
(1958) 05 PAT CK 0007
In the Patna High Court
Case No : A.F.O.D. No. 165 of 1950

Sadhu Saran Ahir and Others APPELLANT
Vs
Sheo Prasad Kanu and Others RESPONDENT

Date of Decision : 06-05-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 22 Rule 3
Evidence Act, 1872 — Section 115
Limitation Act, 1908 — Article 44
Transfer of Property Act, 1882 — Section 43, 5, 6

Citation : AIR 1959 Patna 278

Hon'ble Judges : S.C. Prasad, J; S.C. Misra, J

Bench : Division Bench

Advocate : Parasuram Pd. Verma, for the Appellant; G.P. Das, C.S. Prasad, Shambhu Saran and K.N. Varma, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Misra, J.—This appeal arises out of a suit by two minor plaintiffs, Sheo Prasad Kami and Ram Naresh Kanu, through next friend Mt. Mamva, their aunt, for a declaration that three deeds of transfer, one of them dated the 31st January, 1947, and the remaining two dated the 31st December, 1946, executed by their mother Mt. Sheobachni (defendant No 6) in favour of defendants first and second parties were illegal, fraudulent, without consideration and without legal necessity and the defendants could not claim any title in respect of the properties covered by them,

The plaintiffs are sons of one Guru Charan Kanu who died about the year 1944. Mt. Sheobachni, their mother, married one Rup Chand Kanu of village Dihri in sagai form and left the plaintiffs' house to live with him. She had no connection with the person or property of the plaintiffs who began to live with their aunt, Mt. Manwa. Defendants first and second parties, who also belong to the village of the plaintiffs, viz. Chakia, and were gotias, in collusion with one another and out of fraudulent and dishonest motive, induced and defrauded defendant No. 6 and

managed to obtain the three instruments of transfer in their favour conveying to them the said properties.

On these allegations in the main, the plaintiffs claimed the relief of declaration that the three documents were null and void and prayed for recovery of possession of the properties of which they were dispossessed by the defendants first and second parties on foot of the three sale deeds in their favour referred to above. They also prayed for mesne profits which were assessed at a sum of Rs. 964/4/-, prior to the institution of the suit and also up to the date of recovery of possession.

2. Defendants first and second parties denied the allegations in the plaint. It was alleged that defendant No. 6 had not married Rup Chand Kanu but that she was living still with her minor sons and that she had executed the three documents for herself and for her two minor sons for valid legal necessity as the two children were cripples and needed money for their treatment,

Defendant No. 6, accordingly, after having executed the three documents, received the consideration mentioned therein and duly put the defendants first and second parties in possession. Out of dishonest motive, however, she herself subsequently brought the present suit in the name of her two minor sons making Mt. Manwa a guardian of the plaintiffs. The suit was accordingly fit to be dismissed. Defendant No. 6 did not file any written statement but she was examined as D.W. 1 and in her statement in Court she supported the case of the plaintiffs that she was defrauded by the defendants first and second parties to execute the three impugned sale deeds.

3. The learned Additional Subordinate Judge decreed the suit holding that there was no justifying necessity for the sale deeds nor had consideration passed thereunder. The Court also held that defendant No. 6 had remained and was living in village Dihri and was not looking after the interest of the two minor plaintiffs. In view of the findings recorded by him, the learned Additional Subordinate Judge passed a decree in favour of the plaintiffs. The defendants have preferred this appeal to this Court against the decision of the learned Additional Subordinate Judge.

4. Learned counsel for the appellants has brought to our notice certain facts with regard to the death of the two plaintiffs which occurred in the following circumstances. Plaintiff No. 2 died on the 11th September, 1948, during the pendency of the pauper proceedings and plaintiff No. 1 was, accordingly, left solely to prosecute the suit.

The present appeal was filed on the 17th May, 1950. On the 28th February, 1954, during the pendency of the appeal in this Court, plaintiff No. 1 (respondent No. 1) died. On the 17th March, 1954, the appellants filed an application before the learned Registrar that the mother of the plaintiffs, Mt. Sheobaehni, was already on record as respondent No. 3. Learned counsel for respondent No. 1, however, objected to the mother being substituted for the son.

On the 1st April, 1954, a petition was filed by the sons of their agnatic relation Hari Mahton, namely Babban, Mina and Gorakh, who were no parties to the suit, to be substituted in place of deceased respondent No. 1. No Vakalatnama was, however, filed on behalf of Gorakh and hence his case was not considered. The application was opposed by the appellants who stated that they were not to be substituted as a preferential heir of the deceased was his sister, Mt. Kaushalya,

The mother, Sheobaehni, then appeared and stated that she had surrendered her interest in favour of Babban, Mina and Gorakh and that Kaushalya was not the sister of the deceased respondent. This matter was put up before a Bench of this Court and by Order No. 45, dated 28-2-55, it was directed that Babban and Mina might be brought on record under the guardianship of Babban in place of the deceased respondent No. 1. The application of the appellants for substitution of Kaushalya, the minor sister of Sheo Pd. would be dealt with later on when the name of her guardian who would not (act?) in that capacity might be disclosed.

This matter was again put up before another Bench on the 1st December, 1955, when the order passed was that Mt Kaushalya, under the guardian-ship of her mother Sheobaehni, might be added as respondent in the appeal. It was made clear that by that order the bench did not decide the question as to who would be the preferential heir of Sheo Prasad, That matter was left to be considered at the time of hearing of the appeal.

5. Learned counsel for the appellants has accordingly contended that Mt. Kaushalya should be treated as the preferential heir as she is the sister, and learned counsel for the respondents has challenged her status as a sister with reference particularly to the application filed by Sheobaehni that she was not the sister of the deceased respondent. Mr. B. C. De, for the appellants, has contended that an enquiry might be ordered to determine the question as to whether Kaushalya is the sister of (he respondents as alleged by the appellants.

After having heard the argument of the parties, I am of opinion that that point does not arise, because in view of the fact that Sheobaehni is alive, even if she has remarried, she would be entitled to succeed to the interest of her son after his death and, she being on record, it is unnecessary to find whether Kaushalya is the sister of the respondents as alleged by the appellants, or not.

6. Learned counsel for the appellants has contended that the defendants are, in any case, protected u/s 43 of the Transfer of Property Act, which provides that where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

The point sought to be made out of it is that if, after the death of the two sons of Sheobachani (defendant No. 6), she is held by this Court as the person entitled to inherit the interest of her sons, the interest so acquired shall inure to the

benefit of the transferees. In exhibits G, G(1) and G(2), the three sale deeds, she stated that after the death of her husband all the properties that were acquired by him by inheritance from his father Thakur Kanu, were in possession and occupation of the executant by inheritance.

The two minor sons of hers due to illness had become crippled and they were so seriously ill that it was impossible for them to survive, On account of that she had to bear the expenses of their medicines, treatment and maintenance and meet the household expenses in such hard days and she had been managing her affairs till then by pawning her ornaments to a few persons and borrowing interest bearing accommodation loan and also managed the affairs of the Sradh of her husband by borrowing money here and there.

She stated further that she was by all means competent to sell the property and with a view to that she negotiated for the sale of the property with several persons and at last the negotiation was finally settled with the vendees. Since she made a clear representation in the three sale deeds to the effect that she was in every way competent to dispose of the property on her behalf as well as on behalf of her minor sons, she would be completely bound by that representation u/s 43 of the J Transfer of Property Act.

The representation was either fraudulent, if in fact there was no legal necessity as set out in the sale deeds, or erroneous in so far as she thought that she was competent to dispose of the property even without any legal necessity. In terms, therefore, Section 43 of the Transfer of Property Act would govern this case. Now, if she is found to have acquired interest in that property after the death of her sons and which now u/s 14 of the Hindu Succession Act, 1956 would be her absolute interest, she could not claim recovery of possession of the property.

Learned counsel for the respondents has contended that Section 43 would not be applicable for more than one reason. In the first place, in order to attract the provisions of Section 43, the sale must have been by Mt. Sheobachni of the property as her own. The recital, however, in the three sale deeds was to the effect that she purported to sell them as a mere guardian of her two minor sons, inasmuch as she endeavoured to make out a case of legal necessity.

If, therefore, the case of legal necessity would fail, she cannot be held to be a person who fraudulently or erroneously represented that she was authorised to transfer, the vended properties. Mr. B. C. De, for the appellants, however, relied upon the case of Aisha Bibi Vs. Mahfuz-Un-Nissa Bibi and Others, . The facts of that case were that a Muslim husband executed a mortgage of certain properties belonging to his wife, but the authority to enter into the transaction was not proved.

It was held by a Division Bench of the Allahabad High Court that after the property was acquired by the husband as heir on the death of his wife, to the extent of his interest a decree could be passed. It has been urged that in that case also the executant had mortgaged his wife's property and subsequently he

acquired interest to the extent of one fourth in that property after the death of his wife. The Court was, therefore, of the opinion that a decree for sale of the one-fourth share of the mortgaged property could be ordered in execution of a mortgage decree.

Mr. B. C. De has further contended that in that case the power of attorney alleged to have been executed in favour of the husband by the wife not having been proved, and the husband having executed the mortgage bond on behalf of his wife on the strength of a power of attorney which was not duly proved, there should be no difference, in principle, between that case and the present one.

In my opinion, there is substance in this contention and if this case were on all fours on other matter also with the Allahabad case, the principle might be applicable. As it is, however, there is an important requirement of Section 43 with regard to the passing of consideration occurring in that section, The evidence in the present case will, therefore, have to be examined to see whether it is one where consideration was paid.

The court below has held that no consideration actually was paid and even the recital with regard to the legal necessity was fraudulent, because the two sons of Sheobachni, namely, Sheo Prasad Kami and Ram Naresh Kanu, were cripples from birth. There was no occasion, therefore, for borrowing money for their treatment. The learned Additional Subordinate Judge, accordingly, held that there was no occasion for entering into the transaction. He referred in this connection to the evidence of P. Ws. 2, 3 and 4 who stated that the two sons were cripples from birth. P.W. 5, who was Sheo Prasad Kanu himself, also said the same thing.

The learned Additional Subordinate Judge also commented that there was nothing on record to show that Sheo Prasad Kanu could stand up at any time. The evidence of D. W. 1, who was defendant No. 6, also supported the case of the plaintiffs. The learned Additional Subordinate Judge disbelieved the evidence of the defence witnesses for cogent reasons and the learned counsel has not made any serious endeavour to challenge the findings of the learned Additional Subordinate Judge on this point.

It is also remarkable that the amount of consideration under the three sale deeds, which were executed at short intervals, viz., 31st December, 1946 and 31st January, 1947, is enormous considering the status of the family of the plaintiffs. The consideration under exhibit G is Rs. 1900/-, under exhibit G(1) it is Rs. 1900/- and under exhibit G(2) it is Rs. 1400/-. It is difficult to imagine that such heavy amounts were required for the treatment of these children in the village. There is no evidence to support the other recital also in the sale deeds that there were loans incurred previously by Sheo Bachni which also had to be paid up.

7. Apart from the illness of the two children, the evidence of passing of consideration led by the defendants is also highly unsatisfactory.

(His Lordship considered the evidence and proceeded).

I agree in the conclusion of the learned Additional Subordinate Judge that the passing of the consideration has not been established so far as exhibits G and G(1) are concerned.

8. As for exhibit G (2), the evidence is no better. The payment of consideration with regard to this document is spoken to by Qurban Ali (D.W. 9). He also acted as the identifier of Sheobachni and also signed for her. He stated that the consideration was paid in his presence. There is a recital in this sale deed also that the consideration had been paid; but, according to the case made in the Court, consideration passed after the registration of the document.

This witness stated that when the payment was-made he was present, but in cross examination he had to admit that he did not know when the payment was made and he said, generally, that it was two or three years ago. This difference of one year with regard to the date of payment appears somewhat suspicious. He stated that Chandrika Ahir, Sarbanand, Muni Lal, Sheobachni and himself were present when the consideration was paid.

He did not state however, as to where the payment was made. Chandrika Ahir who is examinee! as D. W. 5 Chandrika Rai (sic) & who came to depose about the payment of Rs. 1400/-, the consideration under this sale deed, stated that Sarbanand, Muni Lal Sheobachni & himself, and none else, were present when this sum of Rs. 1400/- was paid to Sheobachni. This shows that Qurban Ali was not present.

Learned counsel for the appellants has, however, referred to the subsequent statement made by this witness to the effect that the receipt with stamp was written at that time and this receipt was written-by Qurban. This statement, however, runs counter to what the witness stated above and that shows that in fact Quarban was not present there at all. That the passing of consideration under this sale deed is a myth is also corroborated by the fact that the alleged receipt with stamp, which was made over to Sarbanand, has not been produced in Court.

It is thus abundantly clear that the witnesses are telling lies to show that consideration under exhibit C(2) was paid to Sheobachni. It appears to be the design of the vendees and the members of their family to take the sale deeds in question in the names of various potias who represented a united front against any challenge made to the transactions at a subsequent stage. Defendant 6 who appears to have remarried and left the village either was already married, according to the plaintiffs' case, or she was contemplating a remarriage and was evidently induced fraudulently by the vendees to execute the sale deeds in question on the temptation of payment of consideration after execution and registration of the sale deeds, but afterwards they did not pay the money mentioned in the sale deeds as the price of the land.

The argument, therefore, based on the case of Aisha Bibi Vs. Mahfuz-Un-Nissa Bibi and Others, is not available to the learned counsel on behalf of the appellants as this is not a bona fide transaction and consideration was not paid by the vendees and, therefore, they could not take advantage of the doctrine of feeding the estoppel which is incorporated in Section 43 of the Transfer of Property Act.

9. Learned counsel for the appellants has not pressed seriously the plea of legal necessity urged on behalf of defendants 2 to 4 (appellants) in the Court below. I have already referred to this matter in dealing with the question of passing of consideration but the evidence of D. W. 10 Muni Lal Ahir is almost a complete negation of the defence case. He said as follows:

"I don't know with whom the ornaments were pledged. I don't know how much she had to pay to her creditors. I made no enquiry from the creditors and the maliks. I made no enquiry about the necessities from any relation of defendant No. 9 but I made enquiry only from Sri Ahir D.W."

In view of this statement, the learned counsel for the appellants rightly did not stress the argument with regard to any justifying necessity for the sale of the property of the minors.

10. It has been contended, in the next place, that both the minor plaintiffs, namely, Sheo Prasad Kanu and Ram Naresh Kanu now having died, it should be held that the right of action came to an end and nothing is left to be inherited by their mother Sheobachni. Reference is made in support of this contention to the case of Palani Goundan and Another Vs. Vanjiakkal and Another, . That was a case where certain properties belonging to one Karuppa Goundan, the plaintiffs father, was inherited by his minor son, the brother of the plaintiff, after his death.

The mother of the minor acted as his guardian till her death, and after her death, the plaintiff herself managed the property on behalf of her minor brother. She executed a registered lease in respect of some properties which led to some kind of family dispute which was settled by a deed of family arrangement under which defendant No. 1, was made the de facto guardian of the minor. He executed a sale deed in favour of the third defendant reciting the payment of consideration to be applied to certain specified purposes.

The minors died subsequently and then the plaintiff filed the suit giving rise to the appeal to recover possession of the suit properties with mesne profits past and future. The suit was decreed by the two courts below and then a second appeal was preferred in the High Court. Their Lordships allowed the appeal and dismissed the plaintiff's suit holding that after the death of the minor the plaintiff had no right to bring the suit for setting aside the alienation made by the de facto guardian of the minor, because such a right is the personal right of the minor. After a review of the authorities bearing on the point, their Lordships came to the following conclusion :

"The arguments heard by us have not dislodged the four cardinal positions which have become settled law, viz., that the powers of a de facto guardian stand equated to those of a de jure guardian, secondly, that when an alienation is made by such a guardian ostensibly for necessity or for the benefit of the minor, it is only voidable at the instance of the minor who can repudiate it or more formally challenge it by bringing a suit either through a next friend during his minority or after attaining majority within the period of limitation allowed by law; thirdly, that the right to avoid the transfer is a personal privilege and that the minor and minor alone can exercise that personal privilege; and fourthly, this right to avoid is nothing more than a right to sue and is not heritable."

Learned counsel for the appellants has contended that according to this decision it should be held that Sheo Prasad Kariu and Ram Naresh Kauu having already died the present action came to an end. In my opinion, the argument can not be acceded to for more than one reason. In the first place, Palani Goundan and Another Vs. Vanjiakkal and Another, referred to above is no authority for this proposition.

In that case the suit was brought by the plaintiffs who was the sister of the minor who died and who had a right to challenge the alienation made by the de facto guardian. The minor who had the right to challenge the alienation had not exercised that right either by way of repudiation of the transaction or by bringing a suit through a next friend during his minority or, after attaining majority within the period of limitation allowed by law. In the present case, however, the minors had exercised the option by bringing the suit through Mt. Manwa, who actually acted as next friend. The principle of law laid down in the Madras case, therefore, has no bearing upon the present controversy. The only question is where such a minor has exercised the option by repudiating the transaction, whether, after his death, it is open to his heir to inherit that right to prosecute the litigation in his or her own right, or not.

Apart from this consideration even the decisions of the Madras High Court upon the point are not uniform as has been noticed by the learned Judges in Palani Goundan and Another Vs. Vanjiakkal and Another, . The decision in the case of Palaniappa Goundan Vs. Nallappa Goundan and Others, is to the contrary. Their Lordships, however, followed the decision in the case of V. Muthukumara Chetty Vs. Anthony Udayar and thirty Ors., .

In the case of Alamelu Ammal Vs. Krishna Chetty and Others, , another Division Bench of the same High Court adopted the view in the case of Palaniappa Goundan Vs. Nallappa Goundan and Others, and held that any person claiming through a minor either as a transferee or legal representative must bring the suit within the period allowable to the minor himself, which would be within three years of his attaining majority.

No doubt in the case of Jhaverbhai Hathibhai Patel Vs. Kabhai Becher Patel, it was held that when a minor has brought a suit for setting aside an alienation

made by the de facto guardian and subsequently withdrew from the suit, the interest of the minor in the property was extinguished and the subsequent purchaser had no right to continue the suit. This case was distinguished in Palani Goundan's case AIR 1956 Mad 676 and, if I may say so with respect, rightly so.

I am inclined to agree with the view of Vis-wanatha Sastri, J. in Palaniappa Goundan Vs. Nallappa Goundan and Others, , and I hold that it is a vested right in the nature of a right to property and not a mere right to sue and, as such, is heritable. On principle also I see no reason why the right of a ward to set aside an alienation under Article 44 of the Limitation Act should be only a personal right and not a right inherent in the state which would be heritable after his death.

If the view were adopted that such a right was a personal right, the result would be an anomalous one, as the transferee of such property from a guardian would get an indefeasible right to the property based on a transaction which may be fraudulent or otherwise not valid in law. What would be the basis of the title of such a transferee, and as between him and the heir of the minor, who would be entitled to get such property if such a transfer had not interposed?

There is, however, principle in support of the right of the heir & none to support the right of such a transferee. Article 44 of the Limitation Act, which is referred to for coming to the conclusion that the right of the minor is a personal one, in my opinion, should have no bearing on this question. The solution should be looked for in the nature of the right of the minor affected which rests on the property of the minor and is not merely such a personal right as would be with him.

There is no reason why the heir should not be held to be entitled to inherit the right to such property in the same manner as the right to any other property of the minor, which still forms part of the minor's estate. I am, therefore, unable to agree with the principle of law sought to be deduced by the learned counsel for the appellants on the authority of the above Madras case or the ease of V. Muthukumara Chetty Vs. Anthony Udayar and thirty Ors., which was the basis of the above decision.

I feel, however, that Palani Goundan's case AIR 1956 Madras 476 is distinguishable because there the minor had not exercised his right to repudiate the transaction during his lifetime; whereas in the present case the two minors had brought the suit during their lifetime. Even so, this score the present case stands on a different footing from that on which Palani Goundan's case AIR 1956 Mad 470 was decided.

11. I may also refer in this connection, incidentally, to the well-known maxim *Actio personalis moritur cum persona*, which means that a personal action dies with the parties to the cause of action, which was even before the Law Reform (Miscellaneous Provisions) Act, 1934, considerably modified even under the common law so far as injuries to properties" were concerned. Salmond in his Law

of Torts (5th edition, page 84) summarised the position thus :

"Their aggregate effect was, speaking generally, to abolish the rule so far as it related to injuries to property, but to leave it in full operation with respect to injuries of other kinds".

The underlying principle appears to be that whenever the right of personal action arises from right to property of a person held by him or to which he is entitled as vested right, the same would be heritable by his heir. There is no reason to make an exception contrary to this sound principle in the case of a minor's right to property and to hold, therefore, that such a right is personal in the sense that it would the with him does not, in my opinion, rest on sound principle. On this ground as well. I am not inclined to agree with Palani Goundan and Another Vs. Vanjiakkal and Another, referred to above, but I am in agreement with Palaniappa Goundan Vs. Nallappa Goundan and Others, .

12. It has also been contended that even if the alienations are to be set aside these must be only to the extent of the interests of the two minors and must be upheld to the extent of the interest of Sheobachni. Her husband Gurucharan died, according to the plaint, three years prior to the institution of the suit which was on 9-12-1948, so that under the Hindu Women's Right to Property Act, 1937, she had a subsisting interest in that property which she might convey to any vendee even without having partitioned her interest in the joint family property with the other members.

Reference is made in support of this contention to the case of Pem Mahton Vs. Bandhu Mahto and Others, , It was held in that case that the result of Sub-section (3) of Section 3 of the Act, referring to the Hindu Women's Right to Property Act, 1937, therefore, is that the widow can without any legal necessity, alienate her own life estate in the property, but if she wants to convey her undivided interest absolutely, it is necessary that there should be legal necessity for the alienation.

Learned Counsel has contended that in the pre-sent case also three sale deeds were executed by Sheobanchni for herself and as mother and guardian of Sheo Prasad and Ram Naresh, who were her minor sons. It would thus appear that the sale deeds were on her own behalf as well as on behalf of her two sons. A reference to the recital would show that she was selling away the properties for legal necessities describing them as the properties of the minors and herself only as a guardian of those minors.

She did not purport to sell her life interest. The present case, is, therefore, not one where the sale has been made by the widow in possession of her own life interest in the joint family property. In the above Patna case, however, the executant of the sale deed, one Mt. Lilia, purported to do so in express terms saying that she was selling away the interest, which had devolved upon her, in favour of defendants Nos. 1 and 2.

In the present case, the position is entirely different. Therefore, the present sale deeds are to be upheld if in fact they were executed for legal necessity and are to be set aside as a whole if they are not supported by justifying legal necessity. The argument, therefore that they should be upheld at least in part is not to the point and, in that view of the matter, it is not necessary for me to consider as to whether the above case was rightly decided or not.

13. The next argument advanced by the learned counsel for the appellants is as to the date from which mesne profits should be decreed in favour, of the respondent Sheobachni. His first contention is that although she is held to be in possession of the estate of her minor sons after their death, nevertheless she should not be held entitled to any mesne profits whatsoever, as she sold away the properties to defendants 1 to 4 representing to them that she had a title to sell them.

It is difficult to accept this contention, because if Sheobachni is entitled to mesne profits it is only as the heir of the plaintiffs and not in her own capacity as the mother and guardian of the two minor sons. Her rights, therefore, must be coextensive with the rights of the minor plaintiffs and whatever representation she might have made would not be material in determining what she is entitled to now after the death of the two minor plaintiffs. I have already held that the sale deeds must be set aside as a whole and the right of the plaintiffs or their legal representatives must accordingly be also declared in respect of the entire properties.

14. It has next been contended that, in any case, the right to claim mesne profits should be adjudged to begin from the date of the commencement of the suit and not from the date of the execution of the sale deeds. It has been urged that the repudiation of the sale deeds by the minors must be taken to have occurred on the date of the institution of the suit and not on a prior date. Reference is made in this connection to the case of Mallappa Gurupadapa Belvaldavar Vs. Anant Balkrishna Najrayanpeit, . That, no doubt, was a case of sale of certain properties of a minor by the mother acting as his guardian. The sale was set aside on the ground that legal necessity was not proved by the purchaser. In those circumstances it was held:

"Where the plaintiff sues to set aside the original transaction, whether it be a sale by a Hindu widow or manager of joint family or guardian of minor and he makes the original parties to transaction, or their representatives, parties, he is entitled to an order restoring the parties to their original position. In such a case the court is in a position to make such order as is just and equitable and to provide that the plaintiff recovers the land with mesne profits from the date from which he was dispossessed and the defendant purchaser gets back his purchase money with interest.

But if the plaintiff merely desires to recover possession of the land and not to set aside the sale as from its date and to restore parties to their original position

then he is entitled to recovery of possession with mesne profits only from date of suit."

The above case, however, is of no assistance to the learned counsel for the appellants because in that case there was no prayer for setting aside the sale deeds. In the present case, on the contrary, it was mentioned in the relief that the impugned documents were wholly illegal, inoperative and ineffective in law and (the possession of?) the defendants first and second parties was quite wrongful and, if necessary, those documents might be declared null and void.

Then there was a prayer for the award of mesne profits from the date of dispossession the amount of which was fixed at Rs. 964/4/, besides interest. There was also a prayer for future mesne profits till the date of recovery of possession. In my opinion, there is no escape in the present case from the position that the plaintiffs were entitled to mesne profits from the date of their dispossession by virtue of the three sale deeds and not only from the date of the institution of the suit.

On the facts and circumstances of the case also, I see no reason why the plaintiffs, or, for the matter of that, respondent Sheobachni should not be entitled to mesne profits from the date of the dispossession. Defendants 1 to 4 appear to have fraudulently obtained the sale deeds from her and refused to pay any consideration.

15. In the result, the order passed by the Court below that mesne profits should be allowed from the date of dispossession until the date of recovery of possession, must stand. The defendants, however, will be liable for mesne profits independently only in respect of the properties of which they took possession under the three sale deeds executed respectively in their favour. The appeal accordingly fails and must be dismissed but without costs as the learned counsel for Sheobachni has not appeared to oppose the appeal.

16. S. C. PRASAD, J. I have had the ad-vantage of going through the judgment of my learned brother.

17. The right to sue, which a minor has for setting aside a sale made by his guardian on the ground that he was not benefited or that it was not for averting any danger to, or relieving any pressure upon his estate, is not a personal right simpliciter which dies with him on the principle of *Actio personalis moritur cum persona* which is now being applied within increasing limits in modern times.

Strictly speaking, this principle really affects the right which a person has for suing another person in tort, though some Acts have widened its scope to include right to sue for damages for certain breaches of contracts. But where this right arises out of injury to the ownership of a person in relation to his property, it does not partake of the nature of personal action pure and simple in order that it should be with him.

Moreover, in this case the minors had already filed a suit through their next

friend for setting aside the kebal as in favour of the appellants. In such circumstances, the action started by the minors was not affected by their death. The fundamental principle on which this law is based is that when a person has got right to deal with the property of another person within certain prescribed limits, if he oversteps those limits, the person, who owns the property has got a right to avoid the effect of acts by which his rights in the property have been affected adversely.

Such rights including the rights to seek relief in Court in this connection cannot be considered to be mere personal right so as to the with the person concerned. This principle has been applied in the cases of minors, lunatics and other disqualified persons as well as in the case of beneficiaries as against the trustees. I, therefore, think that the contention of the learned counsel for the appellants that when the minors died, the present action came to an end is not correct.

18. The other contention that, at any rate, the kebalas in dispute should operate to the extent of the interest of Musammat Sheobachni in the properties in dispute does not also appear to me to be of any force, because it has been found that Musammat Sheobachni had been defrauded by the appellants into executing these disputed kebalas and that no consideration had been paid by them, even assuming that by stating in the kebala that she was executing them for self and as guardian for her minor sons she purported to deal with her own share in the properties.

19. I agree that the appeal should be dismissed without costs.