

Popat Namdeo Sodanvor Vs. Jagu Pandu Govekar

Popat Namdeo Sodanvor Vs. Jagu Pandu Govekar

SooperKanoon Citation : sooperkanoon.com/338095

Court : Mumbai

Decided On : Feb-14-1968

Reported in : AIR1969Bom140; (1968)70BOMLR456; ILR1968Bom1245; 1968MhLJ665

Judge : Palekar, J.

Acts : Hindu Law; Indian Contract Act; Specific Relief Acts

Appeal No. : A.F.A.D. No. 36 of 1961

Appellant : Popat Namdeo Sodanvor

Respondent : Jagu Pandu Govekar

Advocate for Def. : Y.S. Chitale, Adv.

Advocate for Pet/Ap. : N. Walawalkar, Adv.

Judgement :

1. This is an appeal on behalf of a minor whose suit for specific performance of a contract to purchase irremovable property has been dismissed by both the courts. Survey No. 40/A in village Koregaon belonged to one Namdev, On 20th April 1954, Namdev sold six acres out of this survey number to the defendant Jagu Pandu Govekar for a consideration of Rs. 1500. The plaintiff is the minor son of Namdev and he filed the present suit against the defendant for a declaration that

the sale-deed in respect of the six acres in favour of the defendant was obtained by the defendant by fraud and without adequate consideration. It was also alleged that advantage was taken of Namdev as he was vicious and given to drink. When the guardian-mother came to know of the transaction, she gathered panchas in whose presence the defendant expressed regrets about the transaction and agreed to return the land. Accordingly on 24th December 1954, the defendant gave a writing to the plaintiff represented by his mother agreeing to reconvey the land on payment of Rs, 1500. That document is Ex.50. On these allegations, the plaintiff wanted the sale-deed to be set aside, or, in the alternative, specific performance of the contract dated 24th December 1954.

2. The trial Judge held against the plaintiff on the issues of fraud and inadequacy of consideration. He also held relying upon the Privy Council decision in *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri* ILR (1912) Cal. 232, that the minor's contract to purchase the property could not be specifically enforced. Consequently, he dismissed the suit. In appeal to the District Court, the contentions with regard to fraud and inadequacy of consideration were given up and the principal point which survived was with regard to specific performance. The learned District Judge after discussing the various rulings on the point agreed with the view taken by the trial court that the minor's contract for purchase of land was not capable of being specifically enforced. The appeal was therefore, dismissed.

3. The plaintiff has now come in second appeal, and, it is contended on behalf of the plaintiff by Mr. Walawalkar that both the courts were in error in holding that the contract could not be enforced. The view of the lower courts was supported by Mr. Chitale on behalf of the respondent-defendant. He further argued that the plaintiff's guardian-mother could not be deemed to be either the de jure or de facto guardian of the minor since the minor's father was living, and hence for that reason also the suit was not competent.

4. I will take the second point first. The minor is about ten years old and he is represented in the suit by his mother who is styled as his guardian and next friend. The contract to sell (Ex. 50) dated 24-12-1954 is between her as the guardian of

the minor and the defendant. This agreement is a short one taking the form of a writing passed by the defendant in favour of the guardian-mother. He says therein that he had purchased the land for the sum of Rs. 1500 from Namdev on 20-4-1954 but that he was prepared to reconvert the same in favour of the minor plaintiff if he was paid back Rs. 1500. He further stated that it was always his desire that the minor should not suffer, and there was an oral understanding with regard to the reconveyance of the property. The writing is clearly an agreement to sell, and there is no dispute about it before me.

5. Under the Hindu Law, which applied to the present case, the father is the natural guardian of the person and of the separate property of his minor children, and next to him, the mother. The plaintiff-minor's father Namdev is living, The contention, therefore, is that as long as Namdev was living and capable of entering into a contract on behalf of the minor, the mother was not entitled to take an agreement on behalf of the minor. It is obvious that the mother cannot be the de jure guardian of the minor when the father is living. But the contention of Mr. Walawalkar is that she is a de facto guardian of the minor. and, as his de facto guardian. she has the same power over the property of her ward as the de jure guardian. The learned District Judge has observed that there is nothing on record to show that the mother is the de facto guardian of the property as well as the person of the minor. But it seems to me the learned Judge is in error. Namdev, it would appear from the evidence, was addicted to drink and had disposed of all his lands which were about 24 acres in extent. The last two transactions were in 1954, and both these transactions were in favour of the present defendant. These two transactions relate to Survey No.40 which was about 12 acres in extent. By the sale deed dated 20th April 1954 Namdev sold six acres to the defendant. and with regard to the remaining six acres he entered into a contract for sale in favour of the defendant on 14-11-54. Thus by these two documents he exhausted all his properties. Under the agreement to sell possession was also delivered to the defendant. Namdev had a house at Koregaon. and he used to live there with his wife and son. But after the alienations of his properties, his wife and son went away to Lonand to live there with the wife's father. They are being looked after by Namdev's father-in-law who appears to be a substantial agriculturist. The minor plaintiff lives with his mother at Lonand and goes to school at Lonand. It is obvious

that mother and son went away to live at Lonand, because Narndev had no landed property now left and was unable to maintain them. According to the mother Sundrabai, Namdev had reduced the family to this extremity by his addiction to drink. Now, a de facto guardian is a person who not being an ad hoc guardian manages the affairs of the infant in the same way as a de jure guardian does, though he may not be a natural guardian or a guardian appointed by the court I have little doubt in my mind that after the separation between Namdev and his wife. the affairs of the infant are now being managed by his mother Sundrabai. and, therefore, she should be regarded as his de facto guardian, There is one particular fact which sheds a flood of light on this issue. It appears that under the sale-deed referred to above. a sum of Rs. 500 had been paid to Narndev, and it was agreed that that amount should be paid to the revenue authorities against a taquai loan received from the Government. Narndev did not pay the taquai loan, and hence there was a charge for about Rs. 500 on the properties sold to the defendant The defendant was not able to get anything out of Namdev, and the evidence shows that on the very day he passed the agreement to reconvey in favour of the plaintiff that is. on 24-12-1954, the defendant accompanied by two others went to Lonand to see Sundrabai in this connection. The defendant asked Sundrabai to pay the taquai dues. She appears to have agreed to borrow the money from her father and pay the taquai dues on condition that the defendant agreed to reconvey the property on payment of Rupees 1500. The defendant agreed to this and the same day. the taquai dues of Rs. 492 were paid off by Sundrabai. This incident would go to show that even the defendant felt that he could get nothing out of Namdev and that it was necessary. therefore. to meet the plaintiff's guardian Sundrabai. It is obvious that Sundrabai wanted to preserve the ancestral property for her son and actually paid a large sum of money to free the property from the charge of the Government for taquai. All these acts performed by Sundrabai for the benefit of the minor would clearly go to show that she was the de facto guardian of the minor and in that capacity she was competent to act on her son's behalf as if she was the infant's de jure guardian.

6. That brings us to the more important question as to whether the contract to purchase the land with the infant's guardian-mother was capable of being specifically enforced. The law governing this question for many years was the

decision of the Privy Council in ILR (1912) Cal 232. It was a suit for the specific performance by a minor of an agreement for the purchase by him of certain immovable property entered into by the manager of the minor's estate and his guardian on his behalf. It was held by the Judicial Committee that it was not within the competence, either of the manager of the minor's estate or of the guardian of the minor, to bind the minor or the minor's estate by a contract for the purchase of immovable property: that as the minor was not bound by the contract, there was no mutuality: and that consequently the minor could not obtain specific performance of the contract. This decision held the field for many years. But, according to Mr. Walawalkar, its principle, so far as it applies to a Hindu minor must now be regarded as discarded by the Privy Council in 5. Subrahmanyam V.K. Subba Rao. . He further argued that the doctrine of mutuality was not applicable in a case where a competent guardian on behalf of the minor enters into a contract to sell or purchase immovable property. It was true that under the Contract Act, a minor has no capacity to enter into a contract, but in his submission, once that capacity is supplied by the minor being represented by his guardian under the Hindu Law the contract on behalf of the minor for the sale or purchase of immovable property for legal necessity or the benefit of the estate was a contract capable of specific performance.

7. The law on the subject has been summarised by Pollock and Mulla in their Indian Contract and Specific Relief Acts, Eighth Edition, at page 81, It is as follows:

'Specific performance.-A minor's agreement being now decided to be void. It is clear that there is no agreement to be specifically enforced; and it is unnecessary to refer to former decisions and distinctions, following English authorities which were applicable only on the view now overruled by the Privy Council. The guardian of a minor unless competent to do so has no power to bind the minor by a contract for the purchase or sale of immovable property, and the minor therefore is not entitled to specific performance of the contract: so held by the Privy Council in ILR (1912) Cal 232. In the course of the Judgment their Lord-ships said: 'They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the

minor's estate by a contract for the purchase of immoveable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality and that the minor who has now reached his majority cannot obtain specific performance of the contract'. It is, however, different with regard to contracts entered into on behalf of a minor by his guardian or by a manager of his estate, where the guardian or manager, as under Hindu Law, is competent to alienate Property. (Mulla's Hindu Law 11th Ed. P 617). In such a case it has been held by the Privy Council that the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and further, if it is for the benefit of the minor . But if either of these two conditions is wanting, the contract cannot be specifically enforced at all, Venkatachalam Pillai v. Sethuram Rao. ILR 56 Mad 433=AIR 1933 Mad 322'.

With respect, I am in substantial agreement with this statement of the law. There is a plethora of reported decisions on this point all of which are not uniform. There is, therefore, no need to consider them all. I would, however, like to give a brief outline with a view to explain the various propositions made in the paragraph quoted above.

8. Four landmarks were provided by four decisions of the Privy Council in the development of the law bearing upon specific performance of a minor's contract entered into by his guardian for the sale or purchase of immovable property. The first case in point of time was the well-known case of Hunoomanpersaud Panday V. Mt. Babooee Mundraj Koonwaree (1854) 6 Moo Ind App 393.

9. The case is important as it shows what were the powers of a guardian of an infant heir under the Hindu Law to alienate ancestral Property. That decision recognised the power of a manager or a guardian of an infant heir to charge ancestral estate by loan or mortgage, provided the power was exercised rightly by the manager or the guardian in a case of need or for the benefit of the estate. That decision did not relate to the specific performance of any contract. But it must be noted that it had become such an important Part of Hindu Law that even without referring to it, the Madras High Court observed in Krishnasami v. Sundarappayyar

ILR (1895) Mad 415 that a guardian of a minor had the power to represent him and enter into contracts on his behalf either beneficial or necessary to the minor. On that basis, it was held that a contract for the sale of land entered into by the mother and guardian of a Hindu minor was binding on the minor and was liable to be specifically enforced against him.

10. The next Privy Council decision in point of time is the case of *Mohori Bibee V. Dharmodas Ghose* ILR (1903) Cal 539=30 Ind App 114 (PC). It was finally decided for the first time by the Privy Council that a minor's contract is void under Section 11 of the Contract Act. Before that decision, the Indian High Courts used to follow English authorities, and there was no uniformity of decisions with regard to the minor's contract being capable of specific performance. Since the minor's agreement was void there was no agreement to be specifically enforced, the only question which thereafter remained was how far a contract entered into by his guardian was capable of specific performance.

11. That Point was decided by the Privy Council in ILR (1912) Cal 232 referred to above in 1911. Reference was made to the case of ILR (1903) Cal 539=30 Ind Ap 144 (PC) and their Lordships stated as follows:

'Without some authority their Lordships are unable to accept the view of the learned Judges of the Division Bench that there is no difference between the position and powers of a manager and those of a guardian. They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract'.

It will be clear from this decision that their Lordships of the Judicial Committee made a general proposition that a guardian of a minor was not competent to bind the minor or the minor's estate by a contract for the purchase of immoveable property. It is to be noted that no reference was made either in the arguments or the judgment to *Hunoomanpersaud's case* (1854) 6 Moo Ind App 393 (PC) which

had dealt with the competence of a manager or a guardian to alienate immovable property within certain limits. After 1911, Mir Sarwarjan's case ILR 1912 Cal 232 became the law for the whole of India and was applied without question to all contracts for purchase or sale in which the minor was interested, irrespective of whether the minor was governed by Hindu Law or not. The case specifically dealt with the guardian's power to bind the minor by a contract for the purchase of immovable property. But the principle was extended even to contracts where the guardian of the Hindu infant agreed to alienate or sell the minor's property. See for example Abdul Haq v. Yehia Khan AIR 1924 Pat 81 where it was observed that no distinction could be drawn between an agreement to purchase and an agreement to sell and that the latter agreement could not be enforced against the minor. That was also the view of the Calcutta High Court in Srinath Bhattacharjee v. Jatindramohan Mohan : AIR1926 Cal445 . That court held that no distinction could be drawn between the case of a covenant binding a minor to purchase a property and a covenant binding him to sell his property, and the latter covenant should be held not binding on the minor on the principle declared in Mir Sarwarjan's case ILR (1912) Cal 232. It must, however, be pointed out that sometimes a different view was also taken. (See Brahamdeo Sao V. Haro Singh AIR 1935 Pat 237). In that case, Wort, J. held that a contract for sale of immovable property entered into by the guardian or manager on behalf of a minor and the legal necessity of which has been proved, can be specifically enforced. It is necessary to note here that the learned Judge having noted Mir Sarwarjan's case harked back to Hunoomanpersaud's case (1854) 6 Moo Ind App 393 (PC) and observed as follows:

'To state the proposition broadly, that is to say, that a contract on behalf of a minor can in no way be enforced, would be stating a proposition which obviously cannot be supported in its entirety. The leading case of (1854) 6 Moo Ind App 393 (PC) prevents the assertion of such a proposition. It is quite clear in one form or another that contract on behalf of an infant for the benefit of his estate or for legal necessity is enforceable.'

The learned Judge accordingly held that the decision in Mir Sarwarjan's case ILR (1912) Cal 232 must be limited to only those cases where the contract was for the

purchase of the property on behalf of the minor.

12. The state of law was not very uniform though most of the High Courts applied the principle in Mir Sarwarjan's case ILR (1912) Cal 232 to contracts both of sales and purchases on behalf of the Hindu minor by his guardian And then the Judicial Committee of the Privy Council delivered the weighty judgment in in 1948. This is the fourth and the last landmark so far as the Privy Council is concerned. That was a case in which a minor brought a suit represented by his mother guardian claiming possession of land contracted to be sold by his guardian mother by an agreement in writing. The purchase price was agreed to be applied in discharge of debts owing to the defendant and another by the plaintiff minor's deceased father. The agreement to sell was, therefore, justified by necessity. Under the Indian law an agreement to sell does not create any interest in the property in favour of the purchaser and hence the plaintiff-minor could say that in the absence of a registered sale-deed in favour of the defendant, the title to the property still vested in the plaintiff, and, therefore, he was entitled to sue for possession on his title. The defence was based on Section 53-A of the Transfer of Property Act which dealt with part performance. It reads as under:

'Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part-performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part-performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor, or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract: Provided that nothing in this section shall

affect the right of a transferee for consideration who has no notice of the contract or of the part-performance there-of.'

The defendant who was the appellant before the Privy Council alleged that the plaintiff-minor was the transferor under the contract in right and was, therefore, debarred from enforcing any right with respect to the property of which the defendant transferee had taken possession. The question, therefore, arose whether the plaintiff was transferor within the meaning of Section 53-A. A simple reading of the section would go to show that the word 'transferor' for the purposes of that section refers to 'the person contracting the transfer for consideration any immoveable property by writing signed by him or on his behalf'. The point before the Privy Council was whether the plaintiff-minor came under the description of 'any person contracting to transfer by writing signed by him or on his behalf'. It was contended, as is clear from the arguments of Sir Herbert Conifer summarised at page 118 of the Report, (i) the minor-plaintiff had transferred nothing because in actual fact his guardian had entered into the contract, nor was the transfer "on his behalf", because Section 53A was framed on the hypothesis that the person who is acting is acting for somebody who is competent to act for himself; & (ii) the minor could not transfer the property since the statute postulated the existence of a valid contract, & therefore, to say that the minor could enter into a valid contract would be a contradiction in terms as the minor's contract was void in view of (1903) ILR 30 Cal 539=30 Ind App 114 (PC) already referred to. It was on these two grounds that the learned counsel in that case argued that the defendant was not protected by Section 53-A.

13. Both these objections have been directly met in the judgment of their Lordships. The first objection was met by the following observations:

'Their Lordships entertain no doubt that it was within the powers of the mother as guardian to enter into the contract of sale of November 29, 1935, on behalf of the respondent for the purpose of discharging his father's debts, and that, if the sale had been completed by the execution and registration of a deed of sale, the respondent would have been bound under Hindu Law'.

Reverting again to the subject after a few lines, their Lordships observed:

'The position of a guardian under the Hindu law was considered by their Lordships' Board in (1856) 6 Moo Ind App 393 412 (PC), where the following passage is to be found: 'They consider that the acts of the Ranee cannot be reasonably viewed other-wise than as acts done on behalf of another, whatever description she gave to herself, or others gave to her.'

'Thus the act of the mother and guardian in entering into the contract of sale in the present case was an act done on behalf of the minor appellant'.

Dealing with the second objection, their Lordships approved of the statement of the law in this respect by Pollock and Mulla in their Indian Contract and Specific Relief Acts, 7th Edition, page 70, which was to the following effect:

'A minor's agreement being now decided to be void, it is clear that there is no agreement to be specifically enforced; and it is unnecessary to refer to former decisions and distinctions, following English authorities which were applicable only on the view now overruled by the 'Judicial Committee.....' It is, however, different with regard to contracts entered into on behalf of a minor by his guardian or by a manager of his estate. In such a case it has been held by the High Courts of India, in cases which arose subsequent to the governing decision of the Judicial Committee, that the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and, further, if it is for the benefit of the minor. But if either of these two conditions is wanting, the contract cannot be specifically enforced at all'.

Then their Lordships proceeded to state:

'In the present case neither of the two conditions mentioned is wanting, having regard to the findings in the courts in India. It would appear, therefore, that the contract in the present case was binding on the respondent from the time when it was executed. If the sale had been completed by a transfer, the transfer would have been a transfer of property of which the respondent, and not his mother, was the owner. If an action had been brought for specific performance of the contract, it would have been brought by or against the respondent and not by or against his

mother'.

Having come to that conclusion, their Lordships held that the respondent-infant-plaintiff was the person who most aptly answered the description of the words 'the transferor' in the sense in which those words are used in S. 53-A. In view of this Privy Council decision, the old paragraph with regard to specific performance which appeared at page 70 in Pollock and Mulla's Indian Contract and Specific Relief Acts, 7th Edition, was suitably recast in the later edition, viz., the 8th Edition published in 1957 and has not taken the form in which it has been quoted earlier in the Judgment. The learned authors have pointed out that the guardian of a minor, unless competent to do so, has no power to bind the minor by a contract for the purchase or sale of immoveable property and the minor is, therefore, not entitled to the specific performance of the contract. For this proposition, reliance was placed on the Privy Council ruling in ILR (1912) Cal 232. After quoting the pronouncement of their Lordships, the learned authors added:

'It is, however, different with regard to contracts entered into on behalf of a minor by his guardian or by a manager of his estate, where the guardian or manager, as under Hindu Law, is competent to alienate property. In such a case it has been held by the Privy Council that the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and further, if it is for the benefit of the minor.....'.

It will be seen that this statement of the law is based on the Privy Council decision in quoted above. The case directly involved the determination of the validity of the guardian's contract to sell in case of necessity and is, therefore, authority for the proposition as stated by Pollock and Mulla in their Indian Contract and Specific Relief Acts, 8th Edition, page 81. In such a case, it is obvious, the doctrine of Mutuality is irrelevant because the contract to sell was by one competent to contract on behalf of the minor, and, therefore, though Mir Sarwarjan's case ILR (1912) Cal 232 was cited in the arguments, their Lordships did not refer to it in their judgment.

14. After the above Privy Council decision in 75 Ind App 115=(AIR 1948 PC 95) the point arose before Viswanath Sastri J. in Ramalingam v. Balanambal, : AIR1951 Mad431 . That was a case where a guardian-mother of a Hindu minor had entered into a contract for the sale of the minor's immoveable property for purposes considered under Hindu Law as necessary. Principally relying on the Privy Council decision in it was held that the minor was bound by the contract and such a contract could be enforced against him. When reference was made to Mir Sarwarjan's case ILR (1912) Cal 232 the learned Judge doubted whether Mir Sarwarjan's case ILR (1912) Cal 232 was still applicable after their Lordships had decided in 1948. He observed that the artificial doctrine of mutuality as developed in English decisions was not applicable to cases Hindu minors properly represented by their guardians, and then stated as follows at page 433:

'Yet their Lordships inupheld the contention that a guardian's contract for sale of the immoveable property of the ward was specifically enforceable, if the contract was beneficial to the minor. Principles laid down for the protection or benefit of minors had been applied in this country to their prejudice by invoking this artificial doctrine of mutuality. If the guardian has made an advantageous contract for the sale or lease of the property of the ward there is no reason why the ward should be disabled from enforcing it against the other party to the contract. I submit that the doctrine of 'mutuality', illogical in form and in substance unjust, has now been discarded by the very tribunal which was responsible for its introduction in India and it need no longer cast its spell on Indian Courts an sterilise contracts of sale entered into by a guardian on behalf of his ward for the latter's interest or benefit.....'

The case before the learned Judge was not in respect of a contract for purchase on behalf of the minor. But It appears from the judgment that it would really make no difference once the doctrine of mutuality is discarded.

15. We have then a case of our own High Court in Gujoba Tulsiram v. Nilkanth Kesheo : AIR1958 Bom202 . There again, it was a suit for the specific performance of a contract to sell minor's property. This Court relying upon the Privy Council decision in 75 Ind App 115=(AIR 1948 PC 95) held that the contract

to sell could be enforced specifically against a minor. In the course of the judgment, Mudholkar, J. as he then was, referred to a passage at page 101 in the 4th Edition of Iyer and Anand's Law of Specific Relief which referred to the views of Viswanath Sastri, J. in : AIR1951 Mad431 and opined that the true test for validity and enforceability of a guardian's contract of sale on behalf of a minor was not the existence of mutuality in the contract but whether it was by competent guardian and for legal necessity or benefit of the minor's estate. This view of the learned authors was approved by Mudholkar, J. I have not been referred to any other judgment of this court which takes a contrary view.

16. The point once again came before the Madras High Court before a Full Bench In Sitaram V. Venkatarama. : AIR1956 Mad261 . In that case two Hindu brothers of whom one was minor and the other acting for him, though not his legal guardian, purchased properties on 29th November 1933. Contemporaneously, they entered into an agreement to reconvey the properties to the vendors after attainment of majority by the minor on any day between 1st and 30th June 1947. This agreement to recover was also entered into by the elder brother acting for himself and on behalf of the minor. The benefit of the reconveyance agreement was transferred to the plaintiffs and the plaintiffs brought a suit for the performance of the reconveyance against the brothers. The minor brother, who had attained majority, pleaded that the reconveyance agreement would not be binding upon him as his guardian elder brother was neither his de jure guardian nor the manager of the joint family, and secondly that agreement imposed onerous obligation on him and for want of mutuality was not enforceable against him. The court by a majority held that contracts entered into on behalf of a minor by his guardian or manager of his estate can be specifically enforced by or against the minor if the contract is one which is within the competence of the guardian or manager who had entered into it on behalf of the minor so as to bind him by it and if it is also for the benefit of the minor. This presupposed specific performance of a contract against the minor also. The ground put forward was that the minor could not repudiate the liability to reconvey at the same time retaining to himself the advantage gained by the purchase. The sale-deed and the agreement to reconvey formed part of one transaction and should be read and interpreted together. Since the minor had accepted the title and ratified the sale-deed, he could not be allowed

to repudiate the essential pre-requisite of the sale in his favour. viz, the agreement to reconvey. Incidentally. however. in the majority judgment delivered by Govinda Menon J.. reference was made to Mir Sarwarjan's case ILR (1912) Cal 232 and to the comments thereon by Viswanath Sastri. J. in Ramalingam's case, : AIR1951 Mad431 . Since Ramalingam's case, : AIR1951 Mad431 was decided principally on the Privy Council decision in Ind App 115: the learned Judge considered the Privy Council case also and attempted to show that Mir Sarwarjan's case. ILR (1912) Cal 232 was still good law in its application to contracts for the purchase of immoveable property on behalf of a minor. The learned Judge sought to put an interpretation on the decision of which with great respect to the learned Judge. I am unable to accept. Certain assumptions were made which to me appear to be unwarranted. The first assumption was that a concession was made before the Privy Council that the agreement to sell without a part performance of it under the provision of Section 53-A of the Transfer of Property Act could not be valid. With respect. there is no such concession What was conceded by counsel for the appellants was that their appeal would fail unless the appellants were entitled to the protection afforded by Section 53-A. That was an elementary concession, because it does not require much of an argument to show that if the appellant-purchaser to whom the title in the property had not been transferred was not able to get the protection of Section 53-A by reason of the part performance of the contract. he had no answer to the suit of the respondent-plaintiff who had sued on his title. From the assumption above made, the learned Judge proceeded to observe that there was no observation of the Privy Council which laid down that an executory contract entered into by a guardian on behalf of a minor can be specifically enforced against the minor on his attaining majority. I have already shown that the decision of the Privy Council directly Involved the consideration of the question whether a contract in writing was a valid and enforceable contract If it was not a valid and enforceable contract the purchaser's part performance under Section 53-A of the contract by taking possession of the property would not protect him. There is also no warrant for the observation, viz.,

'what is stated that part-performance under Section 53-A of the Transfer of Property Act is on the same footing as the completed sale by the guardian which would be binding on the minor if, It is for necessity or benefit of the minor's estate'.

I do not think, as the learned Judge has again emphasised, that the Privy Council decision could be understood in the sense That a contract of sale of the property by guardian of a minor which is partly per-formed should be put on the same footing as a completed sale. I am, therefore, unable to agree with the observations made by the learned Judge with a view to salvage the principle of mutuality as laid down in Mir Sarwarjan's case ILR (1912) Cal 232.

17. The correct view, with great respect, has been taken by Full Bench of the Andhra Pradesh High Court presided over by Subba Rao C. J., as he then was, in Surya Prakasam v. Gangaraju, AIR 1956 AP 33 which I will have occasion to discuss at a later stage in greater detail hereafter.

18. It was contended by Mr. Chitale on behalf of the respondent that the Privy Council decision in may at the very best support The view that a minor's contract for sale for legal necessity is enforceable against him, but there was no reason to extend the principle of that decision to the case of a minor's contract to purchase, though for necessity or the benefit of the estate, as the point is directly governed by the Privy Council case in Mir Sarwarjan's case, (ILR 1912) Cal 232. In that case it was pointed out that the agreement to purchase was made by a manager or guardian and it was also held that the contract was beneficial to the minor. Even so, the Privy Council held that the contract was not enforceable. Since that decision is neither considered nor over-ruled, counsel submitted, by the later decision of the Privy Council in , it would be binding on this court on the footing that it still continues to be good law. When dealing with this question, a few considerations may be relevant. In the first place, Mir Sarwarjan's case ILR (1912) Cal 232 was principally based on the doctrine of mutuality. It must be seen that that doctrine has now been considerably shaken by the decision in because the case clearly establishes that a contract by a guardian on behalf of a minor to sell immovable property for necessity or for the benefit of the estate is a valid contract which does not attract the application of the doctrine of mutuality. The doctrine of mutuality was invoked because the minor's contract under the Indian Contract Act was a void contract, but when it is clear that a minor's contract entered into by a guardian for legal necessity or for the benefit of the estate is a valid contract, the doctrine of mutuality has no place. The reason is that the want of capacity of the

minor has been supplied by the guardian, and, therefore, the contract which would have been otherwise void has now become valid, provided of course the guardian acts within his authority permitted by Hindu Law. This proposition would as much apply to a contract for purchase as to a contract for sale. Therefore, on principle, if Mir Sarwarjan's case ILR (1912) Cal 232 cannot be invoked in order to defeat a contract of sale of the property of a minor, it cannot be invoked to defeat a contract for purchase on behalf of the minor, provided the guardian is acting within his authority. Secondly, I have already pointed out that the principle of Mir Sarwarjan's case ILR (1912) Cal 232 was extended by our High Courts to contracts of sales on behalf of minors by their guardian, because on principle, there was no distinction between the two. Conversely, therefore, if the law now is that the minor's contract for sale entered into by his guardian is enforceable by or against him, the contract for purchase on behalf of the minor is equally enforceable. Thirdly, there is no principle of law which prevents a Hindu minor from being a transferee of property. It has been held that if a deed of sale has been executed in favour of a minor and no part of the consideration remains to be executed by him, he can sue for possession of the property on the basis of his valid title under the deed of sale (See for example *Ulfat Rai v. Gauri Shankar* ILR 1911 All 657. If the transaction is bona fide and for the benefit of the minor, one finds it difficult to hold that a contract to purchase is incapable of specific performance. Cases are conceivable where purchase of immovable property would become necessary or beneficial to the estate of the minor. A concrete case may be where the minor's house is destroyed by fire and the guardian contracts to purchase a new house for the residence of the minor. If the minor possesses a large estate and is in possession of cash requiring investment, I do not see why the guardian may not enter into a contract to purchase a house subject to a good title being made out by the vendor. The purchase being for the necessity, a completed transfer would give the minor absolute title. I do not see on what principle a contract to purchase under the circumstances is not enforceable. The paramount consideration in Mir Sarwarjan's case ILR (1912) Cal 232 for refusing to enforce the contract for purchase on behalf of the minor was that the contract would impose a personal obligation on the minor and this the guardian should not be permitted to do. But that solicitude can no longer avail the Hindu minor whose guardian can not only

contract to sell but even sell the minor's property and create obligations binding on the minor under Section 55 of the Transfer of Property Act, Under Section 55 of the Transfer of Property Act, the seller is bound - (a) to disclose to the buyer any material defect in the property; (b) to produce to the buyer his documents of title for examination; (c) to answer to the best of his information all relevant questions relating to the property or the title thereto; (d) to execute a proper conveyance when the price is tendered; (e) to take care of the property between the date of the contract of sale and the delivery of the property; (f) to give to the buyer possession of the property. (g) He is also deemed to contract with the buyer that he has title to the property; and so on and so forth..... All these obligations are undertaken in a sale of minor's improvable property, and if such' obligations really do not come in the way of the guardian alienating the property of the minor for reasons of necessity, I do not see how a contract for the purchase on behalf of the minor. which imposes much less onerous liabilities on him, can be regarded as a bar to specific enforcement As pointed out by Ayyangar J. delivering the judgment of the Bench in Annamalai Chetty Joint Firm, Palni v. Muthuswami AIR 1939 Mad 538 the personal liability arising out of the contract of the guardian is the liability of the minor's estate only. The learned Judge observed:

'..... It is scarcely necessary to add that the liability of the estate though personal, in the English law sense of the word, is not personal in the sense that the person of the minor after majority can be arrested in execution, A personal liability arising out of the contract of the guardian is a liability of the minor's estate only

If for the breach of the statutory covenants involved in a sale a minor's estate is made liable, there is no principle on which his estate may not be made liable for a breach of the contract to purchase immovable Property. However, when considering this question, one must never lose sight of the fact that the guardian is a competent guardian, that the transaction is justified on the ground of necessity or benefit to the estate, and lastly, that it is for the benefit of the minor. Besides when a Party comes to the court for specific performance of the contract, the court is bound to consider whether it would be equitable and just from the minor's point of view that the contract should be enforced against him.

19. I now turn to the Full Bench decision in AIR 1956 Andh 33 referred to above. In that case, there was one contract entered into by a guardian of a Hindu minor which embodied both an agreement to sell the minor's Property and to purchase it after the minor had attained majority. The other parties to the agreement brought a suit for the specific performance of this contract as in the meantime the guardian had sold the property to somebody else subsequent to the above agreement. So the question arose whether a contract entered into by a guardian of a Hindu minor for sale or for purchase of immoveable property was specifically enforceable against the minor, and that question was referred to the Full Bench in view of the observations made by Viswanath Sastri, J. in : AIR1951 Mad431 already referred to. The opinion of the Full Bench was delivered by learned Chief Justice. The whole question was reviewed in detail, and they have deduced principles with which, with great respect, I find entirely in agreement. The principles and points made out may be stated as follows:

- (1) A minor has no legal competency to enter into a contract or authorise another to do so on his behalf. A guardian, therefore, steps in to supplement the minor's defective capacity;
- (2) Capacity is the creation of law, whereas authority is derived from (nature of) the act of parties;
- (3) The limit and extent of the guardian's capacity (authority) are conditioned by Hindu law. They can only function within the doctrine of legal necessity or benefit. The validity of the transaction is judged with reference to the scope of his power to enter into a contract on behalf of the minor;
- (4) Even the personal liability arising out of the guardian's contract is a liability of the minor's estate only;
- (5) Since the guardian under the Hindu law has the legal competency to enter into a contract on behalf of the minor for necessity or for the benefit of the estate, the contract is valid from the time of its inception, and since either party can enforce the contract, the test of mutuality is satisfied;

(6) There cannot be any essential distinction between a contract of sale and contract of Purchase. The difference is only one of degree. There is no difference in principle between the case of purchase by a guardian and that of a case of a sale by a guardian, because both depend for their validity on the competency of the guardian acting within the scope of his power under Hindu law;

(7) An agreement to convey or purchase is only a preliminary step in completing a transaction of sale or purchase as the case may be. Without negotiations and without any agreement, oral or in writing, rarely is a sale-deed executed and registered. To hold that guardian can execute a sale-deed in respect of a specific property but he cannot legally enter into an agreement to convey or purchase the same is incongruous and illogical;

(8) Contracts to sell or purchase property are transactions closely connected with dealings in immoveable property by a guardian giving rise to obligations annexed to that property. They cannot be equated with contracts of loans imposing personal obligations on the minor.

(9) The courts following the decision in Mir Sarwarjan's case, ILR (1912) Cal 232 had held that a contract of sale or purchase entered into by a guardian on behalf of a minor could not be enforced against the minor on the ground of mutuality. That view is no longer sound in view of the later Privy Council decision in which, in clear and unambiguous terms, rules otherwise.

20. The last conclusion seems to be inevitable on the authority, I have not been referred to any judgment of the Supreme Court or of this Court subsequent to the Privy Council decision in taking a contrary view or even doubting it. I would, therefore, hold that a contract to purchase immoveable property by a competent guardian acting within his authority on behalf of a minor is specifically enforceable by or against the minor.

21. Mr. Chitale contended that even if this be the final conclusion on the point of law involved, the same should not be applied where the guardian is a de facto guardian. I do not think I can accept this submission. A Full Bench of this High Court in *Tulsidas v. Raisinghji* : AIR1933 Bom15 . has held that under Hindu law a

de facto guardian of a minor can validly sell the property of a minor to a third person for legal necessity, because there is no difference in respect of the powers of a de jure guardian and a de facto guardian with regard to the dealings of the minor and in regard to minor's Property. In Hunoomanpersaud's case. (1854) 6 Moo Ind App 393 (PC) the lady who was a natural guardian and a de jure manager was treated as if she was a de facto manager, and still it was held that she had the necessary authority to alienate the minor's property for necessity or for the benefit of the estate. If the de facto guardian has power to alienate the property of his ward for reasons of necessity or benefit, he would equally have the authority to purchase immoveable property for the minor for the same reason. It was next contended by Mr. Chitale that when a de jure guardian is living and is under no disability, the de facto guardian has no right to alienate the minor's property. He contended that in the present case. Namdeo was living, and it was not shown that he was under any disability, and, therefore, the mother could not be the proper guardian who could purchase. I have not been referred to any reported decision which holds that a de facto guardian's authority is thus circumscribed. I have already held that the minor is living with the mother and the mother is looking after his affairs and not the father. In the present case, the mother actually intervened to save the property from being sold by the revenue authorities for the recovery of the taquai loan. Namdev did not lift a little finger. Obviously his mother was acting in the best interest of her infant son, while the father was not, and, therefore, the mere fact that he was living at the date would not in any way diminish the authority of a de facto guardian which is rendered to her by reason of the special status of de facto guardianship. Once it is held that she is the de facto guardian, her authority flows from that particular status, and if that authority is used by her within the limits prescribed by Hindu law her contracts must be upheld.

22. Finally Mr. Chitale contended that a contract to purchase immoveable property cannot be regarded as one for the benefit of the estate. As to whether a transaction is for the benefit of the estate or not is essentially a question of fact. This court in Hemraj v. Nathu. 37 Bom LR 427= AIR 1935 Bom 295 has held that under Hindu law the manager of a minor is not entitled to sell the minor's property merely for the purpose of enhancing the value of the property of the minor or for increasing the minor's income, and the question whether the same is for the

benefit of the estate involves the consideration of something more than merely whether the purchase price paid is a good price. It also involves the further question, what is to be done with the purchase-money. In that case a narrow strip of land belonging to a minor was sandwiched between two pieces of land belonging to the defendant. The defendant was anxious to purchase this narrow strip, and, therefore, he paid a sum of Rs. 900 for purchasing that narrow strip although ordinarily the value of that strip would have been just Rs. 600. Obviously there was no necessity for the sale. Some evidence was produced at the time of the hearing to show that the amount realised by sale, that is Rs. 900, was invested in the family business. No evidence, however, was given to show whether the interest thus acquired in the business by the minor was worth more than Rs. 600. It was pointed out that to sell a piece of land at a very good price would not be beneficial if the purchase money was to be invested in insolvent business. However, the learned Chief Justice held that the manager of a minor was not entitled to sell the minor's property merely for the purpose of enhancing the value of the Property of the minor or for increasing the minor's income. At the same time he was not inclined to hold that no transaction could be for the benefit of the minor which was not of a character to protect or preserve the property of the minor. where it is for that purpose. it would be obviously for the benefit of the estate.

23. Mr. Walawalkar contends that the present transaction, in reality, is merely for the preservation and protection of the ancestral property in which the minor had interest by birth. After the disposal of the property by the father, the minor's mother in order to get a written agreement from the defendant to reconvey the same paid nearly Rs. 500 which were due on account of the taquai loan. The defendant also acknowledged in the written statement that he was anxious all the time that there should be no deprivation or loss to the estate of the minor. This postulated that if the property was lost to the family, the minor's interest would suffer. The agreement also refers to an agreement to reconvey from the very beginning. So this is a case in which the motive of the mother was preservation of the ancestral property of the minor which otherwise would be lost for ever. I may further point out that six acres of good land was purported to be sold for just Rs. 1500. My conclusion therefore, is that this agreement to purchase was for the benefit of the estate, and, therefore, it is enforceable at the instance of the minor.

24. In the result, I must hold that the contract of purchase is enforceable at the instance of the minor-plaintiff. The orders of the lower Courts are, therefore, set aside, and it is directed that the defendant do execute a sale-deed in favour of the plaintiff of the property in suit. The plaintiff is directed to deposit the amount of Rs. 1500 in court within one month of the receipt of this record by the trial court. The defendant shall execute the sale-deed within one month of the date of the deposit or such time as the court may extend for the purposes of the deposit. If the sale-deed is not executed by the defendant, the court shall cause the sale-deed to be executed at the cost of the defendant. The plaintiff shall get his costs from the defendant throughout and the defendant shall bear his own costs.

25. Order accordingly.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com