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ALIENATIONS BY GUARDIAN—SUITS TO AVOID THEM BY THE QUONDAM MINOR.

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There are three classes of cases involving transfer of properties in which minors are interested which generally come up for consideration before the Courts.

(*i*) Alienation of joint-family property by the managing member and other adult co-parceners of the family where the minor members are represented by the managing member or any other adult member acting as the guardian of the minor co-parceners.

(*ii*) Alienation of joint-family property where there are no adult co-parceners at all in the family and the alienation is effected by the mother or other natural or legal guardian acting as the guardian of the minor co-parceners constituting the joint family.

(*iii*) Alienation of the separate property of the minor by the guardian of the minor.

What is the proper frame of the suit which the quondam minor has to file in order to avoid the alienation in respect of the three classes of cases mentioned above and what is the period of limitation within which the suit must be filed?

In respect of the first class of cases indicated above, the law seems to be well settled that the minor members of the joint family are not bound to set aside the alienation and that they can simply ignore it and can sue for possession or partition as the case may be within the period of 12 years prescribed by Article 126 or Article 144 of the Limitation Act. Article 44 of the Limitation Act has been held to be inapplicable to such cases (*Vide Ganesa Iyer* v. *Amrithasami Odayar*[1], and *Kanna Panickkar and others* v. *Nanchan and others*[2]). In the case in *Ganesa Iyer* v. *Amrithasami Odayar*[1], the father alienated family properties in the year 1907 and the sons (plaintiffs 1 and 2) brought the suit for partition of the properties. The first plaintiff had attained majority more than three years prior to suit. The second plaintiff was a minor. The Subordinate Judge found some of the alienations to be not binding on the family, but disallowed the first plaintiff's claim for partition on the ground that he, not having brought the suit within three years of his attaining majority, Article 44 of the Limitation Act would apply and his claim was barred. In appeal, the High Court held that the case fell under Article 126 of the Limitation Act and the first plaintiff was given a decree for partition of his 1/3 share in the properties. The learned Judges observe that the fact that the father executes the document as guardian of his son will not take the case out of Article 126 of the Limitation Act and bring it under Article 44 which applies to cases where property belonging to a minor is transferred. In the case of joint-family property the father is co-owner with the sons. He sells the property as the managing member of the family and the mere fact that he describes himself as guardian of the sons would not take the case out of the express terms of Article 126. In the case reported in

1. (1918) M.W.N. 892.
2. (1923) 46 M.L.J. 340.

Kanna Panickkar and others v. *Nanchan and others*[1], the Karanavathi of a Malabar tarwad made an improper alienation of tarwad properties not only as Karnavathi, but also as guardian of the minor members who sued to recover the properties on behalf of the tarwad on the strength of the tarwad title. The alienee contended that the minor plaintiffs were parties to the document of alienation and were bound to set it aside. It was held that the case was governed by Article 144 of the Limitation Act. The learned Judges observed that minors cannot act and that the mere addition of their names cannot make the document their act which must be set aside and they held that Article 44 of the Limitation Act did not apply to the case as the alienation did not purport to be by the guardian alone, but also by the Karnavathi who, under certain circumstances has authority to alienate tarwad property apart altogether from her guardianship of the minor members. Article 44 of the Limitation Act applies only to cases where the property transferred is the separate property of the minor. It does not apply to cases of alienation of joint family property by the father or the manager in which the minor co-parceners also join through their guardians. The circumstance that in the alienation of the joint-family property by the Kartha or manager the minor co-parcerner is represented by the mother as guardian would not make any difference, for, the family being joint and the property dealt with being joint-family property, the mother could not be the legal guardian of the minor in respect of that property. It has been so laid down by the Privy Council in *Gharib-ul-lah* v. *Khalak Singh*[2]. In that case one of the three brothers (who were the morgagors) was a minor and the mother had obtained a certificate of guardianship in respect of that minor and in one of the mortgages in suit the mother had joined as guardian of that minor son. The validity of the mortgage was attacked on the ground that the mother as guardian could not by reason of section 18 of Act XL of 1858 and sections 29 and 30 of Act VIII of 1890, make a valid mortgage of the minor's property without the sanction of the Court, which admittedly had not been obtained. The Privy Council observe that it has been settled by a long series of decisions in India that a guardian cannot properly be appointed in respect of an infant's interest in the property of an undivided family, that the interest of a member of such a family is not individual property at all, and therefore a guardian if appointed, would have nothing to do with the family property and they accordingly hold that the mortgages were not mortgages by the guardian, assuming the mother to be the guardian, but mortgages by the family entered into by the Kartha of the family with the concurrence of the second brother, the only other adult member of the family. As his Lordship Mr. Justice Venktaramana Rao puts it in *Adinarayana* v. *Venkatasubbayya*[3], "The family owns and possesses the property and there is no minor's estate as such." The principle seems to be that where there is an adult co-parcener in the joint family, he would be the Kartha or manager of the family and the legal guardianship of the minor co-parceners in the family will vest in him only and that adult co-parcener as the Kartha of the family is competent to transact with reference to the entire joint-family properties (including the interest of the minor co-parceners) on behalf of the joint family, the true test of the validity of such transactions being whether they are justified by family necessity or benefit.

In respect of the second class of cases mentioned above, it has been held in the case in *Kaja Ankamma* v. *Kameswaramma*[4], that Article 44 of the Limitation Act is the proper Article applicable in such cases, notwithstanding that the property transferred by the guardian is joint-family property. In that case the co-parcenery consisted of two minor cousins and their mothers acting as their guardians alienated certain properties belonging to the minors and one of the minors having died later on, the surviving brother sued after three years of his attaining majority, but within 12 years of the alienation, to recover the properties from the alienee on the ground that the alienation was beyond the power of the guardian to make. It was held

1. (1923) 46 M.L.J. 340.
2. (1903) L.R. 30 I.A. 165 : I.L.R. 25 All. 407 (P.C.).
3. (1937) 2 M.L.J. 653.
4. (1934) 68 M.L.J. 87.

that the case was governed by Article 44 and not Article 144 of the Limitation Act. His Lordship Mr. Justice Varadachariar expresses the view that the application of the dictum laid down by the Privy Council in *Gharib-ul-lah* v. *Khalak Singh*[1] should be restricted to cases where there are adult co-parceners in the family at the time of the alienation, notwithstanding that the property alienated is joint-family property. If the proper condition for the applicability of Article 144 of the Limitation Act and for excluding Article 44—is that the property dealt with by the guardian is joint-family property *ex-hypothesi* it would seem that there can be no warrant for denying to the quondam minor the benefit of the longer period of twelve years prescribed by Article 144 of the Limitation Act on account of the mere accident of there being no adult co-parcener in the family at the time of the alienation, unless you are obliged to regard the joint-family property as the separate property of the minor co-parceners on account of the non-existence of any adult co-parcener in the family. The latter assumption seems to underlie the decision of Mr. Justice Varadachariar in *Kaja Ankamma* v. *Kameswaramma*[2] although the learned Judge does not say so in so many words. In the judgment in the Letters Patent Appeal against that decision reported in *Ankamma* v. *Kameswaramma*[3] the learned Chief Justice (Beasley C.J.,) affirms the view expressed by Mr. Justice Varadachariar and observes that as there were no other co-parceners in the family and the minors were alone interested in the property, the property is the separate property of the minors and the case was therefore governed by Article 44 of the Limitation Act.

We now come to third class of cases—cases of alienation of the minor's separate property by the guardian. These fall under Article 44 of the Limitation Act and the ex-minor must initiate proceedings challenging the transfer effected by his guardian within three years of his attaining majority and if he omits to do so, the title of the alienee from the guardian will become unassailable by virtue of section 28 of the Limitation Act. As observed by His Lordship, Mr. Justice Varadachariar in *Kaja Ankamma* v. *Kameswaramma*[2], the Limitation Act draws a distinction between voidable transactions and void transactions and while a longer period is allowed for remedies arising out of void transactions, a shorter period is prescribed for all actions that seek to avoid voidable transactions.

A transfer of the minor's property by the guardian, though unauthorised, vests the title to the property in the alienee and is operating against the minor, though the transfer is liable to be avoided at the instance of the minor for due cause. A transfer of the minor's property by the guardian is not void ; it is only voidable. It is open to the ex-minor to accept it as valid and binding on him. Filing a suit in terms to set aside the alienation is not the only method of repudiation. In Trevelyan's Law of Minors (5th Edition) at page 202, the learned author says :

> " A transaction which is voidable at the instance of the minor may be repudiated by any act or omission of the late minor by which he intends to communicate the repudiation or which has the effect of repudiating it. It is not necessary that he should bring a suit. . . . . ."

The decisions in *Kamaraju* v. *Gunnayya*[4], *Veera Raghavalu* v. *Sriramulu*[5], *Sivanmalai Goundan* v. *Arunachala Goundan*[6], *Kuppuswami Goundan* v. *Mariappa Goundan*[7], proceed upon the view of the law propounded in the passage extracted above. In the case in *Kamaraju* v. *Gunnayya*[4], the mother of the minor acting as his guardian sold the minor's property. After the minor attained majority, ignoring the sale-deed executed by his mother and on the footing that no valid title was conveyed by it to the vendee, he sold the property to the plaintiff, who (the transferee from the ex-minor) sued to recover the property from the alienee. The alienee from the guardian contended that the suit was bad for want of a prayer to set aside the sale. It was held that such a prayer was unnecessary. The learned Judges (Ramesam and Coleridge, JJ.) observed as follows :

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1. (1903) L.R. 30 I.A. 105 : I.L.R. 25 All. 407 (P.C.).
2. (1934) 68 M.L.J. 87.
3. (1935) 70 M.L.J. 352.
4. (1923) 45 M.L.J. 240.
5. A.I.R. 1928 Mad. 816.
6. (1938) 2 M.L.J. 428.
7. (1943) 1 M.L.J. 249.

"The first defendant (the ex-minor) has got the right of avoiding it (the transfer from the guardian). By selling the property to the plaintiff on the footing that the sale by the guardian was not binding on him, he has chosen to avoid it and the result of it is, that from his point of view he has got a complete title. The title will no doubt be effective only if the Court ultimately finds that the sale by the mother is not binding on him. But contingent on that event he has got a complete title."

Towards the end of the penultimate paragraph of the judgment, His Lordship Mr. Justice Ramesam says :

"If it is necessary, I would even allow the plaint to be amended by adding the necessary prayer." But, adds the learned Judge, "I do not think it necessary."

This decision was followed in another Bench decision *Veera Raghavalu* v. *Sriramulu*[1], where the learned Judges (Ramesam and Jackson, JJ.) after referring to the decisions which lay down that a minor has not got to set aside the transaction by a guardian in suing to recover the property, say, that the minor can ignore the transaction and merely pray for possession and need not pray for cancellation of the instrument, unlike an adult who has executed the instrument himself. In this view the learned Judges held that section 7, clause (iv) (*a*) of the Court Fees Act was not applicable to the case before them. Their Lordships point out that in such cases it is proper that the plaintiff should not add unnecessary prayers to confuse the Court and himself and if the plaint should contain such prayers it is best to expunge them. In the case in *Sivanmalai Goundan* v. *Arunachala Goundan*[2], the assignee from the guardian (appointed under the Guardian and Wards Act) of a mortgage debt due to a minor filed a suit for recovery of the mortgage money. The guardian had made the assignment without obtaining sanction of the Court as provided by the statute and the assignment was therefore voidable at the instance of the minor. When the assignee's suit was pending the ward attained majority, but he did not file a suit to set aside the assignment by the guardian. Instead, ignoring the assignment by the guardian, he filed a suit himself for recovery of the mortgage money. The learned Judges (Venkatasubba Rao and Abdur Rahman, JJ.) observed that :

"the ward in question has avoided the transaction in the most unequivocal way by filing a suit himself for recovery of the mortgage money."

Filing a suit by the ex-minor claiming the mortgage amount himself was a very unequivocal method of repudiating the guardian's act. The learned Judges say that it is far from correct to say that a minor cannot repudiate a transfer effected by the guardian except by filing a suit under Article 44 of the Limitation Act to set aside the transfer. In the recent case in *Kuppuswami Goundan* v. *Mariappa Goundan and Others*[3] there was a partition in 1938 between the plaintiff and his brothers. The plaintiff was then a minor represented by his father. The plaintiff on attaining majority filed a suit for the partition of the family properties and for possession of his 1/3 share ignoring the partition of 1938 as null and void on the ground that the 1st defendant was given very much more than what he was entitled to. It was contended that the plaintiff was bound to get the partition deed of 1938 set aside or cancelled as he was a party to it through his father as guardian. His Lordship Mr. Justice Kuppuswami Iyer following the Bench decision in *Kamaraju* v. *Gunnayya*[4] held that it was not necessary for the plaintiff to get the partition deed of 1938 set aside and that it was open to the ex-minor to ignore the same.

The correct principle deducible from the decisions seems to be that an ex-minor is entitled to repudiate the alienation by the guardian and if he repudiates the transaction in an unequivocal manner by doing an act which is inconsistent with the acceptance by him of the transaction as valid and binding on him and if his act of repudiation receives the imprimatur of the Court in the proceedings that he or his transferee may initiate for recovery of possession or partition of the properties transferred by the guardian, then the transaction stands in effect cancelled or set aside and the ex-minor or his transferee is given a decree for possession or partition as the case may be. The cancellation or setting aside of the document

1. A.I.R. 1928 Mad. 816.
2. (1938) 2 M.L.J. 428.
3. (1943) 1 M.L.J. 249.
4. (1923) 45 M.L.J. 240.

is implicit in the finding of the Court that the document is not valid and binding on the minor. The repudiation of the guardian's act may take the form of a sale of the property by the ex-minor to a third party on the footing that the alienation by the guardian is not valid or it may take the form of a suit by the ex-minor himself —ignoring the alienation or impugning it—for recovery of possession or for partition. The plaint need not contain a prayer for setting aside the alienation in question. All that is necessary is that the suit which the ex-minor or his transferee files for possession or partition—ignoring or impugning the alienation—must be filed within three years of the minor attaining majority. If the suit is not filed within the period of three years prescribed by Article 44 of the Limitation Act, the title of the ex-minor will be extinguished by virtue of section 28 of the Limitation Act and the title of the alienee from the guardian will become unassailable and indefeasible.

This is the principle underlying the decisions in *Raja Ramaswami* v. *Govindammal*[1], and *Ghulam Hussain Sahib* v. *Ayesha Beebi*[2]. In the case in *Raja Ramaswami* v. *Govindammal*[1], there was an unauthorised alienation of the minor's property by his guardian. The minor was born in February, 1903. He attained majority therefore in February 1921. In 1923 the ex-minor conveyed the property to the plaintiff ignoring the sale by the guardian and the plaintiff—the transferee from the ex-minor—filed a suit on 1st December, 1924, against the alienee from the guardian for recovery of possession and mesne profits. It was argued on behalf of the plaintiff that Article 44 of the Limitation Act did not apply and that the case was governed by Article 144. In rejecting that argument, their Lordships observe that it is not the form of the relief claimed which determines the real character of the suit for the purpose of ascertaining under what Article of the Limitation Act the suit falls and that though the relief claimed was possession of immoveable property, yet if the property sued for is held by the contesting defendants under a sale or other transfer which is not void, but only voidable and if the plaintiff cannot obtain possession without the transfer being set aside, the suit must be regarded as one brought to set aside the transfer, though no relief in those terms is prayed for and the prayer is only for possession of the property. It was held that Article 44 applied to the case and the suit, not having been instituted within three years from the date of the minor attaining majority was held to be barred under Article 44. In the Full Bench case, *Ghulam Hussain Sahib* v. *Ayesha Beebi*[2], a Muhammadan mother who was appointed guardian of her three minor sons under the Guardian and Wards Act acting on her own behalf and as guardian of the minor sons sold a house belonging to her late husband without obtaining sanction of the Court as provided in section 29 of the Guardian and Wards Act. The omission to obtain the necessary sanction did not render the transaction void. The transaction was only voidable at the instance of the minors. In January 1932, the three sons who claimed to have become majors by that time sold their shares in the property to one Ghulam Hussain Sahib who in January, 1933, filed the suit to recover from the mother's transferee the shares of his vendors in the property. It was found that one of the three vendors attained majority more than three years before suit and it was held that the plaintiff's claim for recovery of that person's share in the suit property was barred by Article 44 of the Limitation Act. It is to be observed that in this Full Bench case also, there was no prayer in terms to set aside the transfer effected by the guardian and that the transferee from the ex-minor filed the suit for partition on the footing that the sale by the guardian was invalid, and was not binding on the minor. The claim for partition of the share of one of three vendors was disallowed on the ground that the suit was filed more that three years after he had attained majority.

The decisions in *Alagar Ayyangar* v. *Srinivasa Ayyangar*[3], *Doraiswami* v. *Thangavelu*[4], *Venkitakrishniah* v. *Sheik Ali Sahib*[5], which lay down that an ex-minor

1. (1928) 56 M.L.J. 332.
2. (1941) 1 M.L.J. 800 : I.L.R. 1941 Mad. 775 (F.B.).
3. (1925) 50 M.L.J. 406.
4. A.I.R. 1929 Mad. 668.
5. A.I.R. 1938 Mad. 921.

is bound to get the alienation by the guardian set aside cannot be regarded as correct. In the case in *Alagar Ayyangar* v. *Srinivasa Ayyangar*[1], the property that was transferred was not the separate property of the minors, but was joint-family property in which the minors were interested. The view taken by His Lordship Mr. Justice Odgers, in that case is opposed to the law laid down in the earlier decisions in *Ganesa Iyer* v. *Amirthasami Odayar*[2] and *Kanna Panickkar and others* v. *Nanchan and others*[3] already noticed. It is curious to observe that neither of these decisions appears to have been brought to the notice of the learned Judge. The decision in *Kamaraju* v. *Gunnayya*[4], does appear however to have been cited before his Lordship, but the learned Judge distinguished it as not being a case of Court-fee. It is not easy to appreciate the distinction drawn by His Lordship. The determination of the question of the appropriate Court-fee payable in such cases must obviously depend upon the view that you take on the question whether it is necessary for the ex-minor to pray for setting aside the alienation by the guardian. If the ex-minor is entitled to ignore the transaction by the guardian and to sue for possession or partition without praying in so many words for setting aside the alienation by the guardian, no question of paying Court-fee under section 7, clause (iv) (*a*) of the Court Fees Act can possibly arise. In *Doraisamy* v. *Thangavelu*[5], and *Venkitakrishniah* v. *Sheik Ali Sahib*[6], the suits were filed by the ex-minor to avoid alienations of the minor's separate property by the guardian. In *Doraiswamy* v. *Thangavelu*[5], it was held that the ex-minor was bound to set aside the release deed executed by the guardian and that Court-fee was payable under section 7, clause (iv) (*a*) of the Court Fees Act. This decision was followed by His Lordship. Mr. Justice Wadsworth, in *Venkitarkrishniah* v. *Sheik Ali Sahib*[6]. His Lordship observes that where the alienation document is an insuperable obstacle to a prayer for possession so long as it has not been declared void or cancelled, the cancellation or avoidance of that document is an essential part of the relief sought, and the case must come under section 7 clause (iv) (*a*) of the Court Fees Act. The Bench decision in *Kamaraju* v. *Gunnayya*[4], does not appear to have been brought to the notice of the learned Judge who decided *Doraiswami* v. *Thangavelu*[5], and *Venkitakrishniah* v. *Sheik Ali Sahib*[6], and it is interesting to notice that His Lordship, Mr. Justice Venkatasubba Rao, who decided the case in *Doraiswami* v. *Thangavelu*[5], is a member of the Bench which decided the case in *Sivanmalai Goundan* v. *Arunachala Goundan*[7].

To sum up, neither in the case of an alienation of joint-family property nor in the case of an alienation of the separate property of the minor is the ex-minor bound to pray for setting aside the alienation effected by the guardian. No question can therefore arise in such cases of paying Court fee under section 7, clause (iv) (*a*) of the Court Fees Act. The ex-minor is entitled to sue for possession or partition on the footing that the alienation is not binding on him without making a prayer for setting aside the alienation, but while the ex-minor is entitled to get the longer period of limitation prescribed by Article 144 of the Limitation Act in the case of suits in respect of alienations of joint-family properties he is bound to claim redress within the shorter period of three years after attaining majority in respect of alienations of his separate property made by the guardian. A suit filed by the ex-minor claiming possession or partition repudiating the transaction effected by the guardian on the footing that the alienation is not valid and binding on him should be regarded as virtually a suit to set aside the transfer made by the guardian, but it is not necessary in such a suit to pray for setting aside the alienation effected by the guardian. If the ex-minor omits to institute a suit claiming such relief within the period of three years prescribed by Article 44 of the Limitation Act, the title of the ex-minor to the property will be extinguished by virtue of section 28 of the Limitation Act and the title of the alienee from the guardian will become unassailable.

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1. (1925) 50 M.L.J. 406.
2. (1918) M.W.N. 892.
3. (1923) 46 M.L.J. 340.
4. (1923) 45 M.L.J. 240.
5. A.I.R. 1929 Mad. 668.
6. A.I.R. 1938 Mad. 921.
7. (1938) 2 M.L.J. 428.