

# Nahar Singh vs Tek Chand And Anr. on 1 August, 1951

**Equivalent citations: AIR1952ALL184, AIR 1952 ALLAHABAD 184**

**Author: V. Bhargava**

**Bench: V. Bhargava**

## JUDGMENT

Mushtaq Ahmad, J.

1. This is an appeal by defendant 1 in a suit for possession over a certain zamindari property on cancellation of an auction sale.
2. Mt. Umrao Kunwar, mother and guardian of the plaintiff respondent, executed a deed of mortgage on 25.1.1930 in favour of Balloo Mul, defendant 2, Balloo Mul brought a Suit No. 55 of 1932 in the Court of Munsif, Meerut on the mortgage against the plaintiff and his mother. This was referred to arbitration on 4-7-1932 and ultimately a decree was passed on the foot of the award made. In these proceedings the mother acted as the guardian of her minor son, now plaintiff.
3. Balloo Mul, defendant 2, sold his decree to the father of defendant 1, appellant. The appellant's father then purchased the property on 4-4-1936 by putting the same to sale. Then the suit giving rise to the present appeal was filed on 2-10-1945. This relief for possession was claimed on the ground that the proceedings resulting in the award were illegal, as no permission by the Court for reference to arbitration on behalf of the minor had been obtained. It was no doubt also alleged that the mortgage on which the decree was passed had been without consideration and that the guardian had also been guilty of gross neglect in representing the minor.
4. The defendant appellant pleaded that all the proceedings had been valid and binding on the plaintiff, it not being necessary to obtain the permission of the Court for reference to arbitration. The bar of limitation was also pleaded.
5. The trial Court dismissed the suit, holding that it was barred by Article 12, Limitation Act, having been brought more than a year after the attainment of majority by the plaintiff, that the decree was not void for want of permission from the Court in respect of the reference to arbitration, that the mortgage was good, and that the mother, guardian, had not been negligent in prosecuting the case. This decree was reversed by the lower appellate Court which allowed the plaintiff's claim for possession on his paying Rs. 1,700 to the defendant-appellant. It was found that the suit was governed by Article 44 (3 years) and not Article 12 (one year), Limitation Act, that want of permission for reference to arbitration had rendered the decree only voidable and not void, and that

the mortgage was good to a certain extent.

6. On the question whether permission of the Court for reference to arbitration, where a minor was involved, was essential or not, learned counsel for the defendants-appellants contended that the Full Bench case of *Lutawan v. Lachiya*, 12 ALL, L. J. 57 was in his favour, but he conceded that that had been overruled by the later Full Bench case in *Mt. Mariam v. Mt. Amina*, A. I. R. (24) 1937 ALL 65. In the former it had been held that permission of the Court in such a case was not necessary. In the latter it was laid down that absence of each permission rendered the reference and the award voidable. He, however, contends that the proceedings relating to the mortgage suit including those of arbitration having taken place when the earlier Full Bench case was in force, those proceedings were perfectly valid and they cannot be ignored or annulled by a subsequent change in the law. He relies in support of this contention on the dictum of the Judicial Committee in *Abdul Aziz Khan v. Appayasam Naicker*, 27 Mad. 131. At pp 142 and 143 their Lordships observed :

"This reversal of the previously accepted interpretation of the law does not in their Lordships' opinion, displace its application to the construction of the contracts contained in the certificates of sale now under consideration. 'The rights of the parties to a contract', as Willes J., observed in delivering the judgment of the Court of Exchequer Chamber in *Iloyd v. Guibert*, (1865) 6 B, & C 100 at p. 133 'are to be judged of by that law which they intended, or rather, by which they may justly be presumed to have bound themselves.' Their Lordships agree with the Courts below in holding that in 1873 and 1876, when the sales took place, the parties must be taken to be bound by the law as it was at that time stood, and that the estate purchased by the appellant was only of the life interest of the then zamindar."

7. Learned counsel points out the anomaly of a large number of decisions based on the earlier Full Bench being upset, if the later Full Bench case were to be given a retrospective effect and he emphasises that this cannot be allowed.

8. The other question as to whether the shorter period of limitation under Article 12 or the longer period under Article 14, Limitation Act, would apply, is also not quite free from difficulty. The plaintiff sought a relief for possession by the cancellation of an auction sale. In terms, it seems the former Article would apply, and in that view the suit would be time barred. The question is how far this position is affected by the longer period mentioned in the latter Article. That is to say, how far, taking the suit as at least involving the setting aside of an alienation made by a guardian, the plaintiff could be given a larger period. This also is a question of some importance.

9. In these circumstances, I would like to refer this case to a Bench for decision, and order accordingly.

Judgment of the Division Bench Y. Bhargava, J.

10. This appeal arises out of a suit for possession over a certain zamindari property on cancellation of a decree and an auction sale. The facts of this case are given in the order of reference of one of us,

dated 4.12.1950, and need not be repeated. As the order of reference shows, two questions of law arise in this second appeal. The first question is whether a decree, if it is passed on the basis of an award given by an arbitrator on a reference made to him by the Court without the Court giving permission to the guardian of a minor who is a party to the suit to enter into the agreement to refer the case to arbitration, is valid or voidable. The second question is whether if, after a decree, which is voidable on the ground that it was passed on an award which did not fulfill the requirements of Order 32, Rule 7, Civil P. C., has been executed and the property sold, the suit for possession of that property by setting aside the decree and the sale is governed by Article 12 or Article 44, Limitation Act.

11. So far as the first question is concerned, we have considered it unnecessary to go into it because we have come to the view that howsoever it is decided, this appeal must be decided in favour of the defendant-appellant because of our opinion on the second question. In case it could be held that the decree was valid even though the agreement to refer the suit to arbitration had not received prior sanction of the Court, as required by Order 32, Rule 7, Civil P. C., there would naturally be no question of setting aside the decree and, therefore, the plaintiff respondent would obviously not be entitled to ask for possession. It is only if it be held that the decree was voidable at the option of the plaintiff-respondent that the question would arise as to the Article of the Indian Limitation Act which would govern the suit for possession brought by the plaintiff respondent. In order to obtain the relief for possession, it is clear that the plaintiff-respondent must first ask the Court to set aside the sale which took place in execution of the decree. The mere fact that the decree was voidable and could be set aside would not by itself give a right to the plaintiff-respondent to ask for possession from the Court without also asking for the setting aside of the sale which took place in execution of the decree. The prayer to set aside the sale was an essential relief without which the plaintiff-respondent could not ask for possession. The period of limitation for a suit to set aside a sale in execution of a decree of a civil Court is prescribed in Article 12, Limitation Act and, therefore, the present suit must be governed by this Article. Article 44, Limitation Act, is obviously inapplicable because that Article only governs suits to set aside a transfer of property made by a guardian brought by a ward on attainment of majority. In the present case, the suit is not for avoidance of a voluntary transfer by a guardian. It is a suit for possession on cancellation of a court sale. The learned counsel for the plaintiff respondent argued that, even if Article 41 is inapplicable, Article 120, Limitation Act, should be applied to the present suit and not Article 12 of the Act. Article 120 of the Act could only be applied as a residuary Article provided we could hold that Article 12 of the Act is inapplicable. As we have shown above, Article 12, Limitation Act, is clearly applicable to the present suit. The mere fact that, in addition to the prayer for setting aside the sale in execution of the decree, the plaintiff-respondent also asked for a declaration that the decree was not binding on him and requested the Court to grant him possession of the property in suit would not make Article 12 inapplicable. The setting aside of the decree is merely a step which leads to the prayer for setting aside the sale. Since the sale itself has necessarily to be set aside, the period of limitation prescribed for obtaining this relief has to be applied. The further addition of the consequential relief for possession does not, in any way, alter the position. No right of possession accrues to the plaintiff respondent unless he first gets a decree to set aside the sale. The mere addition of the consequential relief will therefore, not take the suit out of the purview of Article 12, Limitation Act. The view, we have taken, finds full support from a decision of a Division Bench of the Madras High Court in

Narayana Naicken v. Venkataswami Nicken, A. I. R. (13) 1926 Mad. 1190. We may also refer to the observations of a Division Bench of the erstwhile Chief Court of Avadh in Mohammad Baksh v. Allah Din, A. I. R. (29) 1942 Oudh 33, in which the Madras case was followed.

12. As a result, the appeal succeeds and is allowed with costs in all the Courts. The suit of the plaintiff-respondent is dismissed.