(1920) 22 BOMLR 680 : 58 Ind. Cas. 257

Bombay High Court

Case No: Second Appeal No. 636 of 1918

Fakirappa Limanna Patil		APPELLANT
	Vs	
Lumanna Mahadu Dhamnekar		RESPONDENT

Date of Decision: Dec. 19, 1919

Acts Referred:
Transfer of Property Act, 1882 â€" Section 38, 88

Citation: (1920) 22 BOMLR 680 : 58 Ind. Cas. 257

Hon'ble Judges: Shah, J; Norman Macleod, J; Heaton, J

Bench: Full Bench

Final Decision: Allowed

Judgement

Norman Macleod, Kt., C.J.
This appeal has now been fully argued, and an opportunity has arisen for deciding a question which has given

rise to a considerable conflict of judicial opinion, namely, whether a Hindu minor on his attaining majority can sue to recover possession of

property transferred by his mother acting as his natural guardian during his minority without suing to set aside the transfer and therefore coming

within the provisions of Article 44 of the Limitation Act. That question was answered in the negative by Beaman and Heaton JJ. in Luxmava v.

Rachappa where the plaintiff had bought certain property from which had been sold by Mudkappa''s mother during his minority to the defendant,

and reference may be made to Mahableshvar Krishnappa v. Ramchandra Mangesh ILR (1913) 38 Bom. 94 where K as manager of the family

appointed a Muktyar who sold Mulgeni rights. K''s eldest son after attaining majority sued to recover possession alleging that the sale was void. It

was held that it could not be treated as a nullity and the right of the plaintiff j to challenge it was barred by Article 44 of Act IX of 1908. But there

are contrary decisions of this Court.

2. In Bhagvant Govind v. Kondi Mahadu ILR (1889) 14 Bom. 279 the plaintiff sued to redeem land alleged to have been mortgaged by his father

in 1858 to the grandfather of the 1st defendant. The defendant alleged that the mortgage had been executed in favour of the father of the 2nd

defendant and that in 1863 the equity of redemption had been sold to the mortgagee by the widows of the mortgagor during the plaintiff''s minority.

The defendant contended that the suit was really one to set aside the sale of 1863 and was barred by Article 44 of the Limitation Act, XV of

1877. It was held that Article 44 did not apply as the necessity for impugning the sale of 1863 to the 2nd defendant arose from the 2nd

defendant''s resisting the plaintiff''s claim to redeem the mortgage, and was therefore subservient to the suit for possession. It was also held that the

2nd defendant having entered into possession as mortgagee could not afterwards set up an adverse possession as owner so as to defeat plaintiff''s

right to redeem: Ali Muhammad v. Lalta Bakhsh ILR (1878) All. 655 and Tanji v. Nagamma (1866) 3 M. H. C. R. 137.

3. In Anandappa v. Totappa (1911) 17 Bom. L. R. 1137 n. the plaintiff sued for a declaration that a deed of exchange dated the 15th June 1900

was not binding on him and for recovery of possession of certain lands. The deed of exchange purported to be between the plaintiff a minor

interested in his own right as the adopted son of a Vatandar acting through his natural father and the natural grand-father of the plaintiff. The District

Judge reversing the decision of the Subordinate Judge held that it was not necessary for the plaintiff to sue to set aside the deed on the authority of

the decision of the Privy Council in Bijoy Gopal Mukerji v. Krishna Mahishi Debi ILR(1907) Cal. 329, P.O. But that was a suit by a reversioner

to recover possession of property leased by a Hindu widow. The decision of the District Judge was upheld in appeal by Scott C. J. and Rao J.

They said: ""Whether a plaintiff must sue for cancellation of a document under which the defendant in possession claims, depends, we think, upon

whether the onus of proving circumstances establishing its invalidity lies upon him or whether it lies upon the defendant to prove circumstances

establishing its validity."" They then referred to the decision of Woodroffe J. in Harihar Ojha v. Dasarathi Misra ILR (1905) Gal. 257. That again

was a suit by a reversioner to recover property alienated by a Hindu widow. Woodroffe J. relied on a passage in the judgment of the Madras High

Court in Unni v. Kunchi Amma ILR(1890) Mad. 26.

4. That was a suit filed on behalf of a Malabar tarwad by two of its members to recover property improperly alienated under a Kanom instrument

by the Karnavan.

5. It was held that since a prayer for the cancellation of the Kanom instrument was not an essential part of the plaintiffs'' relief, the suit was not

barred by the three years rule in Article 91, Act XV of 1877.

6. The Court said: ""In our opinion there is no distinction between this case and other cases where a similar charge is made in respect of an

instrument of alienation executed by a person who, not being the full owner of the property, has a conditional authority only to dispose of it. Such

are the cases of a guardian of a minor, the manager of a Hindu family or the sonless widow in a divided Hindu family. In these cases, as was

argued by the appellants'' Vakil, it is not only not necessary, but it is not possible to have the instrument of alienation cancelled and delivered up

because as between the parties to it it may be a perfectly valid instrument. All that is needed is a declaration that the plaintiffs'' interest is not

affected by the instrument and that declaration is merely ancillary to the relief which may be granted by delivery of possession:"" Reference was

made to Sikher Ghund v. Dulputty Singh ILR (1879) Cal. 363, where Prinsep J. said : ""The fact that a guardian may have improperly sold

property belonging to his ward, and may have embodied this transaction in a written instrument, cannot, in my opinion, affect the position of a

minor seeking to recover that property, merely because a Written instrument was executed. That instrument is between the guardian and a third

party. If the guardian has exceeded his authority, the instrument is not the act of the minor, audit would not be incumbent on him to sue to sot it

aside as in the case of one who has himself executed an instrument the validity of which he impugns.

7. But it must be noted that there was no Article in the Limitation Act of 1871 which was then in force corresponding with Article 44 of the present

Act.

8. In Anandappa v. Totappa it was argued that the existence of Article 44 of the Indian Limitation Act implied that whenever a guardian has

effected a sale of his ward''s property the sale was valid until it was set aside by suit. But Scott C. J. said: ""We are not prepared to hold that the

existence of this Article involves any qualification of the principles expressed in the judgment of Mr. Justice Woodroffe already referred to. The

Article possibly refers to cases in which a ward might sue to set aside a sale effected by his guardian with the authority of the Court which would

prima facie be valid but which, on proof of certain circumstances such as misrepresentation or fraud with regard to the guardian, might be set

aside.

9. In Balappa Dundappa Todkal Vs. Chanbasappa Shivlingappa Patil, the plaintiff sued to redeem a mortgage executed by his father, his step-

mother during his minority having sold the equity of redemption to the defendant mortgagee. As plaintiff brought the suit more than three years after

attaining majority it was argued the suit was barred by Article 44.

10. Scott C. J. said: ""It appears to us extremely doubtful if Article 44 of the Indian Limitation Act has any application in circumstances such as we

have here. The step-mother cannot be in a better position than any other manager to deal with Immovable property which is not her own, as

appears from the case of Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonwerree (1856) 6 M. I. A. 393, which was a case of a

mortgage by a mother... The learned Judge appears to think that the question with regard to Article 44 is disposed of by the judgment of the Privy

Council in Malkarjun v. Navhari ILR (1900) 25 Bom. 337 : 2 Bom. L R. 927. in which a reference is made to Bhagvant Govind v. Kondi valad

Mahadu ILR (1889) 14 Bom. 279. It appears to us that that conclusion is not correct, because the question of the powers of the so-called de

facto guardian in relation to a defence of limitation under Article 44 was considered after exhaustive argument by the Privy Council in Mata Din v.

Ahmad Ali ILR (1911) All. 213., and the conclusion arrived at is that Article 44 has no application to , the case of a de facto guardian wholly

unauthorised to effect a transfer.

11. In Mata Din v. Ahmad Ali a Mahomedan sued to redeem a mortgage, the equity of redemption to which had been sold by his elder brother,

treating'' the sale as a nullity. The defendant pleaded that Article 44 of the Limitation Act applied but their-Lordships of the Privy Council said:

Article 44 pre-. scribes a period of three years within which a ward, who has attained majority, may set aside a sale made by his guardian, the

time running from the date of the ward''s majority. This provision has no application to the present case, for the sale here was effected, not by a

guardian, but by a wholly unauthorised person.

12. But their Lordships did not say that an unauthorized alienation was beyond the scope of Article 44, and herein, with all due respect, lies the

fallacy of the argument of the learned Chief Justice, the foundation of which was laid in the judgment in Unni v. Kunchi Amma ILR (1890) Mad. 26

where all alienations whether by managers of a joint family, Hindu widows or guardians were placed in the same category. As remarked by Mr.

Rustomjee in his Commentary on the Limitation Act at p. 250: ""Article 44 presupposes that the alienation is unauthorized and if it were held that

such alienation does not come within the article, the article would in effect be nullified.

13. In order to answer the question before us we must confine our-selves strictly to the case of a transfer of property by a Hindu mother acting as

natural guardian of her minor son and not be led away by false analogies. The position of the natural guard-Ian is not the same as that of the Hindu

widow, or the, manager of a joint family, or an unauthorised guardian. The doctrine of subserviency which was applied in Bhagvant Govind v.

Kondi Mahadu ILR (1889) 14 Bom. 279, was exprebsly disapproved of by the Privy Council in Malkarjun v. Narhari ILR (1900) 25 Bom. 337 :

Bom. L. R., 927. P.C. In that case a mortgagor sought to redeem after the equity of redemption had been sold at a judicial sale in execution of a

decree. Their Lordships held that the sale was not a nullity and that the suit was to set aside the sale. They said at p. 350: ""It is obvious that the

expression '' set aside a sale '' is not attended by any such difficulty (as the expression ''set aside an adoption''), because a sale, valid until set aside,

can be legally and literally set aside; and anybody who desires relief inconsistent with it may and should pray to set it aside."" Referring to Bhagvani

Govind v. Kondi Mahadu which had been relied upon in argument, their Lordships said: ""In overruling the plea of limitation the Court made the

following observations: ''The necessity of impugning the sale of 1863 to the second defendant arises from the second defendant''s resisting the

plaintiff''s suit to redeem the mortgage and is therefore subservient to that suit.''... Their Lordships find it impossible to grasp the reasoning behind

them. If it means that the right to set aside the sale is kept alive as long as the right to redeem would subsist by virtue of the mortgage, the result is

that the validity of the sale might be held in suspense for sixty years.... But if the sale is a reality at all, it is a reality defeasible only in the way

pointed out by law.... The Limitation Act protects bona fide purchasers at judicial sales by providing a short limit of time within which suits may be

brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside,

and is to vanish directly some other relief consequential on the annulment of the sale is sought, the protection is exceedingly small. Such however

seems to be the effect of the doctrine of subservience laid down by the Bombay High Court."" The argument that if the plaintiff sues for possession

ignoring the transfer, he cannot be said to be suing to set aside a transfer, for the question does not arise until the defence is raised, is also disposed

of by this judgment, while reference may be made to Shrinivas v. Hanmant ILR (1899) 24 Bom. 260., where it was held that Article 118 of Act

XV of 1877 applied to every suit where the validity of defendant''s adoption is the substantial question in dispute whether such question is raised

by the plaintiff in the first instance or arises in consequence of the defendant setting up his own adoption as a bar to the plaintiff''s success.

14. Lastly there is the argument that a plaintiff need not sue to act aside a transfer to which he is not a party: Sikher Ghund v. Dulputty Singh ILR

(1879) Cal. 363. That argument may very well apply to a suit by a reversioner impugning a transfer by a Hindu widow, for the widow represents

her husband''s estate, and until her death there is no one who has a vested interest, nor is there an obligation on any one to take proceedings until

the reversion falls in. But the natural guardian represents the minor''s estate and has power to manage it, subject to the condition that he must

manage it for the benefit of the minor.

15. There was one argument addressed to us, which seems to me to have considerable weight, and which I should have been inclined to favour if it

had not appeared that it has been concluded by authority.

16. The use of the word ''ward'' in Article 44 of the Limitation Act is peculiar and there seems no reason why the word ''minor'' should not have

been used. It was argued that ''ward'' in Article 44 means a minor to whom a guardian has been appointed by the Court under the Guardians and

Wards Act or by will. "Ward" is defined in the Guardians and Wards Act as a minor who has a guardian, but the only guardians referred to in the

Act are guardians appointed by the Court or by will, and there is nothing unreasonable in the suggestion that the term "ward" is confined to a minor

who has such a guardian and does not include minors who have natural guardians. That appears to have been the view underlying the remarks of

Scott C. J. already referred to in Anandappa, v. Totappa. But on reference to the judgment of the Privy Council in Malkarjun v. Narhari at page

351 and Mata Din v. Ahmad Ali it will be seen that their Lordships expressly state that Article 44 applies to transfers by guardians without

excluding natural guardians, and as in the one case they were referring to a Hindu mother, and in. the other to guardians under Mahomedan law, it

is obvious that they considered that natural guardians under Hindu or Mahomedan law were not excluded.

17. It follows that in my opinion Omaria could not redeem without suing to set aside the transfer by his mother and as he did not do so within three

years of his attaining majority the plaintiff"s suit is barred.

18. The appeal must be allowed and the plaintiffs suit dismissed with costs throughout.

Heaton, J.

19. I concur.

Shah, J.

20. I agree that the present suit is barred by limitation; and as this conclusion involves a reconsideration of the ratio decidendi in Balappa

Dundappa Todkal Vs. Chanbasappa Shivlingappa Patil, , to which I was a party, I desire to state briefly my reasons for accepting it.

21. In the present case the property belonged to Nana, who mortgaged it to the defendants" father in 1877. Nana died leaving a widow Sidubai

and a minor son Omana. Sidubai purporting to act as the guardian of Omana sold the equity of redemption to the defendants" father in 1891.

Omana died in 1901 leaving a widow Gopika who died in 1908. The plaintiff who is the next heir of Omana, after the death of his widow Gopika,

filed the present suit in 1916 to redeem the mortgage of 1877. The defendant relied upon the sale by the mother of Omana. But it has been found

by the lower appellate Court that there was no necessity nor was there any benefit to the estate.

22. It is urged, however, on behalf of the defendant, that the sale was liable to be set aside at the instance of Omana on his attaining majority and

that his right to file a suit for that purpose having been barred by Article 44 of the Limitation Act before his death in 1901, the plaintiff''s present

claim for redemption, which necessarily involved the setting aside of the sale by Omana''s mother, was barred. It is urged that he cannot ignore the

sale, which is not void but voidable at the instance of the minor won, and that a prayer to set aside the sale is essentially involved in the claim for

redemption.

23. The questions that arise for decision are whether Article 44 applies to a sale by the natural guardian of a Hindu minor, and, secondly, whether

it is necessary to have it set aside before making any claim for possession or redemption on the footing that no such sale exists.

24. As regards the first point I am satisfied that the scope of Article 44 is not limited to wales by guardians who arc appointed under testaments or

by the Court. The language of the Article is general and wide enough to include sales by natural guardians, who may have some authority, however

limited, to alienate the property of the minor, that is, sales which are not wholly void, but are voidable at the instance of the person interested in the

property. This view derives support from the observations of their Lordships of the Privy Council in Malfairjun v. Narhari ILR (1900) 25 Bom.

337 : 2 Bom. L. R. 927 and Mata Din v. Ahmad Ali (1911) I. L. R. 34 All. 213, PC., Though the article was first introduced in the Limitation Act

of 1877, there is no case in which it is held to be restricted to sales by testamentary guardians or guardians appointed by the Court. The mother of

a Hindu minor as the natural guardian of her son has authority to alienate the Immovable property of her son under necessity or for the benefit of

the estate. It is enough to refer to Hunoomanpersaud Panday v. Mussumat Sabooee Mithraj Koonwervee (1856) 6 M. I. A. 398 on this point. It

cannot be said that the sale here was wholly unauthorised as in Mata, Din''s case, I am, therefore, of opinion that the sale such as we have in this

case was one which the minor on attaining majority could have sued to set aside and Article 44 would have applied to such a suit.

25. The next question in effect is whether he ought to have sued to set it aside, and if so what is the effect of his omission to do so within the

prescribed period on the present suit. On this point also I am of opinion that he ought to have sued to set it aside within the period allowed by

Article 44 and his omission to do so bars the present suit filed by a person who claims under him. It seems to me that the observations of their

Lordships in Malkarjun''s case and in Khiarajmal v. Daim (1904) I. L. R. 32 Cal. 296, P. C. support this view. The sale by the mother in this case

was not null and void, but it was voidable at the instance of Omana.

26. I have reached this conclusion after a consideration of the conflicting authorities on this point, and I am satisfied that the reasoning in Balappa v.

Ghanbasappa cannot be properly applied to the case of a sale by the natural guardian of a Hindu minor, who has power to sell the property of the

minor under certain circumstances.

27. Section 38 of the Transfer of Property Act to which a reference is made in the judgment in Balappa''s case, applies to a sale by any person

authorised only under circumstances in their nature variable to dispose of Immovable property. As for instance it may apply to a Hindu widow who

has inherited her husband''s estate; but has a limited power of disposal over the Immovable property, as well as to a Hindu widow as the natural

guardian of her minor son, who can alienate the Immovable property of her sou under certain circumstances. But it only lays down a substantive

rule as to when such transfers would bind the persons affected by them. It is not the purpose, of the section to lay down the remedies which

persons affected by the transfers may have to adopt to get rid of the effect of the transfers made by different persons with limited powers of

disposal. A reversioner affected by the transfer effected by a Hindu widow who has inherited her husband''s property may be able to adopt a

particular course. A minor whose property has been alienated by his natural guardian may have to adopt a different course. A reversioner may sue

during the life-time of the widow to have her alienation declared inoperative after her death or may wait until her death. The alienation by her is in

no case void: it is good during the widow''s life-time : and after her death it does not require to be set aside under-any Article. The reversioner''s

interest during the widow''s life-time is contingent and not vested in the estate and his suit for possession after the widow''s death is governed by

Article 141. The case of a Hindu minor affected by the transfer effected by his mother appears to be quite different. The sale can be set aside on

his attaining majority and there is a special Article which provides the limitation for such a suit. I do not think, therefore, that Section 88 of the

Transfer of Property Act can afford any reason for treating all cases to which it would apply, on the same basis as to the remedies open to the

persons affected by the transfers.

28. I need not refer to those cases in which the suits were filed by reversioners in respect ot the alienations by the widows who had inherited their

husbands'' property.

29. As regards an alienation by a natural, guardian of a Hindu minor, the case of Bhagvant Govind v. Kondi Mahadu ILR (1889) 14 Bom. 279 is

undoubtedly against the view which we take in this case. But so far as the case relates to the point under consideration, it is distinctly disapproved

by the Privy Council in Malkarjun''s case.

30. Though the case of Balappa v. Chanbasapa, decided by Scott U. J. and myself, may be distinguishable on its special facts, as the alienation in

that case was by a step-mother, the ratio decidendi in that case and in the case of Anandappa v. Totappa, supports the conclusion reached in

Bhagvant''a case: and these two decisions are based upon the view that the necessity for a plaintiff to sue for setting aside a sale depends upon

whether the onus of proving circumstances establishing its invalidity lies upon him or whether it lies upon the, defendant to prove circumstances

establishing its validity. This view was largely based upon observations made in cases relating to suits by reversioners in respect of alienations made

by widows inheriting their husbands'' estates as such. On a further consideration I am satisfied that the necessity for suing to set aside a sale does

not depend so much upon the question Whether the onus lies upon the plaintiff or the defendant in the first instance, but upon the question whether

the sale is by a person wholly unauthorised or by a person who is authorised only under certain circumstances to alienate the property or in other

words whether the sale is null and void or only voidable if the person interested seeks to avoid it. If the latter is the case, the persons concerned

should sue to have it set aside if there is any Article of the Limitation Act applicable to such a suit. In the present case Article 44 applies, and

therefore the necessity of suing to set aside the sale is established under the circumstances.

31. In two later cases, Laxmava Huchappa Nasipudi Vs. Rachappa Chanbasappa Karveershetti, and Hemidas v. Virupaxappa (1918) S.A.1143

of 1917 the decisions in Balapa v. Chanbasappa, and Anandappa v. Totappa have been dissented from. I have reconsidered the point in view of

this conflict of decisions and in the light of the arguments urged in this case, and I am satisfied that the view we now take is the correct view.

32. Speaking for myself I regret the result for as a matter of fact this view is likely to unsettle some existing titles to Immovable properties. The

decision in Bhagvant''s case was in 1889. In 1900 that part of the decision with which we are concerned was disapproved by the Privy Council. In

spite of that Bhagvant''s ease has been probably followed on this point in some cases in this Presidency, I mean cases which have not been

reported. Then we come to the conflicting decisions to which I have already referred. I cannot say that the course of decisions has been uniform

and long enough to invite the application of the doctrine of stare decisis.

33. I therefore concur in the order proposed by my Lord the Chief Justice.