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whether as a matter of fact that particular use of land within the Municipal limits is a nuisance or is likely to become a nuisance to the neighbourhood. Therefore I am in entire agreement with the decision of the learned District Judge and the appeal must be dismissed with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, Mr. Justice Heaton, and Mr. Justice Shah.

1919. *December* 19.

FAKIRAPPA LIMANNA PATIL (ORIGINAL DEFENDANT), APPELLANT *v.* LUMANNA BIN MAHADU DHAMNEKAR (ORIGINAL PLAINTIFF), RESPONDENT*.

Limitation Act (IX of 1908), Article 44—Minor—Ward—Guardian—Alienation by natural guardian of minor—Suit to set aside alienation—Limitation.

A Hindu minor on his attaining majority cannot sue to recover possession of property transferred by his mother acting as his natural guardian during his minority without suing to set aside the transfer within the period of limitation provided by Article 44 of the Limitation Act.

N mortgaged his property to defendant's father in 1877. After his death, his widow S, as natural guardian of his minor son, sold the equity of redemption to the mortgagee in 1891, without necessity. The son attained majority in 1895 and died in 1901 leaving a widow.

S died in 1906, and the son's widow died in 1908. In 1916, the plaintiff, the next reversioner, sued to redeem the mortgage :—

Held, that the suit was barred under Article 44 of the Indian Limitation Act, 1908, for the son ought to have sued to set aside the alienation within three years of his attaining majority.

Per SHAH, J. :—The scope of Article 44 is not limited to sales by guardians who are appointed under testaments or by the Court. The language of the Article is general and wide enough to include sales by natural guardians, who

* Second Appeal No. 636 of 1918.

may have some authority, however, limited, to alienate the property of the minor, that is, sales which are not wholly void, but are voidable at the instance of the person interested in the property.

Bhagvant Govind v. *Kondi valad Mahadu*[1], *Balappa* v. *Chanbasappa*[2], and *Anandappa* v. *Totappa*[3], overruled.

Malkarjun v. *Narhari*[4], *Mata Din* v. *Ahmad Ali*[5], *Mahableshvar Krishnappa* v. *Ramchandra Mangesh*[6] and *Laxmava* v. *Razhappa*[7], referred to.

SECOND appeal from the decision of L. C. Crump, District Judge of Belgaum, reversing the decree passed by B. N. Hublikar, Joint Subordinate Judge at Belgaum.

Suit to recover possession of property, or in the alternative to redeem a mortgage.

One Nana was the owner of the property. He mortgaged the property to defendant's father in 1877. He had a wife named Sidubai and a minor son named Omanna.

After Nana's death, his widow Sidubai purporting to act as natural guardian of his minor son Omanna, sold the equity of redemption to the defendant's father in 1891.

Omanna attained majority in 1894-95 and died in 1901 leaving a widow Gopika. Sidubai died in 1906. Gopika died in 1908.

The plaintiff, who was the next reversioner, sued in 1916, to recover possession of the property from the defendant, or in the alternative to redeem the mortgage of 1897.

It was held by the trial Court that the suit was not barred by limitation; and that as the alienation of 1891

(1) (1889) 14 Bom. 279.
(2) (1915) 17 Bom. L. R. 1134.
(3) (1911) 17 Bom. L. R. 1137 *n.*
(4) (1900) 25 Bom. 337.
(5) (1911) 34 All. 213.
(6) (1913) 38 Bom. 94.
(7) (1918) 42 Bom. 626.

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was supported by legal necessity, it was binding on the plaintiff. The suit was accordingly dismissed.

On appeal, the District Judge found that the sale of 1891 was not for legal necessity; that Omanna could, if living, have sued to redeem the mortgage; and that consequently, the plaintiff also was entitled to redeem.

The defendant appealed to the High Court.

The appeal was at first heard by Macleod C. J., on the 3rd October 1919; but his Lordship directed the appeal to be re-heard before a bench of three Judges, and delivered the following judgment.

MACLEOD, C. J.:—The plaintiff sued to recover Khas possession of the suit property after setting at naught all the contentions of the defendant, or to redeem the suit property after taking account of the mortgage. The suit property belonged to one Nana who died leaving a widow Sidúbai and a son Omanna. Nana had mortgaged the property to the father of the defendant in 1877. Omanna died on the 25th April 1901, leaving a widow Gopika, who died in 1908. The plaintiff is admittedly the nearest reversioner and he sued to redeem the mortgage of 1877. It appears, however, that on the 1st of February 1891 Sidubai purporting to act as guardian of Omanna sold the equity of redemption to the defendant's father.

The lower Court found that the sale by Sidubai was for legal necessity and dismissed the plaintiff's suit with costs.

In appeal the learned appellate Judge considered that there was not sufficient evidence to show that the sale was for legal necessity, and it followed from that, that Omanna could have maintained the suit, in his opinion, for redemption. Therefore he considered that

the plaintiff as the nearest reversioner could sue for redemption, and passed a preliminary decree.

The question does not seem to have been argued in the lower appellate Court whether Omanna was not barred by Article 44 of the Limitation Act. The learned Judge seems to have assumed that the minor on attaining majority could have sued the mortgagee for redemption without first getting rid of the sale by his mother of the equity of redemption. This question was considered by my brother Shah and myself in S. A. No. 1001 of 1917, decided on 26th September 1919, and the matter was then very fully argued before us, but as we were of opinion that the sale by the minor's guardian was justified, we did not decide the point of limitation. Now however, the same question has arisen again, and in this case, as it has been found that the sale was not for legal necessity, the success of the defence must depend on the question of limitation.

In *Laxmava* v. *Rachappa*[1], a minor's mother and natural guardian sold his property. The suit was brought to set aside the sale more than three years after the minor attained majority, it was held that the suit was barred under Article 44 of the Indian Limitation Act. Reference was made to the case of *Balappa* v. *Chanbasappa*[2]. There the transaction which was disputed was a sale by a step-mother who purported to act as guardian of her minor step-son. The learned Chief Justice in his judgment says :—

"It appears to us extremely doubtful if Article 44 of the Indian Limitation Act has any application in circumstances such as we have here. The step-mother cannot be in a better position than any other manager to deal with immoveable property which is not her own, as appears from the case of *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*[3], which was a case of

(1) (1918) 42 Bom. 626.
(2) (1915) 17 Bom. L. R. 1134.
(3) (1856) 6 Moo. I. A. 393.

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a mortgage by a mother. A mother or a step-mother, whether a Hindu or otherwise, purporting to act on behalf of a minor son is, to use the words of section 38 of the Transfer of Property Act, a person authorised only under circumstances in their nature variable to dispose of immoveable property, and the onus of proving authority arising from necessity or apparent authority arising from that cause, justified by reasonable inquiry, is upon the person who tries to assert the transfer against a minor.

Mr. Justice Beaman in *Laxmava* v. *Rachappa*[1] said :—

"The case of *Balappa* v. *Chandbasappa*[2] and the case of *Anandappa* v. *Totappa*[3] with which we have been especially pressed, are, we think, easily distinguishable. We need only mention the first of these cases and point out that the transferor was not the natural guardian of the minor at all but his step-mother. The decision can then be put on the ground that the alienation was not by a guardian strictly speaking so at all but at the highest by a *de facto* guardian who was not authorized to deal in any way with the minor's property."

If then Omanna could not sue the mortgagee for redemption without getting the sale of the equity of redemption by his mother set aside within three years after attaining majority, it follows that the plaintiff as reversioner after the death of Gopikabai would be in no better position. But the decision in *Anandappa* v. *Totappa*[3] must be considered on this point, because the learned Judges there considered in what circumstances the plaintiff must sue for cancellation of a document which stands in his way of success, and in what circumstances he may disregard the document and sue for the recovery of the property leaving the defendant to show that the document on which he relies gives him a valid title. At p. 1139 the learned Judges say :—

"Whether a plaintiff must sue for cancellation of a document under which the defendant in possession claims, depends, we think, upon whether the onus of proving circumstances establishing its invalidity lies upon him or whether it lies upon the defendant to prove circumstances establishing its validity. For example, where a plaintiff sues to recover possession of property which

(1) (1918) 42 Bom. 626 at p. 628. (2) (1915) 17 Bom. L. R. 1134.
(3) (1911) 17 Bom. L. R. 1137 *n.*

the defendant has obtained under a document executed by the plaintiff or one under whom he claims, the plaintiff would have to establish facts entitling him to have the instrument cancelled or set aside and would have to sue within three years of those facts becoming known to him as provided by Article 91 of the Indian Limitation Act. On the other hand, where the defendant has acquired possession under a deed executed not by the real owner of the property but by some one having a power of disposal under certain circumstances on behalf of the real owner, the onus lies on the defendant to prove the existence of those circumstances, and the plaintiff may ignore the deed in bringing his suit for possession."

And later on the judgment proceeds :—

"It is argued, however, that the existence of Article 44 of the Indian Limitation Act implies that wherever a guardian has effected a sale of his ward's property the sale is valid until it is set aside by suit. We are not prepared to hold that the existence of this Article involves any qualification of the principles expressed in the judgment of Mr. Justice Woodroffe already referred to. The Article possibly refers to cases in which a ward might sue to set aside a sale effected by his guardian with the authority of the Court which would *prima facie* be valid but which, on proof of certain circumstances such as misrepresentation or fraud with regard to the guardian, might be set aside."

Mr. Justice Beaman in *Laxmava* v. *Rachappa*[1], although he says that *Anandappa* v. *Totappa*[2] is easily distinguishable, did not explain how he came to that conclusion. In the case before him the property in dispute belonged originally to one Mudkappa who was born in 1891. Whilst he was a minor his mother sold the property to Huchappa, husband of Laxmava, the 3rd defendant, on the 31st May 1909. After Mudkappa attained majority, he sold the property to Rachappa, the plaintiff, on the 25th September 1912, and it was Rachappa who had bought from the minor who instituted a suit against the defendants in 1913.

But it was not considered in the judgment whether a minor or his vendee could sue for the recovery of the property without setting aside the conveyance by the

(1) (1918) 42 Bom. 626. (2) (1911) 17 Bom. L. R. 1137 *n*.

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minor's mother. The Court seems to have assumed that the plaintiff could not recover the property without setting aside the deed. It is unfortunate that the Chief Justice in *Balappa* v. *Chanbasappa*[1] does not refer to the case of *Anandappa* v. *Totappa*[2] which was mentioned by the appellant's pleader during the argument. But I must say there is considerable force in the contention by Mr. Manerikar in this case that the passage in the judgment at page 1139 in *Anandappa* v. *Totoppa*[3] applies to this case. The argument is that the minor could disregard entirely his mother's disposition. The equity of redemption had come down to him from his father. Therefore he was entitled to go to the mortgagee and ask to redeem the property. It would be then for the alleged owner of the equity of redemption, who happened to be the mortgagee, to set up a sale-deed of the equity of redemption from the minor's mother in order to defeat the claim of the mortgagor to redeem. Therefore the argument proceeds that it would not be a suit under Article 44 to set aside a transfer made by the minor's mother of the equity of redemption, as it would lie upon the defendant to prove that document in order to defeat the plaintiff's claim.

As this is a question which must be finally decided sooner or later considering the state of authorities, it seems to me to be advisable that the appeal should be heard before a Bench of three Judges. If I referred a question to a Full Bench, my decision based on their answer to the question would still be appealable under the Letters Patent.

The appeal was accordingly heard by a Bench consisting of Macleod C. J. and Heaton and Shah JJ.

A. G. Desai, for the appellant:—One Nana mortgaged the plaint property to the defendant in 1877. On Nana's

(1) (1915) 17 Bom. L. R. 1134. (2) (1911) 17 Bom. L. R. 1137.

death his widow Sidubai sold it to the defendant in 1891 acting for and on behalf of her minor son Omanna. Omanna died a major in 1901. Plaintiff filed this suit in 1916 as the reversioner of Omanna to redeem the mortgage of 1877 alleging that the sale of 1891 was for very low consideration and for no legal necessity.

The question that has therefore to be decided in this case is whether the suit is or is not barred under Article 44 of the Indian Limitation Act, 1908.

A sale by a Hindu mother purporting to act on behalf of her minor son is not on the face of it a nullity. It is no doubt liable to be set aside if the vendee is not able to prove legal necessity therefor. When such a sale is challenged whether directly or indirectly the Court has not at once to embark on an inquiry into the merits of the case, but has first to see as required under section 3 of the Indian Limitation Act whether the attempt to attack it is made within time allowed by law under Article 44 of the Indian Limitation Act.

This view is no doubt not supported by certain observations of this Court in *Balappa* v. *Chanbasappa*[1] and *Anandappa* v. *Totappa*[2]. In the latter case Scott C. J. observes at p. 1139 that in a case like the one under consideration "the onus lies on the defendant to prove (legal necessity) and the plaintiff may *ignore* the deed in bringing his suit for possession".

This is too broad a proposition if it is meant to be of general application. Confined to the particular facts of the case the principle may well be accepted without demur. Then in *Balappa's case*[1] the alienation was made by a *step-mother* of the minor (who certainly is not under the Hindu law the natural guardian of the minor) and it was rightly held that as only a *de facto* guardian she was wholly unauthorised to transfer.

(1) (1915) 17 Bom. L. R. 1134. (2) (1911) 17 Bom. L. R. 1137 *n*.

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That case was based upon the principle laid down in *Mata Din* v. *Ahmad Ali*[1] which relates to an alienation by a Mahomedan brother who is not recognised by the Mahomedan law as the natural or lawful guardian of a minor. Alienation by a Mahomedan mother stands on the same footing: *Imambandi* v. *Mustaddi*[2]. Similarly, in *Anandappa's case*[3] the transfer was effected by the natural father of the minor after the minor was given in adoption.

The alienation in each of these cases was by a *de facto* guardian and not by a guardian *de jure* and could thus very rightly be ignored. In the case under consideration however the alienation is by the mother who is recognised under Hindu law as the natural and the lawful guardian of the minor. In such a case the alienation being good on the face of it cannot be ignored, but must be set aside within three years as laid down in Article 44.

[HEATON, J.:—In the cases of *Anandappa* v. *Totappa*[3] and *Laxmava* v. *Rachappa*[4] it was assumed that a natural guardian has a power to dispose of the minor's property. But has a natural guardian really such power under the Hindu law?]

A natural guardian has such powers: Mayne's Hindu law, paras. 218, 219.

[MACLEOD, C. J.:—*Prima faice*, you say, that it is presumed that everything is in order when the sale is by a natural guardian.]

Yes. A ward after attaining majority can certainly point out wherein it is not, or to put it properly, he may require the alienee to prove how it is in order. But whichever way the onus may lie he cannot ignore

(1) (1911) 34 All. 213.
(2) (1918) L. R. 45 I. A. 73 at pp. 77, 87.
(3) (1911) 17 Bom. L. R. 1137 *n.*
(4) (1918) 42 Bom. 626.

the sale and with it Article 44 of the Indian Limitation Act.

The case of *Bhagvant Govind* v. *Kondi valad Mahadu*[1] is certainly against me, but it has not been approved of by the Privy Council in *Malkarjun* v. *Narhari*[2], which shows that if the sale is a reality, it is a reality defeasible only in the way pointed out by law.

[MACLEOD, C. J. :—*Malkarjun's case*[2] is of a judicial sale. The point here is whether a sale by a natural guardian can be ignored by the minor.]

But the principle is the same in both the cases. Article 12 applies to a judicial sale, Article 44, to a private sale. It must also be remembered that there was no Article similar to Article 44 in the earlier Limitation Acts of 1859, 1871. The Article allows full three years to the ward on attaining majority within which he must make up his mind whether he would stand by or repudiate the sale and take necessary action to avoid it.

I would also rely on *Mahableshvar Krishnappa* v. *Ramchandra Mangesh*[3] and *Laxmava* v. *Rachappa*[4] and the recent unreported case in Second Appeal No. 1143 of 1917.

D. R. Manerikar, for the respondent :—I submit that Article 44 of the Indian Limitation Act applies only to two classes of guardians (1) testamentary guardian and (2) guardian appointed by the Court. It will have no application to the case of a natural guardian of a minor. This is clear from the use of the word "ward" in that Article. There is a difference between "minor" and "ward". A "minor" means a boy who is not deemed to have attained majority under the provisions of the Indian Majority Act; while a "ward" means a minor

(1) (1889) 14 Bom. 279.
(2) (1900) 25 Bom. 337 at p. 351.
(3) (1913) 38 Bom. 94.
(4) (1918) 42 Bom. 626.

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for whose property or person a guardian is appointed either by testament or by Court: see section 4, clauses (1) and (3) of the Guardians and Wards Act, 1890. This Act was enacted to amend the law relating to guardian and ward; it does not affect the powers of the natural guardian of a minor whose powers are governed by the personal law of the parties: *Honapa* v. *Mhalpai*[1].

The transfers made by the above-mentioned two classes of guardians in accordance with the Guardians and Wards Act are *prima facie* valid and binding on the minor unless the minor gets them set aside through Court. Such suits alone are governed by Article 44: *Anandappa* v. *Totappa*[2]; as regards the transfers made in contravention of sections 28 and 29 of the Guardians and Wards Act they are expressly declared to be voidable by section 30 of the Act and no intervention of the Court is necessary to set them aside. Mere repudiation by the minor on attaining majority is quite sufficient, but the minor can ratify them on attaining majority. Assuming that the word "ward" is synonymous with "minor" and guardian includes even a natural guardian, I submit that Article 44 has no application to those transfers by the natural guardian which are not supported by legal necessity. Such transfers are wholly unauthorised acts of the guardian and need not be set aside. This is the ratio in *Mata Din* v. *Ahmad Ali*[3].

Whether you call such transfers as void or voidable, it is immaterial because the word "voidable" is defined by the Privy Council in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[4] as meaning capable of being affirmed or disaffirmed subsequently and not requiring intervention of the Court for being set aside. This principle

(1) (1890) 15 Bom. 259.
(2) (1911) 17 Bom. L. R. 1137 *n*.
(3) (1911) 34 All. 213.
(4) (1907) 34 Cal. 329 at p. 333.

is rightly followed in *Balappa* v. *Chanbasappa*[1]. This case is not correctly distinguished in *Laxmava* v. *Rachappa*[2] on the ground that it was a case of a *de facto* guardian who is no guardian at all but the arguments and the decision proceeded on the assumption that the step-mother was both a *de jure* and *de facto* guardian. Besides though *de facto* guardians are not recognised by Mahomedan law they are recognised by Hindu law : *Mohanund Mondul* v. *Nafur Mondul*[3].

Desai, in reply :—The word "ward" in the Limitation Act is used in its ordinary sense. It means a minor who has some one to look after him. It cannot include a homeless child or a waif. "Guardian" and "ward" are merely correlative terms. The definition of the words "guardian" and "ward" in the Guardians and Wards Act is not really opposed to this view. The word "guardian" does not necessarily mean only the testamentary or the certificated guardian : See *Hemidas* v. *Virupaxappa*[4] ; and the fact that there is an express provision made in section 30 of the Guardians and Wards Act for avoiding "disposal" of property by such guardian does not mean that alienation made by other guardians can be winked at or ignored or got over by mere repudiation. Article 44 contemplates alienations by all sorts of guardians whether natural, testamentary, or certificated, without distinction and its operation cannot be by mere implication controlled by the Guardians and Wards Act which came into existence nearly thirteen years after Article 44 was enacted.

C. A. V.

MACLEOD, C. J. :—This appeal has now been fully argued, and an opportunity has arisen for deciding a question

(1) (1915) 17 Bom. L. R. 1134.

(2) (1918) 42 Bom. 626.

(3) (1899) 26 Cal. 820.

(4) (1918) S. A. No. 1143 of 1917 (Unrep.) decided on 1-10-18.

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which has given rise to a considerable conflict of judicial opinion, namely, whether a Hindu minor on his attaining majority can sue to recover possession of property transferred by his mother acting as his natural guardian during his minority without suing to set aside the transfer and therefore coming within the provisions of Article 44 of the Limitation Act. That question was answered in the negative by Beaman and Heaton JJ. in *Laxmava* v. *Rachappa*[1] where the plaintiff had bought certain property from one Mudhappa which had been sold by Mudhappa's mother during his minority to the defendant, and reference may be made to *Mahableshvar Krishnappa* v. *Ramchandra Mangesh*[2] where K as manager of the family appointed a Muktyar who sold Mulgeni rights. K's eldest son after attaining majority sued to recover possession alleging that the sale was void. It was held that it could not be treated as a nullity and the right of the plaintiff to challenge it was barred by Article 44 of Act IX of 1908. But there are contrary decisions of this Court.

In *Bhagvant Govind* v. *Kondi valad Mahadu*[3] the plaintiff sued to redeem land alleged to have been mortgaged by his father in 1858 to the grandfather of the 1st defendant. The defendant alleged that the mortgage had been executed in favour of the father of the 2nd defendant and that in 1863 the equity of redemption had been sold to the mortgagee by the widows of the mortgagor during the plaintiff's minority. The defendant contended that the suit was really one to set aside the sale of 1863 and was barred by Article 44 of the Limitation Act, XV of 1877. It was held that Article 44 did not apply as the necessity for impugning the sale of 1863 to the 2nd defendant arose from the 2nd defendant's resisting the plaintiff's claim to redeem the mortgage,

(1) (1918) 42 Bom. 626. (2) (1913) 38 Bom. 94.

(3) (1889) 14 Bom. 279.

and was therefore subservient to the suit for possession. It was also held that the 2nd defendant having entered into possession as mortgagee could not afterwards set up an adverse possession as owner so as to defeat plaintiff's right to redeem: *Ali Muhammad* v. *Lalta Bakhsh*[1]; *Tanji* v. *Nagamma*[2].

In *Anandappa* v. *Totappa*[3] the plaintiff sued for a declaration that a deed of exchange dated the 15th June 1900 was not binding on him and for recovery of possession of certain lands. The deed of exchange purported to be between the plaintiff a minor interested in his own right as the adopted son of a Vatandar acting through his natural father and the natural grandfather of the plaintiff. The District Judge reversing the decision of the Subordinate Judge held that it was not necessary for the plaintiff to sue to set aside the deed on the authority of the decision of the Privy Council in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[4]. But that was a suit by a reversioner to recover possession of property leased by a Hindu widow. The decision of the District Judge was upheld in appeal by Scott C. J. and Rao J. They said: "whether a plaintiff must sue for cancellation of a document under which the defendant in possession claims, depends, we think, upon whether the onus of proving circumstances establishing its invalidity lies upon him or whether it lies upon the defendant to prove circumstances establishing its validity". They then referred to the decision of Woodroffe J. in *Harihar Ojha* v. *Dasarathi Misra*[5]. That again was a suit by a reversioner to recover property alienated by a Hindu widow. Woodroffe J. relied on a passage in the judgment of the Madras High Court in *Unni* v. *Kunchi Amma*[6].

(1) (1878) 1 All. 655 at p. 658.
(2) (1866) 3 Mad. H. C. R. 137.
(3) (1911) 17 Bom. L. R. 1137 *n.*
(4) (1907) 34 Cal. 329.
(5) (1905) 33 Cal. 257.
(6) (1890) 14 Mad. 26.

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That was a suit filed on behalf of a Malabar tarwad by two of its members to recover property improperly alienated under a Kanom instrument by the Karnavan.

It was held that since a prayer for the cancellation of the Kanom instrument was not an essential part of the plaintiffs' relief, the suit was not barred by the 3 years rule in Article 91, Act XV of 1877.

The Court said : " In our opinion there is no distinction between this case and other cases where a similar charge is made in respect of an instrument of alienation executed by a person who, not being the full owner of the property, has a conditional authority only to dispose of it. Such are the cases of a guardian of a minor, the manager of a Hindu family or the sonless widow in a divided Hindu family. In these cases, as was argued by the appellants' Vakil, it is not only not necessary, but it is not possible, to have the instrument of alienation cancelled and delivered up, because, as between the parties to it, it may be a perfectly valid instrument. All that is needed is a declaration that the plaintiffs' interest is not affected by the instrument, and that declaration is merely ancillary to the relief which may be granted by delivery of possession ". Reference was made to *Sikher Chund* v. *Dulputty Singh*[a], where Prinsep J. said " The fact that a guardian may have improperly sold property belonging to his ward, and may have embodied this transaction in a written instrument, cannot, in my opinion, affect the position of a minor seeking to recover that property, merely because a written instrument was executed. That instrument is between the guardian and a third party. If the guardian has exceeded his authority, the instrument is not the act of the minor, and it would not be incumbent on him to sue to set it aside as in the case

(a) (1879) 5 Cal. 363 at p. 370.

of one who has himself executed an instrument the validity of which he impugns ".

But it must be noted that there was no Article in the Limitation Act of 1871 which was then in force corresponding with Article 44 of the present Act.

In *Anandappa* v. *Totapa*[1] it was argued that the existence of Article 44 of the Indian Limitation Act implied that whenever a guardian has effected a sale of his ward's property the sale was valid until it was set aside by suit. But Scott C. J. said: "We are not prepared to hold that the existence of this Article involves any qualification of the principles expressed in the judgment of Woodroffe J. already referred to. The Article possibly refers to cases in which a ward might sue to set aside a sale effected by his guardian with the authority of the Court which would *prima facie* be valid but which, on proof of certain circumstances such as misrepresentation or fraud with regard to the guardian, might be set aside."

In *Balappa* v. *Chanbasappa*[2] the plaintiff sued to redeem a mortgage executed by his father, his step-mother during his minority having sold the equity of redemption to the defendant mortgagee. As plaintiff brought the suit more than three years after attaining majority it was argued the suit was barred by Article 44.

Scott C. J. said: "It appears to us extremely doubtful if Article 44 of the Indian Limitation Act has any application in circumstances such as we have here. The step-mother cannot be in a better position than any other manager to deal with immoveable property which is not her own as appears from the case of *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Kunweree*[3] which was a case of a mortgage by a mother...

(1) (1911) 17 Bom. L. R. 1137 *n*.

(2) (1915) 17 Bom. L. R. 1134. (3) (1856) 6 Moo. I. A. 393.

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The learned Judge appears to think that the question with regard to Article 44 is disposed of by the judgment of the Privy Council in *Malkarjun* v. *Narhari* [1] in which a reference is made to *Bhagvant Govind* v. *Kondi valad Mahadu* [2]. It appears to us that that conclusion is not correct, because the question of the powers of the so-called *de facto* guardian in relation to a defence of limitation under Article 44 was considered after exhaustive argument by the Privy Council in *Mata Din* v. *Ahmad Ali* [3], and the conclusion arrived at is that Article 44 has no application to the case of a *de facto* guardian wholly unauthorised to effect a transfer.".

In *Mata Din* v. *Ahmad Ali* [3] a Mahomedan sued to redeem a mortgage, the equity of redemption to which had been sold by his elder brother, treating the sale as a nullity. The defendant pleaded that Article 44 of the Limitation Act applied but their Lordships of the Privy Council said: "Article 44 prescribes a period of three years within which a ward, who has attained majority, may set aside a sale made by his guardian, the time running from the date of the ward's majority. This provision has no application to the present case, for the sale here was effected, not by a guardian, but by a wholly unauthorised person."

But their Lordships did not say that an unauthorized alienation was beyond the scope of Article 44, and herein, with all due respect, lies the fallacy of the argument of the learned Chief Justice, the foundation of which was laid in the judgment in *Unni* v. *Kunchi Amma* [4] where all alienations whether by managers of a joint family, Hindu widows or guardians were placed in the same category. As remarked by Mr. Rustomji

(1) (1900) 25 Bom. 337 at p. 222.
(2) (1889) 14 Bom. 279.
(3) (1911) 34 All. 213 at p. 222.
(4) (1890) 14 Mad. 26.

in his commentary on the Limitation Act at page 250 : "Article 44 presupposes that the alienation is *unauthorized* and if it were held that such alienation does not come within the Article, the Article would be in effect nullified."

In order to answer the question before us we must confine ourselves strictly to the case of a transfer of property by a Hindu mother acting as natural guardian of her minor son and not be led away by false analogies. The position of the natural guardian is not the same as that of the Hindu widow, or the manager of a joint family, or an unauthorized guardian. The doctrine of subserviency which was applied in *Bhagvant Govind* v. *Kondi valad Mahadu*[1] was expressly disapproved of by the Privy Council in *Malkarjun* v. *Narhari*[2]. In that case a mortgagor sought to redeem after the equity of redemption had been sold at a judicial sale in execution of a decree. Their Lordships held that the sale was not a nullity and that the suit was to set aside the sale. They said at p. 350 : "It is obvious that the expression 'set aside a sale' is not attended by any such difficulty (as the expression 'set aside an adoption'), because a sale, valid until set aside, can be legally and literally set aside ; and anybody who desires relief inconsistent with it may and should pray to set it aside". Referring to *Bhagvant Govind* v. *Kondi valad Mahadu*[1] which had been relied upon in argument, their Lordships said : "In overruling the plea of limitation the Court made the following observations : 'The necessity of impugning the sale of 1863 to the 2nd defendant arises from the 2nd defendant's resisting the plaintiff's suit to redeem the mortgage and is therefore subservient to that suit.'...Their Lordships find it impossible to grasp the reasoning behind (these observations).

(1) (1889) 14 Bom. 279. (2) (1900) 25 Bom. 337.

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If it means that the right to set aside the sale is kept alive as long as the right to redeem would subsist by virtue of the mortgage, the result is that the validity of the sale might be held in suspense for sixty years.....But if the sale is a reality at all, it is a reality defeasible only in the way pointed out by law... The Limitation Act protects *bona fide* purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside, and is to vanish directly some other relief consequential on the annulment of the sale is sought, the protection is exceedingly small. Such however seems to be the effect of the doctrine of subservience laid down by the Bombay High Court." The argument that if the plaintiff sues for possession ignoring the transfer, he cannot be said to be suing to set aside a transfer, for the question does not arise until the defence is raised, is also disposed of by this judgment, while reference may be made to *Shrinivas Murar* v. *Hanmant*[1] where it was held that Article 118 of Act XV of 1877 applied to every suit where the validity of a defendant's adoption is the substantial question in dispute whether such question is raised by the plaintiff in the first instance or arises in consequence of the defendant setting up his own adoption as a bar to the plaintiff's success.

Lastly there is the argument that a plaintiff need not sue to set aside a transfer to which he is not a party: *Sikher Chund* v. *Dulputty Singh*[2]. That argument may very well apply to a suit by a reversioner impugning a transfer by a Hindu widow, for the widow represents her husband's estate and until her death there is no one who has a vested interest, nor is there

(1) (1899) 24 Bom. 260. (2) (1879) 5 Cal. 363.

an obligation on any one to take proceedings until the reversion falls in. But the natural guardian represents the minor's estate and has power to manage it, subject to the condition that he must manage it for the benefit of the minor.

There was one argument addressed to us which seemed to me to have considerable weight, and which I should have been inclined to favour if it had not appeared that it has been concluded by authority.

The use of the word "ward" in Article 44 of the Limitation Act is peculiar and there seems no reason why the word "minor" should not have been used. It was argued that "ward" in Article 44 means a minor to whom a guardian has been appointed by the Court under the Guardians and Wards Act or by will. "Ward" is defined in the Guardians and Wards Act as a minor who has a guardian, but the only guardians referred to in the Act are guardians appointed by the Court or by will, and there is nothing unreasonable in the suggestion that the term "ward" is confined to a minor who has such a guardian and does not include minors who have natural guardians. That appears to have been the view underlying the remarks of Scott C. J. already referred to in *Anandappa* v. *Totappa*[1]. But on reference to the judgment of the Privy Council in *Malkarjun* v. *Narhari*[2] at p. 351 and *Mata Din* v. *Ahmad Ali*[3] it will be seen that their Lordships expressly state that Article 44 applies to transfers by guardians without excluding natural guardians, and as in the one case they were referring to a Hindu mother, and in the other to guardians under Mahomedan law, it is obvious that they considered that natural guardians under Hindu or Mahomedan law were not excluded.

(1) (1911) 17 Bom. L. R. 1137 *n.* (2) (1900) 25 Bom. 337.
(3) (1911) 34 All. 213.

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It follows that in my opinion Omanna could not redeem without suing to set aside the transfer by his mother and as he did not do so within three years of his attaining majority the plaintiff's suit is barred.

The appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

HEATON, J. :—I concur.

SHAH, J. :—I agree that the present suit is barred by limitation; and as this conclusion involves a reconsideration of the *ratio decidendi* in *Balappa* v. *Chanbasappa*[1], to which I was a party, I desire to state briefly my reasons for accepting it.

In the present case the property belonged to Nana, who mortgaged it to the defendants' father in 1877. Nana died leaving a widow Sidubai and a minor son Omanna. Sidubai purporting to act as the guardian of Omanna sold the equity of redemption to the defendants' father in 1891. Omanna died in 1901 leaving a widow Gopika who died in 1908. The plaintiff who is the next heir of Omanna, after the death of his widow Gopika, filed the present suit in 1916 to redeem the mortgage of 1877. The defendant relied upon the sale by the mother of Omanna. But it has been found by the lower appellate Court that there was no necessity nor was there any benefit to the estate.

It is urged, however, on behalf of the defendant, that the sale was liable to be set aside at the instance of Omanna on his attaining majority and that his right to file a suit for that purpose having been barred by Article 44 of the Limitation Act before his death in 1901, the plaintiff's present claim for redemption, which necessarily involved the setting aside of the sale by Omanna's mother, was barred. It is urged that he cannot ignore the sale, which is not void but voidable at

(1) (1915) 17 Bom. L. R. 1134.

the instance of the minor son, and that a prayer to set aside the sale is essentially involved in the claim for redemption.

The questions that arise for decision are whether Article 44 applies to a sale by the natural guardian of a Hindu minor, and, secondly, whether it is necessary to have it set aside before making any claim for possession or redemption on the footing that no such sale exists.

As regards the first point I am satisfied that the scope of Article 44 is not limited to sales by guardians who are appointed under testaments or by the Court. The language of the Article is general and wide enough to include sales by natural guardians, who may have some authority, however limited, to alienate the property of the minor, that is, sales which are not wholly void, but are voidable at the instance of the person interested in the property. This view derives support from the observations of their Lordships of the Privy Council in *Malkarjun* v. *Narhari*[1] and *Mata Din* v. *Ahmad Ali*[2]. Though the article was first introduced in the Limitation Act of 1877, there is no case in which it is held to be restricted to sales by testamentary guardians or guardians appointed by the Court. The mother of a Hindu minor as the natural guardian of her son has authority to alienate the immoveable property of her son under necessity or for the benefit of the estate. It is enough to refer to *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*[3] on this point. It cannot be said that the sale here was wholly unauthorised as in *Matadin's case*[4]. I am, therefore, of opinion that the sale such as we have in this case was one which the minor on attaining majority could have sued to set aside and Article 44 would have applied to such a suit.

(1) (1900) 25 Bom. 337 at p. 351.
(2) (1911) 34 All. 213.
(3) (1856) 6 Moo. I. A. 393 at p. 403.
(4) (1911) 34 All. 213.

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The next question in effect is whether he ought to have sued to set it aside, and if so what is the effect of his omission to do so within the prescribed period on the present suit. On this point also I am of opinion that he ought to have sued to set it aside within the period allowed by Article 44 and his omission to do so bars the present suit filed by a person who claims under him. It seems to me that the observations of their Lordships in *Malkarjun's case*[1] and in *Khiaraj-mal* v. *Daim*[2] support this view. The sale by the mother in this case was not null and void, but it was voidable at the instance of Omanna.

I have reached this conclusion after a consideration of the conflicting authorities on this point, and I am satisfied that the reasoning in *Balappa* v. *Chanbas-appa*[3] cannot be properly applied to the case of a sale by the natural guardian of a Hindu minor, who has power to sell the property of the minor under certain circumstances.

Section 38 of the Transfer of Property Act to which a reference is made in the judgment in *Balappa's case*[3], applies to a sale by any person authorised only under circumstances in their nature variable to dispose of immoveable property. As for instance it may apply to a Hindu widow who has inherited her husband's estate, but has a limited power of disposal over the immove-able property, as well as to a Hindu widow as the natural guardian of her minor son, who can alienate the immoveable property of her son under certain circumstances. But it only lays down a substantive rule as to when such transfers would bind the persons affected by them. It is not the purpose of the section to lay down the remedies which persons affected by

(1) (1900) 25 Bom. 337. (2) (1904) 32 Cal. 296.
(3) (1915) 17 Bom. L. R. 1134.

the transfers may have to adopt to get rid of the effect of the transfers made by different persons with limited powers of disposal. A reversioner affected by the transfer effected by a Hindu widow who has inherited her husband's property may be able to adopt a particular course. A minor whose property has been alienated by his natural guardian may have to adopt a different course. A reversioner may sue during the life-time of the widow to have her alienation declared inoperative after her death or may wait until her death. The alienation by her is in no case void: it is good during the widow's life-time: and after her death it does not require to be set aside under any Article. The reversioner's interest during the widow's life-time is contingent and not vested in the estate and his suit for possession after the widow's death is governed by Article 141. The case of a Hindu minor affected by the transfer effected by his mother appears to be quite different. The sale can be set aside on his attaining majority and there is a special article which provides the limitation for such a suit. I do not think, therefore, that section 38 of the Transfer of Property Act can afford any reason for treating all cases to which it would apply, on the same basis as to the remedies open to the persons affected by the transfers.

I need not refer to those cases in which the suits were filed by reversioners in respect of the alienations by the widows who had inherited their husband's property.

As regards an alienation by a natural guardian of a Hindu minor, the case of *Bhagvant Govind* v. *Kondi valad Mahadu*[1] is undoubtedly against the view which we take in this case. But so far as the case relates to the point under consideration, it is distinctly disapproved by the Privy Council in *Malkarjun's case*[2].

(1) (1889) 14 Bom. 279. (2) (1900) 25 Bom. 337.

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Though the case of *Balappa* v. *Chanbasappa*[1], decided by Scott C. J. and myself, may be distinguishable on its special facts, as the alienation in that case was by a step-mother, the *ratio decidendi* in that case and in the csse of *Anandappa* v. *Totappa*[2] supports the conclusion reached in *Bhagvant's case*[3]; and these two decisions are based upon the view that the necessity for a plaintiff to sue for setting aside a sale depends upon whether the onus of proving circumstances establishing its invalidity lies upon him or whether it lies upon the defendant to prove circumstances establishing its validity. This view was largely based upon observations made in cases relating to suits by reversioners in respect of alienations made by widows inheriting their husbands' estates as such. On a further consideration I am satisfiéd that the necessity for suing to set aside a sale does not depend so much upon the question whether the onus lies upon the plaintiff or the defendant in the first instance, but upon the question whether the sale is by a person wholly unauthorised or by a person who is authorised only under certain circumstances to alienate the property or in other words whether the sale is null and void or only voidable if the person interested seeks to aviod it. If the latter is the case, the persons concerned should sue to have it set aside if there is any Article of the Limitation Act applicable to such a suit. In the present case Article 44 applies, and therefore the necessity of suing to set aside the sale is established under the circumstances.

In two later cases, *Laxmava* v. *Rachappa*[4] and *Hemidas* v. *Virupaxappa*[5], the decisions in *Balapa* v. *Chanbasappa*[1] and *Anandappa* v. *Totappa*[2] have been dissented from. I have reconsidered the point in

(1) (1915) 17 Bom. L. R. 1134.
(2) (1911) 17 Bom. L. R. 1137 *n.*
(3) (1889) 14 Bom. 279.
(4) (1918) 42 Bom. 626.
(5) S. A. 1143 of 1917 (Unrep.).

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view of this conflict of decisions and in the light of the arguments urged in this case, and I am satisfied that the view we now take is the correct view.

Speaking for myself I regret the result for as a matter of fact this view is likely to unsettle some existing titles to immoveable properties. The decision in *Bhagwant's case*[1] was in 1889. In 1900 that part of the decision with which we are concerned was disapproved by the Privy Council. In spite of that *Bhagvant's case*[1] has been probably followed on this point in some cases in this Presidency, I mean cases which have not been reported. Then we come to the conflicting decisions to which I have already referred. I cannot say that the course of decisions has been uniform and long enough to invite the application of the doctrine of *stare decisis*.

I therefore concur in the order proposed by my Lord the Chief Justice.

Appeal allowed.

R. R.

[1] (1889) 14 Bom. 279.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Crump.

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December 19.

DAMU valad DIGA AND ANOTHER (HEIRS OF ORIGINAL PLAINTIFF), APPELLANT *v.* VAKRYA VALAD NATHU KUNBI (ORIGINAL DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XVII, Rule 2, Order IX, Rule 3, Order XXXII, Rule 3—Adjourned hearing—Plaintiffs' default—Non-appearance of defendant—Dismissal of suit—Fresh suit on the same cause of action.

* First Appeal No. 170 of 1918.