

(1920) 10 CAL CK 0001

Calcutta High Court

Case No: None

Arumugam Pillai and Others

APPELLANT

Vs

Pandigam Ambalam and
Another

RESPONDENT

Date of Decision: Oct. 29, 1920

Acts Referred:

- Limitation Act, 1963 - Article 44

Citation: 62 Ind. Cas. 630

Hon'ble Judges: Napier, J; Krishnan, J

Bench: Division Bench

Judgement

Krishnan, J.

The main question argued in this second appeal is whether Article 44 of the Limitation Act applies to it or not. The plaintiff property originally belonged to the 1st defendant. He executed a sale deed for it to his wife Irulayi, and the property then became hers. The plaintiff is her only son by the 1st defendant. She died some time ago and the lower Courts have held, and it is not disputed before us, that on her death the property passed to the plaintiff and he became solely entitled to it. In 1909 when the plaintiff was still a minor, his father, the 1st defendant, and his father's brother, one Palaniyandi now deceased, executed a sale deed, Exhibit I, to the 2nd defendant benami for the 4th defendant for the plaintiff property. In that deed the plaintiff is named as one of the vendors, the 1st defendant executing it on his behalf as his father and guardian; this is so expressly recited in the deed. The plea of limitation has reference to this deed, it being contended that the plaintiff cannot recover the property until the transfer by it is set aside and that as more than 3 years have elapsed since he has become a major, he is barred from doing so under Article 44. The lower Appellate Court has held, differing from the District Munsif, that this Article does not apply and that Article 141 applies. That Court seems, however, to have been somewhat misled by confusing the question with one

of cancellation of a document which is dealt with under Article 91. There is no question of cancelling a document under Article 44, which speaks only of setting aside the transfer, though the result of setting aside a transfer may generally be to invalidate the deed of transfer where one exists. The cases under Article 91 referred to by the Sub-Judge are, therefore, not in point. When a guardian acting in his capacity of guardian sells or otherwise transfers the property of his ward, there can be no question that Article 44 will apply to the suit by the ward to recover that property subsequently, for he must get the guardian's transfer set aside, which is prima, facie binding on him. A transfer by a guardian, however improper it may have been, is not a void transaction but only a voidable one and when property cannot be recovered without avoiding it, it is now settled that Article 44 will apply to the suit. See *Ranga Reddi v. Narayana Reddi* 28 M. 423.; *Madugula Latchiah v. Pally Mukkalinga* 30 M. 393 : 2 M.L.T. 351 : 17 M.L.J. 220.; *Kandasami Naicken v. Irusappa Naicken*. 40 Ind. Cas. 664 : 41 M. 102 : 33 M.L.J. 309.; *Sivavadevelu Pillay v. Ponnammal* 15 Ind. Cas. 365 : 22 M.L.J. 404 : 11 M.L.T. 198 : (1912) M.W.N. 383 and *Munugarra Satyalakshmi Narayana v. Munugarra Jagannadhan* 42 Ind. Cas. 939 : 34 M.L.J. 220 : 6 L.W. 765 : (1917) M.W.N. 854 : 22 M.L.T. 498.

2. No doubt it has been held that, where a Hindu father sells the joint ancestral property of himself and his minor son, Article 44 will not apply even though he purported to act as his minor son's guardian in making the sale. See *kathapeiumal Theran v. Ramalinga Theoan* 27 Ind. Cas. 695 : 17 M.L.T. 138, and *Ganesa Aiyar v. Amirthasami Odayar* 44 Ind. Cas. 603 : 23 M.L.T. 245 : (1918) M.W.N. 892. Article 126 expressly provides for setting aside such alienation of ancestral property and the Court, therefore, held in those cases that the mere fact that the father executed the deed also as guardian of his minor son made no difference to the validity of the sale, as he could have passed his son's share also by executing the deed himself and, therefore, Article 44 was not applicable. Those rulings, however, apply to alienations of ancestral property and are clearly distinguishable from the present case, as here the property has been found to be the minor's separate property.

3. Reliance was also placed by the learned Vakil for the respondent on the case in *Ammani Ammal v. Ramaswami Naidu* 51 Ind. Cas. 57 : 10 L.W. 79 : 37 M.L.J. 113 : (1919) M.W.N. 866. In that case the mother, though she was in fact the guardian of her minor son to whom the property belonged, sold it not as the minor's property but as her own. Such a sale manifestly cannot affect the minor's title, as it was not dealt with by the deed at all and the minor was under no obligation, therefore, to set aside the transfer. As my learned brother who was one of the Judges in that case observed, the sale there was similar to a sale by a stranger of the minor's property. That case does not apply here, as the 1st defendant sold the property of his minor son expressly as his guardian.

4. A good deal of argument was addressed to us in this case to show that there was no transfer of the minor's title under Exhibit I and, therefore, it was no bar in his

way to recover the property. The argument was based on the fact that the 1st defendant in his own personal capacity and his brother joined in executing Exhibit I and on the contention that the recital of the vendor's title in it showed that the property was treated as the joint family property of all the executants. It was urged, therefore, that the sale was of the joint family right and did not affect the real title of the minor, which was one of sole ownership. The appellants' Vakil explains that all the three executants were made to join in the deed by his client to avoid all possibility of future claims by any of them, and not because it was not recognised that they had each of them any right. Even in this suit the plea was raised that the property was joint family property and that shows the necessity there was for caution. However that may be, a sale-deed does not become ineffective against any of the executants of it, because others who are subsequently shown to have had no title, join in executing it.

5. Now as regards the recital as to the vendor's title, it is pointed out by the appellants' Vakil that it is nowhere stated in Exhibit I that the property was joint family property. Nevertheless the recital that "the sale to the plaintiffs' mother was for her maintenance and that as she is dead this sale is effected by us," viz, the three executants, would seem to imply that the parties thought the property was their joint property. That, however, seems immaterial, as in the words of conveyance in the deed, there is no restriction as to the rights of each" of the vendors, nor is there any reference to any separate share of each. The whole property is conveyed by it and that would certainly pass any right or title of any of the executants. Section 8 of the Transfer of Property Act is clear on the point, there being no reservation in the deed as to the right of each vendor that is conveyed by it. An erroneous or false recital of the vendor's title in a sale-deed cannot be relied on as not passing his real title to the property sold. The argument that Exhibit I did not pass the plaintiff's real title must, therefore, be overruled. So long as Exhibit I stands, the plaintiff cannot recover the plaintiff property.

6. The case in *Balwant Singh v. Rev. Rockwell Clancy* 14 Ind. Cas. 629 : 34 A. 296 : 16 C.W.N. 577 : 23 M.L.J. 18 : 11 M.L.T. 314 : (1912) M.W.N. 462 : 9 A.L.J. 509 : 15 C.L.J. 475 : 14 Bom. L.R. 422 : 39 I.A. 109 (P.C.) is entirely distinguishable, as in that case, the mortgagor Sheoraj Singh did not purport to act in any respect as representing his minor brother in executing the mortgage deed and their Lordships of the Privy council held that the minor was, therefore, not affected by the mortgage-deed at all. In principle that case is similar to the case in *Ammani Ammal v. Ranaswami Naidu* 51 Ind. Cas. 57 : 10 L.W. 79 : 37 M.L.J. 113 : (19 9) M.W.N. 866, already referred to and distinguished.

7. The plaintiff's suit must, therefore, be discussed as barred by limitation under Article 44, and no other question arises.

8. I would, therefore, allow the appeal and reversing the decree of the lower Appellate Court confirm the decree of the District Munsif with costs of the appellants

here and in the Court below.

Napier, J.

9. I agree.