
(2007) 09 MAD CK 0060
In the Madras High Court
Case No : C.S. No. 985 of 1993

Chebrolu Thayaramma (deceased) and Others APPELLANT
Vs
South India Educational Trust and The Corporation of Madras RESPONDENT

Date of Decision : 03-09-2007

Acts Referred:

Evidence Act, 1872 — Section 44
Hindu Minority and Guardianship Act, 1956 — Section 8(3)
Limitation Act, 1963 — Section 27(1)
Transfer of Property Act, 1882 — Section 19
Urban Land (Ceiling and Regulation) Act, 1976 — Section 27

Citation : (2007) 09 MAD CK 0060

Hon'ble Judges : M. Jeyapaul, J

Bench : Single Bench

Advocate : P.J. George, for the Appellant; V. Narayanasamy, for the Respondent

Judgement

M. Jeyapaul, J.—The suit is filed for delivery of vacant possession of plaint A schedule properties to the plaintiffs after removing the

superstructure built thereon by the defendants and also for past and future mesne profits.

2. The averment in brief found in the plaint is as follows:

a) Plaintiffs 2 to 7 are the legal heirs of the deceased first plaintiff Chebrolu Thayaramma. The first defendant ""South India Educational Trust"" (for

short ""SIET"") is a registered Educational Trust. The lands bearing R.S. No. 3799 and 3798/2 described as items 1 and 2 in schedule A to the

plaint originally belonged to the first plaintiff's grandfather M. Narayanasamy Chetty. In and by a deed of family settlement dated 1.2.1937, a life

interest in items 1 and 2 of the plaint A schedule properties was created in favour of the father of the first plaintiff M. Lakshmiah Chetty and the

vested remainder was granted in favour of the first plaintiff. Atchanna Chetty, the elder brother of M. Lakshmiah Chetty was nominated as the

Trustee of the suit properties for the benefit of the life estate holder under the said deed.

b) The first plaintiff understands that Atchanna Chetty was removed from the Trusteeship for the alleged acts of malfeasance, misfeasance and non-

feasance and that her father M. Lakshmiah Chetty effected certain transactions purporting to alienate the property described in A schedule to third

parties without the knowledge and consent of the plaintiff. The life estate holder did not have the right to alienate such properties and the rights of

the first plaintiff had not accrued for her to take necessary action with regard to such sales apart from the fact of her not having knowledge of it by

then.

c) The life estate holder M. Lakshmiah Chetty died on 14.12.1975 and on and from the said date, the plaintiff has become the rightful owner of the

A schedule properties as per the terms and conditions of the deed of family settlement dated 1.2.1937. The right has accrued to the first plaintiff

absolutely after the demise of the life estate holder M. Lakshmiah Chetty on 14.12.1975.

d) The first defendant SIET is in possession of two Cownies of land in R.S. No. 3799 and one ground of land in R.S. No. 3798/2. The remaining

extent of 2 grounds and 192 sqft and the other 12 grounds still remain in the name of Danalakshmi Ammal, who initially purchased the said

property from the said Lakshmiah Chetty under a court auction. The second defendant is the only surviving heir of Dhanalakshmi Ammal who is no

more.

e) The alleged registered documents do not convey right, title or interest to the defendants inasmuch as the alleged alienations by the said

Lakshmiah Chetty were void ab initio and also collusive in nature. The first plaintiff was not a party to the said transactions. The alleged

transactions clinched by the life estate holder does not affect the title of the plaintiff in any manner. Under the colour of such void, sales, the

defendants have made constructions over the plaintiff A schedule properties without the consent and knowledge of the first plaintiff.

f) The plaintiffs are entitled to mesne profits for the past three years and also for

future mesne profits for the wrongful use and occupation of the land. The plaintiffs pray that the suit may be decreed as sought for.

3. The first defendant has filed written statement, summary of which is as follows:

a) The first defendant SIET is the absolute owner of schedule A land by virtue of exchange deed dated 11.2.1954. They have been in possession

and enjoyment of the suit A schedule properties for the last 50 years perfecting their title. Lakshmiah Chetty and another filed C.S. No. 480 of

1948 in the High Court of Madras against Atchanna Chetty and others for removal of Atchanna Chetty from the Trusteeship of the properties

described in the suit schedule and to appoint Lakshmiah Chetty as the Trustee and also for delivery of land comprised in S. No. 3799. The above

suit ended in compromise and the compromise memo filed therein was recorded and pursuant to which a decree was passed by this Court and by

its order dated 5.10.1948, a Commissioner was appointed in the said suit to demarcate the lands.

b) After the demarcation of the lands, Application No. 1745 of 1949 was filed by Lakshmiah Chetty for sale of the suit land comprised in S.No.

3799 at Vanniya Teynampet. As there was no income from the said property, the court was pleased to appoint a Commissioner to sell the

property in public auction. The public auction was held on 11.7.1949 and necessary sale certificate was issued to the auction purchaser

Danalakshmi Ammal. The sale proceed was deposited in the court by the Advocate Commissioner.

c) The plaintiff's father took out an application to invest the sale proceeds in mortgage of the house properties in Madras City in order to enhance

the income from the estate for the purpose of living a comfortable life. The court was pleased to grant permission by its order dated 14.12.1949.

The sale proceeds of the land comprised in PLS. No. 3799 was reinvested by Lakshmiah Chetty for the benefit of himself and his daughter.

Dhanalakshmi Ammal has become the absolute owner of the entire property comprised in S. No. 3799 by virtue of sale certificate issued by the

High Court on 3.1.1950. Dhanalakshmi Ammal sold the entire property to and in favour of P.S. Swaminatha Iyer and his son under the registered

sale deed dated 25.2.1953. The said sale was also confirmed by the release deed

executed by C. Thorani Singh Gramani, the husband of

Dhanalakshmi Ammal in favour of Swaminatha Iyer and his son.

d) The first defendant, under an exchange deed entered into between the first defendant and the said Swaminatha Iyer, got exchange of the

properties comprised in R.S. No. 3799 to an extent of 46-1/2 grounds. The first defendant has become absolute owner of the suit A schedule land

by virtue of the above exchange deed. The first defendant also put up construction and are running a Women's College for the last 50 years

without any interference or claims from anybody. The present suit is barred by limitation as the plaintiff did not question the court order passed in

the year 1948. The first defendant has perfected title by adverse possession. The plaintiff who has no title or right over the property has come out

with a false and frivolous suit.

4. In the additional written statement filed by the first defendant, it has been averred as follows:

The plaintiff, having claimed that the court auction sale and other alienations by her father Lakshmiah Chetty were void ab initio, did not seek to set

aside the said alienations. The first plaintiff, who was a minor, was eo nomine a party to the court proceedings in C.S. No. 480 of 1948 on the file

of this Court and also to the subsequent transactions made by her father. The alienations were not void, but only voidable and the said alienations

should be set aside by making proper prayer in the relief portion. The plaintiff cannot get over the bar of limitation by simply stating that the plaintiff

was ignoring the transactions which are voidable ones. The first plaintiff and her husband had full knowledge of the fact of the construction put up

by the first defendant. They are guilty of acquiescence as they have waited for a very long time to file the suit.

5. The issues re-drafted by this Court on 3.4.2007 are as follows:

PRELIMINARY ISSUE:

Whether the suit is maintainable in the absence of prayer to set aside the sale deeds dated 22.8.1949 and 30.11.1956.

OTHER ISSUES:

1. Whether the father of the deceased first plaintiff, Lakshmiah had the right to alienate the property described in A schedule of the plaint and

whether the alienation and subsequent alienation made by him and his successors-in-title are valid in the eye of law.

2. Whether the suit claim is barred by limitation.

3. Whether the plaintiff is entitled to mesne profits as prayed for.

4. Whether the defendants have prescribed title by adverse possession.

5. Whether the plaintiff is entitled to delivery of vacant possession of the property described in A schedule of the plaint after removal of the superstructure built by the defendants.

6. To what relief, are the plaintiffs entitled?

6. On the side of the plaintiffs, the 7th plaintiff was examined and Exs.P1 to P4 were marked and on the side of the defendants, a Member of the

Executive Council of the first defendant Trust was examined as DW1 and Exs.D1 to D19 were marked.

7. Preliminary issue:--The first defendant has set up a plea that the suit itself is not maintainable in the absence of any prayer to set aside the sale

deeds dated 22.8.1949 and 30.11.1956 and the order of sale made on 31.5.1949. The first defendant has chosen to question the maintainability

of the suit challenging the absence of prayer to set aside the private sales as well as the court auction sale. Both the parties have let in evidence

touching upon the absence of prayer for setting aside the private sales as well as the court auction sale which culminated in the exchange deed

clinched by Swaminatha Iyer. Therefore, the re-drafted preliminary issue should be read as follows:

Whether the suit is maintainable in the absence of prayer to set aside the private sale dated 22.8.1949 and 30.11.1956 and the order for sale

made on 31.5.1949 by this Court.

8. If the preliminary issue is decided in favour of the first defendant, the question of embarking upon an adjudication on the other issues will not

survive for consideration. If the plaintiffs survive the lethal preliminary issue, then, the court is bound to decide the other issues framed in the suit.

9. As far as the preliminary issue is concerned, the plaintiff contends that the contingent right viz., vested remainder gets crystalised only on the

death of her father in the year 1975. Therefore, the plaintiff who had not acquired any right of alienation by her father had not rightly filed any suit

previously challenging the court auction sale and private sale of the property of the first plaintiff. Further, the alienation had been made by her father

sans her consent and knowledge and therefore, such alienations made by her father are void and non-est. The alienations so made by her father did

not extinguish her right to seek her claim to the suit property.

10. The defence of the first defendant as regards the preliminary issue is that the suit itself is not maintainable in the absence of any prayer to set

aside the court auction sale and the private sale in respect of items 1 and 2 of the A schedule property as they are voidable in nature. The court

auction sale and the private sale have completely extinguished the right of the plaintiff.

11. Learned Counsel for the plaintiffs would, submit that the court auction sale without associating the deceased first plaintiff and also without

taking care of the interest of the minor first plaintiff, is ab initio void. It is his further submission that a decree had been obtained in C.S. No. 480 of

1948 enacting the shadow fight between the father of the first plaintiff and his own brother in order to knock away the valuable rights of the first

plaintiff who is entitled to the vested remainder of the first item of A schedule property. Though there was no specific averment in the plaint that the

decree in the said suit was obtained by playing fraud, there can be no collusive transaction between the two parties without material element of

fraud. As far as the second item of the A schedule property is concerned, the father of the first plaintiff, totally ignoring the supreme interest of the

minor, has chosen to alienate the same without even obtaining any permission from the court u/s 8 of the Hindu Minority and Guardianship Act.

Therefore, the plaintiffs have rightly laid the suit seeking for delivery of possession and also for past and future mesne profits ignoring the private

sales and court auction sale which are void ab initio.

12. Learned Counsel appearing for the first defendant would vehemently contend that the court auction sale was held under the blessings of this

Court taking into account the prime interest of the minor. The proceeds of the sale had been reinvested by the court in mortgage of the property to

a third party. Even if the transaction is held to be void, unless there is a prayer to set aside such a sale, no suit can be laid straightway seeking

recovery of possession. As regards the sale effected by the father of the first

plaintiff in respect of the second item of A schedule property without obtaining prior permission u/s 8 of the Hindu Minority and Guardianship Act, the plaintiff will have to necessarily seek for setting aside the same.

The said private sale is found to be a voidable transaction. In order to avoid the inconvenient question of limitation to file this suit at this distant of

time, the present suit has been couched in such a form without even praying for setting aside the private sale as well as court auction sale.

Therefore, he would submit that the suit without such prayer is not at all maintainable.

13. Let us now refer to the relevant documents filed on either side. Ex.P1 dated 1.2.1937 is the deed of family settlement whereunder the father of

the plaintiff Lakshmiah Chetty was given life interest and the first plaintiff, who is the progeny of Lakshmiah Chetty, was given vested remainder.

Atchanna Chetty, the elder brother of Lakshmiah Chetty was nominated as a Trustee of the life estate in respect of items 1 and 2 of A schedule

property granted to Lakshmiah Chetty. The death certificate, Ex.P2 would establish that Lakshmiah Chetty passed away on 14.12.1975. Ex.P4 is

the plaint filed in C.S. No. 480 of 1948 not only by the said Lakshmiah Chetty, the father of the first plaintiff but also by the plaintiff herself

represented by her father and guardian Lakshmiah Chetty for removal of the Trusteeship granted to his brother Atchanna Chetty and also for his

appointment as the Trustee in the place of Atchanna Chetty. Prayers for division of the property by metes and bounds and also for a direction to

deliver vacant possession also are found in the said plaint.

14. It is found that the father of the first plaintiff for himself and on behalf of the first plaintiff and his brother Atchanna Chetty and others have filed

a joint consent memo (Ex.D2 dated 22.9.1948) for passing a decree to appoint the father of the first plaintiff as a Trustee of items 1 and 2 of A

schedule property on removal of Atchanna Chetty from the Trusteeship, for delivery of the aforesaid property and for division by metes and

bounds/ and demarcation of the properties. The suit items 1 and 2 of A schedule property has been referred as 3a and 3b in the schedule annexed

with the consent memo, Ex.D2. Under Ex.D3 dated 24.9.1948, the Advocate, who appeared for the plaintiff's father and for the first plaintiff has

given a certificate to the effect that the compromise is effected between the

plaintiff and her daughter on the one side and his brother Atchanna

Chetty on the other side only in the interest of the first plaintiff herein who was a minor then. Thereafter, a consent decree as found under Ex.D4

dated 5.10.1948 was passed by this Court in C.S. No. 480 of 1948 in terms of the memo of consent filed by both the parties under Ex.D2.

15. It is found that Application No. 1745 of 1949 in C.S. No. 480 of 1948 was filed by the father of the plaintiff for himself and on behalf of the

first plaintiff herein seeking a direction to the Advocate Commissioner Mr. P. Sarangapani who was already appointed by this Court for the

purpose of selling item 1 of A schedule property. Based on such an application, this Court was pleased to issue summons under Ex.D5 dated

23.5.1949 to the parties concerned to attend the Chamber of the Vacation Judge. It is found that this Court was pleased to confirm the court

auction sale in favour of Mrs. C. Thorani Singh Gramani for the sale price of Rs. 33,100/= on 19.8.1949. The Advocate Commissioner, it

appears, has deposited the entire sale proceeds into court as found under Exs.D7 to D9. It is found that a sum of Rs. 25,000/= from and out of the

deposits made by the Advocate Commissioner was advanced to one Smt. T.R. Lakshmi Ammal on the security of her bungalow and garden

bearing door No. 12, Brindavanam Street, Mylapore, Chennai at the rate of 6.1/4 per cent interest. It is seen that the amount lying idle in the court

was better utilised in the interest of the minor. This Court was pleased to issue sale certificate Ex.D10 on 3.1.1950 in favour of Mrs. Thorani Singh

Gramani (Dhanalakshmi Ammal). It has been specifically referred to therein that an order of sale by public auction was made on 31st May 1949.

16. The first defendant had made an attempt to obtain the certified copy of the affidavit and further affidavit filed in Application No. 3239 of 1949

seeking permission of the court to sell the minor's property, but, quite unfortunately, the Registry of this Court returned those applications for the

reason that those affidavits were destroyed on 3.8.1966 as per the Rules for the period of preservation was already over as found from Exs.D18

and D19. The first plaintiff being minor was shown as eo nomine a party not only in the proceedings initiated by her father challenging Trusteeship

of the disputed property but also in the subsequent proceedings of court auction sale of the property of the minor. The certified copy of the

relevant application seeking permission from this Court to alienate the property of the minor has been sought for from the Registry but, the said application was destroyed on account of efflux of time as per rules. The court will have to take judicial notice of the fact in the face of telling available materials on record that the court auction sale of the minor's property was ordered by this Court, of course, at the instance of the father of the first plaintiff herein only after taking into consideration the minor's interest and benefit out of such alienation. The major part of the sale proceeds had been invested in a mortgage loan transaction for the benefit of the minor in order to derive some interest for the amount lying idle in the court. The court auction sale of the minor's property was ordered only after taking into confidence the parties to the suit in C.S. No. 480 of 1948. Therefore, it is held that the alienation of item 1 of A schedule property has been made by court auction sale for the interest and benefit of the minor in her presence before the court.

17. Mrs. Dhanalakshmi Ammal had sold away item 1 of A schedule property under Ex.D11 dated 25.2.1953 to Mr. P.S. Swaminatha Iyer. The latter had also obtained a release deed from C. Thorani Singh Gramani, the husband of Dhanalakshmi Ammal under Ex.D12 dated 25.2.1953 releasing his interest if any in the very same property by way of abundant caution. P.S. Swaminatha Iyer had dealt with the property along with his sons under the mortgage deed, Ex.D13 dated 5.3.1953. The first defendant, having given their property to P.S. Swaminatha Iyer and his sons, got the first item of A schedule property from them under the Exchange Deed, Ex.D14 dated 11.2.1954. This is how the first defendant has become the owner of the first item of A schedule property herein.

18. Coming to the second item of A schedule property, it is found that Lakshmiah Chetty for himself and on behalf of the minor, the first plaintiff herein sold away the said property to S. Kesavan under the sale deed, Ex.D15 dated 22.8.1949. The first defendant has purchased the said property under the sale deed Ex.D16 dated 30.11.1956 from the said owner S. Kesavan. This is how the first defendant has acquired title in respect of second item of A schedule property. But, it is found that the father of the first plaintiff, without obtaining court sanction as contemplated u/s 8 of the Hindu Minority and Guardians Act in respect of the second item of A

schedule property, has chosen to alienate the minor's property in favour of S. Kesavan who in turn sold the said property to the first defendant.

19. It is quite relevant in this context to refer to the admission of PW1, the 7th plaintiff herein, who is none other than the husband of the deceased first plaintiff. He admits in his evidence that at the time of sale of the suit properties by his father-in-law, his wife was six years old. There was a dispute over the Trusteeship of the suit items 1 and 2 of the A schedule property. Lakshmiah Chetty, father of the deceased first plaintiff was appointed as a Trustee by the court and permission was also granted to him to sell away the property. He also, having obtained permission, sold away the property through court auction. The deceased first plaintiff was also a co-plaintiff in C.S. No. 480 of 1948. The sale proceeds of the property sold in court auction deposited into court is still lying over there and the same was not so far withdrawn. PW1 was related to his father-in-law even prior to his marriage with his daughter. "He used to visit his father-in-law till he passed away in the year 1975. He was aware that suit items 1 and 2 of the A schedule property belongs to his wife. Even after his marriage, he did not take steps to recover the property of his wife. At the time of the death of his father-in-law Lakshmiah Chetty, there was already a substantial construction in the suit items 1 and 2 of A schedule property, he further admits.

20. DW1, who is none other than the Executive Committee Member of the first defendant SIET, has deposed that there was no third party affidavit to the effect that the first item of A schedule property was being sold for the benefit of the minor filed before the court to his knowledge. Further, no permission was obtained from the court to sell away the second item of A schedule property by the father of the first plaintiff to S. Kesavan, he further admits.

21. It is not as if the deceased first plaintiff was not aware of the court proceedings in C.S. No. 480 of 1948. The aforesaid admission of the husband of the deceased first plaintiff would make it clear that she was very much aware of the removal of the Trusteeship from Atchanna Chetty and the appointment of her father Lakshmiah Chetty as Trustee of the first and second item of A schedule property, the permission obtained from the court to sell away the first item of A schedule property through court auction,

subsequent sale of the said property by court auction, the deposit of sale proceeds into court to the credit of the suit and substantial constructions made over the suit property. Even if she was not personally aware of it, she should have been posted of these informations by PW1 being her husband. But, quite unfortunately, she had not chosen to challenge the alienation of the properties within three years from the date of attainment of majority.

22. The deceased first plaintiff was given vested remainder of the first and second item of A schedule property under the family settlement deed,

Ex.P1. Of course, the vested remainder blossoms only on the death of the life estate holder viz., Lakshmiah Chetty in the year 1975. The vested

remainder contemplated under Ex.P1 was already knocked away through the court auction sale at the instance of his father Lakshmiah Chetty. She

cannot wait till the death of the life estate holder to challenge the alienation made by her guardian as her right to challenge has already accrued even

on the date of alienation of items 1 and 2 of A schedule property. Of course, she had been afflicted with the disability of minority at the time of the

alienation of the properties by her natural guardian, but, such disability keeps her right to challenge the alienations alive only during the subsistence

of such disability and three years which followed thereafter.

23. Let us now refer to various provisions of law which govern the disputed subject in question. The powers of the natural guardian is dealt with

u/s 8 of the Hindu Minority and Guardianship Act, 1956. The natural guardian is mandated to dispose of the property standing in the name of the

minor only for the benefit of the minor with the previous sanction of the competent court. It has been made clear u/s 8(3) of the said Act that any

disposal of immovable property by a natural guardian, in contravention of Sub-section (1) or Sub-section (2), is voidable at the instance of the

minor or any person claiming under him. A duty also has been cast upon the court to see that the disposal of the immovable property of the minor

is for an evident advantage of the minor/ while granting permission to the natural guardian to dispose of the property.

24. It is quite clear from Section 8 of the Hindu Minority and Guardianship Act, 1956 that even in a case where natural guardian disposes of the

immovable property of the minor without obtaining sanction from the competent

court showing the benefit or evident advantage that may accrue to the minor is only voidable in nature and not void ab initio. The minority of a person is considered as legal disability and the right to institute a suit after the disability has ceased as contemplated under Article 6 of the Limitation Act. Article 8 of the Limitation Act is a controlling one which stipulates that in no case can a period of limitation be extended to beyond three years from the cessation of the disability on account, of minority.

The period of limitation shall be computed from the cessation of disability or death of the person affected by disability. But, as far as pre-emption suit is concerned, the extended period of limitation under Article 6 of the Limitation Act does not apply. In other words, the right of pre-emption should be immediately asserted as the minority or the other disability does not excuse laches in assertion to the right of pre-emption. Once the limitation starts running as contemplated under Articles 6 and 8 of the Limitation Act, the subsequent disability or inability to institute a suit does not have the potential to stop it as per Article 9 of the Limitation Act.

25. It is pertinent to refer to Article 60 of the Limitation Act which is found to be the relevant Article which governs the period of limitation applicable to the facts and circumstances of this case. Three years period of limitation has been prescribed to set aside a transfer of property made by the guardian of a ward from the date when the ward attains majority. Article 60 of the Limitation Act makes it abundantly clear that the limitation as far as alienation of the properties of the minor is concerned, starts from the date of alienation of the property by the guardian. But, the disability of the minor on account of his minority postpones the period of limitation and the right to challenge the transfer of the property survives only for a period of three years from the date of attaining majority by the ward as per Article 60 of the Limitation Act. Section 27 of the Limitation Act declares that at the determination of the period limited to any person for instituting a suit for possession of any property under the Limitation Act, his right to such property shall be extinguished. Therefore, as per the lethal provision u/s 27 of the Limitation Act, the first plaintiff, who had not chosen to challenge the public court auction sale as well as private sale gets extinguished immediately after the expiry of three years from the removal of disability on account of minority.

26. What is "vested interest" has been defined u/s 19 of the Transfer of Property Act, 1882. Interest created in favour of a person on a transfer of property on the happening of an event becomes vested. Even if such a person for whose benefit, interest is created on a transfer of property was not living then, he acquires such vested interest immediately upon his birth although he may not be entitled to the enjoyment immediately on his birth. Here, in this case, though the life estate has been given to the father of the deceased first plaintiff, the right to the vested remainder conferred on her takes effect from her birth despite the fact that the life estate holder has the right to enjoy the property till his lifetime. The vested remainder of the property may come to the deceased first plaintiff only after the demise of her father, but, the right to such vested remainder of the first plaintiff is recognised even from the time of her birth. Therefore, the first plaintiff cannot slumber over the alienations made already by her father totally ignoring the very vested remainder conferred on her under Ex.P1 till the life estate holder passes away in the future.

27. As already held by this Court, the first plaintiff was eo nomine a party not only to the suit proceedings in C.S. No. 480 of 1948 which ultimately-culminated in the court auction sale of her property at the instance of her father but also in the private sale effected by her father for himself and also on behalf of her under Ex.D15 dated 22.8.1949.

28. Now let us take up the authorities cited on the side of the defendants. Three propositions of law have been laid down by the Full Bench of this Court way back in the year 1956 in Sankaranarayana Pillai and Another Vs. Kandasamia Pillai, . The first proposition of law is that in cases where the minor is eo nomine a party to a sale deed or other document of alienation at the instance his guardian, it is not enough for him to merely sue for possession ignoring the sale transaction without seeking to set aside the sale deed and other documents of alienation. The second proposition laid down by the Full Bench of this Court is that a transaction entered into by a guardian relating to a minor's properties is not void but is only voidable at the instance of the erstwhile minor within three years from the date of his attaining majority. It has been further assertively held that even if the minor is not eo nomine a party to the said transaction, he is deemed to be a party to the sale transaction. Only in case where a sale transaction was

made on behalf of a joint family of which the minor was not a member at all, he has got a right to ignore the transaction as not binding on the family

and can simply seek for recovery of possession. In the instant case, even at the time of alienation of the properties, the first plaintiff was six years

old, but, quite unfortunately, no step was taken by the first plaintiff within three years from attaining majority to challenge the court auction sale as

well as private sale. She cannot simply seek for recovery of possession simpliciter ignoring the court auction sale as well as private sale as those

transactions as per the aforesaid ratio decidendi are only voidable and not void in nature.

29. The Honourable Supreme Court in Smt. Rani and Another Vs. Smt. Santa Bala Debnath and Others, has categorically held that when the legal

necessity for alienation of the property by the limited owner is established, then the onus shifts on the plaintiff to prove that the recital in the sale

deed concerned is false. The legal necessity has been adverted to in the court proceedings in C.S. No. 480 of 1948 initiated by the father of the

first plaintiff and also in the sale deed, Ex.D15 executed by the father of the first plaintiff for himself and also on behalf of her. But, in this case, no

contra evidence is available on the side of the plaintiffs to show that there was no pressure on the property alienated by the father of the first

plaintiff necessitating its alienation. If there had been no legal necessity at all, the court would not have given its approval for selling the property of

the minor through court auction. Further, the sale proceeds deposited to the credit of the suit in C.S. No. 480 of 1948 would not have been

invested taking the mortgage of valuable property levying interest on the amount advanced.

30. On a careful perusal of the plaint pleadings, it is found that there is no averment to the effect that the alienation had been made by the father of

the first plaintiff without any legal necessity. In this context, it is relevant to refer to the decision in Pandurang Mahadeo Kavade and Others Vs.

Annaji Balwant Bokil and Others, where the Honourable Supreme Court has held that when the plea as to want of necessity has not been raised in

the plaint, proof of legal necessity by the alienee does not arise at all. Therefore, the plaintiffs cannot now contend sans necessary pleadings that the

alienations lack legal necessity.

31. Let us analyse what is the consequence that would follow if the alienations had been made even without legal necessity. The Honourable

Supreme Court in *Raj Kumar Raghubanchmani Prasad Narain Singh Vs. Ambica Prasad Singh (Dead) by Lawyers and Others*, has categorically

held that the alienation of the manager of joint family even without legal necessity is voidable and not void. As already pointed out by this Court, as

per Section 8 of the Hindu Minority and Guardianship Act, even if the guardian has not obtained sanction from the competent court establishing the

legal necessity for alienation, the transaction is only voidable and not void. In this case, there is sufficient material to show that both items 1 and 2 of

A schedule property have been alienated only for the interest and benefit of the first plaintiff. Even assuming for the sake of argument that there is

lack of legal necessity for alienation, such transaction is only voidable and not void. The consequence is that such a voidable transaction should be

set aside before ever recovery of possession is sought for.

32. In his context, it is pertinent to refer to the authority reported in *Divya Dip Singh and others Vs. Ram Bachan Mishra and others*, wherein it has

been held by the Honourable Supreme Court in a similar set of facts that the alienation of the immovable property of the minor by a natural

guardian without previous permission of the court is only voidable at the instance of the minor.

33. As far as the second item of the A schedule property is concerned, it is found that no sanction was obtained by the father of the first plaintiff

before ever he alienated the said property. Even in such a case of alienation, the option left open for the first plaintiff is to set aside the sale and to

seek for recovery of possession. Even if a guardian had simply ignored the mandatory provision u/s 8 of the Hindu Minority and Guardianship Act,

the minor cannot simply ignore such transaction as the transaction is only voidable.

34. It has been held in *Vishwambhar v. Laxminarayana (Dead)* 2001 (3) CTC 316, *Nagappan v. Ammasai Gounder* (2004) 13 SCC 480,

Krishnaswamy v. Rangaswamy Gounder 1981 LW 338 and *Chinnannan Vs. Paranimalai and Others*, in a similar set of facts, that the minor who

attained majority cannot simply seek for recovery of possession of the property alienated by his guardian without seeking to set aside the subject

sale deeds within three years from the date of attaining majority.

35. Let us now refer to the various citations referred to by the learned Counsel appearing for the plaintiffs. In State of Maharashtra Vs. Pravin

Jethalal Kamdar (Dead) by Lrs., , the Honourable Supreme Court has observed in para 6 of the judgment as follows:

Thus, it has not been and cannot be disputed that the order dated 26th May, 1976, was without jurisdiction and nullity. Consequently, sale deed

executed pursuant to the said order would also be a nullity. It was not "necessary to seek a declaration about the invalidity of the said order and

the sale deed. The fact of plaintiff having sought such a declaration is of no consequence. When possession has been taken by the appellants

pursuant to void documents, Article 65 of the Limitation Act will apply and the limitation to file the suit would be 12 years. When these documents

are null and void, ignoring them a suit for possession simpliciter could be filed and in the course of the suit it: could be contended that these

documents are nullity.

That was a case where pursuant to the order dated 26th May 1976 passed by the competent authority u/s 27 of the Urban Land (Ceiling and

Regulation) Act, 1976, a sale deed was executed between the plaintiff and the State of Maharashtra and the possession also was taken over by

the Deputy Commissioner of Sales Tax, Eastern Division, Nagpur, but, later on, when the very Act was put to test before the Honourable

Supreme Court, the Honourable Supreme Court upheld the validity of the said Act except, Section 27(1) insofar as the said provision imposing a

restriction on transfer of any urban or urbanisable land with a building or a part of such building which was within the ceiling limit. In other words,

Section 27(1) of the said Act to the extent it sought to affect the right of a person to dispose of his urban property within the-ceiling limit was held

invalid. The said suit was filed by the plaintiff therein in the aftermath of the above authoritative decision pronounced by the Honourable Supreme

Court. Under the above facts and circumstances, it has been held that the said order dated 26th May 1976 had been passed by the competent

authority without jurisdiction and therefore such an order was a nullity. The sale deed executed pursuant to such order also would culminate in

nullity. When the sale transaction had drawn inspiration from an order which was

null and void, the Honourable Supreme Court has observed that ignoring such a sale transaction, a suit for possession simpliciter could very well be filed. But, in the instant case, the competent court, having given permission to sell item 1 of the suit A schedule property, ordered for court auction sale as per the order dated 31.5.1949. The auction was conducted pursuant to such valid order passed by the competent court. The subsequent sale transaction by the father of the first plaintiff in respect of item 2 of the A schedule property was without the permission from the competent court u/s 8 of the Hindu Minority and Guardianship Act. The law proclaims that such a transaction is only a voidable transaction/ Therefore, the plaintiffs cannot also bank on Article 65 of the Limitation Act to avail the 12 years period of limitation to recover possession without seeking to set aside the sale.

36. The following observation in para 3 of the decision in Parwatabai Vs. Sonabai and others, is referred to by the learned Counsel for the plaintiffs:

Admittedly, after the demise of Panjuba, Parwatabai succeeded as widow's estate prior to 1941 and that, therefore, she was only life estate holder to enjoy the estate for her life time. Under the gift deed, what she could bequeath was enjoyment of life estate and not right and title of the property of Punjaba. Consequently, on her demise the appellants being heirs of Punjaba are entitled to assert their right to the property of their father on the basis of their title.

Observing so, the Honourable Supreme Court has further stated that- Article 65 of the Limitation Act would apply in the facts and circumstances

of the said case. That was a case where the limited holder of the estate of her husband has chosen to gift away the right and title of the property of

her husband. The reversioners challenged such a disposition invoking the period of limitation contemplated under Article 65 of the Limitation Act.

Here in the instant case, the life estate holder viz., the father of the deceased first plaintiff did not alienate the right and title of the property in his

capacity as full owner thereof. It is found that he has taken steps to auction the first item of A schedule property with the permission of the court

not in his capacity as the full owner of the said property, but, in his capacity as guardian of the minor. The second item of A schedule property was

also alienated of course without the sanction of the competent court not only in his capacity as limited estate holder but also in his capacity as the

guardian of the minor. The aforesaid transactions are already held to be voidable in nature. Therefore, the facts and circumstances of the case on

hand Cannot be compared with the case where the life estate holder herself gifts away the right and title of the reversioners.

37. The ratio laid down in *Narayana Menon and Others Vs. Kochuvareed and Others*, and *Jagat Ram Vs. Varinder Prakash*, is that the limitation

to challenge the sale in dispute starts from the death of the life estate holder and not from the date of alienation of the property by him. In these two

cases, it is found that the life estate holder, though not vested with the absolute right and title over the property, alienates absolute ownership of the

property to a third party. But, in the instant case, the absolute owner herself alienates the property through her father, the natural guardian. In such

circumstances, the minor has to wake up and assert her right over the property which was already alienated within three years from the date of

attaining majority.

38. As far back in 1881, the Bench of our High Court has observed in *Venkata Narasiah v. Subbamma* Vol. IV The Indian Law Reports (Madras

Series) 178 as follows:

If defendant in Suit No. 8 , of 1864, the plaintiff in the present suit is entitled to recover them on proof of such title and of its transfer first to

Narasinga Rao and then to himself, and has no reason to set aside the sale set up by the defendant.

That was a case where the plaintiff purchased the property from one Adamma, wife of Narasinga Rao who allegedly got the property under a

decree against one Thimmiah in a suit No. 8/1864. The defendant claiming that her husband had purchased the suit property in court auction sale in

execution of the decree in the very same suit 8 of 1864 defended the said suit filed by the plaintiff. The Bench of our High Court, having observed

that Adamma's husband Narasinga Rao under whom the plaintiff claims the property was not a party to the decree or the execution proceedings in

suit No. 8 of 1864 which resulted in the court auction sale on which the defendant's husband became the purchaser chose to hold that there was

no necessity to set aside such a sale set up by the defendant. The sum and

substance of the above said ratio is that a party can simply ignore the court auction sale where his predecessor-in-title was not a party and the court auction sale was conducted behind the back of his predecessor in title and seek straightway for recovery of possession of the property. Here, in the instant case, it is found that the minor was co nomine a party to both the court auction sale and private sale.

39. A judgment or a decree obtained by playing fraud upon the court is a nullity and non est in the eyes of law. Such a fraudulent decree can be

simply ignored. (Union Public Service Commission Vs. Girish Jayanti Lal Vaghela and Others,).

40. There is no necessity to file a suit for declaration or for setting aside the fraudulent and collusive judgment. (Gram Panchayat of Village

Naulakha Vs. Ujagar Singh and Others,).

41. It has been authoritatively held in Asharfi Lal Vs. Smt. Koili (dead) by L.Rs., in para 14 of the judgment that

In other words, in cases where an inference of fraud or collusion can be drawn from the negligence or gross negligence of the next friend it would

permissible for a minor to avoid the judgment or decree passed in the earlier proceeding by invoking Section 44, of the Evidence Act without

taking resort to a separate suit for setting aside the decree or judgment.

42. It is well settled proposition of law that a fraudulent and collusive transaction can be ignored and there was no necessity for the party claiming

right over the property to seek for setting aside such fraudulent and collusive transaction.

43. The plaintiffs have simply pleaded that the alienations by Lakshmiah Chetty were void ab initio and also collusive in nature. There is no specific

pleading that Lakshmiah Chetty fraudulently obtained a compromise decree and alienated the property of the minor. There is sufficient material on

record produced on the side of the first defendant to establish that the alienations had been done only for the benefit and interest of the minor. No

contra evidence is available to say even vaguely that there was collusion between the brothers and the alienation had been fraudulently done by

Lakshmiah Chetty. If the plaintiffs can establish that alienations of the property of the minor first plaintiff had been done fraudulently, then the

plaintiffs can simply ignore such a fraudulent transaction and file straightway a

""suit for recovery of possession. The first plaintiff, having not woken up from her slumber to challenge the order for sale dated 31.5.1949 and 22.8.1949 within three years from the date of attaining majority, has come out with a weak plea that the transaction was void ab initio and was collusive in nature. Such a plea has been set up only to avoid the rigors of the period of limitation contemplated under Article 60 of the Limitation Act. Article 65 of the Limitation Act will have no application to the facts and circumstances of the case.

44. In view of the above, it is held that the suit is not maintainable in the absence of prayer to set aside the sale deeds 22.8.1949 and 30.11.1956

and the order for sale made on 31.5.1949. The preliminary issue is decided in favour of the first defendant. The necessity to decide the other issues

does not arise for consideration as the preliminary issue non suits the plaintiffs.

45. In the result, the suit stands dismissed with costs.