. Order XXI Rule 90 CPC is extracted hereunder:

“[R. 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

A 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.

B *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.]”

C 23. Sub-rule (1) of Order XXI Rule 90 makes it clear that when 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 ratable 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. As provided in sub-rule (2) of Rule 90 of Order XXI merely on the ground of irregularity or fraud, the sale shall not be set aside unless the substantial injury has been caused to the objector by reason of such irregularity or fraud and such an objection should be the one which could not have been raised before the date on which the proclamation of sale was drawn up as provided in Order XXI Rule 90 sub-rule (3) and mere defect or absence of attachment of the property shall not be a ground for setting aside a sale. It is necessary to prove the substantial injury where fraud or material irregularity has taken place whereby injustice had been suffered. It was held by this Court in *Rajender Singh v. Ramdhar Singh & Ors.*, AIR 2001 SC 2220 that mere inadequacy of price is not a ground for setting aside court sale. In the present case, the application under Order XXI Rule 90 was filed by original plaintiff which was dismissed for default in appearance. It was nonetheless dismissal of the application so filed. It was not a case set up that the decree passed in maintenance case was obtained by fraud and substantial injury thereby has been caused.

G 24. Where an application has been filed under Rule 90 Order XXI CPC to set aside a sale on the ground of material irregularity, and the sale is confirmed under Rule 92(1) of Order XXI, the objector is precluded by virtue of the provisions under Order XXI Rule 92(3) from bringing a suit to set aside the sale on the same grounds as held in *Brahayya v. Appayya*, (1921) 44 Mad. 351 = 62 IC 203 = AIR 21 Mad. 121, *Ma Saw v. Maung Kyaw*, AIR 28 Rang 18; *Nand Kishore v. Sultan*, AIR 1926 Lah 165.

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25. When the auction purchaser is the decree-holder himself and when an application is made to set aside the sale on a ground other than that covered by Rule 90 and no application has been made under Rule 89, the case would fall under section 47 as has been laid down in *Superior Bank Ltd. v. Budh Singh*, (1924) 22 All LJ 413; *Akshia v. Govindarajulu* (1924) 47 MLJ 549. Thus, it would depend upon the grounds which are urged in the application. It is permissible to join a claim to set aside a sale on the ground of material irregularity under Order XXI, Rule 90 with a claim under section 47 for a declaration that the sale is a nullity as the decree was passed after the death of the judgment-debtor. Objection by legal representatives of deceased judgment-debtor that suit land was ancestral property and sale was not binding on them can be raised under section 47 read with Order XXI Rule 90. However, it would depend upon the nature of the objection whether it was covered under Rule 90 of Order XXI CPC or not. There can be restoration of the petition dismissed for default filed under Order XXI Rule 90 and thereafter if sale has been confirmed, it is provided under Order XXI Rule 92(3) that no suit to set aside an order made under Rule 92(1) shall be brought by any person against whom such an order is made. Order XXI Rule 92(1) provides that where an application has been filed under Order XXI Rule 89, 90 or 91, same has been disallowed, the court shall make an order confirming the sale and thereupon the sale shall become absolute, and no suit shall lie as per the mandate of sub-rule (3) of Rule 92 of Order XXI CPC against whom such an order is made. The order confirming the sale may be made either where no application is made at all to set aside the sale or where an application is made and disallowed may be that it is dismissed for default. No suit shall lie in either case to set aside the order confirming the sale. The refusal to set aside a sale is an order appealable. In case the court has set aside or refused to set aside a sale that would include a case where an application under Order XXI Rule 89, 90 or 91 has been dismissed for default.

26. In the instant case admittedly an application was filed by original plaintiff under Order XXI, 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.

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A 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 XXI Rule 92(3) would operate as a bar for the entertainment of the fresh suit on the ground so urged.

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27. 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 XXI Rule 90(1) 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 XXI Rule 90. Dismissal of the same would preclude him to file a fresh suit, it was incumbent upon him to question the court auction on any permissible grounds necessary for the entertainment of fresh suit but that has not been done. The grounds which were covered under Order XXI Rule 90 cannot be raised in the instant matter. There is no pleading of fraud or collusion raised in the plaint. Thus, the first appellate court and High Court both have travelled beyond the pleadings to give a finding that the auction sale was held fraudulently and in collusion. It is provided in Order VI Rule 4 CPC that the plea of fraud, misrepresentation, and collusion has to specifically set out in the pleadings before any finding can be given on the same. There is no evidence on record for substantiating the plea which itself was not taken, it has neither been substantiated. Thus, the first appellate court and the High Court have committed gross illegality by giving the finding with respect to fraud and collusion of the decree-holder and judgment debtor in the court auction so held.

28. The auction purchase made by decree-holder Thopamma had attained finality. Confirmation of sale was not questioned by the plaintiff. Thus, no relief could have been granted and the earlier orders have attained finality and operate as a bar for the entertainment of the fresh suit.

29. Coming to the question of *lis pendens*, Smt. Thopamma had filed the suit in 1968 for the creation of charge of maintenance inter alia

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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 & Ors. v. B. Shama Rao & Ors.* AIR 1956 SC 593 this Court observed:

“9. On this question, as the plaint in O. S. 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 Exhibit 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.

But he contends that the decision of the courts below that the sale deed dated 30-1-1920 is hit by section 52 is bad on the following three grounds : (1) The question of lis pendens was not raised in the pleadings, and is not open to the plaintiff. (2) The suit for maintenance, O. S. No. 100 of 1919-20 and the sale in execution of the decree passed therein are all collusive, and section 52 has accordingly no application. (3) The purchase by Devamma in execution of the decree in O. S. No. 100 of 1919-20 on 2-8-1928 is void and inoperative, as the Official Receiver in whom the estate of Keshavananda had vested on 19-2-1926 was not a party to the sale proceedings. These contentions must now be considered.”

(emphasis is ours)

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A 30. About *lis pendens*, this Court has held that concession was rightly made, thereafter laid down the legal proposition. The sale was clearly subject to the provisions contained in section 52 of the TP Act.

B 31. On behalf of the respondents, reliance has been placed on the provisions of section 39 of the TP Act which deals with transfer where a third person is entitled to maintenance. It provides if such property is transferred the right may be enforced against the transferee who has notice thereof or if the transfer is gratuitous but not against a transferee for consideration and without notice of the right. Section 39 clearly makes out that charge of maintenance can be enforced against the immovable property held by a transferee. In the instant case, the transferee was not put in possession of the property is apparent from the plaint and possession of defendant No.1 continued. The sale also does not appear to be *bona fide*. It was clear with the intent to defeat the claim of the wife for maintenance that is why possession had not been handed over. The case of the plaintiff that though sale deed was executed in 1974, defendant D No.1 again took forcible possession in 1976, is not worthy of acceptance. Apart from that it is not so pleaded in the application under Order XXI Rule 90 that he was not aware of the pendency of the suit at the time of execution of the sale deed on 9.11.1974. He was a close friend of defendant No.1 and was obviously aware of the factum of litigation pending since 1968. Thus, he could not be said to be a *bona fide* purchaser at all. Apart from that, the application under Order XXI Rule 90 read with section 47 CPC containing the said plea stood dismissed. E

F 32. Reliance has also been placed on the provisions contained in section 100 of TP Act which cannot be said to be applicable. Section 100 provides that property of one person by operation of law is made the security of money for payment to another. Latter person is said to have a charge on the property. However, no charge shall be in the hands to whom such property has been transferred for consideration and without notice. As already held, N.K.Giriraja Shetty could not be said to be a *bona fide* purchaser. Besides that, it was clearly subject to the provisions contained in section 52 of the TP Act. Apart from that the objection under Order XXI Rule 90 stood dismissed. Thus, he was aware of the auction sale and its confirmation which he ought to have questioned. G

H 33. Reliance has also been placed on section 27 of the Act so as to contend that maintenance under the Act shall not be a charge on the

estate of the deceased or any portion thereof unless that has been created by the will of the deceased or by the decree of the court by an agreement between the defendant and the owner of the estate or any portion otherwise. It is not the case of creation of charge on the estate of the deceased. Thus, the provision is not applicable. Section 27 is extracted hereunder:

“27. Maintenance when to be a charge.—A dependant’s claim for maintenance under this Act shall not be a charge on the estate of the deceased or any portion thereof, unless one has been created by the will of the deceased, by a decree of court, by agreement between the dependant and the owner of the estate or portion, or otherwise.”

34. Section 28 of the Act has been relied on, it provides that where a dependant has a right to receive maintenance out of an estate and such estate or any part is transferred, right to receive maintenance may be enforced against a transferee. However, such transferee should not be a bona fide transferee for consideration and without notice and it cannot be enforced against the transferee for consideration without notice. The provision is of no help in view of findings recorded.

35. Reliance has been placed on *Sadhu Singh v. Gurdwara Sahib Narike & Ors.* (2006) 8 SCC 75 in which this Court has laid down that provision of section 39 of the TP Act is akin to the provisions contained in section 28 of the Act. However, no sustenance can be drawn from the aforesaid decision in the facts of the present case.

36. It was also contended that the court sale was mechanically made and confirmed without speaking order and without compliance with the mandatory provisions of Order XXI Rule 66. No such ground has been taken in the plaint as such and in the absence of evidence, it cannot be examined. Sale and its confirmation itself has not been questioned on any ground whatsoever. There is total suppression with respect to sale and delivery of possession to defendant No.2. The original plaintiff did not come to the Court with clean hands and was guilty of *suppressio veri*.

37. It was also contended that this Court can suomoto take notice of the illegalities as held by this Court in *Nani Gopal Paul v. T. Prasad Singh & Ors.* (1995) 3 SCC 579. It was contended that when non-

A compliance with the mandatory procedure was there, this Court would not remain a mute and helpless spectator and has to undo manifest illegality committed while conducting the court sale fraudulently. There is no dispute with the proposition. However, in the instant case, there is no challenge to the auction proceedings on any ground good, bad or otherwise. In the absence of evidence and suppression of facts, it cannot
B be examined.

38. Once the auction has not been questioned and there is a bar created by Order XXI Rule 92(3), all these questions cannot be agitated or urged. Plaintiff has not come to the court with clean hands as such he could not be said to be entitled to any relief on the grounds so urged.

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39. Reliance has also been placed on the decision of this Court in *Lal Chand v. VIIIth Addl. District Judge & Ors.* (1997) 4 SCC 356 contending that auction sale on 5.10.1977 was irregular and void *ab initio*, smacking of collusion and fraud between husband and wife. Though the interim order of the Court filed in the appeal has also been relied upon due to its non-compliance of deposit of Rs.5,000/-, the property could have been sold in the auction. The sale could not be said to be fraudulent, collusive or *ab initio void*. Being a purchaser *lis pendens*, it was not necessary to issue any notice and N.K.Giriraja Shetty was aware of the suit and the charge and of sale, he filed objections under Order XXI Rule 90 CPC and failed to prosecute the same. In *Lal Chand* (supra) this Court has laid down that the provisions of Order XXI Rule 72 are mandatory and no decree-holder has any right to bid in the auction without permission of the court. However, in the instant case permission had been granted and set off against the decretal amount of maintenance was made in the auction. The amount of Rs.11,600 was due which was
a huge amount at the relevant time. It was not the case set up that the sale was not notified in accordance with law as per the provisions contained in Order XXI Rules 66 and 67 CPC.

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40. Reliance has also been placed on section 18 of the Evidence Act. In the instant case, there is no admission after parting with the interest made in the execution proceedings *inter se* husband and wife. The auction was held by the court in accordance with law. It was not the case set up that the decree passed in the maintenance suit was based upon fraud or a collusive one. Nor was such a case so set up with respect to the auction of the properties in the execution of the decree.

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On the contrary, the husband had preferred an appeal against the judgment and decree passed in the maintenance case, which was dismissed on merits. Section 18 of the Evidence Act states :

“18. Admission by party to proceeding or his agent.—Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

by suitor in representative character.—Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Statements made by—

(1) party interested in subject-matter.—persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

(2) person from whom interest derived.—persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements.”

Thus, after parting with the interest, no admission with respect to the interest which has been parted away is admissible, the provision is not attracted in the fact-situation of the instant case. The so-called settlement entered into between the husband and wife on 5.8.1978 has not been pressed into service by either and has been disowned by the husband and wife both. They set up a case that no such settlement had been entered into nor any claim had been made by them on the basis thereof. Had that been the case, the provisions of section 18 of the Evidence Act would have been attracted.

41. Reliance has also been placed on the decision of this Court in *V.Swarajyalaxmi & Ors. v. Authorised Officer, Land Reforms*, AIR 2003 SC 2347 to raise the ground that on the date of the court sale defendant No.1 was not having any saleable interest in the property.

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- A Thus the sale itself was void and vitiated. The decision is not attracted as there was a charge on the property and purchase was made during *lis pendens* and was subject to the provisions contained in section 52. The transaction could not be said to be of bona fide purchase and pendency of the suit without notice. Apart from that objection filed regarding auction has been dismissed and auction has not been questioned in the suit. Thus, the plea set up has no legs to stand in the factual matrix of the case.
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42. It was also contended on behalf of the respondent that claim was made by defendant No.1 under the Land Reforms Act to be a tenant of N.K.Giriraja Shetty. The false claim that has been set up does not carry the cause of the plaintiff as the auction was already held in 1977 and stood confirmed in 1979. Further, by the filing of the counterclaim by defendant No.1 and its abatement is not going to serve any purpose of the plaintiff as plaintiff has to succeed on the strength of his own title in the case to recover possession. Merely because defendant
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- D No.1 filed a counterclaim that conveyance was nominal and fictitious and it was a transaction of loan, the dismissal of the same does not carry the case of the plaintiff any further. As the property was subject to court auction that was not questioned by him. Thus, he has lost the right, title and interest in the property, if any.

- E 43. Resultantly, we find the judgment and decree passed by the trial court to be appropriate. It has been illegally set aside by the first appellate court. The High Court has also erred in dismissing the second appeal on the impermissible grounds. Thus, the judgment and decree passed by the first appellate court, as affirmed by the High Court, deserves to be and are hereby set aside, and the suit of the plaintiff is ordered to be dismissed. The judgment and decree passed by the trial court are restored. The appeal is allowed in these terms. In the facts and circumstances of the case, parties to bear their respective costs, as incurred.
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