Civil Appeal

Present:
The Hon'ble Mr. Justice Bhaskar Bhattacharya
And
The Hon'ble Mr. Justice Raghunath Bhattacharya
Judgment on 20.08.2010

F.A. No. 25 of 2002
With
F.A. No. 35 of 2010

Srimati Nirodanandini Mondal & Ors.

Versus

Smt. Sandhya Rani Mondal & Ors.

Points:
Declaration, Limitation: Grand father of the plaintiff died in 1970- Father of the plaintiff died in 1977-Suit filed in 1993-In spite of knowledge of the alleged fraud the father of the plaintiffs had decided not to challenge the deed executed by the grand father of the plaintiff during his life time- whether plaintiffs can be allowed to alleged said fraud-Specific Relief Act, 1963-S.31
Facts:

One Jamini Mondal had two sons, *viz*. Niranjan and Pulin. The suit for eviction has been filed by the heirs Niranjan by treating Pulin as licensee under them whereas Pulin has subsequently filed the suit for partition claiming half share in the property by virtue of a registered deed of sale executed by Jamini in favour of both Niranjan and Pulin. Plaintiff alleged that Niranjan was the original owner of the suit land, which he purchased with his own money. Subsequently, at the time of making construction over the land in question, Niranjan took loan of Rs.3,000/- from Jamini, and executed an apparent deed of sale in favour of his father with oral agreement for reconveyance on the stipulation that after the

repayment of the said loan, Jamini would reconvey the property in favour of Niranjan. Such sale-deed was executed by Niranjan in the year 1964. Jamini executed a deed of reconveyance in favour of Niranjan, where the stamp paper was purchased by Niranjan, but it was subsequently detected that in the sale-deed, Pulin was shown to be joint purchasers along with Niranjan. Pulin was looking after execution of the deed, and by practising fraud in collusion with the lawyer who drafted the deed, he incorporated his name as one of the joint purchasers though Niranjan alone paid back the full consideration money as per agreement. Such fraud was detected subsequently by Niranjan during his lifetime when Pulin pleaded for mercy and even had given a declaration in writing that Niranjan was the absolute owner of the property. After the death of Niranjan, Pulin became the guardian of the heirs of Niranjan and on the plea of mutating their names in the municipality, he took back of all papers including the written declaration given by him, which was subsequently not returned, and it transpired that Pulin mutated his name along with heirs of Niranjan in the Municipal records. Defendant alleged that Jamini, the father of the parties, was the real owner of the property who also purchased the property in the name of Niranjan and subsequently, such position was clarified by a formal execution of the sale-deed in favour of Jamini. Jamini, thereafter took loan from the Government of Rs.10,000/- and constructed building thereon with that money and, thereafter, executed a deed of sale in favour of both Niranjan and Pulin by accepting Rs.1,500/- each from his two sons. Thus, by virtue of such purchase, Pulin became joint owners of the property along with his brother Niranjan.

Held:

It was Niranjan who took active part in execution of the deed inasmuch as stamp paper was purchased in the name of Niranjan and it was Niranjan, who identified his father at the time of registration. Niranjan put his signature in English on the deed but the deed was written in Bengali and as such, the learned Trial Judge quite reasonably found that the contents of the deed were very much known to Niranjan at the time of execution and registration as he was a literate person. Even in the plaint, it has been admitted that Niranjan allegedly detected the fraud of Pulin but did not take any step for rectification of the deed either during the lifetime of his father Jamini who died in the year 1972 or even 5 years thereafter so long Niranjan was alive. Niranjan in spite of detection of the alleged fraud having failed to file any suit for rectification of the transaction during the lifetime of his father or even during his own lifetime till his death in the year 1977 and the suit having been filed in year 1993, long 16 years after his death by his heirs, the plea taken by the heirs of Niranjan is not tenable so long the sale-deed executed by Jamini in favour of his two sons is not annulled by any competent Court. In such circumstances, the heirs of Niranjan are precluded from disputing the genuineness of the deed year 1970 executed by Jamini in favour of both his sons. Paras 14 and 15

The heirs of Niranjan had failed to lead any cogent evidence to show that the deed executed by Jamini in favour of both the sons was vitiated by fraud or that the deed executed by Niranjan in favour of his father was a loan in substance although such plea was available to Niranjan during the lifetime of Jamini and

even after his death, during his own lifetime. Once Niranjan had in spite of knowledge of the alleged fraud by Pulin had decided not to challenge the deed executed by his father of the year 1970 by accepting his brother as a co-sharer, such plea is not available to his heirs. Para 19

Cases cited:
Md. Noorul Huda vs. Bibi Raifunnessa, 1996(7) SCC 767

For the Appellants: Mr. S.P. Roychowhdury, Mr. K.D. Paddar, Mr. D.N. Mukherjee, Mr. Pradip Paul, Mr. Dilip Kr. Shyamal.

For the Respondents: Mr. Tapas Kr. Banerjee, Mr. Arijit Chatterjee.

Bhaskar Bhattacharya, J.:

These two appeals were heard together as those are directed against a common judgment dated 28th November, 2000 passed by the learned Civil Judge, Senior Division, 7th Court, Alipore, thereby disposing of two suits, one for eviction of a licensee and the other, for partition by dismissing the suit for eviction and passing a preliminary decree in the suit for partition.

2. Being dissatisfied, the plaintiffs of the eviction suit, who are the defendants of the partition suit, have preferred these two appeals.

3. The facts, giving rise to filing of the aforesaid two suits out of which these two appeals arise, may be summed up thus:

4. One Jamini Mondal had two sons, *viz*. Niranjan and Pulin. The suit for eviction has been filed by the heirs Niranjan by treating Pulin as licensee under

them whereas Pulin has subsequently filed the suit for partition claiming half share in the property by virtue of a registered deed of sale executed by Jamini in favour of both Niranjan and Pulin.

5. According to the heirs of Niranjan, their predecessor was the original owner of the suit land, which he purchased with his own money. Subsequently, at the time of making construction over the land in question, Niranjan took loan of Rs.3,000/- from Jamini, his father, and executed an apparent deed of sale in favour of his father with oral agreement for reconveyance on the stipulation that after the repayment of the said loan, Jamini would reconvey the property in favour of Niranjan. Such sale-deed was executed by Niranjan in the year 1964. According to the plaintiffs, in fact, pursuant to such understanding, Jamini executed a deed of reconveyance in favour of Niranjan, where the stamp paper was purchased by Niranjan, but it was subsequently detected that in the sale-deed, Pulin was shown to be joint purchasers along with Niranjan. According to the heirs of Niranjan, Pulin was looking after execution of the deed, and by practising fraud in collusion with the lawyer who drafted the deed, he incorporated his name as one of the joint purchasers though Niranjan alone paid back the full consideration money as per agreement. According to the heirs of Niranjan, such fraud was detected subsequently by Niranjan during his lifetime when Pulin pleaded for mercy and even had given a declaration in writing that Niranjan was the absolute owner of the property. After the death of Niranjan, Pulin became the guardian of the heirs of Niranjan and on the plea of mutating

their names in the municipality, he took back of all papers including the written declaration given by him, which was subsequently not returned, and it transpired that Pulin mutated his name along with heirs of Niranjan in the Municipal records. Hence, the suit was filed for eviction by treating Pulin as a licensee.

6. After the filing of the suit for eviction, Pulin filed a suit for partition claiming 8 annas share in the property on the allegation that Jamini, the father of the parties, was the real owner of the property who also purchased the property in the name of Niranjan and subsequently, such position was clarified by a formal execution of the sale-deed in favour of Jamini. Jamini, thereafter took loan from the Government of Rs.10,000/- and constructed building thereon with that money and, thereafter, executed a deed of sale in favour of both Niranjan and Pulin by accepting Rs.1,500/- each from his two sons. Thus, by virtue of such purchase, Pulin became joint owners of the property along with his brother Niranjan. It is further alleged that there was no question of inducting Pulin in the property as licensee. The heirs of Niranjan contested the said suit by reiterating their plaint case of the eviction case as the defence in the suit for partition.

7. At the time of hearing of the suit, one of the sons of Niranjan and another person gave evidence in support of the suit for eviction and the defence in the suit for partition while the widow of Pulin, who died during the pendency of the

suit, alone deposed in opposing the suit for eviction and in support of suit for partition.

8. The learned Trial Judge on consideration of materials on record came to the conclusion that the plea of the heirs of Niranjan that fraud was practised upon Jamini by Pulin had not been established and as such, in view of the sale-deed executed in the year 1970 by Jamini in favour of his both the sons, Pulin and Niranjan acquired 8 annas share each in the property. It was pointed out that although Niranjan was alive even after detection of fraud till the year 1977, he, during his lifetime, never initiated any proceeding for annulling the deed executed by his father as a void document.

9. The learned Trial Judge further found in such circumstances the heirs of Niranjan were not entitled to get decree for eviction whereas the other suit filed by Pulin should be decreed in preliminary form by declaring 8 annas share in the property of both Pulin and Niranjan. The learned Trial Judge thus decreed the suit for partition and dismissed the suit for eviction.

10. As indicated above, these two appeals have been filed by the heirs of Niranjan.

11. Mr. Roy Chowdhury, the learned senior advocate appearing on behalf of the appellants, strenuously contended before us that the learned Trial Judge totally overlooked the fact that the defence taken by Pulin that Niranjan was the

benamder of Jamini was not pressed and as such, it was established that Niranjan was the real owner of the property. According to Mr. Roy Chowdhury, once it is established that Niranjan was the real owner of the property, the case made out by his clients that the sale-deed in favour of father was really a loan transaction should have been accepted. Mr. Roy Chowdhury contends that there was no justification of execution of a sale-deed by the father on the same consideration of Rs.3,000/-after lapse of 6 years unless Niranjan was the real owner of the property. Mr. Roy Chowdhury further contends that in such circumstances the learned Trial Judge should have decreed the suit for eviction as the heirs of Pulin failed to establish their defence of benami. Mr. Roy Chowdhury further contends that the widow of Pulin could not say anything about the earlier transactions and thus, the learned Trial Judge erred in law in accepting the defence version of Pulin which is not supported by any cogent evidence.

12. Mr. Banerjee, the learned advocate appearing on behalf of the respondents has supported the reason assigned by the learned Trial Judge and has prayed for dismissal of these appeals.

13. After the hearing the learned counsel for the parties and after going through the materials on record, we find that there is no dispute that Niranjan in the year 1964 executed an apparent sale-deed in favour of his father at the price of Rs.3,000/- when construction was not made on the property. It has been established from evidence on record that Jamini after acquiring title through the

sale-deed, took loan of Rs.10,000/- from the Government and it will appear from the subsequent sale-deed executed by Jamini in favour of his two sons of the year 1970 that he made construction over the property by his own money and, thereafter, executed a sale-deed in favour of his two sons.

14. It is definite case of the heirs of Niranjan that the said sale-deed of 1970 was obtained by Pulin by practising fraud and it was the intention of Jamini to reconvey the property in favour of Niranjan alone. We, however, find from the materials on record that it was Niranjan who took active part in execution of the deed inasmuch as stamp paper was purchased in the name of Niranjan and it was Niranjan, who identified his father at the time of registration. Niranjan put his signature in English on the deed but the deed was written in Bengali and as such, the learned Trial Judge quite reasonably found that the contents of the deed were very much known to Niranjan at the time of execution and registration as he was a literate person. Even in the plaint, it has been admitted that Niranjan allegedly detected the fraud of Pulin but did not take any step for rectification of the deed either during the lifetime of his father Jamini who died in the year 1972 or even 5 years thereafter so long Niranjan was alive.

15. We are of the view that Niranjan in spite of detection of the alleged fraud having failed to file any suit for rectification of the transaction during the lifetime of his father or even during his own lifetime till his death in the year 1977 and the suit having been filed in year 1993, long 16 years after his death by his heirs, the plea taken by the heirs of Niranjan is not tenable so long the sale-deed

executed by Jamini in favour of his two sons is not annulled by any competent Court. In such circumstances, the heirs of Niranjan are precluded from disputing the genuineness of the deed year 1970 executed by Jamini in favour of both his sons.

16. In this connection, we may profitably refer to the decision of the Supreme Court in the case of Md. Noorul Huda vs. Bibi Raifunnessa reported in 1996(7) SCC 767, where 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."

(Emphasis supplied by us)

17. It further appears that the heirs of Niranjan admitted in their pleadings that in the municipal record the name of Pulin had been mutated but no evidence has been adduced to show that any step was taken for rectification of such mutation before the Municipal Authority. Even the plea of alleged deed of declaration executed by Pulin admitting Niranjan's title as stated in the plaint has not been pressed by Basudev Mondal, the son of Niranjan, in evidence. Although Basudev Mondal in evidence stated that his father paid Rs.10,000/- with interest to building department but Exht. 5 to 5c show only a paltry sum of Rs.3,000/- and odd was paid and that too, in the name of Jamini.

18. It is, therefore, established that Jamini took loan of Rs.10,000/- in his own name from the Government and from that money the construction was made and the plea of payment of the said amount by Niranjan or the alleged fraud by Pulin in incorporating his name in the deed of the year 1970 were bereft of any substance.

19. We, therefore, find that in the facts of the present case, the heirs of Niranjan had failed to lead any cogent evidence to show that the deed executed by Jamini in favour of both the sons was vitiated by fraud or that the deed executed by Niranjan in favour of his father was a loan in substance although such plea was available to Niranjan during the lifetime of Jamini and even after his death, during his own lifetime. Once Niranjan had in spite of knowledge of the alleged fraud by Pulin had decided not to challenge the deed executed by his father of the year 1970 by accepting his brother as a co-sharer, such plea is not available to his heirs.

20. We, therefore, find no reason to interfere with a well-reasoned finding recorded by the learned Trial Judge by disbelieving the case of heirs of Niranjan and accepting the version of the heirs of Pulin.

21. Both the appeals are dismissed.

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

(Bhaskar Bhattacharya, J.)

I agree.

(Raghunath Bhattacharya, J.)