

**(1985) 11 KL CK 0034****High Court Of Kerala****Case No:** C.R.P. No. 1551 of 1980

A.A. Joseph

APPELLANT

Vs

Varghese George and Another

RESPONDENT

**Date of Decision:** Nov. 28, 1985**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 66, Order 21 Rule 91
- Limitation Act, 1963 - Section 17, 17(1), 18, 20, 21

**Citation:** (1986) 23 KLJ 132**Hon'ble Judges:** K. John Mathew, J**Bench:** Single Bench**Advocate:** George Thomas, for the Appellant; M.K. Narayana Menon, for the Respondent**Judgement**

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K. John Mathew, J.

The additional decree-holder is the revision petitioner, who is hereinafter referred to as "the decree-holder". He challenges an order dismissing his petition to set aside a court sale under Order XXI Rule 91 of the Code of Civil Procedure. We are now concerned only with item 2 of the properties sold in court auction which is hereinafter referred to as "the property". The property was attached on 19-8-1968. It was purchased by the decree-holder in the court sale conducted on 16-3-1970 for an amount of Rs. 10848.72. After confirmation of sale delivery was effected on 6-11-1970. Respondents 12 to 14 before the lower court filed a petition for redelivery on 25-11-1970. The decree-holder received notice of this petition on 15-1-1971. He filed E. A. No. 128/71 under Order XXI Rule 91 C. P. C. to set aside the sale on 16-1-1971. Defendants 4 to 13 who were the owners of the property had sold it to respondents 12 to 14 before the lower court by registered sale deed dated 18-5-1966, namely before the date of attachment. Therefore the decree-holder alleged that the judgment-debtors had no saleable interest in the property and on

that basis the application to set aside the sale was filed. The decree-holder also raised the ground that in the encumbrance certificate issued, the sale in favour of respondents 12 to 14 was not entered. It was further submitted that the 8th defendant who filed objections to the proclamation schedule did not disclose the fact of sale in favour of respondents 12 to 14. The above facts are admitted by both sides. The only controversy is whether the application is barred by time. The execution court held that the judgment-debtors suppressed material facts in the objection filed to the sale proclamation and that made the decree-holder believe that the judgment-debtors had saleable right over the property and as a result he purchased the property in court sale. It was also found that the decree-holder knew about the assignment in favour of respondents 12 to 14 only on 15-1-1971 when he received notice in the redelivery petition filed by them and therefore he is entitled to get the period till 15-1-1971 excluded. Therefore the execution court allowed the petition and the sale was set aside. However, in appeal the lower appellate court was of the view that it is for the person who alleges fraud to prove beyond any reasonable doubt that fraud was played upon him by the opposite party. According to the appellate court there is no proper allegation in the affidavit in support of the application to set aside the sale. Reliance was also placed on the decision reported in *Annamma v. Tresiamma* 1975 KLT 388 F. B. to the effect that non-mention of the fact that the judgment-debtors have no title to the property in the objection to the proclamation schedule will not amount to fraud or misrepresentation. Therefore, the lower appellate court held that the judgment-debtors were under no legal obligation to enlighten the decree-holder about the transfer of the property. Accordingly the appeal was allowed and the application to set aside the auction was dismissed.

2. In E. A. No. 128/71 the decree-holder has cited only Order XXI Rule 91 C. P. C. and section 17 of the Limitation Act. In para 5 of the affidavit in support of that application there is an averment that the 8th defendant had raised the objection that the property in question as well as the other properties included in the proclamation schedule will be worth over Rs. 6 lakhs. There is a further statement that on account of such an objection the decree-holder was led to believe that the property belonged to the defendants and that the defendants intentionally did not disclose the fact that the property was already sold by them and therefore, u/s 17 of the Limitation Act the decree-holder is entitled to exclude the period from 16-3-1970 to 16-1-1971. The decree-holder did not mention that he is claiming relief u/s 17(1) (a) of the Limitation Act, but merely stated Sec. 17 In the memorandum of this civil revision petition the decree-holder has specifically raised a contention that the lower appellate court overlooked the provision in section 17(1) (c) of the Limitation Act, under which in any application for relief from the consequences of a mistake, the period of limitation shall not begin to run until the applicant discovers the mistake or could with reasonable diligence have discovered it. Therefore, the question to decide is whether the decree-holder is entitled to exclude the period from 16-3-1970

to 16-1-1971 u/s 17(1) (b) or (c) of the Limitation Act,

3. In *Annamma v. Tresiamma* (1975 K. L. T. 388 F. B.) this Court had occasion to consider a somewhat similar question in a second appeal in a suit filed by the decree-holder-auction purchaser for recovery of purchase money paid by him when subsequent to the sale he found out that the judgment-debtor at the time of court sale had no saleable interest in the property. There was no petition to set aside the sale under Order XXI Rule 91 C. P. C. This Court also held as follows:-

The situation has been brought about by the decree holder and solely by him. If someone is to lose in the transaction it must necessarily be the party who has been responsible for the situation and that would be the plaintiff himself. Therefore it may not be possible to find that the defendant had received the money of the benefit for the use of the plaintiff. Consequently no action for money had and received would lie.

Certainly there are some observations in this judgment in support of the position canvassed by the judgment-debtor. But I do not think that the specific question that arises in this civil revision petition was considered or decided by the Full Bench.

4. Section 17 of the Limitation Act is as follows:

17. Effect of fraud or mistake -- (1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act -

(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or

(c) the suit or application is for relief from the consequences of a mistake; or

(d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him;

the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:

Provided that nothing in this section shall enable any suit to be instituted or application to be made to recover or enforce any charge against or set aside any transaction affecting, any property which -

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe that any fraud had been committed, or

(ii) in the case of mistake, has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or

(iii) in the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed,

(2) Where a judgment-debtor has, by fraud or force, prevented the execution of a decree or order within the period of limitation, the court may, on the application of the judgment-creditor made after the expiry of the said period extend the period for execution of the decree or order:

Provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be.

5. Section 18 of the Limitation Act of 1908 was as follows :

18. Effect of fraud-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, or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit or making an application -

(a) against the person guilty of the fraud or accessory thereto, or

(b) 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, or, in the case of the concealed document when the first had the means of producing it, or compelling its production.

6. Article 95 of the Act of 1908 prescribed three years period to set aside a decree obtained by fraud, the period commencing from the time when the fraud becomes known to the party. Under Article 96 of the Act of 1908 a period of three years was provided for relief on the ground of mistake, and there also time will run from the date on which the mistake becomes known to the plaintiff. Both these Articles are now repealed and the residuary Article 117 read with Section 17 of the Limitation Act of 1963 covers these cases. Under Article 113 the same period of three years is prescribed. However, there is a specific Article, namely Article 127, prescribing the period to set aside a sale in execution of a decree. Since the date of sale in this case was on 16-3-1970 the period of limitation is 30 days from the date of sale.

7. In paragraph 4 of the objection filed by the 8th defendant to the sale proclamation it is stated as follows:-

In the said objection there was also a prayer to allow instalment payments under Act 31 of 1958, The execution court rejected the objection by order dated 30th October, 1969 on E. P. No. 148 of 1968. It was thereafter that sale was conducted on 16-3-1970. In this connection it may also be mentioned that in the encumbrance certificate produced along with the draft proclamation filed on 26-10-1968, the sale deed dated 18-5-1966 in favour of respondents 12 to 14 was not mentioned. u/s 17(1) (b) of the Limitation Act fraud must be practised by the defendant. Learned counsel for the judgment-debtors submitted that u/s 3 of the Transfer of Property Act, registration of a document is notice and therefore the decree-holder must be deemed to have notice of the sale deed. So also it was submitted that in an enquiry under Rule 66 of Order 21 C. P. C. it is for the decree-holder to collect the details of the property to be sold in order that they may be specified in the sale proclamation. Learned counsel for the decree-holder submitted that the statement in the objection filed by the 8th defendant, which was really filed on behalf of all the defendants, material facts were suppressed and this will amount to fraud. However, as long as there is no duty to disclose, it is not possible to hold that mere suppression will amount to fraud. But in case the defendant has made any statement which will positively show that he intended to mislead the decree-holder or the court, that will amount to fraud. The execution court without examining this aspect held that since the defendant did not disclose the fact of sale, that will amount to suppression of material facts, which will in turn amount to fraud on the part of the defendants. Under these circumstances this question requires reconsideration.

8. The ground for exclusion of time based on the plea of mistake is specifically raised only in the memorandum of civil revision petition. Both the execution court and the lower appellate court did not examine that question. Learned counsel for the decree-holder submitted that in case there is a mistake in the court sale, for filing a petition to set aside the sale, the decree-holder is entitled to exclude the period from the date of sale till he discovered the mistake. Learned counsel for the judgment-debtor submitted that the mistake must be a mutual mistake as required in Sections 20 & 21 of the Indian Contract Act. According to learned counsel, if the mistake is that of the decree-holder he will not be entitled to exclude any period and make the judgment-debtor liable. There is no indication in Section 17 of the Limitation Act, warranting such a restricted meaning to the word "mistake". In clause (a) of sub-section (1) of Section 17 it is specifically provided that the fraud must be of the defendant or respondent or his agent. In clause (c) there is no such restriction, the words used being only "the suit or application for relief from the consequences of a mistake". Therefore if the court is satisfied that there is a mistake in the court sale, and the decree-holder could not have discovered with reasonable diligence the decree-holder is entitled to exclude the period till he discovers the mistake. The burden is on the decree-holder to prove the mistake in the first instance. Thereupon it will be for the judgment-debtor to show that the decree-holder had either actually discovered the mistake or could have done so with

reasonable diligence even prior to the period of limitation. Under these circumstances it is necessary in the interest of justice to direct a re-examination of both these questions. The parties will, if so advised, be allowed to file additional pleadings. The C. R. P. is allowed and E. A. No. 128 of 1971 is remanded to the execution court for fresh consideration and disposal in accordance with law and in the light of the observations in this order.