

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4811 OF 2000

UTHA MOIDU HAJI

APPELLANT

(S)

VERSUS

KUNINGARATH KUNHABDULLA AND ORS.

RESPONDENT(S)

O R D E R

The first defendant in the suit is in appeal before us being aggrieved by and dissatisfied with the judgment and order dated 17th June, 1998, passed by a learned Single Judge of the Kerala High Court in Second Appeal No.8/1991.

The basic fact of the matter is not in dispute. One Kunhahammed was the owner of the property in question. He died in 1960 leaving behind the second defendant as his widow and defendants

3 to 8 as also the plaintiff of the suit are his children. The land in

question was purported to have been sold by defendant Nos.2 to 8, not

only on their own behalf but also on behalf of the plaintiffs, by a

registered sale deed dated 30.8.1963, in favour of the father of the first

defendant Moosa Haji. It is not in dispute that Moosa Haji was father

of defendant No.2 i.e. maternal grandfather of the plaintiff and

defendant Nos.3 to 8. In the said deed of sale, plaintiff was represented

by his father - defendant No.4.

Moosa Haji sold half share in the said purchased property, in

favour of the appellant by a registered sale deed dated 2.5.1970. As

noticed hereinbefore the appellant before us is son of the said Moosa

Haji. By reason of a partition which took place in the family of Moosa

Haji, another half share of the property in question was allotted in

favour of the appellant. The appellant thus became full owner thereof.

The plaintiff attained majority on 30th July, 1974. On or about

18.3.1981, he filed a suit in the Court of Subordinate Judge, Calicut,

praying inter for the following reliefs:

"(A) To allot 4 shares exclusively to the plaintiff's possession on division of the plaint schedule property into 94 equal shares but by discarding the sale deed executed by defendants 2, 3 and 4 on 30.8.63 for their on behalf and on behalf of the minor defendants 5 to 8 and the plaintiff.

(B) To permit the plaintiff to recover the mesne profits of the plaint-schedule properties for the last 3 years at the rate of Rs.10,000/- per annum from the first defendant or other defendants.

(C) To recover the cost of the suit by the plaintiff from the defendants."

One of the issues which arose for consideration before the learned Trial Judge was as to whether the suit was barred by limitation being issue No.3 thereof.

The learned Trial Judge opined that Article 60 of the Schedule

appended to the Limitation Act, 1963 being applicable, the suit was barred by limitation. The plaintiff filed an appeal thereagainst. The appellate Court was of the opinion that the plaintiff could have instituted the suit within a period of 12 years from the date of execution of the sale deed i.e. till the year 1986 and the suit was not barred by limitation. The appellant herein carried the matter in second appeal before the High Court. By reason of the impugned judgment, a learned Single Judge of the Kerala High Court although opined that in terms of Sections 6 & 8 of the Limitation Act, 1963, the suit was required to be filed by the plaintiff-respondent within 3 years from the date of attaining majority or 12 years from the date of execution of the sale deed. The learned Single Judge proceeded to dismiss the second appeal inter alia on the premise that the appellant as also his predecessor in interest having become co-owner in the suit property, the provisions of Article 65 of the Limitation Act, 1963 would be applicable. Having held so, it was further opined that as the defendant No.1 - appellant had failed to plead and ouster as against the plaintiff, the suit was bound to fail.

Mr. Krsiahnamurthy, learned senior counsel appearing on behalf of the appellant would submit that the opinion of the learned Single Judge is contrary to the pleadings of the parties inasmuch as the plaintiff-respondent in his plaint clearly averred that the interest of the appellant and his predecessor in interest was adverse to that of the plaintiff and in that view of the matter the question of the appellant and/or his predecessor in interest in who is interested did not arise. It was further submitted that on a plain reading of the provisions of Sections 6 & 8 of the Limitation Act, 1968, vis-a-vis Article 60 of the Schedule thereof would clearly show that the suit was barred by limitation.

Mr. Vishwanatha Iyer, learned senior counsel appearing on behalf of the plaintiffs-respondents on the other hand, would submit that as the sale deed was a void ab initio the plaintiffs continued to be co-owner and in that view of the matter it was incumbent upon the defendants to raise the plea of ouster in terms of Article 65 of the

Limitation Act. Learned counsel would further contend that, in any event, the plaintiff being a minor the question of starting of adverse possession as against him by a co-owner would arise only when he attains majority and not prior thereto.

Our attention in this connection has been drawn to the statement made in the plaint to the effect that the plaintiff could come to learn about the execution of the sale deed only on 4.3.1983.

The application of the provisions of the Limitation Act is not in question. Section 6 of the Limitation Act, 1963 reads as under:

"6. Legal disability.- (1) 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 therefor in the third column of the Schedule.

(2) Where such person is, at the time from which the prescribed period is to be reckoned, affected by two such disabilities, or where, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased, as would otherwise have been allowed from the time so specified.

(3) Where the disability continues up to the death of that person, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been allowed from the time so specified.

(4) Where the legal representative referred to in sub-section (3) is, at the date of the death of the person whom he represents, affected by any such disability, the rules contained in sub-sections (1) and (2) shall apply.

(5) Where a person under disability dies after the disability ceases but within the period allowed to him under this section, his legal representative may institute

the suit or make the application within the same period after the death, as would otherwise have been available to that person had he not died."

"8. Special exceptions.- 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 or application."

Articles 59 & 60 of the Limitation Act reads as under:

Description of suit	Period of limitation	Time from which period begins to run
59. To cancel or set aside an instrument or decree or for the rescission of a contract.	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the

contract rescinded

first become known

to him.

60. To set aside a
transfer of property

Three years

When the ward

attains majority.

made by the guardian

of a ward-

(a) by the ward who has

attained majority;

(b) by the ward's legal

representative

(i) When the ward dies

Three years

When the ward

within three years from

attains majority.

the date of attaining

majority;

(ii) When the ward dies

Three years

When the ward dies.

before attaining

majority.

From a bare perusal of the prayer of the plaintiff in the suit it

is evident that he, for all intent and purport, prayed for setting aside

the deed of sale. The learned Trial Judge considered the matter at

great length and came to the conclusion that:

"The case of the plaintiff that he filed the suit on his getting information from PW2 his father's brother is not correct. On the basis of Ext XI(a) entry in Ext.XI,I find that the date of birth of plaintiff is 30.7.56 and he has attained majority on completion of 18th by 30th of July, 1974. Admittedly the suit filed by the plaintiff before the transferor court was 18th March, 1981.

That means after his sleeping for six years over his right to sue for the subject matter involved in the suit.

As provided under Article 60(a) of the Limitation Act, 1963, 3 years is the period of limitation to file a suit on attainment of majority in the case of minor. Here the plaintiff in order to escape from the clutches of law of limitation as made cock and bull story against Ext.XI(a) entry in Ext.XI - register and failed the suit in a carefully careless manner, but after 6 years on his attaining majority that on 30th August, 1974. Though the plaintiff cannot be blamed for reporting wrong date of birth in Ext.A1 S.S.L.C. Book. Ext.XI(a) entry in Ext.XI Register up roots the foundation of the plaint

claims. Hence the apple-cart of the plain turned turtle.

The law of limitation as pointed out by the learned counsel appearing for the plaintiff might be a legal fiction but it has got applicability. Therefore, each provision laid down in the law of limitation is applicable to legal proceedings instituted by litigants like plaintiff. I would have respectively appreciated with the arguments advanced by litigants like the learned counsel for the plaintiff on this aspect of non-application of the law of limitation provided the suit instituted by the plaintiff was within the period of limitation under Article 60(a) of the Limitation Act, 1963.

For the reason stated above, the plaint claims are found barred by Article 60(a) of the Limitation Act, 1963. Hence, the suit is not maintainable. Issue Nos.1 and 3 are found against the plaintiff."

We may notice that the issue as to whether the appellant herein or his predecessor in interest became indefeasible owner of the property in the light of Section 27 of the Limitation Act, was never

made an issue. The plaintiff-respondent herein cannot not raise a contention for the first time before the High Court or before us, that the appellant's claim that he had acquired indefeasible title would be hit by Article 60 of the Limitation Act.

The learned Trial Judge had not arrived at any finding that the plaintiff came to know of the execution of the said deed of sale or or about 4.3.1981. If that be so, the plaintiff would be deemed to have knowledge about the execution of the sale deed on his attaining majority, as soon as he pleaded and proved that his case comes within the purview of the exception contained in the provisions of the Limitation Act. As indicated hereinbefore, the applicability of the said limitation is not in a suit of this nature. The learned Single Judge had in fact held that the period of limitation would be either 3 years from the date of attaining majority by the plaintiff or 12 years from the date of execution of the deed of sale. To the same effect is the decision of this Court in Prem Singh and Ors. vs. Birbal and Ors., [2006 (5) SCC 353], wherein this Court compared the provisions of Article 91 of the

old Limitation Act vis-a-vis Articles 59 & 60 of the new Limitation Act

so as to hold:

"17. Once, however, a suit is filed by a plaintiff for cancellation of a transaction, it would be governed by Article 59. Even if Article 59 is not attracted, the residuary article would be.

18. Article 59 would be attracted when coercion, undue influence, misappropriation or fraud which the plaintiff asserts is required to be proved. Article 59 would apply to the case of such instruments. It would, therefore, apply where a document is prima facie valid.

It would not apply only to instruments which are presumptively invalid. [See Unni v. Kunchi Amma, (ILR 1891 14 Mad. 26) and Sheo Shankar Gir v. Ram Shewak Chowdhri, (ILR 1897 24 Cal 77)].

19. It is not in dispute that by reason of Article 59 of the Limitation Act, the scope has been enlarged from the old Article 91 of the 1908 Act. By reason of Article 59, the provisions contained in Articles 91 and 114 of

the 1908 Act had been combined.

20. If the plaintiff is in possession of a property, he may file a suit for declaration that the deed is not binding upon him but if he is not in possession thereof, even under a void transaction, the right by way of adverse possession may be claimed. Thus, it is not correct to contend that the provisions of the Limitation Act would have no application at all in the event the transaction is held to be void."

It was further held:

"If a deed was executed by the plaintiff when he was a 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 3 years of attaining majority. Here, the plaintiff did not either sue within 12 years of the deed or within 3 years of attaining majority. Therefore, the suit was rightly held to be barred by limitation by the trial court."

A grandfather from the mother side, under the Mohammadan Law, is not a co-owner of a property. Moosa Haji as a predecessor in interest of the said property also did not become the co-owner. The expression co-owner presupposes ownership. If the contention of the plaintiff-respondent that Moosa Haji did not acquire any interest in the property so far as plaintiff is concerned is correct, the question of his becoming co-owner of the property by reason of the said deed of sale or otherwise would not arise. When a person enters into possession of a land under a void or voidable transaction, his possession becomes adverse from the date he comes in possession. His possession would be exclusive, it will be a repetition to state, in the capacity of of a co-owner. The concept of co-owner, therefore, in our opinion, has not been correctly applied in the peculiar facts and circumstances of this case. Reliance has been placed by Mr. Vishwanatha Iyer on a decision of the Division Bench of the Calcutta High Court in Jagannath Marwari and Ors. vs. Mst. Chandni Bibi and Anr. (AIR 1921 Cal. 647).

Therein the parties were co-sharers and a question was raised as to

whether a co-sharer becomes entitled to claim indefeasible title by starting possession of the property adverse to the interest of the plaintiff who was a minor at that point of time. The Calcutta High Court opined that the question of adverse possession as against the

minor to his knowledge would arise only from the date of his attaining

majority and not prior thereto. As noticed hereinbefore, we are not

concerned with such a situation in the present case as the only question

which fell for consideration before the learned Trial Judge was that

whether the provisions of Article 60 of the Schedule appended to the

Limitation Act would be attracted in the facts and circumstances of the

case.

In the facts and circumstance of this case, the impugned

judgment cannot be sustained. Accordingly, the judgment of the High

Court as also the first Appellate Court are set aside and that of the

learned Trial Judge is restored. The appeal is allowed. However, in the

facts and circumstances of the case, there shall be no orders as to costs.

.....J

(S.B. SINHA)

.....J

(MARKANDEY KATJU)

NEW DELHI;

NOVEMBER 30, 2006.

ITEM NO.101

COURT NO.7

SECTION XIA

(Part-heard)

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

CIVIL APPEAL NO. 4811 OF 2000

UTHA MOIDU HAJI

Appellant(s)

VERSUS

KUNINGARATH KUNHABDULLA AND ORS.

Respondent(s)

(With office report)

Date: 30/11/2006 This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE S.B. SINHA

HON'BLE MR. JUSTICE MARKANDEY KATJU

For Appellant(s) Mr. P. Krishnamurthy, Sr.Adv.

Mr. Rajiv Mehta,Adv.

For Respondent(s) Mr. T.L. Vishwanatha Iyer, Sr.Adv.

Mr. Gopalakrishnan R.,Adv.

Mr. Jai Kishore Singh,Adv.

Mr. Subramonium Prasad,Adv.

UPON hearing counsel the Court made the following

O R D E R

Heard the learned counsel for the parties.

The judgment of the High Court as also the first
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Judge is restored. The appeal is allowed in terms of the signed
judgment. However, in the facts and circumstances of the case,
there shall be no orders as to costs.

(A.S. BISHT)

BHARDWAJ)

COURT MASTER

(PUSHAP LATA

COURT MASTER

(Signed reportable judgment order is placed on the file)