

(1995) 07 PAT CK 0001

Patna High Court

Case No: Appeal From Appellate Decree No. 161 of 1991

Syed Md. Abdus
Samad

APPELLANT

Vs

Bibi Anwari Khatoon
and Others

RESPONDENT

Date of Decision: July 27, 1995

Final Decision: Allowed

Judgement

B.L. Yadav, J.

This is Defendant's Second Appeal preferred u/s 100 of the Code of Civil Procedure, 1908 (for short "the Code") arising out of a suit filed by the Plaintiffs-Respondents for a declaration that the sale deed dated 14.2.1966 alleged to have been executed by Md. Hasan alias Aju in favour of the Defendant-Appellant was fraudulent and fictitious, and for a declaration that the compulsory registration of the said sale deed was illegal, and that the order passed u/s 145/146 of the Code of Criminal Procedure, 1973 is not binding on the Plaintiffs-Respondents and for declaration of title.

2. The Plaintiffs-Respondents filed Title Suit No. 45 of 1975 on 10.7.1975 for the aforesaid reliefs. This plaint was ordered to be returned on 28.8.1978. Against that order of return of plaint the Plaintiffs-Respondents preferred an appeal and the same was dismissed on 4.4.1980. The plaint was taken back from the file on 20.8.1980 and was filed in the Court of the Subordinate Judge and thereafter it was numbered as Title Suit No. 283 of 1980. There was no explanation offered by the Plaintiffs-Respondents as to why the plaint was taken back on 20.8.1980, when the appeal was dismissed on 4.4.1980.

3. The averments in the suit were that one Noor Hasan Mian had two sons, Amir Hasan alias Gunga and Md. Hasan alias Aju. Plaintiff No. 1 Bibi Anwari Khatoon is the wife of Amir Hasan and Plaintiff No. 2 S. Kalimuddin and Plaintiff No. 3 Ainul Haque are the sons of Amir Hassan and Plaintiff No. 4 Hamida Khatoon and Plaintiff

No. 5 Jamila Khatoon are the daughters of Amir Hassan. Amir Hassan died about three years back and he was a deaf and dumb person. Md. Hassan alias Ajju had married one Most. Rakiba who predeceased. After the death of Most. Rakiba, Md. Hassan alias Ajju remarried Most. Bibi Quraisha (Defendant No. 2), who also had no issue from Md. Hassan. Thereafter she was divorced, by him and she re-married one Ali Hassan, from whom a son Md. Kamal was born. Md. Hassan alias Ajju had taken a loan of Rs. 800/- from Plaintiff No. 1 and in lieu thereof he surrendered his right, title and interest in the property to the Plaintiff No. 1 and accordingly entire house came in possession of Amir Hassan and his wife (Plaintiff No. 1). Md Abdus Samad (Defendant-Appellant) was a very clever person and he obtained a sale deed dated 14.2.1966, which was forged He filed an application u/s 36 of the Indian Registration Act and without knowledge or service of notice on the Plaintiffs, obtained an order of refusal on 11.5.1966 from the Sub-Registrar and thereafter an appeal was filed u/s 73 of the Indian Registration Act (Compendiously "the Act") by the Defendant-Appellant and a collusive decree and order was obtained. After the death of Md. Hassan alias Ajju, his heirs executed a false and fabricated sale deed in favour of the Defendant-Appellant, but this was illegal. As the Defendant-Appellant has obtained the sale deed in his favour and possession was delivered to him in the proceedings u/s 145/146, Code of Criminal Procedure, hence the present suit was filed.

4. The suit was contested by the Defendant-Appellant denying the averments made in the plaint and that the suit was time-barred, as the sale deed was dated 14.2.1966 and subsequent Title Suit No. 283 of 1980 was filed after three years in 1980. The suit was barred by principles of res-judicata, inasmuch as, eviction Suit No. 17 of 1977 was filed by the Appellant and was decreed in his favour. An application for execution was filed. It was Execution Case No. 15 of 1978. Misc. Case No. 64 of 1978 was registered and an enquiry was held under Order 21 Rule 101 of the Code on 5.2.1978. The said Misc. Case in execution was allowed. Thereafter the Appellant preferred Misc. Appeal No. 201 of 1978 against the said order and it was allowed on 16.7.1979 holding that the present Defendant-Appellant has an interest over the suit land and that the sale deed in favour of the Appellant was valid (vide Annexure 6) and the Plaintiff's Civil Revision No. 1668 of 1979 was dismissed on 2.5.1980 and in consequence thereof the Appellant had taken delivery of possession over an area of 978 Sq. ft. of the suit premises (vide Ext. A/9) and this judgment and order in execution proceeding would operate as res judicata.

5. Following issues were settled for the decision of the suit:

- (i) Is the suit as framed maintainable?
- (ii) Is the suit barred by Law of Limitation?
- (iii) Is the suit barred by the principle of res-judicata and estoppel?
- (iv) Is the suit barred u/s 53(A) of the Transfer of Property Act?

(v) Is the suit bad for non-joinder of Bibi Chanda and Md. Kamal and is the Bibi Chanda widow and Md. Kamal is the son of Md. Hassan alias Aju?

(vi) Has the Defendant No. 1 acquired valid right, title and possession by virtue of the sale deed dated 14.2.1966?

(vii) Is the Defendant No. 1 legal heir of Md. Hassan alias Aju?

(viii) Are the Plaintiffs entitled to declaration sought for?

6. It was held by the trial Court that Bibi Chanda was not the wife and Md. Kamal was not the son of Md. Hassan alias Aju and Defendant No. 1 had not acquired right and title under the registered sale deed dated 14.2.1966 and that the suit was not barred by the principle of res-judicata and estoppel and the Defendant No. 2 was held not to be the heir of Md. Hassan alias Aju. With these findings the suit was decreed and Defendant No. 1 was directed to hand over the possession of the suit house within six months.

7. The Defendant-Appellant's First Appeal was also dismissed vide judgment and decree dated 19.3.1991. Against these decrees and judgments the present Second Appeal has been filed.

8. Mr. A.B. Mathur, learned senior Counsel for the Appellant contended that the suit filed by the Plaintiff-Respondents was time barred and that the suit was barred by principle of res-judicata. The proceedings for compulsory registration of the sale deed were legal and valid. The sale deed was obtained by the Defendants-Appellant by the heirs of Md. Hassan alias Aju in pursuance of the appellate order under the Act. Hence the sale deed cannot be ignored. Mr. Mathur leaned heavily on [Sri Amar Chand Inani Vs. The Union of India \(UOI\)](#), The substantial questions of law have been incorrectly decided.

9. Mr. S.C. Ghose, learned Senior Counsel for the Respondents, however, refuted the submissions of the learned Senior Counsel for the Appellant and contended that the suit was not time barred nor the same was barred by the principle of res-judicata and estoppel and that the findings of the Courts below are findings of fact. No substantial question of law was involved. There would be no justification for interference in view of the provisions of Section 100 of the Code.

10. Having Weighed the submissions of the learned Counsel for the parties the principal questions for determination are as to whether the suit of the Plaintiffs-Respondents was time barred and whether the suit was barred by the principle of res-judicata and that whether the substantial questions are involved and have been correctly decided.

11. As regards the first question about the suit being barred by limitation there are two limbs of the arguments of the learned Counsel for the Appellant. The first was that the suit was obviously time barred, as it was filed much after three years. Such

suits for cancellation of instrument or declaration are filed as required by Section 31 of the Specific Relief Act, 1963. The next was that Article 59 of the Limitation Act, 1963 was applicable and the suit ought to have been filed by the Plaintiffs-Respondents within three years from the facts entitling the Plaintiffs to have the instrument or decree cancelled or set aside. The Title Suit No. 45 of 1975 was filed on 10.7.1975, its plaint was returned on 28.8.1978 for presentation before the proper Court. Against the order for return of the plaint the Plaintiffs filed the appeal, but the same was withdrawn on 4.4.1980 and hence the appeal was dismissed (vide Ext. A/28). The last limb of the argument of the learned Counsel for the Appellant was that in any case the plaint was taken back on 20.8.1980 after about four months sixteen days and it was filed on the same date i.e. on 20.8.1980 before the appropriate Court. The question is whether the earlier suit can be deemed to be pending between 4.4.1980 (the date of withdrawal of the appeal filed by the Plaintiffs) and 20.8.1980 (the date on which the plaint was actually taken back by the Plaintiffs).

12. The sale deed was executed in favour of the Appellant on 14.2.1966 and the suit of the Plaintiffs-Respondents was filed on 10.7.1975 for declaration that the sale deed alleged to have been executed by Md. Hassan alias Ajju and his heirs in favour of Defendant No. 1 (Appellant) has been fraudulently executed. The subsequent suit, as stated above, (T.S. No. 283 of 1980) was filed on 20.8.1980 before the Subordinate Judge. After about 12 years from the date of execution of the sale deed the suit was filed.

13. In [Sri Amar Chand Inani Vs. The Union of India \(UOI\)](#), it was ruled:

If the Plaintiff had filed the suit in the Trial Court on March 2, 1959, then certainly the suit would have been within time u/s 4, as that was the proper Court in which the suit should have been filed. As the Karnal Court had no jurisdiction to entertain the plaint, it was not the proper Court. The fact that the Plaintiff would be entitled to take advantage of the provisions of Section 14 of the Act would not, in any way, affect the question whether the suit was filed within the time as provided in Section 4 in the Karnal Court. Section 14 of the Act only provided for the exclusion of the time during which the Plaintiff has been prosecuting with due diligence another Civil proceeding against the Defendant, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction, or other cause of a like nature, is unable to entertain it. Even if the Plaintiff was entitled to get an exclusion of the time during which he was prosecuting the suit in the Karnal and Panipat Courts, the suit would not be within time as the filing of the suit in the Karnal Court was beyond the period of limitation. It was, however, argued by counsel for the Appellant that the suit instituted in the Trial Court by the presentation of the plaint after it was returned for presentation to the proper Court was a continuation of the suit filed in the Karnal Court and, therefore, the suit filed in Karnal Court must be deemed to have been filed in the

Trial Court. We think there is no substance in the argument, for, when the plaint was returned for presentation to the proper Court and was presented in that Court, the suit can be deemed to be instituted in the proper Court only when the plaint was presented in that Court. In other words, the suit instituted in the trial Court by the presentation of the plaint returned by the Panipat Court was not a continuation of the suit filed in the Karnal Court (See the decisions in [Hirachand Succaram Gandhi Vs. G.I.P. Railway Company,](#) [Bimala Prosad Mukerji Vs. Lal Moni Devi and Others,](#) and [Gangamoni Devi Vs. Kumud Chandra Mazumdar and Others,](#) Therefore, the presentation of the plaint in the Karnal Court on March 2, 1959, cannot be deemed to be a presentation of it on that day in the Trial Court.

14. In view of the aforesaid observations it is manifest that in the first suit the order was passed on 28.8.1978 under Order 7 Rule 10 of the Code for return of the plaint to present in the proper Court. But against that order the Plaintiffs-Respondents preferred an appeal and the same was dismissed on 4.4.1980. The plaint was, however, taken back on 20.8.1980 after about four months sixteen days. The short question was whether the suit was time-barred, and particularly whether the period of four months sixteen days was in continuation of the earlier suit. The Apex Court, as indicated above, ruled that the suit would be deemed to be instituted in the proper Court only when the plaint was actually presented in the proper Court. As the period spent in taking back the plaint cannot be deemed to be in continuation of the earlier suit, in my considered opinion, therefore, the Plaintiffs-Respondents cannot get the benefit of the provision of Section 14 of the Limitation Act and the suit was obviously time barred.

15. The matter can be angulated from another perspective. There was no explanation for the delay either in presentation of the plaint in the proper Court, or in taking back the plaint, or in filing the suit. The suit was filed after about twelve years from the date of sale. In any view of the matter, the earlier suit instituted by the presentation of the plaint by the Plaintiffs-Respondents in a Court having no jurisdiction, and having directed on 28.8.1978 for return of the plaint cannot be deemed to be instituted in the proper Court nor the second suit can be said to be in continuation of the earlier suit (See [Satyadhyam Ghosal and Others Vs. Sm. Deorajin Debi and Another,](#) and [Arjun Singh Vs. Mohindra Kumar and Others,](#)

16. In a Division Bench decision of this Court in [Lakshmi Narain Ram Narain Vs. The State of Bihar,](#) his Lordship Mr. Justice L.M. Sharma, J. (as his Lordship then was) speaking for the Bench observed (under paragraph 15 at page 77) that if a suit was brought for compensation of breach of contract or even for cancellation of sale deed; after three years was obviously time barred. Following the same analogy in the instant case the suit for the relief of cancellation of the sale deed filed much after three years would also be time barred.

17. Reverting to the question of resjudicata, suffice it to say that Eviction Suit No. 17 of 1977 was filed against the Plaintiffs-Respondents by the Defendant-Appellant and

was decreed. Thereafter an application for execution was filed. It was registered as Execution Case No. 15 of 1978. Ultimately Misc. Case No. 64 of 1978 was registered and enquiry was held under Order 21 Rule 101 of the Code and the questions to be determined were for right, title and interest over the suit property arising between the parties to the proceedings. Those questions were to be decided by that Court and not in a separate suit for this purpose. The application of the Appellant was rejected on 5.2.1978. Against this order the Appellant preferred an appeal/application and it was held that the title of the Appellant was established on the basis of valid sale deed (vide C.R. No. 1668 of 1979) on 2.5.1980. These proceedings between the parties became final and would operate as resjudicata.

18. The validity of the sale deed in favour of the Defendant-Appellant was upheld in the proceedings for compulsory registration under the Act. The sale deed was compulsorily registered under the provisions of Section 75 of the Indian Registration Act; the proceedings for compulsory registration were legal and valid and the proceedings for registration of sale deed in dispute in favour of the Appellant was valid and legal. There was a presumption u/s 114(e) of the Indian Evidence Act that the official acts shall be deemed to have been correctly performed. Registration of the sale deed by the Registrar in favour of the Appellant and the proceedings for compulsory registration be deemed to be genuine and valid. Nothing has been demonstrated from the side of the Plaintiffs-Respondents to show as to how the Defendant-Appellant was not entitled to the said presumption.

19. The provision of Section 100 of the Code, as amended in 1976, has been drastically changed and it has been provided that in order to interfere in Second Appeal, there must be substantial question of law involved. The questions as to whether the suit was barred by res-judicata and whether the suit was barred by limitation were no doubt, substantial questions of law. Those questions are involved in this appeal in the sense that they have been erroneously decided by the Courts below.

20. In National Insurance Company Ltd. v. State Bank of India and Ors. (Judgment Today 1993 (2) SC 464) their Lordships of the Apex Court have ruled that there must not be a question at issue factual in nature even if the findings of fact recorded either by the appellate Court or the trial Court was erroneous. The findings pertaining to the question of limitation and res-judicata cannot be said to be findings of fact. In my opinion, both the substantial questions of law are involved and they have been erroneously decided by the Courts below. As the suit was time barred, hence there was no escape from the conclusion that the suit has to be dismissed.

21. In view of the premises aforesaid applying the principles of Aristotelian and Baconian reasonings, the present Second Appeal succeeds and the same is allowed and the decrees of the Courts below are set aside and the suit of the Plaintiffs-Respondents is dismissed with costs throughout.