

In Re: Marappa Goundar

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Court : Chennai

Decided On : Jul-02-1957

Reported in : AIR1959Mad26; (1958)IMLJ260

Judge : Ramaswami, J.

Acts : Limitation Act, 1908 - Sections 18 - Schedule - Article 95; Code of Civil Procedure (CPC) - Order 21, Rule 90

Appeal No. : Civil Revn. Petn. No. 719 of 1957

Appellant : In Re: Marappa Goundar

Advocate for Pet/Ap. : S. Mohan Kumaramangalam and ;S. Sethuratnam, Advs.

Disposition : Revision dismissed

Judgement :

ORDER

Ramaswami, J.

1. This is a Revision sought to be preferred against the order made by the learned District Munsif of Coimbatore in E. A No 1247 of 1956 in E. P. No. 77 of 1956 in O. S. No. 793 of 1952.

2. The decree-holder Marakkal (first respondent in the lower Court) obtained a decree against the petitioner Marappa Counter. In pursuance of that decree the decree-holder took out execution proceedings and brought the properties of the petitioner to sale subject to a mortgage, The sale was held on 9-7-1956 and the successful auction purchaser is Rangaswami Gounder (second respondent in the lower Court).

Then the petitioner filed an application to set aside the sale beyond 30 days accompanied by an application to excuse delay under Section 18 of the Limitation Act. In order to attract the provisions of Section 18, the petitioner contended that there was a Panchayat at the instance of some mediators between himself, the decree-holder and the mortgagee. Valliakkal and others. In that Panchayat it is stated that it was agreed that Sellappa Gounder, the Sammandhi of the petitioner should purchase the properties for Rs. 10,000/-.

Sellappa Gounder wanted three months' time to enable him to get the necessary funds for the purchase. The first respondent decree-holder is stated to have agreed to receive the amount out of Court three months later after the sale to Sellappa Gounder. The decree-holder is said to have agreed to this course because she would get the entire decree amount without waiting till 1958 July for recovery of the amount as per Act I of 1955.

The mortgagee Valliakkal it is further stated agreed that her mortgage may be subjected in the sale deed. On account of this arrangement it is finally stated that the decree-holder agreed to receive the amount in the village itself and she promised that she will not proceed with the sale of the properties and the petitioner need not go to Coimbatore in connection with the sale and that therefore acting upon this representation the petitioner kept quiet and subsequently learnt that the mortgagee Vollikkal's son, the second respondent, had purchased the property in Court auction. Therefore, the petitioner came to Court with an application after excusing delay to set aside the sale.

3. The two points which arose for consideration before the lower court were whether the Panchayat set up by the petitioner is at all true; and secondly, whether the petitioner can rely upon the said Panchayat to attract the provisions of Section

18 of the Limitation Act in view of the admitted fact that the petitioner was aware that 9-7-1956 had been fixed as the date of sale.

4. On both these points the lower court held against the petitioner viz., that the alleged Panchayat is not true and that Section 18 of the Limitation Act would not be attracted I agree with the lower, court in regard to its conclusions on both these points and consider that its decision rejecting the application is irreproachable. Here are my reasons. After discussing the evidence on Point 1, in para 5 His Lordship concluded.) Therefore, looked at from any point of view this alleged Panchayat has been evolved in order to make out a plausible case for attracting the provisions of Section 18 of the Limitation Act. Point 1 was rightly found against the petitioner.

6. Point 2: Section 18 of the Limitation Act is an enabling section which postpones the starting point of limitation for suits and applications like applications to set aside execution safes where the plaintiff's or the applicant's right to seek relief is kept from his knowledge by means of fraud. The mere fact that the cause of action is founded on fraud is not enough to bring the case within this section. Article 95 will apply to such cases.

Whether Section 18 or Article 95 applies, time, however, runs from the date when the fraud first becomes known to the person injuriously affected by the fraud and the right of the party defrauded is not attested by lapse of time so long as he remains in ignorance of the fraud.

7. A person desiring to invoke the aid of this section must establish three things viz.,

(1) that there has been fraud;

(2) that by means of such fraud he was kept from the knowledge of his right to sue or apply or of the title on which such right is founded; and

(3) time will be extended under the section only as against the person guilty of fraud, or who is accessory thereto or who claims through the person guilty of fraud otherwise than in good faith and for valuable consideration.

These three conditions must concur in proceedings to set aside execution sales on the grounds set out in Section 18 of the Limitation Act. It is not enough for instance for the plaintiff or the applicant to show that the action by the defendant or respondent was fraudulent.

8. What is fraud? Upendra Nath Mitra's Law of Limitation and Prescription (M.L J. publication), Seventh Edition, Volume I, page 188 has the following to say:

"Fraud affects limitation only where it prevents a person from knowing of his right or the title on which the right is founded; it means active deceit in defrauding or endeavouring to defraud a person of his rights by artful device, that is, designed fraud by which a party knowing to whom the right belongs, conceals the circumstances giving that right, i.e., the title to the right to sue.

To constitute fraud there should be an abuse of confidential position, come intentional imposition, some deliberate concealment of facts, a designed fraud by which a party knowing to whom the right belongs conceals the facts and circumstances giving that right. The knowledge required by the section is not mere suspicion, but full knowledge of such a character as will enable the person defrauded to seek his remedy in court The right of the party defrauded is not affected by lapse of time, or generally speaking, by anything done or omitted to be done, so long as he remains without any fault of his own in ignorance of the fraud which has been committed.'

It has been further pointed out in the AIR commentaries on the Limitation Act (3rd Edition), Volume I, page 561 :

'The fraud contemplated by this section is not confined to fraud committed at the inception of the cause of action, but may include fraud committed even before that date. Thus, where fraud is committed by the decree-holder in execution proceedings taken for bringing the property of the judgment-debtor to sale, this section would apply to an application by the judgment-debtor to set aside the sale on the ground of fraud, though the right to apply only arises on the date of the sale and though no fresh act of fraud is proved at the date of the sale.

The reason is that the fraud committed in the execution proceedings would have a continuing influence and would retain its power of mischief until that influence ends. If at the date of the cause of action the effect of the antecedent fraud continued so as to keep the person injured from knowledge of his right to seek relief, this section would clearly apply.....'

9. The proof of fraud required has been summarised in Rustomji's Law of Limitation (5th Edition), Volume I, page 283 as follows:--

'The onus is on the person seeking the protection of Section 18 to prove the fraud. Moreover, by reason of Order 7, Rule 6, C. P. C., an exemption on the ground of fraud must be claimed in the plaint. Fraud must be proved and cannot be inferred, and the Court must not presume its existence from certain suspicious circumstances. Charges of fraud and collusion must, no doubt, be proved by those who make them,.....proved by established facts or inferences legitimately drawn from those facts taken together as a whole.

Suspicious and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by an accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dexterous knave would escape.

The party who alleges fraud must do so clearly and specifically and with detailed particulars. General allegations of fraud will not be permitted. Fraud ought not to be lightly imputed to the living; for the legal presumption is the other way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud is clear, beyond a reasonable doubt.'

10. I have already pointed out that time will be extended under Section 18 only as against the person guilty of fraud, or who is accessory thereto or who claims through the person guilty of fraud otherwise than in good faith and for valuable consideration. It seems to be clear, therefore, that where an execution sale is brought about by the fraud of the decree-holder, and the property is purchased by

a third person in good faith and for valuable consideration, the period prescribed for an application to set aside the sale on the ground of fraud cannot be extended as against the auction purchaser, though, if an application is filed within the prescribed period, it is not necessary in order to set aside the sale under the provisions of Order 21, Rule 90 of the Code of Civil Procedure that the purchaser should also be guilty of fraud.

A contrary view has been expressed in *Sailendra Nath v. Sudhanya Charau*, : AIR1950 Cal166 (A), that it is not necessary for the applicability of this section that the purchaser should also be guilty of fraud. Where the decree-holder is not guilty of fraud, but the auction purchaser is does the section apply so as to extend the time for an application against either to set aside the sale? There is a difference of opinion on this point. It was held in *Azizannessa v. Dwarika Prasad* : AIR1925 Cal1227 , that it will not apply, while a contrary view has been held in *P. Venkanna v. C. Venkanna*, : AIR1950 Mad509 (C), and *Pulla Reddi v. Pattabhirama Reddi*, AIR 1933 Mad 628 (U).

This conflict of opinion has been settled by a Bench decision of this court in *Kamppanna Gounder v. Ponnutbayee*, 1955 2 Mad LJ (NRC) 62: AIR 1956 Mad 198 (E), where it has been held as follows :

'A judgment-debtor, who is kept out of the knowledge of the execution sale by fraud, can, in an application under Order 21 Rule 90, Civil Procedure Code, to set aside the sale, invoke the aid of Section 18 of the Limitation Act, to extend the period of limitation where the fraud is proved to have been committed by the decree-holder or the auction-purchaser or both.

It is the that fraud as contemplated under Section 18 of the Limitation Act, must be fraud of the person against whom the suit or application is made and as both the auction purchaser and the decree-holder are necessary patties to an application under Order 21, Rule 90, Civil Procedure Code, for setting aside a sale, the fraud of one or the other would be sufficient to have the sale set aside.'

In this connection it is interesting to note that in the AIR Commentaries on the Limitation Act, the view expressed in this Bench decision is submitted to be the

correct view (vol. I page 568).

11. Bearing these principles in mind if we examine the facts of this case, we find that the provisions of Section 18 of the Limitation Act are attracted.

12. This Revision is dismissed.

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