

ABDUL
KADIR
v.
SAMIPANDIA
TEVAR.
—
SESHAGIRI
AYYAR, J.

that decision applies equally to the present case; vide *Rama-
bhadra Raju Bahadur v. Maharajah of Jeypore*(1).

For all these reasons, I am of opinion that the decision of
the District Judge must be reversed and the execution appli-
cation should be dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Phillips.

KUPPUSWAMI AYYANGAR AND DEVANATHA
AYYANGAR (PLAINTIFFS), APPELLANTS,

v.

KAMALAMMAL AND THREE OTHERS (DEPENDANTS), RESPONDENTS.*

1920,
April,
21, 22.

*Limitation Act (IX of 1908), Arts. 44 and 144—Alienation by mother as guardian
of the sons—Decree against the sons represented by the mother as guardian
ad litem—Sale in execution—Decree and sale, whether nullities—Suit by
minors to recover possession—Limitation—Civil Procedure Code (V of 1908),
O. XXXII, r. 4 (1).*

Where a mother acting as the guardian of her minor sons mortgaged their
property and a decree on the mortgage was passed against the minors represented
by the mother as guardian *ad litem* and the property sold in execution, and subse-
quently the sons sued to recover possession of the properties more than three
years after the elder of them attained majority but within twelve years of the
sale, alleging that their mother was not competent to represent them in the
previous suit, as her interest was adverse to theirs,

Held, that the decree against the minors was not a nullity and had to be set
aside, and that the suit was consequently barred by limitation.

SECOND APPEAL against the decree of R. ANNASWAMI AYYAR,
Temporary Subordinate Judge of Cuddalore, in Appeal Suit
No. 113 of 1917, preferred against the decree of K. L. VENKATA
RAO, Additional District Munsif of Villupuram, in Original
Suit No. 1 of 1916.

One Venkatasa Ayyangar executed a will, dated 27th Decem-
ber 1897, whereby he appointed Thiruvengkata Achariyar as
guardian in respect of the joint family properties of his two minor
sons, aged five years and one year, respectively. The mother of the
minors, professing to act as their guardian alienated the property
by way of mortgage to different persons; and two suits were

(1) (1919) I.L.R., 42 Mad., 813 (P.C.); L.R., 48 I.A., 151.

* Second Appeal No. 784 of 1919.

instituted (Original Suit No. 217 of 1903, and Original Suit No. 597 of 1904 on the file of the District Munsif's Court of Tindivanam) against the minors represented by their mother as guardian *ad litem*; decrees were passed and the properties were sold and purchased by the second and third defendants. The sons instituted the present suit on 28th June 1914 for recovering possession of the lands sold in execution, on the ground that the alienation was not for any necessity, and that the suit and decree and the execution sale were not binding on them. The suit was filed more than three years after the first plaintiff attained majority. The plaintiffs contended, inter alia, that the decree and sale were nullities, as the mother was not a proper guardian *ad litem* as required by Order XXXII, rule 4 (1), Civil Procedure Code, and that consequently the sale need not be set aside, and that article 144 and not article 44 of the Limitation Act applied to the case. The lower Courts held that the suit was barred by limitation as regards both the plaintiffs, and dismissed the suits. The plaintiffs preferred this Second Appeal.

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K. Bashyam Ayyangar and *T. G. Raghava Achariyar* for the appellants.

L. S. Viraraghava Ayyar for the respondent.

The JUDGMENT of the Court was delivered by

OLDFIELD, J. → The lower Appellate Court held that the suit was barred, because a previous decree having to be set aside, before relief could be given, article 144, Schedule 1 of the Limitation Act was inapplicable. OLDFIELD, J.

Appellants contend that the previous decree need not be set aside, being a nullity, inasmuch as it was obtained against them as minors with their mother as guardian *ad litem* and her interest in the litigation being adverse to theirs, she was not competent to represent them with reference to Order XXXII, rule 4 (1), proviso. Assuming, but not deciding that the mother had any sort of adverse interest, we are not prepared to hold that she was so wholly disqualified that her representation must be treated as no representation and the decree must be regarded as null and need not be set aside on proof of fraud or otherwise. No authority cited for appellants goes that length; *Bajjnath Rai v. Dharam Deo Tiwari*(1) has been relied on. But in it the question was not whether a previous decision should be set aside, but

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whether it was *res judicata*, when it was alleged to have been obtained through the guardian's gross negligence, and it is not clear that the same considerations arise on the latter question as on the former. The other case mainly relied on was *Khira-rajmal v. Daim*(1), and in it the Judicial Committee no doubt referred to decrees obtained and sales held, when the persons directly concerned were not parties to the proceedings or properly represented, as nullities. But the question then is what constitutes proper representation, their Lordships not dealing with the point further except by reference to *Kishen Chunder Ghose v. Mussumat Ashoorun*(2), in which there was no representation at all. On the other hand, in *Walian v. Banke Behari Pershad*(3), it was pointed out that a defect in following the rules as to representation of minors was not necessarily fatal to the proceedings. We are not, in the circumstances, prepared to hold that any possible adverse interest on the part of the mother rendered the decree against the present plaintiffs, the minors, a nullity. It, therefore, had to be set aside and the present suit is out of time.

Next it is argued that this suit should have been regarded as one against the second defendant to recover from him the advantage which he has realized as implied trustee for the plaintiffs during their minority. It is not necessary to set out in detail the facts on which this plea is based, or to deal with it on its merits, because it was not in our opinion relied on in the Court of first instance and we are not prepared to consider it for the first time in Second Appeal.

Lastly, the suit has been held barred, on the assumption that time ran from the date on which the elder of the plaintiffs attained majority, consistently with *Doraisami Serumadan v. Nondisami Saluvan*(4). Reference has been made to *Nobin Chendra Barna v. Chandra Madheb Barna*(5), in which it is said a plea of limitation was disallowed in similar circumstances. There, however, perhaps with reference to the Dayabhaga law, the elder of the plaintiffs concerned was held not capable of giving a discharge and that case must be distinguished on that ground.

The Second Appeal is dismissed with costs.

K.R.

(1) (1905) I.L.R., 32 Cal., 296 (P.C.).

(2) (1868) Marshall, 647.

(3) (1908) I.L.R., 30 Cal., 1021.

(4) (1915) I.L.R., 88 Mad., 318.

(5) (1917) I.L.R., 44 Cal., 1 (P.C.).