

Lakkappa Vs. Thimmappa

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Court : Karnataka

Decided On : Sep-06-1951

Reported in : AIR1953Kant48; AIR1953Mys48; (1953)31MysLJ90

Judge : Balakrishnaiya and ;Mallappa, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 21, Rule 90; Limitation Act, 1908 - Sections 18 - Schedule - Article 166; [Evidence Act, 1872](#) - Sections 114

Appeal No. : Second Appeal No. 46 of 1949-1950

Appellant : Lakkappa

Respondent : Thimmappa

Advocate for Def. : E. Kanakasabhapathy, Adv.

Advocate for Pet/Ap. : Maloor Subba Rao, Adv.

Judgement :

Mallappa, J.

1. This is an appeal against the decision passed by the Additional Subordinate Judge, Tumkur in R. A. No. 67 of 48-49 setting aside the order in Misc. Case No. 10 of 48-49 on the file of the Munsiff of Tiptur. The appellant-petitioner is a judgment-debtor in Ex. Case No. 217 of 45-46 who filed an application under

Order 21 Rule 90 in Misc. Case No. 10 of 48-49 referred to above. It is alleged in the application that the mortgage decree obtained against him was executed at the instance of the respondent as assignee of the original decree-holder. The applicant was not aware of the assignment and was not served with a notice. It is also alleged in the application that the assignee decree-holder has fraudulently got the properties of the applicant-judgment-debtor sold, that he was not served with any sale notice, that there was no proclamation of the sale and that the sale is invalid in law and liable to be set aside. This is particularly so it is contended, as apart from two-thirds share of the judgment-debtor in the suit properties, the entire property including the one-third share was also sold. It is also alleged that the petitioner came to learn about the fraudulent execution of the sale proceedings about three weeks prior to the date of the petition and is entitled to damages. The allegations have been denied. The petitioner has examined himself and two witnesses one of whom has attested the delivery receipt. They say that there was no sale proclamation in the village. The applicant has also sworn that he was not served with a notice. The learned Munsiff is of opinion that it was not proved that the sale notice was not served or the sale proclamation was not published by beat of tom-tom. As pointed out by him, the mere fact that two of the villagers did not know that the sale proclamation was published by tom-tom does not necessarily mean that there was no such sale proclamation. He further relied on the fact that it is not even alleged that the petitioner has suffered substantial injury or irreparable loss from the irregularity and fraud in the conduct and publication of the sale. The learned Subordinate Judge has not considered the evidence at all but observes that it is not disputed or denied that the judgment-debtor was not served with a sale notice in the execution case though he says that a notice of assignment before the final decree was passed, could be considered to be unnecessary. It is not clear why he says that it is not disputed or denied that the judgment-debtor was not served with the sale notice, though the allegations in the petition as observed by the learned Munsiff about the sale notice having not been served had been denied. He does not say what reason there is to differ from the learned Munsiff and to hold that there was no sale proclamation or that the judgment-debtor was not served with sale notice, this also of opinion that the fact that the Court held a sale in respect of the entire property though the judgment-debtors

had only two-thirds interest has also prejudiced the judgment-debtor-applicant. He does not say how the judgment-debtor is prejudiced. The sale was confirmed more than two-years prior to the date of the application under Order 21 Rule 90 and it must be stated that even if all that is said in the application is said to have been proved, it cannot be a case in which the sale could be set aside under Order 21 Rule 90. Order 21 Rule 90 is as follows :

'90(1) Where any immovable property has been sold, in execution of a decree, the decree-holder, or any 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; Provided that no sale shall be set aside on the ground of irregularity or. fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.'

It is clear that before an applicant under Order 21 Rule 90 succeeds he must allege in his application that there was a material irregularity or fraud in publishing or conducting the sale. It is also provided in that rule that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. It must be alleged in the application, therefore, that not only that there was a material irregularity or fraud in publishing or conducting the sale but also that the applicant has sustained substantial injury and that it is by reason of such irregularity or fraud that such substantial injury has been caused. It will be noticed that there are no allegations in his petition to show that on account of the irregularity or fraud the applicant sustained substantial injury. It follows that he has not stated that fraud or irregularity is the reason for any such substantial, injury. The application as it stands is not maintainable as one falling under Order 21, Rule 90, Civil P.C.

2. Again it will be noticed that no application under Order 21 Rule 90 could be filed beyond 30 days after the date of confirmation of sale-The application is filed more than two years after the confirmation of sale. Unless it comes under Section 18, Limitation Act the application is barred by time. Section 18, Limitation Act makes it

clear that'

'where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded the time limited for instituting a suit or making an application runs against the person guilty of fraud or necessary thereto, or against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected thereby

In this case, the applicant merely states that he_ came to know of the sale about three weeks prior to the date of the application. He does not even say that he came to know about the sale less than 30 days before he filed the petition. Before Section 18, Limitation Act is made applicable he must allege in the application not merely that there was fraud or irregularity in publishing or conducting the sale but also that he has been by means of fraud kept from the knowledge of his right to file the application. No such allegation has been even made in the application and as such, the application is barred by time.

3. As regards the service of sale notice it must be stated that merely because the petitioner swears that he was not served with a notice, it follows that there was no service at all. The Full Bench decision in '16 Mys LJ 485' (A) has laid down, it was argued, that it is not wrong to expect the applicant under Order 21 Rule 90 to examine either the Amin or the Process Server or witnesses present at the time of service. As observed in that decision

'the Court is not bound under Section 114, Evidence Act to raise a presumption that a summons to a defendant, which according to the return 'to it has_ been served upon him, has been duly served.'

This does not, however, mean that no presumption at all arises. Under Section 114, Evidence Act, the Court may presume the existence of any fact (as per Illus. 'E' to Section 114, Evidence Act) that judicial or final acts have been regularly performed. It is not a case in which it has been said that the Court shall presume. It is open to the Court to raise a presumption or not to raise a presumption

considering the circumstances of each case and all that is pointed out in the Full Bench decision referred to above is this aspect of the matter i.e., that the Court is not bound to raise a presumption. This does not mean that the burden of proof is shifted or that in no case the Court could raise such a presumption. As observed in that case, no rule could be laid down as to who has to ordinarily examine the Process Server who professes to have served the summons or the witnesses attesting the service as his witnesses. Each case has to be considered on its own merits and considering the circumstances in each case, it is for the Judge to raise a presumption or not and to give a finding on the evidence available as to whether the point at issue has been proved or not. Considering the circumstances of this case, we think that the appreciation of evidence by the learned Munsiff is quite correct and that by the learned Subordinate Judge is wrong in merely differing from him by observing that the point has not been disputed. In this case, the applicant-judgment-debtor had two-thirds interest in the property and it was this that was for sale. The other one-third interest belonged originally to Rule W. 1, a brother of the judgment-debtor, and he admits that he has conveyed it to the assignee-decree-holder. Any way, he does not feel aggrieved that his property was included in the sale. It has not been shown that any interest of the judgment-debtor not included in the decree has been sold in this case or that the judgment-debtor has in any way been prejudiced by the inclusion of the one-third share not belonging to him. The decision in -- 'Ram Ganu v. Hari Sambhu', : AIR1950 Bom346 (B) deals with a case where 16 guntas of property belonging to the judgment-debtors had been sold in execution of a decree obtained against them though, the decree directed sale of only 8 guntas, A suit was filed for recovery of 8 guntas not covered in the decree on the ground that the sale of those 8 guntas was without jurisdiction and therefore a nullity. The decision makes it clear that the application under Order 21 Rule 90 does not lie in cases of that kind. It may be mentioned that the persons who filed the suit were persons whose interest had been sold, while the applicant in this case had admittedly no interest in the property sold and not included in the decree.

4. On the whole, even if all the allegations made in the application are believed, though of course, as already observed there is no reason to believe the same, it is clearly a case where the application of the judgment-debtor under Order 21 Rule

90 has to be dismissed as the allegations to set aside the sale under Order 21 Rule 90 are not even made in it and necessary allegations are also not included in the application to show that time is extended under Section 18, Limitation Act.

5. The order of the learned Subordinate Judge is, therefore, set aside and that of the learned Munsiff restored. Parties will bear their own costs in this appeal.

Balakrishnaiya, J.

6. I agree with the conclusion.

7. Appeal allowed.

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