



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 22ND DAY OF JULY, 2024

PRESENT

THE HON'BLE MR JUSTICE SREENIVAS HARISH KUMAR

AND

THE HON'BLE MS JUSTICE J.M.KHAZI

REGULAR FIRST APPEAL NO. 557 OF 2016

C/W

REGULAR FIRST APPEAL NO. 558 OF 2016

IN RFA No.557/2016

BETWEEN:

1. Nayamat Ali Khan
S/o Sri Lathif Khan,
Aged about 36 years,
Residing at No.73/2B, 8th Cross,
Rajendra Nagara,
Narasimharaja Mohalla,
Mysuru-570007.
2. Sateesha C.S.
S/o Late Sri C.A.S Shetty ,
Aged about 54 years,
Residing at No.3020, 2nd Cross,
Gas Godown Road, Vidyanagar,
Nanjangud-571371.

...Appellants

(By Sri S.Sriranga, Senior Counsel for
Smt. Sumana Naganand, Advocate)

AND:





1. M. Sadananda
S/o Late Sri M.L. Mariswamy
Aged about 60 years,
Residing at No.613/5-6,
Behind India Overseas Bank,
Chamaraja Double Road,
K.R. Mohalla
Mysuru-570024.

2. K.R. Nagananda
S/o Late Sri K.H. Ramashetty
Aged about 57 years,
Residing at No.349/1A,
A Ramanana Street Devaraja Mohalla
Mysuru-570 001.

3. K. R. Hanumantha Raju
S/o Late Sri K.H. Ramashetty
Aged about 57 Years,
Residing at No.349/1 A,
A Ramanana Street Devaraja Mohalla
Mysuru-570 001.

...Respondents

(By Sri B.S.Ravindra, Advocate, for R-1 to R-3)

This Regular First Appeal is filed under section 96 read with Order 41 Rules 1 and 2 of C.P.C. against the order dated 05.10.2015 passed in Ex.No.05/2015 on the file of the Prl. Senior Civil Judge, CJM, Mysuru, disposing of the petition filed under Order 21 Rule 95 of CPC., for possession.



IN RFA No.558/2016

BETWEEN:

Tajmul Ali Khan
S/o Sri Lathif Khan,
Aged about 32 years,
Residing at No.73/2B, 8th Cross,
Rajendra Nagara,
Narasimharaja Mohalla,
Mysuru-570007.

...Appellant

(By Sri S.Sriranga, Senior Counsel for
Smt. Sumana Naganand, Advocate)

AND:

1. K.R. Nagananda
S/o Late Sri K.H. Ramashetty
Aged about 57 years,
Residing at No.349/1A,
A Ramanana Street Devaraja Mohalla
Mysuru-570 001.
2. K. R. Hanumantha Raju
S/o Late Sri K.H. Ramashetty
Aged about 49 Years,
Residing at No.349/1 A,
A Ramanana Street Devaraja Mohalla
Mysuru-570 001.
3. Anasuya Upadhyaya
W/o Late Sri. T.S.L.Upadhyaya,
Aged about 63 years,
Residing at No.23, Raj Arcade,



2nd Cross, Vidhyanagara,
Kurubara Halli Main Road,
Bengaluru-560 086.

4. Puneeth Upadhyaya
S/o Late Sri. T.S.L.Upadhyaya,
Aged about 30 years,
Residing at No.23, Raj Arcade,
2nd Cross, Vidhyanagara,
Kurubara Halli Main Road,
Bengaluru-560 086.

5. Nishanth Upadhyaya
S/o Late Sri. T.S.L.Upadhyaya,
Aged about 30 years,
Residing at No.23, Raj Arcade,
2nd Cross, Vidhyanagara,
Kurubara Halli Main Road,
Bengaluru-560 086.

...Respondents

(By Sri B.S.Ravindra, Advocate for R-1 and R-2;
R-3 to R-5 are served)

This Regular First Appeal is filed under section 96 read with Order 41 Rules 1 and 2 of C.P.C. against the order dated 05.10.2015 passed in Ex.No.06/2015 on the file of the Prl. Senior Civil Judge, CJM, Mysuru, disposing of the petition filed under Order 21 Rule 95 of CPC for possession.

Date on which the appeal was reserved for judgment	19.06.2024
Date on which the judgment was pronounced	22.07.2024



These Regular First Appeals having been heard & reserved, coming on for pronouncement this day, **Sreenivas Harish Kumar J.**, pronounced the following:

JUDGMENT

The question to be answered in these appeals is whether purchasers from auction purchaser can make an application under Order 21 Rule 95 CPC for obtaining possession of the properties which are in occupancy of the respondents in these appeals.

2. If the facts leading to these two appeals are traced, they are:

O.S.No.73/1969 was a suit for partition instituted in the court of Principal Civil Judge, Mysuru, by Gowramma and others against T.G.Harinath and others. Preliminary decree was passed on 30.06.1980 declaring the extent of shares of the parties to the suit. In the final



decree proceeding i.e., FDP No.3/1982, as it was found that one of the subject matters of the suit i.e., Upadhyaya Building was not feasible for division by metes and bounds since 29 shares were to be carved out, the parties agreed for sale of the said building and to share the sale proceeds. Thereafter auction was held and the bid of one Sri Siraj Ahmed for Rs.4,52,00,000/- was accepted. The sale was confirmed on 21.02.2014 and sale certificate was issued to the purchaser on 19.03.2014. Upadhyaya building consisted of a number of shops. The auction purchaser sold portions of the building to several persons. Appellants in RFA No.557/2016 purchased one shop portion each in their individual names vide two sale deeds dated 12.09.2014 and 26.09.2014. Likewise, the appellant in RFA No.558/2016 also purchased a shop portion from Siraj Ahmed under sale deed dated 12.09.2014. It is to be noted here that Siraj Ahmed did not obtain possession of the



entire building after he was issued with sale certificate, instead he sold different portions of the building to several persons by executing sale deeds. The appellants herein thereafter initiated two execution proceedings i.e., Ex.No.5/2015 and Ex.No.6/2015 for obtaining possession of their respective shop portions by filing applications under Order 21 Rule 95 CPC. The executing court, vide order dated 05.10.2015, dismissed the applications mainly on the ground that the respondents were not the judgment debtors inasmuch as the property was not sold in execution of a decree and therefore the appellants could not avail remedy under Order 21 Rule 95 CPC. Against this order, these two appeals are filed.

3. We have heard the arguments of Sri S. Sriranga, learned senior counsel appearing for the appellants and Sri B.S.Ravindra for respondents in



RFA 557/2016 and for respondents 1 and 2 in RFA 558/2016.

4. Sri S Sriranga argued this way: The appellants being the purchasers from the auction purchaser can very much maintain an application under Order 21 Rule 95 CPC inasmuch as they stepped into the shoes of the auction purchaser. It is not in dispute that Siraj Ahmed was the highest bidder in the auction sale and the sale certificate was also issued to him. He could have initiated action to take possession of the entire property as he was the auction purchaser. Instead he sold the portions of the building to several persons without taking possession from the occupants of the building. A lawful purchaser of immovable property is to be put in possession or else there is no meaning to sale. Since the sale was through intervention of court in final decree proceeding, there was no need to file a separate



suit to take possession of the property from the occupants of the building. If the purchasers are asked to file separate suit for possession, it is against the scope of Order 21 Rule 95 of CPC which permits the auction purchaser to take the possession of the property. Only requirement is that the application should be made within one year from the date of issuance of sale certificate. In this case, the applications were made within a year and therefore the applications were very much maintainable. The view of the executing court that the respondents are not judgment debtors and therefore application against them under Order 21 Rule 95 CPC cannot be filed is incorrect. The scope of the said rule is that possession can be had either from the judgment debtor or any person claiming under him. Section 146 of CPC permits the purchasers i.e., the appellants to initiate execution proceeding. This



being the position of law, the executing court should not have dismissed the applications.

5. Sri B.S.Ravindra's argument was that since the appellants are purchasers from the auction purchaser, they cannot take possession under Order 21 Rule 95 CPC as this rule only enables an auction purchaser to take possession. The sale transaction between them was outside the court for the reason of which they can only institute a suit for possession. He also argued that the second appellant in RFA 557/2016 sold away the shop premises that he purchased to one Abdul Rasheed Sait under a sale deed dated 17.04.2015, and the latter thereafter filed a suit for ejectment against the respondents in this appeal. Some of the other purchasers from the auction purchaser filed suits against the persons holding possession of shop premises. Therefore the view taken by the executing court in the impugned order is correct



and it cannot be interfered with. Thus Sri Ravindra argued for dismissal of the appeals.

6. For better analysis of the question it is necessary to extract here the actual findings of the executing court.

"8. In the evidence, it is not in dispute that the Respondent No.3 is in the possession of the property. The petitioner who got examined himself as PW1 has not stated as to what is the nature of the possession of the respondents. As rightly contended by the counsel for the respondents the provision U/O 21 R 95 CPC is not applicable as the property was not sold in a execution of a Decree and it did not belong to the J.Dr. Therefore, the provision U/O 21 R 95 of CPC is not applicable.

9. The nature of the possession of the respondents and whether the petitioners are entitle for possession has to be decided in a separate suit. The petitioners would be only entitled for symbolic possession of the Petition Schedule B property.

10. It is relevant to observe that the Petitioners have stepped into the shoes of the original owner. Therefore, the Petitioners would be entitled for possession of the property only if the Original



owners of the property were entitled for possession of the same. The Original owners had not obtained any Decree against the persons in possession of the property. Therefore, the Petitioners cannot obtain the possession by filing this execution petition and they have file a separate suit claiming possession as per law depending on the nature of the possession of the respondents. Hence, this Court holds that the petitioners are not entitled for possession of the petition B schedule property. Hence Point No.1 is answered in the Negative.”

7. The findings of the executing court are perhaps founded on the premise that Order 21 Rule 95 of CPC applies only when the property was attached and sold in an execution proceeding. No doubt, an immovable property is to be first attached before it is sold in auction. But attachment of an immovable property does not arise when it is ordered to be sold in a proceeding for final decree pursuant to a preliminary decree in a partition suit. To arrive at this conclusion, it is necessary to refer to sections 7 and 8 of the Partition Act.



"7. Procedure to be followed in case of sales.—*Save as hereinbefore provided, when any property is directed to be sold under this Act, the following procedure shall, as far as practicable, be adopted, namely:—*

(a) if the property be sold under a decree or order of the High Court of Calcutta, Madras or Bombay, in the exercise of its original jurisdiction, the procedure of such court in its original civil jurisdiction for the sale of property by the Registrar;

(b) if the property be sold under a decree or order of any other court, such procedure as the High Court may from time to time by rules prescribe in this behalf, and until such rules are made the procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees.

8. Orders for sale to be deemed decrees.—*Any order for sale made by the court under section 2, 3 or 4 shall be deemed to be a decree within the meaning of section 2 of the Code of Civil Procedure (14 of 1882)."*



8. Clause (b) of section 7 makes it clear that until the High Court frames rules as to the manner of holding auction, provisions of CPC are to be followed, and in that view provisions of Order 21 relating to sale of immovable property become applicable; but it does not mean that property is to be attached, for it is not necessary since the sale is according to section 2 of the Partition Act, and what is required is an order to sell the property in auction if none of the share holders comes forward to purchase the moiety of others. Once the court passes an order to sell the property, other rules relating to sale of immovable property of Order 21 are to be followed and sale is to be confirmed under Rule 92 followed by issuance of sale certificate under Rule 94 in favour of auction purchaser.

9. Section 8 of the Partition Act states the order for sale is a decree for which reason such an



order is appealable, but it also conveys a meaning that a purchaser becomes entitled to take possession by making an application either under Rule 95 or Rule 96 of Order 21 as the case may be. If this right is not available to the purchaser the purpose of sale is frustrated, for one of the legal incidents of sale is to obtain possession which may be actual or constructive. If the purchaser wants to take actual possession, he can make an application under Order 21 Rule 95 within one year from the date of confirmation of sale in accordance with Article 134 of the Limitation Act. This is a summary remedy made available to the auction purchaser without requiring him to prove his title. If he does not make an application under Rule 95 within one year from the date of order of making the sale absolute, he can file a suit.

10. Rule 96 of Order 21 operates if the property sold in auction is in occupancy of a tenant



or other person entitled to occupy the same. Here the auction purchaser takes symbolic possession, not actual possession. The distinction between Rules 95 and 96 is so narrow in that Rule 96 applies where property is held by a tenant or a person entitled to occupy, and Rule 95 applies where property is held by a judgment debtor or any person being in possession on behalf of judgment debtor. There is no scope for disputing the auction purchaser's right to take possession, and if at all any right is available to the person in occupancy of the property it is under Rule 97 provided the occupant has an independent right to oppose.

11. The next aspect is about right of purchaser from auction purchaser to claim possession under Rules 95 and 96 of Order 21. It cannot be said that auction purchaser cannot sell or alienate the property that he purchases once



sale certificate is issued to him, for alienation is his right. Section 47 of CPC can be pertinently applied here. Explanation II to section 47 states that purchaser in an auction is deemed to be a decree holder, that means he can initiate action for taking possession. If he sells the property *inter vivos*, there takes place devolution of interest on his purchaser in which event the latter can take out execution to obtain possession in accordance with section 146 of CPC. If there is transfer of decree; the transferee gets right under Order 21 Rule 16 of CPC, but such a situation will not arise if auction purchaser sells the property to another as is in this case. Apposite to like situation judgment of the Supreme Court in ***Jugalkishore Saraf vs Raw Cotton Company Limited [1955 SCC Online SC 26]*** can be referred here. There the facts indicate that a business concern Habib & Sons instituted a suit against Jugalkishore Saraf for the recovery of a certain sum of money with



interest. When suit was still pending Habib & Sons transferred all its transactions including debts due to it to a company called M/s Raw Cotton Company, but the transferee company did not come on record in the suit in terms of Order 22 Rule 10 of CPC and instead the suit was continued by Habib & Sons. The two partners of Habib & Sons migrated to Pakistan consequent to which the properties of Habib & Sons vested in custodian of Evacuee Property who appears to have continued the suit which came to be decreed against Jugalkishore Saraf. The custodian of evacuee property informed about the decree to the transferee company and also confirmed the transfer of transactions of Habib Ali to Raw Cotton Company Limited. When decree was put into execution by Raw Cotton Limited, Jugalkishore Saraf, the judgment debtor disputed the company's right to execute. In that context the Hon'ble Supreme Court held :



"37. There is another ground on which the right of the respondent company to maintain the application for execution has been sought to be sustained. This point was not apparently taken before the High Court and we have not had the advantage and benefit of the opinion of the learned Judges of that Court. Section 146 of the Code of Civil Procedure on which this new point is founded provides as follows:

"146. Proceedings by or against representatives. Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him".

There are two questions to be considered before the section may be applied, namely, (1) whether the Code otherwise provides and (2) whether the respondent company can be said to be persons claiming under the decree-holder. As regards (1) it is said that Order XXI, rule 16 specifically provides for application for execution by a transferee of decree and, therefore, a transferee of decree cannot apply under section 146 and must bring himself within Order XXI, rule 16. This is really begging the question. Either the respondent



company are transferees of the decree by an assignment in writing or by operation of law, in which case they fall within Order XXI, rule 16, or they are not such transferees, in which event they may avail themselves of the provisions of section 146 if the other condition is fulfilled. There is nothing in Order XXI, rule 16 which, expressly or by necessary implication, precludes a person, who claims to be entitled to the benefit of a decree under the decree-holder but does not answer the description of being the transferee of that decree by assignment in writing or by operation of law, from making an application which the person from whom he claims could have made. It is said: what, then, is meant by the words "save as otherwise provided by this Code"? The answer is that those words are not meaningless but have effect in some cases. Take, by way of an illustration, the second proviso to Order XXI, rule 16 which provides that where a decree for payment of money against two or more persons has been transferred to one of them it shall not be executed against the others. This is a provision which forbids one of the judgment-debtors to whom alone the decree for payment of money has been transferred from making an application for execution and, therefore, he cannot apply under section 146 as a person claiming under the decree-holder. As the respondent company do



not fall within Order XXI, rule 16 because the document did not cover the decree to be passed in future in the then pending suit that rule cannot be a bar to the respondent company making an application for execution under section 146 if they satisfy the other requirement of that section, namely, that they can, be said to be claiming under the decree-holder.

38.

39. *As between the respondent company and the transferors the former may well claim a declaration of their title. Here there is no question of transfer of the decree by the transferors to the respondent company by assignment of the decree in writing or by operation of law and the respondent company cannot apply for execution of the decree under Order XXI, rule 16. But the respondent company are, nonetheless, the real owners of the decree because it is passed in relation to and for the recovery of the debt which undoubtedly they acquired by transfer by the document under consideration. The respondent company were after the transfer, the owners of the debt which was the subject matter of the suit and the legal incidents thereof and consequently were the real owners of the decree. The respondent company derived their title to the debt by transfer from the transferors*



and claimed the same under the latter. When the respondent company became the owner of the decree immediately on its passing they must, in relation to the decree, be also regarded as persons claiming under the transferors. The respondent company would not have become the owner of the decree unless they were the owners of the debt and if they claimed the debt under the transferors they must also claim the relative decree under the transferors as accretions, as it were, to their original right as transferees of the debt. In my opinion, the respondent company are entitled under section 146 to make the application for execution which the original decree- holders could do."

(emphasis supplied)

12. Almost identical question arose before Patna High Court in ***Gobardhan Das and Others vs M/s Jankidas Bansidhar and Others [1971 SCC Online Pat 54]***. Referring to ***Jugalkishore*** and a few other decided cases, it was held :

"9. In view of these authorities there can be no doubt that in circumstances of the present case the petitioners, if they can establish that they are purchasers of the



property sold in the auction sale, can avail themselves of the provision of Section 146 of the Code and also avail of the summary remedy provided in (Order 21, Rule 95 or 96 (as the case may be)).”

13. The respondents deny to be tenants. Their specific stand is found in statement of objections filed by respondents 2 and 3 to an application filed by the appellants as per I.A.1/2019 for a certain direction by this court. This application was disposed of by order dated 24.02.2020, but their specific stand shows the nature of possession and it is relevant here. In para 2 of statement of objections the respondents have stated as below :

"2. The averments made by the appellant.No.1 in his accompanying affidavit para. No.3 to 11 is not correct and same is denied, it is submitted that respondent. No.2 and 3 are not tenant in premises. It is submitted that the property bearing 1770, Upadhyaya Building, Sanyaji Rao Road, Mysore belong to one Mr.T.S.L.Upadhaya and his family members. Mr.T.S.L.Upadhaya's sister and brothers



filed suit for partition ie. O.S.No.73/1969 for partition of said property and same was decreed. It is submitted that when partition suit was pending, Mr.T.S.L.Upadhyaya entered into Partnership agreement dated 28-10-1988 with respondent.No.2 and 3 and started Matching Centre business in portion of said property and said Partnership not yet dissolved. It is submitted that on the other hand, Mr.T.S.L.Upadhaya during his life time, had obtained hand loan from the respondent.No.2 and 3 and he did not settled the loss and profit of Partnership and he did not repay the loan. In this respect, the respondent. No.2 and 3 filed suit against the Mr.T.S.L.Upadhaya. The copy of partnership agreement is produced herewith as Document.No.R-1.”

14. It becomes clear that property in question was dealt with by T.S.L.Upadhyaya during pendency of the suit by entering into a partnership with the respondents and contributed the property in question as his share to the partnership business. The said transaction was since during pendency of the suit within the meaning of explanation to section 52 of the Transfer of



Property Act, it was hit by section 52 of the said Act, and the respondents are the persons who hold occupancy of the property under a party to a partition suit. In this view Rule 96 of Order 21 is not applicable, the appellants are justified in invoking Rule 95 of Order 21.

15. The appellants are the purchasers from auction purchaser. There was no transfer of decree in favour of appellants in order that they could have exercised their right to execute under Order 21 Rule 16, but their right to take possession under Order 21 Rule 95 is not impeded in as much they derive right under section 146 of CPC. But to proceed under Order 21 Rule 95, application there under must be filed within one year in terms of Article 134 of the Limitation Act, from the date of order of making the sale absolute under Order 21 Rule 92 of CPC, not within one year from date of issuance of sale certificate under



Rule 94. In the case on hand, the dates are important. The sale was confirmed i.e., made absolute on 21.02.2014. Sale certificate was issued on 19.03.2014. Two sale deeds were executed by the auction purchaser on 12.9.2014. Another sale deed was executed on 26.09.2014. All the purchasers filed applications under Order 21 Rule 95 of CPC on 02.01.2015 which date is within one year from 21.02.2014. Therefore these applications are very much maintainable.

16. If the second appellant in RFA 557/2016 sold away his property and the purchaser from him has instituted a suit, it cannot be said that the first appellant in RFA 557/2016 and the appellant in RFA 558/2016 cannot proceed under Order 21 Rule 95 of CPC. RFA 557/2016 survives so far as the first appellant is concerned.

17. Hence the following :



ORDER

- (a) *RFA 557/2016 stands allowed as it relates to appellant No.1, the order dated 05.10.2015 in Execution 5/2015 on the file of Principal Senior Civil Judge, Mysuru, on application under Order 21 Rule 95 of CPC is set aside and the said application is allowed.*
- (b) *RFA 558/2016 is allowed, the order dated 05.10.2015 in Execution 6/2015 on the file of Principal Senior Civil Judge, Mysuru, on application under Order 21 Rule 95 of CPC is set aside and the said application is allowed.*
- (c) *The executing court shall proceed further for issuance of delivery warrants against the respondents in both the execution cases.*

There is no order as to costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

Ckl/kmv

List No.: 1 Sl No.: 1