

Narayanan Namboodiripad Vs. Thomakutty and ors.

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Court : Kerala

Decided On : Sep-14-1966

Reported in : AIR1967Ker163

Judge : S. Velu Pillai and T.S. Krishnamoorthy Iyer, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rules 9, 47, 54(2), 67, 67(1), 90 and 92

Appeal No. : C.R.P. No. 1140 of 1964

Appellant : Narayanan Namboodiripad

Respondent : Thomakutty and ors.

Advocate for Def. : V. Sankara Manon,; K.K.K. Kurup and; Madhuri Latha,

Advocate for Pet/Ap. : C.S. Narayanan, Adv.

Disposition : Petition allowed

Judgement :

ORDER

1. The decree-holder auction purchaser is the revision petitioner. In execution of the decree, the decree schedule properties were sold in court auction on 6-2-1961 and purchased by the decree-holder for Rs- 154.37 in satisfaction of the decree. The court auction was confirmed on 10-3-1961. The respondents who are the judgment-debtors filed an application on 20-3-1961 under Sections 47 and 151 and Order 21. Rule 90. C. P. C. to set aside the court sale. The execution court held that in view of the omission to affix the proclamation of sale in the properly sold and the omission to publish the same by beat of drum there was material irregularity and fraud in publishing and conducting the sale as a result of which the respondents sustained substantial injury.

The learned Munsiff also took the view that the application to set aside the sale filed on 20-3-1961 was not barred by limitation as the respondents were entitled to the benefit of Section 18 of the Limitation Act. The learned District Judge though concurred with the learned Munsiff in setting aside the sale took the view that the omission to affix the proclamation of sale on the property sold and the omission to publish the same by beat of drum is not a mere irregularity in the publication or conduct of the sale but 'would render the sale illegal or void and it is open to the judgment-debtor to have the court sale declared illegal or void by an application filed

under Section 47, C. P. C. which will be governed by Article 181 of the Indian Limitation Act.

2. Both the lower courts have found that a copy of the proclamation was not affixed to a conspicuous part of the properly and there was no publishing of the proclamation by beat of drum. Order 21. Rule 67 of the Civil Procedure Code reads thus:

'(1) Every proclamation shall be made and published, as nearly as may be in the manner prescribed by Rule 54, Sub-rule (2).

(2) Where the court so directs, such proclamation shall also be published in the official Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where properly is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given'.

Order 21, Rule 54, Clause (2) reads thus:

'The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court-house and also in the Village Office or in case there is no such office in the Taluk Office of the place in which the land is situate and where the properly is situated within the limits of a Municipality or Panchayat in the office of the Municipality or Panchayat within the limits of which the property is situate'.

Order 21, Rule 67, C. P. C. prescribes only the manner in which the sale should be proclaimed. On a careful consideration of the above provisions it will be seen that the affixing of a copy of the proclamation on the property to be sold should be done at the time the sale is proclaimed by beat of drum and the affixing of the copies of the proclamation of sale in the court-house, Village Office etc. has to be after the publication on the property. This is clear from the use of the word 'then' in Order 21. Rule 54. Sub-clause (2), C. P. C. The question raised in the appeal before us is what is the legal effect of an omission to publish a proclamation of sale by affixing the same on a conspicuous part of the properly and the failure to proclaim the same at some place on the property or adjacent to the properly.

The learned advocate for the revision petitioner contended that a such omissions will be only irregularities in publishing and conducting the sale and the appropriate remedy of the judgment-debtor is to have the court sale set aside by an application under Order 21. Rule 90, C. P. C. by proving that he has sustained substantial injury by reason of such irregularity. The contention advanced on behalf of the respondents was that the defects referred to are not mere irregularities in publishing and conducting the sale but would render the court sale illegal or void and could be declared so by an application under Section 47, Civil Procedure Code. Our learned brother Raghavan, J. in *Chidambara Iyer v. Kunhumammed*, 1964 Ker LJ 35: (AIR 1965 Ker 99) took the view relying on the decision *Jayarama Aiyur v. Vridhagiri Aiyar*, AIR 1921 Mad 583; *Venkateswara Etnn Naicker v. Ayyammal*, AIR 1950 Mad 367 and *S. C. Venkatanarayan v. Pennapali Elias*, AIR 1954 Mad 1024 that the failure to affix the proclamation in any part of the property proclaimed for sale is not a mere

irregularity in the publication or conduct of the sale, but it is an illegality and the appropriate remedy to get rid of the same is by an application under Section 47 and not Order 21, Rule 90, C. P. 6. In *Swaminatha v. Krishnanswami*. AIR 1947 Mad 213 the question arose whether the failure to attach the properties sold in execution of a decree was only an irregularity such as would give a right to the judgment-debtors to move the court under Order 21, Rule 90, C P. C. and if that was not done whether the auction-purchaser obtained a title which could not thereafter be attacked in collateral proceedings. Patanjali Sastri. J. observed thus:

'Are the plaintiffs then entitled to avoid the sale to Sundararaju Pillai so far as their shares are concerned? Their Pfather, defendant 1 failed to take any steps to have the sale set aside under Order 21, Rule 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 ILR 14 Pat 436: (AIR 1935 Pal 205). 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 lime of the order for sale.

If omission to attach docs 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 Order 21, Rule 90 That remedy not having been availed of the purchaser's title has become unassailable and the appeals must fail.'

3. The point for decision therefore is whether the court sale which was held on 6-2-1961 is void or only voidable on account of the omission to proclaim the sale of property by heat of drum and to affix the proclamation on a conspicuous part of the property. In AIR 1921 Mad 583 the Madras High Court had to consider the legality of a sale where though the proclamation of sale as framed by the court was not published in the village where the lands were situated, the process server intimated at the village that the sale would be held at a place and by an officer different from those fixed by the proclamation. It was held that the sale was void and not merely irregular within the meaning of Order 21, Rule 90 of the Code. Oldfield J. observed thus:

'It seems to me that if, when a proclamation was made any of the usual and effective methods prescribed or permitted by the Code for its publication has been misleading as to details of the matter proclaimed and has been such as not merely not to give information to possible bidders, but to divert them to a place where the sale is not to be held, the result must be in the words of *Basharutulla v. Uma Churn Dutt*. (1889) ILR 16 Cal 794 that the property had never been sold under the Code at all.'

The concurring Judge Seshagiri Ayyar. J. expressed himself thus:

'The Code itself gives some indication as to when a sale can be regarded as irregular and when illegal. In Order XXI, Rule 90, which permits an aggrieved party to come to Court to set aside a sale, the language employed is that it may be set aside on the ground of material irregularity or fraud in publishing or conducting it. Where there is no publication or conduct of the sale, it is, I think, a right inference to draw from rule 90 that the sale should be regarded as illegal. In the present case, on the facts which my learned brother has fully stated, my conclusion is that there has been no publication at all. If a sale is held at a place to which the proclamation at the village

makes no reference, and per contra invites bidders to go to another place, I am prepared to hold that there was no proclamation leading up to the sale.'

It will therefore be seen that the conclusion in AIR 1921 Mad 583 that the sale was illegal was reached in view of the finding that there was no publication of the proclamation and the publication at all made was misleading. In AIR 1950 Mad 367 Krishnaswami Nayudu, J. accepted the finding of the court below that there was no publication at all. The learned Judge therefore took the view that a sale held without proclamation was void and proceeded to observe thus:

'It cannot be said that the total failure to make the proclamation under Order 21. Rule 60 is a mere irregularity in the publication or conduct of the sale.'

In AIR 1954 Mad 1024 Rajamannar, C. J. accepting the concurrent findings of the courts below that there was no publication of the sale whatsoever took the view that there was no sale at all under the Code and the alleged sale was a nullity. The learned Judge observed:

'We are not now concerned with the correctness of the decision AIR 1921 Mad 583 in so far as it held that on the facts of the case there had been no publication at all. The value of the decision, in my opinion, lies in the enunciation of the general principle that where there is no publication or conduct of the sale, then it is not a case of mere irregularity. It is as if a sale had not been held at all within the meaning of the Code. If there was no publication of the sale whatever, at any place or in any manner, but some officer of the court chose to hold a sale at some places on some date, it cannot be said that there has been a material irregularity or fraud in publishing a sale.

Likewise it follows from this decision that if there is in effect no conducting of the sale it would not be a case of material irregularity in conducting it. Suppose the selling officer does not conduct an auction but merely takes a private offer and reports to the Court that the property has been sold to the person making that offer. Can it be said that there has been a conduct of the sale? I think not.'

It can therefore be seen that in the three decisions referred to in 1964 Ker LJ 36: (AIR 1966 Ker 99) there was no publication of the sale at all in any manner and the view taken in those decisions that the sale was illegal was on account of the total absence of the publication. They are not authorities for the proposition that the failure to affix the proclamation of sale in the property sold or to publish the same by best of drum, which are only some of the modes of publishing the proclamation of sale prescribed under Order 21, Rule 67(1) C. P. C., will render the court sale void.

4. The effect of the non-compliance of the provisions of Order 21, Rule 67(2) came up for decision before a bench of this Court in Philip v. Thomas, 1957 Ker LT 774: (AIR 1958 Ker 305). The facts were that the court directed the publication of the proclamation in 'Kerala Bhooshanam' under Order 21. Rule 67. Clause (2), C. P. C. The publication was made only in the issue of 21-2-1956 on which date the properties were sold in auction. The question arose whether the sale was a nullity which could be declared so without any proof of substantial injury by the judgment-debtor. Vaidialingam, J. observed in these terms:

'In view of the decisions of the Privy Council and the Calcutta High Court, referred to above, it follows that the non-compliance with the provisions of Order XXI, Rule 67

(2) C. P. C. will, at the most amount only to a material irregularity which could be relied upon by a judgment-debtor for filing an application under Order XXI, Rule 90. But the sale so held is not an illegal or a void sale. Such a sale could be set aside only if the judgment debtor is able to satisfy the court that he has sustained substantial injury by reason of such irregularity.'

An identical question which is raised before us came up for discussion before T. K. Joseph, J. in the Travancore-Cochin High Court in P. Ponnayyan Nadar T. K. P. Parvathi Pillai, 1956 Ker LT 327 (TC). The point raised in the said decision was that the proclamation of sale was not affixed on item No. 5 and therefore the sale was illegal. The headnote of the decision is in these terms:

'The omission to comply with the requirements in publishing and conducting the sale will not render the sale void. Even if there are material irregularities in publishing and conducting the sale the remedy of the judgment-debtor is to apply for setting aside the sale within thirty days of the same.'

In Vasudeva Kavu v. Mani Naicka. AIR 1953 Mad 683, the facts were that there was a publication but the sale was held on a date different from that notified without an order of adjournment and without a further sale proclamation. In repelling the contention that the sale held on such date is illegal or void being in contravention of Order 21. Rule 66 (2), C. P. C. Venkala-rama Aiyar, J. stated the proposition in those terms:

'Considering the question on principle and apart from authorities, it is difficult to see why the prescriptions as to the time and place of sale in Order 21, Rule 66 (2) should alone be held to amount to conditions precedent to a valid sale and not the others. The policy underlying the entire scheme of Order 21 is to ensure due publicity for court auction sales so that fair price could be realised for the properties. With this end, elaborate provisions are made for attachment of the properties. Rule 54; for settlement of sale proclamation, Rule 66; and for its publication. Rule 67 The sale is not to be held before the expiry of 30 days from the date of publication. Rule 68. The decree-holder is prohibited from purchasing the properties in court auction, unless he obtains leave of the court, Rule 72. All these provisions are enacted with one purpose and that is that the properties might fetch the best price possible. If there is a failure to observe any one of these rules, the sale following thereon could be in no sense be said to be illegal because illegality consists in the violation of an express provision of law. For such illegalities, however, the statute provides a remedy and that is an application to set aside the sale under Order 21, Rule 90 on proof that substantial injury has resulted therefrom. Order 21, Rule 92 prohibits such matters from being made a ground of attack in collateral proceedings by way of suit.'

Rajamannar. C. J. in AIR 1954 Mad 1024 accepted the correctness of the decision in AIR 1953 Mad 683 but held that the said decision does not apply to cases where there was no publication at all on the ground that complete absence of publication does not stand on the same footing as an irregularity or defect in the publication of a sale proclamation. In Marudanayagam Pillai v. Manickavasakam Chettiar, AIR 1945 PC 67 their Lordships of the Judicial Committee had to consider the effect of a failure to observe the provisions of Order 21, Rule 66, C. P. C. in the settlement of proclamation of sale. In the case which went up before the Judicial Committee the particulars given in the sale proclamation as to the valuation of the property were incorrect and the provisions of Order 21. Rule 66(2) had not been complied with. The legal

consequence of such a default was considered by Sir John Beaumont in these words:

'The position therefore is that this sale took place at a serious undervalue occasioned by failure on the part of the court and of the respondent decree-holder to carry out their obligations under Rule 66, and there can be no doubt that the appellant sustained substantial injury thereby. Their Lordships are of opinion that the case falls within the language of Rule 90 and that however dilatory and unsatisfactory the conduct of the appellant may have been, he has not on the facts found debarred himself of the right to have the sale set aside.'

The decisions in *Nana Kumar Roy v. Golam Chunder Dey* (1891) ILR 18 Cal 422 where there was no publication of the sale proclamation in respect of a revenue paying land in the Collector's office as required by Section 289 of the C. P. C., in *Firm Bundhel Khand Cycle and Motor Agency v. Peoples Bank of Northern India Ltd.* AIR 1939 Pesh 9 where there was no publication of the sale proclamation in the Court-house, in *Wish Nath v. Rahmat Ullah*, AIR 1923 Lah 671 and in *Nripathi Nalh Bhatta-charjec v. Jatindra Kumar Das*. AIR 1926 Cal 577 where there was no publication of the sale proclamation in the property to be sold, and in *Rajendra Behari Lal v. Gulzari Lal*. AIR 1933 All 747 where there was no publication by beat of drum, took the view that such omissions are only irregularities in publishing or conducting the sale and the proper remedy of the judgment-debtor is to have the sale set aside by an application under Order 21, Rule 90, C. P. C. by proving substantial injury.

The learned advocate for the respondents relied on the decision of a single Judge of the Andhra High Court in *K. Narayanappa v. Akkulappa*, AIR 1965 Andh Pra 215 in support of his argument. There the learned Judge took the view that the sale was illegal as the learned Judge found that there was no publication at all. This decision therefore comes under the category of decision in AIR 1954 Mad 1024. The decision in (1889) ILR 16 Cal 794 cited by the learned counsel for the respondent cannot also help him. The facts in that case were that the sale which was fixed to take place at 12 noon was actually held and concluded at 10.30 a.m. A suit was filed by the judgment-debtor to set aside the sale on the ground that it is illegal and void. In overruling the contention that the suit is not maintainable, the court observed as follows:

'As a matter of fact, the sale in this case did not take place at the time advertised. When the time advertised arrived, the property had been sold, and the whole thing was over; and when persons came for the purpose of attending the sale at the time advertised, they found that the property had been sold, and that they were too late.

Under those circumstances, it seems to us that there was no sale within the meaning of the Code at all, and that this proclamation of the time and place of sale and the taking place of the sale at the time and place advertised are conditions precedent to its being a sale under the Code at all. Under these circumstances, it appears to us that this property never has been sold under the Code, and consequently the plaintiff is entitled to a declaration that whatever took place when the property was put up for sale has no effect as against him, and that he is entitled to recover this property.'

5. The above decision was followed in *Mothar Hussain v. Mohammad Yakub*, AIR 1925 Cal 201. These two decisions were relied on by the learned counsel for the respondent in support of his contention that a court sale held without complying strictly to the provisions of Order 21, Rule 67, Clause (1) read with Order 21. Rule 54 Sub-rule (2). C. P. C. is void.

6. The Judicial Committee of the Privy Council has held that breaches of provisions in the Civil Procedure Code relating to the attachment and sale of immovable properties are mere irregularities in publishing and conducting the sale and will not render the sale void or illegal. The failure to state the amount of revenue as required by Order 21. Rule 66(2). C. P. C., conducting a sale before the expiry of 30 days prescribed under Section 290 (now Order 21. Rule 68), failure to observe the provisions of Section 291 (now Order 21, Rule 69), sale held contrary to the provisions of Section 248, will not according to their Lordships of the Judicial Committee as could be seen from *Macnaughten v. Mahabir Pershad Singh*, (1883) 1LR 9 Cal 656 (PC); *Baliram Singh v. Narsingdas Prayagdas*, AIR 1923 PC 93, *Tasad-duk Rasul Khan v. Ahmad Husain*, (1894) ILR 21 Cal 66 (PC) *Gajraimati Teorain v. Akbar Husain*, (1907) ILR 29 All 196 and *Malkarjun v. Narhari*, (1901) ILR 25 Bom 337 (PC) render the court sale void.

The Privy Council decided in *Radha Krishna v. Bisheshar Sahay*, AIR 1922 PC 336 that a purchase by the decree-holder without taking permission under Section 294 (Order 21. Rule 72) did not render the sale illegal or void. The Calcutta High Court in *Gobardhan Behari v Saint Chandra*, AIR 1933 Cal 486 and *Jogendra Nath v. Sheikh Nabi Newaj* AIR 1938 Cal 699 took a view different from the one taken in (1889) ILR 16 Cal 794 and AIR 1925 Cal 201. The same High Court in *Ashalata Rose v. Manindra Nath Bose*. AIR 1942 Cal 275 considered the decisions in (1889) ILR 16 Cal 794 and AIR 1925 Cal 201 and held that in view of the decisions of the Privy Council quoted above their correctness was open to doubt. We do not therefore accept the decisions in (1889) ILR 16 Cal 794 and AIR 1925 Cal 201 as laying down the correct law.

7. At this stage it is necessary to refer to the decision in *Dhirendra Nath v. Sudhir Chandra*. AIR 1964 SC 1300 cited by the learned counsel for the revision petitioner where their Lordships of the Supreme Court had to consider the validity of a court sale held in contravention of Section 35 of the Bengal Money Lenders Act, 1940 (Bengal Act X of 1940). Section 35 of the said Act reads as follows:

'Notwithstanding anything contained in any other law for the time being in force, the proclamation of the intended sale of property in execution of a decree passed in respect of a loan shall specify only so much of the property of the judgment-debtor as the Court considers to be saleable at a price sufficient to satisfy the decree, and the property so specified shall not be sold at a price which is less than the price specified in such proclamation:

Provided that, if the highest amount bid for the property so specified is less than the price so specified, the Court may sell such property for such amount, if the decree-holder consents in writing to forego so much of the amount decreed as is equal to difference between the highest amount bid and the price so specified.'

8. Subba Rao. J. speaking for the Court laid down the proposition in the following words:

'Under Section 35 of the Act a duty is cast upon the court in settling the proclamation of the intended sale of property in execution of a decree passed in respect of a loan to which the Act applies to specify only so much of the property of the judgment-debtor as the court considers to be saleable at a price sufficient to satisfy the decree and not to sell the property so specified at a price which is less than the price so specified in such proclamation. This provision is in effect a statutory addition to Order XXI. Rule

66 of the Code of Civil Procedure. Indeed, this provision could have been added as another clause to the said rule. This statutory provision pertains to the field of proclamation. The rule says so in terms The said two conditions are also steps to be taken by the court in the mailer of publishing or conducting the sale. If a sale is held without complying with the said conditions, what is the remedy open to a party affected thereby to get the sale set aside? Order XXI. Rule 90 of the Code in terms provides for the remedy. It says that a person 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 or on the ground of failure to issue notice to him as required by Rule 22 of the Order. As the mm-compliance with the said conditions is a material irregularity in publishing or conducting the sale the court under the first proviso to Order XXI. Rule 90 of the Code can not set aside the sale unless it is satisfied that the applicant had sustained substantial injury by reason of such irregularity.'

The above principles apply with equal force when a court sale is held in contravention of the provisions of Order 21. Rule 67(1) read with Order 21. Rule 54(2) of the C. P. C. In the case before us there was only the failure to affix the proclamation in the property to be sold and publish the same by beat of drum. We are not called upon to decide the validity of a court sale where there is a total absence to publish the proclamation in any manner and we do not therefore deal with it.

9. A sale held in contravention of the provisions of Order 21, Rule 67 (1), C. P. C. is not without jurisdiction and is not null and void. Failure to comply with the provisions of a statute may vitiate the proceedings. As was pointed out by the Judicial Committee in *Ledgard v. Bull*, (1887) ILR 9 All 191 (PC) it is only where a court lacks inherent jurisdiction over the subject matter of the proceedings or action in which an order is made or judgment rendered that such order or judgment is wholly void with the result that the order may be shown to be a nullity in any proceeding where reliance is placed upon it although no formal or direct proceedings have been taken to have it vacated. In the case before us the execution court had inherent jurisdiction to execute the decree by sale of immoveable property. It is only the breach of provisions relating to the publication and the conduct of sale that is complained of. The test to determine whether the violation of an express provision in a statute will nullify the proceedings was laid down in the following terms by Mookerjea, J. in *Ashutosh Sikdar v. Behari Lal Kirfania*, (1908) ILR 35 Cal 61 (71):

'The only rule, therefore that may be adopted is that, when the provision of a statute has been contravened, if a question arises as to how far the proceedings are affected by such contravention, it must be determined with regard to the nature, scope, and object of the particular provision which has been violated. As pointed out in *Macnamara on Nullities and Irregularities*, no hard and fast line can be drawn between a nullity and an irregularity; but this much is clear, that an irregularity is a deviation from a rule of law which docs not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated. It may be conceded, that the application of this doctrine to an individual case, may some-times be attended with difficulty. One test, however, is well-established, and is often useful as was observed by Mr. Justice Coleridge in *Holmes v. Russell*, (1841) 9 Dowl 487. 'it is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to sec whether the

party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity."

Where the court possesses inherent jurisdiction over the subject matter and assumes jurisdiction or exercises the same in an irregular or illegal manner, the objection in such a case may be waived and may, in general assumed to be waived when not taken as enjoined by the statute.

10. Subba Rao, J. in AIR 1964 SC 1300 already referred to, in considering the question whether a court sale held in contravention of 8. 35 of the Bengal Money Lenders Act is a nullity observed thus at page 1304:

'If a provision of a statute is only directory, an act done in contravention of the provision is manifestly not a nullity. Section 35 of the Act is couched in a mandatory form and it casts in terms a duty on the court to comply with its provisions before a sale is held. Prima facie the provision is mandatory; at any rate, we shall assume it to be so for the purpose of these appeals.'

And observed further at page 1305:

'Where the court acts without inherent jurisdiction, a party affected cannot by waiver confer jurisdiction on it. which it has not. Where such jurisdiction is not wanting, a directory provision can obviously be waived. But a mandatory provision can only be waived if it is not conceived in the public interests, but in the interests of the party that waives it In the present case the executing court had inherent jurisdiction to sell the property. We have assumed that Section 35 of the Act is a mandatory provision. If so the question is whether the said provision is conceived in the interests of the public or in the interests of the person affected by the non-observance of the provision. We are, therefore, satisfied, on a true construction of Section 35 of the Act, that it is intended only for the benefit of the judgment-debtor and therefore, he can waive the right conferred on him under Section 35 of the Act.

If that be the legal position. Order XXI, Rule 90 of the Code of Civil Procedure is immediately attracted.'

The effect of contravention of Order 21, Rule 67(1), C. p. C on a court sale cannot in any way be different from that produced by violating the provisions of Section 35 of the Bengal Money Lenders Act. The provisions of Order 21, Rule 67, have been made for the protection of the judgment-debtors and for ensuring that the properties of such persons shall not be put to sale unless due publicity is given regarding the sale to be bold to enable bidders to attend the sale. It therefore follows that violation of Order 21, Rule 67(1) in conducting a court sale cannot nullify the same. Such a sale is not void and inoperative but only voidable. Order 21, Rule 90, taken with the three sub-rules of Rule 92 of Order 21 shows that the setting aside of the sale by the execution court which alone is competent to do so is confined to the ground 'of a material irregularity or fraud in publishing or conducting it.' Applications to set aside court sales which are voidable on the ground of material irregularities or fraud committed otherwise than in publishing or conducting the sale have to be dealt with under Section 47, C. P. C. The meaning of 'irregularity' as given in Black's Law Dictionary (4th edition) is as follows :

'The doing or not doing that, in the conduct of a suit at law which, conformably with

the practice of the court, ought or ought not to be done, Violation or non-observance of established rules and practices. The want of adherence to some prescribed rule or mode of proceeding; consisting either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner.' Muthusami Aiyar. J. in *Arunachelam Chatty v. Kulandasamitevai*. (1895) 5 Mad LJ 70 interpreted the term 'material irregularity' in Section 311 of the C. P. C. (Order 21. Rule 90 of the present Code) and observed thus: 'The term 'irregularity' means in ordinary parlance the state of being irregular, or not being in conformity to some recognised rule and in Section 311, it can only mean not being in conformity to some one of the rules provided by the Code of Civil Procedure to regulate execution sales If it had been the intention of the legislature to make a distinction between illegality and irregularity and to dispense with proof of actual loss in the one case and not in the other, they would have expressed that intention clearly in apt language. In one sense, whatever is irregular is also illegal, as irregularity connotes want of conformity to some recognised rule of procedure and it is in this sense. I think, that the term is used in the Code. There is warrant for this view in Section 584 of the Code which postulates as a ground of Second Appeal a substantial error or a defect in the procedure, as prescribed by this code or any other law, which may possibly have produced error or defect in the decision of the case on the merits. I think that it is the violation of an established rule of procedure regarding sales that constitutes an irregularity and it is the consequential loss that constitutes it a material irregularity or ground for cancelling the sale.'

One thing is clear from the wording of Order 21. Rules 90 and 92. An application to set aside the court sale and if the said application is allowed, an order setting aside the sale is necessary. This obviously shows that the irregularity in the publication or conduct of the sale contemplated in Order 21, Rule 90. must be the result of 'the violation of some provisions relating to the publication and conduct of the court sale which would render the court sale voidable and not void. A court sale which is only voidable on account of the contravention of any of the rules prescribed but not void may also be illegal in one sense.

If on account of breach of any provision which relates to the publication or conduct of the sale, the court sale can be said to be void and not merely voidable, there is no scope for applying Order 21 Rule 90, C. P. C. To declare such sales void, Section 47, C. p. C. has to be invoked, as is now held to be necessary in the decisions of this Court in *Chcria Chacko v. Kumaran Kesavan*, 1962 Ker LT 848: (AIR 1963 Ker 258) and *Ammukutty Amma Malathy Amma v. Varu Jos*. 1963 Ker LT 635: (AIR 1964 Ker 68) (FB). On the other hand if the court sale has to be set aside by an order on account of contravention of any prescribed rules for publication and conduct of the sale, it has to be done only by an application under Order 21, Rule 90. C. P. C.

11. In the case decided in 1964 Ker LJ 35: (AIR 1965 Ker 99) there was no total absence of publication. The only defect was that the proclamation was not affixed in any part of the property proclaimed for sale. That is only one of the modes of publication prescribed by Order 21. Rule 67(1) read with Order 21, Rule 54(2), C. P. C. The decisions in AIR 1921 Mad 583; AIR 1950 Mad 367 and AIR 1954 Mad 1024 relied on in 1964 Ker LJ 35: (AIR 1965 Ker 99) only held that complete absence of publication would render the sale void. We are therefore constrained with great respect to the learned Judge to disagree with the decision in 1964 Ker LJ 35; (AIR 1965 Ker 99) and hold that failure to affix the proclamation in any part of the property liable to be sold or to publish the same by beat of drum will not render the

court sale illegal or void, but they are only irregularities in the publication and conduct of the sale rendering the court sale voidable and furnishing only a cause of action for an application under Order 21. Rule 90, C. P. C.

12. The use of the expression 'as nearly as may be' in Order 21, Rule 67(1) of the C. P. C. also indicates that only substantial compliance with those provisions is contemplated and that any violation thereof cannot nullify the proceedings but only make them irregular or illegal in a limited sense. The expression 'as nearly as may be' in the said provision indicates only an approximation to the several modes prescribed in Order 21, Rule 54(2), C. P. C. and not to a strict observance thereof.

13. There was a discussion at the bar as to whether the other formalities mentioned in Order 21, Rule 67(1) read with Order 21. Rule 54(2) were observed in the matter of the publication or conduct of the sale. In the application to set aside the sale the only irregularities pleaded were those found by the courts below. No other irregularities were alleged in the application to set aside the sale. It has therefore to be taken that the other formalities enjoined by Order 21, Rule 67(1) read with Order 21, Rule 54(2) were duly observed.

14. Though the execution court found that the respondents were entitled to the benefit of Section 18 of the Limitation Act the learned appellate Judge did not consider the same. We have held that the application can be sustained only under Order 21. Rule 90. C. P. C. Admittedly the application was filed after 30 days, from the date of the sale Prima facie the application is therefore barred. The respondents are therefore entitled to a consideration of their plea based on Section 18 of the Limitation Act. It has therefore become necessary to remand the application to set aside the sale to the lower appellate court for fresh disposal. In the result, the order of the learned District Judge is set aside and the case remanded to his file for fresh disposal treating the application filed by the respondents as one under Order 21. Rule 90. C. P. C. In the circumstances of the case, we make no order as to costs in this Court