Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Middleton.

1909.
August 24.

MANUEL NAIDE *et al. v.* ADRIAN HAMY *et al.*

SINNE LEBBE MARIKKAR, Added Defendant, Appellant.

D. C., Kalutara, 3,742.

Minor—Alienation of immovable property without leave of Court—Invalidity—Prescription.

Alienation of immovable property by a minor without the leave of Court is void according to the Roman-Dutch Law.

Andris Appu v. G. Abanchi Appu[1] and *Mustapha Lebbe v. Martinus*[2] followed.

THIS was a partition suit in which the plaintiffs and the defendants sought to partition a land called Mahakumbura. The added defendant intervened and claimed a share by right of inheritance. The plaintiffs alleged in reply that the added defendant, together with his mother and brother, by deed No. 2,066, dated July 2, 1864, gifted his share by way of dowry to his sister Alima Umma Natchia, from whom the plaintiffs claimed. The added defendant alleged that at the date of the execution of the deed he was a minor, and that it was therefore void.

The District Judge (P. E. Peiris, Esq.) held that the added defendant was at the date of the execution of the deed a minor, but that the deed was valid, as it had been entered into with the authority of his mother, the natural guardian, and the added defendant had not taken any steps for forty-five years to rescind it. He accordingly disallowed the added defendant's claim.

In appeal,

A. St. V. Jayewardene, for the added defendant, appellant.

H. A. Jayewardene, for the plaintiffs, respondents.

Cur. adv. vult.

August 24, 1909. HUTCHINSON C.J.—

The defendant A. L. M. Sinne Lebbe Marikkar appeals against a judgment dated April 6, 1909, by which it was declared that he was bound by a deed which was alleged to have been executed by him on July 2, 1864, when he was a minor.

The action is one for partition of a small piece of land. The appellant intervened in the action and claimed a share. The

[1] *(1902) 3 Browne 12.* [2] *(1903) 6 N. L. R. 364.*

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plaintiffs filed a reply in his claim, alleging that he and his mother and his brother had by the deed of 1864 given their shares to his sister, who sold it to the plaintiffs.

On March 29 last the record says: "Issues to be decided are: Was the fourth defendant, 'the appellant,' a minor at the time of the execution of R. S. 1, *i.e.*, the deed of 1864; if so, is the deed void as against him?" The Court in settling these issues seems to assume that the deed in fact was executed by the appellant. There is no recorded admission or evidence that he executed it, and he denied it on oath. As the deed was forty-five years old and was produced by the plaintiffs, section 90 of the Evidence Ordinance would apply to it; although the signature omit which is said to be the appellant's is illegible, the attestation by the notary is in proper form. The Judge in his judgment evidently disbelieves the appellant's denial, and makes no reference to it; the petition of appeal does not suggest that he did not execute the deed, and I think it is sufficiently proved that he executed it.

It would have been better if the issues which were raised in the pleadings had been tried together instead of piecemeal; for the evidence on one of them might be very important for the decision of the others. Both the plaintiffs and the appellant set up a title by prescription; but the Judge has not begun to try that issue, which will, perhaps, be the decisive one. If the deed of 1864 was, as the Judge held, voidable by the appellant, the fact that it was never acted upon, or that it was always acted upon—that the grantees under it have had possession under it, or that the appellant has had possession notwithstanding the deed—would be decisive of the issue whether he was bound by it.

The Judge has found that at the date of the deed the appellant was a minor. The deed is called a "deed of dowry," and by it Pattuma Natchia, the widow of S. L. Amadu Lebbe Marikar, and her two sons, the appellant and another, give as "dowry" certain lands to her daughter and her intended husband, who are to be married according to our "custom and religion as agreed by us." This is not a deed of pure gift without consideration. There is no evidence as to whether the intended marriage took place, or as to the possession of the land since the date of the deed; but the deed is produced by the plaintiffs, who claim under it. Under these circumstances there ought to be reasonably clear evidence of the appellant's age, if the deed is to be upset on the ground that he was a minor in 1864. He called as witnesses a Police Vidane, who produced what he calls "the householders' lists," in which the appellant's name appears as forty-three years old in 1894 and fifty-eight in 1907. It does not appear that the object or one of the objects of those lists is to record the ages of householders, and this evidence seems to me to be worthless. The only other evidence is that of the appellant, who swears that at present he is less than sixty, which would make him less than sixteen

in 1864. He admits that he has been exempted from poll tax since 1895, but explains that that was because he had fever and was anæmic. On this evidence the Court found that he was a minor in 1864; and as there was no evidence to contradict that of the appellant, I think we must accept the finding, although the evidence in support of it would not have satisfied me. If, then, the appellant was a minor when the deed was executed, I concur with Middleton J. in holding that it was void.

When the District Judge said "issues to be decided" are so and so, he cannot have meant that those were the only issues, for it is obvious that there was at least one other which would have to be decided. The judgment under appeal should be set aside, and the case sent back for trial. And with great unwillingness, because I am sure the appellant has no merits, I agree that he should have his costs of this appeal.

MIDDLETON J.—

This was a partition action, and the added defendant-appellant intervened claiming a $\frac{1}{32}$ share of the land in question. The plaintiffs replied that by deed of gift No. 2,066 dated July 2, 1864, the mother of the added defendant, his brother, and himself granted an entire $\frac{3}{8}$ share of the land to the vendor to the plaintiff. This $\frac{3}{8}$ share would include the $\frac{1}{32}$ share claimed by the added defendant-appellant who intervened. Both the plaintiffs and the added defendant-appellant alleged prescriptive possession of the land in question.

The issue settled was: Was fourth defendant a minor at the time of the execution of R. S. 1 (which is the deed pleaded by the plaintiffs); if so, is the deed void as against him?

The District Judge held that the fourth defendant was a minor at the date of the execution of R. S. 1, and on the authority of *Muttiah Chetty v. De Silva et al.*[1] decided that the grant made by the fourth defendant was binding on him. On the argument of the appeal, counsel for the respondents contended that the finding of the District Judge as to minority is not justified by the evidence, as the District Judge gave his decision, as he says, on the evidence led, which did not, it is said, prove that the added defendant was a minor when the deed was executed. I think, however, we must hold that the Judge was justified in his decision, which must have been undoubtedly formed to some extent on the personal appearance of the added defendant.

If the added defendant was not a minor at the date of the deed, he must have been at least sixty-six years of age when he gave his evidence, and his personal appearance must have been a strong factor in the Judge's decision. I do not feel, therefore, that I am

[1] *(1895) 1. N. L. R. 358.*

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able to say that the Judge was wrong on this point. This being so, the question is whether a minor's immovable property can be alienated by him or his parent or guardian without the authority of the Court. In my opinion the balance of authority is to the effect that it cannot (see *3 S. C. C. 46* and *6 N. L. R. 367*, and the authorities quoted there; see also *3 Browne 12 and 150*). I think therefore the deed R. S. 1 must be held void.

In my opinion this case was not properly tried, as the learned Judge appears to have endeavoured to decide the case piecemeal, without getting at the real facts in issue between the parties. Both parties pleaded prescription, and no issue to that effect was settled. If the plaintiff in 1907 was fifty-eight, he would have been twenty-one years of age in 1870, and he has apparently since then sat down complacently without complaining of a deed which he now, in 1909, asserts is void. It may be, of course, that he has been in fact in possession all the time, notwithstanding the deed R. S. 1.

I think the judgment should be set aside, and that the case should go back for the settlement and trial of an issue as to whether the plaintiffs and their predecessor in title, Alima Umma Natchia, have had adverse possession of the property in question so as to avail them against the title by inheritance of the fourth defendant. The fourth defendant should, I think, have his costs of the appeal; the other costs will be costs in the cause.

Appeal allowed; case remitted.