

Md. Noorul Hoda

Vs

Bibi Raifunnisa and Others

SLP (C) No. 25847 of 1995

(K. Ramaswamy, B. N. Kirpal JJ)

01.12.1995

ORDER

1. In a see-saw legal battle between S.K. Mahangu and S.K. Rafique, the brother-in-law of the petitioner, the Court is called upon to decide whether the petitioner's title Suit No. 148 of 1981 filed in the Court of Munsif, Arari in Bihar was filed within the limitation. Though the proceedings are numerous, the facts relevant to decide the question of limitation may be culled out in a short compass. In Khata No. 1593 which is part of Plot No. 4364 of an extent of 473 acres situated in Basantpur Village, the names of 'Bibi Raifunnisa Mahangu and Bibi Afta heirs of Fidvi were recorded as owners thereof. Khata No. 1593 of admeasuring 7 bighas 6 kathas of the land is the subject-matter of the dispute. The petitioner claimed that he had purchased the said land, benami in the name of Rafique on 1-12-1959 and was in possession and enjoyment thereof. Bibi Raifunnisa filed Title Suit No. 220 of 1969 for partition and division by metes and bounds was decreed and a preliminary decree date 22-1-1973 was passed. In furtherance thereof, final decree was passed on 9-2-1974. The suit land fell to the share of Bibi Raifunnisa. The petitioner obtained another sale deed from Rafique on 6-9-1980. He filed the suit in 1981 for a declaration that the preliminary and final decrees dated 22-1-1973 and 9-2-1974 respectively made in Title Suit No. 220 of 1969, were illegal, collusive and did not bind him and made a prayer to adjudicate and set aside the same as such and to grant perpetual injunction.

2. The trial court decreed the suit but on appeal, the District Court held that the petitioner being not a party to the preliminary or final decree, they could not bind the petitioner but nonetheless Rafique, the benamidar had knowledge of the preliminary decree passed in 1973 and final decree passed in 1974. The lands were allotted to Bibi Raifunnisa. The petitioner had thereby constructive notice. The suit having been filed beyond three years, was barred by limitation applying Article 59 of the Schedule to the Limitation Act, 1963 (for short "the Act"). The High Court in AAD No. 18 of 1988 by judgment and order dated 7-8-1995 confirmed the same. Thus this petition by the plaintiff.

3. The appellate court recorder the finding that : "Moreover, PW 8, Rafique himself admitted in his evidence that he had filed the said Kewala (sale deed) in Title Suit No. 220 of 1969 and this fact has been corroborated from the Exh. list of document filed in Title Suit No. 220 of 1969 Exhs. H-1 and H-2 clearly indicate that Kewala dated 1-12-1959, alleged to have been executed in favour of Rafique was filed in Title Suit No. 220 of 1969". It was also found that the petitioner a PW 9 admitted "that he had not paid any amount to Rafique. He further admitted in para 32 that there is mention that Rafique was the benamidar and so the land is land is now transferred". On those findings it was held that in the preliminary and final decrees Exhs. J and J-1, the lands were allotted to Raifunnisa. The petitioner had not filed the original sale deed dated 6-9-1980 and accordingly, it found that Rafique had full knowledge about the Title Suit No. 220 of 1969. The petitioner, PW 9

came to know about the title suit through his benamidar. Article 59 of the Schedule to the Act is applicable to the facts. Therefore, the suit is barred by limitation. The High Court in the impugned judgment held that the knowledge of the benamidar under the facts and circumstances of this case could be imported to be knowledge of the real owner, namely, the petitioner. The petitioner, therefore, had full knowledge about the earlier proceedings of the preliminary and final decrees and concluded thus : "... from the very beginning the plaintiff had knowledge of the entire things inasmuch as he himself had purchased the suit property by the first sale deed dated 1-12-1959, but according to the plaintiff actually he was the owner and Rafique was Benamidar and again he himself had purchased the suit property by the subsequent sale deed dated 6-9-1980. Thus the Benamidar had got all the knowledge about the earlier proceedings.... In my opinion, therefore, the plaintiff is presumed to have got full knowledge of the earlier proceeding in the suit relating to the litigation in respect of the preliminary and final decree of the Benamidar." Accordingly it was held that the suit is governed by Article 59 of the Schedule to the Act and the suit having been filed in 1981, is barred by limitation.

4. It is contended for the petitioner that he being not a party to the decree, Article 59 of the Schedule to the Act is inapplicable. The residual Article 113 is the appropriate article applicable to the facts in this case. The right to sue accrued to the petitioner when his possession was sought to be interdicted in execution. He became aware for the first time on 17-6-1981 when the possession was sought to be taken from him. Therefore, the suit was filed within three years. It is also sought to be contended that the original sale deed dated 1-12-1959 was not filed in the court. He had no knowledge of the proceeding in the partition suit. All the actions were collusive and fraudulent to deprive the petitioner real owner of the property. We find no force in the contentions. The appellate court after an exhaustive discussion of the evidence recorded the finding extracted hereinbefore. Admittedly Rafique, petitioner's brother-in-law is benamidar and the petitioner derives title through him. The High Court also accepted the finding that the petitioner is presumed to have full knowledge of the earlier proceeding in the partition Title Suit No. 220 of 1969 and the preliminary and final decrees passed therein. The petitioner had filed his subsequent sale deed dated 6-9-1980 got executed by Rafique.

5. Section 55(1) of the Transfer of Property Act, 1882 regulates rights and liabilities of the buyer and seller. The seller is bound to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover. The seller is to answer, to the best of his information, all relevant questions put to him by the buyer in respect of the property or the title thereto. The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. Section 3 provides that "a person is said to have a notice of a fact when he actually knows the fact, or when but for wilful abstention from an enquiry or search or which he ought to have made, or gross negligence, he would have known it". Explanation II amplifies that "any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof". Constructive notice in equity treats a man who ought to have known a fact, as if he actually knows it. Generally speaking, constructive notice may not be inferred unless some specific circumstances can be shown as a starting point of enquiry which if pursued would have led to the discovery of the fact. As a fact it is found that Rafique filed the sale deed dated 1-12-1959 executed in his favour by Mahangu, in Title Suit No. 220 of 1969 for which the petitioner claims to have derivative title through Rafique. Rafique had full knowledge that despite the purported sale, Bibi Raifunnisa got the preliminary decree passed in 1973 and in 1974 under the final decree the right, title and interest in the suit property passed on to her. Under Section

55 when second sale deed dated 6-9-1980 was got executed by the petitioner from Rafique, it is imputable that Rafique had conveyed all knowledge of the defects in title and he no longer had title to the property. It is also a finding of fact recorded by the appellate court and affirmed by the High Court that the petitioner was in know of full facts of the preliminary decree and the final decree passed and execution thereof. In other words, the finding is that he had full knowledge from the inception of Title Suit No. 220 of 1969 from his benamidar. Having had that knowledge, he got the second sale deed executed and registered on 6-9-1980. Oblivious to these facts, he did not produce the second original sale deed nor is an attempt made to produce secondary evidence on proof of the loss of original sale deed.

6. The question, therefore, is as to whether Article 59 or Article 113 of the Schedule to the Act is applicable to the facts in this case. Article 59 of the Schedule to the Limitation Act, 1908 had provided inter alia for suits to set aside decree obtained by fraud. There was no specific article to set aside a decree on any other ground. In such a case residuary Article 120 in Schedule III was attracted. The present Article 59 of the Schedule to the Act will govern any suit to set aside a decree either on fraud or any other ground. Therefore Article 59 would be applicable to any suit to set aside a decree either on fraud or any other ground. It is true that Article 59 would be applicable if a person affected is a party to a decree or an instrument or a contract. There is no dispute that Article 59 would apply to set aside the instrument, decree or contract between the inter se parties. The question is whether in case of person claiming title through the party to the decree or instrument or having knowledge of the instrument or decree or contract and seeking to avoid the decree by a specific declaration, whether Article 59 gets attracted ? As stated earlier, Article 59 is a general provision. In a suit to set aside or cancel an instrument, a contracts or a decree on the ground of fraud, Article 59 is attracted. The starting point of limitation is the date of knowledge of the alleged fraud. When the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded, Section 31 of the Specific Relief Act, 1963 regulates suits for cancellation of an instrument which lays down that any person against whom a written instrument is void voidable and who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, can sue to have it adjudged void or voidable and the court may in its discretion so adjudged it and order it be delivered or cancelled. It would thus be clear that the word 'person 'in Section 31 of the Specific Relief Act is wide enough to encompass a person seeking derivative title from his seller. It would, therefore, be clear that if he seeks avoidance of the instrument, decree or contract and declaration to have the decrees set aside or cancelled he is necessarily to lay suit within three years from the date when the facts entitling the plaintiff to have the decree set aside, first became known to him.

7. The question, therefore is as to when the facts of granting preliminary and final touching upon the suit land first became known to him As seen, when he claimed title to the property as owner and Rafique to be his benamidar, as admitted by Rafique, the title deed dated 1-12-1959 was filed in Title Suit No. 220 of 1969. Thereby Rafique had first known about the passing of the preliminary decree in 1973 and final decree in 1974 as referred to earlier. Under all these circumstances, Article 113 is inapplicable to the facts on hand. Since the petitioner claimed derivative title from him but for his wilful abstention from making enquiry or his omission to fir the second sale deed dated 6-9-1980, an irresistible inference was rightly drawn by the courts below that the petitioner had full knowledge of the fact from the beginning; in other words right from the date when title deed was filed in Title Suit No. 220 of 1969 and preliminary was decree passed on 2-1-1973 and final decree was passed on 5-2-1974 Admittedly, the suit was filed in 1981 beyond three years from the date of

knowledge. Thereby, the suit is hopelessly barred by limitation. The decree of the appellate court and the order of the High Court, therefore, are not illegal warranting interference.

8. The special leave petition is accordingly dismissed.