

(2012) 03 CAL CK 0059
In the Calcutta High Court
Case No : Second Appeal No. 152 of 2009

Musst. Majidan Bibi @ Nazena Bibi and Others	APPELLANT
Vs	
Rama Kant Mishra @ Misra being dead substituted by his L.Rs Rabi Shankar Mishra @ Misra and Others	RESPONDENT

Date of Decision : 13-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 43 Rule 1, Order 9 Rule 13, 11
Evidence Act, 1872 — Section 44
Limitation Act, 1963 — Article 59

Citation : (2012) 03 CAL CK 0059

Hon'ble Judges : Tarun Kumar Gupta, J

Bench : Single Bench

Advocate : Mohini Mohan Mukherjee and Mr. Tapan Kumar Mitra, for the Appellant; Gopal Chandra Ghosh and Mr. Debapratim Banerjee, for the Respondent

Final Decision : Allowed

Judgement

Tarun Kumar Gupta, J.—Legal heirs of original defendant Nos. 1 and 2 are the appellants against this judgment of reversal.

2. The predecessor-in-interest of the respondent Nos. 1 - 3 namely Rama Kant Mishra filed Title Suit being No. 579 of 1988 in the Court of learned Civil Judge (Junior Division), 4th Court Sealdah (24 Parganas North) praying for declaration, permanent injunction, cancellation of deed of conveyance, recovery of possession together with other consequential reliefs.

3. The original plaintiffs' case, in short, may be summarized as follows:-

One Bartali Mia being the original owner of the suit property died on 5th of November, 1919 leaving behind his wife Tetari Bibi and grandson Abdul Rahman through his predeceased daughter. Tetari Bibi transferred her share in the suit property to Abdul Rahman. Abdul Rahman became absolute owner of the suit

property and sold out the same to one Makaradhwaj Misir through a registered kobala. On death of Makaradhwaj Misir the suit property devolved upon his brother Bahadur Misir. On death of Bahadur Misir the present plaintiffs stepped into his shoes as legal heirs.

4. One Md. Hossain claimed himself to be the owner of the suit property as the legal heir of Fakir Muhammad in whose favour Bartali Mia executed a deed of gift dated 29th of July, 1920 in respect of suit property. He filed a suit being Title Suit No. 438 of 1951 in the Second Court of learned Munsif, Sealdah. Said suit subsequently renumbered as Title Suit No. 145 of 1953 on being transferred to the Court of learned First Additional Munsif, Sealdah. Said suit was filed against Abdul Rahman, the vendor of predecessor-in-interest of the present plaintiffs. Learned Trial Court dismissed said Title Suit No. 145 of 1953 on contest on the ground that as Bartali Mia died on 5th of November, 1919 there was no chance of executing a deed of gift on 29th July, 1920 in favour of Fakir Muhammad and that said deed of gift was a fraudulent document.

5. Md. Hossain later filed a suit being Title Suit No. 213 of 1977 in the Court of learned Munsif 4th Court, Sealdah against the plaintiffs for declaration of his title over the self-same suit property and permanent injunction on the basis of said alleged deed of gift dated 29th of July, 1920. Said suit was decreed ex parte against the plaintiffs on 28th of July, 1982 without considering the fact that the judgment of Title Suit No. 145 of 1953 operated as res judicata.

6. Original defendant No. 1 Md. Hossain Ali illegally sold out a portion of "A" Schedule property which was fully described as "B" Schedule property, to defendant No. 2 by registered deed of conveyance dated 7th January, 1988. As ex parte decree did not create any title in favour of original defendant No. 1, the deed of conveyance dated 7th January, 1988 was a void document and was liable to be cancelled.

7. Defendant No. 1 filed a written statement alleging inter alia that the suit was barred by the principle of res judicata as well as by the law of limitation. It was further case that defendant No. 1 had right, title and interest in the suit property which was declared by the ex parte decree passed in Title Suit No. 213 of 1977 and that he had right to sell out well demarcated portion of the suit property to defendant No. 2 by said kobala dated 7th January, 1988. Said written statement filed by original defendant No. 1 was adopted by his legal heirs as well as by defendant No. 2.

8. Sundar Ram Kewat as defendant No. 3 filed a written statement alleging that he was in possession of 17 decimals of land comprising C. S. Dag No. 514 in Khatian No. 1688 of Mouza Titagarh and also of three decimals of land comprising C. S. Dag No. 514/1548 under Khatian No. 1687 of Mouza Titagarh together with four rooms thereupon for long openly and acquiring title thereupon by way of adverse possession. He prayed for a decree for declaration of his ownership and possession and also for injunction against the plaintiff and other

defendants.

9. The plaintiff denied said counter claim and submitted written objection.

10. Learned Trial Court dismissed the suit by observing that in view of ex parte decree passed in Title Suit No. 213 of 1977 against the present plaintiffs, the subsequent suit of 1988 was hit by the principle of res judicata. Learned Trial Court also observed that the suit of 1988 was also barred by limitation as the ex parte decree was passed on 28th of July, 1982 and that in the same year plaintiffs filed a Misc. Case being No. 151 of 1982 under Order 9 Rule 13 of the CPC which was ultimately dismissed on contest in 1990. Learned Trial court was of the opinion that as within three years of the date of knowledge of passing of said ex parte decree in Title Suit No. 213 of 1977, the present case was not filed, the same was barred by limitation.

11. Learned Trial Court also rejected the counter claim preferred by defendant No. 3.

12. The plaintiffs preferred an appeal being Title Appeal No. 102 of 2003 in the Court of learned Additional District Judge, First Court, Barasat. Defendant No. 3 also made cross objection against the appeal. After contested hearing the appeal was allowed on contest against defendant No. 3 (respondent No. 8) and ex parte against the rest. Learned Lower Appellate Court observed that ex parte judgment and decree of Title Suit No. 213 of 1977 was a nullity being vitiated by fraud and hence said judgment cannot operate as res judicata in the subsequent suit. Learned Lower Appellate Court further observed that as said ex parte decree was vitiated by fraud the limitation of three years as prescribed in Article 59 of the Limitation Act, 1963 would not stand in the way to cure the defect.

13. At the time of admission of the second appeal the following substantial questions of law were framed:-

(1) Whether the learned Court of appeal below committed substantial error of law in reversing the judgment and decree passed by the learned Trial Judge by holding that the decree passed in Title Suit No. 213 of 1977 was a nullity being vitiated by fraud by overlooking the fact that the respondent filed an application under Order 9 Rule 13 of the CPC for setting aside the ex parte decree but was unsuccessful and the said decree attained finality.

(2) Whether the learned Court below committed substantial error of law in declaring the decree passed by a court of co-ordinate jurisdiction as nullity merely on the ground that the defendant in that proceeding though had opportunity of hearing and contesting but did not appear or disclose a vital document.

(3) Whether the learned Court below committed substantial error of law in overlooking the fact that decree passed in the suit of 1977 though ex parte constituted res judicata as laid down by a Division Bench of this Court in the case of Vishnu Sugar Mills Ltd. -vs- I. S. P. Trading Company reported in AIR 1983

Cal. 246.

14. Mr. Mohini Mohan Mukherjee, learned counsel for the appellant/defendant submits that original defendant No. 1 Md. Hossain filed a suit being Title Suit No. 213 of 1977 against the original plaintiffs praying for declaration of his right, title, interest and for other consequential reliefs. According to him, though plaintiffs entered appearance in said suit and filed written statement but ultimately did not contest the suit resulting passing of an ex parte decree on 28th of July, 1982. According to him, original plaintiffs later on filed a Misc. Case No. 151 of 1982 under Order 9 Rule 13 of the CPC for setting aside said ex parte decree passed in Title Suit No. 213 of 1977. During pendency of said Misc. Case original plaintiffs filed a suit being Title Suit No. 579 of 1988 against Abdul Rahman and others praying for declaration of plaintiffs' title in the suit property, cancellation of deed of conveyance dated 7th January, 1988 executed by defendant No. 1 Md. Hossain (since deceased) in favour of defendant No. 2 and for setting aside the ex parte decree passed in Title Suit No. 213 of 1977 as void and inoperative together with permanent injunction.

15. Mr. Mukherjee submits that the ex parte decree dated 28th July, 1982 passed in Title Suit No. 213 of 1977 declaring original defendant No. 1 Md. Hossain's right, title, interest on the suit property remained as it is up till now. Said suit was filed against the present plaintiffs. Though the present plaintiffs filed a Misc. Case being No. 151 of 1982 under Order 9 Rule 13 of the CPC for setting aside said ex parte decree but the same was dismissed on contest on 3rd of February, 1990. According to him, when an ex parte decree was passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the ex parte decree under Order 9 Rule 13 of the Code of Civil Procedure. According to him, in this case the plaintiff did not file any review petition but filed a petition under Order 9 Rule 13 of the CPC (Misc. Case No. 151 of 1982). He further submits that once said Misc. Case under Order 9 Rule 13 of the CPC was dismissed the defendant could have availed the only remedy available namely to file an appeal under Order 41 Rule 1 of the Code of Civil Procedure. According to him, in this case the defendants of Title Suit No. 213 of 1977 did not file any such appeal under Order 43 Rule 1 of the CPC against said order of dismissal dated 3rd of February, 1990 passed in said Misc. Case. Rather they filed, according to him, a separate suit being Title Suit No. 579 of 1988 praying for declaring their right, title and interest in the suit property covered by Title Suit No. 213 of 1977 and other consequential reliefs on 22nd November, 1988. According to him, said subsequent suit being Title Suit No. 579 of 1988 was hopelessly barred by the principle of res judicata. In this connection he has referred a case law reported in Vishnu Sugar Mills Ltd. Vs. I.S.P. Trading Co., . He has also referred a case law reported in Bhanu Kumar Jain Vs. Archana Kumar and Another, in support of his earlier contention. According to Mr. Mukherjee the plaintiffs of Title Suit No. 579 of 1988 being defendants in Title Suit No. 213 of 1977 filed a written statement taking the

same plea that in view of passing the judgment and decree in Title Suit No. 145 of 1953 Title Suit No. 213 of 1977 was not maintainable but did not contest said Title Suit No. 213 of 1977 for proving those averments in W. S. According to him, learned Trial Court has rightly held that subsequent Suit being Title Suit No. 579 of 1988 filed by the plaintiffs being defendants of Title Suit No. 213 of 1977 were hopelessly barred by the principle of *res judicata*. Mr. Mukherjee has next contended that even in 1982 when the plaintiffs filed Misc. Case under Order 9 Rule 13 of the CPC they were aware that *ex parte* decree was passed in Title Suit No. 213 of 1977 on 28th July, 1982 and they also took the plea that judgment of Title Suit No. 213 of 1977 was obtained by practising fraud upon this learned Court. According to him, under Article 59 of the Limitation Act the period of limitation is three years either from the date of decree or from the date of knowledge of passing of decree. Admittedly, the original plaintiffs were aware of passing of said *ex parte* decree as far back as in 1982 when they filed Misc. Case under Order 9 Rule 13 of the CPC for setting aside the *ex parte* decree. As such, this specific suit for setting aside *ex parte* decree on the ground of fraud filed in 1988 was clearly barred by limitation and learned Trial Court was absolutely right to hold the same. According to him, learned Lower Appellate Court being oblivious of these facts and principles of law, set aside the well reasoned judgment of learned Trial Court observing that *ex parte* decree in Title Suit No. 213 of 1977 was obtained suppressing the judgment of dismissal of earlier Title Suit No. 145 of 1953 and hence the *ex parte* decree of Title Suit No. 213 of 1977 was vitiated by fraud and accordingly the *ex parte* judgment in title Suit No. 213 of 1977 had no value in the eye of law and could not operate as *res judicata*. According to him, learned Lower Appellate Court was also of the opinion that no limitation was applicable for setting aside said *ex parte* decree obtained by practising fraud upon Court. According to him, learned Lower Appellate Court was swayed by sentiment and not by principles of law and accordingly the judgment and decree of learned Lower Appellate Court is liable to be set aside.

16. Mr. Gopal Chandra Ghosh, learned advocate for the respondent plaintiffs, on the other hand, has submitted that the judgment obtained by practising fraud upon Court is a nullity from the very beginning and cannot operate as a *res judicata*. In this connection, he has referred to Section 44 of the Indian Evidence Act and submits that in terms of section 44 of the Indian Evidence Act a party can avoid the effect of an earlier judgment passed in between the parties over the same subject matter on three counts, namely, that the Court which passed the judgment had no competency and jurisdiction to pass the same, or that it was obtained by practising fraud, or that it was obtained by collusion. According to him, Section 44 of the Indian Evidence Act is an exception to Section 11 of CPC wherein *res judicata* was defined.

17. Mr. Ghosh submits that admittedly the *ex parte* decree in Title Suit No. 213 of 1977 was obtained by suppressing the fact that Md. Hossain, plaintiff of said case, earlier filed one Suit being Title Suit No. 438 of 1951 against Abdul Rahman (vendor of plaintiffs" predecessor-in-title) which was subsequently

renumbered as Title Suit No. 445 of 1953 claiming his title over the self-same suit property and that it was dismissed on contest.

18. According to Mr. Ghosh, the judgment of Title Suit No. 145 of 1953 should have operated as *res judicata* in subsequent Title Suit No. 213 of 1977 over the self-same property and between parties litigating under the same title in a Court competent to try both the suits, had it been filed in Court during trial. According to him, as the *ex parte* decree dated 28th of July, 1982 in Title Suit No. 213 of 1977 was obtained by suppressing the judgment of Title suit No. 145 of 1953, it was nothing but practising fraud upon the Court and hence said *ex parte* judgment and decree of Title Suit No. 213 of 1977 was void and inoperative. According to Mr. Ghosh as said *ex parte* judgment of Title Suit 213 of 1977 vitiated by fraud it can neither operate as *res judicata* in the subsequent suit being Title Suit No. 579 of 1988 nor there can be any limitation for filing said subsequent suit for declaration of title, injunction and other consequential reliefs including a prayer for declaring the *ex parte* judgment of Title Suit No. 213 of 1977 void being vitiated by fraud. In support of his contention he has referred a bunch of case laws namely *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*, *Gowrishankar and Another Vs. Joshi Amba Shankar Family Trust and Others*, *United India Insurance Co. Ltd. Vs. Rajendra Singh and Others*, , *Nechhittar Singh Vs. Jagir Kaur and Others*, , 41 C.W.N (Talluri Venkata v. Thadikonda) and *Khirod Chandra Mohanty Vs. Banshidhar Khatua and Others*,

19. In support of his contention that there is no period of limitation for filing a suit challenging a void decree obtained by fraud referred case laws namely AIR 1954 S. C. page 340 (*Kiran Singh and others v. Chaman Paswan and others*) and *Smt. Usha Ghosh Vs. Rabindra Nath Das and others*,

20. There is no denial that Md. Hossain Ali (original defendant No. 1) of Title Suit No. 579/88 obtained an *ex parte* decree in Title Suit No. 213 of 1977 against the plaintiffs of Title Suit No. 579/88 over the suit property declaring his right, title and interest thereupon. It is also admitted fact that plaintiffs of said Title Suit No. 579/88 appeared in said Title Suit No. 213 of 1977 and filed a written statement alleging that said Md. Hossain Ali earlier filed one Title Suit No. 438 of 1951 (renumbered as Title Suit No. 445 of 1953) against Abdul Rahaman (vendor of plaintiffs' predecessor-in-title) claiming his title over the self-same property and the same was dismissed on contest. It is also a fact that plaintiffs of Title suit No. 579/88 filed a Misc. Case being No. 151 of 1982 under Order 9 Rule 13 of the CPC for setting aside of said *ex parte* decree passed in Title Suit No. 213 of 1977 and that the same was dismissed on contest on 3rd of February, 1990. There is also no denial that during pendency of said Misc. Case being No. 151 of 1982 defendants of Title Suit No. 213 of 1977 filed the present suit being Title Suit No. 579/88 alleging that judgment and decree of Title Suit No. 445 of 1953 which would have operated as *res judicata* in subsequent suit being Title Suit No. 213 of 1977, were not produced during *ex parte* hearing of said Title

Suit and hence said ex parte decree in Title Suit No. 213 of 1977 vitiated by fraud and hence the same can neither operate as res judicata in Title Suit No. 579/88 not the same can be barred by limitation as there is no limitation for challenging a judgment vitiated by fraud. The same plea as taken in Title Suit No. 579/88, was also taken in Misc. Case No. 151 of 1982. It further appears that said plea of res judicata in view of judgment in Title Suit No. 445/53 was also taken by the plaintiffs of Title Suit No. 579/88, in the written statement filed by them in Title Suit No. 213 of 1977.

21. There is no denial that even an ex parte decree operates as a res judicata in a subsequent suit between the same parties over self same matter as held in Vishnu Sugar Mills" case (ibid). Now the question is whether said ex parte decree passed in Title Suit No. 213 of 1977 will not operate as res judicata in the subsequent suit T.S. 579/88, being vitiated by fraud as decided by learned Lower Appellate Court, for suppressing the judgment and decree of earlier Title Suit No. 445 of 1953 filed by Md. Hossain Ali against Abdul Rahaman (the vendor of predecessor-in-interest of the present plaintiffs).

22. In supprot of said stand of Lower Appellate Court, learned counsel for the present respondents/plaintiffs of 579/88 referred a bunch of case laws already referred. In those cases it was held by Hon"ble Apex Court that a judgment or decree obtained by practising fraud on the Court is a nullity and will not operate as a res judicata in any subsequent suit. But if we go through the facts of those case laws it appears that in all those cases the facts which were within the special knowledge of the plaintiffs and not known to the other side as well as to the Court, were withheld and accordingly Hon"ble Apex Court observed as stated above. But in the case in hand it was well within the knowledge of the respondents about judgment and decree passed in Title Suit No. 445 of 1953. They also took a specific plea to that effect in the written statement filed in Title Suit No. 213 of 1977. But for reasons best known to them they did not care to contest said Title Suit No. 213 of 1977 resulting passing of ex parte decree. Learned Trial Court while passing said ex parte decree in Title Suit No. 213 of 1977 was certainly aware about the averments made by the defendants of said case in their written statement but in spite of that he did not take any cognizance of said defence disclosed, by asking the plaintiffs of said case to file the judgment and decree of Title Suit No. 445 of 1953. As such, in the facts and circumstances of this case it cannot be said that ex parte decree was obtained in Title Suit No. 213 of 1977 by suppressing the material facts from learned Court concerned, though it might be argued that learned Court concerned should have not passed said ex parte decree without asking the plaintiff of said case to produce the judgment and decree of Title Suit No. 445 of 1953 when a specific allegation to that effect was made by the defendants in their written statements. The defendants of said Title Suit No. 213 of 1977 could have challenged said ex parte decree by filing an appeal, but preferred to file an application under Order 9 Rule 13 of the CPC for setting aside the ex parte decree. However, said Misc. Case under Order 9 Rule 13 of the CPC was also dismissed on contest later on

against which admittedly there was a provision for preferring an appeal in terms of Order 43 Rule 1 of the Code but no such appeal was filed. Rather during pendency of said Misc. Case the subsequent suit being Title Suit No. 579/88 was filed by the defendants of Title Suit No. 213 of 1977 challenging said ex parte decree of Title Suit No. 213 of 1977 being vitiated by fraud. I have already discussed above that the ex parte judgment and decree of Title Suit No. 213 of 1977 was not vitiated by fraud as the factum having a judgment and decree in Title Suit No. 445 of 1953 was within the knowledge of defendants of Title Suit No. 213 of 1977 as disclosed in their W. S. and accordingly was within the knowledge of learned Court concerned though learned Court did not take any cognizance of the same. If that be the factual position then the above referred case laws on this point as referred by learned counsel for the respondents have no application. Said ex parte judgment passed in Title Suit No. 213 of 1977 not being vitiated by fraud cannot be said to be non-est though the defendants of said case had a right to file an appeal against said ex parte judgment, but said right was not exercised.

23. Said defendants of Title Suit No. 213 of 1977 has filed a fresh suit being Title Suit No. 579/99 in 1988 for declaring the said ex parte judgment and decree of 213 of 1977 being void and for other consequential reliefs.

24. It is true that plaintiffs of Title Suit No. 579/88 being defendants of Title Suit No. 213 of 1977 had a right to file a separate suit to pray for cancellation or setting aside a decree in terms of Section 59 of Limitation Act, 1963. In terms of Article 59 of said Act, 1963 the period of limitation is three years when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescind first become known to him. Admittedly, the factum of passing of an ex parte decree in Title Suit No. 213 of 1977 was well within the knowledge of the plaintiffs of Title Suit No. 579/88 as far back as in 1982 when they filed an application under Order 9 Rule 13 of the CPC being Misc. Case No. 151 of 1982. Admittedly the subsequent Title Suit No. 579/88 was filed in 1988 i.e., about six years after having knowledge of passing of said ex parte decree in Title Suit No. 213 of 1977.

25. Learned Lower Appellate Court set aside the judgment of learned Trial Court namely dismissal of the suit on the ground of Limitation also, by observing that no period of limitation would run as the judgment and decree of Title Suit No. 213 of 1977 were obtained by practising fraud upon Court. In support of said observation of learned Lower Appellate Court the respondents being plaintiffs of Title Suit No. 579/88 have also referred case laws namely Kiran Singh and Ors. (ibid) and Smt. Usha Ghosh (ibid) but those case laws have no application in the facts and circumstances of this case in view of the specific observation as made above that the judgment and decree of Title Suit No. 213 of 1977 were not vitiated by fraud. Be that as it may, the period of limitation for setting aside such a decree is three years from the date of knowledge. Admittedly, present respondent (plaintiff of Title Suit No. 579/88) had knowledge of said passing of

ex parte judgment and decree in Title Suit No. 213 of 1977 as far back as in 1982 when they filed a Misc. Case on that score. If that be the position then said Title Suit No. 579/88 was hopelessly barred by the laws of limitation. I fail to appreciate the observation of learned Lower Appellate Court on the basis of which he set aside the judgment and decree of learned Trial Court in Title Suit No. 579/88.

26. As a result, the appeal is hereby allowed on contest by setting aside the impugned judgment and decree passed by learned Lower Appellate Court and thereby restoring the judgment and decree of learned Trial Court.

27. However, I pass no order as to costs.

28. Send down Lower Court records along with this judgment to the Lower Court at the earliest.

29. Urgent photostat certified copy of this judgment be supplied to learned counsel/counsels of the party/parties, if applied for.