

(2008) 09 CAL CK 0015

Calcutta High Court

Case No: S.A. No. 480 of 1993

Sri Tarak Nath Paul

APPELLANT

Vs

Sri Joy Krishna Dhara and Others

RESPONDENT

Date of Decision: Sept. 11, 2008

Acts Referred:

- Limitation Act, 1963 - Section 27, 6, 7, 8

Citation: (2008) 4 CALLT 57

Hon'ble Judges: Partha Sakha Datta, J

Bench: Single Bench

Advocate: Prabal Mukherjee and Mr. Animesh Das, for the Appellant; Tarit Kumar Bhattacharya and Mr. Sanjib Sett for the Respondent No. 5, Mr. Gourisankar De and Mr. Rudranil De for the Respondent No. 1, for the Respondent

Final Decision: Dismissed

Judgement

Partha Sakha Datta, J.

This Second Appeal is directed against the judgment and decree dated 3rd December, 1992 passed by learned Additional District Judge, 1st Court, Howrah allowing the appeal and thereby dismissing the suit on contest after reversing the judgment and decree dated 27th of June, 1990 passed in Title Suit No.20 of 1985 by the learned Assistant District judge, 3rd Court, Howrah whereby the suit was decreed on contest.

2. Bereft all necessary verbiages the plaint case of the appellant-plaintiff is that the suit properties comprised in good number of plots appertaining to Khatian No.1369 in Mouza - Khariap under P.S. Amta in the district of Howrah belonged to Smt. Parul Bala who died in 1940 leaving behind her three sons i.e. Biswanath, Baidyanath and Tarak Nath. Biswanath is the defendant No.3, Baidyanath is proforma defendant No.5 and Taraknath is the plaintiff. Some time after the death of Parul Bala her husband Nanda Kumar Pal became untraced and remained unheard for long 40/41

years and is considered to be dead in the eye of law. Each of the three sons of Parul Bala who inherited the suit properties has 1/3rd share and each of them is in possession of the suit properties according to their respective shares. Biswanath is the eldest of the three brothers and after their father became untraced he would look after to other brothers who were at the material time minors. During the minority of the plaintiff and Baidyanath, Biswanath transferred their shares in the suit properties to the defendant No.1 and defendant No.4 by several deeds during the period from 1959 to 1966. The plaintiff and the proforma defendant No.5 Baidyanath had no knowledge of such transfers. Biswanath had no authority to make as he was neither the natural guardian nor defacto gurdian of Taraknath and Baidyanath. The proforma defendant No.5 Baidyanath on attaining majority sold his share in respect of some of the properties to defendant No.1 on 14th of December, 1966. In the middle of the month of January 1982 the defendant No.1 and 2 proclaimed that they had purchased the suit properties from the defendnat No.3, Biswanath and threatened the plaintiff with dispossession. Having searched the necessary documents in the office of the Registrar of Howrah on 22nd February, 1982 the plaintiff came to know of such transfers which were fraudulently and surreptitiously made in a mala fide manner by his brother Biswanath in favour of the defendant Nos.1 and 2. All these transfers are void, illegal, collusive and fraudulent. The deeds of conveyances in relation to the suit properties conveying share of Taraknath and Baidyanath by Biswanath are dated 20th January, 1960, 15th September, 1960, 2nd December, 1960 and 10th December, 1960. Yet there is another deed of conveyance dated 14th December, 1966 which was allegedly executed by defendant No.3 in the name of the proforma defendant No.5. The plaintiff claims to be in continuous possession of the suit properties. The defendant No.3 is further said to have executed two other deeds of conveyances on 23rd November, 1959 and 26th June, 1955 in respect of some portions of the suit property to the defendant No.4 and such transfers were also fraudulent and void.

3. The defendant No.1 and defendant No.4 filed two separate written statements denying the plaint narrative contending inter alia that the plaintiff was all along aware of series of sales which were effected by Biswanath, the defendant No.3 for the benefit of the minors as he had no other means to maintain them. The defendant No.1 has been in possession of the suit properties by virtue of purchase. The fact of the matter is that the proforma defendant No.5 Baidyanath instituted a Title Suit being T.S. No.229 of 1970 in the Court of the learned Munsif, 3rd Court, Howrah against the defendants and the present plaintiff as a proforma defendant praying for same relief but became unsuccessful, and the present plaintiff has been set up by the other brother suppressing the fact of dismissal of the previous suit instituted by proforma defendant No.5.

4. The written statement of the defendant No.4 is in the same line as that of the defendant No.1.

5. The reliefs sought for in the plaint was for partition upon declaration of the deeds of conveyances to be void, illegal, fraudulent and not binding on the plaintiff.

6. The suit was decided first by the learned Assistant District judge, 3rd Court, Howrah on 28th of May, 1987 by dismissal on the ground of the suit being hit by Law of Limitation. The learned lower Appellate Court remanded the case back to the learned Trial Court for fresh trial and upon such fresh trial the learned Assistant District judge, 3rd Court, Howrah by the judgment and decree dated 27th of June, 1990 decreed the suit against which the appeal being Title Appeal No. 197 of 1990 was preferred by the defendant No.1 and the learned Additional District Judge, 1st Court, Howrah by the appellate judgment and decree dated 3rd of December, 1992 allowed the appeal and thereby dismissed the suit holding that the suit was grossly barred by limitation.

7. Against the First Appellate Court's judgment and decree as aforesaid the second appeal has been preferred by the plaintiff-appellant and the ground on which the appeal has been heard is one and singular i.e. whether the suit was barred by limitation.

8. I have heard Mr. Probal Mukherjee, appearing with Mr. Animesh Das learned Advocates for the appellant-plaintiff and Mr. Gouri Shankar De, appearing with Mr. Rudranil De, learned Advocates for the respondent No.1 (defendant No.1) and Mr. Tarit Kumar Bhattacharya appearing with Mr. Sanjib Sett for the respondent No.5.

9. Certain facts are not in dispute. The properties in suit originally belonged to the maternal grand father of the plaintiff and on his death his only daughter Parul Bala who is the mother of the plaintiff and the defendant No.3 and the proforma defendant No.5 succeeded to the estate and became the owner of the properties. Some 42 years preceding the presentation of the plaint (the suit was instituted on 2nd June, 1982) the mother of the plaintiff and the proforma defendant Nos.3 and 5 died leaving the plaintiff, defendant No.3 Biswanath and proforma defendant No.5, Baidyanath as her legal heirs who inherited the said properties to the extent of 1/3rd share each. Parul Bala's husband Nanda Kumar Pal is said to have remained untraced immediately after the death of the mother of the plaintiff and remained unheard of since long. Unquestionably, the suit properties were transferred by the defendant No.3 by series of deeds of conveyances in favour of the defendant No.1, 2 and 4 during the period from 1959 to 1966 conveying the shares of plaintiff and the proforma defendant No.5.

10. While the plaintiff alleges that such transfers were effected illegally without the permission of the District judge and without any legal necessity by the defendant No.3 who was neither the natural guardian of the plaintiff and the proforma defendant No.5 nor the defacto guardian of them, the defendant No.1 and the defendant No.4 contended in the written statement that such transfers were effected for the benefit of the minors and such transfers were to the knowledge of

the plaintiff. Further the proforma defendant No.5 instituted Title Suit No. 229 of 1970 before the learned Munsif, 3rd Court, Howrah challenging such transfers but the suit was dismissed and the present suit of Taraknath is but another attempt without having any cause of action.

11. With regard to possession in respect of which arguments have been advanced by each of the parties, each of the contesting parties claims to be in possession. The learned First Appellate Court has found that the plaintiff appellant's case that he is in possession of the suit properties has not been proved, rather has been disproved because of the fact that the plaintiff himself admitted in cross-examination that he does not pay any rent for the suit properties and that defendant No.1 is in possession of the suit properties, though in other breath he states that he cultivates the suit properties with the help of labourers none of whom could be produced by him to give evidence in his favour. Be that as it may, the question of possession is not so much of importance, and what is of prime importance is whether the suit is barred by limitation or not. The learned Trial Court held that having regard to Article 59 concerning suits relating to decrees and instruments the period of limitation is three years in terms of which the time from which the period begins to run is when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first became known to him. Since according to the plaintiff on 22nd February, 1982 he came to have knowledge of such transfers the period of limitation of three years will begin to run from the date of such knowledge and that being so the suit which was instituted in June 1982 was well within time.

12. The learned First Appellate Court in disagreeing with the learned Trial Court succinctly observed that having regard to Article 58 of the Limitation Act, limitation for institution of the suit is three years from the point of time when right to sue accrues and as to when such right to sue accrues in the given situation section 6 gives the answer. u/s 6 where a person is entitled to institute a suit is at the time from which the prescribed period is to be reckoned a minor he may institute when the disability ceased. The learned First Appellate Court referred to section 8 of the Act which provides that nothing in section 6 or section 7 applies to suits to enforce right on pre-emption, or would be deemed to extend for more than three years from the cessation of the disability. The plaintiff was born on 1st of January, 1945 and he attained majority on 1st of January, 1963 which is not denied. Therefore, the suit could have been lawfully instituted within three years of that date but he has not done so and he instituted the suit 16 years after attainment of majority. The learned First Appellate Court reasoned that since the defendant No.3 was not the natural guardian of the plaintiff and without the permission of the District judge during the minority of the plaintiff and proforma defendant No.5 the transfers were void ab initio and this being so, the plaintiff was not required to ask for cancellation or setting aside all such void deeds. In effect the suit was one for declaration that the impugned deeds are void and for partition commensurate to his 1/3rd share in the suit properties. Thus, according to the learned First Appellate Court Article 59 of

the Limitation Act thus has no manner of application to the suit.

13. The learned Advocate for the respondent defendant No.1 elaborated the reasoning of the learned First Appellate Court and submitted that even if the transfers were illegally made not for benefit of the minors still then the suit is not legally entertainable having regard to the fact that it was instituted exactly 16 years after expiry of three years after the plaintiff had attained majority which even took place on 1st of January, 1963. The mala fide of the plaintiff is sought to be assessed and gathered by the reason of institution of Title Suit No.229 of 1970 by the proforma defendant No.5 i.e. the other brother challenging the self-same transfers or the self-same grounds but the said suit stood dismissed and in that suit the present plaintiff was a proforma defendant in the same manner as the plaintiff of the suit is now proforma defendant. My attention has been drawn to the decision of the Supreme Court in [Prem Singh and Others Vs. Birbal and Others](#), and the Division Bench of this Court in Hamida Begum v. Umran Bibi, (2008) 2 WBLR (Cal) 689 wherein Prem Singh (supra) was referred to.

14. Mr. Prabal Mukherjee, the learned Advocate appearing for the appellant takes me to the paragraph Nos.11, 12 and 16 of the plaint to argue that the plaintiff-appellant has clearly averred that he derived knowledge of transfers of the suit properties only in February, 1982 when the defendant No.1 gave out that the defendant Nos.1, 2 and 4 had purchased the suit properties from the defendant No.3 and pursuant to such disclosure he approached the Registration Office to find on 22nd 1982 of the existence of transfers of the properties. That date has to be the date from which time has to run for a period of three years consistent with what is contained in Article 59 of the Limitation Act. It is submitted that the plaintiff has verbally prayed for setting aside the deed of sale and no decree for partition in preliminary form was available to him unless the instruments are set aside. It is submitted that for a suit for setting aside or cancellation of instrument on the ground of fraud Article 59 will be attracted and the starting point of limitation is the date of knowledge of such fraudulent transfer. In this connection, Mr. Mukherjee has referred to a decision in Md. Noorul Hoda v. Bibi Raifunnisa and Ors., (1996) 7 SCC 787. It is submitted further that there is no material to hold that the present plaintiff was a party to the Title Suit No.229 of 1970 which was instituted by proforma defendant No.5 and moreover that suit having been dismissed for default the principle of res judicata does not apply. Mr. Mukherjee further submits that as regards possession, it rests with the plaintiff who has adduced evidence in support of his possession and the learned first Appellate Court misconstrued the evidence of the plaintiff so as to unjustly ensure to the benefit of the respondent No.1.

15. Mr. Tarit Kumar Bhattacharyya, learned counsel for the proforma opposite party No.5 adopted the arguments of Mr. Mukherjee.

16. Amidst the conflicting submissions of the learned Advocates for the parties the question that calls for consideration is whether the period of limitation is three years

from the date of attainment of majority or from the date when the execution of instrument became known to the plaintiff for the first time. It has to be stated at the outset that the plaintiff-appellant was not a party to the transfers although transfers allegedly affected him. The very first relief that has been prayed for by the plaintiff is that the deeds of conveyances are void, collusive, illegal and fraudulent. It cannot be gainsaid that when a person not being a natural guardian or a de facto guardian makes transfer of a property of a minor without permission of the District judge or without any legal necessity, such transfer is, as has been rightly held by the learned first Appellate Court is void ab initio. Therefore, the plaintiff has not to seek for cancellation or setting aside the instruments in which case his date of knowledge of transfer is the starting point of limitation. Since essentially the deeds are void ab initio prayer for setting aside instruments is not necessary for him. He necessarily in such a situation seeks for a declaration of the deeds being void. Sub-section (1) of section 6 of the Limitation Act is directly to the point. It runs thus:

"Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned, a minor or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefore in the third column of the Schedule."

17. Suffering minority is on the face of sub-section (1) of section 6 a suffering from disability. Such disability ceased in the instant case on 1st of January, 1963. And, the period of limitation of three years would be a period within three years from the date of attainment of majority.

18. Article 59 does not appear to have any manner of application. Ordinarily under Article 60 to set aside a transfer of property made by the guardian of a ward is three years by the ward when he attains majority. In Prem Singh (supra) their Lordships of the Supreme Court held that Article 59 of the Limitation Act applies specifically when relief is claimed on the ground of fraud or mistake. It only encompasses within its fold fraudulent transactions which are voidable transactions and would apply where a document is prima facie valid. But when a document is void ab initio a decree for setting aside the same would not be necessary as the same is non est in the eye of law, as it would be a nullity. Paragraph 28 of the judgment gives a complete answer to our question:

""If a deed was executed by the plaintiff when he was minor and it was void, he had two options, to file a suit, to get the property purportedly conveyed thereunder. He could either file the suit within 12 years of the deed or within three years of attainment majority. Here, the plaintiff did not either sue within 12 years of the deed or within three years of attainment majority. Therefore, the suit was rightly held to be barred by limitation by the Trial Court."

19. Obviously, when the Lordships observed that the suit could be filed within three years of attainment majority their Lordships were referring to Article 58 of the Limitation Act.

20. A Division Bench of this Court held in Hamida Begum (supra) referred to the decision in [Bailochan Karan Vs. Basant Kumari Naik and Another](#), and reproduced the decision of the Hon"ble Court by referring to the facts of that case as follows:-

"In that case, one "B" died and was survived by his wife, son and daughter. His widow executed a Will in favour of the daughter bequeathing the entire property to her. The daughter sold the property on 6.2.1953 to the plaintiff. The plaintiffs came into possession from that date. The suit was filed by the plaintiffs against a person who was the appellant before the Supreme Court alleging that he was an illegitimate son of P; the son of "B" and that the appellant/defendant had forcibly trespassed in the land in 1971. The High Court in second appeal found that if the appellant was born in 1945, he attained majority in 1966 on completion of 21 years and he could have instituted a suit for recovery of possession within three years therefrom, i.e. 1969. The suit by the plaintiff was filed in 1971, which was beyond the said period of three years. In such a case, the Apex Court held that the appellant could not have filed any suit for recovery of possession beyond the year 1969 and the plaintiffs had perfected title to the property by virtue of section 27 of the Limitation Act.

(emphasis supplied)

Section 8 runs as follows:

"Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period of limitation for any suit upon application."

21. In the circumstance the plaintiff's suit which was filed 16 years after expiry of three years after the plaintiff had attained majority is barred by limitation. The learned First Appellate Court has rightly applied the law and I find no illegality or infirmity in the judgment complained of.

22. The appeal fails and is dismissed but in the circumstance without any order as to costs. The judgment and the decree of dismissal of the appeal and consequently of the suit passed by the learned Additional District Judge, 1st Court at Howrah is hereby confirmed.

No formal decree need be drawn up.

A copy of the judgment along with the LCR shall be sent to the learned Trial Court for information and necessary action.