

APPELLATE CIVIL.

*Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Reilly.*

RAJAGOPALA AYYANGAR AND OTHERS
(PLAINTIFFS), APPELLANTS,

1927,
December 1.

v.

SRINIVASA RAGHAVA AYYANGAR AND OTHERS
(DEFENDANTS), RESPONDENTS.*

Indian Limitation Act (IX of 1908), sec. 7—Sale of joint family lands by father—No suit by eldest son questioning it within three years of his majority—Suit by younger sons against father and alienee—Limitation.

A suit by a younger son within three years of his attaining majority, against his father and an alienee from the father, to set aside an alienation made by the father of joint ancestral family properties is not barred by limitation, even though the eldest son who had attained majority more than three years prior to the suit had allowed his claim to become barred by limitation. *Jawahir Singh v. Udai Parkash*, (1926) I.L.R., 48 All., 152 (P.C.) and *Narayana Naicken v. Venkataswami Naicken*, (1926) 51 M.L.J., 845, followed. *Vigneswara v. Bapayya*, (1893) I.L.R., 16 Mad., 436 and *Doraiswami Serumadan v. Nondiswami Saluvan*, (1915) I.L.R., 38 Mad., 118, dissented from.

APPEAL against the decree of the Court of the Subordinate Judge of Tanjore in Original Suit No. 12 of 1920.

The facts are given in the judgment.

P. R. Srinivasan for the appellant argued that the decision in *Doraiswami Serumadan v. Nondiswami Saluvan*(1) relied on by the Subordinate Judge would not apply to the present case where the plaintiff's father whose alienation was questioned was alive and was impleaded in the suit as a defendant. During the lifetime of the father the elder brother of the plaintiff could not have acted as the manager and consequently would not be

* Appeal No. 288 of 1923.
(1) (1915) I.L.R., 38 Mad., 118.

RAJAGOPALA
 AYYANGAR
 v.
 SRINIVASA
 RAGHAVA
 AYYANGAR.

competent to give a discharge within the meaning of section 7 of the Limitation Act. In *Doraiswami Serumadan v. Nondiswami Saluvan*(1) the alienation questioned was by the mother acting as guardian of her minor sons and as the elder son on attaining majority would *ipso facto* as the senior coparcener become the manager and competent as such to give a discharge, the suit by the younger brother more than three years after attainment of majority by the elder brother was held barred. Further the decision in *Doraiswami Serumadan v. Nondiswami Saluvan*(1) has been expressly overruled by the recent Privy Council decision in *Jawahir Singh v. Udai Parkash*(2) where their Lordships of the Privy Council on facts exactly similar to the present case, approved of the contrary Allahabad view in *Ganja Dayal v. Muni Ram*(3) and dissented from the Madras decisions. Reliance was also placed on the decision of DEVADOSS and WALLACE, JJ., in *Narayana Naicken v. Venkataswami Naicken*(4) applying the Privy Council decision in a case where the father was alive at the institution of the suit.

K. S. Champakesa Ayyangar for the respondent, contended that the decision in *Doraiswami Serumadan v. Nondiswami Saluvan*(1) was still good law and that the decision of the Allahabad Court on appeal before Privy Council was not available and that in the Privy Council case in *Jawahir Singh v. Udai Parkash*(2) there was no discussion of the point. Reference was also made to the decision of DEVADOSS and JACKSON, JJ., in *Surayya v. Subbamma*(5) who held that the Privy Council had not overruled *Doraiswami Serumadan v. Nondiswami Saluvan*(1). The existence of the father in the present case would not make any difference. The test to be applied is whether there was capacity in the elder brother to give a discharge and not whether at the date of the suit or earlier, the elder brother could actually have given a discharge or not. As the elder brother in the present case could have acted as manager, and given a discharge he fulfilled the requisites of section 7 of the Limitation Act.

KUMARA-
 SWAMI
 SASTRI, J.

KUMARASWAMI SASTRI, J.—This appeal arises out of a suit filed by the plaintiffs who are the sons of the first defendant for partition and for setting aside the alienations made by the father, the first defendant.

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

(2) (1926) I.L.R., 48 All., 152 (P.C.).

(3) (1909) I.L.R., 31 All., 156.

(4) (1926) 51 M.L.J., 845.

(5) (1927) 53 M.L.J., 677.

The case of the plaintiffs was that they and the first defendant were members of an undivided Hindu family and that the father, the first defendant, made certain alienations which they impeach as not binding on them for the reasons given in the plaint. Several issues were raised. It is only necessary to consider issues 5 and 6. The Subordinate Judge dismissed the suit on the preliminary point that the suit was barred by limitation because the twenty-fifth defendant, the elder brother of the plaintiffs who was a major did not contest the alienations within the period of limitation prescribed by the Limitation Act and that consequently the plaintiffs who were his brothers were barred even though the suit was brought within three years after the first plaintiff attained majority and even though plaintiffs 2, 3 and 4 are still minors. The Subordinate Judge relies upon the decision in *Doraiswami Serumadan v. Nondiswami Sabuvan*(1) as clear authority for the position that the suit is barred. He also relies on a subsequent case *Gottukula Surapa Raju v. Gottumkkula Venkayya*(2).

It is contended for the appellants that the suit is not barred by limitation as the alienations were by the father who was alive at the date of the suit and who was the managing member and it was not competent for the twenty-fifth defendant to give a valid discharge or make the alienations binding on the plaintiffs. We think the present case is clearly within the ruling of the Privy Council in *Jawahir Singh v. Udai Parkash*(3). In that case a Hindu father had sold certain properties and a suit was brought by his younger son within three years of his attaining majority though the elder son had attained majority more than three years earlier and had allowed his claim to set aside the alienations to become barred.

RAJAGOPALA
 AYYANGAR
 v.
 SRINIVASA
 RAGHAVA
 AYYANGAR,
 ———
 KUNARA-
 SWAMI
 SASTRI, J.

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

(2) (1916) 32 I.C., 802.

(3) (1926) I.L.R., 48 All., 152.

RAJAGOPALA
 AYYANGAR
 v.
 SRINIVASA
 RAGHAVA
 AYYANGAR.
 ———
 KUMARA-
 SWAMI
 SASTRI, J.

Their Lordships of the Privy Council held that the suit brought by the younger son within three years of attaining majority was not barred by limitation. It appears from page 154 of the judgment that the High Court of Allahabad against whose judgment this present appeal was before the Privy Council relied on the decisions of *Ganga Dayal v. Mani Ram*(1) and differed from the view taken by the Madras High Court in *Vigneswara v. Bapayya*(2) and in *Doraiswami Serumadan v. Nondiswami Saluvan*(3). Their Lordships of the Privy Council observe as follows,

“ On appeal to the High Court the learned Judges overruled the plea of limitation. They relied on the decisions of their own Court (*Ganga Dayal v. Mani Ram*(1) and in a later case and differing from the view taken by the Madras High Court in *Vigneswara v. Bapayya*(2) and *Doraiswami Serumadan v. Nondiswami Saluvan*(3) on which the Subordinate Judge has rested his judgment) they held that the conduct of Faeth Singh, the eldest brother, did not affect the undoubted rights of the plaintiffs.”

Then dealing with the question of limitation what their Lordships of the Privy Council say is that they concur with the High Court and that they are of opinion that there is no substance in the appeal. It is clear from a perusal of this report that their Lordships of the Privy Council adopted the view taken by the Allahabad High Court which was against the view taken by the Madras High Court in 16 and 38 Madras. We find it difficult to distinguish the facts of the present case from the case of the Privy Council. We may also point out that in *Narayana Naicken v. Venkataswami Naicken*(4), DEVADOSS and WALLACE, JJ., held following 48 Allahabad that a suit to set aside a sale by a younger son within three years of attaining majority would not be barred, because his elder brother had not filed a suit within the time and allowed his claim to become barred. The fact that in

(1) (1909) I.L.R., 31 All., 156.

(2) (1893) I.L.R., 16 Mad., 486.

(3) (1915) I.L.R., 38 Mad., 118.

(4) (1926) 51 M.L.J., 845.

48 Allahabad the Privy Council recognized the joint cause of action does not help the respondents in this case very much because the question is whether a valid discharge can be given and there is no authority for holding that one brother can give a valid discharge. We are of opinion that the Subordinate Judge was wrong in holding that the suit was barred by limitation and dismissing the suit on the preliminary question.

RAJAGOPALA
 AYYANGAR
 v.
 SRINIVASA
 RAGHAVA
 AYYANGAR.
 —
 KUMARA-
 SWAMI
 SASTRI, J.

It is argued before us that plaintiffs 2 to 4 are minors and were born after the alienations and therefore they have no cause of action. Issue 6 has been raised as to whether plaintiffs 2 to 4 are entitled to maintain this suit, and that has not been disposed of by the Subordinate Judge. We do not know what grounds may be urged in support of their claim.

We reverse the decision of the lower Court and remand the suit for disposal on the issues raised in the case. We think the costs of the appeal will abide and follow the result of this suit. The costs of the respondents who appear before us here will abide and follow the result.

REILLY, J.—I agree. It is true, as has been argued by Mr. Champakesa Ayyangar, that we have not before us the judgment of the Allahabad High Court, which was under appeal before their Lordships of the Privy Council, and that in their Lordships' judgment they merely say that on the question of limitation they agree with the Allahabad High Court. But from the statement of facts in the report it is clear that their Lordships were dealing with facts similar to those of the present case and that the decision that that suit was not barred by limitation must apply to the present suit.

REILLY, J.