APPELLATE CIVIL.

Before S. K. Ghose J.

NAGENDRANATH GHOSH

v.

MOHINIMOHAN BASU.*

1930

March 7.

Minor—Alienation of minor's property by certificated guardian without the court's authority—Subsequent sale of the same property by the same guardian with the court's authority—Ward benefited by the consideration of the first sale—Suit for possession by the purchaser at the last sale without prayer for setting aside the first sale, if maintainable—Restitution of benefit—Reimbursement of the previous purchaser by the subsequent purchaser—Limitation—Guardian and Wards Act (VIII of 1890), s. 30—Transfer of Property Act (IV of 1882), s. 6—Indian Limitation Act (IX of 1908), Sch. I, Arts. 91, 120.

The certificated guardian of a minor sold the latter's property to the defendant's (respondent's) vendor without previously obtaining the permission of the court. Thereafter, by another deed, the said guardian again sold the same property to the plaintiff with the permission of the court.

Held that, in a suit by the plaintiff for declaration of his title and for *khas* possession, the prayer for setting aside the previous sale by the certificated guardian without the court's authority was unnecessary and that the plaintiff was entitled to recover possession of the property from the defendant on a declaration that the sale to the defendant without the permission of the court was not binding upon the plaintiff.

Held, further, that Article 120 (and not Article 91) of the Limitation Act applied to this case.

Where the consideration money paid by a prior purchaser of a minor's property from a certificated guardian who sold the same without the permission of the court was found to have benefited the minor, a later purchaser, of the same property from the same guardian who sold the property with the permission of the court cannot avoid the prior sale without reimbursing such prior purchaser.

Eastern Mortgage Agency Co., Ld. v. *Rebati Kumar Ray* (1), *Hem Chandra Sarkar* v. *Lalit Mohon Kar* (2), *Abdul Rahman* v. *Sukhdayal Singh* (3) and *Dwijendra Mohan Sarma* v. *Manorama Dasi* (4) followed.

SECOND APPEAL by the plaintiff.

The facts of the case will appear from the judgment.

*Appeal from Appellate Decree, No. 639 of 1928, against the decree of Osman Ali, Subordinate Judge of the 24-Parganas, dated Sept. 23, 1927, affirming the decree of Nishikanta Banerji, Munsif of Alipore, dated Aug. 21, 1926.

(1) (1906) 3 C. L. J. 260.
(2) (1912) 16 C. W. N. 715.
(3) (1905) I. L. R. 28 All. 30.
(4) (1922) I. L. R. 49 Calc. 911.

Sharatchandra Ray Chaudhuri and *Aneelchandra Ray Chaudhuri* for the appellant.

Jogeshchandra Ray and *Karunamay Ghosh* for the respondents.

S. K. GHOSE J. The plaintiff sues for declaration of title to and recovery of *khâs* possession of lands on the following allegations. On the 12th November, 1919, he purchased the suit lands for a sum of Rs. 400 from the husband and certificated guardian of the minor Sudhanbala with the permission of the District Judge and obtained possession. But in 1922, he was dispossessed by the principal defendants who claimed to have purchased from the husband of Sudhanbala on the 18th July, 1919. This latter purchase was without the permission of the District Judge. The defence is that the defendants' *kabâlâ* was only voidable, and that the suit is barred by limitation. The trial court held that the plaintiff's *kabâlâ* was genuine, but that the defendants' *kabâlâ* was voidable, and the suit was barred under Article 91 of the Limitation Act. On appeal, the learned Subordinate Judge did not decide the question of limitation, but he held that, at the time of the sale to the plaintiff, the certificated guardian, having already sold to the defendant, had only a right to avoid the latter sale, and that, therefore, what the plaintiff purchased was the mere right to sue, which would not be transferable under section 6 of the Transfer of Property Act. He further held that, as the defendants' purchase stood and the plaintiff had not offered to reimburse the defendant, the suit was not maintainable. The plaintiff now comes in Second Appeal.

It is contended that the learned Judge was in error in holding that the plaintiff had purchased the mere right to sue. The *kabâlâ* (Ext. I) in its terms purports to convey the entire property, and not a mere right to avoid the previous sale in favour of the defendant. What the plaintiff got by his purchase was the entire right of the minor at that date, and, under section 30 of the Guardian and Wards Act, the

1930

Nagendranath Ghosh v. *Mohinimohan Basu.*

Ghose J.

minor had the right to avoid the sale in favour of the defendant. The trial court took the view that it was necessary for the plaintiff to set aside the sale in favour of the defendants and such a relief would be barred under Article 91 of the Limitation Act. This view is supported by two cases which were decided by this Court, *viz.*, *Krishna Dhone Bhattacharjya* v. *Bhagaban Chandra Bhattacharjya* (1) and *Kanok Dasi* v. *Srihari Goswami* (2). These cases, however, did not consider the question whether the plaintiff, in such circumstances, was entitled to sue for possession on a declaration that the previous sale to the defendant was not binding. This is the relief that the plaintiff in the present suit has asked for in the plaint. That the plaintiff in such circumstances would be entitled to such relief, without being required to have the sale in favour of the defendant set aside, has been held in a number of cases. See the cases of *Abdul Rahman* v. *Sukhdayal Singh* (3), *Dwijendra Mohan Sarma* v. *Manorama Dasi* (4) and *Rajani Kanta Roy* v. *Manmatha Nath Nandi* (5). It has even been held that when a guardian sells for the second time, that is enough for the repudiation of the prior sale. See the cases of *The Eastern Mortgage and Agency Co., Ld.* v. *Rebati Kumar Ray* (6), *Hem Chandra Sarkar* v. *Lalit Mohon Kar* (7) and also the case of *Abdul Rahman* v. *Sukhdayal Singh* (3). All that section 30 of the Guardian and Wards Act says is that the disposal of immoveable property by a guardian, in contravention of the previous two sections, is voidable at the instance of any other person affected thereby. It was pointed out in the case of *Dwijendra Mohan Sarma* v. *Manorama Dasi* (4) that the previous sale must be set aside by a proper proceeding. But it does not follow that the plaintiff must seek to have the sale expressly set aside. In these circumstances, it seems to me that the plaintiff in the present case is entitled to the relief

(1) (1916) 34 Ind. Cas. 188.
(2) (1919) 52 Ind. Cas. 269.
(3) (1905) I. L. R. 28 All. 30.
(4) (1922) I. L. R. 49 Calc. 911.
(5) (1918) 46 Ind. Cas. 665.
(6) (1906) 3 C. L. J. 260.
(7) (1912) 16 C. W. N. 715.

that he has asked for, namely, to recover possession of the property on a declaration that the sale in favour of the defendant, which was without the sanction of the District Judge, is not binding upon him. The Article of limitation would be Article 120 of the Limitation Act and the suit is within time.

The only other point is, whether the plaintiff is liable to reimburse the defendant on account of the latter's purchase. It has been held in a number of cases that, on equitable grounds, a purchaser in such a case would be entitled to be reimbursed. See the cases of *The Eastern Mortgage and Agency Co., Ld.* v. *Rebati Kumar Ray* (1), *Dwijendra Mohan Sarma* v. *Manorama Dasi* (2) and *Hem Chandra Sarkar* v. *Lalit Mohon Kar* (3). The learned judge in the court below has pointed out that the plaintiff did not offer to reimburse the defendant. The plaintiff made the case that the defendant's *kabâlâ* was fraudulent and so he did not offer to reimburse. It has been found, however, by both the courts that the defendants' *kabâlâ* was genuine and for consideration. The learned Judge mentions in his judgment that a part of the consideration money was paid in the presence of the Sub-Registrar; and he apparently affirms the view of the trial court that the entire consideration had been paid. He also finds that the plaintiff purchased with knowledge of the prior sale to the defendant. It is contended on the other side that it is now too late for the plaintiff to be allowed to have the suit decreed by giving him an opportunity to reimburse the defendant. But, having regard to the circumstances, I think that the plaintiff may be given such a decree on terms. The learned advocate for the plaintiff appellant has pointed out that there is no express finding as to how much of the consideration money was spent for the benefit of the minor. But, having regard to the findings of the courts and the fact that the plaintiff did not, in the courts below, make any offer to reimburse the defendant as to any part of the

(1) (1906) 3 C. L. J. 260. (2) (1922) I. L. R. 49 Calc. 911.
(3) (1912) 16 C. W. N. 715.

1930

Nagendranath Ghosh v. *Mohinimohan Basu.*

Ghose J.

consideration money, I do not think that it would be proper that the parties should be relegated to another enquiry for the purpose of ascertaining how much of the consideration money was spent for the benefit of the minor. Having regard to the circumstances, I take it that the entire consideration money was spent for the benefit of the minor, and I think that the equity of the case will be met by giving the plaintiff a decree on the following terms.

Within three months of the notice of the arrival of records in the court of first instance being received by the plaintiff, he will deposit the entire amount of the consideration money mentioned in the *kabâlâ* (Ex. A), together with interest at the rate of six *per cent. per annum* simple from the date of the suit to the date of the deposit. Upon his doing so, the suit will be decreed in his favour. Upon his failure to do so, the suit will stand dismissed. The appeal is allowed accordingly; but in this Court the parties will bear their own costs.

Appeal allowed.

A. K. D.