

CALCUTTA HIGH COURT

Sanni Bibi

Vs.

Munshi Siddik Hossain

(Newbould and Panton, JJ.)

29.07.1918

JUDGMENT

Newbould , J.

1. The plaintiffs who are the appellants before us brought the suit out of which this appeal arises for the recovery of possession of a share of certain land on declaration of their title thereto. They also asked for cancellation of a deed of sale by which they had transferred the property in suit to the defendant No. 1, alleging that they had executed the deed in consequence of a fraudulent representation by this defendant that the deed was a jimba-nama for their maintenance for a term of three years.

2. The plaintiffs originally claimed fifteen plots of land. At the trial the claim to plots Nos. 5, 6 and 7 was abandoned. It has been found that the plaintiffs have been out of possession of plots Nos. 3, 9, 11 and 13 for more than twelve years, and it is conceded that as regards these plots it cannot be disputed on second appeal that this portion of the claim is barred by limitation. We are ' now, therefore, concerned only with plots Nos. 1, 2, 4, 8, 10, 12, 14 and 15. As regards these plots both the lower Courts have found that the claim is barred by limitation, on the ground that the plaintiffs cannot succeed without first obtaining a cancellation of the deed of sale and consequently Article 91 of the first Schedule of the Indian Limitation Act applies. The Court of first instance held that the alleged fraud in the execution of the kobala "was proved and that the plaintiffs executed it knowing and believing it to be the jimba-nama." The lower Appellate Court after holding that the plaintiffs' whole claim was barred by limitation did not go into the question of fraud.

3. The only point urged before us is that if the Munsif's finding is correct, the deed is void ab initio and Article 91 has no application and, therefore, the case should be remanded to the lower Appellate Court for a finding as to the truth of the plaintiffs' allegation as to the execution of the document. The principle which has been applied by the lower Courts is that stated by Woodroffe, J., in *Harihar Ojha v. Dasarathi Misra*¹ There can be no doubt that when a person seeks to

recover property against an instrument executed by himself or one under whom he claims, he must first obtain cancellation of the instrument and that the three years' rule enacted by Article 91 applies to any suit brought by such person." This principle of law is not disputed, but it is contended that on the facts found by the Munsif that the plaintiffs executed the deed of sale believing that they were executing a deed of a

¹33 C. 267 at. p. 265 : 9 C.W.N. 636 : 1 C.L.J. 408

different kind, there was in law no execution of the deed by them. The same contention put in another form is that, though when consent to an agreement is caused by fraud or misrepresentation the agreement is a contract voidable under Section 19 of the Contract Act and not void, here there was no consent at all. In our opinion this contention must prevail. It is based primarily on the authority of the English cases of *Thorough-good's case* (1582) 2 Co. Rep. 9a : 76 E.R. 408 and *Foster v. Mackinnon*² In the former it was held that if a deed is falsely read over to an illiterate man and he executes the deed relying on the false reading as being the true substance of the transaction, his act is wholly void. In the latter the defendant had purported to endorse a bill of exchange which he was told was a guaranty. The plaintiff was a subsequent holder for value and therefore the fact that the defendant's signature was obtained by fraud would not have protected him in this action. The Court held that his signature not being intended as an endorsement to a bill of exchange was wholly inoperative. The principle established by these decisions has been applied by the Bombay High Court in *Oriental Bank Corporation v. John Fleming*³ and *Dngdu v. Bhana*⁴ and by this Court in *Banku Behari Shaha v. Krishto Gobindo Joardar*⁵ We, therefore have no hesitation in holding that it ought to be applied in the present case if the Munsif's finding on the facts can be upheld, Whether the Munsif's finding is right is a question on which we express no opinion.

4. We accordingly decree this appeal and remand the case to the lower Appellate Court for a rehearing of the appeal. He will first come to a finding as to the circumstances under which the sale-deed in question was signed by the plaintiffs and then decide in the light of the above remarks whether the claim of the plaintiffs to the remaining eight plots is barred by limitation.

5. Costs will abide the result.

²(1869) 4 C.P. 704 : 38 L.J.C.P. 310 : 20 L.T. 887 : 17 W.R. 1105

³3 B. 242 : 2 Ind. Dec. (N.S.) 163

⁴28 B. 420 : 6 Bom. L.R. 126

⁵30 C. 433