

1931
EMPEROR
v.
SOOBA.

whether the time asked by the police for the remand is, in the circumstances of the case, reasonable or not. The reasons given for releasing the accused on bail are (1) that section 167 of the Criminal Procedure Code applies to the case and (2) that the accused may be in jail for seven months before they are put on their trial. The first of these reasons appears to be wrong; the second is not really sufficient.

I therefore accept the application made on behalf of the Crown and cancel the order of the learned Sessions Judge. The Magistrate will have to consider, in the light of the above remarks, the cases of the accused individually when and if a further application is made for a further remand.

APPELLATE CIVIL.

Before Mr. Justice Pullan and Mr. Justice Niamat-ullah.

1931
March, 18.

RAM CHARITTER MISIR (DEFENDANT) v. SIRAJ TELI
(PLAINTIFF)*

Guardians and Wards Act (VIII of 1890), section 30—Sale of minor's property by certificated guardian—Permission to sell obtained by fraud—Sale voidable, not void—Suit by minor to recover property—Limitation Act (IX of 1908), articles 44, 144—Plea of limitation raised in first court but abandoned in appeal and raised again in second appeal—Practice and pleading.

A certificated guardian of a minor fraudulently obtained the permission of the District Judge to sell the minor's property by misrepresenting that the transaction was a mortgage. The minor brought a suit to recover possession of the property, more than three years after the attainment of majority.
Held—

According to section 30 of the Guardians and Wards Act a transfer made by a certificated guardian without the permission of the District Judge is voidable. If the permission of

*Second Appeal No. 1072 of 1928, from a decree of Shiva Harakh Lal, Additional Subordinate Judge of Ballia, dated the 13th of April, 1928, confirming a decree of Zillur Rahman, Munsif of Ballia, dated the 22nd of August, 1927.

the Judge was obtained through misrepresentation or fraud the permission is certainly void but the transaction itself is not void on that score. A transfer made in pursuance of such permission must be considered to be one made without permission, and as such it is voidable under section 30. When the minor, after attaining majority, brings a suit to recover possession of the property, article 44 of the Limitation Act applies to such suit and the plaintiff can not avail himself of the longer period provided for by article 144 of the Limitation Act.

A plea of limitation raised and argued in the court of first instance, but not raised or argued in the lower appellate court, can be re-agitated in second appeal, where there is no complication as regards the facts on which the plea rests, e.g. when it rests on facts admitted by the plaintiff himself.

Mr. *A. P. Pandey* and Miss. *S. K. Nehru*, for the appellant.

Messrs. *Haribans Sahai* and *Janaki Prasad*, for the respondent.

PULLAN and NIAMAT-ULLAH, JJ. :—This is a defendant's appeal and arises out of a suit brought by the plaintiff respondent for recovery of certain property sold by his mother, who was the certificated guardian, during his minority, to the defendant appellant.

It appears that an application was made by the guardian to the District Judge for permission to mortgage the property in dispute. The District Judge made some inquiries to satisfy himself as regards the propriety of transfer of the minor's property and directed the guardian to produce the draft of the mortgage deed for which sanction had been applied for. At a later date the draft of a sale deed was filed. It has been found that the District Judge was under the impression that the draft produced before him was that of the proposed mortgage deed to which his permission referred. The District Judge, it has again been found, sanctioned the draft under the impression that it related to the transaction of mortgage to which the

1931

HAM CHARIT-
TER MISIR
D.
SIRAJ TELL.

1931

RAM CHARIT-
TER MJSIR
v. TELI.
SIRAJ TELI.

proceedings before him referred. The sale deed was eventually executed on the 1st of June, 1918, for a sum of Rs. 500. The plaintiff respondent instituted the suit which has given rise to this appeal on the 22nd of January, 1927, claiming possession and impugning the sale deed executed by his guardian as void. It was expressly stated in the plaint that he attained majority on the 1st of December, 1923, a question on which the defendant appellant joined issue. It is not necessary for us to find the exact date on which the plaintiff attained majority, as for purposes of the appeal it is enough to assume that the date given by the plaintiff is correct.

Both the courts below have decreed the suit. The court of first instance held that the permission of the District Judge was obtained by misrepresentation and fraud and that the plaintiff's suit was governed by twelve years' limitation provided for by article 144. On these findings it decreed the plaintiff's suit for possession subject to payment by him of a sum of Rs. 244, part of the consideration of the sale deed (namely, Rs. 500) which according to that court was warranted by legal necessity. In appeal before the lower appellate court the question of limitation does not seem to have been raised either in the petition of appeal or in arguments, and the learned Additional Subordinate Judge affirmed the decree passed by the court of first instance without reference to the question of limitation.

The only point in second appeal is that the plaintiff's suit is, on the face of the plaint, barred by limitation. We may clear the ground by disposing of the contention put forward before us by the learned advocate for the respondent that the plea of limitation was abandoned before the lower appellate court. It is true that the finding of the court of first instance that

article 144 of the Indian Limitation Act applied was not impugned in the grounds of appeal. The judgment of the lower appellate court is also silent as to any question of limitation having been raised before it in course of the arguments. We are inclined to think that the pleader who represented the appellant in the lower appellate court was of opinion that the question of limitation had been rightly decided by the court of first instance. We are, however, of opinion that it is open to the appellant to re-agitate the question of limitation on the facts admitted by the plaintiff respondent. If there had been any complication as regards the facts on which the plea rests, so that the finding of the lower appellate court could possibly have been in favour of the respondent, we might not have entertained the plea of limitation under the circumstances referred to; but the argument addressed to us rests on facts admitted by the plaintiff himself. The date on which, according to the plaintiff respondent, he attained majority was the 1st December, 1923, and the suit having been instituted on the 22nd of January, 1927, was barred by the three years' rule, if it is applicable.

The only question is whether article 44 or article 144 of the Indian Limitation Act applies. It is argued that as permission of the District Judge was obtained by practising fraud, the transaction entered into by the guardian in pursuance of such permission is void. The contention is not, in our opinion, sound. Section 30, Guardians and Wards Act, declares that the transfer made by a certificated guardian without the permission of the District Judge is voidable. If the permission of the District Judge was obtained through fraud or misrepresentation it is certainly void, but the transaction itself is not void on that score. A permission obtained by a fraudulent misrepresentation being void is a nullity, and a transfer ostensibly made in pursuance of such permission must be considered to be

1931

 RAM CHARIT-
 TER MISIR
 v.
 SIRAJ TELL.

1931
 RAM CHARIT-
 TER MISHR
 v
 SIRAJ TELI.

one made without permission, and as such it is voidable under section 30, Guardians and Wards Act. In this view, there can be no doubt that article 44 of the Limitation Act is applicable, and the plaintiff cannot avail himself of the longer period provided by article 144 for a suit for possession if his claim to have the voidable alienation made by the guardian during the plaintiff's minority set aside is barred. In the case before us the suit, having been admittedly brought more than three years from the date the plaintiff attained majority, is clearly barred.

The result is that this appeal must succeed. It is accordingly allowed, and the decrees passed by the courts below are set aside and the plaintiff's suit is dismissed.

Before Mr. Justice Young and Mr. Justice Pullan.

1931
 March, 19.

ABDUL SHAKUR (DEPENDANT) v. NAND LAL AND
 OTHERS (PLAINTIFFS)*

Haq-i-chaharum—Covenant in lease binding lessee to pay to landlord one-fourth of sale price on transfer by lessee—Transferee taking with notice of covenant—Covenant not enforceable against transferee—Transfer of Property Act (IV of 1882), section 40.

A covenant in a lease by which the lessee bound himself to pay to the landlord *haq-i-chaharum*, i.e. one-fourth of the sale price whenever he sold his interest in the land, can not be enforced against the transferee, although he has purchased with notice of the covenant.

Haq-i-chaharum can not be considered to be a restrictive covenant of the kind dealt with in English law as in the case of *Tulk v. Moxhay* (1).

Section 40 of the Transfer of Property Act can not be applied to a personal obligation such as the payment of

*Second Appeal No. 1255 of 1928, from a decree of V. Mehta, Subordinate Judge of Benares, dated the 2nd of May, 1928, modifying a decree of Niraj Nath Mukerji, Additional Munsif of Benares, dated the 4th of January, 1928.