
(2008) 03 CAL CK 0024
In the Calcutta High Court
Case No : F.A. No. 174 of 2005

Hamida Begum alias Alo Bibi

APPELLANT

Vs

Umran Bibi and Others and Sk. Karim Ali and Others

RESPONDENT

Date of Decision : 06-03-2008

Acts Referred:

Limitation Act, 1908 — Article 113, 120, 59
Limitation Act, 1963 — Section 10, 12, 14, 16, 18
Specific Relief Act, 1963 — Section 31

Citation : (2008) 3 CHN 639

Hon'ble Judges : Rudrendra Nath Banerjee, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Kasem Ali Ahmed and Shefalika Bhattacharya, for the Appellant; Ashis Bagchi, Ziaul Islam and S.M. Sahabuddin, for the Respondent

Judgement

Bhaskar Bhattacharya, J.—These two appeals were heard analogously as those are preferred against the common judgement dated April 5, 2005 passed by the learned Judge, 6th Bench, City Civil Court at Calcutta thereby disposing of two suits being Title Suit No. 634 of 1984 and Title Suit No. 1232 of 1991. By the said judgment, the learned Trial Judge dismissed the Title Suit No. 634 of 1984 but decreed the other title suit being Title Suit No. 1232 of 1991.

2. Being dissatisfied, the plaintiff of the Title Suit No. 634 of 1984, who is also the defendant of the Title Suit No. 1232 of 1991, has preferred these two appeals.

3. So far the Title Suit No. 634 of 1984, a suit for partition, is concerned, the case is made out by the plaintiff/appellant may be summed up thus:

(a) One Md. Sakur was the owner of the two brick built houses situated on two cottahs and eight chittaks more or less comprising of 13 rooms therein being part of the premises No. 33B, Sharif Lane, PS. Park Street, Calcutta as described in schedule "A" to the plaint.

(b) At the time of death of the said Md. Sakur, he left his wife, namely, Umrani Bibi, three sons, namely, (1) Zeenat Ali, (2) Rahamat Ali and (3) Md. Solaiman and two daughters, namely, (1) Jani Begum and (2) Lali Begum.

(c) Immediately after the death of Md. Sakur on 1st day of March, 1972, all the aforesaid persons absolutely seized and possessed the aforesaid suit property being thika tenanted land measuring one cottah seven chittaks more or less together with one storied brick built building standing thereon and also another thika tenanted land measuring two cottahs eight chittaks more or less together with one storied brick built building.

(d) After the death of Md. Sakur, his legal successors and heirs, mentioned above, were enjoying the right, title, interest and peaceful possession in those properties according to Mohamedan Law and the shares of those persons are as follows:

Name Rate of share in Re. 1/-

1. Umrani Bibi 12 paise

2. Zeenat Ali 22 paise each Rahamat Ali

3. Jani Begum

Lali Bibi 11 paise each

Total 78 paise only.

(e) That the balance 22 paise devolved upon the minor youngest son of the said Md. Sakur, namely, Solaiman Ali, who, of late, died and after the death of the said Solaiman Ali, his share in the property devolved amongst the co-sharer of the deceased, the present defendants.

(f) By virtue of inheritance, the abovenamed defendants and also the minor son Solaiman Ali were the only legal heirs of the said deceased Md. Sakur and accordingly, all the defendants including the minor viz. Solaiman Ali represented by her mother sold, transferred and assigned all their right, title and interest of the property to the plaintiff in respect of the thika tenanted land measuring one cottah seven chittaks a little more or less together with one storied brick built building being premises No. 33B, Sharif Lane and out of the above mentioned legal successors of the deceased Md. Sakur, the defendant No. 2, Zeenat Ali further sold, conveyed, transferred and assigned his entire share, as mentioned hereinabove, to the plaintiff which was mentioned in schedule "B" for a consideration sum of Rs. 22,000/- by virtue of a deed of sale dated 1st October, 1981 which was registered before the Registrar of Assurances, Calcutta.

(g) According to the said conveyance dated 1st October, 1981, the plaintiff seized, possessed and enjoyed the right, title and interest and also the possession of the thika tenanted land together with building thereon measuring one cottah seven chittaks more or less out of the abovementioned two buildings absolutely and

uninterruptedly.

(h) By virtue of the aforesaid deed of sale, all the defendants transferred and delivered their entire right, title and interest and also peaceful possession of the defendant Nq.2's share of the schedule "A" property to the plaintiff immediately after the execution of the deed of sale but the defendants did not pay any heed to the several requests of the plaintiff to deliver possession of the "B" schedule and they avoided delivery of possession of the entire share of the defendant No. 2, in the schedule "B" property to the plaintiff.

(i) Though the plaintiff repeatedly requested the defendant No. 2 to deliver his entire share already transferred by virtue of the aforesaid deed of sale in favour of the plaintiff, all the defendants in collusion with each other did not deliver peaceful possession of the right, title and interest of the plaintiff and the plaintiff was compelled to serve a notice by registered post with A/D dated 9th December, 1983 through her lawyer to all the existing tenants in the suit property and the copy of such notice was also sent to all the defendants asking the tenants in the suit property to stop their payment of monthly rents till the schedule "B" property was partitioned mutually between the defendants and the plaintiff.

(j) In the fourth week of February, 1984, the plaintiff along with her husband met all the defendants and asked them to make partition the suit property and deliver possession of the schedule "C" property but the defendants refused and neglected to do the same.

(k) The plaintiff, therefore, filed the suit for partition claiming preliminary decree for partition in respect of the "B" schedule property according to the share of the property and for final decree and account of calculation of rent from the tenants.

4. The suit was contested by the defendants by filing written statement thereby denying the material allegations made in the plaint. One set of written statement was filed by the defendant Nos. 1, 3, 4 and 5 while defendant No. 2 filed another written statement. The first written statement was filed in the month of January, 1986 while the defendant No. 2 filed the written statement on 23rd February, 1991.

5. Long thereafter in the year 1991, the four of the defendants of the earlier suit including the defendant No. 2 filed a suit for declaration that the sale-deed dated 1st October, 1981 executed by them and their mother, since deceased, in favour of the plaintiff of the former suit was illegal, forged, fabricated and void and that by virtue of such deed, no right accrued in favour of the plaintiff of the earlier suit. According to them, their father was the owner of the schedule "A" property and he orally gifted the same to their mother and her name was mutated in the register of the Corporation and after the death of their mother, they inherited the property. According to them, sometime in the year 1981, their mother wanted to make partition of her property during her lifetime among his sons and daughters and for that purpose went to the registration office along with them and the

husband of the plaintiff of the earlier suit. As they and their mother were illiterate, they had signed on the partition deed in good faith and affixed their LTI, on the deed as per direction of the husband of the plaintiff of the earlier suit but Jeenat Ali, the defendant No. 2 of the earlier suit, came to know in the year 1991 that the said deed was a sale deed in favour of the plaintiff of the earlier suit.

6. The suit was contested by the plaintiff of the earlier suit by filing written statement thereby denying the material allegations made in the plaint and the defence in the second suit was the plaint case of the first suit.

7. Ultimately, both the suits were taken up together and the learned Trial Judge dismissed the suit for partition filed by the appellant while decreed the suit for declaration filed by the respondents before us.

8. Being dissatisfied, these two appeals have been preferred.

9. Mr. Ahmed, the learned Counsel appearing on behalf of the appellant in both these appeals, has attacked the judgement and decree passed by the learned Trial Judge by contending that the said Court totally overlooked the fact that the deed of 1981 executed by the respondents and their mother was challenged as a void document by the executants thereof although none of them disputed the signature or the thumb impression of the vendors. Mr. Ahmed points out that the execution of the deed in question was duly admitted even by the lawyer of the vendors who, as the deed indicates, explained the document to the vendors in Urdu. He further contends that although the suit for partition was filed in the year 1984 and the defendants appeared and filed written statement therein in the year 1986, the second suit was filed for avoiding the deed of 1981 long thereafter in the year 1991. Mr. Ahmed contends that such suit was patently barred by limitation in the year 1991 and if such suit is barred by limitation, the Court should have dismissed the suit on that ground alone and consequently, the earlier suit filed by his client should succeed. Mr. Ahmed, therefore, prayed for setting aside the decree passed by the learned Court below and for allowing these appeals by passing a decree for partition and dismissing the suit filed by the respondents.

10. Mr. Bagchi, the learned Advocate appearing on behalf of the respondents, on the other hand, opposes the aforesaid contentions advanced by Mr. Ahmed and contends that merely because the relief claimed in a suit has become barred by limitation, such fact does not bar the defence of a litigant. According to Mr. Bagchi, even if it is assumed for the sake of argument that the second suit filed by his clients was barred by limitation, his clients were entitled to take the plea of nullity of the deed by way of defence in the suit for partition filed by the appellant. Mr. Bagchi, however, contends that plea of limitation being basically a plea of mixed question of law and fact and the appellant, having failed to raise such issue in the Trial Court, is precluded from taking such plea in this appeal for the first time. At any rate, according to Mr. Bagchi, the learned Trial Judge on

consideration of the materials on record having disbelieved the case of the appellant and having accepted the veracity of the evidence adduced by his clients, this Court should not upset such finding of fact unless there is patent error in the matter of appreciation of evidence on record. Mr. Bagchi, therefore, prays for dismissal of these appeals.

11. Therefore, the first question that falls for determination before us is whether the suit filed by the respondents in the year 1991 was barred by limitation.

12. Before dealing with the said question, we propose to answer the point of waiver raised by Mr. Bagchi. According to Mr. Bagchi, the issue of bar of limitation being basically an issue of fact and not having been raised by the appellant in the Court below, such point cannot be raised before the Appellate Court. In our view, Section 3 of the Limitation Act gives complete answer to the point raised by Mr. Bagchi. It is now a settled law that the provisions contained in Section 3 of the Limitation Act is mandatory and it is the duty of the Court to see whether on the basis of materials on record, the suit is barred by limitation although the plea of limitation has not been specifically pleaded in the written statement. Therefore, although a decree passed in violation of the law of limitation cannot be branded as a nullity so as to challenge it in the proceedings for execution, yet, an Appellate Court dealing with an appeal against a decree passed in violation of the law of limitation, is entitled to scrutinize whether from the materials on record it can be said that the suit is barred by limitation notwithstanding the fact that the plea of bar of limitation is not set up as a defence in the pleading. [See: AIR 1935 85 (Privy Council) , followed by the Apex Court in *Ittavira Mathai Vs. Varkey Varkey and Another*,].

13. There is no dispute that the said suit was filed by virtue of the right created u/s 31 of the Specific Relief Act, 1963 and the period of limitation for filing such suit is 3 years according to Article 59 of the Limitation Act. The time runs when the facts entitling the plaintiffs to have the instrument cancelled or set aside first become known to them.

14. At paragraph 8 of the plaint, it is stated that the cause of action for filing the suit arose on February 20, 1991 when Jeenat AH, the plaintiff No. 1 came to know for the first time that the appellant had filed a suit for partition on the basis of such deed. The other plaintiffs than Jeenat Ali including his mother Umrani Bibi, however, had appeared in the earlier suit of 1984 long back in the year 1985 and filed written statements denying the allegation made in the plaint in the year 1986. Therefore, it is apparent, that the other plaintiffs than Jeenat Ali had definite knowledge of the said deed at least in the month of January, 1986 when they filed written statement in the earlier suit. The suit of 1991 filed by the respondents, therefore, was barred by limitation so far the plaintiffs other than Jeenat Ali were concerned.

15. We now propose to consider whether Jeenat Ali has been able to prove that he had no knowledge about the execution of the deed of sale beyond three years

from the date of institution of the suit viz. 12th August 1991.

16. Jeenat Ali died on January 28, 1998 whereas the first suit was filed in the year 1984 and the second one in the month of August, 1991. Jeenat Ali filed separate written statement in the month of February, 1991 although the other defendants gave written statement long back in the year 1986. It appears from the Order No. 16 dated September 16, 1985 that the summons by ordinary way returned after service upon all the defendants including Jeenat Ali, the defendant No. 2 and on that day, on the prayer of the defendant Nos. 1, 3, 4 and 5, time was allowed for filing written statement. However, for the reason best known to them, the defendant No. 2 did not appear. In the written statement filed in the year 1991, he pleaded that the deed was executed by exercising undue influence and no amount of consideration money was paid to him. No allegation of fraud was pleaded therein. The widow of Jeenat Ali in her evidence stated that Mr. M. Alim, learned Advocate signed one document at their request without going through the contents of the same and after expiry of two months, they came to know about such fact. Therefore, within two months of execution of the deed of 1981, they allegedly discovered the fraud. Mr. M. Alim, the learned Advocate appearing for the respondents admitted that he made endorsement on the deed, but according to him, he did so without reading the contents. It is however very difficult to believe such a statement from a lawyer. He stated that he was engaged by Umran Bibi, Jeenat and others in the suit for partition and after going through the contents of the plaint of the first suit, he came to know of the fraud and advised the respondents to file the second suit. Thus, all the respondents including Jeenat Ali had knowledge of the deed at least in the year 1986 and deliberately, separate written statement was filed by Jeenat in the year 1991 although summons was served long back. The second suit of 1991 filed by the respondents, therefore, was barred by limitation even as regards Jeenat Ali. Moreover, as indicated earlier, we have already pointed out that Jeenat Ali took the plea of undue influence whereas the other respondents took a plea that the parties to the deed were under the impression that a deed of partition would be executed but by practising fraud, a sale-deed was executed. Such plea is, however, inconsistent with their own case that by oral gift, Md. Sukur, their father gifted the property to his wife, viz. Umran Bibi and after her death they became owners. If Umran Bibi was the absolute owner of the property by virtue of an oral gift from her husband, there was no question of execution of a deed of partition among the sons and daughters of Umran Bibi during her lifetime. Umran Bibi alone could either make a gift or create a deed of trust during her lifetime in favour of her children and in that case, there was no question of execution of any document by the children of Umran as according to their own case, they did not acquire any right in the property before the death of their mother. However, such case of execution of a gift or trust by their mother was never made out. Moreover, if Umran Bibi, the alleged sole owner, in spite of her knowledge of the alleged fraud did not file any suit within three years of filing her written statement in the suit for partition, her right to challenge the deed became time

barred and her heirs, including Jeenat Ali, after her death, could not maintain the suit for cancellation of the deed once such right of their predecessor viz. Umran Bibi, had become time barred in the year 1989 even if we assume for the sake of argument that Jeenat had no knowledge of the real nature of the deed earlier.

17. The next question is whether the defence in the suit for partition would be barred simply because the suit, filed by the respondents taking self-same plea is liable to be dismissed on the ground of limitation.

18. It is well-settled that simply because a particular relief in respect of a property has become barred by limitation, the right to such property is not extinguished unless the case comes within the purview of Section 27 of the Limitation Act, which is an exception to the aforesaid principle. Section 27 of the Limitation Act is quoted below:

At the determination of any period hereby limited to any person for institution a suit for possession of any property, his right to such property shall be extinguished.

19. At this stage, it will be relevant to refer to Section 31 of the Specific Relief Act and the same is quoted below:

31. When cancellation may be ordered (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

20. A combined reading of Section 31 of the Specific Relief Act and Section 27 of the Limitation Act makes it abundantly clear that if a party admits execution of a deed of transfer in favour of another but claims that the said transaction is vitiated by fraud either as to the contents or as to the nature of the transaction, he is under obligation to file a suit u/s 31 of the Act for avoiding such transaction within the period of limitation provided in Article 59 of the Limitation Act and the period is 3 years and the time starts running when the facts entitling the plaintiff to cancel or set aside the instrument first become known to him. If the remedy becomes time barred, his right to resist a claim over the said property based on such deed will automatically be barred because of the provisions contained in Section 27 of the Limitation Act even if he remains in possession of the property unless he asserts adverse possession and claims to have perfected his title by such adverse possession after the execution of the deed.

21. The moment the period of limitation provided in Article 59 of the Limitation Act expires, the possession of the executant of the document, if any in the

property, is no better than that of a trespasser in respect of the property covered by the deed and his right to recover possession from the holder of the deed would be lost forever unless he acquires fresh title by adverse possession. In this case, the respondents have filed the suit in the year 1991 after 7 years from the execution of the deed and before that, the purchaser has already filed a suit for partition in the year 1984 and thus, adverse possession, even if any, remained suspended from the year 1984. In this case, the respondents, however, have not even claimed adverse possession.

22. In this connection, reference may be made to the following observations of the Apex Court in the case of *Bailochan Karan Vs. Basant Kumari Naik and Another*, . 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 there from, 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.

23. Therefore, according to the Supreme Court, the title of the recipient of the deed, if not declared void by a Court of competent jurisdiction, on a suit filed by the person who wants to avoid the document within the period of limitation, will be perfected by virtue of Section 27 of the Limitation Act.

24. Similarly, in the case of *Md. Noorul Hoda Vs. Bibi Raifunnisa and Others*, , the Supreme Court emphatically stated that a person who wants to avoid a deed executed by him or his predecessor on the ground of fraud is required to file a suit. The following observations quoted below are relevant in this connection:

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 contract 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 or 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 adjudge it and order it to 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 seeks a declaration to have the decrees set aside or cancelled he is necessarily bound to lay the suit within three years from the date when the facts entitling the plaintiff to have the decree set aside, first became known to him.

25. We are quite conscious that a Bench consists of two Judges of the Supreme Court in a later decision in the case of Prem Singh and Others Vs. Birbal and Others, , after holding that Section 31 applies both to void and voidable documents, further held that for void ab initio documents, no suit is required to be filed. The latter part of the observations is however in conflict with the aforesaid two decisions mentioned above and thus, the said observation cannot be treated as a valid precedent.

26. In this connection, we may profitably refer to a three Judges Bench decision of the Supreme Court in the case of State of Punjab v. Gurdev Singh reported in AIR 1991 SC 2219, where the question was whether for avoiding an ultra vires order of dismissal, an employee is required to approach a Court within a specified time prescribed by the law of limitation. The argument was based on the principle that for challenging a void order, there is no period of limitation and the aggrieved person can approach the Court at any time. In that context, the Apex Court held as follows:

First of all, to say that the suit is not governed by the law of limitation runs afoul of our Limitation Act. The Statute of Limitation was intended to provide a time limit for all suits conceivable. Section 3 of the Limitation Act provides that a suit, appeal or application instituted after the prescribed "period of limitation" must subject to the provisions of Sections 4 to 24 be dismissed although limitation has not been set up as a defence. Section 2(j) defines the expression "period of limitation" to mean the period of limitation prescribed in the Schedule for suit, appeal or application. Section 2(j) also defines, "prescribed period" to mean the period of limitation computed in accordance with the provisions of the Act. The Court's function on the presentation of plaint is simply to examine whether, on

the assumed facts, the plaintiff is within time. The Court has to find out when the "right to sue" accrued to the plaintiff. If a suit is not covered by any of the specific articles prescribing a period of limitation, it must fall within the residuary article. The purpose of the residuary article is to provide for cases which could not be covered by any other provision in the Limitation Act. The residuary article is applicable to every variety of suits not otherwise provided for. Article 113 (corresponding to Article 120 of the Act of 1908) is a residuary article for cases not covered by any other provisions in the Act. It prescribes a period of three years when the right to sue accrues. Under Article 120 it was six years which has been reduced to three years under Article 113. According to the third column in Article 113, time commences to run when the right to sue accrues. The words "right to sue" ordinarily mean the right to seek relief by means of legal proceedings. Generally, the right to sue accrues only when the cause of action arises, that is, the right to prosecute to obtain relief by legal means. The suit must be instituted when the right asserted in the suit is infringed or when there is a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted [See: (i) AIR 1930 270 (Privy Council) and (ii) Gannon Dunkerley and Co., Ltd. Vs. Union of India (UOI),].

In the instant cases, the respondents were dismissed from service. May be illegally. The order of dismissal has clearly infringed their right to continue in the service and indeed they were precluded from attending the office from the date of their dismissal. They have not been paid their salary from that date. They came forward to the Court with a grievance that their dismissal from service was no dismissal in law. According to them the order of dismissal was illegal, inoperative and not binding on them. They wanted the Court to declare that their dismissal was void and inoperative and not binding on them and they continue to be in service. For the purpose of these cases, we may assume that the order of dismissal was void, inoperative and ultra vires, and not voidable. If an Act is void or ultra vires it is enough for the Court to declare it so and it collapses automatically. It need not be set aside, The aggrieved party can simply seek a declaration that it is void and not binding upon him. A declaration merely declares the existing state of affairs and does not "quash" so as to produce a new state of affairs.

But none the less the impugned dismissal order has at least a de facto operation unless and until it is declared to be void or nullity by a competent body or Court. In *Smith v. East Elloe Rural District Council* (1956) AC 736 Lord Redcliffe observed:

An order even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.

Apropos to this principle, Prof. Wade states: the principle must be equally true

even where the "brand of invalidity" is plainly visible: for there also the order can effectively be resisted in law only by obtaining the decision of the Court (see : Administrative Law, 6th Ed. p. 352). Prof. Wade sums up these principles:

The truth of the matter is that the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiffs lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the "void" order remains effective and is in reality valid. It follows that an order may be void for one purpose and valid for another, and that it may be void against one person but valid against another." (Ibid p. 352)

It will be clear from these principles, the party aggrieved by the invalidity of the order has to approach the Court for relief of declaration that the order against him is inoperative and not binding upon him. He must approach the Court within the prescribed period of limitation. If the statutory time limit expires the Court cannot give the declaration sought for.

27. The aforesaid principle equally applies to a void transaction and in view of Section 31 of the Specific Relief Act, we are of the view that even void ab initio transaction must also be avoided by filing a suit within the period of limitation, otherwise, by virtue of an even void transaction, the title of the party would be lost.

28. We, therefore, find that the suit for declaration filed by the respondent was clearly barred by limitation and the learned Trial Judge erred in law in overlooking the averments made in the plaint as well as the evidence on record. The moment we hold that the document has not been avoided by the respondents by filing a suit u/s 31 of the Specific Relief Act within the period of limitation we are entitled to hold that the title of the appellant has been perfected by taking aid of Section 27 of the Limitation Act as held by the Apex Court in the case of Darshan Singh v. Gurdev Singh and Ors. (supra). The fact that the respondents were in possession of the property as co-sharers is immaterial as would appear from the fact that in the case of Darshan Singh (supra), the plaintiff who acquired title through an alleged void transaction was out of possession and prayed for recovery of possession and such suit was decreed and the defence was found to be barred as no suit was filed by the defendant for avoiding the transaction after attaining majority within the period of limitation.

29. Over and above, we have already pointed out that even according to the case of the respondents, their mother having failed to challenge the deed within three years from the date of filing her written statement in the earlier suit, they cannot file the suit as the alleged representatives of their mother. Even on merit, it is apparent that the plea of fraud was a false one as would appear from the fact

that all the brothers and the sisters had knowledge of the deed and they took inconsistent plea of fraud and undue influence in their separate written statements filed in the suit for partition. We disbelieve the statement of their own lawyer that although he signed the document with the endorsement that the contents were explained to the executants, he did so without reading the contents of the same. We cannot lose sight of the fact that in this case, the sale-deed was preceded by an agreement for sale and such document was also proved. The learned Trial Judge, as it appears from the judgement impugned was impressed by the fact that the appellant "failed to prove beyond reasonable doubt that the consideration money of Rs. 22,000/- was actually paid to the vendors or their Ld. Advocate". The learned Trial Judge totally overlooked the well-settled principle that in a civil litigation, a party is not required to prove a fact beyond reasonable doubt but preponderance of probability is sufficient. Moreover, even if it is established that full amount of consideration money has not been paid to the vendor that fact will not stand in the way of passing title once execution and registration of the document are established. The property will remain charged for the unpaid price and such charge will not enable the seller to retain possession of the property as against the buyer but it positively gives him a right to enforce the charge by suit. [See: Vidhyadhar v. Mankikrao and Anr. reported in AIR 1991 SC 1441]. After all, the suit was even not filed for avoiding the deed on the ground of non-payment of consideration money.

30. The learned Trial Judge, therefore, erred in declaring the sale-deed as a void deed in the facts and circumstances of the case.

31. We, therefore, set aside the judgement and decrees impugned in these two appeals and decree the first suit for partition filed by the appellant by declaring her 22 paise share in "B" schedule property out of 100 paise and dismiss the suit filed by the respondent as barred by limitation. The appellant is also entitled to get a preliminary decree for accounts of collection of rent from the tenants. The parties are given two months time to amicably partition and settle the accounts; in default, the parties would be entitled to apply for appointment of a Commissioner for the above purposes. The appeals are allowed to the extent indicated above.

In the facts and circumstances, there will be, however, no order as to costs.

Rudrendra Nath Banerjee, J.

I agree.