

(1935) 10 MAD CK 0078
In the Madras High Court

(Maddali) Visweswara Rao

APPELLANT

Vs

(Maddala) Suryarao and Others

RESPONDENT

Date of Decision : 18-10-1935

Acts Referred:

Citation : AIR 1936 Mad 440 : (1936) 43 LW 349

Hon'ble Judges : Stone, J

Bench : Division Bench

Judgement

Stone, J.—This is an appeal from the decree of the Subordinate Judge of Ellore in O.S. No. 7 of 1926, an action which was in the nature of a partition action, asking inter alia for a declaration that a certain mortgage is void, that the decree granted in an action brought by the mortgagee upon the mortgage should be set aside, that the consequential auction held following upon that decree should be set aside, and that certain alienations made before that suit was brought in order to pay the moneys due under that mortgage should also be set aside. The decree was granted in the suit as before mentioned brought by the mortgagee, in which suit there was a minor, which minor was represented by a Court guardian which Court guardian was a clerk of the Court having been appointed in consequence of the failure of the minor's uncle adequately to represent the minor's interests. The reason why it is now said the decree should be set aside is that that Court guardian was negligent and the ground upon which this charge is made is that when the case came on for trial the counsel who had represented the Court guardian said he had no instructions. That minor and the present plaintiff are the same. The ground of attack in law is that it was an alienation by the mortgagor for which there was no necessity, he being the managing member of the joint Hindu family comprising himself and his son. At the time of the transaction those were the two members of the joint Hindu family. The son subsequently died without having either ratified or attacked the alienation and some considerable time after his death, a time exceeding the period of gestation, the present plaintiff was born into that family.

2. The following questions arise : (1) Can an after-born son, not conceived during the lifetime of his brother which brother was, apart from the father, the only other coparcener of the joint Hindu family, sue to set aside, as being without necessity, an alienation effected by the father without the consent of the son then living? (2) If such a person can so sue, what is the cause of action and when in respect of that cause of action does time begin to run, it being common ground that the proper Article for the purpose of limitation is Article 120? (3) Assuming there is a great doubt as to the capacity of such an after-born son to sue, but that in the result and after full debate it were decided that he could sue, is a Court guardian to be convicted of gross negligence simply because he does not defend the action on behalf of such minor when a defendant in an action by a mortgagee seeking to enforce the liability? On the threshold it may be said that there are two cases and two cases only, of which only one is reported, brought to our attention in which the question has been considered whether such an after-born son has a cause of action, that is to say, in circumstances where there is a period exceeding the period of gestation between his birth and the death of the only other coparcener (his brother) except the father. The unreported case is a decision in Appeal No. 179 of 1928 by a Bench of this High Court composed of Curgenvin and Sundaram Chetty, JJ. in which the learned. Judges say as follows:

If the gift was valid until avoided, Ramachandra Reddi (the son living at the time), no doubt had an opportunity of avoiding it, but upon his death that right must have expired, and on the occurrence of that event, there being no one in existence who could avoid the deed, it must have become valid for all purposes just as if it had been made at a time when no other coparcener existed. That being so, the plaintiff who was subsequently born would have no cause of action for the relief now claimed, and the proper course will be to dismiss his suit.

3. The reported case is *Mukund Singh v. Waziruddin* 1933 Lah 359 . There a Bench of the Lahore High Court observed:

The plaintiff son M was not alive at the time of this alienation. The eldest son M S was. There being two definite gaps between the death of A S and the birth of B S and the death of B S and the birth of M, and those gaps not being bridged over by the fact that the subsequently born son had been begotten or any reversioner being shown to have been in existence, the question is whether the plaintiff can challenge the alienation merely by virtue of his elder brother having been in existence at the time of the alienation though he died in the following year. It appears to us quite clear that he cannot. Allowing the usual nine months, there was an interval of eight or nine months between the death of A S and the date on which B S was begotten; and similarly, there was an interval of eight or nine months between the death of B S and the begetting of M. It not being shown that there was a reversioner in existence during these intervals, the alienations could not be challenged during such intervals, and therefore no subsequently born son could possibly do so as the alienations had become indefeasible and absolute.

4. The same position was apparently assumed in the course of the argument in *Hitendra Narayan Singh v. Sukhdeo Prasada Ja* 1929 8 Pat 558 : On the other hand there are a number of decisions in which there is no gap, in which it has been held that where the son that is alive at the time of the alienation is A and during his lifetime B enters his family by birth and A attacks the alienation he does so not only for his own advantage but also for the advantage of B; and there are other cases that decide that although in such cases A would, being the only son alive, be able to ratify the alienation before the birth of B, still after the birth of B, A alone could not ratify the alienation, but the consent of B also would be required. The present question is whether they go beyond that and decide that B in such a case has an individual right to challenge the alienation (i. e. a right that continues after A's right is lost) although he was not born at the time of the alienation. It will be found that all these cases are cases where there was no gap between the death of A and the conception of B.

5. The cases in question, all of which will require some examination, are 28 M L W 834(3); *Bhup Kuar v. Balbir Sahai* 1922 44 All 190; *Tulshi Ram v. Babu Lal* (1911) 33 All 654 and *Chandramuni v. Jambeswara* 1931 34 MLW 598 which follows *Tulshi Ram v. Babu Lal* (1911) 33 All 654. In order to see how far they really go, it becomes necessary to consider the statement so frequently quoted from Mayne's Hindu Law, Edn. 9, p. 468, para. 342, and the cases which it is urged form the foundation of the essential paragraphs in that statement; that is to say *Bunwari Lal v. Daya Sunker Misser* 13 CWN 815; *Hutodoot Narain Singh v. Beer Narain Singh* (1869) 11 WR 480; and the case that criticised those cases *Chuttan Lal v. Kallu* (1911) 33 All 283. It will also be helpful to consider *Ramaswami v. Thambusami* 1922 16 MLW 981 , the important decision of the Privy Council in *Lal Bahadur v. Ambika Prasad* 1925 47 All 795 at pp. 797,800, and the further decision in the same volume of the Privy Council, *Ranodip Singh v. Parmeshwar Prasad* 1925 47 All 165, which was followed in *Udayamuthier v. Shunmugam Chettiar* 1935 41 MLW 610. Before embarking upon an enquiry into those cases it is desirable to put on one side an argument that was strongly pressed in reply by Mr. Raghava Rao. It was said by him that an alienation by the manager of a joint Hindu family while the son was living was not merely a voidable transaction but a transaction which was wholly null and void. That point is dealt with in *Mulla* at p. 273 in very unambiguous terms as follows:

An alienation by the manager of a joint family made without legal necessity is not void, but voidable, at the option of the other coparceners. They may affirm it or they may repudiate it.

6. It will be observed that this was impliedly assumed as correct in the above cited case in *Mukund Singh v. Waziruddin* 1933 Lah 359 and in the unreported Madras case above referred to and in *Hitendra Narayan Singh v. Sukhdeo Prasada Ja* 1929 8 Pat 558 . It is said that this statement is wrong because of the decision of a Bench of this High Court reported in *Kandaswami Asari v. Somaskanda Ela Nidhi Ltd.* (1912) 35 Mad 177. The relevant part of the head-

note reads as follows:

An alienation by a manager without justifiable necessity is void as regards the shares of the other members of the family and where such necessity exists it is valid in its entirety.

7. In *Subba Goundan v. Krishnamachari* 1922 45 Mad 449 at pp. 465 and 466 another Bench of this High Court held as follows:

The alienation by the father to the extent of his share will be good. In the case of sales, by a father or managing member of the joint family for alleged necessity, we think the sale will be good till avoided, as it is open to the other co-parceners to affirm the transaction. The position of such a purchaser cannot be worse than that of a purchaser from a widow without legal necessity, in whose case it has been held that the sale is good till repudiated by the reversioners. We respectfully dissent from the view taken by Krishnaswami Ayyar, J., in *Kandaswami Asari v. Somaskanda Ela Nidhi Ltd.* (1912) 35 Mad 177 that a sale without necessity is incapable of ratification by the other coparceners.

8. On the other hand in *Amirthalinga Thevan v. Atumuga Ambalagaran* 1928 28 MLW 634 it was decided by another Bench of this High Court that such a sale is a void transaction so far as the shares of the minor co-parceners are concerned. But in that case at p. 637 the learned Judge who was delivering the judgment observes, criticising Odgers, J., in *Alagar. Aiyangar v. Srinivasa Iyengar* 1925 22 MLW 515:

I respectfully think that the dictum in *Subba Goundan v. Krishnamachari* 1922 45 Mad 449 has not the meaning attributed to it by Odgers, J. I think what the learned Judges in that case meant to say is that if the other co-parceners do not seek to set aside the transaction it may be practically treated as good.

9. We do not understand how a void transaction may be either practically treated as good or treated as practically good. He proceeds:

If the manager in effecting the sale acted within his powers the sale will be good apart from the assent or dissent of the other coparceners whose interests also he purports to convey. Otherwise it cannot per se be binding on the other coparceners. But even a sale made by the father or manager without necessity may be assented to by the other coparceners, and if they do so it will bind their interests also.

10. We find it very difficult to see how a "wholly void transaction could be ratified, and of those views we prefer the view expressed in *Subba Goundan v. Krishnamachari* 1922 45 Mad 449. The fact that the Privy Council have in certain cases, for example *Sahu Ram Chandra v. Bhup Singh* 1917 39 All 437 and in *Lachman Prasad v. Sarnam Singh* 1917 39 All 500, used words which suggest that such a transaction is void does not assist us. Their Lordships were not deciding the question whether such a transaction is void ab initio and so incapable of ratification or merely voidable. Further, those cases were Allahabad

decisions and there is a difference between Allahabad and Madras as regards the alienation by a manager of a joint Hindu family. Bearing in mind the fact that it is commonplace that a transaction of this nature can be perfected by the subsequent consent of the sons, and that it can be repudiated and set aside by the subsequent action of the sons and that such repudiation goes back to the date of the original alienation, we think that it is preferable to regard such an alienation as perfect unless and until set aside, and one that accordingly becomes unchallenged when the power to sue to set aside is lost. Terms such as voidable and void, valid or invalid, may each be a little misleading. Concerning the citation from Mayne's Hindu Law which we find relied upon in *Tulshi Ram v. Babu Lal* (1911) 33 All 654, *Bhup Kuar v. Balbir Sahai* 1922 44 All 190, *Amirthalinga Thevan v. Atumuga Ambalagaran* 1928 28 MLW 634 and *Chandramuni v. Jambeswara* 1931 34 MLW 598, it is perhaps desirable, instead of endeavouring to construe the words used in that text book, to go direct to the cases on which those words are founded. One should not, we think, treat a text book, however eminent, like a sacred text and endeavour to ascertain what the law is by regarding the true construction of what the text writer says. The words in question will be found in Edn. 9 at p. 468, para 342, beginning with the words:

Therefore, a son cannot object to alienations validly (it was debated what does "validity" here mean) made by his father before he was born or begotten, because he could only by birth obtain an interest in property which was then existing in his ancestor. [For this proposition *Chuttan Lal v. Kallu* (1911) 33 All 283 and *Bholanath Khettry v. Kartick Kissen Das* (1907) 34 Cal 372 are relied upon]. Hence, "if at the time of the alienation there has been no one in existence whose assent was necessary or if those who were then in existence had consented, he could not afterwards object on the ground that there was no necessity for the transaction. (No difficulty arises as to this.) Where, however, the father had contracted to sell family land, of which he was not in possession, as soon as he obtained possession, and after the contract, but before possession, a son was born, it was held that a decree for specific performance was not binding on the son, who had not been made a party to the suit. The Court held that the same decision would have been proper in the case of a son born after contract for sale, but before actual transfer. (Again no difficulty arises as to this.) On the other hand, if the alienation was made by a father without necessity, and without the consent of sons then living, it would not only be invalid against them, but also against any son born before they had ratified the transaction; and no consent given by them after his birth would render it binding upon him.. [What is relied on for that is *Hutodoot Narain Singh v. Beer Narain Singh* (1869) 11 WR 480 and *Tulshi Ram v. Babu Lal* (1911) 33 All 654.] The reason of the thing is not of course that the unborn son has any right in the family property at the time of the alienation, but that on his birth he acquires a share in the family property as it then stands. (The question here raised is as to the meaning of the expression as "it then stands)." If a previous alienation of any portion of the family property was validated by consent or failure to set it aside in time on the part of the other

members of the family then in existence, the property in which he acquires a share at birth has diminished to the extent of the portion thus alienated. If the alienation was invalid, he acquires a share in the whole property including the portion purported to be alienated-not because the alienation was an invasion of his rights, for he had none; but because it was bad in itself and did not diminish the corpus of the joint family property. [For that 38 All 12G (20) is relied upon].

11. In *Lachmi Narain Prasad v. Kishan Kishore* 1916 38 All 126 it will be found that what was decided was this: that where A alienates at a time when he had a minor son B, which minor son attained majority in 1895, so that his right to challenge was lost under the Limitation Act by 1898 and then after 1898 B had other sons born to him, those minors have no right of action because the right of the son B to sue was barred in 1898, so that the property ceased to be joint family property and the subsequently born grandsons were not in a position to dispute the sale. This case therefore decides that if there is an alienation, and if the person living at the time of the alienation loses the right which he undoubtedly has to challenge that alienation by effluxion of time, the result will be as though the alienation were good because it cannot be challenged, the right to challenge having been lost under the Limitation Act. Therefore the family is divested of the property completely and therefore the members of the family coming later on the scene after the family property is thus lost cannot challenge that alienation. As to Mayne's earlier statement that the alienation, if without necessity and without consent, would not only be invalid against sons born at the time but also against any son born before such sons had ratified, it is necessary to consider *Hutodoot Narain Singh v. Beer Narain Singh* (1869) 11 WR 480, *Bunwari Lal v. Daya Sunker Misser* 13 CWN 815 *Chuttan Lal v. Kallu* (1911) 33 All 283. *Hutodoot Narain Singh v. Beer Narain Singh* (1869) 11 WR 480 decides this: that a Hindu father has no power to settle ancestral property by conveyance in his lifetime or by a will to take effect after his death, without the consent of all his sons living at the time. If such sons living at the time will not consent they cannot consent after another son is born so as to bind the latter.

12. That is to say, even regarding the position of a settlement as similar to an alienation, this is merely an authority for the last two lines in the passage quoted, viz., and no consent given by them after his birth would render it binding upon him. The reason for this we think is as follows: (it is not necessary for us to decide anything as regards this.) When the sons consent, they perfect the alienation and finally divest the family of the property; that is to say, the final and effective-divesting of the family of the property takes place on the giving of the consent assuming the family has not been already divested as a consequence of the right to sue possessed by the coparceners existing at the time of the alienation having been lost. Until the family has been divested it has got a right to attack the alienation and as against the family the alienation is not complete. This view proceeds on the assumption that the alienation can be perfected by the consent of all the members of the family living not merely at the time of the alienation by the father but at the time of the completion of that alienation by

the assent of the, sons. Therefore the assent of the sons living at the time of the father's alienation, it might be urged, does not bind a son not assenting and living at the time when the other sons give their consent. In *Bunwari Lal v. Daya Sunker Misser* 13 CWN 815 the following obiter dictum is to be found:

It is well settled that any coparcener who was born at the time of the completion of the alienation (two cases are cited) would be entitled to sue to set aside the invalid alienation, and such alienation, if invalid because made without the consent of all the coparceners then in existence, can be set aside even at the instance of another coparcener who was born subsequent to the alienation.

13. For that latter proposition the case relied upon is the case before mentioned, viz. *Hutodoot Narain Singh v. Beer Narain Singh* (1869) 11 WR 480. In *Chuttan Lal v. Kallu* (1911) 33 All 283 it was held that a member of a joint Hindu family who was born after the alienation of the family property by another member of that family cannot question the validity of that alienation, and the following observations are passed upon *Hutodoot Narain Singh v. Beer Narain Singh* (1869) 11 WR 480 and 13 C W N 815:

The learned Vakil for the appellant in support of the contention that the plaintiff is entitled to maintain the suit, relies upon a passage in the *Mitakshara*...He further relies upon a decision of the Calcutta High Court in *Hutodoot Narain Singh v. Beer Narain Singh* (1869) 11 WR 480. That case in our opinion has no bearing upon the question before us. There it was held that a Hindu father had no power to settle ancestral property by conveyance in his lifetime or by a will to take effect after his death without the consent of all his sons living at the time: and where such a settlement was not assented to by the sons living at the time and another son was afterwards born, no subsequent assent of the former would be binding on the latter... The learned Vakil also relies upon a dictum of the learned Judges who decided the case in *Bunwari Lal v. Daya Sunker Misser* 13 CWN 815. The dictum is to the effect that an alienation, if invalid, because made without the consent of all the coparceners then in existence, can be set aside even at the instance of another coparcener who was born subsequent to the alienation. The authority cited for this view is the case in *Hutodoot Narain Singh v. Beer Narain Singh* (1869) 11 WR 480, to which we have referred. That case, as we have pointed out above, did not decide the question whether an alienation validly made at a time when a coparcener was not in existence could be questioned by such a coparcener. It seems to us to be clear that a plaintiff can question the validity of an alienation of such property only in which he had an interest at the date of the alienation. If his interest came into existence subsequently to the alienation, he cannot question the validity thereof.

14. [As to this, see *Udayamuthier v. Shunmugam Chettiar* 1935 Mad 431, where the same conclusion was arrived at.] Then the learned Judges cite Mayne:

A son cannot object to alienations validly made by his father before he was born or begotten, because he could only by birth obtain an interest in property which

was then existing in his ancestor.

15. They then proceed:

Hence, if at the time of the alienation there had been no one in existence whose assent was necessary, or if those who were then in existence had consented, he could not afterwards object on the ground that there was no necessity for the transaction.

16. Again there is very little difficulty in following that. The question arises: What was the position where there was an after-born son and at the time of the alienation the alienor was not by himself but had sons living who neither consented nor repudiated and then died.

17. It is now necessary to turn to the series commencing with *Tulshi Ram v. Babu Lal* (1911) 33 All 654. That decides that where an alienation of ancestral property is invalid as having been made without legal necessity by one member of the coparcenary without the consent of the rest, it is open to coparceners to object to such alienation notwithstanding that they were born subsequently thereto. This distinguishes *Chuttan Lal v. Kallu* (1911) 33 All 283. It is a case where there was no gap between the birth of the subsequently born son and the death of the coparcener. It is founded upon the quo-nation from Mayne. The facts were that a mortgage was made in 1891 by A. A had two sons B and C. B left two sons D and E. The suit was instituted by the mortgagee against C, D and E. D and E were not born at the time of the mortgage and it was argued that they could not as defendants question the validity of the mortgage even though a co-defendant C was in existence at the time of the mortgage. *Chandramuni v. Jambeswara* 1931 34 MLW 598 decides that in an action of the mortgagee to enforce a mortgage, an after born son can challenge the mortgage made by his father (also a party) if there be other coparceners not assenting at the time of the alienation. The decision follows *Tulshi Ram v. Babu Lal* (1911) 33 All 654 which is treated as sufficient authority, and there are no further reasons given for adopting the view that he can. That again was a case where the plaintiff was the mortgagee and there was also in that case no gap, and the defendants in that case included a son in existence at the time of the alienation as well as the second defendant who was not in existence at the time of the alienation.

18. But there is this difference between the two cases: that in *Chandramuni v. Jambeswara* 1931 34 MLW 598 the son who was in existence at the time of the alienation was barred by *res judicata* from litigating the question of the validity of the mortgage. In *Bhup Kuar v. Balbir Sahai* 1922 44 All 190 again there was no gap. In that case A mortgaged joint family property at a time when he had a son B living. Almost immediately after the alienation B by his guardian filed a suit to declare the mortgage not binding. While that suit was pending C, another son, was born. B died and the suit he brought was dismissed. Then the mortgagee sued C and A's widow and it was held that C could defend the suit on the same pleas as had been urged by B in B's suit. This decision in my opinion involves

necessarily the view that there is a distinct cause of action in B and in C, for otherwise the litigation of that cause of action by B, for B was the plaintiff, would preclude thereafter C from litigating the same point in the role of defendant. And we understood Mr. Raghava Rao not to seriously challenge that view and he did not rely on *Bhup Kuar v. Balbir Sahai* 1922 44 All 190 to its full extent but only that part of it that suggested, apart from the question of res judicata, that the second son, though after-born could raise the defence in the mortgagee's suit. The case proceeds, as is apparent from pp. 194 and 195, on the view that, if there is a son in existence, the father's power to alienate is imperfect and consequently the family has a right either to set aside the alienation or to defend the suit brought by the mortgagee, and that right can be wielded while that cause of action exists either by a son born at that time or a son born subsequent to the transaction. In our present case, conceding that view for the sake of argument, it would be necessary to go further and show that various members of the family have got separate and distinct causes of action because here all the members of the family who could have challenged the alienation at the time are dead and with their death their right of action, and the cause of action itself, disappears. See *Lachmi Narain Prasad v. Kishan Kishore* 1916 38 All 126, *Ramaswami v. Thambusami* 1922 16 MLW 981, *Ranodip Singh v. Parmeshwar Prasad* 1925 47 All 165 and *Udayamuthier v. Shunmugam Chettiar* 1935 Mad 431.

19. After a period of time during which the father is the sole coparcener a son comes on the scene. Unless with his birth there springs into existence a new cause of action it is difficult to see how he can challenge the alienation in respect of which all the other coparceners had lost their cause of action by death. In *Amirthalinga Thevan v. Atumuga Ambalagaran* 1928 28 MLW 634, the same quotation from Mayne is relied upon and no further authority is quoted. That case again is a case where the plaintiff was the mortgagee and the defendants included a coparcener at the time of the transaction, and so this case could have been decided, as it was on the principle that the successful defendant, the coparcener living at the time of the alienation, defended not only in his own interest but in the interests of the family, and therefore all benefited who were members of the family at the time of the successful defence. There again there was no gap, and had there been, the Court would presumably have considered not merely the question of whether the action died with the death of an existing coparcener but whether a new cause of action sprang up with the birth of an after-born coparcener. In *Ramaswami v. Thambusami* 1922 16 MLW 981 it is indicated by a Full Bench of this High Court that an after-born son would not have an independent cause of action to set aside an alienation which had taken effect before he was born and acquired a status in the coparcenary. The same was decided by a Bench of the Allahabad High Court in *Lachmi Narain Prasad v. Kishan Kishore* 1916 38 All. 126. And finally and, so far as we are concerned, conclusively it was decided by the Privy Council in *Ranodip Singh v. Parmeshwar Prasad* 1925 47 All 165 that where there was a Hindu father with three sons at

the time of the alienation which was in 1893, and there was born to him a fourth son in 1900, and a suit was brought to recover possession of the alienated property in 1920, and the right of action of the three sons living at the time of the alienation was barred because they had waited until beyond the three years after they attained majority, the right of action of the fourth son who had brought the action within the three years was barred also, the reason being that he had no separate cause of action the cause of action was that of his elder brothers (as being the coparceners in existence at the time of the alienation) and that cause of action was barred. So obviously, had he had a separate cause of action it would not have been barred. Their Lordships of the Privy Council observe at p. 169:

To the contention that by the cited Sections (viz. Sections 6, 7 and 8, Lim Act) the period of limitation is extended for three years from the cessation of the fourth plaintiff's minority, the answer is that by their express terms this extended period can only be claimed by a person entitled to institute the suit, at the time from which the period of limitation is to be reckoned. The fourth plaintiff does not come within this description, for at that time he was not in existence.

20. It was faintly argued that but for Sections 6, 7 and 8 this suggests that the after-born son has in himself a separate cause of action i.e., the restriction imposed is only a restriction for the purposes of the Limitation Act. But their Lordships state in quite unambiguous language at p. 169 that the plaintiff's subsequent birth did not create a fresh cause of action. It follows directly that the only cause of action is one which arose at the time of the alienation. It is, at highest, restricted to those who are, or come into (as to this I express no opinion) existence while that cause of action is subsisting, i.e., while someone exists who can sue. If that class fails by death it is at an end: it would require a fresh cause of action to spring into existence by a later birth of, after a gap, a later-born son who could sue. This is also important when considering the question of what is the starting point of limitation in this present case. *Ranodip Singh v. Parmeshwar Prasad* 1925 47 All 165 was followed in *Udayamuthier v. Shunmugam Chettiar* 1935 41 MLW 610. In *Bholanath Khettry v. Kartick Kissen Das* (1907) 34 Cal 372 it was decided that a member of a joint family can contest the validity of the alienation by his father or grandfather only of such an interest in the ancestral property as existed at his birth and vested in him by his birth, and that where there is a complete transfer of property by mortgage by the father or grandfather prior to the birth of such member, the only interest that may vest on birth is the equity of redemption. This was a case where it was assumed that the alienation was for an immoral purpose. Again Mayne is relied upon. The alienations were by the grandfather who had at that time a son, which son joined in them. It therefore perhaps does not carry the matter very much farther because it is in the class of cases where the alienation is by the whole of the coparceners existing at the time. In *Lal Bahadur v. Ambika Prasad* 1925 47 All 795 however at p. 797 Lord Blanesburgh delivering the judgment of the Privy Council stated that where A, a father having two sons living in 1895, alienates

property, both his sons being then minors, and one of those sons, whom I will call B, grows up and in course of time has two sons, those two sons will have no right to challenge the grandfather's alienation in 1895. His Lordship's observations are as follows:

Ram Din, one of these joint managers had two sons, Awadh Behari and Jantri Prasad. In 1895 Awadh Behari was about 13 years old, Jantri Prasad about 8. The respondents, plaintiffs in the suit, are sons of Awadh Behari. In 1895 they were still unborn. This, as will later appear, is one of the most important facts in the case. It follows from it that these two mortgage-deeds have always been binding on the respondents. The only joint family estate to an interest in which they succeeded was an estate which to the extent of these two mortgages had already been alienated.

21. Our conclusion from the above is as follows : that whether or not an after-born son can effectively join with existing sons to attack or resist an alienation, the cause of action or the right to defend is a cause or right that was in those members of the family that were alive at the time of the alienation and were not consenting. The right to attack begins to exist at the moment of the alienation and at the highest (we do not decide whether it extends so high) exists in all members of the family that exist while such right of action is intact. If that right of action is lost by those members of the family who had it when it arose, i.e. those coparceners who were in existence and not consenting at the time of the alienation, if that right of action is lost by them by the operation of the statute of limitation, it is lost to the family and does not live on in some child who becomes a coparcener even during the lifetime of the coparceners that existed when the alienation took place where such coparceners' cause of action has been barred. And by parity of reasoning just as where the right of action possessed by the coparceners existing at the time of the alienation if barred is lost, not only by them but also by any member of the family later born if they allowed the period of limitation to expire, so it is also lost if those persons who were in existence at the time of the alienation lost that cause of action by death before there came into existence the after-born child; for the after born child has got no right to action in himself, no individual and separate cause of action that springs up immediately he is born, but his right to contest, if any, is derived from the right that those in existence at the time of the alienation who were not consenting had, and that right is lost to him when it is lost to them, and it is lost to them when they die, or when they permit the period of limitation to expire.

22. And now remains the question as to limitation. It was argued by Mr. Raghava Rao, who admits that Article 120 is the proper Article to apply here, that the starting point is not the date of the alienation but the date when the action was launched by the mortgagee seeking to enforce the mortgage. It will be remembered that in this case two separate causes of action at least are being pursued. The one is to set aside a decree which in effect declares that the mortgage is valid and the other is to set aside the mortgage, and the former is

merely a step towards the latter and is an idle step unless the latter point on being reached is successfully achieved. Now it may be that the starting point of the cause of action which seeks to set aside the decree on the ground of gross negligence was either (1) the date of the bringing of that suit or (2) the date on which occurred the act of gross negligence on the part of the guardian or (3) the date of the decree in that suit. I do not pursue these various alternatives because that is not the point that has to be determined. Assuming that the action is in time so far as that cause of action is concerned, the question remains, is the action in time so far as the former cause of action is concerned, viz. that part of the claim that seeks to set aside the mortgage? Divested of all the complexities due to the previous suit this action simply becomes an action by a coparcener to set aside the alienation of another coparcener on the ground that it was made without necessity and I should have thought that it was beyond argument that that cause of action arose at the time of the alienation. If that be the time, then admittedly this action was brought more than six years after the starting point of Article 120, which is that time when the right to sue accrues. And therefore on this ground also, even though the answer to the first point is wrong, this action would fail as being time barred so far as that part of it is concerned which seeks to set aside this alienation. So far as that part of it is concerned which seeks to set aside the decree, other considerations might apply.

23. It is said that this is not the right way to regard the matter for, assuming the right to sue to set aside the alienation is now lost, and was lost at the time of the institution of this suit, it was not lost at the time of the institution of the mortgagee's action; that therefore if that action is restored by the setting aside of that decree, the minor will be relegated to the position he then was in. Then he had not lost his right to action and accordingly the alienation had not been perfected even assuming appeal No. 179 of 1928, *Mukund Singh v. Waziruddin* 1933 Lah 359 and *Lachmi Narain Prasad v. Kishan Kishore* 1916 38 All 126 were right when they said, once the cause of action to set aside the alienation is lost, the alienation is perfected. It is accordingly urged that, although that part of the cause of action which seeks to set aside the alienation is barred (and accordingly the alienation is now perfected) the part of the cause of action which seeks to set aside the decree is not barred; if set aside, the minor may defend on any grounds open to him at the time that action was launched and he might accordingly win that action (assuming the first point above considered was decided in the plaintiff's favour instead of against him). Thus we should have this action deciding that the right to sue being barred the alienation is perfected and yet we should send the minor off to defend suit which, if he won it, would decide that the alienation must be set on one side. The logic, I confess, appears good; the result unsatisfactory. To avoid such a result I think it must be that, whatever may be the position where the minor restricts himself to defence, where he adopts the role also of attacker, he must fail if the attack fails; he cannot lose in the role of attacker and win in the role of defender at the same time. Otherwise the Court stultifies itself by deciding that the alienation is

perfected while asking another Court to consider whether this now perfected alienation should not now be set aside on the ground that it once was voidable.

24. This difficulty, of course, only arises on the assumption that the conclusion arrived at on the first point is wrong. If the decision on the first point is right, this minor can neither successfully attack nor defend. But in my opinion the cause of action (to set aside the decree, fails for another reason. It was necessary for the plaintiff to maintain that in that case the guardian that was representing the minor's interests was so grossly negligent that it is necessary in the interests of justice to set aside the decree that was made in that case. The reason why it is said that guardian, who was a Court guardian, not a relative but a clerk of the Court, should be held to have behaved in this grossly negligent way is, that counsel for him reported no instructions; in other words he did not fight the case. In my opinion before a Court guardian can be charged with gross negligence, and a decree of a Court set aside on that ground, very cogent evidence is necessary to show that no reasonable man could fairly have behaved as the Court guardian in question behaved. There the Court guardian behaved wisely if the law was, as a Bench of this High Court has since considered it to be, as a Bench of the Lahore High Court has since held it to be or as I have now regarded it as being. It may be, of course, that we are all wrong. But there is no decision to the contrary, where, as here, there is a gap. There are two decisions of the Privy Council to the effect that an after-born son has no independent cause of action and it seems to me that where the law is such that so many Judges can take such a view it would be unreasonable to find a layman guilty of gross negligence because he arrived at the same conclusion. Mr. Raghava Rao has urged that there is no evidence that he arrived at such a conclusion. But we think one must assume that prima facie a Court guardian is doing everything rightly and properly in his office until there is some ground for making one think he is not; and if one sees a Court guardian abandoning a case one should assume, unless there are reasons to think the contrary, he is abandoning the case because he honestly thinks it cannot be fought with any prospect of success, and not assume, especially when he is not a relative but an officer of Court in the double sense he is not only the guardian but on the staff of the Court, that he is negligently sacrificing the interests of a minor. On this ground also in my opinion the appeal fails and must be dismissed with costs (one set). The plaintiff will pay the court-fee due to Government.