

CASE NO.:  
Appeal (civil) 4811 of 2000

PETITIONER:  
Utha Moidu Haji

RESPONDENT:  
Kuningarath Kunhabdulla and Ors.

DATE OF JUDGMENT: 30/11/2006

BENCH:  
S.B. Sinha & Markandey Katju

JUDGMENT:  
JUDGMENT

S.B. SINHA, J.

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 the 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, thus, 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 his attaining majority or 12 years from the date of execution of the sale deed, but dismissed the second appeal of the appellant herein inter alia on the premise that he as also his predecessor in interest having become co-owner in the suit property with the plaintiff-respondent, 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 prove 'ouster' as against the plaintiff, the suit was bound to fail.

Mr. Krishnamurthy, learned senior counsel appearing on behalf of the appellant would submit that the findings of the learned Single Judge are 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 having interest in the welfare of the minor 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, it would be evident that the suit was barred by Limitation.

Mr. Vishwanatha Iyer, learned senior counsel appearing on behalf of the plaintiff-respondent on the other hand, would submit that as the sale deed was 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 to the statements 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 (11) and Section 8 of the Limitation Act, 1963 read 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.

"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 read as under:

Description of suit limitation to run	Period of period begins	Time from which
39. To cancel or set aside an instrument or	Three years	when the facts entitling the

decree or for the rescission of a contract. cancelled or set aside or become known to him.

plaintiff to have the instrument or decree the contract rescinded first

60. To set aside a transfer

of property made by the guardian of a ward- Three years when the ward attains majority.

(a) by the ward who has attained majority;

(b) by the ward's legal representative

(i) When the ward dies within three years from the date of attaining majority, Three years When the ward attain majority.

(ii) When the ward dies before attaining majority Three years When the ward dies.

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 following conclusion.

"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 clothes 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 the issues 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 65 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 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 any 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 issue in the suit. The learned Single Judge of the High Court 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 execution of the deed of sale. To the same effect is the decision of this Court in Prem Singh and Ors. v. 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 Shanker 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 Article 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's 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 thus did not become the co-owner of the plaintiff. 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 or not, in the capacity 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. v. 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. We also agree with Mr. Ramamoorthy that it was also not a case where the vendor held the property in suit in trust for the plaintiff. 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.