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The defendant is entitled to retain the deposit of Rs. 4,000: see *Howe* v. *Smith*[1] and *Bishan Chand* v. *Radha Kishan Das*[2].

We reverse the decree of the lower Court and dismiss the suit with costs throughout.

Attorneys for the appellant: *Messrs. Bicknell, Merwanji, Romer & Co.*

Attorneys for the respondent: *Messrs. Mulla and Mulla.*

Decree reversed.

H. S. C.

(1) (1884) 27 Ch. D. 89. (2) (1897) 19 All. 489.

APPELLATE CIVIL.

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

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MAHABLESHVAR KRISHNAPPA AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* RAMCHANDRA MANGESH KULKARNI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), section 7, schedule I, article 44—Joint Hindu family consisting of minors and widows—Manager—Mukhtiarnama *executed by manager—Management by the* mukhtiar *during the life-time and after the death of the manager—Sale by the* mukhtiar *after the death of the manager—Binding effect—Minor—Limitation to set aside sale.*

K, the manager of a joint Hindu family consisting of minors and widows, executed a *mukhtiarnama* providing for the management of the family estate, including settlement of money debts and pecuniary claims both during his life-time and after his death until his eldest minor son attained majority. The *mukhtiar* was empowered to manage the estate as he thought fit including the power of sale and settle claims as K himself could have done during his life-time. In connection with the registration of the *mukhtiarnama*, the Sub-Registrar examined the widows in the family including the widow of K, the manager, who had died in the meanwhile, and the deed was registered as the widows admitted the same. Subsequently the *mukhtiar* sold *mulgeni*

* Second Appeals Nos. 160 and 161 of 1910.

(leasehold) rights of the family in certain lands for valuable consideration. K's eldest son having attained majority on the 10th December 1894, he with his minor brother brought a suit on the 17th May 1899, to recover possession of the property alleging that the sale of the *mulgeni* (leasehold) rights was void *ab initio*.

The lower Courts having dismissed the suit, on second appeal by the plaintiffs,

Held, that (1) the sale by the *mukhtiar* was binding on plaintiffs as having been within the authority conferred by the *mukhtiarnama*.

(2) The sale could not be treated as a nullity, inasmuch as a dying adult Hindu might appoint a manager and trustee for the minors themselves without interfering with the succession to the property.

Raj Lukhee Dabea v. *Gokool Chunder Chowdhry*[1] and *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh*[2], referred to.

(3) The right of plaintiff 1, if any, to challenge the sale was barred at the date of the suit under article 44, schedule I of the Limitation Act (IX of 1908) by reason of his failure to sue within three years of his attaining majority.

(4) Plaintiff 2, a minor, was also barred under section 7 of the Limitation Act (IX of 1908) inasmuch as plaintiff 1 after attaining majority could have bound the minor plaintiff if he had chosen to give a discharge and acquittance of all claims to the defendants in respect of *mulgeni* (leasehold) interests, as manager.

SECOND appeal against the decision of T. Walker, District Judge of Kanara, confirming the decrees, one passed by E. F. Rego and the other passed by K. R. Natu, Subordinate Judges of Kumpta in two suits.

Companion suits, one to recover possession of property and the other to recover money due under a mortgage.

On the 3rd August 1886 one Krishnappa, manager of an undivided Hindu family consisting of minors and widows, executed a *mukhtiarnama* in favour of Manjappa appointing him guardian of his two minor sons, Mahableshvar and Ramkrishna, plaintiffs 1 and 2, two minor nephews and a minor grand-nephew. The said guardian *mukhtiar* was given the power to manage the

(1) (1869) 13 Moo. I. A. 209. (2) (1866) 7 W. R. 74.

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family estate as he thought fit, including the power of sale, both during Krishnappa's life-time and after his death until Krishnappa's eldest son, Mahableshvar, attained majority. The material portions of the *mukhtiarnama* were as follows :—

Therefore, I, by this writing, appoint you as my *mukhtiar* (agent) to manage the whole estate as is described below, to recover money owing to us from outsiders and to pay off what is due to creditors, and give in your possession the entire estate. You should carry on the *vahivat* (administration) of this estate in a proper manner and should perform the religious ceremonies (Havya, Kavya, etc.,) which are to be observed by our family. You should also get them performed by them. In the matter of recovering outstandings you are authorized (competent) to make remissions in the case of debtors who are either very poor or have been paying us interest for a long time, to allow mortgagors to redeem their property on their paying what is due to us and in this behalf to sue in a Court of law, whenever necessary, in order to recover the moneys, and also to pay off the amounts owing to our creditors and obtain receipts from them. You should keep clear accounts with respect to the moneys received and paid off as set forth above. And in this manner you should conduct our family affairs from this day till my eldest son, Mahableshvar, comes of age.

So long as I continue to live, you should conduct the *vahivat* in accordance with my advice. After my death, you may manage as you like. And you should take care of the members of my family as I am now doing.

Among the outstandings due to the family there were two mortgage debts of Rs. 2,500 each plus interest secured on *mulgeni* (leasehold) rights over certain lands. In respect of one mortgage Manjappa brought a suit and in execution of the decree purchased on the 7th July 1888, half the *mulgeni* rights himself on behalf of the minors. He also obtained a decree on the other mortgage and in execution one Subba purchased the other half of the *mulgeni* rights.

On the 25th July 1889 Manjappa and Subba joined in a transaction by which they sold the entire *mulgeni* right to defendants 3–20 for Rs. 3,000. Out of the said sum Subba got Rs. 1,500 which he handed over to

Manjappa who passed a receipt in complete satisfaction of the mortgage lien which amounted to nearly Rs. 5,000.

Mahableshvar, plaintiff 1, attained majority on the 10th December 1894. Ramkrishna, plaintiff 2, was a minor in 1899.

On the 17th May 1899, Mahableshvar and Ramkrishna, as plaintiffs 1 and 2, brought a suit to recover possession of the property alleging that the sale by Manjappa to defendants 3—20 was ineffectual. They also brought another suit to recover the mortgage money payable by Subba in satisfaction of the mortgage lien. The two suits were tried together as companion suits and evidence was led in one of them only.

The defendants pleaded *inter alia* that the *mukhtiarnama* passed by Krishnappa to Manjappa, who was friend and well-wisher of the family, was a valid one and the sale by Manjappa to the defendants was good and that the claim was time-barred.

The Subordinate Judge dismissed the suits on the ground that they were barred by time.

On appeal by the plaintiffs the District Judge upheld the decrees on the following among other grounds :—

Such a suit seems to me to fall unquestionably within the 44th article of schedule II of the Limitation Act, and plaintiff 1 would be barred by limitation on the 10th December 1897 from questioning the sale. But he was also the guardian and manager of his younger brother plaintiff 2 (born 1884 or 1885 according to exhibits 63 and 382), and competent to give a discharge without the concurrence of plaintiff 2; consequently under articles 7 and 8 of the Limitation Act plaintiff 2 was also time-barred on the same day (16 Mad. 436). 'Appellants' pleader relies on 25 Mad. 38 and 31 Allah. 154 as showing that the elder plaintiff here gets the benefit on the minority of the younger. The first does not seem to bear out the contention at all; and the second is easily distinguishable, as exhibits 62, 63, 52, 59, 204 show that plaintiff 1 certainly acted as manager. I hold the suit by both to be time-barred.

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Should it be necessary to find the age of plaintiff 2 Ramkrishna, I hold on exhibit 68 that he was born about February 1885.

* * * * * * *

It is contended for appellants that article 44 of the Limitation Act, schedule II, does not apply, as the alienations were a nullity and need not be set aside. The conveniences of this way of getting over the difficulty are obvious, but the argument is capable of too great extension and application not to be carefully scrutinized. It is urged that Manjappa was not a legal guardian of plaintiffs 1 and 2 and had no power to alienate: that the Minors' Act XX of 1864 was then in force, and that Krishnappa had no power to appoint Manjappa guardian by exhibit 68. It is of course true that Manjappa was not appointed by the Court: but the Courts have always I believe recognized *de facto* guardians, who are therefore just as much legal guardians as any others, to the extent of their powers. It may be that Manjappa exceeded his powers and plaintiffs 1 and 2 might have so contended had they sued within the period of limitation; but I cannot agree that his alienations are to be disregarded as nullities.

Plaintiffs preferred a Second Appeal.

Dhurandhar with *N. A. Shiveshvarkar* and *G. P. Murdeshvar* for the appellants (plaintiffs):—The appointment of the guardian was void *ab initio* under the Hindu law. The *mukhtiarnama* was a nullity. A manager of a joint Hindu family cannot appoint a guardian for minor co-parceners by will or deed. It is against the spirit of the Hindu law: Mayne's Hindu law, p. 273; Macnaghten, p. 103; Trevelyan's Hindu law, p. 56; *Budhilal* v. *Morarji*[1] which leans against the validity of such an appointment by will; *Gharib-ul-lah* v. *Khalak Singh*[2]. At Krishnappa's death the crown became the guardian of the minors under Bombay Act XX of 1864. Manjappa being a stranger to the family, had no place as a guardian, as the mothers of the minors were their natural guardians and they alone could act as legal guardians under the impliedly delegated authority. Moreover the *mukhtiarnama* was in the nature of a

[1] (1907) 31 Bom. 413. [2] (1903) L. R. 30 I. A. 165.

will: *Harilal Bapuji* v. *Bai Mani*[1] where the will empowering the trustees to take whole property into their possession till the son attained majority was set aside.

Manjappa was merely a trespasser acting under an invalid deed. An act which is manifestly a nullity need not be set aside. The lower Courts have found as a fact that Manjappa acted as a guardian for several years, but a *de facto* guardian cannot clothe himself with legal powers to sell though he assumes important responsibilities in relation to the minor's property: *Mata Din* v. *Sheikh Ahmad Ali*[2].

Further, plaintiff 1 could not have given a discharge within the meaning of section 7 of the Limitation Act, because that would not have been for the benefit of plaintiff 2. A manager cannot recover a time-barred debt. It is not found that plaintiff 1 was in fact a manager. The point is concluded by the decision of the Allahabad High Court in *Ganga Dayal* v. *Mani Ram*[3] which is on all fours with the present case. See also *Govindram* v. *Tatia*[4], *Mulchand* v. *Kesari*[5].

Lastly, we submit that the case will have to be remanded as there is no finding on the question of necessity or benefit of the family. No act of a guardian would have a binding effect unless necessity for the act is established. There is no presumption of law that the act of a guardian is for the necessity of the family. On the other hand the recorded facts clearly show that the alienation was made for a grossly inadequate consideration. Our suit is dismissed upon a preliminary ground of limitation.

Nadkarni with *S. S. Patkar* (Government Pleader) and *V. R. Sirur* for the respondents (defendants):—The

(1) (1905) 29 Bom. 351.
(2) (1912) 14 Bom. L. R. 192.
(3) (1908) 31 All. 156.
(4) (1895) 20 Bom. 383.
(5) (1910) 12 Bom. L. R. 682.

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appointment of the guardian was valid under Hindu law: Colebrooke's Digest, Vol. II, p. 576. See also Katyáyaná's text, "But if a man die, leaving an infant son, his wealth must be provided entire by his kinsmen," to which Jagannath adds, "there is no harm in permitting the estate to be guarded by a kinsman selected by her, for it is only directed that the widow and the rest *shall* guard the property by *any possible means*." Here the means adopted by the widows, who were the natural guardians of the minors, consisted in the confirmation of the appointment of the guardian made by the head of the family. The guardian was in fact their mouth-piece. Their acquiescence in the appointment shows that he was their agent as well: *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*[1]. In any event we submit that an adult Hindu may appoint a guardian or even a trustee when all the co-parceners are minors, provided the succession to the co-parcenery property is not disturbed. Otherwise there would be a complete dead-lock. Moreover, the guardian may be appointed by the Court when all the co-parceners are minors: *Bindaji* v. *Mathurabai*[2] wherein *Gharib-ul-lah* v. *Khalak Singh*[3] is distinguished. See also the later case of *Ramchandra* v. *Krishnarao*[4]. If Manjappa had applied to the Court, the Court would have appointed him guardian as the widows, the natural guardians, had acquiesced in the appointment. In that case, the sale by Manjappa would not have been void but voidable under section 30 of the Guardians and Wards Act, 1890. Acts of 1858 and 1864 have no application to the present case. But supposing that they did apply, we submit having regard to *Honapa* v. *Mhalpai*[5] and the current of authorities following it, it is well estab-

(1) (1869) 13 Moo. I. A. 209.
(2) (1905) 30 Bom. 152.
(3) (1903) L. R. 30 I. A. 165.
(4) (1908) 32 Bom. 259.
(5) (1890) 15 Bom. 259.

lished that neither Act forbids the natural or *de facto* guardian of a minor, not holding a certificate under the Acts, from disposing of property belonging to a minor. The acts of a *de facto* guardian are not void *ab initio*: *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*[1], where it was held that the title of a person who had taken from a *de facto* manager is not affected by the want of union of the *de facto* with *de juri* title. See also *Girraj Bakhsh* v. *Kazi Hamid Ali*[2] and *Mohanund Mondul* v. *Nafur Mondul*[3] following *Ram Chunder Chuckerbutty* v. *Brojonath Mozumdar*[4]. In the present case both the Courts have found that Manjappa had exercised various acts of guardianship for ten years. In fact the property in dispute was purchased by Manjappa on behalf of the minors. The minors obtained title to the property by Manjappa's act. Subsequently Manjappa sold the property for consideration. The plaintiffs, therefore, cannot approbate and reprobate. They cannot affirm the purchase by Manjappa and repudiate the sale by him.

A Hindu may appoint a guardian by will: *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh*[5] where it was held that a mother could be excluded from guardianship: sections 6, 7, clause (3) and 39 of the Guardian and Wards Act, 1890; Trevelyan's Hindu Law, p. 207. The ruling in *Budhilal* v. *Morarji*[6] can be distinguished on the ground that the only point decided there was that assuming a Hindu father has power to appoint a guardian by will, he is not, for the purposes of section 440 of the Civil Procedure Code, 1882, an authority competent in that behalf: *Jogesh Chunder Chakravarti* v. *Umatara Debya*[7]; *In the matter of*

(1) (1856) 6 Moo. I. A. 393 at p. 413.
(2) (1886) 9 All. 340 at p. 346.
(3) (1899) 26 Cal. 820.
(4) (1879) 4 Cal. 929.
(5) (1867) 7 W. R. 74.
(6) (1907) 31 Bom. 413.
(7) (1878) 2 C. L. R. 577.

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Srish Chunder Singh[1], which pre-suppose that a testamentary guardian may be appointed by a Hindu.

On the question of limitation we submit that a suit for a declaration that a sale of the plaintiffs' property by his guardian is not binding on him and for possession and mesne profits, is governed by article 44 and not article 144 of the Limitation Act: *Sham Chandra Dafadar* v. *Gadadhar Mandal*[2], *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*[3], *Malkarjun* v. *Narhari*[4], *Doraisawmy* v. *Nondisawmy*[5], *Rampal Singh* v. *Balbhaddar Singh*[6], *Ranga Reddi* v. *Narayana Reddi*[7], *Madugula Latchiah* v. *Pally Mukkalinga*[8], *Govindasamy Pillai* v. *Ramasawmy Pillai*[9], *Chanvirapa* v. *Danava*[10], *Hafiz Aminuddin Ahmed* v. *G. L. Garth*[11].

Plaintiff 2 is also barred under section 7 of the Limitation Act: *Ahinsa Bibi* v. *Abdul Kader Saheb*[12], *Periasami* v. *Krishna Ayyan*[13], *Vithu Dhondi* v. *Babaji*[14], *Anando Kishore Dass Bakshi* v. *Anando Kishore Bose*[15], *Ranga Reddi* v. *Narayana Reddi*[7].

In *Ganga Dayal* v. *Mani Ram*[16] the Court had not found as in the present case that the elder brother was the manager of the family. In *Mata Din* v. *Ahmad Ali*[17] there was no *de facto* guardian as such, for one single act, which is itself impeached, cannot constitute a person a *de facto* guardian.

(1) (1893) 21 Cal. 206.
(2) (1911) 13 Cal. L. J. 277.
(3) (1899) 23 Mad. 271.
(4) (1900) 25 Bom. 337.
(5) (1911) 21 Mad. L. J. 1041.
(6) (1902) 25 All. 1.
(7) (1905) 28 Mad. 423.
(8) (1907) 30 Mad. 393.
(9) (1908) 32 Mad. 72.
(10) (1894) 19 Bom. 593.
(11) (1898) 3 Cal. W. N. 91.
(12) (1901) 25 Mad. 26.
(13) (1902) 25 Mad. 431.
(14) (1908) 32 Bom. 375.
(15) (1886) 14 Cal. 50.
(16) (1908) 31 All. 156.
(17) (1912) 34 All. 213.

SCOTT, C. J.:—The *Mukhtyarnamah* (Exhibit 68) was executed by Krishnappa in order to provide for the management of the estate (including the settlement of money debts and pecuniary claims) both during Krishnappa's life-time and after his death until the attainment of majority by the eldest minor in the family, *i. e.*, the 1st plaintiff. The document was similar in design to the *Hibbahnamah* in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*[1] but was dissimilar in that instead of prohibiting the guardian and manager from making gifts or sales it gave Manjappa after Krishnappa's death power to manage as he thought fit.

In a family consisting in other respects of minors and women it is a matter of practical convenience that the dying adult male should be able to make arrangements for guardianship and management, otherwise a deadlock and loss would be arrived at through various widows quarrelling among themselves.

The Privy Council in the case above mentioned have recognized the right of the dying adult to appoint managers and trustees without interfering with the succession. So also in *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh*[2], the Bengal High Court held that a Hindu might by will appoint one widow guardian of all his sons to the exclusion of the natural mother of two of them even though the will should prove invalid so far as it purported to affect the devolution of the property.

If the right of the father to make a binding arrangement is restricted to the interests of his own sons and wives, (for the cases above cited go no further), yet in the present case the mothers of Krishnappa's undivided nephews acquiesced in the arrangement and they in the absence of any other lawfully appointed guardians were

(1) (1869) 13 Moo. I. A. 209. (2) (1866) 7 W. R. 74.

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the guardians of their sons' interests. There is every reason to suppose on the findings of the lower Courts that such acquiescence was in the interests of the minors concerned and the best arrangement that could have been made. Nothing however turns on the question whether Manjappa was the lawfully appointed guardian of Krishnappa's nephews or the agent of such a guardian, for the nephews were all dead before these suits were instituted and their interests devolved by survivorship upon the plaintiffs 1 and 2.

It appears to me that the sale by Manjappa was binding on the plaintiffs 1 and 2 as being within the authority conferred by Exhibit 68. It was certainly not a nullity and none but the plaintiffs 1 and 2 could challenge it. The 1st plaintiff's right, if any, to challenge it was barred at the date of suit under article 44 of the Limitation Act. He could on becoming manager (as he did when 18 years of age) have given a discharge and acquittance to defendants of all claims on them in respect of the leasehold interests if the defendants had chosen to reconvey them and such acquittance would have been binding on his minor co-parcener the plaintiff 2. This plaintiff is therefore barred under section 7 of the Limitation Act.

We affirm the decrees of the lower Courts and dismiss the appeals with costs.

BEAMAN, J.:—I entirely concur.

Decree confirmed

G. B. R.