

Tirbhobun Singh v. Jhono Lall (1). The language there used is as follows:—"Therefore the facts appear to be that this was a transferable tenure that might and ought, according to the provisions of Act X of 1859, to have been sold; but, instead of the Collector making the proper decree,—namely, a decree for sale,—a decree of ejectment under s. 78 of Act X was made. Now, the present plaintiff, the mortgagee, was not a party to those proceedings; if he had been, the proper course would have been to question the validity of the decree for ejectment under s. 78 by an appeal, but having been no party to those proceedings, the plaintiff is now, we think, at liberty to question the validity of that decree and to shew that in fact the Collector had no power, under Act X of 1859, to make a decree for ejectment."

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We, therefore, remand the case to the Subordinate Judge that he may try and determine whether the dur-mokurari tenure was of such a character that it could be properly cancelled by a decree for ejectment made under s. 52 of Beng. Act VIII of 1869, or whether it was not a transferable tenure in respect of which the proper procedure was to hold a sale. Costs will follow the result.

Case remanded.

Before Mr. Justice Mitter and Mr. Justice Maclean.

PROSONNA NATH ROY CHOWDRY (PLAINTIFF) v. AFZOLONNESSA
BEGUM (DEFENDANT).*

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Aug. 14.

*Limitation Acts, IX of 1871, s. 7, and XV of 1877, sched. ii, art. 44—
Minority—Alienation by Guardian.*

K. R. died in 1844, leaving a widow *O. T.* and a minor son *G. D.* In 1847 *O. T.* executed in favor of the defendant a mourasi izara of certain property, but it did not appear whether she so acted as guardian or mother of *G. D.* *G. D.* died in 1855 before attaining majority, and, under an *anumati patra* executed by *K. R.* before his death, the plaintiff was adopted in 1858. *O. T.*

* Appeal from Appellate Decree, No. 2360 of 1877, against the decree of E. S. Moseley, Esq., Officiating Judge of Zilla Mymensingh, dated the 27th of June 1877, affirming the decree of Baboo Bidhu Bhoosun Banerji, First Subordinate Judge of that District, dated the 26th of November 1875.

(1) 18 W. R., 206.

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died in 1861. In a suit brought by the plaintiff in 1873 to set aside the alienation by *O. T.* in 1847,—*held*, that if the alienation was made by *O. T.* as guardian of *G. D.* the suit was not barred, it having been brought within three years after the plaintiff attained his majority; if made by her as a Hindu widow, the suit was still not barred, the cause of action not arising until her death, when the plaintiff was a minor.

THE facts are sufficiently stated in the judgment.

Baboo *Mohiny Mohun Roy* and Baboo *Nilmadhub Bose* for the appellant.

Baboo *Sreenath Doss* and Baboo *Nullit Chunder Sen* for the respondent.

MITTER, J.—In this case the plaintiff's suit has been dismissed by the Courts below as barred by limitation. The facts found by the lower Appellate Court are these:—The property in dispute originally belonged to one Kalinauth Roy, who died in Bhadro 1251 (Aug.—Sept. 1844), survived by his widow Oma Tara and an infant son Gobind Dass. In 1254 (1847) Oma Tara executed, in favor of the defendant, a mourasi izara of the property in suit. In this document she does not describe herself as guardian or mother of Gobind Dass; but the District Judge is apparently of opinion that it was executed by Oma Tara as guardian of Gobind Dass. In this opinion, we think he is right. See *Hunooman Persaud Panday v. Mussamat Baboee Munraj Koonweree* (1).

Gobind Dass died, before attaining majority, in Bhadro 1262 (Aug.—Sept. 1855), and, under an *anumati pattro* executed by Kalinauth before his death, the plaintiff in this case was adopted by Oma Tara in Assar 1265 (June—July 1858). Oma Tara died in Pous 1268 (Dec. 1861, and Jan. 1862). The plaintiff, attaining his majority on the 28th Magh 1278 (10th Feb. 1872), has instituted this suit, within three years, on the 27th Magh 1281 (8th Feb. 1875), to set aside the mourasi izara patta granted to the defendant by Oma Tara in 1254 (1847). The District Judge is of opinion that the suit is barred by limitation, because the

(1) 6 Moo. I. A., 393.

cause of action accrued to Gobind Dass when the property was alienated in the year 1254 (1847) and possession taken by the defendant, and therefore, time having once begun to run against Gobind Dass, the subsequent disability of the plaintiff could not, under s. 9 of Act IX of 1871, save the case from the operation of the law of limitation.

We are of opinion that the District Judge is not right in taking this view of the law. The cause of action did not accrue to Gobind, who was a minor at the time of the alienation, and died before attaining majority. An alienation of a ward's property by the guardian or manager is not void *ab initio*, but voidable by the ward on attaining majority. Although Act XV of 1877, the new Limitation Act, is not applicable to this case (it being governed by the Limitation Act of 1871), yet art. 44 of the second schedule of that Act may be referred to in support of the view that, in a case like the present, the cause of action does not accrue to the minor during his minority. The time, therefore, did not begin to run against Gobind, who died a minor.

The District Judge, in support of his view, refers to *Gobind Coomar Chowdhry v. Huro Chunder Chowdhry* (1); but in that case, the guardian was dispossessed from a portion of his ward's property, therefore the cause of action accrued when wrongful possession was taken by the defendant. That case, therefore, cannot apply to the facts of this case.

In the course of argument the case of *Gobindo Nath Roy v. Ram Kanay Chowdhry* (2) was relied upon by the defendant's pleader. But that case is also distinguishable. There the alienation by the mother of the plaintiff's adopted son was made not in the capacity of a guardian of any infant, but in her capacity of a Hindu widow. The suit was brought in the lifetime of the widow. The cause of action to set aside an alienation by a Hindu widow during her lifetime accrues from the date of the alienation. A separate right to the reversionary heir,—*viz.*, the right to immediate possession,—arises upon the death of the widow. In this case the facts are entirely different.

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(1) 7 W. R., 134.

(2) 24 W. R., 183.

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The suit is to set aside an alienation of a guardian by a person who occupies the same position as the ward for whom the guardian acted at the time of the alienation. This suit has been also brought for immediate possession after the death of the plaintiff's adoptive mother. We think, therefore, that the cause of action in this case arose on the plaintiff's attaining majority. The suit having been brought within three years from that date is within time.

If it be supposed that the alienation in this case was made by Oma Tara as a Hindu widow, then the cause of action would arise on her death, and, as at that time the plaintiff was a minor, the present suit is also within time under s. 7 of Act IX of 1871.

It has been further contended that the defendant took possession of the property in suit under an alienation made by Oma Tara, who was an utter stranger to it. Upon the finding of the lower Appellate Court, it is not open to the defendant's counsel to contend for this view of the case. But allowing the defendant to put forward this view of the mourasi izara of 1254, still the suit does not seem to us to be barred by limitation.

Upon the facts found, the property in dispute on Gobind's death devolved upon Oma Tara. Therefore the izara patta, which she executed as an unconcerned party in 1254, had the force and effect of an alienation, so far as her rights were concerned, the moment she succeeded to the property. Therefore, in this view of the case, also the defendant having been in possession since Bhadro 1262,—*i. e.*, since the death of Gobind Dass, as an alienee of a Hindu widow, the cause of action to the next reversioner for possession of the property accrued on the widow's death, when, as already stated, the plaintiff was a minor.

The plaintiff's claim is, therefore, not barred by limitation. We reverse the decree of the lower Appellate Court, and remand the case for re-trial to that Court. Costs to abide the result.

Appeal allowed and case remanded.