*Per Curiam.* We vary the learned Judge's judgment by declaring that on the true construction of the settlement the plaintiff has not become absolutely entitled to the property at Kambekar Street in Bombay mentioned in the plaint, but is entitled to the net rents and profits derived from such property during her lifetime. Otherwise the appeal to be dismissed. Costs of all parties of the appeal to come out of the trust estate, those of defendant No. 1 being as between attorney and client.

Attorneys for appellant : Messrs. *Divecha & Thakore.*

Attorneys for respondent : Messrs. *Thakordas & Madgaokar.*

*Answer accordingly.*

B. K. D.

## APPELLATE CIVIL.

*Before Sir John Beaumont, Chief Justice, and Mr. Justice Divatia.*

MALLAPPA BIN GURUPADAPA BELVALDAVAR (ORIGINAL DEFENDANT NO. 2), APPELLANT *v.* ANANT BALKRISHNA NARAYANPEIT AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT NO. 3), RESPONDENTS.*

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*Hindu law—Hindu minor's property—Alienation by mother acting as guardian—Suit by minor on attaining majority—Suit for possession and mesne profits—Legal necessity not proved—Purchase money paid—Plaintiff not seeking to set aside conveyance as from its date—Plaintiff only entitled to recover possession with mesne profits from date of suit.*

In 1915 the mother of a Hindu minor, acting as his guardian, sold certain property in order to raise money for the education of the minor and the marriage expenses of her daughter. In 1929, that is, within three years of his attaining majority, the minor sued the alienee to recover possession of the property with past and future mesne profits.

*Held,* (1) that although the purchase money had been paid, legal necessity did not in fact exist and that the purchaser did not make enquiry as to the existence of the alleged necessity;

(2) that since the plaintiff did not sue to set aside the conveyance as from its date, but merely sued to recover possession, he could not treat the purchaser, who was in,

*First Appeal No. 31 of 1930.

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under a voidable conveyance, as a mere trespasser before the date at which the plaintiff elected to treat the conveyance as void as against him;

(3) that the plaintiff was, therefore, only entitled to an order for recovery of possession with mesne profits from the date of suit.

*Sahebgouda Sonappa* v. *Parawa*,[1] followed.

*Appanna Kenchappa* v. *Vithal Ramachandra*,[2] not followed.

*Banwari Lal* v. *Mahesh*,[3] referred to.

Where the plaintiff sues to set aside the original transaction, whether it be a sale by a Hindu widow, or manager of a joint family, or guardian of a minor, and he makes the original parties to the transaction, or their representatives, parties, he is entitled to an order restoring the parties to their original position. In such a case the Court is in a position to make such order as is just and equitable, and to provide that the plaintiff recovers the land with mesne profits from the date from which he was dispossessed, and the defendant-purchaser gets back his purchase money with interest, and in a proper case other moneys to which he may be entitled. But if the attitude which the plaintiff adopts is that he merely desires to recover possession of the land, and that the payment of the purchase money to a party who was not entitled to receive it, is no concern of his, then he is entitled merely to an order for recovery of possession with mesne profits from the date of suit.

FIRST APPEAL from the decision of B. D. Sabnis, First Class Subordinate Judge, Dharwar, in Special Civil Suit No. 7 of 1929.

Suit to recover possession of property.

The property in suit which originally belonged to one Antaji Krishna was owned by his son, Balkrishna, and later, by Anant (plaintiff). After Balkrishna's death and during plaintiff's minority, plaintiff's mother Venubai (defendant No. 3), while in possession of the property, sold it to Parvetappa (defendant No. 1), on February 26, 1915. The alienation was for Rs. 1,000 and the sale-deed recited that the money was required to meet the expenses of the son's education and the daughter's marriage.

Plaintiff alleged that Venubai had no right to sell the property, that the amount was not utilized for his benefit, that the sale was without legal necessity, that he was not bound by the sale, and that defendant No. 1 and his

[1] (1934) F. A. No. 73 of 1932, decided on 31st August 1934 (unrep.).
[2] (1936) F. A. No. 20 of 1930, decided on 10th February 1936 (unrep.).
[3] (1918) L. R. 45 I. A. 284, s. c. 41 All. 63.

undivided brother (defendant No. 2) refused to hand over possession to plaintiff. On January 16, 1929, plaintiff, therefore, sued the defendants to recover possession of the suit property with Rs. 2,600 as past mesne profits for thirteen years at the rate of Rs. 200 per year, future mesne profits and costs.

Defendants Nos. 1 and 2 contested the claim, contending that the sale was for legal necessity and for plaintiff's benefit, that the same was binding on him, that Rs. 1,000 were paid in cash, and that he was not entitled to mesne profits. Defendant No. 3 admitted the plaintiff's claim.

The trial Judge held that the alienation was not for legal necessity, that it was not binding on the plaintiff and that defendants Nos. 1 and 2 did not really pay the consideration as stated in the sale-deed. He accordingly gave plaintiff a decree for possession with Rs. 1,950 as past mesne profits and made an order for future mesne profits, agreeably to the provisions of Order XX, rule 12 (*c*), of the Civil Procedure Code. In making the order the learned Judge observed as follows :—

"The sale-deed not having been passed for the benefit of the minor, the present Plaintiff, and by the mother in her own name as owner, the Plaintiff is, I think, entitled to mesne profits, the Defendants Nos. 1 and 2 being in wrongful possession from the date of the sale. As to the amount, the extracts from the Record of Rights put in by the Defendants do show that the rental capacity of the second land in suit is Rs. 64 a year and this land is evidently of inferior quality than the first land as we can see from the respective assessment amounts as compared with the area. We may safely therefore take the rent to be at least ten times the assessment. The total assessment is Rs. 19. The rent thus comes to Rs. 190 a year ; out of this we have to deduct the assessment. We must make some allowance for bad seasons. Taking all these facts and possibilities into consideration I accordingly fix the amount of mesne profits at Rs. 150 a year on an average. The total amount due to Plaintiff for 13 years thus comes to Rs. 1,950 only. I accordingly find as above on issue No. 3."

Defendant No. 2 appealed.

*G. R. Madbhavi*, for *V. V. Bhadkamkar*, for appellant.

No appearance for the respondents.

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BEAUMONT C. J. This is an appeal from a decision of the First Class Subordinate Judge of Dharwar. The plaintiff sued to recover possession of the suit property on the ground that it had been sold to the defendants by the plaintiff's guardian, and that the sale was not for legal necessity and was invalid against the plaintiff. The learned Judge made an order that the plaintiff do recover possession of the suit lands from defendants Nos. 1 and 2 together with Rs. 1,950 as past mesne profits from the date of the sale. The respondents have not appeared in this appeal.

The sale-deed alleges necessity in that the money was required for the education of the son of the vendor, who was the mother of the plaintiff, and for the marriage of her daughter. The learned Judge held that these grounds of necessity were not proved. The learned Judge refers to a good many discrepancies in the evidence, to which I attach considerably less importance than he did. The sale took place in 1915, and the witnesses were giving evidence fifteen years later, and it is not to be wondered at that their recollections of what took place did not altogether agree. The learned Judge came to the conclusion that the purchase money, which was Rs. 1,000, was not paid, but I am not prepared to accept that view. There were two independent witnesses, Yellappa and Shankargouda, who stated that the money was paid in their presence. I see no reason to reject that evidence. It was not the plaintiff's case that the money was not paid. The plaintiff's case was that the money was paid to his mother at the instance of her brother, and that the object of the sale was to raise money to defend two other brothers of hers on a charge brought against them for dacoity. But I think the learned Judge's view is correct that it is not proved that necessity for the sale did exist, and that the defendants did not make sufficient enquiries and satisfy themselves as to the existence of the alleged necessity. Defendant No. 1, who was the actual purchaser and the elder brother of defendant No. 2, has died. So we have not

got his version of what took place. But all the witnesses for the defendants admit that, as far as they know, no attempt was made to ascertain whether in fact a daughter of the vendor was about to be married, or whether her son required moneys to be spent for his education. The son, viz., the present plaintiff, was only two or three years old at the time, and on the evidence, money was not required at the moment for his education or for the marriage of a daughter. I think, therefore, that there is no ground on which we can disturb the learned Judge's finding that in fact legal necessity did not exist, and the purchaser did not take the necessary steps to ascertain whether or not there was any case of legal necessity. That being so, we cannot disturb the Judge's order that the plaintiff is entitled to recover possession.

But a serious question arises as to the propriety of the learned Judge's order for payment of mesne profits as from the date of the sale in 1915. The net result of his order is that the unfortunate purchaser loses his purchase money as from 1915, loses the land for which he paid, and loses all the profits made out of the land since 1915, largely no doubt by his own exertions, although all that can be said against him is that after fifteen years he was unable to prove that he exercised due diligence in ascertaining the facts. He is placed in a far worse position than he would have been in, if the conveyance had been set aside on the ground of his fraud, when the parties would have been restored to their original position. It seems to me that the learned Judge's order cannot be justified on principles of equity, and the question is whether in law it is right. There are two conflicting decisions of this Court on the point, both unreported. In *Sahebgouda Sonappa* v. *Parawa*,[1] a bench of this Court followed two Madras cases, *Subba Goundan* v. *Krishnamachari*[2] and *Ramasami Aiyar* v. *Venkatarama Ayyar*,[3] in

[1] (1934) F. A. No. 73 of 1932 decided by Beaumont C. J. and Sen J. on August 31, 1934 (Unrep.).
[2] (1921) 45 Mad. 449.
[3] (1923) 46 Mad. 815.

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deciding that past mesne profits were not recoverable. Those were cases in which the reversioner was suing to recover possession on the ground that a sale made by a Hindu widow was not for legal necessity or for the benefit of the estate, and the Court held that the purchaser could not recover mesne profits before the date of the suit, since the conveyance was voidable and not void. No doubt, in the case of a sale by a widow no mesne profits could be recovered in any event before the date of the widow's death, because the sale would be binding upon her, and she would be herself entitled to the profits down to that date. But as from the date of her death mesne profits could be awarded if the conveyance was void *ab initio* against the reversioner. In a subsequent case before another bench of this Court, *Appanna Kenchappa* v. *Vithal Ramachandra*,[1] in which the plaintiff was suing to set aside a sale made by his guardian, the Court refused to follow the previous decision of this Court or the cases in Madras, holding that in those cases certain decisions of the Privy Council had been overlooked, and suggesting that there might be a distinction in principle between a sale by a guardian and a sale by a Hindu widow. The cases in the Privy Council which were relied on were *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*,[2] *Raja Rai Bhagwat* v. *Debi Dayal Sahu*,[3] and *Satgur Prasad* v. *Har Narain Das*.[4] In my opinion, the first and the last of those cases have really no bearing on the matter before us. The case of *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[2] was a case in which the Privy Council had to consider whether a suit by a reversioner to set aside an *ijara*, or lease, made by a Hindu widow was a suit to recover possession of property which fell under article 141 of the Indian Limitation Act, or was a suit to cancel or set aside an instrument not otherwise

[1] (1936) F. A. No. 20 of 1930, decided by Broomfield and Tyabji JJ., on February 10, 1936 (Unrep.).
[2] (1907) L. R. 34 I. A. 87, s. c. 34 Cal. 329.
[3] (1908) 10 Bom. L. R. 230 P. C.
[4] (1932) L. R. 59 I. A. 147, s. c. 34 Bom. L. R. 771.

provided for and fell under article 91. The Board recognized that the alienation by the widow was voidable and not void, but they held that it was sufficient for the plaintiff to sue to recover possession, and that by so doing he elected to treat the transaction as void, and that it was not necessary for him to sue in express terms to have the conveyance set aside. The Court was not dealing with mesne profits, and the case is no authority for the proposition that in such a case the conveyance is void *ab initio*, as this Court seems to have supposed. The case of *Satgur Prasad* v. *Har Narain Das*[1] was a case to set aside a transaction induced by fraud, and the Court held that the plaintiff was entitled to mesne profits either under section 86 of the Indian Trusts Act of 1882 or on the equitable principle of *restitutio in integrum*. That case again has no bearing on the question before us in which there is no suggestion of restoring the parties to their original position. The other case of *Raja Rai Bhagwat* v. *Debi Dayal Sahu*[2] was no doubt a case of a sale by a widow; it was held that it was in part for legal necessity and in part not for legal necessity, and the Privy Council held that the plaintiff was entitled to mesne profits, the specific amount to be ascertained in execution, but as against that the purchaser was entitled to interest at six per cent. on so much of the purchase money as had been devoted to legal necessity. So that case was, in part at any rate, a case of *restitutio in integrum*. Compare also the decision of the Privy Council in *Banwari Lal* v. *Mahesh*.[3]

There being conflicting decisions of different benches of this Court on a question of principle, it is open to us to decide which case we ought to follow. In my opinion the true view is that where the plaintiff sues to set aside the original transaction, whether it be a sale by a Hindu widow, or manager of a joint family, or guardian of a minor, and he makes the original parties to the transaction, or their representatives,

(1) (1932) L. R. 59 I. A. 147, s. c. 34 Bom. L. R. 771.
(2) (1908) 10 Bom. L. R. 230, P. C.
(3) (1918) L. R. 45 I. A. 284, s. c. 41 All. 63.

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parties, he is entitled to an order restoring the parties to their original position. In such a case the Court is in a position to make such order as is just and equitable, and to provide that the plaintiff recovers the land with mesne profits from the date from which he was dispossessed, and the defendant-purchaser gets back his purchase money with interest, and in a proper case other moneys to which he may be entitled. That is the form of order made when a sale is set aside as induced by fraud, see Seton on Decrees, 7th Edition, Vol. III, page 2250. But if the attitude which the plaintiff adopts is that he merely desires to recover possession of the land, and that the payment of the purchase money to a party who was not entitled to receive it, is no concern of his, then he is entitled, in my opinion, merely to an order for recovery of possession with mesne profits from the date of suit. He cannot in such a case treat the purchaser, who was in under a voidable conveyance, as a mere trespasser before the date at which the plaintiff elects to treat the conveyance as void as against him. In the present case, the plaintiff did not sue to set aside the conveyance as from its date, and to restore the parties to their original position. He merely sought an order for recovery of possession, and, in my opinion, it follows that he is only entitled to mesne profits as from the date of the suit.

The decree of the lower Court will, therefore, be varied by striking out the order that the defendants do pay Rs. 1,950 as past mesne profits. The order will be that the plaintiff do recover possession of the land with mesne profits from the date of the suit. The amount to be ascertained in execution. The plaintiff will be entitled to his costs of the suit. With regard to the costs of the appeal, as the appeal has succeeded in part and failed in part, there will be no order as to costs.

DIVATIA J. I agree. The decision of the lower Court on the point of legal necessity appears to me to be correct because the defendant-appellant, on whom the burden lies

to prove legal necessity or enquiry, has not succeeded in proving the same. At the same time the lower Court does not seem to be correct in holding that the whole of the consideration was not paid. The depositions of Venubai and Mallappa would show that the consideration must have been paid, and looking to the fact that the suit has been brought nearly fourteen years after the date of the transaction, some of the discrepancies in the evidence are due to this distance of time. Therefore, it appears that although the transaction may not be supported on legal necessity, the consideration had actually passed.

With regard to mesne profits, I agree that on the facts of the present case, the plaintiff is not entitled to mesne profits before the date of the suit. As has been observed by the Privy Council in *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy*,[1] mesne profits are in the nature of damages which the Court may award according to the justice of the case. It seems to me that the defendant-appellant has not been able to prove legal necessity or enquiry because of the delay of fourteen years that has taken place after the transaction was entered into, and the plaintiff has come to the Court to demand possession of the property without offering to repay the consideration which he is stated to have received. That being so, there is scope for the application of the equitable principle that he would not be entitled to mesne profits before the date of the suit. Such equitable principle has been applied by the Courts. In *Bhirgu Nath Chaube* v. *Narsingh Tiwari*[2] it has been held that where the father, as manager, alienates joint family property without legal necessity, and the sons repudiate the sale, a purchaser who had no notice that the father was incompetent to sell the property, is in equity only liable to pay mesne profits from the date of such repudiation, and the Privy Council has also in *Banwari Lal* v. *Mahesh*[3] made an order for the recovery

[1] (1900) L. R. 27 I. A. 110, s. c. 27 Cal. 951. [2] (1916) 39 All. 61.
[3] (1918) L. R. 45 I. A. 284, s. c. 41 All. 63.

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of mesne profits from the date of the suit, where there was a conditional decree passed in the plaintiff's favour. I think, therefore, that it is open to Courts to apply this equitable principle according to the facts of each case, and on the facts of this case, I think the plaintiff should get mesne profits not from the date of the transaction but from the date of the suit.

*Decree varied.*

Y. V. D.

## APPELLATE CRIMINAL.

*Before Mr. Justice Broomfield and Mr. Justice Wassoodew.*

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EMPEROR *v.* MOTIRAM ALIAS TANA RAISING (ORIGINAL ACCUSED).*

*Indian Evidence Act (I of 1872), sections 32, 8—Dying declaration—Questions put to deceased—Answers to questions by signs and gestures—Verbal statement—Gestures explained by questions—Conduct—Admissibility of evidence.*

Owing to serious injuries inflicted on her throat, the injured woman lost all power of speech but was otherwise conscious and in full possession of her faculties. While she was in the dispensary where she had been taken, the Magistrate put certain questions to her and she answered them by signs and gestures, implicating the accused as her assailant. The record of the examination was reduced to writing as her dying declaration. On the following day the woman died.

The accused was afterwards tried for an offence of murder when the dying declaration was given in evidence. The trial ended in the conviction of the accused. The accused appealed.

When the matter came up for confirmation of the sentence, it was contended for the accused that the evidence in the form of the dying declaration was not admissible under section 32 of the Indian Evidence Act, 1872, or otherwise :—

*Held*, confirming the order of conviction and sentence, that the evidence was admissible, that it was reliable evidence, and that the conviction was not based entirely or even mainly on that evidence.

*Queen-Empress* v. *Abdullah*,[1] commented on;

*Emperor* v. *Sadhu Charan Das*,[2] *Chandrika Ram Kahar* v. *King Emperor*,[3] and *Ranga* v. *The Crown*,[4] referred to.

*Confirmation Case No. 9 of 1936 (with Criminal Appeal No. 191 of 1936).

[1] (1885) 7 All. 385, F. B.
[2] (1921) 49 Cal. 600.
[3] (1922) 1 Pat. 401.
[4] (1924) 5 Lah. 305.