APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1917, January, 8 and 23.

KANDASAMI NAIKEN (FIRST DEFENDANT), APPELLANT,

v.

IRUSAPPA NAIKEN AND TWO OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

Limitation Act (IX of 1908), sec. 7 and art. 44—Sale by a Hindu mother as guardian of her only son—Second son in the womb at the time of sale—Subsequent sale by both the sons to another—First purchaser dispossessed by the latter—Suit in ejectment—Limitation.

The plaintiff claimed under a sale-deed executed by a Hindu widow as guardian of her only son at a time when she had another son in the womb. The plaintiff was afterwards forcibly ejected by the appellant who had obtained a later sale-deed from the elder son who executed it both on behalf of himself and his minor brother. The plaintiff sued in ejectment more than three years after the first son's attaining majority but within three years of the attainment of majority by the second.

Held, that no suit having been brought by the first son within the period prescribed by article 44 of the Limitation Act to set aside the sale, the plaintiff's right to the share of the first son became absolute and that as the mother did not execute the sale-deed as guardian of the second son, his share in the suit land did not pass to the plaintiff.

Held also, that as the causes of action for the two sons were different, section 7 of the Limitation Act had no application to the facts of the case.

Doraisami Serumadan v. *Nondisami Saluvan* (1915) I.L.R., 38 Mad., 118, distinguished.

SECOND APPEAL against the judgment of V. VENUGOPALA CHETTI, the District Judge of Chingleput, in Appeal No. 260 of 1914, preferred against the decree of R. V. KRISHNA AYYAR, the Additional District Munsif of Chingleput, in Original Suit No. 317 of 1913.

The material facts and contentions are set out in the judgment of SADASIVA AYYAR, J.

C. V. Anantakrishna Ayyar and *P. S. Narayanaswami Ayyar* for the appellant.

K. Bhashyam Ayyangar for the first respondent.

The other respondents were not represented.

* Second Appeal No. 954 of 1915.

SADASIVA AYYAR, J.—The first defendant is the appellant. The plaintiff sued in ejectment basing his title on a sale-deed of 1893 (Exhibit A) executed to him by the mother of the defendants Nos. 2 and 3. The plaintiff was in possession till 1909 when he was ejected forcibly by the first defendant who had obtained a sale-deed from the second defendant in 1908 (Exhibit II). The sale-deed (Exhibit II) was executed by the second defendant for himself and also for the third defendant who was then a minor. The second defendant attained majority in 1903 while the third defendant attained majority about the end of 1911 or the beginning of 1912. The suit was brought in July 1912.

The sale-deed by the mother of the defendants Nos. 2 and 3 to the plaintiff was executed by her as guardian of the second defendant alone, the third defendant (the posthumous son of his father) not having been born then. The statement of the District Judge in paragraph 2 of his judgment that the plaintiff's sale-deed was executed by the mother of the defendants Nos. 2 and 3 *acting as the guardian of both* is clearly an error.

Both the lower Courts have found that the sale-deed of 1893 in favour of the plaintiff was executed for no consideration and that the minor second defendant as whose guardian his mother executed it got no benefit under it. The District Munsif dismissed the plaintiff's suit.

On appeal the learned District Judge has given a decree in plaintiff's favour on the following reasoning, as I understand his judgment:—

(*a*) The second defendant did not sue to set aside his mother's sale-deed of 1893 within three years of his attaining majority. (The said three years expired in 1906.) Both the defendants Nos. 2 and 3 ought to have sued to set aside such sale within 1906. As they did not do so they are barred under article 44 of Limitation Act from questioning the sale.

(*b*) Even if article 44 did not apply, article 144 would have applied to a hypothetical suit for possession if it had been brought by the defendants Nos. 2 and 3 just before the plaintiff was forcibly dispossessed in 1909. Such a suit would have been dismissed as barred as at that time the plaintiff had been in possession for sixteen years. (The District Judge gives the figure 18.) Hence the plaintiff had obtained title by adverse possession against the defendants Nos. 2 and 3 on the date when he was

KANDASAMI v. IRUSAPPA.

SADASIVA AYYAR, J.

dispossessed in 1909. The plaintiff basing his right on his title so perfected by adverse possession is entitled to sue in ejectment the first defendant who claims from the defendants Nos. 2 and 3.

Mr. Anantakrishna Ayyar, the appellant's learned vakil, argued as follows :—

(*a*) That even though a suit by a ward who has attained *majority to set aside* his *guardian's* alienation may be barred under article 44, he can avoid it as defendant by denouncing it in the suit for possession brought by the alienee.

(*b*) That the lower Appellate Court was wrong in holding that the *plaintiff* was *in adverse possession* of the land as against the defendants Nos 2 and 3 between 1893 and 1909 as his possession between 1893 and 1903 at least (when the second defendant attained majority) must have been as agent of the defendants Nos. 2 and 3 ; and

(*c*) That the sale-deed of 1893 was executed by the mother, not as guardian of both the defendants Nos. 2 and 3 as mistakenly supposed by the lower Appellate Court but as guardian of the second defendant alone.

The third defendant was therefore not bound to have it set aside so far as his interest in the property is concerned. The plaintiff also could not have acquired the third defendant's undivided interest by adverse possession as the third defendant had three years from his attaining majority (that is, till the end of 1914) to sue to recover possession of his interest and as the first defendant had recovered possession in 1909 itself of third defendant's said interest before third defendant's right to recover possession from plaintiff had become barred. It is clear from *Madugula Latchiah* v. *Pally Mukkalinga*(1) that the sale-deed executed by a guardian ought to be set aside by a ward by instituting a suit within the period mentioned in article 44 and that till it is so set aside, the title vests in the alienee. It is also established by that decision that, though article 44 describes the suit to be brought by the ward as a suit merely to set aside the transfer of his property by his guardian, if the transferee has obtained, and is in, possession and the ward has therefore to add a prayer for the relief of possession, article

(1) (1907) I.L.R., 30 Mad., 393.

44 alon still applies to the suit though brought for both the reliefs. Section 28 of the Limitation Act says that at the determination of the period limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. As the second defendant's right to institute a suit under article 44 for setting aside the sale of 1893 and for possession of the property from the plaintiff became barred in 1906, his right to such property became extinguished under section 28 of the Limitation Act and the plaintiff became the owner of the second defendant's interest in the property in 1906. As he has brought the suit in 1912 and as his title to the second defendant's interest of which he became the owner in 1906 subsisted at the date of the suit, his claim for possession of such interest has to be decreed. I must therefore reject the contention (*a*) put forward by Mr. Anantakrishna Ayyar.

Coming to his contention (*b*), I am unable to accept Mr. Anantakrishna Ayyar's argument that the agency power given to the plaintiff by the second defendant's mother under Exhibit I was a general power of attorney which made him the second defendant's agent as regards the management of the plaint property also which had been alienated by the second defendant's mother on the day previous to the execution of the agency deed. It seems to me clear that the plaint property was excluded from the agency and I am unable to differ from the finding of fact arrived at by the lower Appellate Court that plaintiff's possession between 1893 and 1909 was adverse to the defendants Nos. 2 and 3.

Coming to the last contention (*c*), it is clear from the wording of Exhibit A that the sale-deed was executed by the second defendant's mother as guardian of the second defendant alone. Plaintiff-respondent's learned vakil asked us to presume in the plaintiff's favour that the second defendant's mother intended to execute it in the exercise of all the powers to alienate which she possessed though she may not have known that she had the power to execute it also as guardian of the child then in her womb. I do not think that a Court is bound to stretch any point in favour of a person like the plaintiff who took advantage of the helplessness of his mother-in-law (the second and the third defendant's mother) to obtain a sale-deed without consideration in fraud of his brother-in-law from her. The sale-deed therefore

KANDASAMI v. IRUSAPPA.

SADASIVA AYYAR, J.

did not affect the third defendant's undivided interest in the plaint properties. He was hence not bound to have it set aside under article 44. As against his interest, the plaintiff could rely only upon adverse possession under article 144. But as article 144 read with sections 6 and 28 of the Limitation Act did not bar the third defendant's rights or confer title on the plaintiff as regards third defendant's rights before the plaintiff was dispossessed in 1909, the plaintiff cannot claim any title to the third defendant's interests in the properties. (It is unnecessary to consider whether the third defendant's interest has passed to the first defendant in this case owing to the sale-deed executed by the second defendant in the first defendant's favour in 1908.) The contention (c) has therefore to be upheld. Mr. K. Bashyam Ayyangar next contended for the plaintiff that, as the second defendant could have when suing on his own behalf (in the suit governed by article 44) to set aside the sale by his mother of his undivided interest also joined in that suit a cause of action as the next friend of the third defendant (or as managing member of the undivided family consisting of himself and the third defendant) to recover possession of the third defendant's interests also in that same suit, the principle of the Full Bench decision in *Doraisami Serumadan* v. *Nondisami Saluvan*(1) applied and that, therefore, the third defendant had also become barred in 1906 from claiming title to his undivided share. I think that, that decision gave as wide an effect to section 8 of Act XV of 1877 (corresponding to section 7 of the present Act) as possible and that it is wholly undesirable to extend the scope of that section further. Where two brothers have got the same cause of action (that is, where all the material allegations giving rise to a right of suit are the same), where the whole right litigated and the nature of the entire claim litigated are the same and where under such circumstances the elder brother could institute a suit for himself and his younger brother on that joint right and joint cause of action, section 7 would become applicable according to the Full Bench decision and would bar the younger brother's right when the eldest brother's became barred. But in this case the second defendant's cause of action and his right to bring a suit depend upon the fact of his mother's

(1) (1915) I.L.R., 38 Mad., 118.

execution of Exhibit A and a suit on such right of his is governed by article 44 whereas the third defendant's right of suit has nothing to do with Exhibit A or with article 44 and his suit would have been governed by article 144. The mere fact that under Order I, rule 1, Civil Procedure Code, the second defendant suing for himself and praying for one particular remedy could have joined in that same suit another cause of action vesting in the third defendant for whom he (second defendant) could have acted as next friend will not bring such a suit within the ambit of section 7 of the Limitation Act which contemplates the existence in two or more persons of a joint right and a joint cause or joint causes of action in support of a single suit.

In the result the lower Appellate Court's decree will be modified and a preliminary decree for partition of the plaint properties into two equal shares will be passed. The plaintiff's right to recover from the first defendant mesne profits on the said half share from fasli 1319 is also declared. Final decree will be passed (after taking the necessary steps contemplated by law) by the District Munsif as regards possession to plaintiff of the particular land which might fall to his half share in division and in respect of the sum due to him for value of mesne profits.

The plaintiff must pay the first defendant's costs on half the value of the plaintiff's claim throughout and bear his own costs. (The right to the other half share as between the defendants Nos. 1 and 3 is not decided in this suit.)

SPENCER, J.—The plaintiff obtained a sale-deed in respect of the suit properties in 1893 from the mother of the defendants Nos. 2 and 3. In this document (Exhibit A) she described herself as the wife of her deceased husband and as the mother and protecting guardian of second defendant. The statement of the District Judge that she acted as guardian of defendants Nos. 2 and 3 in this transaction is incorrect. In the plaint it was stated that she acted in the capacity of guardian of the second defendant alone, and for the purpose of this Second Appeal it may be taken that the third defendant was in his mother's womb on the date of sale.

SPENCER, J.

Accepting the finding of the Judge that the possession by the plaintiff of the plaint lands which are not included in the lands entrusted under Exhibit I to his management as an agent

KANDASAMI v. IRUSAPPA. — SPENCER, J.

of the family, was adverse, it is clear that, unless the time be extended under section 6 of the Limitation Act, his title must have been perfected by prescription before the first defendant obtained a conveyance of them from the second defendant in 1908.

The second defendant being eight years old in 1893 as stated in Exhibit A must have attained his majority in 1902 or at least by 1903.

His title to his share of the ancestral property alienated became extinguished in 1906, when for three years after attaining majority he failed to set aside the transfer made by his guardian during his minority (vide sections 6 and 28 of the Limitation Act), and therefore he had no interest of his own to convey to his transferee (first defendant) in 1908 when he executed Exhibit II on behalf of himself and his minor brother.

But in 1893, there was not any alienation of the third defendant's share in the property of the Hindu joint family to which he belonged at his conception.

Both the lower Courts have found that the sale in 1893, regarded as an alienation of ancestral property, was without consideration and for no justifiable necessity. Third defendant attained majority less than three years before the institution of this suit.

Hence the title of the third defendant which was not alienated in 1893 and was kept alive by his legal disability up to the date of this suit (section 6 of the Limitation Act) does not stand on the same footing with the title of the second defendant which was alienated in 1893 and became extinguished by limitation in 1906.

The District Judge without making any distinction has treated the title of both these defendants as extinguished. It is now argued in support of his judgment that time should be calculated under section 7 of the Limitation Act as running against both, on the ground that they were jointly entitled to institute a suit to recover their property and that one could give a valid discharge without the concurrence of the other.

I consider that section 7 of the Limitation Act does not apply to the circumstances of this case. Owing to their interests having become split up, defendants Nos. 2 and 3 were not joint in estate in respect of this particular property, after the execution of Exhibit A.

The cause of action for the second defendant to set aside the alienation made by his guardian is not identical with the cause of action for the third defendant or his representative in interest to obtain a partition of his share of family property upon a subsisting title from a third party who was in wrongful possession thereof.

When the second defendant attained majority he was not competent to give a lawful discharge of the third defendant's claim, under the circumstances found to have existed in this case.

Thus this case is distinguishable from *Doraisami Serumadan* v. *Nondisami Saluvan*(1). I agree that the appellant is entitled to succeed in respect of third defendant's undivided moiety of the suit property and that he must fail as regards the second defendant's moiety, and that costs should be awarded as stated in my learned brother's judgment.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

SIVANUPANDIA THEVAR AND TEN OTHERS (PLAINTIFFS), APPELLANTS,

v.

MEENAKSHI SUNDARA VINAYAKA VISAKAPERUMAL SETHURAYAR AVARGAL,

MINOR ZAMINDAR OF URKAD REPRESENTED BY KRISHNA RAO, MANAGER OF THE ESTATE UNDER THE COURT OF WARDS (DEFENDANT), RESPONDENT.*

1917, March, 6 and 7.

Estates Land Act (Madras Act I of 1908), sec. 40, cl. (3)—'Years' in, meaning of — Swami-bhogam, whether rent or cess within section 3, clause (11) — Agreement between landlord and tenant for a consolidated grain rent, enforceability of.

In section 40, clause (3) (*a*) of the Madras Estates Land Act, 'preceding ten years,' means the ten years preceding the year in which the Collector

(1) (1915) I.L.R., 38 Mad., 118.

* Second Appeals Nos. 1074 to 1084 of 1916.