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That being so, I think, the injunction granted by the trial Court was right. I agree, therefore, that this appeal must be allowed and that the judgment of the trial Court must be restored and that the appellant must have all his costs throughout.

Decree reversed.

J. G. R.

FULL BENCH.

APPELLATE CIVIL.

Before Sir Stanley Batchelor, Kt., Acting Chief Justice, Mr. Justice Shah and Mr. Justice Kemp.

1918. *February* 19.

NARSAGOUNDA BIN SAVANTGOUNDA PATIL (ORIGINAL DEFENDANT), APPELLANT *v.* CHAWAGOUNDA ADGOUNDA PATIL (ORIGINAL PLAINTIFF), RESPONDENT.*

Indian Limitation Act (IX of 1908), Schedule I, Article 91—Sale-deed executed by a minor—Void instrument—Suit to recover possession—Suit for cancellation of sale deed, whether necessary.

Article 91, Schedule I of the Indian Limitation Act, 1908, does not apply to a suit for possession, where the plaintiff alleges and proves that a sale deed is void because it was executed by him whilst a minor, but does not claim expressly to have it cancelled or set aside.

SECOND appeal against the decision of W. Baker, District Judge of Satara confirming the decree passed by M. H. Limaye, Second Class Subordinate Judge at Tasgaon.

Suit to recover possession.

The property in suit originally belonged to the plaintiff. In 1901 it was mortgaged with possession to the defendant. On June 16, 1903, while the plaintiff was still a minor, he executed a sale deed of the property in

* Second Appeal No. 722 of 1916.

favour of the defendant. The plaintiff attained majority on June 10, 1903. In September 1911 he filed a suit to recover possession of the property alleging that the sale deed obtained from him during his minority was void and that the defendant was wrongfully in possession of the property.

The defendant contended *inter alia* that though the plaintiff was a minor at the date of the sale deed, he had fraudulently led the defendant to believe that he was of full age having described himself as twenty years of age in the deed; that the plaintiff could not take advantage of his own fraud; and that the suit was barred under Article 91 of the Limitation Act, 1908.

The Subordinate Judge allowed the plaintiff's claim holding that the plaintiff was not estopped from alleging that he was a minor at the date of the sale deed and that he could obtain possession of the property without getting the sale deed cancelled.

On appeal, the District Judge confirmed the decree.

On appeal to the High Court the case was argued before Beaman and Marten JJ. Their Lordships after hearing the arguments made a reference to the Full Bench. The referring judgments were as follows:—

BEAMAN, J.:—The plaintiff-respondent in these two appeals sued to recover the plaint lands. The defendants relied principally upon two sale-deeds of the year 1903 executed to them by the plaintiff. These deeds were executed in March, while the plaintiff has since proved that he only attained majority the following June. But in the deeds themselves he is described as a man of twenty years of age.

The Court of first appeal has found as a fact that the defendants were not deceived by the false representation in the deeds, and that disposes of the issue of estoppel.

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The principal question we have to answer is: whether, since the plaintiff admittedly did not sue to have the deeds of 1903 set aside or cancelled, within three years, he can succeed in these ejectment suits, and so indirectly deprive these deeds of all legal effect?

It is clear that unless he could disprove the apparent rectitude of his own deeds, his suits would necessarily be defeated by their mere production. It is also quite clear that the onus of proving that he was a minor in March 1903 was upon the plaintiff. It is admitted that he was well aware of the grounds upon which he has, in effect, got these deeds cancelled or treated as void, from the date on which he attained his majority, the 10th June 1903. He brought these suits in 1911.

The first material proposition necessary to the success of the defendant's contention is that where the law of limitation compels a person to obtain the cancellation or setting aside of a deed within a certain time, and he fails to do so, he cannot, after the expiration of that time, challenge the deed. He must either show that it is void or voidable within three years or admit it to be valid in all respects. If that proposition is unsound, there is nothing left to argue about. It also becomes hard to discover any practical reason why Article 91 should not be wiped out.

If it be argued that while the affirmative right to have a deed set aside or cancelled is gone if not exercised within the prescribed period, that does not preclude a person, against whom the deed is set up by way of defence, from proving after the expiration of the former period that he might have got the deed cancelled, the answer is that, for all purposes of scientific theory and exact reasoning, no distinction can be drawn between cases of deeds under Article 91 and cases of adoption under Articles 118, 119.

The policy of the Statute is quite clear and the same in both cases.

If a man wishes to avoid his own deed (and I doubt whether Article 91 will apply to any but a man's own deeds) as void *ab initio*, or voidable for any reason, the law declares that he must prove all facts necessary to be proved before the deed is seen to be void or voidable, within three years.

If a man wishes to prove that an adoption never took place, or was invalid (here is a pretty close correspondence between void and voidable deeds under Article 91) he must do so within six years. If questions of that sort are to be left open for twelve, or, may be, sixty years, proof might be very difficult to get, and very unsatisfactory.

The second proposition which the defendants must establish is that Article 91 applies to void as much as to voidable deeds. If it does not then, again, there is nothing left to argue about. No reason, theoretical or practical, for so restricting the operation of the Article occurs to me. If the need of the Article is to be sought in the expediency of adducing proof of these matters within a comparatively short time, it must be felt just as much where a man seeks to show that his deed was void *ab initio* as where he seeks to show that it has since become voidable, or was in its nature voidable from the first. Where upon the face of it a deed purports to have been made by a major, and he desires to prove that he was not a major at the time, the issue is as much one of fact, as much in need of proof, as an issue of fraud or undue influence.

This case is as good as any other for practical illustration.

It is everybody's case that the defendants were in possession of the land as mortgagees in 1901. In 1903,

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the plaintiff sold them the lands by registered deeds, in which he describes himself as being twenty years of age. Let us suppose that fifty-nine years after the date of the mortgage the plaintiff were to sue to redeem. The defendants would of course rely upon the sale-deeds of 1903. On any other view than that to which I incline it follows that the plaintiff might, fifty-six years after having executed these sale-deeds, go into the question of his minority at the time.

If we turn to section 39 of the Specific Relief Act we find that the same relief is given against void and voidable deeds. I do not know that it has ever yet been suggested that Article 91 of the Limitation Schedule was not framed with special reference to all cases of the kind provided for in section 39 of the Specific Relief Act. Where proof must be given before a Court can know whether an instrument is void or not, then, regard being had to the object of Article 91, I do not think any valid reason can be given for saying that that Article was not intended to cover void instruments. There may be many void instruments which one, if not both parties to them, intended to be operative. Benami deeds are on a different footing for the parties to them, *ex hypothesy*, never intended at any time that they should be operative *inter se*. So it was held in *Petherpermal Chetty* v. *Muniandy Servai*[1].

Neglecting exceptions of that kind and confining myself to deeds which would have to be proved to be void or voidable by one injuriously affected by them, it seems to me that the true principle governing all cases of the kind, no matter, upon what facts they may arise, has been laid down in *Jagadamba Chowdhrani v. Dakhina Mohun*[2] and for this High Court finally

(1) (1908) 35 Cal. 551. (2) (1886) L. R. 13 I. A. 84.

settled and most clearly stated by Jenkins C. J. in the Full Bench case of *Shrinivas* v. *Hanmant*[1].

That case arose upon Articles 118, 119, but "deed" might be substituted for "adoption" throughout the judgment without affecting the cogency of the reasoning, or the applicability of the principle in the slightest degree. As to earlier cases of this High Court, such as *Nabab Mir Sayad Alamkhan* v. *Yasinkhan*[2], the dictum of Sir Charles Sargent upon which the plaintiff relies was *obiter*. The reason given for it has no relevancy at all to the principle I am discussing. For all purposes of Article 91 it cannot make the slightest difference whether possession were taken under deed, later impugned, or independently of it, so long as, if valid, that deed would confirm the possession and make it unassailable.

In many of the judgments to which we have been referred I find a confusion of reasoning arising out of assuming that Article 91 has some theoretical connection with Articles 142 and 144. It is only where those Articles will not help, that recourse must be had to Article 91. I give this example. A takes possession of B's land as a trespasser. Two years later, B sells his land to A. Five years later B sues in ejectment. A could get no help from his adverse possession, which began before the sale-deed. But if my view of Article 91 be right, B's suit would necessarily fail. He could not challenge the sale-deed, and as long as it stood unchallenged it is a complete answer to B's suit. Probably no deed falling within the contemplation and intention of Article 91 would be found which, if it related to immovable property, did not confer title, as from its date, and as soon as that is clearly realized all the confusion to which I have been alluding must disappear.

(1) (1899) 24 Bom. 260.

(2) (1892) 17 Bom. 755.

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Where one principle is equally applicable to several groups of facts the establishment of that principle upon one of those groups of facts must, by implication, if not expressly, over-rule a decision upon another of those groups of facts, which rests upon a different and irreconcilable principle. Thus in my opinion even were it more than an *obiter dictum* so much of Sir Charles Sargent's decision in *Nabab Mir Sayad Alamkhan* v. *Yasinkhan*[1] as the plaintiff relies on was over-ruled by the Full Bench decision in *Shrinivas* v. *Hanmant*[2].

If we substitute "deed" for "adoption" in the first of the three questions in the answers to which Jenkins C. J. thought that the principles deducible from *Jagadamba's case*[3] were best expressed, and I can discover no good reason why this substitution should not be made, the whole of the close and powerful reasoning of that judgment will apply *totidem verbis* to the case before us. Prior to that decision in 1899 there had been some conflict of judicial authority, in this High Court, and there still is between the Bombay and other High Courts. But as a Bench of this Court we are of course bound by the decision of the Full Bench in *Shrinivas' case*[2], unless it can be distinguished. I do not think it either can, or ought to be. In my opinion, and speaking with all respect, the reasoning both of that and *Jagadamba's case*[3] is unanswerable. Nor do I think it prudent to strain ingenuity to find fine distinctions and so sow a crop of exceptions, impairing what would otherwise be a very simple, easily intelligible, and uniformly applicable principle to every case of the kind. I mention before concluding a certain amount of argument arising out of *non est factum* cases. A moment's reflection will show that they are utterly irrelevant, and I do not think any useful purpose will be served by examining

(1) (1892) 17 Bom. 755. (2) (1899) 24 Bom. 260.
(3) (1886) L. R. 13 I. A. 84.

that set of arguments. If the plaintiff cannot impeach his deeds of 1903 in these suits because he did not do so within three years, it is plain that he must fail. It is as plain that he cannot obtain the relief he asks in these ejectment suits without disturbing those deeds. In my opinion nothing, from the theoretical standpoint, turns upon the deeds which a plaintiff, situated as this plaintiff is, has to get rid of, being void or only voidable. The point and the only point is, within what time can he be allowed to prove that his deeds are either void or voidable?

I would, therefore, hold that these suits are time-barred and must be dismissed with all costs. But since there might be a reasonable doubt whether such a decision does not conflict with *Nabab Mir Sayad Alamkhan* v. *Yasinkhan*[1] and further whether assuming that it does, the latter decision was not by necessary implication over-ruled by the Full Bench in *Shrinivas* v. *Hanmant*[2], and, lastly, since the point is one of far-reaching importance, we would submit the following questions to a Full Bench :—

"If a plaintiff in ejectment has executed a deed or deeds which, if legal, valid and in all respects binding upon him as upon their face they purport to be, would defeat the title upon which he sues in ejectment the burden of proving that they are void or voidable being upon him would such ejectment suit be governed by Article 91 or by Articles 142 or 144 of the 1st Schedule of the Limitation Act"?

MARTEN, J. :—In this second appeal the real point depends on Article 91 of the Indian Limitation Act. Does Article 91 apply to a suit for possession where the plaintiff alleges and proves that a sale-deed is void because it was executed by him whilst a minor, but

(1) (1892) 17 Bom. 755. (2) (1899) 24 Bom. 260.

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does not claim expressly to have it cancelled or set aside?

The plaintiff was born on the 10th June 1885. Whilst a minor he executed, or purported to execute, a sale-deed, dated the 16th March 1903 in favour of the defendant. He filed the present suit on the 28th July 1911. The plaint merely prays for possession and ancillary relief. It pleads the void sale-deed, and the plaintiff's then infancy, but ignores a mortgage of 30th August 1901 executed by the plaintiff's guardian in favour of the defendant. The defendant appears to have taken possession under that mortgage.

In the Courts below, the case almost entirely turned on whether the plaintiff was estopped by a statement in the sale-deed that he was then twenty. Both Courts found that there was no estoppel, because the defendant was well aware of the true facts and was in no way deceived by the false statement. The estoppel point was again argued before us, but it is clear that on the facts as found in the Courts below the defendant must fail on that point. I will only add that if it was necessary to go into the facts they are such as to arouse the greatest suspicion in a Court of Equity in considering the dealings between the infant and the defendant with whom he was living. The Court of first instance described the defendant as a perfectly unscrupulous man (see page 13, line 59) and the lower appellate Court considered his conduct to be verging on fraud (see page 3, line 41). The Court of first instance treated the suit as in effect a redemption suit, and decreed possession on payment of Rs. 199. The lower appellate Court held nothing remained due on the mortgage and decreed possession only. We must, I think, accept this finding of fact by the lower appellate Court. So too I think that, in the absence of objection made in the Court below, it is not now open

to the defendant to contend that the suit cannot be regarded as a redemption suit and must therefore fail. So far as mere recovery of possession is concerned, the suit would appear to be one for recovery of possession whether regarded as an ejectment or a redemption suit: see *Hunt* v. *Worsfold*[1].

This leaves us then with the bare point of law under Article 91, a point which was practically taken for granted in favour of the plaintiff in the Courts below when once he had succeeded on the estoppel point. It is now settled by the Privy Council that in India a mortgage by a minor is void *ab initio*: see *Mohori Bibee* v. *Dharmodas Ghose*[2]. On the other hand a mere plea of *non est factum* appears to be insufficient in England, for, according to Simpson on Infants, page 4, the infancy must be pleaded specifically. The appellant says, however, this is because in England some minors' contracts are voidable only, and that in India a plea of *non est factum* would suffice. Assuming, however, that infancy ought to be pleaded, does such a plea involve in effect a claim to cancel or set aside the sale-deed under Article 91?

In *Petherpermal Chetty* v. *Muniandi Servai*[3], the Privy Council held that Article 91 only applied to suits in which the document sought to be set aside was intended to be operative against the plaintiff and would remain operative if not set aside. They further held that Article 91 did not apply to a Benami deed, if I may properly use that expression. This decision has since been applied in *Jagardeo Singh* v. *Phuljhari*[4]. The Calcutta Courts appear to consider that a void deed, as opposed to a voidable deed, does not require to be set aside or cancelled and consequently is not within

(1) [1896] 2 Ch. 224 at p. 228.
(2) (1903) 30 Cal. 539.
(3) (1908) L. R. 35 I. A. 98.
(4) (1908) 30 All. 375.

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Article 91 (see *Sham Lall Mitra* v. *Amarendro Nath Bose*[1]; *Banku Behari Shaha* v. *Krishto Gobindo Joardar*[2]; and *Harihar Ojha* v. *Dasarathi Misra*[3]). In this Court a similar view appears to have been taken in *Abdul Rahim* v. *Kirparam Daji*[4] by Birdwood and Parsons JJ. Another distinction was taken by Sir Charles Sargent and Mr. Justice Candy in *Nabab Mir Sayad Alamkhan* v. *Yasinkhan*[5], viz., that where a defendant did not get possession under the sale-deed but only used it to defend his title, Article 91 did not apply. That case followed *Bhagvant Govind* v. *Kondi valad Mahadu*[6], a decision of Sir Charles Sargent and Mr. Justice Bayley. Standing alone these two latter cases would appear to govern the present case, for defendant's counsel did not dispute that his client took possession originally under the mortgage and not under the sale-deed.

The cases above cited appear however to have been decided on a different line of reasoning to that which eventually prevailed in the adoption cases, *Jagadamba Chowdhrani* v. *Dakhina Mohun*[7] and *Shrinivas* v. *Hanmant*[8], the former being a decision of the Privy Council and the latter of a Full Bench of this Court. The force of that reasoning in the adoption cases is apparent. Its reconciliation with the other line of cases, viz., the deed cases, is not so apparent. Curiously enough the above authorities in the deed cases do not appear to have been cited in the adoption cases. As regards other cases under the Act, a suit to set aside a deed on the ground of undue influence must be brought within three years (see *Janki*

(1) (1895) 23 Cal. 460.
(2) (1902) 30 Cal. 433.
(3) (1905) 33 Cal. 257.
(4) (1891) 16 Bom. 186.
(5) (1892) 17 Bom. 755.
(6) (1889) 14 Bom. 279.
(7) (1886) L. R. 13 I. A. 84.
(8) (1899) 24 Bom. 260.

Kunwar v. *Ajit Singh*[1]); as must a suit to set aside a bond for fraud: see *Bakatram Nanuram* v. *Kharsetji*[2]. Even in forgery cases or in suits by a ward to set aside a transfer of property by his guardian the period of limitation appears in general to be three years: see Articles 92, 93 and 44. If then Article 91 does not apply in the present case the plaintiff would have 12 years under Article 144 if the suit be regarded as an ejectment suit, or alternatively sixty years under Article 148 if the suit be regarded as a redemption suit.

The defendants further relied on section 39 of the Specific Relief Act, but as at present advised I doubt whether that section carries the matter much further. It is a permissive and not an obligatory section.

Under the above circumstances I am of opinion that the case is one which by reason of its general importance and of the conflict of authority requires consideration by a Full Bench.

The questions to be submitted to the Full Bench should, I think, be as follows, viz.:—

1. Whether Article 91 of the Indian Limitation Act, 1908, applies to a suit for possession, where the plaintiff alleges and proves that a sale-deed is void because it was executed by him whilst a minor, but does not claim expressly to have it cancelled or set aside?

2. Whether in such a case as that mentioned in the last question, it makes any difference that the defendant originally obtained possession of the property under some instrument other than the void sale-deed?

THE reference was heard on February 15, 1918, by a Full Bench composed of Batchelor, Ag. C. J., Shah and Kemp JJ.

(1) (1887) 15 Cal. 58.

(2) (1903) 27 Bom. 560.

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R. S. Navalkar, for the appellant :—I submit that the plaintiff's suit is barred under Article 91 of the Indian Limitation Act, 1908. Plaintiff was born on June 10, 1885. He attained majority on June 10, 1903. The sale deed in favour of my client was passed on March 16, 1903, and the suit was filed on September 8, 1911. By the sale deed the title to the property was passed to my client. His possession which he held under a former mortgage of 1901 was confirmed by this sale and a portion of the mortgaged property was reconveyed to the plaintiff as a result of the sale transaction. So it was a completed contract: see section 54 of the Transfer of Property Act, 1882.

The plaintiff's suit is in substance a suit to get the sale deed set aside and thereby to recover the property. To such a suit Article 91 must apply. In similar suits brought under the Dekkhan Agriculturists' Relief Act, 1879, it was held that the relief prayed for was the setting aside of the transactions: see *Chandabhai* v. *Ganpati*[1] and *Mt. Bachi* v. *Bickchand*[2]. Whether the deed is voidable or void makes no difference. Even if it is void it must be got rid of: see section 39 of the Specific Relief Act, 1877. The wording of the section is applicable to both void or voidable deeds.

[BATCHELOR, AG. C. J.:—The section says 'may sue to have it adjudged void' and not 'must'. It is optional with the plaintiff.]

I submit though the word is 'may' it ought to be interpreted as 'must' as it is necessary for the party to get the instrument adjudged void or voidable within the time provided by law, and that time is provided by Article 91 of the Limitation Act, 1908, only; otherwise the instrument will act to his prejudice: see *Janki*

(1) (1916) 18 Bom. L. R. 763. (2) (1910) 13 Bom. L. R. 56.

Kunwar v. *Ajit Singh*[1]; *Kotrabassappaya* v. *Chenvirappaya*[2]; *Bakatram Nanuram* v. *Kharsetji*[3] and *Rampal Singh* v. *Balbhaddar Singh*[4]. Just as a suit under Article 44 by a minor to have an alienation made by his guardian during his minority set aside has to be brought within three years after attaining majority (*Mahableshvar Krishnappa* v. *Ramchandra Mangesh*[5]; *Balappa* v. *Chanbasappa*[6]; *Chanvirapa* v. *Danava*[7]; *Sham Lall Mitra* v. *Amarendro Nath Bose*[8] and *Ranga Reddi* v. *Narayana Reddi*[9]) so also in this case possession having been given by the minor representing himself to be a major in the sale-deed he had to get it cancelled within three years after attaining majority irrespective of the deed being void or voidable.

In suits for the recovery of property on the ground of the validity or invalidity of an adoption it has been held that they must be brought within the shorter period under Articles 118 and 119 of Limitation Act, 1908; see *Jagadamba Chowdhrani* v. *Dakhina Mohun*[10]; *Mohesh Narain Moonshi* v. *Taruck Nath Moitra*[11]; *Shrinivas* v. *Hanmant*[12]; *Jagadamba's* case[10] was followed in *Malkarjun* v. *Narhari*[13]; *Chunder Nath Bose* v. *Ram Nidhi Pal*[14] and *Hasan Ali* v. *Nazo*[15].

[SHAH, J.:—In *Malkarjun* v. *Narhari*[13] the Court-sale was not a nullity and therefore it was necessary to set

(1) (1887) 15 Cal. 58 at p. 63.
(2) (1898) 23 Bom. 375 at p. 380.
(3) (1903) 27 Bom. 560.
(4) (1902) 25 All. 1 at p. 16.
(5) (1913) 38 Bom. 94.
(6) (1915) 17 Bom. L. R. 1134 at p. 1139.
(7) (1894) 19 Bom. 593.
(8) (1895) 23 Cal. 460 at p. 465.
(9) (1905) 28 Mad. 423.
(10) (1886) L. R. 13 I. A. 84.
(11) (1892) L. R. 20 I. A. 30.
(12) (1899) 24. Bom. 260
(13) (1900) 25 Bom. 337 at pp. 342 350.
(14) (1902) 6 C. W. N. 863.
(15) (1889) 11 All. 456.

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it aside within the shorter period. But a sale by a minor is a nullity.]

In this case also the transaction is not a nullity on the face of it. Under the Indian Contract Act, 1872, void contract is defined in section 2, cl. (i) as "a contract which ceases to be enforceable by law." This contract has never ceased to be enforceable because it was an executed contract and therefore not in its nature totally void. So the sale-deed creates a real obstacle by the loss of possession of the property. Without disturbing this apparent title the plaintiff cannot recover the land.

The scheme of the Indian Limitation Act is that when a party enters into a contract and that contract is intended to be acted upon by the other side and has been so acted upon, if the party entering into contract wishes to have the contract set aside he has to do it within the shorter period provided by law. There are cases where the Courts have held that the larger period to recover possession may be availed of, but those are cases of *benami* transactions and suits by reversionary heirs to set aside alienations made by widows, in which the transactions were intended to be not operative from the beginning, but in the present case the transaction was intended to be operative from its commencement.

In *Petherpermal Chetty* v. *Muniandy Servai*[1], Article 91 was held not to apply because the document was not intended to be operative from the commencement. So the question No. 1 should be answered in the affirmative and the second question framed by Marten J. in the negative. The cases of *Bhagvant Govind* v. *Kondi-valad Mahadu*[2] and *Nabab Mir Sayad Alam-khan* v. *Yasinkhan*[3] are overruled by *Malkarjun* v. *Narhari*[4].

(1) (1908) 35 Cal. 551.
(2) (1889) 14 Bom. 279.
(3) (1892) 17 Bom. 755.
(4) (1900) 25 Bom. 337 at pp. 342, 350.

K. N. Koyajee, for the respondent:—I do not dispute that where a party is in possession under a voidable document, Article 91 of the Indian Limitation Act, 1908, would apply, but as regards void documents it has been held by the Privy Council and by all the High Courts of India that it is not necessary to have them set aside and Article 91 does not apply. A party aggrieved by such documents may bring a suit to get them cancelled but it is not obligatory: section 39 of the Specific Relief Act, 1877; *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[1]; *Petherpermal Chetty* v. *Muniandi Servai*[2]; *Rakhmabai* v. *Keshav*[3]; *Manchharam* v. *Panabhai Lallubhai*[4]; *Abdul Rahim* v. *Kirparam Daji*[5]; *Banku Behari Shaha* v. *Krishto Gobindo Joardar*[6]; *Harihar Ojha* v. *Dasarathi Misra*[7]; *Jagardeo Singh* v. *Phuljhari*[8] and *Narayanan Chetty* v. *Kannammmai Achi*[9].

If the document has a legal operative effect if allowed to remain uncancelled, Article 91 applies but if the document is inoperative *ab initio* the Article applicable would be Article 142 or 144. A contract by a minor is void *ab initio*: see *Mohori Bibee* v. *Dharmodas Ghose*[10].

The cases cited by the appellant's learned pleader with reference to Article 44 of the Indian Limitation Act, 1908, have no bearing on the present point under Article 91. The case of *Malkarjun bin Shidramappa Pasare* v. *Narhari bin Shivappa*[11] is in my favour as it was held there that a judicial sale which was not a nullity but was attended by some irregularity ought to be set aside within one year under Article 12 of the Indian

(1) (1907) L. R. 34 I. A. 87.
(2) (1908) L. R. 35 I. A. 98.
(3) (1906) 31 Bom. 1.
(4) (1915) 40 Bom. 51.
(5) (1891) 16 Bom. 186 at p. 189.
(6) (1902) 30 Cal. 433.
(7) (1905) 33 Cal. 257.
(8) (1908) 30 All. 375.
(9) (1904) 28 Mad. 338.
(10) (1903) 30 Cal. 539.
(11) (1900) L. R. 27 I. A. 216.

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Limitation Act. The case of *Janki Kunwar* v. *Ajit Singh*[1] and other cases cited are cases of voidable transactions brought about by undue influence, fraud, &c.

Cases of adoption stand on a different footing altogether. Adoptions and contracts of sale are treated as entirely different classes of transactions in the Indian Limitation Act and in the judicial decisions. Adoptions raise question of recognition or reputation of a status which may be confirmed by long acquiescence: *Rajendro Nath Holdar* v. *Jogendro Nath Banerjee*[2]; Mayne's Hindu Law, 8th Edn., para. 159, page 206; and hence the necessity of special Articles like Articles 118 and 119 of the Indian Limitation Act. No amount of acquiescence can contribute to the validity of an invalid and void deed of sale, with regard to which a plea *non est factum* is sufficient without anything more: see Mayne's Hindu Law, 8th edn., para. 159, page 206.

The cases of *Bhagvant Govind* v. *Kondi valad Mahadu*[3] and *Nabab Mir Sayad Alamkhan* v. *Yasinkhan*[4] would have to be considered if the first question referred by Marten J. is answered in the affirmative; but they would no doubt have to be considered in the light of the observations of the Privy Council in *Malkarjun bin Shidramappa Pasare* v. *Narhari bin Shivappa*[5].

Navalkar in reply:—

The cases of *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[6] and *Harihar Ojha* v. *Dasarathi Misra*[4] are cases of reversionary heirs, who succeeded on their own title and had not to set aside any transactions of their own or of those under whom they

(1) (1887) 15 Cal. 58 at p. 63.
(2) (1871) 14 Moo. I. A. 67.
(3) (1889) 14 Bom. 79.
(4) (1892) 17 Bom 755.
(5) (1900) L. R. 27 I. A. 216.
(6) (1907) L. R. 34 I. A. 87.

claimed. The cases of *Bhagvant Govind* v. *Kondi valad Mahadu*[1], *Abdul Rahim* v. *Kirparam Daji*[2] and *Nabab Mir Sayad Alamkhan* v. *Yasinkhan*[3] proceeded on the principle of ancillary relief which has been discredited by the Privy Council in *Malkarjun* v. *Narhari*[4]. In *Mohesh Narain Moonshi* v. *Taruck Nath Moitra*[5] their Lordships of the Privy Council applied the shorter period even though the adoption was illegal and void. There was no question of repute or status in that case as suggested for the respondent. In *Maharani Beni Pershad Koeri* v. *Dudh Nath Roy*[6] referred to by your Lordships, the grant of the pottah was by the plaintiff's predecessor-in-title whose tenure was good for his life and on his death it became a spent instrument. It was, therefore, not binding on the plaintiff and so he was not bound to have it cancelled.

C. A. V.

BATCHELOR, Acting C. J. :—In this reference the facts are these : The suit, which was filed in September 1911, was brought to obtain possession of lands. The plaintiff attained majority on 10th June 1903 : on the 16th March 1903, and consequently while he was still an infant, he executed a deed of sale in favour of the defendant. The defendant had obtained possession under a mortgage of 1901, executed by the plaintiff's guardian in his favour. In the plaint the sale-deed of 16th March 1903 is mentioned, and it is pleaded that the deed is void by reason of the plaintiff's then infancy : there is no prayer that the deed should be set aside or cancelled.

The question we have to decide is whether the suit is governed by Article 91 of the Indian Limitation Act

(1) (1889) 14 Bom. 279.
(2) (1891) 16 Bom. 186 at p. 189.
(3) (1892) 17 Bom. 755.
(4) (1900) 25 Bom. 337 at pp. 342, 350.
(5) (1892) L. R. 20 I. A. 30.
(6) (1899) L. R. 26 I. A. 216.

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of 1908: if it is so governed, then it is barred; otherwise it is in time.

The sale-deed of March 1903 was, and is, void and inoperative by reason of the plaintiff's infancy. That being so, it is contended for the plaintiff that he was under no obligation to sue to get it set aside or cancelled, and that his omission to bring such a suit does not expose his present suit for possession to the bar created by Article 91 of the Indian Limitation Act.

I think that this contention should succeed, and, in my opinion, the question is in substance answered by decisions of the Privy Council. In *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[1] the heirs of a Hindu sued, first, for a declaration that an Ijara granted by the deceased widow had become inoperative against the plaintiffs after her death, and, secondly, for khas possession of the properties. Their Lordships held that the suit was substantially one for possession, and was governed by Article 141, not by Article 91. In delivering the judgment of the Board, Lord Davey said, speaking of the Hindu widow:—"Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir." Now if that is true even of a voidable transaction, subsequently avoided by the election of the party interested, it seems to me that it must *a fortiori* be true of a transaction which, as here, was void *ab initio*: in that case there was a real obstacle, which at least had temporary operation: here

[1] (1907) L. R. 34 I. A. 87 at p. 92.

there never was at any time any real obstacle at all, but the thing which seemed to constitute an obstacle was in the eye of the law no reality at all. *Pether-permal Chetty* v. *Muniandi Servai*[1] is, I think, even more directly in point. There in a suit for the possession of land it appeared that the plaintiff's predecessor-in-title had, six years prior to the institution of the suit, executed a *benami* deed of sale of the land collusively and in order to defeat the claim of a prior equitable mortgagee. Counsel for the defendant contended—I quote the report—that "before he (the plaintiff) could recover the land, he must first set aside the conveyance, and a suit for that purpose was barred by Act XV of 1877, Schedule II, Article 91." Upon this argument a specific question was raised by Lord Atkinson, who answered it in these words, which I set out because they seem to me decisive of the point now under consideration:—"As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance,.....being an inoperative instrument, as, in effect, it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims. The 144th, and not the 91st, Article in the Second Schedule to the Act is, therefore, that which applies to the case, and the suit has consequently been instituted in time." It is important to observe that Article 91 was excluded, not in terms because the conveyance was *benami* but because it was, as found in the suit, inoperative. So here the deed of sale by the infant was inoperative and, consistently with these decisions, I think we are bound to hold that the present suit is not barred by Article 91. The same conclusion is suggested by *Maharani Beni Pershad Koeri* v. *Dudh Nath Roy*[2], where a suit was brought in 1893 to recover

(1) (1908) L. R. 35 I. A. 98. (2) (1899) L. R. 26 I. A. 216.

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possession of a village. The plaintiff's ancestors had parted with possession in 1836, when a grant for life had been made to another person. In 1849 the grantee executed a permanent Pottah of it to one Ram Golam, and in 1855 the grantee surrendered the village to the plaintiff's predecessor, who allowed Ram Golam to remain in possession, paying rent as stipulated in the Pottah. It was found that the Pottah was void against the grantor. The question remained whether the plaintiffs were entitled to eject the defendant, who claimed title under Ram Golam. It was contended that the suit was barred because the plaintiff's predecessors might and ought to have sued for declaration of their right to possession on Ram Golam's death under section 39 of the Specific Relief Act, and that such a suit was barred under Article 91. But Lord Davey said :—"It is sufficient answer to this argument to say that, though such an action might have been brought, the Maharajah was not bound to bring it, and there was no necessity for him to do so. According to their Lordships' view the Pottah (whatever its construction) had become a spent instrument, and had no longer any vitality as a grant of the property." In our case the deed of sale can be in no better position, for it never had any vitality as a conveyance of the property. On the same principle the Indian High Courts, especially here and in Calcutta, have held that it is not necessary in the case of a void deed to sue to have it set aside or cancelled.

These decisions seem to me to require a conclusion in the plaintiff's favour. I need not refer to other decisions of the Judicial Committee which have been cited for the defendant, for in none of them was the Court concerned with a deed such as we have here. The only case where the facts bear a superficial resemblance to the present facts and where the decision went the

other way is *Janki Kunwar* v. *Ajit Singh*[1]. There the deed involved was a grant of land, alleged to have been obtained by fraud and undue influence from one of the plaintiffs. It was decided that the suit was governed by Article 91. But then their Lordships held that the suit was a suit, not to obtain possession but to set aside the grant; and—what seems to me of greater significance—it was never found that the deed was liable to be set aside: on the contrary the Judicial Commissioner found no proof of undue influence or fraud, and their Lordships saw "no ground for thinking that on that matter he came to a wrong conclusion." The deed, therefore, was never ascertained to be even voidable.

If I am right in thinking that the point before us is concluded by the decisions of the Privy Council, it becomes unnecessary to consider whether the rulings of our own Court are consistent with the conclusion. This I say merely in order to explain the present judgment, and not with any desire to cast doubt upon these rulings. That most canvassed for the defendant was *Shrinivas* v. *Hanmant*[2], a Full Bench decision where the leading judgment was delivered by Sir Lawrence Jenkins, C. J. As I have said, I am not concerned to reconcile this decision with the cited decisions of the Privy Council, but I may say that for my own part I can see no inconsistency. In *Shrinivas' case*[2] an essential part of the suit was a prayer for a declaration that an adoption was invalid. It was held that, this part of the claim being exposed to the bar of Article 118 of the Schedule, the whole claim was time-barred; but nothing was decided as to the applicability of Article 91, as it was nobody's case that that Article entered into the controversy. I need not say that I am very sensible of the weight of my learned brother Beaman's arguments

(1) (1887) 15 Cal. 58, (2) (1899) 24 Bom. 260.

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that it would have tended to logical symmetry and simplicity of principle if the legislature had treated adoptions and deeds on the same footing. But they have not done so, and separate Articles of the Limitation Act are provided for these separate cases. It is of course not for us to assign reasons for this action of the Legislature, but presumably it was thought that a substantial distinction existed between adoptions and deeds. Among possible grounds for such a distinction would be the greater publicity and the change of status consequent on an apparent adoption. This, however, is merely conjecture; whatever the reason for it may be, the difference of treatment is there, and in a well-known passage in *Quinn* v. *Leathem*[1] the Earl of Halsbury L. C. has warned us against the danger of applying rigorously logical tests to propositions of law. "A case," his Lordship there says, "is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

On these grounds, and with sincere respect for the contrary view of Beaman J., I would say that the first of Marten J.'s two questions should be answered in the negative. That is sufficient for present purposes, and I do not think we should decide more than that.

SHAH, J.:—I agree.

KEMP, J.:—The facts out of which this reference arises are few and simple in their inception. The plaintiff, who attained his majority on 10th June 1903, purported, on 16th March 1903, to execute a sale-deed of some of his lands in favour of this defendant who was already in

[1] [1901] A. C. 495 at p. 506.

possession of those and other lands of the plaintiff by virtue of a mortgage of 30th August 1901 executed in his favour by plaintiff's guardian. The plaintiff filed this suit on 8th September 1911 for the lands alleging that on the date of the sale-deed he was a minor. The matter comes before us on a Reference from Beaman and Marten JJ. who held divergent views on the question as to whether Article 91 of the Indian Limitation Act applied to plaintiff's suit. Both learned Judges have framed questions for decision by this Full Bench. With great respect to Beaman J. I think the question framed by him is in too general terms. It proceeds on the assumption that there is no difference between a minor's deed and other deeds of the description mentioned in the question and I take it he framed his question for decision in this form on the argument by way of the analogy of the principles governing adoption cases which he considered applicable and which he applied to the facts of the present case. With great respect I am not prepared to adopt that line of reasoning and I therefore personally must decline to answer the question in the wide terms in which it is framed.

The questions framed by Marten J. appear to me to cover more appropriately the point for determination and I, therefore, confine myself to a discussion of the precise point raised by them. The question in short is: Whether Article 91 of the Indian Limitation Act, IX of 1908, applies to the plaintiff's suit?

Now, I may preface my remarks with the general view which I take of the scope of Article 91. In my opinion, it applies to suits the main object of which is to cancel or set aside an instrument not otherwise provided for by the Act. If there be any other substantial relief prayed for and the cancellation of the instrument be not actually necessary or merely auxilliary to the

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granting of such relief, Article 91 does not apply. It would be otherwise if the prayer for possession in a suit be merely consequential.

The further question, therefore, arises whether the plaintiff can escape the application of Article 91 by filing his suit for possession in this case.

The determination of this question may be considered from the point of view of all deeds or instruments which, like a minor's deed, are void at their inception or it may be considered from the point of view of the peculiar position of a minor in the eye of the law, i.e., by a consideration of arguments applicable to a minor's deed in particular. The adoption of this latter method is another reason for declining to answer the question in the form propounded by Beaman J.

Now, as to the sale-deed in this case, regarded in common with other instruments which are declared by law to be void at their inception, I am entirely in accord with the judgment of my Lord as to the distinction pointed out by him between such instruments and adoptions and as to the result arrived at by him that Article 91 does not apply to such void instruments. I think the point is really concluded by authority: see the decisions of the Privy Council in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[1] and *Petherpermal Chetty* v. *Muniandi Servai*[2].

I respectfully deprecate the application to other instruments of arguments based on the analogy of the principles in decided cases in adoptions. Analogy, like parity of reasoning, may be a useful servant to invoke in the determination of complex questions of law but must be handled cautiously and where legal

(1) (1907) L. R. 34 I. A. 87. (2) (1908) L. R. 35 I. A. 98.

problems can be solved by the application of straight forward principles of law I fail to see any place for the application of any arguments based on analogy.

But a minor's deed stands on a particular footing by itself. It has been decided by the highest tribunal that a minor's contract is null and void "*ab initio*": *Mohori Bibee* v. *Dharmodas Ghose*[1]. The law protects minors and the disability of infancy goes no further than is necessary for the protection of the infant: *Burnaby* v. *Equitable Reversionary Interest Society*[2].

Unlike the law in England which, in certain cases, gives a binding effect after majority to a contract entered into by an infant during infancy, the law here declares the minor's contract void and incapable of ratification.

That being so it can scarcely have intended to impose an obligation on the minor, after attaining majority, to set aside a transaction entered into during minority and which it has expressly declared to be void and incapable of ratification. If that were its intention the attitude of the law would be inconsistent and it would be inflicting an obligation upon the minor in consequence of an attempted contractual obligation entered into by him during minority. I think this is a sufficient answer to the defendant on this point.

Section 39 of the Specific Relief Act is permissive, not obligatory. There is, therefore, no obligation on the minor to sue under that section and if he does not need to sue under that section it cannot be said by not suing he loses the right which he in common with every other person possesses to the period of limitation for a suit for land.

(1) (1903) 30 Cal. 539.

(2) (1885) 28 Ch. D. 416, per Pearson J. at p. 424.

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I, therefore, think that the answer to the first question asked by Marten J. should be in the negative.

In the second question propounded by Marten J. another consideration is introduced, viz., the legal effect of the mortgage of 30th August 1901 executed by the minor's guardian. The determination of that question depends on whether the present suit can be treated as a suit by the plaintiff for redemption of the mortgage. The lower Courts have so treated it and the referring Bench apparently inclined to the same view. Apparently the plaintiff does not object to this and the mortgage must, therefore, be taken as established and binding on him. This question does not, therefore, to my mind arise for decision by us.

Answers accordingly.

J. G. R.

CRIMINAL REVISION.

Before Mr. Justice Shah and Mr. Justice Marten.

IN RE KHEMA RUKHAD*.

1918. *February* 22.

Criminal Procedure Code (Act V of 1898), section 520—Order as to disposal of property—Order can be varied only by a Court of appeal or Court of revision entitled to act in the case.

In acquitting an accused person of the charge of theft of cattle, the trying Magistrate ordered the cattle to be returned to him. This order was modified by the Sessions Judge, who ordered the cattle to be given up to the complainant. The accused having applied to the High Court :—

Held, that the Sessions Judge had no jurisdiction, under section 520 of the Criminal Procedure Code, to make the order he had made, since he was neither a Court of appeal or a Court of revision in the case.

In re Laxman Rangu Rangari(1), followed.

Queen-Empress v. *Ahmed*(2), dissented from.

*Criminal Application for Revision No. 404 of 1917.

(1) (1911) 35 Bom. 253. (2) (1886) 9 Mad. 448.