AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Second Appeal No. 61 of 2007

Judgment reserved on 18/10/2019

Judgment delivered on 05/11/2019

Mohammed Haneef S/o Late Habeeb Miyan, Aged about 53 years, R/o Village Sonpur, Tahsil Surajpur, District Surguja, Chhattisgarh.

---Appellant/Plaintiff

Versus

1. Ramlakhan S/o Shivpratap Choubey, Aged about 54 years.
2. Ramgopal S/o Gajanand Choubey, Aged about 52 years.

   Both the above R/o Village Vilaro, Tahsil Baikunthpur, District Korea, Chhattisgarh.
3. State of Chhattisgarh, through Collector, Surguja, Chhattisgarh.

--- Respondents/Defendants

For Appellant	:	Mr. Manoj Paranjpe, Advocate
For Respondent No. 1	:	None
For Respondent No. 2	:	Mr. Sachin Singh Rajput,Advocate
For State	:	Mr. Ravi Bhagat, Deputy Government Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. The substantial question of law involved, formulated and to be answered in this second appeal preferred by the appellant/plaintiff states as under :-

> “Whether the finding recorded by the First Appellate Court that the suit was barred by limitation is contrary to law ?”

(For the sake of convenience, parties would be referred hereinafter as per their status and ranking shown in the suit before the trial Court.)

2. Suit property was originally held by plaintiff's father namely late Habeeb Miyan. It is the case of the plaintiff that his father gifted the suit property to him by a gift deed dated 15/01/1955 (Exhibit P/1) when he was a minor through her mother Jainab Bibi and since then he is in possession of the suit property by cultivating the same and his other brothers namely Mohammed Basheer and Allaudin, born out of the wedlock of Habeeb Miyan with his second wife, were residing separately. In the month of May, 1986, plaintiff came to know that defendants have got their names mutated in the revenue records on the basis of sale deed dated 22/12/67 (Exhibit D1A) allegedly executed by plaintiff's brother in favour of defendants No. 1 and 2 which compelled the plaintiff to institute civil Suit No. 264A/04 for

declaration of title and permanent injunction stating *inter alia* that alienation made by plaintiff's brother in favour of defendants No. 1 and 2 by sale deed dated 22/12/67 (Exhibit D1A) is void and inoperative and not binding upon him, as such, he is entitled for decree as claimed.

3. Defendants No. 1 and 2 denied the plaint allegations by filing their written statement stating *inter alia* they have purchased the suit property from the brother of plaintiff after making payment of sale consideration of Rs. 2000/- and whole of the plaintiff's family knew about the sale and after execution of the sale deed dated 22/12/67, defendants are in possession of the suit property by cultivating the same and moreover, plaintiff's suit is barred by limitation and it deserves to be dismissed with cost(s).

4. Learned trial Court, upon appreciating the oral and documentary evidence on record, decreed the suit in favour of the plaintiff vide judgment and decree dated 12/09/2006 holding that the sale deed dated 22/12/67 (Exhibit D1A) allegedly executed by plaintiff's brother in favour of defendants No. 1 and 2 is void and inoperative and plaintiff is the exclusive owner of the suit

property on the basis of gift deed dated 15/01/1955 (Exhibit P/1) executed by plaintiff's father in his favour. Learned trial Court also came to the conclusion that plaintiff's suit is not barred by limitation.

5. Being aggrieved, defendants No. 1 and 2 preferred Civil Appeal No. 11A/2006 under Section 96 of the CPC wherein learned first appellate Court, though maintained the finding of gift deed dated 15/01/1955 (Exhibit P/1) executed by plaintiff's father in his favour and that sale deed dated 22/12/1967 (Exhibit D1A) is void and further held that plaintiff is the title-holder of the suit property, but ultimately held that suit is barred by limitation under Article 59 of the Indian Limitation Act, 1963 and by its judgment and decree dated 08/01/2007 set aside the judgment and decree passed by the trial Court.

6. Questioning the said judgment and decree of the first appellate Court, this second appeal has been preferred by the plaintiff/appellant herein under Section 100 of the CPC wherein substantial question of law has been formulated and set out in the opening paragraph of this judgment.

7. Mr. Manoj Paranjpe, learned counsel for the appellant/plaintiff would submit that the first

appellate Court was absolutely unjustified in setting aside the decree granted by learned trial Court in favour of the plaintiff by holding plaintiff's suit to be barred by Article 59 of the Limitation Act as D.W. 4 namely ShivPrasad and D.W. 6 namely Gajanand Choubey, both have admitted in their statements that plaintiff got the suit property measured immediately before filing the suit which led to the filing of the suit by the plaintiff for declaration of title and permanent injunction and would further submit that Article 59 of the Limitation Act would be applicable to question the sale deed from the date of knowledge of execution of the sale deed as admittedly, after measurement of the suit property allegedly done by the defendants as plaintiff came to know about the mutation of defendants' names in the revenue records which led to the filing of the suit which has already been held not to be barred by limitation by the trial Court, as such, the first appellate Court reversed the finding of the trial Court on the issue of limitation on perverse ground holding plaintiff's suit to be barred by limitation after having held that plaintiff is the title-holder of the suit property on the basis of the gift deed dated 15/01/1955 (Exhibit P/1) executed by his father in his favour and after having held that sale deed dated 22/12/1967 (Exhibit D1A) is a void document, therefore, judgment and decree of the first appellate Court qua finding of limitation is liable to be set aside and the second appeal deserves to be allowed.

8. None appears for respondent/defendant No. 1 though served.

9. Mr. Sachin Singh Rajput, learned counsel for respondent/defendant No. 2 would submit that the finding recorded by learned first appellate Court holding plaintiff's suit to be barred by limitation is a finding of fact which is based on evidence available on record as there is no evidence on record to show that plaintiff had no knowledge of the sale deed dated 22/12/67 (Exhibit D1A) executed by plaintiff's brother in favour of defendants No. 1 and 2 and plaintiff came to know about it only on 10/03/1987 after obtaining a copy of sansodhan panji. Defendants got the land measured in the month of May, 1986 after which plaintiff filed the suit on 18/03/1994, as such, the finding recorded by the first appellate Court that suit is barred by Article 59 of the Limitation Act is strictly in

accordance with law, therefore, the second appeal deserves to be dismissed.

10. I have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.

11. Appellant/plaintiff filed a suit for declaration of title and permanent injunction stating that suit property described in *Schedule-A* appended with the plaint is the property held by his father and the same was gifted to him by his father by gift deed dated 15.01.1955 and the alienation made by his brother on 22.12.1967 is void therefore, defendants be restrained from interfering with his possession. Learned trial court held that gift deed dated 15/01/1955 (Exhibit P/1) was validly made by his father in favour of plaintiff and sale deed dated 22.12.1967 (Exhibit D/1A) is a void document and not binding on the plaintiff and the suit so filed was within the period of limitation and thereby, decreed the suit. On an appeal preferred by defendants No. 1 and 2, the first appellate court affirmed the decree of the trial court to the extent of and by holding that plaintiff is the title holder of the suit land by

gift deed executed by his father in his favour (Exhibit P/1) and the sale deed (Exhibit D/1A) is not binding on him, but interfered with the decree of the trial court by holding that the suit ought to have been filed within three years from the date of attaining the majority by plaintiff or within the period of twelve years from the date of execution of the sale deed and thereby, set aside the decree of trial court and dismissed the suit of the plaintiff.

12. The question for consideration would be whether the suit as framed and filed for declaration of title and for declaring the sale deed dated 22.12.1967 as void was within the period of limitation or it was beyond the period of limitation as recorded by the first appellate court.

13. A suit for cancellation of instrument is based on provisions of Section 31 of Specific Relief Act, 1963 which states as under:-

> "**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."

A careful perusal of the aforesaid provision would show that it refers to both void and voidable documents. It provides for discretionary relief.

14. The relief by way of cancellation of an instrument may be claimed not only by party to instrument but by any person against whom the instrument is void or voidable. [See ***Suraj Ket Prasad v. Chandra Mul***[1]].

15. The Supreme Court in the matter of ***Md. Noorul Hoda v. Bibi Raifunnisa and others***[2] has held that the word "person" employed in Section 31 of the Act includes person seeking derivative title from a seller and held as under:-

> "……….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

1 AIR 1934 All 1071
2 (1996) 7 SCC 767

> 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."

16. The suit for cancellation of the instrument as provided in Section 31 of the Specific Relief Act,1963 is governed by Article 59 of the Limitation Act, 1963 which provides as under:-

Description of suit	Period of limitation	Time from which period begins to run
To cancel or set aside an instrument not otherwise provided for.	Three years.	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.

Article 59 would apply when a suit is filed for cancellation or for setting aside a document which is not *void ab initio*. If document is *void ab initio* and is an illegal document from its very inception, it is not required either to cancel it or to set aside by filing a suit because according to law such document doesn't exist.

17. The Supreme Court in the matter of ***Md. Narool Hoda*** (supra) held that Article 59 of the Limitation Act is general provision. It would apply to set aside instrument decree or contract between the inter se parties. It was further held that Article 59 is attracted in a suit to set aside or cancel an instrument or contract on the ground of fraud and starting point of limitation is a date of knowledge of the alleged fraud.

> "6. The question, therefore, is as to whether Article 59 or Article 113 of the Schedule to the Act is applicable to the facts in this case. Article 59 of the Schedule to the Limitation Act, 1908 had provided inter alia for suits to set aside decree obtained by fraud. There was no specific article to set aside a decree on any other ground. In such a case, the residuary Article 120 in Schedule III was attracted. 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……...”

18. The Supreme Court in the matter of ***Prem Singh and others v. Birbal and others***[3] has held that Article 59 would be apply in case of fraud etc. and held as under:-

> “18. Article 59 would be attracted when coercion, undue influence, misappropriation or fraud which the plaintiff asserts is required to be proved. Article 59 would apply to the case of such instruments. It would, therefore, apply where a document is prima facie valid. It would not apply only to instruments which are presumptively invalid. (See *Unni v. Kunchi Amma* [ILR (1891) 14 Mad 26] and *Sheo Shankar Gir v. Ram Shewak Chowdhri* [ILR (1897) 24 Cal 77] .)”

19. Principle of law laid down by their Lordships of the Supreme Court in ***Md. Narool Hoda*** (supra) was followed with approval by the Supreme Court in the matter of ***Abdul Rahim and others v. SK. Abdul***

3 (2006) 5 SCC 353

Jabbar and others[4]. In the said case, it was held as under:-

> "28. A suit for cancellation of transaction whether on the ground of being void or voidable would be governed by Article 59 of the Limitation Act. The suit, therefore, should have been filed within a period of three years from the date of knowledge of the fact that the transaction which according to the plaintiff was void or voidable had taken place. The suit having not been filed within a period of three years, the suit has rightly been held to be barred by limitation."

20. Under the third column of Article 59, irrespective of the ground on which the suit to cancel or set aside an instrument or decree or for the recession of the contract is laid, time begins to run from the date when the facts enabling the plaintiff to have the instrument or decree cancelled or set aside first became known to the plaintiff. Thus, for the time to run under Article 59 firstly, the facts necessary to entitle the plaintiff to the relief sought must exist and secondly, they must be known to him. The facts entitling a plaintiff to have an instrument cancelled or set aside stated in Section 31 of the Specific Relief Act, 1963. Time doesn't commence to run until the plaintiff

4 (2009) 6 SCC 160

has knowledge of such facts and a cause of action has accrued to him to maintain the suit.

21. In the matter of ***Jamila Begum (Dead) through LRs v. Shami Mohd.(Dead) through LRs. and another***[5] Their Lordships of the Supreme Court considered the applicability of Article 59 of the Limitation Act and held that the suit for cancellation of sale deed has to be filed within three years from the date when the facts entitling the plaintiff to set aside or cancel the instrument or decree became first known to him and held as under:-

> "36. As discussed, the suit was filed for declaration that the mortgage deed dated 21-11-1967 as well as sale deed dated 21-12-1970 executed by Wali Mohd. were not executed by him out of his free will and are void. In Para (14) of the plaint, it is averred that the cause of action of the suit arose on 21-11-1967 and 21-12-1970. Under Articles 58 and 59 of the Schedule to the Limitation Act, 1963 in a suit filed for any declaration is to be filed within three years when the right to sue accrues. Under Article 59 of the Limitation Act, suit filed to cancel or set aside the instrument or decree, the suit has to be filed within three years from the date when the facts entitling the plaintiff to set aside or cancel the instrument or decree became first known to him. Plaintiff Shami Mohd. has admitted in his evidence that he got knowledge about the execution of the sale deed dated 21-12-1970 on the third day of death of his father on 17-5-1971. The suit must have been filed within three years of the date of knowledge or the date of the sale deed

5 (2019) 2 SCC 727

> but the suit was filed on 12-7-1978. In the case in hand, the suit filed challenging the validity of the mortgage deed dated 21-11-1967 and sale deed dated 21-12-1970 is beyond the period of limitation of three years as prescribed under Articles 58 and 59 of the Schedule to the Limitation Act and barred by limitation.”

22. Thereafter, again in the matter of ***Illoth Valappil Ambunhi (D) by LRs. v. Kunhambu Karanavan***[6], the Supreme Court followed the principle laid down in ***Md. Narool Hoda*** (supra) and also noticed the principle of law laid down in ***Prem Singh*** (supra) and held as under:-

> “**29.** In *Md.NoorulHoda v. BibiRaifunnisa* reported in ((1996) 7 SCC 767), this Court held that Article 59 of the Limitation Act would be applicable if a person affected is a party to a decree or an instrument or a contract which was questioned by initiation of a suit. Article 59 would apply to set aside the decrees, instruments or contracts between the parties inter se. However, in the case of a person claiming title through a party to the decree or instrument or contract who seeks to avoid the instrument, contract or decree by a specific declaration, the starting point of limitation under Article 59 would be the date of knowledge of the fraud and/or illegality which renders the decree and/or instrument and/or other document void.
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> **30.** In *Prem Singh v. Birbal* reported in (2006) 5 SCC 353, cited on behalf of the appellant, this Court held that when a document is valid, no question arises of its cancellation; when a document is void, initiating a decree for setting aside, the same would not be necessary

6 2019 SCC OnLine SC 1336

> as the same is nonest in the eye of law as it would be a nullity.
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> **31.** In *Prem Singh* (supra) this Court further held that Article 59 of the Limitation Act deals only when relief is claimed on the ground of fraud, coercion, undue influence, mistake, etc. to avoid a voidable transaction. Article 59 is attracted where fraud, coercion, undue influence, mistake etc. have to be proved. It would not apply to instruments which are presumptively invalid.
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> **32.** The High Court held, and rightly, that Article 59 of the Limitation Act deals with suits for cancellation for setting aside an instrument or decree or for rescission of a contract and prescribes a period of three years commencing from the time when the fact entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded is first known to him. So far as Exh. A1 being the deed of gift is concerned, the donor had no authority to revoke the same. Hence, the subsequent documents were in themselves without authority and null and void. The declaration was only incidental to the title and possession of the donee and hence Article 59 had no application."

23. Finally, reverting to facts of the case in hand in light of principle of law governing limitation in a suit for cancellation of sale deed under Section 31 of the Specific Relief Act, it is quite vivid that Article 59 would apply as it was a case of the plaintiff that the sale deed dated 22.12.1967 is a void document and it is not binding on him, therefore, it be declared void.

It is appropriate to mention here that while filing the written statement, the defendant though took a ground that the suit as framed and filed is barred by limitation in paragraph 13 of the written statement, but did not take the ground explicitly that suit is barred by limitation by pleading the necessary facts constituting the ground that suit is barred by Article 59 of the Limitation Act. It is well settled law that plea of limitation is a mixed question of law and fact and it must be specifically raised and it must be duly proved, but the defendant in the instant case half-heartedly took the one line plea of limitation stating that suit is barred by limitation, yet the trial court took cognizance of the said plea by framing an issue and tried the same but ultimately, answered the issue in negative holding the suit is within limitation. But, the first appellate court held otherwise by holding that it ought to have been filed within three years from the date of attaining the majority of the plaintiff or within twelve year from the date of execution of sale deed dated 22.12.1967 but since, the suit was filed on

20.03.1987, therefore, such suit is barred by Article 59 of the Act of 1963.

24. The question that arises now is when did the plaintiff came to know about the facts entitling him to have the instrument cancelled or set aside? It is his case that in the month of May, 1986 the defendants got the suit land measured then, they inquired the matter and thereafter, got the copy of sansodhan panji on 10.03.1987 and thereafter, filed the suit on 20.03.1987. The trial court relied upon the statement of PW-4 Shiv Prasad who is father of defendant No.1 and the defendant No.6 who is father of Ramgopal defendant No.2 who have admitted in their cross examination that after the measurement of land by the defendant the suit was filed by the plaintiff seeking declaration of sale deed as void and cause of action arose immediately thereafter to file the suit, which the first appellate court has set aside.

25. The defendants ought to have taken express plea based on Article 59 of the Limitation Act that the plaintiff was aware of the execution of sale deed by his brother in their favour and all the facts entitling to have the sale deed cancelled

was within his knowledge and he failed to file the suit within three years from the date of knowledge of the sale deed dated 22.12.1967 (Exhibit D/1A), and thereby, the plaintiff was deprived of meeting with the said plea in absence of plea having been expressly taken in the written statement. The plaintiff has established the fact of having acquired the knowledge of sale deed dated 22.12.1967 on 10.03.1987 after getting a copy of sansodhan panji (Exhibit P/3), which was obtained on the basis of measurement got conducted by defendant which was duly established as per statement of father of defendant No. 1 and 2 namely Shiv Prasad PW-4 and Gajanand Choubey PW-6. The finding so recorded by the trial court holding the suit to be within the period of limitation was well-reasoned finding based on evidence available on record which could not have been interfered with by the first appellate court by recording a finding which is not only perverse but also lacks express pleading followed by appropriate evidence of clinching nature as the first appellate Court has made out a new case holding it was barred by Article 59 of the Limitation Act, whereas it was not taken either in written statement or before the trial Court. As such, the judgment and decree of the first appellate court deserves to be set aside.

26. As a fallout and consequence of the aforesaid discussion, the judgment and decree of the first appellate court qua the issue of limitation is set aside and it is held that suit filed by the plaintiff was within the period of limitation and first appellate court misdirected itself in setting aside the finding of limitation recorded by the trial court.

27. Resultantly, the impugned judgment and decree passed by the first appellate court is hereby set aside and that of the trial court is restored. The second appeal is allowed to the extent indicated herein-above with no order as to cost(s).

28. Decree be drawn up accordingly.

Sd/-
Sanjay K. Agrawal
JUDGE

Harneet