his son, had deliberately withheld his evidence, which would have shown how the rest of the consideration had been applied".

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It appears from the facts of that case that the consideration was a sum of Rs. 18,400 and the evidence showed that a sum of Rs. 2,000 had not been shown to have been applied for payment of the debts. In this case the facts are different. The sale deed itself shows that the first item of Rs. 10,285-4-0 was the amount due in respect of the three earlier mortgages. The sale deed also shows that the sum of Rs. 4,714-12-0 was a cash advance. This is, therefore, a case where part of the consideration was for the payment of antecedent debts and part was for the personal benefit of defendant No. 3. If that is so, it seems to me that the principle laid down in *Masit Ullah's* case cannot apply to the facts of the present case. In conceivable circumstances it is possible to uphold a transaction where, for example, a substantial part of the consideration is either for the payment of antecedent debts or for a justifying necessity and only a small portion is not shown to have been expended for one or the other purpose. But where, as in this case, a sum of Rs. 4,714-12-0 was admittedly borrowed for the personal benefit of defendant No. 3, I am unable to hold that the sale itself could be justified. That was the view taken by the Court below and I think, that view is right.

For the above reasons, the decree appealed from is correct and this appeal will be dismissed with costs in one set.

Appeal dismissed.

K. B. S.

APPELLATE CIVIL

Before Mr. Justice Gajendragadkar and Mr. Justice Vyas.

GANGADHAR BALKRISHNA DHARMADHIKARI (ORIGINAL DEFENDANT), APPELLANT *v.* DATTATRAYA BALIRAM KULKARNI (ORIGINAL PLAINTIFF), RESPONDENT.*

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Nov. 4

The Code of Civil Procedure (Act V of 1908) O. XXXII, r. 7—Agreement with reference to suit made by next friend or guardian of minor without leave of the Court—Whether void or voidable—Indian Limitation Act (IX of 1908), Art. 44.

A minor on attaining majority filed a suit for redemption of a mortgage on the ground that the sale of equity of redemption made by the guardian during the plaintiff's minority as a result of the compromise in a previous suit was not binding on the plaintiff as no leave of the Court

* Second Appeal No. 461 of 1949.

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was obtained for the compromise. On the question whether the compromise was void or only voidable at the option of the minor,

Held, that the effect of the provisions of O. XXXII, r. 7 of the Code of Civil Procedure, 1908, is to render an agreement made on behalf of the minor by the next friend or guardian with reference to the suit without the leave of the Court voidable at the option of the minor and not altogether void.

Chhabba Lal v. *Kallu Lal*,[1] explained.

Mariam Bibi v. *Amna Bibi*,[2] *Mahatab Singh* v. *Durga Narain Singh*,[3], *Subramaniam Chettiar* v. *Raja Rajeshwar Dorai*[4] *Manoharlal* v. *Jadu Nath Singh*,[5] *Virupakshappa* v. *Shidappa and Basappa*,[6] *Bhiwa* v. *Devchand Bechar*,[7] *Chhotabhai Motibhai* v. *Dadabhai Narandas*,[8] and *Gangadhar Balkrishna Dharmadhikari* v. *Dattatraya Baliram Kulkarni*,[9] referred to.

Held, further that a minor, on attaining majority, cannot sue to recover possession of property transferred by his guardian during his minority, without suing to set aside the transfer within the period of limitation prescribed by art. 44 of the Indian Limitation Act, 1908 and that, therefore, the suit was barred.

Bijoy Gopal Mukerji v. *Krishna Mahishi Debi*,[10] distinguished.

Fakirappa Limanna Patil v. *Lumanna* bin *Mahadu Dhamnekar*,[11] followed.

SECOND APPEAL against the decision of G. N. Katre, District Judge, West Khandesh, confirming the decision of N. L. Ranade Extra Joint Civil Judge (Junior Division), Dhulia.

One Baliram was the owner of a field bearing survey No. 254 situate at Songir in the West Khandesh District. On April 27, 1920 he executed in favour of Gangadhar (defendant), a simple mortgage for Rs. 400. After Baliram's death the mortgagee filed suit No. 350 of 1929 to recover the mortgage debt by the sale of the mortgaged property. The suit was filed against the plaintiff, who was a minor then, represented by his mother Savitribai who was appointed his guardian. A decree was passed in favour of the mortgagee on March 4, 1930. In 1932 the mortgagee sought execution of this decree and an order for sale of the property was made. Pending the execution proceedings the plaintiff's mother acting as the guardian of the minor judgment-debtor executed on August 30, 1932, a deed of sale in favour of the defendant in respect

(1) (1946) 48 Bom. L. R. 6. 4.
(2) [1937] All. 317 F. B.
(3) [1936] A.I.R. All. 811.
(4) (1915) 39 Mad. 115, P.C.
(5) (1906) L. R. 33 I. A. 128.
(6) (1901) 26 Bom. 109.
(7) (1911) 35 Bom. 322.
(8) (1934) 36 Bom. L. R. 738.
(9) (1952) First Appeal No. 28 of 1951, decided by Rajadhyaksha and Vyas JJ., on September 3, 1952 (unrep.)
(10) (1907) 34 Cal. 329, P.C.
(11) (1919) 44 Bom. 742, F. B.

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of the suit property for the consideration of Rs. 1,000 in full satisfaction of the decretal claim. As a result, the decree was marked fully satisfied and the Darkhast was disposed of. The mortgagee (defendant) entered into possession and had been in possession since then.

The plaintiff attained majority in 1941 and on July 16, 1946, instituted the present suit for accounts of the mortgage and redemption of the mortgage. The plaintiff's case was that the agreement of compromise and the resulting sale effected by his mother who was appointed as his guardian in suit No. 350 of 1929 were void inasmuch as sanction of the Court had not been obtained as required by O. XXXII r. 7 of the Code of Civil Procedure, 1908.

The defendant contended, *inter alia,* that the private sale in favour of the defendant was for the benefit of the plaintiff, that the deed of sale was not by way of compromise in Court but that it was a transaction outside the Darkhast proceedings, for which the Court's permission was not necessary and that the sale was valid and legal and therefore, binding upon the plaintiff. It was also contended that the suit was barred by limitation.

The trial Court held that the deed of sale obtained by the defendant from the guardian of the plaintiff during his minority was void and illegal as the same was obtained without the permission of the Court; it was also held that the plaintiff's suit was in time. After recording findings upon the other issues, the trial Court passed in favour of the plaintiff a decree declaring that an amount of Rs. 1,196-1-4 was the amount due from the plaintiff and by a subsequent order made after the plaintiff had paid the Court-fees, a preliminary decree for redemption was passed.

The plaintiff and the defendant both preferred appeals against the said decree. The District Judge held that the plaintiff was entitled to avoid the deed of sale and that the suit was in time. The decree of the trial Court was confirmed and both the appeals were dismissed.

The defendant appealed to the High Court. The appeal was heard by Dixit J. who referred it to a division bench on September 29, 1952 observing in his referring judgment as follows:

DIXIT J. (After stating facts the judgment proceeded).

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Upon this appeal Mr. R. B. Kotwal appearing for the defendant contends, firstly, that the sale deed, dated August 30, 1932, was not hit by the provisions contained in O. XXXII, r. 7 of the Code of Civil Procedure and, secondly, that, in any case, the plaintiff's suit is barred by the law of limitation. The lower appellate Court seems to have taken the view that the transaction of sale dated August 30, 1932 was a void transaction and that the same was not binding upon the respondent, and in doing so, the lower appellate Court relied upon the cases of *Mahatab Singh* v. *Durga Narain Singh*,(1) and *Chabba Lal* v. *Kallu Lal*.(2) The lower appellate Court also relied upon two other cases reported in *Subramanian Chettiar* v. *Raja Rajeshwara Dorai*,(3) and *Partab Singh* v. *Bhabuti Singh*.(4) Mr. Joshi who appears for the respondent has endeavoured to support the view by relying upon these cases. Mr. Kotwal who appears for the appellant has, on the other hand, contended that the transaction of sale was a transaction which was voidable at the option of the respondent and if the transaction is a voidable transaction the present suit of the pliantiff would be barred by the law of limitation. In the first place, he has referred to the case of this Court reported in *Virupakshappa* v. *Shidappa and Basappa*.(5) A part of the head-note in that case shows that "the compromise of a suit on behalf of a minor without the leave of the Court is voidable under s. 462 of the Civil Procedure Code and can be avoided by the minor on his attaining majority and that it can be avoided before that time." It is also held in that case that s. 462 of the Civil Procedure Code applies to a compromise of execution proceedings. It may be mentioned that s. 462 of the Code of 1882 is in terms similar to the provisions contained in O. XXXII, r. 7 of the Code of 1908. There is also in his favour another judgment of this Court reported in *Bhiwa* v. *Devchand Bechar*,(6) The head-note in that case is in the following terms:—

"When a suit, to which a minor is a party, is compromised and no leave of the Court is obtained under s. 462 of the Civil Procedure Code (Act XIV of 1882) the compromise does not bind the minor and is voidable. The fact that it is for the benefit of the minor, or that he has derived benefit from it, makes no difference." And in support of that conclusion the Court consisting of Mr. Justice Chandavarkar and Mr. Justice Heaton relied upon a decision of their Lordships of the Privy Council in *Manohar Lal* v. *Jadu Nath Singh*(7) and the decision of this Court in *Virupakshappa* v. *Shidappa and Basappa*.(8)

Now, before I deal with these authorities, it will be necessary to refer to the terms of O. XXXII, r. 7 which runs as follows:—

"No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into an agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor."

(1) [1936] A. I. R. All. 811.
(2) (1946) 48 Bom. L. R. 452.
(3) (1915) 39 Mad. 115.
(4) (1913) 35 All. 487.
(5) (1901) 26 Bom. 109.
(6) (1911) 35 Bom. 322.
(7) (1906) L. R. 33 I. A. 128.
(8) (1901) 26 Bom. 109.

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Having regard to the two Bombay cases to which I have referred above and having regard to the language of O. XXXII, r. 7, Mr. Kotwal would seem to be on a safe ground. But the difficulty which arises is by reason of the decision of their Lordships of the Privy Council in *Chabba Lal* v. *Kallu Lal*[1] on which the lower Courts have relied. The difficulty is further accentuated by the circumstance that there are two other decisions to which reference has been made already viz. the cases in *Subramanian Chettiar* v. *Raja Rajeshwara Dorai*[2] and *Partab Singh* v. *Bhabuti Singh*[3] on which the lower appellate Court has based its conclusion. This conclusion is also supportable by the decision of the Allahabad High Court in *Mahatab Singh* v. *Durga Narain Singh.*[4]

The position, therefore, is that, on the one hand, there are cases such as *Chabba Lal* v. *Kallu Lal,*[5] *Subramanian Chettiar* v. *Raja Rajeshwara Dorai*[6] and *Partab Singh* v. *Bhabuti Singh,*[7] which seems to be in favour of the contention of the plaintiff. It is obvious that there are at least two Bombay cases which go to support the contention of the defendant and speaking generally, there seems to be a conflict of authority upon the point.

Now, if the matter is to be decided by the language of O. XXXII, r. 7, I find no difficulty in saying that such a transaction is only voidable at the option of the minor. But some cases having the highest authority seem to take the view that a compromise entered into in contravention of the provisions contained in O. XXXII, r. 7 is a void transaction and in the present state of authorities, the question is, I think, by no means easy to decide. It may be contended in support of one view that if the language of the rule says that such a transaction is voidable, then it is obvious that the plaintiff is required to avoid the transaction. The object of enacting r. 7 seems to be that where the Court has appointed a guardian-*ad-litem* of the suit, the Court should keep control over the proceedings and no compromise should be allowed to be entered into without the leave of the Court. That is a provision for the benefit of a minor party. It is arguable that if that is the intention of enacting r. 7, then obviously any transaction entered into without the leave of the Court would be contrary to the express provisions contained in O. XXXII, r. 7. On the other hand, it is arguable that even where the leave of the Court is not expressly recorded but a guardian-*ad-litem* entered into a compromise, it is open to the minor to bring a suit within the period of limitation and avoid the transaction. It is open to the minor either to accept the compromise or to challenge it and if the latter is the case, he should do so by a suit brought within the period of limitation.

It will be obvious from the cases which I have indicated above that the question is not free from difficulty and it is not right that an important question like this should be left in a state of conflict because a question is often likely to arise, and, sitting singly, my task is by no means easy. If I were to decide the question, apart from authority, I should not have felt the slightest difficulty in deciding this particular point. But since two views are possible and they are supported by authorities, it

(1) (1946) 48 Bom. L. R. 452. (2) (1915) 39 Mad. 115.
(3) (1913) 35 All. 487. (4) [1936] A. I. R. All. 811.
(5) (1946) 48 Bom. L. R. 452. (6) (1915) 39 Mad. 115.
(7) (1913) 35 All. 487.

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seems to me that it is only right that such an important question should be decided rather by a Division Bench than by myself.

If the compromise is only voidable, then in that event the plaintiff-respondent will have to avoid it and it is possible to argue that to such a suit art. 44 of the Indian Limitation Act applies. In that event, there is a judgment of this Court upon the applicability of art. 44 and this will be found in *Fakirappa Limanna* v. *Lumanna Bin Mahadu.*[1] But the question of limitation will arise only upon the determination of the principal question at issue which is whether the sale deed of August 30, 1932, is a void or voidable transaction.

Mr. Kotwal for the appellant then contends that the sale deed can be supported also on the ground that it was a transaction entered into by the natural guardian on behalf of the minor respondent in order to pay off a decretal debt. The debt is evidenced by a mortgage decree in relation to a mortgage executed by the respondent's father. It is obvious that the payment of the decretal debt would be a justifying necessity, the more so because in this case it appears that the value of the property as mentioned in the Panchnama was stated to be Rs. 700 only and the object of the sale deed was to wipe off the indebtedness of the respondent in relation to the mortgage transaction. This would be, I think, a good point were it not for the fact that at the date when the sale deed was executed the execution proceedings were pending. It is significant that the sale deed makes mention of Darkhast No. 137 of 1932 which was pending on the date of the sale deed and what is more significant is the circumstance that on the date on which the sale deed was executed, the Darkhast had been disposed of by the executing Court upon the basis that the judgment-creditor was paid off before the sale and the decree was satisfied. Mr. Kotwal argued that in view of the fact that the sale deed was executed for a justifying necessity by a natural guardian, the transaction would be a valid one. But in view of the facts which I have mentioned above, it seems to me that that contention cannot be accepted. The contention cannot be accepted also for the additional reason that in the suit in which the mortgage decree was passed, the respondent was represented by his mother as guardian-*ad-litem* for the suit and if the appointment was made pursuant to the provisions contained in O. XXXII, then the appointment of the guardian would continue subject to the provisions contained in O. XXXII. It is just a coincidence that the guardian happened to be a natural guardian, the guardian being the mother of the respondent. But that makes, I think, no difference.

As the question raised by Mr. Kotwal is a question of some considerable importance, especially in view of the authorities to which I have referred above, it seems to me that this second appeal should better be disposed of by a Division Bench than by myself and I direct accordingly.

The appeal was heard by a Bench composed of Gajendragadkar and Vyas JJ.

R. B. Kotwal, for the appellant.

K. V. Joshi, for the respondent.

Gajendragadkar J. The principal question which arises in this appeal is whether an agreement entered into by the next

[1] (1919) 44 Bom. 742.

friend or guardian of a minor without the sanction of the Court is entirely void or is voidable at the option of the minor. A subsidiary question of limitation also arises, but its decision will depend upon the answer that is given to the first question. Both the Courts below have found that the agreement entered into by the guardian of the plaintiff was void and so his suit was within time. When this matter was argued before Mr. Justice Dixit he was apparently disposed to take the view that the agreement in question was voidable and the present suit was barred, but he was apparently requested to refer this matter to a Division Bench because there were conflicting judgments on this point. That is why this case has been referred to a Division Bench and has come before us for final disposal.

The facts leading to the present litigation are few and there is really no dispute about it. The property in suit is a field bearing survey No. 254 situate at Songir. The plaintiff's father executed a mortgage in respect of this property in favour of the defendant on April 27, 1920, for Rs. 400. Subsequently, the plaintiff's father died and the mortgagee sued the plaintiff by his guardian in 1929 (Civil Suit No. 350 of 1929). The plaintiff's mother was appointed as the guardian of the plaintiff. A decree was passed in favour of the mortgagee for Rs. 200 and costs. The mortgagee took out execution of this decree and filed darkhast No. 137 of 1932. He sought to recover the decretal amount by sale of the mortgaged properties. The mortgaged property was valued and the panchas put the value at Rs. 700. Pending these darkhast proceedings, the mother of the plaintiff entered into a compromise with the mortgagee as a result of which the mortgaged property was sold to the defendant for Rs. 1,000 in full satisfaction of his decretal claim. As a result, the decree was entirely satisfied and the darkhast was accordingly disposed of. The mortgagee entered into possession of this property and has been in such possession ever since. The plaintiff became a major in 1941 and on July 16, 1946 he brought the present suit for accounts of the mortgage and for redemption. In respect of the sale executed by his mother in favour of the mortgagee, the plaintiff's case was that the agreement of compromise and the resulting sale effected by his mother who had been appointed as his guardian in suit No. 350 of 1929 were void, since the sanction of the Court had not been obtained for the agreement between the guardian and the

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mortgagee as required by O. XXXII, r. 7 of the Code of Civil Procedure. The Courts below have held that the failure to comply with the requirements of O. XXXII r. 7 made the agreement void and so they have granted the plaintiff's claim for redemption and have held that his suit for redemption is within time. If the transaction of sale between the plaintiff's mother and the defendant is void, there is no doubt that this suit is within time. If however it is voidable, the question of limitation will have to be decided because it has been argued before us that even if the transaction is voidable, the present suit should be held to be within time. That is how the principal question which we have to decide is as to the effect of the provisions of O. XXXII, r. 7 on the agreement entered into by the plaintiff's mother with the defendant in 1932.

Rule 7 of O. XXXII provides that

> "No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into an agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian."

It is common ground that the plaintiff's mother was appointed as the guardian for the plaintiff in the suit which the mortgagee had filed against him in 1929; and it is not disputed that before the plaintiff's mother entered into a compromise with the mortgagee by which the mortgaged property was sold in full satisfaction of the decretal amount, the previous sanction of the Court had not been obtained. Therefore, it is clear that the requirements of sub-r. 1 of r. 7 of O. XXXII have not been complied with. Sub-r. 2 of r. 7 of O. XXXII deals with cases where the requirements of sub-r. 1 have not been complied with. It provides that an agreement which has been entered into by the guardian of a minor without complying with the requirements of sub-r. 1 shall be voidable against all parties other than the minor, and it is these words which we have to construe in the present appeal.

Apart from authorities, as the words stand themselves, they do not present any difficulty. They clearly indicate that an agreement which has been made without complying with the requirements of sub-r. 1 would be binding against all the parties except the minor. The minor is not bound by such an agreement and he can avoid it. But the other parties to the agreement cannot purport to avoid it on the ground that the agreement affected the interests of the minor as the sanction

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required by sub-r. 1 of r. 7 of O. XXXII for the protection of the minor's interests had not been obtained. It seems to us clear that the effect of the provisions of r. 7 is to make the impugned agreement voidable at the option of the minor. Such an agreement is not void altogether because if it is held to be void, it would be a nullity and it would not bind any parties to the agreement. That clearly does not appear to be the effect of the words used in sub-r. 2 of r. 7. Therefore, in our opinion, reading r. 7 of O. XXXII by itself, the position seems to be that the agreement which offends against the requirements of sub-r. 1 can be avoided by the minor and if it is so avoided, the parties would naturally be restored to the position which they occupied before the agreement was made. But if the minor does not avoid the agreement, the other parties are bound by the agreement and it would be fully effective against them. As I have already mentioned, Mr. Justice Dixit was himself inclined to take the same view; but he felt that there was a conflict of judicial decisions on this point and so we must proceed to examine these decisions.

The decision of the Privy Council in *Chhabba Lal* v. *Kallu Lal,*[1] must be considered first. In this case their Lordships of the Privy Council were dealing with an award which had been made on a reference to which a minor was a party; and it appeared that in agreeing to the reference, the guardian of the minor had not obtained the sanction of the Court under O. XXXII, r. 7. When the arbitrator made his award and the report was received by the Court, the minor sought to challenge the award on the ground that his guardian had not obtained the sanction of the Court in submitting to the reference and so neither the reference nor the award following it bound his interest. Two questions, therefore, fell to be considered in this case. The first was whether the provisions of O. XXXII, r. 7 applied to an agreement to refer the disputes pending between the parties in a suit to arbitration and their Lordships of the Privy Council held that such an agreement fell within the scope of O. XXXII, r. 7. Sir John Beaumont who delivered the judgment of the Board expressed the conclusion of the Board on this point by saying that (p. 454):

> "...Their Lordships agree with the view of the High Court, following on this point, a ruling of a full bench of the Allahabad High Court in *Mariam Bibi* v. *Amna Bibi,*[2] disagreeing with certain other Indian rulings that O. XXXII, r. 7 applies to an agreement to refer matters in dispute to arbitration."

[1] (1946) 48 Bom. L. R. 452, s. c. L. R. 73 I. A. 52.

[2] [1937] All. 317, F. B.

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Having held that O. XXXII, r. 7 was applicable to the agreement entered into by the minor's guardian, their Lordships proceeded to consider the effect of the failure of the guardian to obtain the sanction of the Court before he agreed to refer the dispute to arbitration. Sir John Beaumont in his judgment emphasised the fact that the policy of O. XXXII, r. 7 seems to be to protect the interests of the minor against possible mischief and he observed that (p. 455):

> "...The interests of minors might well be sacrificed by an improper reference to arbitration and it is necessary that their interest be protected by the Court."

Then he added (p. 455):

> "...If minors successfully chalenge an agreement to refer as not made in compliance with sub-s. (*1*) of r. 7, it is avoided against all parties under sub-s. (*2*)."

Then the learned Judge proceeded to consider the second question as to whether it was open to the minor to raise an objection against the award at the stage that he did and having answered this point in favour of the minor, the learned Judge concluded by saying that (p. 455):

> "if there is no valid reference, the purported award is a nullity, and can be challenged in any appropriate proceeding."

It is this last statement on which considerable reliance is placed by Mr. Joshi in support of his argument that the Privy Council have held that non-compliance with sub-r. 1 of r. 7 of O. XXXII, makes the agreement with which we are concerned void. We are not prepared to accept this contention. It would be noticed that in dealing with the objections of the minors, the learned Judge has expressly pointed out that it is only if and when the minors successfully challenge an agreement to refer as not complying with sub-r. (*1*) or r. 7 that it can be avoided against all the parties under sub-r. (*2*). In other words, it seems to follow even from this judgment that if the minors had not avoided the agreement, the agreement would have bound all the other parties and even the minors. It is only where the minors succeed in setting aside the said agreement that the parties are restored to their original position before the agreement was made and it is only at that stage and in that sense that the agreement is ultimately avoided against all the parties. Therefore, in our opinion, it would not be correct to read this decision as supporting the view that failure to comply with the requirements of sub-r. (*1*) of r. 7 makes the offending agreement of compromise totally void.

The next case to which reference may be made is a judgment of Rachhpal Singh J. in *Mahatab Singh* v. *Durga Narain Singh*.[1] Mr. Joshi has strongly relied upon certain observations in this judgment and it must be conceded that these observations are very much in favour of Mr. Joshi's contentions. Dealing with the compromise entered into by a minor's guardian without obtaining the sanction of the Court, the learned Judge has no doubt observed in the earlier part of his judgment that such a compromise is not only voidable but is void altogether. He read the provisions of O. XXXII, r. 7, sub-r. 2 as meaning (p. 814):

"...that a compromise made in total disregard of the provisions of r. 7, O. XXXII is voidable against all parties who are majors and not void, but it does not bind the minor in any manner. As it is not binding on the minor, it is void against him."

But, in the subsequent portion of his judgment, the learned Judge has added that (p. 816):

"...If a minor after attaining majority does not get the agreement set aside within three years of the date of his attaining majority, the compromise decree may be held to be binding upon him, but so long as that stage has not arrived, it is always open to him to plead in defence that it is not binding whenever an attempt is made in any subsequent suit to enforce the terms of the compromise decree."

With respect, we find it difficult to reconcile this statement of law with the earlier observation made by the learned Judge that a compromise which offends against the provisions of sub-r. 1 of r. 7 of O. XXXII is void against the minor. If it is void, it is unnecessary for the minor to avoid it and his failure to avoid it within three years after attaining majority cannot make it binding against him. Further, on the facts with which the learned Judge was dealing, it appears that the minor was avoiding the contract by his defence within three years of his attaining majority and the judgment proceeded more on the consideration of the question as to whether it was necessary for the minor to bring a suit to avoid the compromise or whether he could do it by a written statement and the learned Judge took the view that the minor could either bring a suit or he may even plead the voidable character of the contract by a written statement, subject of course to the over-

[1] [1936] A. I. R. All. 811.

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riding consideration that the plea is taken in a written statement within three years after he attains majority. Therefore, in our opinion, with respect, not much importance can be attached to the first part of the judgment in which the learned Judge has categorically stated that an agreement which offends against sub-r. 1 of r. 7 of O. XXXII is altogether void and not voidable.

The decision of the Privy Council in *Raja Rajeswara Dorai* alias *Muthuramalinga Dorai* v. *Subramanian Chettiar*[1] has also been relied upon by Mr. Joshi. In this particular case, the document impeached was found to be bad on other grounds. But incidentally the Privy Council observed that the said document would be invalid on the additional ground that the compromise on which it was based did not comply with the condition imposed by s. 462 of the Civil Procedure Code. Old s. 462 was materially in the same terms as the provisions contained in the present Code under O. XXXII, r. 7. Leave of the Court had not been obtained and in the absence of such leave the compromise, says the judgment, cannot be supported. Mr. Justice Ameer Ali added that the provisions contained in s. 462 of the Code were of great importance to protect the interests of the minor; and he referred with approval to the observations of Lord Macnaghten in *Manohar Lal* v. *Jadu Nath Singh*,[2] where it was observed that it is not sufficient that the terms of the compromise were before the Court (p. 131):

> "there ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromises, and it ought to be shown, by an order or petition, or in some way not open to doubt, that the leave of the Court was obtained."

We may add that sub-r. 1 of r. 7 in the present Code requires that the leave of the Court must be expressely recorded in the proceedings so that it is no longer open to any party to suggest that such leave should be inferred from surrounding circumstances. Rule 7, sub-r. 1 expressly requires that the Court must consider the interests of the minor in sanctioning a compromise entered into by the guardian and must expressly record its sanction in the proceedings themselves. But the judgment in *Raja Rajeshwar Dorai's* case does not carry the point any further. It only emphasises the importance of complying with the provisions of s. 462 in order that the interests of the minors should

(1) (1915) 39 Mad. 115, P.C.

(2) (1906) L. R. 33 I.A. 128.

be protected. The question as to whether failure to comply with these provisions makes the agreement void or not did not fall to be considered in this case. Therefore, in our opinion, these decisions on which reliance has been placed by Mr. Joshi do not support his contention that the agreement in suit was void altogether and need not have been avoided by the plaintiff. On the other hand, there are some decisions which seem to take the view that the agreement is merely voidable; and as we have already mentioned, the words used in sub-r. 2 itself are unambiguous and clear.

In *Virupakshappa* v. *Shiddappa*,[1] this Court held that:

"The compromise of a suit on behalf of a minor without the leave of the Court is voidable under s. 462 of the Civil Procedure Code and can be avoided by the minor on his attaining majority. It can be avoided by him before that time."

To the same effect is another decision in *Bhiwa* bin *Jotiba* v. *Devchand Bechar*,[2] It must however be added that both these cases arise from a suit filed by the minor plaintiff to avoid the transaction which offended against the provisions of s. 462 or O. XXXII, r. 7 and so the question as to whether the transaction which offends against the said provisions is void or voidable did not strictly arise for decision. The suits themselves were based on the assumption that the transactions were voidable and had to be avoided and in fact the plaintiffs in both the suits sought to avoid the same.

Mr. Kotwal has referred us to the observations made by Mr. Justice Divatia in *Chhotabhai Motibhai* v. *Dadabhai Narandas*,[3] in regard to the effect of the provisions of O. XXXII, r. 7. The learned Judge has observed that:

"In each particular case it must be seen from the application and order thereon, whether the Court intended to grant such leave; but if no such leave is given, the compromise or the withdrawal of the suit in virtue of a compromise is voidable at the instance of the minor by a suit to avoid it, with the result that if the decree or order of the Court disposing of the suit is set aside, the minor is restored to his original position in that suit."

In our opinion, therefore, the compromise entered into by the plaintiff's mother with the mortgagee contrary to the provisions of O. XXXII, r. 7, sub-r. 1, was not void but was voidable at the option of the minor and so we must consider the question of limitation raised by the defendant in the present suit on this basis.

(1) (1901) 26 Bom. 109. (2) (1911) 35 Bom. 322.
(3) (1934) 36 Bom. L. R. 738.

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I may also refer here to a decision of a division bench of this Court to which my brother Vyas was a party, in which the question as to the construction of O. XXXII, r. 7 was incidentally considered. In *Gangadhar Balkrishna Dharmadhikari* v. *Dattatraya Baliram Kulkarni,*[1] it has been held that a partition effected by a compromise, but without the sanction of the Court when one of the parties to the partition is a minor is not void but is voidable only at the instance of the minor. It was also held that it could not be avoided by any person other than the minor himself.

The plea of limitation which has been raised by the defendant is based upon the provisions of art. 44 of the Indian Limitation Act. Article 44 provides a period of three years for a suit by a ward who has attained majority to set aside a transfer of property by his guardian and column 3 lays down the starting point of limitation as the time when the ward attains majority. Mr. Kotwal's contention is that if the compromise made by the plaintiff's mother was voidable, it was necessary that he should have brought a suit within three years after attaining majority; and since he has not done so, the said compromise and the sale that followed it have become binding against the plaintiff.

On the other hand, Mr. Joshi contends that in substance his present suit is one for redemption and his argument is that it is not necessary that his client should have brought a suit to set aside the agreement so long as the right to redeem was alive. In support of this argument, Mr. Joshi has relied upon a decision of the Privy Council in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi.*[2]. In this case, the Court was dealing with the reversion in respect of an alienation by a Hindu widow. It was held that such an alienation is not absolutely void but is *prima facie* voidable at the election of the reversionary heir. Such a reversionary heir, observed Lord Davey, 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. In such a case, there is nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. Mr. Joshi contends that the position of his client is not different

[1] (1952) F. A. No. 28 of 1951, decided by Rajadhyaksha and Vyas JJ. on September 3, 1952 (unrep.).

[2] (1907) 34 Cal. 329.

in law. There was a mortgage executed by his father. It was followed by a sale executed by his guardian which does not bind him and which it is conceded could have been avoided by him and he seeks to avoid it by bringing the present suit and the only relief which he claims is one of redemption and possession. Unfortunately for Mr. Joshi, however, this point cannot be entertained by us because it is covered by a decision of the Full Bench in *Fakirappa Limanna Patil* v. *Lumanna* bin *Mahadu Dhamnekar.*[1] The decision of the Full Bench was that 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 art. 44 of the Limitation Act. Mr. Joshi has asked us to consider the facts giving rise to this suit and his whole argument is that on the facts the case with which the Full Bench was concerned is easily distinguishable. Now, these facts were that a mortgage was created by N. After N's death his widow 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 without challenging the transfer by his mother. He was survived by his widow who died in 1908 and in 1916 the reversioner had brought the suit. An argument was pressed before the Full Bench that it was unnecessary for the son or his reversioner to bring a suit under art. 44 and that the narrower period prescribed by art. 44 should be applied only to a suit which is brought for the purpose of setting aside the alienation in question. This argument was repelled and it was held that the failure of the son to impeach the transfer by his guardian within three years on his attaining majority precluded the reversioner from obtaining possession of the property on the ground that the transfer by the mother was unauthorised. The argument that it is unnecessary to bring a suit under art. 44 could apply to a suit by a reversioner, said the learned Chief Justice, 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 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 for the benefit of the minor. In other words, what would be true about the reversioner's suit in which he seeks to challenge the alienation by a Hindu

[1] (1919) 44 Bom. 742.

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widow would not be true about an alienation made by a minor's guardian because in the latter case it is obligatory upon the minor to challenge the alienation within the narrower period of limitation prescribed by art. 44 of the Limitation Act. It would thus be clear that this decision directly helps to distinguish the observations made in *Bijoy Gopal Mukherji* v. *Krishna Mahishi Debi*[1] on which Mr. Joshi relied. Therefore, in our opinion, it was necessary for the plaintiff to have sued within three years on his attaining majority to set aside the impugned compromise. Mr. Joshi says that his right to redeem and to obtain possession of the property could not be said to be barred under s. 28 of the Indian Limitation Act because the period for his instituting a suit for redemption and possession had not been determined at the date when he filed the present Suit. But the bar which is pleaded against his present suit is not that his right has been extinguished by lapse of time, but that it has been extinguished by the sale of the equity of redemption which he can no longer challenge. It is true that the said sale was not binding on him as it was the result of a compromise which was voidable at his option; but if he did not avoid that compromise within the limitation prescribed by art. 44, the result inexorably was that the compromise became binding and operative against him and if the compromise must be deemed to be binding against him after the three years expired on his attaining majority, that creates a bar to the present suit for redemption. The equity has been sold and by the act of parties the right to redeem has been extinguished. Therefore, in our opinion, the Courts below were wrong in decreeing the plaintiff's suit.

The result is the appeal succeeds and must be allowed and the decree passed by the Courts below must be set aside and the plaintiff's suit dismissed with costs throughout. Since we are dismissing the plaintiff's suit, the cross-objections also fail and must be dismissed with costs.

Appeal allowed.

K. B. S.

[1] (1907) 34 Cal. 329.