

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

S.A. 488 of 1988

Sri Chandi Charan Pal

Vs.

Shri Netai Chandra Dalapati & Ors.

For the Appellant : Mr. Kartick kr. Bhattacharya
Ms. Soumashree Dutta
Mr. Monojit Pal
Ms. Papiya Naskar

Heard on : 16.05.2024

Judgment on : 30.07.2024

Ajoy Kumar Mukherjee, J.

1. Being aggrieved and dissatisfied with the judgement and decree dated 30th September 1980 in T.A. no. 208 of 1977, passed by Additional District Judge, 2nd Court Midnapur, arising out of Judgment and decree dated 25th June, 1977 passed by Munsiff 3rd Court, Tamluk in T.S. No. 49 of 1974, present second Appeal has been preferred. By the impugned judgment, learned court below allowed the appeal in part declaring plaintiff no. 2's right title interest in the suit property to the extent of 1/5th share.

2. Plaintiffs case in a nutshell is that one Sarada Devi was the original owner of the suit property who gifted the same in favour of predecessor-in-

interest of the plaintiffs and defendant no.2 to 4, namely Bhutnath Dalapati by a registered deed dated 04.07.1938. Accordingly said Bhutnath after accepting the deed of gift, began to possess the said property and recorded his name in the Revisional settlement. Thereafter said Bhutnath died intestate leaving behind plaintiffs and defendant no. 2 to 4 as his heirs and all his properties including suit property devolved upon the aforesaid heirs of Bhutnat in equal share. It is further case of the plaintiffs that after the death of Bhutnath, defendant no. 1 Chandi Charan Pal used to look after the properties of the plaintiff and defendant no. 2 to 4.

3. However, on 15.09.1380 BS said defendant no.1 denied plaintiff's right title interest in the property and threatened to dispossess them therefrom on the plea that he had purchased the interest of the plaintiffs in the suit lands by a registered deed dated 31.12.1958, alleged to have executed, by wife of Bhutnath namely Radharani who is defendant no.3, for herself and on behalf of the minor sons i.e. plaintiff No. 1 & 2 and defendant No.2 and also by defendant No.4. The plaintiffs thereafter made enquiries and came to learn that the defendant no.1, taking advantage of the helpless condition of the plaintiffs and the defendant no. 2 to 4 got a sale deed executed by Radharani (defendant no.3) for self and on behalf of her minor sons, as well as by defendant no.4 Tulsirani (major daughter of defendant No.3) in respect of the suit property.

4. Plaintiff's further case is said Radharani was an illiterate pardanashin lady and she never executed any deed in favour of defendant no. 1 nor received any consideration from him. The plaintiffs who are the sons of Radharani challenged the deed on various grounds including the ground

that no consideration was passed due to said transfer. Plaintiff's further case is both plaintiff no. 1 and 2 were minors at the date of the execution of said deed. Plaintiff no. 1 and 2 were born on 25.03.1953 and 24.05.1956 respectively. Plaintiffs further allegation is that there was no legal necessity for sale of the suit property and the deed dated 31st December, 1958 and connected documents are all fictitious and that plaintiffs were not benefited by the aforesaid sale and that no permission of the District Judge was obtained before effecting the transfer and that the defendant no. 1 did not acquire any interest in the suit properties by virtue of aforesaid alleged purchase. So plaintiff filed the said suit for declaration of their title as well as for declaration that the impugned deed dated 21.12.1958 is fraudulent and inoperative deed which is liable to be cancelled.

5. Defendant no.1 Chandi Charan Pal contested the suit by filing written statement and denied material allegations made in the plaint. Defence case is in order to defray the medical expenses and for some other purposes Bhutnath executed Kobalas dated 23.09.1958 and 28.09.1958 and entered into an agreement for re-conveyance but it could not be registered on account of sudden death of Bhutnath. Defence further case is that in order to meet the expenses of Sradh ceremony of Bhutnath, defendant No.1 incurred expenses and thereafter he requested the defendant no.3 to take steps for registration of the unregistered deed executed by Bhutnath but Radharani declined. Thereafter shalishi (meeting for amicable settlement) held over the issue and Radharani admitted the receipt of consideration price and ultimately defendant no.3 executed the deed for herself and on behalf of her minor sons namely plaintiff no. 1 and 2 and defendant no. 2

and after execution of the deed they deliver possession of land to the defendant. Defendant No.1's further case is that plaintiffs attained majority long before the institution of the suit and the suit having been brought beyond three years from the date of their attaining majority, is barred by limitation. Defendant no.1 claimed to have been in possession of suit property all along since the date of the execution of the deed and as such prayed for dismissal of the suit.

6. Learned Trial court found that there was legal necessity for the sale and plaintiffs have not prayed for recovery of possession, though they are out of possession since 1958 and also the claim of plaintiff No.1 is barred by Limitation and accordingly dismissed the plaintiffs' suit on contest with costs.

7. Being aggrieved by the judgment and decree of the Trial court plaintiffs preferred first appeal before the court below. Learned court below while deciding the appeal came to a finding that the defendant has not succeeded in proving that there was legal necessity for the sale or that the minor appellant no.2 was benefitted as a result of the sale. He further held that defendant no. 2 to 4 have not joined in the suit and the claim of the plaintiff no.1 has become time barred since he did not approach before the court within three years of attaining majority. However, plaintiff no.2/appellant no.2 is entitled to get a declaration to the extent of his 1/5th share in the suit property since he approached before the court within three years of attaining majority and that the sale made by his mother in favour of defendant no.1 was not for legal necessity of plaintiff No.2 nor plaintiff No.2 was benefitted by the said sale and accordingly the court below decreed the

suit in favour of plaintiff no.2. only in the suit property to the extent of his 1/5th share.

8. A Division Bench of this court while admitted the appeal vide order dated 28.04.1982 pleased to held:

“This appeal will be heard on the ground that the decree of injunction as passed is not consistent with the declaration of the plaintiff no.2s 1/5th share in the suit property, where there is no prayer for partition.”

Decision

9. In the present context it is not in dispute that the suit property originally belonged to Sarada Devi who gifted the same to Bhutnath Dalapaty. It is also not in dispute that Bhutnat died intestate leaving behind plaintiff no.1 Nitai Chand Dalapaty, plaintiff no. 2 Basanta Kumar Dalapaty, proforma defendant no.2 Shri Gour Hari Dalapaty, proforma defendant no.3 Radharani Dalapaty, who is the widow of Bhutnath and proforma defendant no. 4 Smt. Tulsirani Jana. Since wife of Bhutnath and one son namely Gour Hari and daughter Smt. Tulsi Rani did not join with the plaintiffs, so they are being made proforma defendants. It is alleged in the plaint, when the deed was executed in the year 1958 both the plaintiffs and proforma defendant no.2 were minors and on their behalf their mother Smt. Radharani, who is defendant no.3 did not execute the deed on legal necessity of the minors nor the sale was in any way benefitted them. Proforma defendant no. 2, 3 and 4 who are also the legal heir of the Bhutanth being the widow son and daughter have not challenged the deed. It is also not in dispute that at the time of execution of the deed on 31st December, 1958 plaintiffs being the legal heir of Bhutnath were minor.

10. Article 60 of the Limitation Act postulates if a deed is executed by the guardian on behalf of a minor, the minor can pray for set aside the said deed within three years of his attaining majority. Accordingly in the present case it is very crucial to ascertain as to whether both the plaintiffs had filed the suit within three years of their attaining majority or not.

11. Record reveals that the T.S. no. 44 of 1974 was instituted before the Munsiff court at Tamluk on 05.03.1974. Plaintiff in his plaint claimed that plaintiff no.1 was born on 25.03.1953 and plaintiff no.2 was born on 24.05.1956. To substantiate the said claim, the school admission register of the plaintiff no.1 and defendant no.2 and the transfer certificate of plaintiff no. 1 and defendant no. 2 and horoscope of plaintiff no. 1 were placed. The school admission register was filled up by the Headmaster who had deposed in this case as DW 2. Said Headmaster Mr. Sakti Pada Samanta has clearly stated that all the concerned entries in the school register were made by him and serial no. 22 which bears the name of Gour Hari Sasmal (Dalpaty) who is defendant no. 2, was admitted in the school on 18.01.1955 where his date of birth appearing in column no.7 is recorded as 12th January, 1947. He also stated that he found some subsequent over writing on the number “7” of “47” showing “7” as “9” but such overwriting has been manipulated which is evident from column no.8 in serial no 22 where there is no interpolation and it says that on the date of admission his age was 8 years 6 days. Accordingly if Gour Hari was admitted in the school on 18.01.1955 at the age of 8 years then his year of birth cannot be 1949. Similarly, in serial no. 41 of the admission register relates to plaintiff no. 1 Nitai Chand Sasmal (Dalapaty), wherein also in column no.7 his date of birth was written by the

Headmaster as 25.03.1949 but again there is an over writing by which “49” has been tried to be interpolated as “53”. Such interpolation in respective column of both the serial no. is very much apparent in view of the fact that in column no.6 it was written that on the date of admission, the age of Nitai Chand was 6 years and he was admitted on 25.04.1955 as no interpolation or over writing was made in column no.6 so it is very much clear that the year of birth of Nitai Chand cannot be 1953.

12. The Headmaster as DW-2 also stated that he put his signature in column no. 14 and there is no over writing in column no.8. He also stated that the subsequent over writing by which “1947” was tried to be converted into “1949” was not made by him, nor it bears his signature.

13. From the aforesaid facts and circumstances of the case it is palpably clear that plaintiff no.1 Nitai chand was born on 25.03.1949 and defendant no.2 Gour Hari was born in 12.01.1947. The interpolations on the admission register are very much apparent through naked eyes. Accordingly Trial Court correctly came to a conclusion that Gour was born on 12.01.1947 and Nitai was born on 25.03.1949.

14. Both the courts below also came to a finding that so far as Nitai’s date of birth is concerned it is on 25.03.1949 and as such he attained majority in 25.03.1967 and for which plaintiff no.1 Nitai ought to have filed suit seeking cancellation of deed within 25.03.1970. So both the courts below rightly held suit filed by plaintiff no. 1 Nitai is barred by limitation.

15. In this context it is also to be mentioned though a transfer certificate of aforesaid Nitai and Gour were filed in the present context showing that Gour was born on 12.01.1949 and Nitai was born on 25.03.1953 but such

transfer certificate itself clearly states that the date of birth put in the said certificate has been reproduced from the Admission Register of the school. Since it has been held by both the courts below and since the interpolation bearing no initial which is apparent from the admission register, so the date of birth put on the transfer certificate has got no evidentiary value since it is based on interpolated date of birth of the said two persons namely plaintiff no.1 and defendant no.2. The courts below also rightly refused to place reliance upon the horoscope as it does not bear the name of person who prepared the horoscope. The Trial court in this context observed how PW-3 deposed on behalf of the plaintiff claiming himself as maker of horoscope, when PW1/mother could not say as to who prepared the horoscope. Accordingly said horoscope is absolutely a vogue document and the court below rightly did not place reliance upon the said documents. Accordingly there is nothing to interfere with the concurrent observation of the courts below that Nitai was born in 1949 and as such his suit in the year 1974 is absolutely barred under Article 60 of the Limitation Act as he did not come before the court seeking cancellation of the deed within 3 years of his attaining majority.

16. Now so far as plaintiff no.2 Basanata Kumar Dalapaty is concerned the court below held that said plaintiff no. 2 was born in 1361 BS corresponding to 1954 and he observed that defendant has not succeeded in proving that there was legal necessity for the sale or that the minor appellant no.2 was benefitted as a result of the sale. Both the aforesaid observations of the court below is perverse in view of the fact that defendant is under no obligation to prove that deed was not executed for any legal

necessity nor plaintiff is entitled to get any decree on the ground that defendant has failed to prove any issue raised by plaintiff. The settled law is plaintiff will have to succeed on the strength of his own case and not on the basis of any weakness on the part of the defendant.

17. Though the court below held that plaintiff no.2's suit is not barred by limitation as it was filed within 3 years of his attaining majority, so I need to look into the evidence of the mother of plaintiff no.2 namely Radharani who has deposed as PW1 in the present case. It is true that in the examination-in-chief, she stated that her husband Bhutnath died 18 years ago and she deposed on 1st December, 1976, which means Bhutnath died sometime in 1958. She further stated that Nitai was at that time 5/6 years old and Gour was 8 to 9 years old and plaintiff No.2 Basanta was 1 ½ years old. If this statement is taken to be correct then Netai must have born in 1952 to 1953 which is not correct as it has been established from oral and documentary evidence that Nitai was born on 25.03.1949. Similarly, she stated that Gour was 8-9 years old when his father Bhutnath died. If that be so then Gour was born in 1949/1950 but it has been clearly established from the school Register that Gour was born on 12.01.1947. Similarly, it is also stated by said PW1 that plaintiff no.2 Basanta was 1 ½ years old at the time of his father's death meaning thereby Basanta was born in 1956/1957.

18. The aforesaid evidence of PW1 when placed to the touch stone of the school register it appears that such evidence is tutored one. However, in cross examination said mother/PW1 revealed the truth where she stated that defendant no.4 is eldest among her children who was born one year after severe cyclone in 1349 BS. Gour Hari was born 5 years after the birth

of Tulsi. Accordingly eldest issue of pro-defendant-3 namely pro-defendant No.4 was born in 1942-43 and accordingly Gour Hari was born 5 years thereafter in the year 1947 and Nitai was born 3 years thereafter which is approximately in the year 1949 and the youngest son Basanta i.e. plaintiff 2 was born 3 years after the birth of Nitai. Now the date of birth of Nitai has been well established i.e. on 25.03.1949. So if plaintiff no.2 was born 3 years after the birth of Nitai, then plaintiff no.2 must have born within 1952 and he must have attained majority in 1970 but as I have already stated that the suit was filed in the year 1974 so the suit filed by plaintiff no. 2 is also barred under Article 60 of the Limitation Act. The Court below failed to put the law correctly on proper appreciation of evidence and as such the court below was not justified in coming to a conclusion that plaintiff no. 2 was born in 1954 or thereafter and for which his suit is not barred under the Limitation Act. In such view of the matter the ultimate finding of the Trial Court is sustainable and the judgment passed by court below is liable to be set aside.

19. S.A. 488 of 1988 is allowed.

20. The impugned judgment passed on 30th September, 1980 in T.A. no. 208 of 1977 by the Additional District Judge, 2nd Court, Midnapur is hereby set aside and the ultimate dismissal order of the Trial Court is hereby affirmed and thereby T.S. No. 49 of 1974 stands dismissed.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(AJOY KUMAR MUKHERJEE, J.)