Raja Rajeswara Dorai Alias Muthuramalinga Dorai Late a Minor Through His Next Friend M. Veluswami thevar Declared a Major Vs. A.L.A.R.E.M. Arunachellan Chettiar

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Court : Chennai

Decided On : Mar-03-1913

Reported in : (1915)ILR38Mad321

Judge : Miller and ;Sadasiva Ayyar, JJ.

Appellant : Raja Rajeswara Dorai Alias Muthuramalinga Dorai Late a Minor Through His Next Friend M. Veluswami Th

Respondent : A.L.A.R.E.M. Arunachellan Chettiar

Judgement :

Miller, J.

1. This appeal arises from a suit in which the Raja of Ramnad (the present sole plaintiff) prays the Court to hold that two leases executed by his father, one on the 5th of November 1889 and the other on the 2nd of June 1893, are not binding upon him and to direct the defendant to deliver to him possession of the property affected by them.

2. The principal ground on which the suit is based is that the lessee obtained the leases by the exercise of undue influence. That is denied by the defendants, who also raise many other pleas and among them, a plea that the suit is barred by Article 91 of the second schedule of the Limitation Act.

3. The original lessee died in 1899, and the plaintiff's father was then alive. The suit was instituted in 1904, and it is not contended before us, though it was contended in the Court below, that the undue influence continued after the death of the lessee to be exercised by his sons.

4. For the appellant it is argued that Article 91 is inapplicable to the case, first, because it cannot, in any case, be applied to a ssuit founded on an allegation of undue influence, and secondly, because the suit is not a suit to cancel or set aside an instrument. As to the first contention, the first column of Article 91 does in terms apply to the suit, because in no other article is provision made for setting aside a deed executed under undue influence, but it is argued that the language of the third column, the column in which the starting point of limitation is set out, is inapplicable to a case of undue influence and consequently the article must be held inapplicable. It is doubtless true that cases can be imagined in which the undue influence may continue for three years after the victim has become fully aware of all the facts entitling him to avoid the consequences of its exercise and may so prevent his taking action, but that possibility does not seem to me to indicate that the starting point is wholly inapplicable; it shows only that there may be cases in which, its application would be a hardship. In very many, if not in most, cases of undue influence, the influence is utilised to distort or misrepresent material facts, and, though it must be confessed that there may be cases in which it will be difficult satisfactorily to apply Article 91, it cannot be said that on its language it is altogether inapplicable, and

there is authority for its application which I am unable to disregard. In Janki Kunwar v. Ajit Singh I.L.R., (1988 Calc., 58, the Privy Council applied it to what, on their Lordships' statement of facts, was, it seems to me, clearly a case of undue influence; it was applied also by Subrahmanya Ayyar, J., in Roop Laul v. Lakshmi Doss I.L.R., (1906) Mad., 1, to a case of undue influence, and though his view on the question of limitation was not accepted by the Full Bench, the applicability of Article 91 to the case as a case of undue influence was not questioned. It was held that it did not operate to prevent a defendant in possession from pleading the undue influence to protect his possession. Hasan Ali v. Nazo I.L.R., (1889) All., 456, to which the article was applied, seems also to have been a case of undue influence.

5. An observation of Subrahmanya Ayyar, J., in Roop Laul v. Lakshmi Doss I.L.R., (1906) Mad., 1, suggests that the starting point might be held to be postponed till cessation of the undue influence; that is a question which he had not to decide, and which it is unnecessary for us to decide, for, even if that be so, this suit of 1904 was instituted more than three years after the cessation of the undue influence, which we may assume for the present purpose to have continued down to the death of Ramaswami Chettiar in 1899.

6. I think Article 91 must, on its language and on authority, be held to be applicable to a suit to set aside an instrument on grounds of undue influence.

7. The second contention on behalf of the appellant is that the plaintiff, having elected to terminate the leases on the ground of undue influence, is now entitled to ask the Court for possession without any further setting aside of the instruments. The lease is terminated, the interest transferred to the lessee is revested in the lessor, and nothing remains but to give effect to his right to immediate possession. In Janki Kunwar v. Ajit Singh I.L.R., (1898) Calc., 58, the Privy Council, dealing with this question, observed that it was necessary to bring a suit to set aside the sale on payment of Rs. 1,25,000 before possession could be recovered; but it is argued that observation assumes the necessity and is not to be taken as laying down a rule of law that an instrument of transfer which is voidable by the transferor for undue influence can be avoided only by a decree of the Court; or, if it was intended to lay down such a rule, that rule cannot be applied to a transfer made after the enactment of the Trusts Act and the Transfer of Property Act.

8. I do not feel justified in deciding that is unnecessary which the Privy Council has declared to be necessary, unless it is quite clear that these enactments, which, it may be, did not apply to the sale dealt with in Janki Kunwar v. Ajit Singh I.L.R., (1898) Calc., 58, have altered the law upon this subject.

9. Mr. K. Srinivasa Ayyangar did not rest his case on any distinction between an 'ancillary' and a 'substantial relief prayed for in the suit. I do not think he could do so in the face of the decision to which I have just referred. Then their Lordships lay it down that the immoveable property (in that case) could not be recovered until the deed of sale had been set aside, and so far as this point is concerned, that case cannot be distinguished from the one before us. I think it therefore unnecessary to discuss the cases in India in which attempts have been made to distinguish Janki Kunwar v. Ajit Singh I.L.R., (1898) Calc., 58 and which in some cases proceed, as Mr. K. Srinivasa Ayyangar was prepared to admit, on differences which are without much substance.

10. It was necessary, then, in the present case to set aside the leases before possession could be recovered by the Raja, and we have to consider the question whether he has already effectively set them aside, or whether the Court has to do so for him by its decree. In the latter event, the suit is barred by limitation.

11. Reliance was placed by Mr. K. Srinivasa Ayyangar on Sections 64 and 66 of the Indian Contract Act and Section 126 of the Transfer of Property Act and Section 86 of the Trusts Act as showing that, whatever may be the case elsewhere, the law of India does not require the intervention of the Court to make effective an avoidance by the transferor, against the will of the transferee, of a transfer avoidable at his option.

12. It is, I think, clear that neither the Indian Contract Act nor the Transfer of Property Act is inconsistent with a rule requiring a decree to set aside a transfer. Sections 64 and 66 of the Contract Act were in force before

the transfer dealt with in Janki Kunwar v. Ajit Singh I.L.R., (1898) Calc., 58 and, besides, do not provide for the method of rescission of a contract, and Section 126 of the Transfer of Property Act does not lay down the method to be adopted to effect the revocation of a gift; these provisions may well co-exist with a rule of law that a transfer which can be effected only by a registered instrument can be avoided only by a formal re-transfer, or by the Court's decree, which may be a sufficient substitute for an instrument of re-transfer. And such a rule would, I conceive, be entirely in accordance with the policy of the law as indicated by the fourth proviso to Section 92 of the Evidence Act; that proviso forbids proof of an oral agreement 'to rescind a contract, grant or disposition of property in cases in which the law requires the contract, grant or disposition to be effected by an instrument in writing. This rule has been said to be a rule of positive law rather than of evidence; the law will not enforce the agreement and so will not allow it to be proved; but whatever be the foundation on which the rule is based, it has the effect of preventing the rescission, by oral agreement, of a transfer which cannot be effected by oral agreement, but not of other transfers. The inference is that the law desires the same publicity and the same safeguards in the case of a re-transfer as were required to support the original transfer, for, if a writing was unnecessary for the transfer, then it is unnecessary for the re-transfer, and consequently the rule cannot be put merely on the ground that documentary evidence is better than oral evidence. And the fact that the transferor has been wronged and is therefore in a position to compel the re-transfer seems to me to make no difference from this point of view; it is a concession to him if the decree of a Court under the Specific Belief Act is allowed to suffice to revest the transferee's interest in him, instead of the registered instrument required by the Transfer of Property Act. The English cases [Clough v. London and North Western Railway Company (1871) L.R., 7 Ex. Ch., 26, Oakes v. Turquand (1867) L.R., 2 H.L., 325 and Reese River Silver Mining Company v. Smith (1869) L.R., 4 H.L., 64, cited by Mr. K. Srinivasa Ayyangar, do not touch this particular question, and the analogy of the forfeiture of a lease, suggested by him, is not exact, for the title in that case is revested by virtue of a provision in the contract itself.

13. So far then as the provisions of the Transfer of Property Act and the Contract Act are concerned, I am unable to see any reason why I should hold that the observation of the Privy Council in Janki Kunwar v. Ajit Singh I.L.R., (1898) Calc., 58 does not bind me or that the law is not in accordance with it. Mr. K. Srinivasa. Ayyangar argued that, if that is so, Lakshmi Doss v. Roop Laul I.L.R., (1907) Mad., 169, and the cases which have allowed defendants in possession to plead undue influence after the time prescribed by Article 91, must be held to have been wrongly decided. That is not a question which we have to decide in this case, but, unless we are to hold that in each case a plea of undue influence is a counter-suit for setting aside the instrument, the conclusion we are asked to draw does not necessarily follow. The defendant is required to get the Court to set aside the instrument, but, if he can do so without a suit of his own, it is possible that he need not do it within the period provided by Article 91.

14. Section 86 of the Trusts Act raises a somewhat different question; by that enactment, a transferee in possession under a voidable transfer, must, on receipt of notice of rescission, hold the property for the benefit of the transferor, subject to repayment of the consideration actually paid.

15. The contention is that no further avoidance is necessary; the transferor, as a constructive cestui que trust, has the right to compel the transferee, as constructive trustee, to surrender the property.

16. It is not at all clear to me that the plaintiff in this case can base any claim on this section. I do not find in the plaint any allegation that a notice of rescission was given to the defendants or their father before the suit, and the plaint itself is therefore the only notice available to the plaintiff wherewith to satisfy the requirements of the section. But the plaint is primarily a prayer to the Court to adjudicate upon a statement of claim, and can only operate as a notice to the defendants under Section 86 of the Trusts Act when a copy is served on them in due course and that, in this country, is after the suit is duly instituted; (vide Order V, Rules 1 and 2, Civil Procedure Code). The defendants, therefore, were not trustees under Section 86 at the date of the suit, and the right to immediate possession had not then vested in the plaintiff by virtue of that section.

17. But if I assume the section to be applicable at all or if Section 89 can be held applicable, then Section 96

will, I think, operate to prevent their application here. For, as I have held, I am bound by the Privy Council decision to hold that there is a rule of law requiring that, if a sale is to be rescinded, it must be by judicial rescission or a written instrument, and that rule will apply to the present case. Now, in order to obtain a judicial rescission, the plaintiff must invoke the aid of the Court within the time allowed by Article 91 of the second schedule of the Limitation Act. This ha has not dona, and to allow him now to rely on Section 86 of the Trusts Act would be to place on the defendants an obligation of which they have been in effect relieved by Article 91 -an obligation in evasion of that provision of the law. Again, Section 96 shows that Chapter IX of the Trusts Act was not intended to alter any provision of the law, but merely to make provision, so far as that could be done consistently with the laws already in force, for certain cases in which Courts of Equity in England fastened a constructive or resulting trust upon holders of property and for which in India, before the Trusts Act, there was no statutory provision. It follows that Chapter IX does not repeal the rule of law laid down by the Privy Council.

18. For these reasons I think Article 91 must be applied to the present case.

19. The question whether there is a custom in the Ramnad zamindari by which the alienations made by one Zamindar are void as against his successor, was raised and presented to us for our consideration, but the evidence clearly negatives it, as my learned brother shows in his judgment, which I have read.

20. The appeal must be dismissed with costs.

Sadasiva Ayyar, J.

21. While 1 fully concur in the judgment just now pronounced by my learned brother, I consider that it is due to the strenuous and able arguments advanced by the appellant's learned vakil that I. should state in my own language my views on the question of limitation arising in this case. Though sixty eight grounds are mentioned in the appeal memorandum as valid grounds for attacking the Lower Court's judgment, it is unnecessary for the decision of this appeal to consider more than a few, as the other grounds relate to certain questions of fact and law, such as whether the defendants' father really exercised' undue influence over the late Raja and so on, which might all be assumed as decided in the plaintiff's favour, without actually deciding them. The sixtieth ground was abandoned, the appellant's learned vakil conceding that the Privy Council decision in Ramasami v. Bhaskarasami I.L.R., (1879) Mad., 67 was against the contention raised in that ground (the contention being based on Section 11 of the Rent Recovery Act). Grounds 56 to 59 raised the contention that, by the custom of the estate, the leases in question (one being a lease for 50 years and the other being a perpetual lease) were invalid beyond the late Raja's life-time, the late Raja having died in December 1903, about four months before the suit was brought. But the plaintiff in his plaint (paragraphs 4 and 5) admits the power of his father (the late Raja) to settle the zamin by a trust-deed on the plaintiff so as to be valid beyond the Raja's life; Vijiasami Tevar v. Sasivarma Tevar I.L.R., (1905) Mad., 560 shows that in the Sivaganga Zamindari (carved out of Ramnad), no such custom, as contended for, against inalienability exists, and the decisions in Sartaj Kuari v. Deoraj Kuari I.L.R., (1888) All., 272, Sivasubramania Naicker v. Krishnammal I.L.R., (1895) Mad., 287 and Sri Raja Rao Venkata Surya Mahipathi Rama Krishna Rao Bahadur v. The Court of Wards I.L.R., (1899) Mad., 383 clearly establish that the onus of proving a custom of inalienability in the case of these impartible zamindaries lies heavily on the person who alleges it. (After the coming into force of the Madras Impartible Estates Act, the question of the right to alienate, of course, stands on an entirely different footing.) Far from there being any evidence of such custom in this case, the evidence is almost wholly against the existence of any such custom (See Exhibits CIII, CXL series, CXLI-A, CXLI-E, etc.). That before the decision in Sartaj Kuari v. Deoraj Kuari I.L.R., (1888) All., 272, it was erroneously thought by the Court, by the Revenue Officers and by the litigant public as a matter of law that impartible estates were inalienable, cannot constitute evidence of the custom of inalienability, which ought to be proved by cogent evidence as in the Ammayanayakanur case, Sivasubramania Naicker v. Krishnammal I.L.R., (1895) Mad., 287. In fact, the contention raised by the grounds Nos. 56 to 59, though not abandoned by the appellant's learned vakil, was only, very slightly pressed before us and it 'must be decided against the appellant.

22. I have thus sufficiently cleared the ground for the consideration of the point of limitation, which was strenuously argued before us. The proper decision of that point depends on the answers to be given to the following question:

(1) Is the plaintiff bound to have the leases in dispute set aside by a judicial pronouncement before obtaining the relief of possession and mesne profits claimed in this suit? (It is admitted, if I understood the respondent's vakil aright, that the relief of setting aside the leases might be given in the same suit in which the relief as to possession is claimed, and as ancillary to the relief awarding possession). Or is no such judicial pronouncement necessary, and whether the mere bringing of the suit by the plaintiff, alleging in the plaint that he or his father has repudiated the lease, or a mere oral declaration by the plaintiff or his father that he has repudiated the lease, is sufficient to put an end to the lease and to give a right to the plaintiff to obtain the relief as to possession and mesne profits? Whether even a repudiation is unnecessary, on the ground that the provisions of the Trusts Act entitled the plaintiff to treat the defendants as trustees of the plaint property for the plaintiff and to recover possession of the same from the defendants?

(2) If a mere repudiation in pais (before or at the time of the plaint) would suffice, can it be made at any time (however long) after the date of the lease, or ought it to be made within the time fixed by law for the bringing of a suit to set aside the leases, or, at least, within the time fixed by law for possession of the property?

(3) Is Article 91 of the Limitation Act inapplicable to a suit which seeks such a declaration of the invalidity of the lease, on the ground that the plaint in the suit prays also for possession of immoveable property?

23. I am unable to accept the contention that, because chapter IX of the Indian Trusts Act attempted to enunciate, in the form of sections, the principles which the Courts of Equity in England have established for their own guidance in order to fix wrongdoers with obligations to be fulfilled in favour of wronged persons, substantive rights and obligations were at once created by those sections without the person who invokes those principles in his favour being obliged to obtain the establishment of those rights by first invoking the aid of the Court in the manner indicated and provided for by law. The appellant's vakil relies on Sections 86 and 89 of the Trusts Act which are as follow:

Where property is transferred in pursuance of a contract which is liable to rescission or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for, the benefit of the transferor, subject to repayment by the latter of the consideration actually paid.

Where by exercise of undue influence, any advantage is gained in derogation of the interests of another, the person gaining such advantage without consideration, or with notice that such influence has been exercised, must hold the advantage for the benefit of the person whose interests have been so prejudiced.

24. The wide phrases 'hold the property' (Section 86) or 'hold the advantage' (Section 89) 'for the benefit' of the transferor, cannot be held to create at once an enforceable as distinguished from an establishable trust in favour of the transferor. The chapter itself in which these sections occur, is headed thus 'Of certain obligations in the nature of Trusts.' If a trust obligation has to be created and if the law requires that the creation of the trust itself (not an inchoate obligation in the nature of a trust) should be the act of the Court regularly invoked for that purpose, the person who wants to benefit by the provisions of the Trusts Act ought to so invoke the aid of the Court for the effective creation of the trust within the time limited by law. I entirely agree with my learned brother that is the effect of the last clause in Section 96 of the Trusts Act. That the contention on the appellant's side would lead to startling and anomalous results which could not have been intended by the Legislature, might be shown easily by a reference to Section 91 of the Trusts Act. That section is as follows:

Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

25. Can it be argued on this section that, because A, the purchaser under a registered deed of sale with notice of a previous contract of sale in favour of B, 'must hold the property for the benefit' of B (the prior promisee from the vendor), A became a complete trustee for B on the date of A's sale-deed itself, and hence B need not bring a suit for specific performance within three years of the date fixed for the performance (article 113 of the Limitation Act), but might bring a suit within 12 years, nay, after any length of time, for possession of the lands against A (the subsequent purchaser) as if A had been created an express trustee for B by the effect of Section 91 of the Trusts Act from the date of A's sale-deed If such construction of Section 91 of the Trusts Act is correct, Section 12 of the Specific Belief Act, which gives a discretion to the Court to give specific relief (in the above case, the relief would be the compelling of B to execute a registered conveyance to A), the provisions of the Transfer of Property Act requiring a registered conveyance to transfer property (see Immudipatian Thirugnana Kondama Naick v. Periya Dorasami I.L.R., (1901) Mad., 377 the provisions of the Evidence Act, Section 92, excluding oral proof of the setting aside of a registered document and requiring proof of such to be in writing, the provisions of Section 26 of the Specific Belief Act, requiring the court to decree specific performance only subject to a variation in certain circumstances, might all be evaded and set at naught, as the Trusts Act, Section 91, merely uses the general expression that, if specific performance could be enforced (with or without variation and with or without conditions), A must hold the property for the benefit of B. There might be cases coming under a few sections of chapter IX, where a judicial declaration of trust might be unnecessary even when the beneficiary comes in as plaintiff, but the present is not such a case. Property in the hands of a mare constructive trustee does not become the property of the beneficiary under the constructive trust so as to enable him to treat it as such without a judicial declaration of the trust. As said in Lewin on Trusts, chapter X, para. 18, 'Until some judgment or decree has been obtained, the money' (in the possession of the person who obtained a pecuniary advantage by unfair use of a fiduciary relation) 'cannot be said to be the money of the principal.' As said by Lindley, L.J. in Lister & Co. v. Stubbs (1890) 45 Ch. D. l of such an argument, 'the unsoundness of it consists in confounding ownership with obligation.'

26. As I said before, a perusal of the whole of chapter IX of the Trusts Act has left the clear impression on my mind that it was intended only to lay down the principles which ought to govern the Courts in India in ascertaining the rights and obligations of parties in certain cases, and not to relieve a party from any obligation to take the necessary steps (required by the substantive or adjective law to be taken by him) before a trust could be validly established and created in his favour. Similar observations apply to the argument based on Sections 64, 65, and 66 of the Contract Act. A unilateral expression of a rescission of a contract by one of the parties to the contract cannot be held to relieve him from his obligation to have the contract rescinded by Court under the substantive law of the land and within the time allowed by statutory law, if he wants, as plaintiff, the assistance of the Court in obtaining certain reliefs on the basis that the contract has ceased to exist. Reese River Silver Mining Co. v. Smith (1369) L.R., 4 H.L., 64, quoted by the appellant's learned vakil, does not (it seems to me) do away with the necessity of rescission by the Court in the case of a plaintiff. There are, no doubt, certain passages in Lord Hatherley's judgment tending in the appellant's favour, but the other learned Law Lords gave their verdict for the plaintiff only on the short ground that,' as he had filed his bill in Chancery for rescission of his contract as a shareholder with the company before the company was ordered to be wound up, the rescission by Court related back to the date of the filing of the bill.

27. The argument of the appellant's learned vakil, if I understood him aright, was that the law of the land does not require a judicial rescission of a contract or the judicial rescission of a registered lease deed or conveyance in order to enable the party to a contract or the executant of a conveyance to sue for reliefs flowing from the rescission of the contract or setting aside of the conveyance, as the case may be, provided that he himself repudiates the contract or the conveyance, his own repudiation, if found to be for good cause, having equal effect with a decree of Court rescinding the contract or setting aside the conveyance. In considering this question, we have to bear in mind that Courts of Equity, in England were not bound by any law of limitation so far as the distinctive reliefs granted by such Courts were concerned. Equity, no doubt, tried to follow the law as much as possible and refused to grant equitable reliefs where the plaintiff was guilty of laches. Laches took the place of limitation but the ground covered by the two was not the same in many

cases. For instance, the law of limitation never took note of the fact that a plaintiff was unable to bring his suit within the period prescribed owing to poverty, but the doctrine of laches allowed poverty to be a good excuse. Expressions, therefore, quoted from several of the cases decided by Courts of Equity in England in which the effect of the repudiation by a party was not clearly distinguished from a judicial rescission, have not much force, because, where there is no question of limitation governing the power of the Court to grant a judicial rescission, repudiation for good cause by the party and judicial rescission for the same good cause by the Court when the matter comes before it can be practically put and talked of as if standing on the same footing. Again, even where the law of limitation affects the power of the Court to grant or declare a judicial rescission in favour of a plaintiff, the power of the Court to find in favour of a defendant that a proper rescission has taken place by the repudiation of the defendant for good cause and the power of the Court on such a ground to non-suit the plaintiff, seems to be much larger, as has been held in the Pull Bench case of Lakshmi Doss v. Roop Laul I.L.R., (1907) Mad., 169 . The defendant, though his right to bring a suit for rescission of a contract or a lease may be barred, might be permitted to defend his possession of properties by showing that the contract or lease so voidable at his instance has been repudiated by him. Section 28 of the Limitation Act is as follows: 'At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.' This shows that it is only where a person is under a necessity to institute a suit for possession of the property to which he lays a claim (and where the time for instituting such suit has lapsed), that his title to the property is extinguished. But if he is himself in possession and it is only his right to sue as plaintiff to set aside or declare invalid the deed or title set up by another man that is barred, he could defend his possession by pleading, as defendant, the voidability of the deed or title set up by the plaintiff who seeks possession. I am not sure that even the defendant, unless he has perfected his title by adverse possession, should not be deprived of his possession if there is a registered deed (corresponding to a deed under seal in English Law), which, prima facie, has transferred title to the plaintiff, though it was voidable at the instance of the defendant, if the defendant had not brought the suit within the prescribed period to have that deed set aside. But Lakshmi Doss v. Roop Laul I.L.R., (1907) Mad., 169 has decided otherwise, though the learned Judges did admit the difficult 1 nature of the question, and I do not wish to unsettle the law as fixed by that decision. A defendant who has properly repudiated a contract or a deed, might well be allowed to sit tight over his possession and defend his right to such possession by setting up, by way of plea, such proper repudiation by him, though he might be barred if he seeks positive relief as plaintiff on the basis of such repudiation. (Even a defendant could not however retain possession, if ha had only a right to obtain a title-deed from his vendor and had lost that right by limitation-see the judgment of the Full Bench in Kurri Veerareddi v. Kurri Bapireddi I.L.R., (1906) Mad., 333 . If, as the appellant's learned vakil, Mr. K. Srinivasa Ayyangar, contends, the vendor became a trustee for the purchaser as soon as the contract for sale was made, and also gave possession to the beneficiary purchaser of the property held in trust, he could not recover possession from the purchaser who had neglected to obtain the registered conveyance.) But so far as a plaintiff seeking relief is concerned, the decision in Lakshmi Doss v. Roop Laul I.L.R., (1907) Mad., 169 does not help him; on the other hand, there are observations in that case to the effect that a plaintiff seeking relief cannot evade the statute of limitations like a defendant. The question is, therefore, now narrowed to this point. Is a litigant coming forward as plaintiff for a relief which he cannot get if a document executed by himself or his predecessor in title is in force on the date of suit, is such a litigant entitled to the relief of possession after the expiry of the time fixed by law for the setting aside of that document and simply on his allegation and proof that he has himself repudiated the document on proper grounds, assuming that the document is voidable at his instance? If he brings a suit for possession within the time limited by law for setting aside that document, that suit, of course, might be taken as brought for both the reliefs of possession and rescission, and there will be then no difficulty. The difficulty will arise only where the time fixed by law for a suit to set aside the document has elapsed, but the limitation for possession of the immoveable property dealt with under the document has not elapsed, and also in cases where the suit was brought after the expiry of the period fixed by law for the recovery of the property, if calculated from the date when the plaintiff became entitled to repudiate the contract, but within such period, if calculated from the date when he actually repudiated the contract or deed. However, it must be admitted

that there is no Indian statute expressly laying down that a person who comes in as plaintiff claiming relief against the effect of a deed voidable at his instance, should have it judicially rescinded before or at the time of his getting that relief. But if judicial decisions have laid down the common-law of the land as requiring Such judicial rescission, and if there are implications to be found in the statute law supporting the judicial decisions as to the rules of the common-law, we are bound to follow such decisions. The common-law being founded on common sense, many of its principles will be found laid down in English cases also. And if the principles so laid down by English decisions have been adopted by the Privy Council and by the Indian High Courts, they form part of the law, binding upon Indian Courts. Hence, though I do not wish usually to refer to the English law, as numerous English decisions were referred to in the course of the arguments in this case, I shall very briefly refer to what I consider to be the result of those decisions. Isolated passages in several of those judgments can, no doubt, by ingenious interpretation, be made to support the appellant's view. I do not mean, however, to enter, upon an elaborate refutation of the arguments advanced by the appellant's learned vakil based on such passages. I shall merely refer to what Lord Halsbury in his Laws of England, volume 20, Section 1745, says on this point:

Where the representee has been induced by misrepresentation, whether fraudulent or innocent, to enter into a contract or transaction with the representor, which, unless and until rescinded, would be binding on the parties, such contract or transaction is voidable at the option of the representee. This means that the representee, on discovery of the truth, has a right to elect whether he will affirm or disaffirm the contract or transaction, and, if he adopts the latter course, is entitled to give notice to the representor of repudiation, and demand from him a complete restoration of the status quo. In the event of his demand not being complied with, he may, subject to certain conditions and affirmative defences, maintain an action or analogous proceedings for the purpose of having the contract or transaction declared void B and rescinded by the court, in which event it is deemed to have been void ab initio.

28. This shows that where the repudiation is by one party alone, he cannot, as plaintiff, get any relief except as consequent on getting a declaration and a rescission by the Court. Of course, if the repudiation is accepted by the other side in the mode allowed by law, then the contract or transaction might be properly rescinded by the act of both parties without the intervention of a Court. (See Sections 62 and 63 of the Contract Act on this point.) Or if the original contract or deed itself, by clauses of forfeiture or similar clauses, puts an end to the contract or transaction, then also it is really determined by both parties, and the aid of the Court is not required. But in other cases, even though the contract or transaction is voidable at the instance of one party, its rescission is effectuated, not by the mere repudiation of one party, but by the decree or declaration of the Court. The form and extent of the relief are thus indicated in Section 1755 of Halsbury's Laws of England, volume 20. 'The ordinary form in which the aid of the court is invoked is an action, or counterclaim for rescission, in which, on discharging the necessary burden of allegation and proof, unless countervailed by any affirmative plea successfully raised by the representor, the representee is entitled to relief of a nature to effectuate the objects already indicated-that is to say, to an order rescinding or setting aside the contract, with or without a prefatory declaration, and in certain special cases, to an order for the delivery up of the instrument in which the contract is contained or recorded to be cancelled, or for rescission of the conveyance by which it was completed; and to such further orders for repayment of money with interest, reconveyance and retransfer, indemnity, not being in the nature of damages, injunction, accounts and inquiries, rectification of an entry in a statutory register which otherwise would or might import liability, and generally, and otherwise, all such directions as, in the circumstances of the particular case, may be required for the purpose of complete restitutio ad integrum; which means that, on his part, the representee must also make all such corresponding repayments, retransfers, and reconveyances as are necessary to restore the status quo on both sides. Where the representee has simply paid money to the representor under the contract, and has received neither money nor money's worth in exchange, and so has nothing to restore, the proceeding assumes the form of an action for money had and received, which succeeds, or fails, on precisely the same principles as if the action were for rescission; and, similarly, where the representee has parted with property or an instrument, without receiving any money or other benefit, the action may be in trover, or for the mere

delivery up of the instrument to be cancelled, in which case, again, the same principles apply.' In Bigelow on Fraud at pages 75 to 79, the whole matter is put very lucidly: 'There are three classes, of cases in which rescission may be effected, each having a mode of its own. These classes, nameless in the books, may be severally termed 'rescission in pais,' 'judicial rescission,' and 'rescission by plea (or answer).' Then the learned author says that rescission in pais is very rarely effective, that rescission by plea or answer as in Lakshmi Doss v. Roop Laul I.L.R., (1907) Mad., 169 , may be fully effectual in certain cases, and, lastly, that judicial rescission may fall under two sub-heads, one where it is a mere substitute for a rescission in pais, and the other, where acts of repudiation in pais are insufficient to rescind the contract or transaction or to restore the status quo. Then the learned author says on page 78. 'It (that is, judicial rescission) is the remedy for fraud in transfers of real estate, according to the general common-law doctrine, for specialities, according to some authorities, and for fraud in contracts generally where tender and demand are insufficient or inappropriate for the end sought, or where there is nothing to tender because nothing has been received, and yet where a defence alleging the fraud might not afford sufficient relief.' This again, is clear authority for the proposition that a mere unilateral repudiation in pais by the plaintiff cannot constitute an effectual rescission of a contract or deed and such effectual rescission entitling the plaintiff to obtain further reliefs must be made by a decree of Court declaring that the contract or transaction is void and setting it aside.

29. Now let us see whether the Indian Legislature has indicated, at least by implication, that contracts and deeds prima facie binding on the plaintiff, as entered into by himself or as executed by himself or his predecessor, ought to be judicially set aside as a necessary preliminary to the granting to the plaintiff of reliefs consequent upon the wiping out of the contract or deed. The Indian Contract Act, Section 2, Clause (1), defines a voidable contract thus:An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract. Section 10 says: All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.' Section 14 says: Consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake.' Reading Sections 10 and 14 together, therefore, an agreement to which consent is caused by coercion, etc., is not a contract. However, Sections 19 and 19-A loosely call an agreement caused by coercion, etc., as a contract voidable at the option of the party whose consent was so caused. Then Section 19-A is a most important section; it is as follows:

When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely, or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustration.

(a) As son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

(b) A, a money-lender, advances Rs. 100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 per cent, per month. The Court may set the bona fide, ordering B to repay the Rs. 100 with such interest as may seem just.

30. I think this section clearly indicates that, as regards a contract voidable by the plaintiff or the defendant on the ground of undue influence, the legislature, though it calls it a voidable contract, clearly intended that, in order that the avoiding by the party might be effectual to set aside the contract, the bond, even when the defendant raises a plea in answer to the plaintiff's action on the bond, as in the first illustration, and, of course, when the obligor is the plaintiff (which seems to be the meaning of the second illustration), ought to be set aside by the Court in favour of the defendant or the plaintiff as the case may be. Chapter IV, Section 35, of the Specific Relief Act provides for the Court rescinding a contract voidable or terminable by the plaintiff,

and also, where a contract of sale or lease has been made and the purchaser or lessee makes default in payment of the purchase money or the premium money after a decree for specific performance had been passed. Again, the Limitation Act prescribes a limitation of one year in Articles 11 and 11-A for suits to set aside certain judicial orders, in Article 12(a) the same period to set aside sales in execution of a decree of a Civil Court or of a Revenue Officer or held for recovery of arrears of Government revenue and so on, and in Articles 13, 14 and 15 for setting aside other similar orders of public authorities. Article 44 of the Act prescribes a period of three years for a suit by a ward (to set aside alienations by his guardian) calculated from the date when the minor attains majority. Article 91 provides a three years' limitation period for a suit to cancel or set aside an instrument not otherwise provided for. Article 95 gives again three years for setting aside a decree obtained by fraud or for other relief on the ground of fraud. Article 113 provides three years for specific performance of a contract. Article 114 provides three years for a suit for rescission of a contract. Let us take the case mentioned in Article 95. Supposing there is a decree obtained by A through fraud, declaring against B that A is entitled to retain as against B the suit land as absolute owner, though really A was only a permissive tenant of B in respect of the land, having obtained possession of the land as such permissive tenant one year before the decree was passed. B knows of the fraud two years after the decree is passed. He keeps quiet for four years and then sues for possession of the land, he being then barred from bringing a suit to set aside the declaratory decree obtained through fraud by A. It seems to me clear that fraudulently obtained decree which has not been set aside must stand in his way. Similarly, it seems to me that the other articles, including the article relevant to this case, viz. Article 91, will stand in the way of a plaintiff suing for the relief claimed by him against the tenor of the decisions or instruments, as the case may be, to which he has been a party and which are binding on him till set aside by the Court. In a very recent article in page 55 of the Madras Law Journal (February), Mr. Shephard says that Section 36 of the Specific Relief Act indicates that 'rescission imports a judicial decision' and that 'rescission by a person entitled to rescind means that he having resolved not to persist in demanding performance, is in a position to sue for rescission or to defend an action brought on the contract.' If he allows the time (prescribed by the Indian Law of Limitation) to sue for rescission to pass, his rescission in pais cannot entitle him to sue for any other relief on the basis that the contract has been set aside though, as a defendant, he may be allowed to defend his possession in a suit brought by the other party, provided his title to the property in dispute has not passed to the other party by the effect of a registered deed under the provisions of a statute giving such effect to such a deed. Even in the latter case, if he has acquired a title by prescriptive possession, he can, of course, successfully put forward that plea.

31. (I may add that, in this case, the second lease sought to be set aside, though it is called a perpetual lease, is really a conveyance, as though there is a sum nominally reserved as rent, that sum is wholly to be paid to the Government towards the revenue due upon the leased land, and the late Raja followed up that lease, which is dated 1893, by another instrument of 1894, Exhibit E, by the effect of which the defendants' father was even relieved of his obligation to pay the peshkash through or on behalf of the late Raja and was allowed thereafter to pay it to Government direct. The Government, in accordance with the wishes of the Raja, sub divided the leased lands as a separate estate and registered it in the defendants' father's name. Whatever the parties may choose to call this transaction, effected by the deeds of 1893 and 1894 (Exhibits C2 and E), I am unable to entertain any doubt that they constitute an absolute conveyance of the properties mentioned in them in favour of Ramaswami Chetti. The late Raja could not claim even a pepper-corn rent from the defendants' father after the document of 1894 and he retained absolutely no interest in those properties.)

32. Having considered the common law and the implications of the statute law, I shall refer to a few of the decisions passed in Indian cases. Naturally the leading decision of the Privy Council, in Janki Kunwar v. Ajit Singh I.L.R., (1888) Calc., 58 , has to be first considered. That case arose out of a suit brought by the plaintiff on the 18th February 1884 to obtain the cancellation of a deed of sale, dated the 29th July 1872 (on the ground that it had been obtained from the plaintiff and her late husband by fraud and undue influence), and to have the property conveyed by the sale restored to the plaintiff's possession with mesne profits and costs upon certain conditions to be imposed on the plaintiff. Though the suit was brought within 12 years of the

plaintiff's having lost possession of the conveyed property, the Privy Council held that the suit fell under Article 91 and was barred. Criticising the judgment of the lower Court, their Lordships say as follows: 'Then the Judicial Commissioner deals with the case in a different way. He says that the suit is essentially a suit for the possession of immoveable property, and as such falls within the 12 years' limitation. Now he is clearly wrong there. It was not a suit for the possession of immoveable property in the sense to which this limitation of 12 years is applicable. The immoveable property could not have been recovered until the deed of sale had been set aside, and it was necessary to bring a suit to set aside the deed upon payment of what had been advanced, namely, the Rs. 1,25,000. Therefore there has been on the part of the lower Courts a misapprehension of the law of limitation in this case. Their Lordships are clearly of opinion that the suit falls within Article 91 of the Act XV of 1877, and is therefore barred.' The appellant's learned vakil sought to distinguish this case by arguing that the Privy Council dealt with the case of a document voidable for fraud and not for undue influence. The facts of the case, however, clearly show that it was a case of undue influence. The word 'fraud' is, no doubt, used in some places, but that word when used by Courts is not confined to its meaning as defined in Section 17 of the Contract Act. Courts have always refused to define fraud exhaustively, as it is as hydra-headed as the devices of human ingenuity. Every unfair means used to obtain unconscionable advantage over another is spoken of as 'fraud.' In Sundaram v. Sithammal I.L.R., (1893) Mad., 311 the suit was brought in 1889 for possession of land conveyed away in 1883 by one of the plaintiffs. The conveyance was found to have been obtained by undue influence. The two learned Judges who formed the Bench upheld the plaintiffs' claim on the ground that Article 91 did not apply but Article 144. With the greatest respect I must dissent from the ruling in this case, as, in my opinion, it is clearly opposed to the decision of their Lordships of the Privy Council in Janki Kunwar v. Ajit Singh I.L.R., (1888) Calc., 58. One of the learned Judges distinguished Janki Kunwar v. Ajit Singh I.L.R., (1888) Calc., 58 on the ground that the plaintiffs in this latter case asked for a decree for their property being restored upon their paying to the defendants so much of the consideration money as might be found to be justly due under the sale-deed which was impugned and the plaintiffs did not ask for a decree for unconditional possession. I am (with the greatest respect) unable to appreciate the distinction. The other learned Judge sought to distinguish Janki Kunwar v. Ajit Singh I.L.R., (1888) Calc., 58 on the ground that the plaintiffs in that case came into Court expressly asking that the deed should be set aside as obtained by fraud and undue influence, whereas in Sundaram v. Sithammal I.L.R., (1890) Mad., 311 the plaintiffs did not pray for any such relief. I am equally unable to see how the ingenuity of a party in the wording of the reliefs claimable by him can affect the question of limitation. Their Lordships of the Privy Council in Malkarjun v. Narhari I.L.R., (1901) Bom., 337 and 352 (P.C.), dealt with some arguments employed by the Bombay High Court in Bhagavant Govind v. Kondi valad Mahadu I.L.R., (1890) Bom., 279, similar to the arguments employed in Sundaram v. Sitharnmal I.L.R., (1890) Mad., 311, and remarked that they found it 'impossible to grasp the reasoning behind such observations.' Malkarjun v. Narhari I.L.R., (1901) Bom., 337 and 352 (P.C.) arose out of a suit for redemption of the plaint property brought without setting aside a judicial sale under which the mortgaged properties had been sold away irregularly in satisfaction of a money decree against the plaintiffs' predecessor-in-title, the mortgagee having purchased the equity of redemption in such Court-sale. I shall here quote some of the observations of their Lordships in the case. 'A sale valid until set aside can be legally and literally set aside; and anybody who desires relief inconsistent with it may and should pray to set it aside.' 'If a sale is a reality at all, it is a reality defeasible only in the way pointed out by law.... In the adoption case just cited from Jagadamba Chowdhrani v. Dakina Mohun (1886) 13 I.A., 84, this Board remarked that there was no principle on which simple declarations of invalidity should be barred by the lapse of twelve years after the adoption, while the very same issue, if only mixed up with a suit for the possession of the same property, is left; open for twelve years after the death of the widow. Their Lordships make the same remark now. What is the justification for refusing to construe Article 12(a) according to its obvious meaning whenever a suitor goes on to pray for that relief which is the object, perhaps the only object, of setting aside the sale? Their Lordships hold that both the letter and the spirit of the Limitation Act require that this suit, when looked on as a suit to set aside the sale, should fall within the prohibition of the article.'

33. I think the principle underlying these remarks of their Lordships apply as aptly to a suit for possession of

immoveable property, when that relief is inconsistent with a registered lease-deed executed, by the plaintiff's predecessor-in-title and I hold that the plaintiff, who desires a relief inconsistent with the said document, may and should pray to set it aside, and that the letter and spirit of Article 91 of the Limitation Act require that such a suit should fall within the prohibition of the article. In Ranga Reddi v. Narayana Reddi I.L.R., (1905) Mad., 423 a suit for possession of properties conveyed away by the minor's guardian, brought more than three years after the minor attained majority but within 12 years of the sale, was held to be barred by limitation, the learned Judges applying Article 44 and holding that Article 144 did not apply to that case. It seems to me that, if even a ward is obliged to have an alienation by his guardian set aside by a judicial declaration before he could recover the property, it is an a fortiori case where the alienation was made by an adult plaintiff himself or his predecessor-in-title. An alienation by a guardian beyond his powers is really void, whereas an alienation by an adult is only voidable. The principle of the decision in Ranga Reddi v. Narayana Reddi I.L.R., (1905) Mad., 423 is accepted as correct in Madugula Latchiah v. Pally Mukkalinga I.L.R., (1907) Mad., 393, Sivavadivelu v. Ponnammal : (1912)22MLJ404 and Chunder Nath Bose v. Ram Nidhi Pal (1902) 6 C.W.N., 863. I am therefore clear that Article 91 of the Limitation Act must be applied to this case.

34. Then there was the further argument of the appellant's learned vakil that Article 91 should not be applied to cases of undue influence, as the period from which time runs is stated to be the time when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him; and as in most cases the facts are not at once known to the person against whom the undue influence is exercised, the legislature could not have intended that article to apply to cases of undue influence. I need only say that the Privy Council did apply that article to the case of undue influence in Janki Kunwar v. Ajit Singh I.L.R., (1888) Cale, 58 and even Sir S. Subrahmanya Ayyar in Roop haul v. Lakshmi Doss I.L.R., (1906) Mad., 1 applied that article, though he thought that the time from which the period begins to run might be the cessation of undue influence and not the time when the facts become known to the plaintiff. I am, however, unable to hold that the cessation of undue influence can fix the time from which the period begins to run when the legislature has clearly fixed another period. Formerly, in English Law, the period when a man was in prison was excluded from computation against him. All those rules are now obsolete and we have to look to the plain words of the statute, which is based principally on considerations of public policy, and we cannot allow considerations as to hardship in the case of particular plaintiffs to override the plain provision of the Act. The Limitation Act provides exceptions on the ground of the plaintiff's disability or inability to sue in Sections 7, 8 and 13 (the last section relating to the defendants' absence from British India and not to the plaintiff's and the first two relating to the plaintiff's being a minor, an insane man or an idiot). As Mitra says: 'The exceptions recognised by the legislature are founded on its own idea of expediency, that is, on what it considers expedient upon the balance of convenience and inconvenience. The Judge and the lawyer arguing analogically from the reason of the law cannot engraft a new exception upon the rule.' I am, therefore, clear that new exceptions based on the fact of the plaintiff's having been in prison or the plaintiff's having been out of British India or his having been under undue influence (or even wrongful restraint at the defendant's instance) for a long time cannot be grafted upon the Limitation Act. In the present case, even if Sir S. Subbahmanya Ayyar's cautious obiter dictum as to the cessation of undue influence giving the starting point of limitation be followed, the suit is clearly barred.

35. I do not think it necessary to refer in detail to the contention of the appellants' learned vakil that the repudiation in pais might be made by him any number of years after the date of the transaction (as the Limitation Act does not deal with repudiation in pais) and to his further contention that he has a period of 12 years to sue from such repudiation for possession of the lands 1a fact his contention came to this, that he could indefinitely postpone the commencement of the limitation period at his pleasure. Even in the exceptional case of a Hindu reversioner, their Lordships of the Privy Council, while holding that he could repudiate the alienation without having it set aside by a suit, did not state that he could take his own time for the repudiation and have 12 years again from the date of repudiation. See Bijoy Gopal Mukerji v. Krishna Mahishi Dibi I.L.R., (1907) Calc., 329. Their Lordships only held that the repudiation might be within the 12 years granted for bringing the suit for possession, the commencement of limitation for the latter relief having

nothing to do with the date of repudiation.

36. In the result, I agree that the appeal must be dismissed with costs.