

APPELLATE CIVIL.

Before Sir Guy Ruddle, Kt., K.C., Chief Justice, and Mr. Justice Brown.

1929

Jan. 18.

BOWRAMMAH

v.

A.N.A.N. FIRM AND ANOTHER.*

Limitation Act (IX of 1908), s. 18—Cause of action based on fraud not sufficient—Knowledge of right to claim, withheld fraudulently, essential.

Where a person claims the benefit of s. 18 of the Limitation Act on the ground of fraud, it is not sufficient to show that the cause of action was based on fraud. It is necessary to show that the right claimed, or the title on which it is founded, was kept from the knowledge of the applicant by means of fraud.

A person who merely alleges that, in fraud of an agreement to postpone a Court sale, a decree-holder allowed the sale to take place, is barred from applying to have the sale set aside if the application is made after 30 days from the date of sale. This was not a case where the knowledge of the sale was kept from the applicant or where it could be assumed from the act of fraud itself which gave the cause of action that this act of fraud was fraudulently concealed from the person affected.

M. C. Naidu for the appellant.

K. C. Bose for the respondents.

RUTLEDGE, C.J., and BROWN, J.—The respondent Chettyar Firms obtained a mortgage decree against the appellant, Bowrammah, and others. In execution of this decree certain property was sold by auction on the 3rd of March, 1928. The sale was confirmed on the 4th of April, 1928. On the 5th of April, one of the defendants, Veenam Subba Row, filed an application asking to have the sale set aside. He stated that the plaintiffs, in collusion with the present appellant, had sold the land privately for Rs. 1,250. This application was dismissed on the 7th of April. On the 9th of June, the present appellant filed an application to set aside the sale. She is the mother of Subba Row who

* Civil Miscellaneous Appeal No. 114 of 1928 from the order of the Original Side in Civil Execution Case No. 387 of 1927.

made the application on the 5th of April. She states that she heard about a week before filing her application that Subba Row had negotiated with the plaintiffs for sale of the property to a Chinaman for Rs. 6,000 ; that the Chettyars then said that they would arrange not to hold the sale if payment were made within three months ; and that, subsequently, the Chettyars fraudulently arranged to prevent the Chinaman from being present at the auction.

The appellant's application was filed under the provisions of Order XXI, Rule 90 of the Code of Civil Procedure. It was filed three months after the date of the sale sought to be set aside, and was *prima facie*, therefore, clearly barred by limitation. The appellant, however, claims that she is saved from this bar by the provisions of section 18 of the Limitation Act. The learned trial Judge held that she had not established this claim and rejected her application as time-barred. She has now appealed against this decision.

Three cases have been cited to us, but none of them appears to have any direct bearing on the point at issue.

In the case of *Ramdhuri Chowdhuri v. Deonandan Prasad Singh* (1), it was held at page 70, in circumstances similar to the present, that the application was time-barred unless it could be shown that the respondent's right to set the sale aside was concealed from him by the fraud of the appellant.

A similar view was taken in the case of *Mohendra Narain Chaturaj and others v. Gopal Mondul and others* (2), and in the case of *Golan Ahad Chowdhry v. Judhister Chundra Shaha* (3).

These decisions merely set forth the provisions of section 18 of the Limitation Act as applying to cases such as the present.

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(1) (1922) 2 Pat. 65.

(2) (1890) 17 Cal. 769.

(3) (1902) 30 Cal. 142.

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We have been referred on behalf of the appellant to a passage in the judgment in *Golam Ahad Chowdhry's* case (1), at page 153:—

“But if the right of the appellant to apply under the section was concealed from him by the fraud of the respondents, he would, by the operation of section 18 of the Limitation Act and notwithstanding the confirmation of the sale, have thirty days within which to make his application from the date on which the fraud first became known to him.”

It is contended that this is an authority in favour of the appellant's claim in the present case, because the fraud alleged in the present case is a fraud by the respondents. We are unable, however, to see how this helps the appellant.

Section 18 of the Limitation Act does not say that, when the cause of action is based on fraud, limitation only begins to run from the date when the fraud became known to the applicant. Section 18 states:—

“Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, * * * the time limited for instituting a suit or making an application against the person guilty of the fraud * * * shall be computed from the time when the fraud first became known to the person injuriously affected thereby, * * *”

It is clearly not sufficient to make this section operative that the cause of action should be based on fraud. It is also necessary that the right claimed, or the title on which it is founded, should have been kept from the knowledge of the applicant by means of fraud; and it does not seem to us that there is any allegation to this effect in the present case.

The appellant does not claim that she took any interest in the sale at the time of sale, that she was

present at the sale, or that knowledge of the sale was kept from her. The fraud she complains of was really a fraud practised on Subba Row, and it is not alleged that the respondents took any steps, either active or passive, to conceal this fraud from the appellant.

It may be that in certain circumstances it could be assumed from the act of fraud itself which gave the cause of action that this act of fraud was fraudulently concealed from the person affected. But it does not seem to us that there are any circumstances which would justify such an assumption in the present case.

That being so, we are unable to hold that the provisions of section 18 of the Limitation Act are operative in the present case. The appellant's application was, therefore, barred by limitation and was rightly rejected.

We accordingly dismiss this appeal with costs, advocate's fee, three gold mohurs.

APPELLATE CIVIL.

Before Mr. Justice Pratt.

MAUNG BAN GYI

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Civil Procedure Code (Act V of 1908), s. 144—Restitution—Decree-holder, purchaser at Court auction—Modification of decree on appeal—Claim for restitution on satisfaction by debtor of modified decree—Reversal of decree not necessary for restitution.

Where a decree is modified on appeal in favour of the judgment-debtor and the judgment-debtor satisfies such decree, he is entitled to restitution of his property from the decree-holder who bought it at the Court auction in execution of the original decree. To claim restitution it is not necessary that the original decree should have been entirely reversed.

* Civil Second Appeal No. 122 of 1928 (Mandalay) from the order of the District Court of Sagaing in Civil Appeal No. 32 of 1928.