
(1962) 07 GAU CK 0010
In the Gauhati High Court
Case No : Second Appeal No. 2 of 1961

Niasha Ghose

APPELLANT

Vs

Kari Siddek Ali and Others

RESPONDENT

Date of Decision : 23-07-1962

Acts Referred:

Limitation Act, 1963 — Article 694, 91
Penal Code, 1860 (IPC) — Section 447
Specific Relief Act, 1963 — Section 39, 42

Citation : (1962) 07 GAU CK 0010

Hon'ble Judges : G. Mehrotra, C.J

Bench : Single Bench

Advocate : P. Choudhuri and S.K Sen, for the Appellant; N.M. Dam, for the Respondent

Final Decision : Allowed

Judgement

G. Mehrotra, C.J.—The short points raised in this appeal are (1) whether: the suit as framed is maintainable and (2) whether the suit is barred by limitation.

2. The facts are that Kari Siddek Ali, Gopesh Chandra Deb and Jyotirffloy Deb who are Plaintiffs Nos. 1, 2 and 3 respectively, brought a suit for cancellation of a deed stated to be a Kabuliyat dated the 10th March, 1950 executed by Defendant No. 1 Niasha Ghose in favour of Plaintiff No. 1 in respect of the land set out in schedule 1 attached to the plaint after declaring the said Kabuliyat to be, a false, fabricated and illegal document. Plaintiffs further prayed for a permanent injunction restraining the Defendant from taking possession of the disputed land or from disturbing the peaceful possession of the Plaintiff No. 1 through Plaintiffs Nos. 2 and 3. The case of the Plaintiffs as set out in the plaint is that the land of the first schedule is situated in ward No. "2 of the Karimganj Municipality. Plaintiff No. 1 was a tenant with jote right in respect of the land under Khan Bahadur Abdul Mazid Choudhury on payment of an annual rent of Rs. 40/-. He was occupying the land after constructing two houses described in

schedule 2 to the plaint.

As Plaintiff No. 1 found after the communal disturbances on 13th February, 1950 that it was not possible for him to stay there in peace, he arranged to exchange the jote right to the land of the first schedule together with the two houses as described in the second schedule with some landed property owned and occupied by Plaintiffs 2 and 3 situated in the State of Pakistan. On 4th March, 1950 exchange deeds were drawn up. Possession of the disputed land was given to Plaintiffs 2 and 3 and Plaintiff took possession of the land of the Plaintiffs 2 and 3 in Pakistan: When Plaintiffs 2 and were in peaceful possession of the disputed land and the houses situated thereon, the Defendants are alleged to have forcibly trespassed into the suit land and they seriously assaulted Plaintiffs 2 and 3.

Thereafter a criminal case was started against the Defendants u/s 447, Indian Penal Code, in the course of the trial of the case it transpired that Defendant No. 1 executed and registered a Kabuli yat without the knowledge of Plaintiff No. 1 in his favour. The Plaintiffs came to know of this fraudulent document and they obtained a copy of the Tigestered Kabuliyat. During the criminal proceedings the Defendant relied upon the Kabuliyat in support of his possession. The Government requisitioned the land and further ordered that the land will be derequisitioned after the title to the land had been established by Plaintiffs Nos. 1 to 3. Plaintiffs have thus brought the present suit for the reliefs which I have already mentioned.

3. The defence was a denial of the Plaintiffs right and title to the land. Mainly it is urged that the suit as framed is not maintainable and in any case it is barred by limitation. It was also alleged in the written Statement that the Plaintiff was never in possession of the land and the houses situated thereon.

4. Both the courts below decreed the suit and the present appeal has been filed by Defendant No. 1. The contention of the Appellant is that the Plaintiffs' remedy was to file a suit for declaration of their right and title to the property and for possession if they are out of possession. The suit for mere cancellation of the document executed by Defendant No. 1 is not maintainable u/s 39 of the Specific Relief Act. It is secondly contended that if the present suit as framed is maintainable, it is barred by limitation as Article 91 of the Limitation Act will be attracted and the starting point of limitation will be the date of knowledge.

5. Section 39 of the Specific Relief Act provides as follows:

Any person against whom a written instrument is void or avoidable, 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.

The contention of the Respondents is that as the document was obtained fraudulently and is a faceted document, it is void and a suit for cancellation of

such a document is maintainable u/s 39 of the Specific Relief Act. Plaintiff No. 1 is no party to the Kabuliyat. The Kabuliyat is, a unilateral document executed by Defendant No. 1. Such a document without the knowledge of the Plaintiff No. 1 may or may not be binding on him. A Kabuliyat without a proper lease executed by Plaintiff No. 1 may not create any right in favour of Defendant No. 1, but it cannot be said to be a document void or avoidable against the Plaintiffs. The Plaintiffs claim to have right over the land and their case is that the Kabuliyat executed by Defendant No. 1 does not affect their rights inasmuch as the document was obtained without the knowledge of Plaintiff No. 1 or his consent. In substance the Plaintiffs want to remove the cloud on their title cast by the execution of the document. The execution of the document thus may give a cause of action to bring a suit for declaration of right and title of Plaintiff No. 1 to the suit property. But no suit for cancellation u/s 39 of the Specific Relief Act can be filed by the Plaintiffs.

6. The scope of Section 39 of the Specific Relict Act is laid down by the Madras High Court in the Full Bench decision of Muppudathi Pillai v. Krishnaswami Pillai reported in AIR 1960 Mad 1 (FB) as follows:

The provisions of Section 39 make it clear that three conditions are requisite for the exercise of the jurisdiction to cancel an instrument: (1) the instrument is void or voidable against the Plaintiffs; (2) Plaintiff may reasonably apprehend serious injury, by the instrument being left outstanding; (3) in the circumstances of the case the court considers it proper to grant this relief of preventive justice. On the third aspect of the question the English and American authorities hold that where the document is void on its face the court would not exercise its jurisdiction while it would if it were not so apparent. In India it is a matter entirely for the discretion of the court.

The question that has to be considered depends on the first and second conditions set out above. As the principle is one of potential mischief, by the document remaining outstanding, it stands to reason the executants of the document should be either the Plaintiff or a person who can in certain circumstances bind him. It is only then it could be said that the instrument is voidable by or void against him., The second aspect of the matter emphasises that principle. For there can be no apprehension if a mere third party, asserting a hostile title creates a document . Thus relief u/s 39 would be granted only, in respect of an instrument likely to affect the title of the Plaintiff and not of an instrument executed by a stranger to that title.

Let us take an example of a trespasser purporting to convey the property in his own right and not in the right of the owner. In such a case a mere cancellation of the document would not remove the cloud occasioned by the assertion of a hostile title, as such a document even if cancelled would not remove the assertion of the hostile title. On that case it would be the title that has got to be judicially adjudicated and declared, and mere cancellation of an instrument would not achieve the object. Section 42 of the Specific Relief Act would apply to

such a case. The remedy u/s 39 is to remove a cloud upon the title, by removing) a potential danger but it does not envisage an adjudication between competing titles.

It was observed in this case that the principle underlying Section 39 is the same as set out in Story on Equity Jurisprudence, English Edn. 1920 in Article 694 as follows:

It is obvious that the jurisdiction, exercised in cases of this sort, is founded upon the administration of a protective or preventive justice. If, therefore, the instrument was void for matter apparent upon the face of it, there was no call to exercise the jurisdiction, with the possible exception of instruments, forming a cloud upon the title to land. The party is relieved upon the principle, as it is technically called quia time; that is, for fear that such agreements, securities, deeds, or other instruments may be vexatiously or injuriously used against him, when the evidence to impeach them may be lost; or that they may now. throw a cloud or suspicion over his title or interest.

I am in complete agreement with the law enunciated in the above passages of the Full Bench decision of the Madras Court. If the Plaintiffs' case is that the Kabuliyat alone will not pass any title to the Defendant, the Kabuliyat will not affect the title of the Plaintiff and the question of the document to be void or voidable as against the Plaintiff does not arise. If the contention is that the document is .not binding on the Plaintiffs as it was obtained by fraud and fabrication, even then the Plaintiffs not being a party to the document and the Defendant No. 1 not having executed the deed for or on behalf of the Plaintiff No. 1, the question of getting it cancelled u/s 39 of the Specific Relief Act does not arise. The Plaintiff No. 1 has alleged that by, an exchange the property was given to Plaintiffs Nos. 2 and 3 and as between the Defendant No. 1 and Plaintiffs Nos. 2 and 3, the question is which document is to prevail - whether the exchange or the Kabuliyat, and as between the Plaintiffs Nos. 2 and 3 and Plaintiff No. 1 the question is - who had a better title to the property. It will thus be adjudicating the respective claims of Plaintiffs 2 and 3 and Defendant No. 1 to the property and relief u/s 39 is not an appropriate relief under these circumstances.

7. The next question is whether the suit is barred by limitation. Article 91 of the Limitation Act provides for cancellation or setting aside an instrument not otherwise provided for. The period of limitation is three years from the date when the facts entitling the Plaintiff to have the instrument cancelled or set aside become known to him. The contention of the Respondents is two-fold on this question. Firstly the argument is that Article 91 will not apply to the present suit as the suit is not one for cancellation or setting aside the Kabuliyat on the ground that it is voidable. The document is void as it is a unilateral document to which the consent of the Plaintiff was not given. It is not necessary to get this document cancelled and Article 120 of the Limitation will apply.

8. The second argument is that the starting point of the limitation will be the

15th December, 1951 - the amended date of the cause of action. Reliance is placed on the case of Chandi Charan Pandit v. Sarat Chandra Sarma, AIR 1955 Gau 231 wherein it was held that Article 91 applies where the deed is voidable but not where the deed is void from its inception and there is no obligation to have it set aside. That was a suit brought for a declaration that the deed of gift executed by the Plaintiffs father in favour of the Defendant was not operative against the Plaintiff and that the Defendant had not acquired any right, title or interest in the land covered by this deed of gift. There was a further prayer for a declaration that the compromise decree and the ex parte decree obtained against the Plaintiff by the Defendant were fraudulent and inoperative and the Plaintiff asked for confirmation and restitution of possession with regard to the property in suit. The point raised on behalf of the Defendant was that Article 91 was attracted in the present case, as in effect the suit was for the cancellation of the deed of gift. This" argument was not accepted and it was held that on the relief claimed it was not necessary to get the gift cancelled. In the present case the Plaintiffs themselves have asked for the cancellation of the Kabuliyat and one of the points raised by the Defendant is that the suit as framed is not maintainable and further the Plaintiffs are not entitled to any relief u/s 39 of the Specific Relief Act.

9. The next case referred to is Appanna Vs. Jami Venkatappadu and Others, There also it was held that Article 91 presupposes that a suit is necessary under the law to set aside the instrument. But, where under the law there is no duty cast on the person to get an instrument set aside, the article does not impose any obligation on him to get it set aside. In that case the deed was held to be wholly void and the suit was brought for recovery of possession of the property comprised therein. It was argued that the suit in effect is one for cancellation of the deed and Article 91 applied. This contention was repelled. It was said that the prayer for a declaration that the deed was void was of course ancillary to the substantive prayer for possession. In the present case as I have already pointed out, the substantive relief is one for cancellation of the document u/s 39 of the Specific Relief Act and there was no relief claimed for possession or declaration of title. On the reliefs as claimed in the plaint Article 91 of the Limitation Act will be attracted.

10. The next question is what will be the starting point of the limitation of the three years. Under column 3 of Article 91 of the Limitation Act the period of three years will start from the date when the facts entitling the Plaintiff to have the instrument cancelled or set aside become known to him. The court below did not apply its mind to the question at all as to when the Plaintiffs came to know of the facts on which they are seeking the cancellation of the document. The suit was filed on the 13th July 1954. In the plaint, it is alleged that when the Plaintiffs 2 and 3 continued their possession, Defendants forcibly trespassed into the suit land, and seriously assaulted Plaintiffs 2 and 3 and their men and a criminal case was instituted against the Defendants u/s 447/323, Indian Penal Code. In the course of the trial it transpired that Defendant No. 1 executed and registered a

Kabuliyat without the knowledge of Plaintiff No. 1 which was forged and fabricated. The Plaintiffs after having obtained a certified copy of the Kabuliyat, came to know that Defendant No. 1 had created the forged Kabuliyat in collusion with his own men and per sons under his control.

In paragraph 6 of the plaint it was stated that the cause of action arose on 15th July, 1950 where the Plaintiffs had knowledge of this document. An application was subsequently made for amendment of this clause by inserting "15th December 1951" in place of "15th July 1950" as the date of knowledge. In the application it is stated that Defendant No. 1 for the first time disclosed about the existence of the forged document In suit in course of trial of G. R. Case No. 207 of 1950 u/s 447/323, Indian Penal Code. The said case was tried in the month of December 1951. At that time Plaintiff No. 1 was in Pakistan. Plaintiff after coming two days before the delivery of judgment came to learn that the. Defendant No. 1 has registered a Kabuliyat in favour of the Plaintiff. In the draft plaint the lawyer kept blank the date of knowledge of the Plaintiff but the clerk through mistake filed the plaint after putting in the date 15-7-50 as the date of knowledge in place of 15-12-51.

It has been specifically mentioned that the Plaintiff came to know about the existence of the Kabuliyat for the first time during trial of 447 Indian Penal Code case. The trial of that case did not commence on 15-7-50. This application for "amendment was allowed by both the courts and the courts below have held that even if Article 91 is attracted, the starting point of limitation will be 15th December, 1951 and not 15th July 1950. Even assuming that the amendment of the plaint was rightly allowed, the courts below should have found on the materials before them, on which date the Plaintiffs in fact came to know of the existence of this document. The argument for the counsel for the Appellant is that there is nothing either in the evidence of the Plaintiff or anything else on the record to show that the Plaintiffs in fact got knowledge of this document within three years of the (filing of the suit. Merely because in the plaint by amendment the date of knowledge is given to be 15th December, 1951 it cannot be said that it has been proved by the Plaintiffs as a fact that they came to know of the document only on the 15th December 1951.

11. It is also urged that the anendment in the present case should not have been allowed. The Additional Subordinate Judge has only disposed of this point with the observation that according to Plaintiff the existence of the alleged Kabuliyat came to light during the criminal case. At that time Plaintiff No. 1 was in Pakistan. He had no opportunity to know of the existence of such a Kabuliyat in his favour. As such amendment was allowed. In substance the argument of Plaintiff No. 1 is that the existence of the document came to light only during the trial of the criminal case and as Plaintiff No. 1 was no party to those criminal proceedings and was at that time in Pakistan, he came to know of it when he returned during the pendency of the trial two days before the delivery of the judgment. This statement does not mean that Plaintiffs Nos. 2 and 3 had no

knowledge of the document earlier. and that the trial of the case was not going on in July 1950. As stated by the judge himself, there was an order passed on the 24th July 1950 in which it was stated that the Plaintiff No. 1 was entitled to get back possession of the two houses with the observation that in case any difficulty arose in putting Plaintiff in possession, the houses are to be requisitioned, taken over by Government and possession delivered to Siddek A Ji. This order was passed 24th July 1950 and the difficulty contemplated this order could only arise on account of the assertion by the Defendant that he was entitled to possession under the Kabuliyat. When this order of 24th July, 1950 was thus passed to the knowledge of the Plaintiff No. 1 he must have been aware of the existence of this document in July 1950. Moreover if the allegation of Plaintiff No. 1 is that he was in possession through Plaintiffs 2 and 3, as Plaintiffs Nos. 2 and 3 at whose instance the criminal case was started, knew of the existence of this document, through them Plaintiff No. 1 will also be presumed to have knowledge of the existence of this document . In this view of the matter even if the finding of the courts below is accepted that the amendment was rightly allowed, the mere assertion in plaint does not establish the fact that Plaintiff No. 1 acquired knowledge of the document only in December, 1951. As the courts below have not come to any finding on what date actually the Plaintiffs had knowledge of this document, I might have remanded the case for a finding on that question. But as from the allegation in the plaint it is clear that the document came to light during the trial of the case and from the order of the 24th July, 1950 it is abundantly clear that the Plaintiffs came to know of this document in July 1950, no useful purpose will be served by remanding the case and the suit thus was barred by limitation. In the result therefore I allow this appeal, set aside the order of the courts below and dismiss the Plaintiffs' suit but there will be no orders as to costs of this appeal. Parties will bear their own costs throughout.