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whether the dividend declared was the final dividend or whether any further assets are available for payment of another dividend. The order of the lower Court is set aside and the case will go back to the lower Court for disposal in the light of the observations made by us. As regards the costs of this appeal we think we would not be justified in giving any costs to the appellants as all the delay and difficulty has arisen from the fact that he delayed the tendering of proof of his debt. We direct each party to bear his costs in this appeal.

K.R.

APPELLATE CIVIL.

Before Mr. Victor Murray Coutts Trotter, Chief Justice, and Mr. Justice Ramesam.

1924, March 26.

LETCHMANA CHETTY AND TWO OTHERS (PETITIONERS), APPELLANTS,

v.

SUBBIAH CHETTY AND OTHERS (RESPONDENTS), RESPONDENTS.*

Limitation Act (IX of 1908), sec. 7—Joint decree-holders—Minority of some of them—Father of minors acting as their next friend—Decree in favour of father and sons, with their father as next friend—Death of father after decree—No application for execution by father in his lifetime—First application by eldest son within three years of his attaining majority but more than three years after decree—Bar of limitation—Father, whether competent to give valid discharge under sec. 7—Civil Procedure Code (V of 1908), O. XXXII, r. 6—Time for filing application, when begins to run against joint decree-holders.

A Hindu father and his three minor sons represented by him as their next friend, obtained a joint decree on the 16th October 1913; the former died two months after decree without filing an application to execute it; the eldest son, who attained majority at the end of December 1914, applied for execution on the 3rd December 1917 within three years of his majority but

* Appeal against Order No. 222 of 1921.

more than three years after the decree. It was contended that this application was barred by limitation.

Held, that as the father was the next friend of his minor sons in the suit and in the decree, he was not, during his lifetime, in a position to give a legal and valid discharge of the decree without leave of the Court obtained under Order XXXII, rule 6 of the Civil Procedure Code; *Ganesha Row* v. *Tuljaram Row*, (1913) I.L.R., 36 Mad., 295 (P.C.), applied;

that as the father was not competent to give a valid discharge during his lifetime, the time for making an application for execution of the decree did not begin to run as against any of the joint decree-holders until their respective disabilities had ceased; and the application was not barred by limitation.

APPEAL against the order of P. S. SITARAMA AYYAR, Additional Subordinate Judge of Rāmnād at Madura, in Execution Application No. 48 of 1920 in Original Suit No. 224 of 1911.

This appeal arises out of an application for execution of the decree in Original Suit No. 224 of 1921, passed on the 16th October 1913 in favour of the father of the present appellants and the appellants who were all of them minors represented by their father as next friend. The father died in December 1913. He had filed no application for execution before his death. The first appellant attained majority about the end of December 1914. The first appellant presented the first application for execution of the decree on the 3rd December 1917 within three years of his attaining majority. The second and third applications for execution were made on 1st December 1918 and 13th November 1919, respectively, and the present application was filed by the first appellant for himself and as next friend of his brothers (who were still minors) on the 30th March 1920. In the second and third applications, the question of limitation was left open by the Court. The defendants contended that the present application was barred by limitation as the first application of the 3rd December 1917 was

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barred by limitation, as the father did not file any application for execution during his lifetime after the decree was passed. The appellants contended that the father could not have given a valid discharge and that therefore the application of 3rd December 1917 was within time. The Subordinate Judge held that the father as manager of the joint Hindu family could have given a valid discharge during his lifetime and that section 7 of the Limitation Act did not save limitation against any of the decree-holders. He dismissed the application as barred by limitation. The appellants preferred this appeal.

K. V. Krishnaswami Ayyar and *V. Rajagopala Ayyar* for appellant.

A. Swaminatha Ayyar for respondents.

JUDGMENT.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—This case furnishes a signal instance of the mischievous tendency of the Courts in this country to evade, or endeavour to evade, plain statutory mandates, and in no sphere of the law, so far as I have observed, has that tendency been more freely exercised than in that branch of the law we are concerned with in the present case, namely, the law of limitation. The way in which this matter stands is as follows :—In October 1913, a decree was obtained in a suit in which the plaintiffs were a father and his three sons, and the three sons were described on the face of the proceedings as suing through their next friend and guardian the first plaintiff (that is, the father). Two months after that decree the father died and it was not until December of the following year 1914 that the eldest of the three sons attained his majority. On the 3rd December 1917, well within three years of the attainment of majority, an execution application was taken out. It is said that application was barred because time must be taken to have run not from

the attainment of majority of the eldest son but from the date of the decree itself, i.e., October 1913. The reason for it is said to be this and it depends upon the construction of two sections of two statutes. One the learned Judge has referred to, and the other he has not. Before I approach the consideration of the case law I will look at the sections of the statutes themselves. The relevant section of the Limitation Act is section 7. It says this : "where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability (that means for our present purpose minority) and a discharge can be given without the concurrence of such person, time will run against them all ; but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased."

Therefore a good discharge, which could be given without the concurrence of the others, is necessary before limitation can be invoked. Now it is said that the father in this case became entitled to give a good discharge as soon as the decree was passed, and to give a good discharge not only on behalf of himself but on behalf of his minor sons. This Court held in a number of cases culminating in the case of *Ganesha Row* v. *Tuljaram Row*(1) that a Hindu father could, as managing member of a family, give a good discharge of a decree debt notwithstanding the fact that he might appear in the suit in the capacity of guardian *ad litem* or next friend. They based that decision upon the express provisions of Hindu Law and they said that his position as a father was independent of his position as guardian *ad litem* or next friend and that no disability which could attach to him can be

(1) (1913) I.L.R., 36 Mad., 295 (P.C.).

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supposed to attach to him by reasons to which I am coming presently and could in any way affect his position under the general Hindu law as father. That is the decision of this Court in several cases culminating in *Ganesha Row* v. *Tulja Ram Row*(1). What the learned Judges were dealing there with was an argument based upon a section of the Civil Procedure Code. That section is the present rule 6 in Order XXXII and it reads as follows:—

"A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor, either (*a*) by way of compromise before the decree or order, or (*b*) under a decree or order in favour of the minors."

As I said, the basis of the decision in Tuljaram Row's case was that the father occupied two entirely separate positions, that he was clothed with a double personality, and that inhibition of his acting in a certain manner in one of those capacities was no inhibition of his doing it under the other, the general powers of a Hindu father. Thereupon Tuljaram Row's case went to the Privy Council with this pronouncement of the Madras High Court to deal with and to say whether it was right or whether it was erroneous, and the words of the Privy Council are absolutely explicit in their application of the principle laid down by the Madras High Court and which, so far as I can see, is the necessary substratum of the whole of the argument that has been addressed to us. What their Lordships say is this:

"They (their Lordships of the Privy Council) consider it to be clear that when he (that is the father) himself is the next friend or the guardian of the minor, his powers are controlled by the provisions of the law and he cannot do any act in his capacity as father or managing member which he is debarred from doing as a next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment."

(1) (1911) 21 M.L.J., 1093.

In other words their Lordships say in the plainest language, the inhibition imposed upon him in one character must be extended to the other suggested character or else the Act becomes waste paper. It is said that there are decisions of this Court subsequent to that pronouncement of the Judicial Committee which nevertheless go on saying that a father can give a good discharge without the consent of the Court where the decree has been obtained. I am not at all sure that those cases—most of them are very inadequately reported—do purport to go counter to the principle laid down in Tuljaram Row's case, because it is not quite plain, so far as I can see, that, in those cases, the father was the guardian *ad litem* of the minors. All I can say is that, if he was the guardian, the Privy Council decision compels me to say that those cases were wrongly decided; if he was not, they merely say that where the father is not the guardian *ad litem* he can take the money and give a good discharge and though I do not disagree with that, I would like to reconsider that position hereafter. I am not saying that if this was what those cases had decided, those cases are incorrect; but I am quite clear about this, that if in those cases the father was the guardian *ad litem*, they are clearly wrongly decided in the teeth of the express mandate of the Privy Council case. No one, I think, could plausibly contend that a man in such a double position could give a good discharge. He can only give a discharge after obtaining the permission of the Court. It therefore follows that at the time when the father died, he had never been in a position to give a good and legal discharge for this debt and that therefore the time must be calculated as beginning to run from the date when the respective disabilities cease. Seeing that one of the decree-holders is still a minor, there is really no question of limitation arising in the case. The case will go back for further proceedings in execution.

The appellants will have their costs throughout.

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RAMESAM, J.—I agree.

Several decisions of this Court have been referred to by the learned vakil for the respondent. The first of these is the decision in *Duraiswami Sastrial* v. *Venkatarama Iyer*(1). It expressly purports to be based on the decision in *Ganesha Row* v. *Tulja Ram Row*(2) which was a decision of this court on Order XXXII, rule 7. It was reversed afterwards by the Privy Council in *Ganesha Row* v. *Tuljaram Row*(3). This was followed by a single Judge in *Ramanadham Sivayya* v. *Udatha Atchayya*(4). The next case is *Palaniandi Pillai* v. *Papathi Ammal*(5). It is true that this was after the decision of the Privy Council, but no reference was made in the argument to Order XXXII, rule 6, or to the fact that the decision in *Ganesha Row* v. *Tulja Ram Row*(2) on which the decision in *Duraiswami Sastrial* v. *Venkatarama Iyer*(1) was based, had been reversed by the Privy Council. This was again followed in *Venkatasubbiah* v. *Venkateswaralu*(6) and the same remarks apply to this case also. In *Rati Ram* v. *Niadar*(7) the decree was obtained by a single decree-holder. There was no minor among the original plaintiffs. The original decree-holder died leaving two sons, one a major and the other a minor. The major son on behalf of himself and acting as the next friend for his younger brother applied that they should be made legal representatives in the place of their deceased father. Before the order was made on the application, the applicant died, and on the day the application came on for hearing, nobody appeared and the petition was dismissed. The result was they were not made parties, so that it is not a case where we have two decree-holders one of whom

(1) (1911) 21 M.L.J., 1088.
(2) (1911) 21 M.L.J., 1093.
(3) (1913) I.L.R., 36 Mad., 295 (P.C.).
(4) (1913) M.W.N., 288.
(5) (1914) M.W.N., 159.
(6) (1917) M.W.N., 816.
(7) (1919) I.L.R., 41 All., 435.

is a major and the other a minor represented by the major as next friend. Order XXXII, rule 6, cannot apply to the facts of that case. That case is therefore correctly decided and cannot therefore help us in this case.

K.R.

APPELLATE CIVIL.

Before Mr. Victor Murray Coutts Trotter, Chief Justice, and Mr. Justice Ramesam.

KOYASAN KOYA HAJI AND OTHERS (LEGAL REPRESENTATIVES OF PLAINTIFF IN S.A. No. 949 OF 1921), APPELLANTS,

1924, March 26.

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF MALABAR, AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Madras Land Encroachment Act (III of 1905), ss. 6 and 14, Explanation—Notices to quit—Encroachment on poramboke lands—Plaintiffs' possession, not disturbed after notice—Review—Dismissal—Order to vacate—Suit for declaration and injunction—Cause of action for suit—Limitation of six months—Plaintiff, deeming himself aggrieved—Plaintiff's right to elect by which proceedings he is aggrieved—Starting point of limitation.

Where a Deputy Collector on behalf of the Government issued to the plaintiff, under section 6 of the Land Encroachment Act (III of 1905), a notice to quit certain lands in his occupation but nothing further happened to oust him from possession, and the plaintiff filed a review petition before the Deputy Collector who dismissed it and issued an order to the plaintiff to vacate the lands, on a suit for declaration and injunction being instituted by the plaintiff against the Secretary of State, more than six months from the issue of the first notice to quit but within six months of the last order to vacate the lands,

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* Second Appeals Nos. 949 and 1341 of 1921.