appellate Court. I do not see any reason to disallow the mesne profits which have been allowed by the trial Court.

The result is that all the contentions in support of the appeal fail, and that the decree of the lower appellate Court is affirmed with costs.

BATCHELOR, J.:—I concur both in the conclusions and in the reasons of my learned colleague.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Heaton.

1916.
September 28.

NARO GOPAL KULKARNI (ORIGINAL DEFENDANT NO. 1) APPELLANT *v.* PARAGAUDA BIN BASAGAUDA AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT NO. 2) RESPONDENTS.*

Hindu Law—Joint family Property—Alienation by father—Suit by sons to set aside alienation—One of the sons born after alienation—Whether his interest bound—Time-barred debt acknowledged by registered deed—Undue influence—Father's interest bound by the deed—Time when the share is ascertained.

The plaintiffs P and B and defendant No. 2 their father constituted a joint Hindu family. On September 19, 1901, defendant No. 2 sold certain family land to defendant No. 1. Plaintiff B was born subsequently to the date of the alienation and was a minor when the suit was filed. The plaintiffs sued to set aside the sale deed on the ground that it was taken from defendant No. 2 by undue influence and for no consideration. The Subordinate Judge dismissed the plaintiffs' suit holding that the consideration for the deed was an antecedent debt which though barred by time was acknowledged by defendant No. 2 by a registered deed which was binding on the plaintiffs. The lower appellate Court reversed the decree and directed that plaintiffs and defendant No. 2 be restored to possession. On appeal to the High Court by defendant No. 1, the question was raised whether the time-barred debt acknowledged by the

*Appeal No. 43 of 1915 under the Letters Patent.

1916.

NARO GOPAL v. PARAGAUDA.

registered deed was not good consideration for the alienation of the defendant No. 2's interest in the property,

Held, that defendant No. 2's interest was bound by the deed.

Held, also, that defendant No. 1 acquired the half share in the alienated property to which defendant No. 2 was entitled at the date of the alienation owing to the fact that the minor plaintiff was not then born.

APPEAL under the Letters Patent against the decision of the High Court in Second Appeal No. 832 of 1915 preferred against the decision of S. R. Koppikar, First Class Subordinate Judge, A. P., at Belgaum reversing the decree passed by K. G. Kulkarni, Joint Subordinate Judge at Athni.

Suit to recover possession.

The plaintiffs Paragauda and Babagauda with their father Basagauda (defendant No. 2) constituted a joint Hindu family. On the 19th September 1901 defendant No. 2 as the head of the family effected a sale of certain family land in favour of defendant No. 1.

The material portion of the sale deed was—

"You took a bond for expenses which you incurred in the prosecution of my suit for partition against my Bhaubands and sued me for their recovery in Suits Nos. 740 and 741 of 1896 of the Athni Court. The proceedings held in these suits ended against you. But it is true you spent money in my suits against my Bhaubands and I have consented to pay the amount which may be found to have been spent after an account at the house of deceased Vishnupant Gadgil, pleader, and I have expressed this consent even in my written statement. Though the suits were decided against you and because the amount is really due to you, you and I have come to an account and fixed the amount due from me at Rs. 1,500 including interest. If more is found to have been spent, I am not liable to pay it. For Rs. 1,500 settled as due in this way, and Rs. 1,500 which I have taken today in cash for my personal needs, or a total of Rs. 3,000, I sell you the land Revision S. No. 722, measuring 19 acres and 11 gunthas and assessed at Rs. 22, &c., &c."

The plaintiffs in 1912 sued to recover possession of the land or in the alternative to get their two-thirds share by partition by metes and bounds alleging that the land was the ancestral property of the family; that

the sale deed was taken by defendant No. 1 by exercising undue influence over defendant No. 2 and for no consideration and that the plaintiffs were not bound by the transaction.

The plaintiff Babagauda was born after the date of alienation and was a minor at the date of the suit.

Defendant No. 1 contended that he purchased the land for a valid consideration; that the plaintiffs could not question the alienation; that the suit for possession was not maintainable without first having the sale deed set aside; that the plaintiffs could not sue for partial partition and that the claim was barred by limitation.

Defendant No. 2 did not appear at the trial.

The Subordinate Judge held that the consideration for the sale was an antecedent debt of Rs. 1,500 which though barred by time was acknowledged by the registered sale deed and further cash advances of Rs. 1,500, that the sale was binding on the plaintiffs. He, therefore, dismissed the suit.

The lower appellate Court reversed the decree holding that as regards the Rs. 1,500 representing the further advances they were not proved to have been made and as regards the Rs. 1,500 in respect of the acknowledged time-barred debt, the 2nd defendant was influenced unduly by defendant No. 1. He decreed that the plaintiffs and defendant No. 2 should be restored to possession.

The defendant No. 1 preferred a second appeal to the High Court which was dismissed by Batchelor J., under Order XLI, Rule 11, clause (1) of the Civil Procedure Code, 1908.

Against the decision, defendant No. 1 preferred an appeal under the Letters Patent.

1916.

NARO GOPAL v. PARAGAUDA.

Coyaji with *K. H. Kelkar* for the appellant :—The lower appellate Court does not as a matter of fact find that there was absolutely no consideration for the sale in suit. That Court, however, seems to be under the impression that a time-barred debt is not a good and valid consideration. That view is wrong: see *Subramania Aiyar* v. *Gopala Aiyar*.[1]

If then there is good and valid consideration for the sale in suit it must stand so far at any rate as defendant No. 2 the father is concerned. He has not sought to avoid it nor has he put in any written statement or preferred an appeal from the decree of the first Court. He in fact admits consideration. If he had to file a suit his suit would have been time barred.

We also say that the share of plaintiff No. 2 is bound by the sale in dispute as he was born after that sale: see *Kastur Bhavani* v. *Appa*;[2] *Rambhat* v. *Lakshman Chintaman Mayalay*;[3] *Bholanath Khettry* v. *Kartick Kissen Das Khettry*;[4] *Chuttan Lal* v. *Kallu*.[5] The plaintiff would, therefore, get a decree, in respect of one-third and not even one-half: see *Chinnu Pillai* v. *Kalimuthu Chetti*.[6]

We further contend that the whole suit ought to be dismissed because the plaintiff cannot claim to recover a share in any particular property in suit. His proper remedy is by way of a partition suit.

Jayakar with *A. G. Desai* for respondents Nos. 1 and 2 :—The lower Court holds that there was absolutely no consideration for the sale in suit. It also finds that the plaintiffs' father did not give his free consent to the sale in suit and was a victim of the machinations of the defendant. This is, therefore, a finding of fact.

(1) (1909) 33 Mad. 308.
(2) (1876) 5 Bom. 621.
(3) (1881) 5 Bom. 630.
(4) (1907) 34 Cal. 372.
(5) (1910) 33 All. 283.
(6) (1910) 35 Mad. 47.

The sale is tainted at its root on the findings of the lower appellate Court. That being so it cannot be successfully contended that it ought to stand in part, i.e., so far as defendant No. 2 is concerned. The whole transaction is a nullity and is, therefore, inoperative.

The fact that defendant No. 2 did not contest the plaintiffs' suit is no answer to the present suit which seeks to set aside the sale in dispute as being wholly inoperative: see *Ningareddi* v. *Lashmawa*;[1] *Ramanna* v. *Venkata*;[2] *Vrandavandas Ramdas* v. *Yamunabai*.[3]

As regards the contention that the plaintiff No. 2 is not entitled to any share as he was not born at the time of the sale in dispute, we submit, that for correctly answering this point we have not to look to the date of the sale or to the date of the birth of plaintiff No. 2, but to the date of the actual partition of the family property. It is at the time of the partition that the shares are finally determined and by the time such partition is actually effected the shares must fluctuate by births or deaths in the family: see *Gurlingapa* v. *Nandapa*;[4] *Pandurang Anandrav* v. *Bhaskar Shadashiv*.[5]

The point that the whole suit ought to be dismissed is suggested for the first time in second appeal. This objection pre-supposes a number of things, to wit, that there is other family property. These points will have to be gone into and it is too late now to non-suit the plaintiff on this point.

SCOTT, C. J.:—This suit was instituted by the plaintiffs as members of a joint Hindu family of which their father the 2nd defendant was the head, to set aside a sale of certain family land being Survey No. 722

[1] (1901) 26 Bom. 163.
[2] (1888) 11 Mad. 246.
[3] (1875) 12 Bom. H. C. R.229.
[4] (1896) 21 Bom. 797.
[5] (1874) 11 Bom. H. C. R. 72.

1916.

NARO GOPAL v. PARAGAUDA.

measuring 19 acres and 11 gunthas executed by the defendant No. 2 in favour of defendant No. 1 on the 19th of September 1901 and to recover possession thereof from the 1st defendant or in the alternative for their $\frac{2}{3}$rd share therein by partition or at least for joint possession with the defendant No. 1 : they alleged that the sale deed was taken from the defendant No. 2 by undue influence and for no consideration. The learned Judge of the trial Court held that the consideration for the deed was an antecedent debt which though barred by time was acknowledged by the registered sale-deed and further advances aggregating Rs. 1,500 which he held established. He held that even the antecedent debt would authorise an alienation by the father binding on the sons and he dismissed the suit with costs.

His decree was reversed on appeal the learned appellate Judge holding that as regards the Rs. 1,500 representing the further advances they were not proved to have been made and as regards the Rs. 1,500 in respect of the acknowledged time-barred debt the 2nd defendant must have been influenced unduly by the defendant No. 1 and could not have given his free consent to its inclusion as part of the consideration. He decreed that the plaintiffs and defendant No. 2 should be restored to possession of the property in suit. It may be conceded that the learned trial Judge was in error in thinking that a time-barred debt could support an alienation by a father of joint family property even against his sons : see *Subramania Aiyar* v. *Gopala Aiyar* ;[1] and as to the Rs. 1,500 representing fresh advances, it may for the purpose of argument be assumed that the appellate Court was right in holding them not proved : the question however still remains whether the time-barred debt acknowledged by the registered deed was not good consideration for the alienation of the defendant No. 2's interest in the property.

[1] (1909) 33 Mad. 308.

Upon the findings of the lower appellate Court the plaintiffs are not, or at all events the adult plaintiff is not, bound by the deed and it may to that extent be treated as a nullity: see *Unni* v. *Kunchi Amma*.[1] But it is otherwise with the defendant No. 2 the executing party whose interest is *prima facie* bound by his deed. Assuming the deed was obtained from him by undue influence it is only voidable at his option. He however has not sought to avoid it. His right to file a suit for such a purpose has long since been barred by limitation. His sons have no right to exercise his option. To hold as has been held by the lower appellate Court that he cannot have done willingly what he has explicitly purported to do in his sale-deed is to make a case which was not open to him and which he never tried to make for himself. The lower appellate Court has not found that no moneys were expended by defendant No. 1 for defendant No. 2 which could be acknowledged. Such a finding would be impossible in view of the defendant No. 2's admission when called as a witness on behalf of the plaintiffs. "I was plaintiff in Suit No. 415 of 1887. Naro Gopal (defendant No. 1) used to assist me with money in that suit. I passed a document for that amount." The learned Judge says that the documents show that the defendant No. 2 was at least reckless in matters of business and incapable of exercising ordinary prudence. That however is no justification for disregarding the terms of section 19A of the Indian Contract Act and Article 91 of the Indian Limitation Act. The defendant No. 2 is, therefore, bound by his deed and the defendant No. 1 is entitled to the defendant No. 2's interest in the property.

We have next to consider what is the interest in the property which passed to the purchaser. Is it the half share to which the defendant No. 2 was entitled at the

[1] (1890) 14 Mad. 26,

1916.

NARO GOPAL v. PARAGAUDA.

date of the sale or the ⅓rd to which but for the alienation the defendant No. 2 since the birth of his younger son would now be entitled? As remarked by Sir Charles Farran in *Gurlingapa* v. *Nandapa*[1] the decisions in *Pandurang Anandrav* v. *Bhaskar Shadashiv*[2] and *Mahabalaya* v. *Timaya*[3] point to the period of alienation as that at which the rights of the alienee are to be determined, but the Court nevertheless in *Gurlingapa* v. *Nandapa*[1] laid down *obiter*, following the decision of the Madras High Court in *Rangasami* v. *Krishnayyan*,[4] the proposition that a purchaser of a coparcenary share stands in no better position than his alienor and consequently like the latter is liable to have his share diminished before partition by the birth of other coparceners if he stands by and does not insist on partition.

This conclusion appears to be inconsistent with the proposition that an alienation by a joint tenant effects a severance as a result of which the alienee before division by metes and bounds becomes a tenant-in-common: see *Jogeswar Narain Deo* v. *Ram Chund Dutt*;[5] *Udaram Sitaram* v. *Ranu Panduji*.[6] It is also as pointed out in *Chinnu Pillai* v. *Kalimuthu Chetti*[7] (in which *Rangasami* v. *Krishnayyan*[4] was dissented from) inconsistent with the orders passed by the Privy Council in *Baboo Hurdey Narain Sahu* v. *Pundit Baboo Rooder Perkash Misser*.[8]

In this state of the authorities we must hold that the defendant No. 1 acquired the half share in the alienated

(1) (1896) 21 Bom. 797 at p. 805.
(2) (1874) 11 Bom. H. C. R. 72.
(3) (1875) 12 Bom. H. C. R. 138.
(4) (1891) 14 Mad. 408.
(5) (1896) L. R. 23 I. A. 37 at p. 44.
(6) (1875) 11 Bom. H. C. R. 76 at p. 81.
(7) (1910) 35 Mad. 47.
(8) (1883) L. R. 11 I. A. 26.

property to which the defendant No. 2 was entitled at the date of the alienation owing to the fact that the minor plaintiff was not then born.

The plaintiffs are interested equally in one moiety only of the property in suit. The defendant No. 2 whose interest is now confined to the other family property, if any, raises no objection to partition being limited to the property in suit. Under the circumstances I do not think the defendant No. 1 as tenant-in-common of one moiety of the suit land can object to partition: *Subramanya Chettyar* v. *Padmanabha Chettyar*;[1] *Ram Charan* v. *Ajudhia Prasad*.[2]

HEATON, J.:—My only difficulty in the case is this:

If there was no consideration at all for the sale of the property by defendant No. 2 to defendant No. 1 in 1901, the sale is invalid and can be set aside at the instance of the plaintiffs. For a Hindu coparcener can only make a valid alienation of his share or part of his share in an undivided Hindu family property if he does so for valuable consideration. This aspect of the case is one which was presented in this Court, but was not considered by the Court of first appeal. The Judge of that Court dealt with the question of consideration more generally. He asked himself the question whether the consideration stated in the sale-deed was proved. He found that it was not and he further found that it was not proved what the consideration actually was. But he did not ask himself the question whether it was shown that there was not any consideration at all. There are indications in his judgment that he was not of opinion that there was no consideration whatever for the sale. He does not repudiate or contradict the finding of the trial Court that there was or at least had been an antecedent debt payable by the defendant No. 2 to

[1] (1896) 19 Mad. 267.

[2] (1905) 28 All. 50.

1916.

NARO GOPAL v. PARAGAUDA.

defendant No. 1. Therefore we can find for ourselves that there was valuable consideration. That, I think, is an appropriate way out of the difficulty which confronts me and moreover it is a way which brings about a conclusion consonant with law and justice.

I agree that by the sale, defendant No. 2 acquired a share of one-half not of one-third only in the land sold. But he acquired a right to partition not a right to possession prior to partition. As their Lordships of the Privy Council stated in the case of *Baboo Hurdey Narain Sahu* v. *Pundit Baboo Rooder Perkash Misser*.[1] "According to the judgment of their Lordships in *Deendyal's case*,[2] the decree, which ought properly to have been made would have been that the plaintiff... should recover possession of the whole of the property, with a declaration that the appellant, as purchaser at the execution sale, had acquired the share and interest of Shib Perkash Misser, and was entitled to take proceedings to have it ascertained by partition." Still in this case the plaintiffs have sued in the alternative for partition, so the theoretical objection to a decree for partition disappears.

There must, therefore, be a decree for partition in equal moieties; each party to bear his own costs throughout.

Decree reversed.

J. G. R.

[1] (1883) L. R. 11 I. A. 26 at p. 30. [2] (1877) L. R. 4 I. A. 247.