

APPELLATE CIVIL.

Before Jack and Mitter JJ.

NRIPENDRACHANDRA SARKAR

v.

EKBARALI JOARDAR.*

1929

Mar. 20.

Specific performance—Minor—Contract made by karta of joint family on his behalf, if enforceable—Contract if enforceable against the other members of the joint family.

A contract by the *karta* to sell land belonging to a Hindu joint family, which includes a minor, is not enforceable in respect of the share of the minor. The contract may be enforced with variation in respect of the shares of the adult members, though it fails in respect of the share of the minor.

The application of the principle laid down in *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri* (1) is not limited to the case of a contract for the purchase of immoveable property.

Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri (1) explained and followed.

Hari Charan Kuar v. Kaula Rai (2) dissented from.

Srinath Bhattacharya v. Jatindra Mohan Chatterji (3) referred to.

SECOND APPEAL by the defendants.

The appeal arose out of a suit for specific performance of a contract for the sale of land and for injunction for stay of execution. The plaintiff alleged that defendants Nos. 1 to 4 were members of a Hindu joint family, of which defendant No. 1 was the *karta*; that defendant No. 1, as *karta* of the joint family, agreed to enter as satisfied a mortgage decree obtained against the plaintiff *ex parte*, who had made an application to have it set aside, on payment by plaintiff of Rs. 1,000; and to sell the disputed lands to the plaintiff on payment of a further sum of Rs. 654 within two months; that, in pursuance of the said agreement, the plaintiff refrained from prosecuting the application for rehearing and had paid the sum of Rs. 1,654 within the stipulated time, but that the defendants appropriated the said sums in part

*Appeal from Appellate Decree, No. 1421 of 1924, against the decree of M. Osman Ali, Subordinate Judge of Nadiya, dated March 7, 1924, affirming the decree of Brojendra Saran Sanyal, Munsif of Kushtia, dated March 23, 1923.

(1) (1911) I. L. R. 39 Calc. 232 ;
L. R. 39 I. A. 1.

(2) (1917) 2 Pat. L. J. 513.
(3) (1925) 30 C. W. N. 263.

satisfaction of the said *ex parte* decree and sold the disputed land to the defendant No. 5. Hence the suit. The defence *inter alia* was that, defendant No. 3 being a minor, at the time of the agreement, the contract made by the *karta* of the family was not binding on him and that defendant No. 5, being a *bonâ fide* purchaser for value without notice of plaintiff's claim, was not affected by the said contract. The Munsif, who tried the suit, overruled all the objections of the defendants, although he held that defendant No. 3 was a minor at the time of the contract, and decreed the plaintiff's suit with costs, which was upheld, on appeal, by the Subordinate Judge.

The defendants, thereupon, appealed to the High Court.

Dr. Radhabinode Pal, Mr. Bhupendrakishore Basu and *Mr. Jitendramohan Banerji*, for the appellants.

Mr. Kshetramohan Ghosh, Mr. Premranjan Ray Chaudhuri, Mr. Saratkumar Maiti and *Mr. Mahendrakumar Ghosh*, for the respondents.

MITTER J: This is an appeal by the defendants and arises in a suit for specific performance of a contract. The plaintiff, now respondent, alleges that the defendants got an *ex parte* mortgage decree against the plaintiff for a sum of Rs. 2,500 and the plaintiff intended to apply to have the *ex parte* decree set aside. At this stage, the parties came to an arrangement, and the arrangement was arrived at between the plaintiff on the one hand and the defendant No. 1 on the other, purporting to act on behalf of the joint family of which defendants Nos. 2, 3 and 4 were also members. It was agreed that two plots covered by the mortgage, *viz.*, plots which were mentioned in schedule *ka* and *kha* to the plaint, would be sold by the defendant No. 3, as representing the family, to the plaintiff and the defendants would refrain from executing their mortgage decree on payment by the plaintiff of the sum of Rs. 1,654 in

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certain instalments. Of the numerous defences which had been taken in this case, it is necessary to notice only one, which is to the effect that, as the defendant No. 3 was a minor at the time of the plaintiff's alleged contract, no specific performance of the contract could be enforced in this case, as the contract was entered into by the manager of the family, of which defendant No. 3 was a member. Both the courts below have not given effect to this defence and the court of first instance decreed the suit for specific performance, after holding that the agreement with the plaintiff for retransfer of the two properties in dispute on payment of Rs. 654 and the payment of the said money and the breach of that agreement by the defendants must be taken to be established and the court of first instance directed that the defendants do execute a *kabala* for the said properties in favour of the plaintiff within 15 days from the date of the judgment, failing which the *kabala* would be executed by the court. Against this decree, an appeal was taken to the court of the Subordinate Judge of Nadiya, which affirmed the decision of the Munsif. It is to be mentioned in this case that defendant No. 5 is a subsequent purchaser of the two properties now in suit and the finding was that she was not a *bonâ fide* purchaser for value, although the lower appellate court came to the conclusion upon the circumstance that there was no *bonâ fides* in the vendor. It is unnecessary, however to consider this part of the case, as I shall show presently.

A Second Appeal has been taken to this Court against the decision of the Subordinate Judge, affirming that of the Munsif, and two points have been taken before us by the learned advocate for the appellants. It is argued, in the first place, that no specific performance of the contract could be ordered, as defendant No. 3 was a minor at the time of the contract and, on the principle of want of mutuality, which is available, in this case, as a good defence, this suit must fail. It is argued, in the second place, that, even if the defendants do not succeed on this

point, as there is no finding that defendant No. 5 is not a *bonâ fide* purchaser for value and as the plaintiff did neither allege in his plaint that she was not a *bonâ fide* purchaser for value nor adduce any evidence on that point, the decree of the court of first instance, which was affirmed by the lower appellate court, cannot possibly be sustained.

With regard to the first point taken, we think that the contention of the appellant is well founded and must prevail, although not to the extent contended for by the learned advocate for the appellants. In view of the decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri* (1), it cannot now be seriously contended that the contract, which was entered into by defendant No. 1 on behalf of the joint family, at a time when defendant No. 3 was a minor, could be enforceable as against defendant No. 3. It is argued on behalf of the respondent that the decision of the Judicial Committee of the Privy Council must be limited to a case, where the contract on behalf of the minor is a contract for the purchase of the immoveable property. We can find no such limitation in the decision of their Lordships. It is also said that this principle has no application to a case when there is a contract to sell for the purpose of necessity by a manager of a joint Hindu family and reliance is placed in support of that contention on a decision of the Full Bench of the Patna High Court in the case of *Hari Charan Kuar v. Kaula Rai* (2). As we read the decision of their Lordships of the Judicial Committee, it seems to us that it is impossible to draw the distinction which has been drawn by the learned Judges of the Patna High Court. In the case of *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri* (1), which has already been cited, their Lordships say this:—"They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the

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“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.” Chamier C. J., who delivered
judgment of the Full Bench of the Patna High Court,
said this:—“I apprehend that the decision of their
“Lordships in the case of * * * *Mir Sarwarjan v.*
“*Fakhruddin Mahomed Chowdhuri* (1) does not
“apply to contracts made by the managing member
“of a joint Hindu family for family necessities or
“for the benefit of the family, *i.e.*, contracts made by
“the managing members which bind the minor
“members of the family. Such contracts can be
“enforced on behalf of the family by the persons who
“make them and I find nothing in the decision of
“their Lordships which requires us to hold that such
“contracts cannot be enforced against the family.”
In the observations of their Lordships of the Judicial
Committee of the Privy Council, in the case of *Mir
Sarwarjan v. Fakhruddin Mahomed Chowdhuri* (1),
we can find no such limitation as is suggested in the
Patna Full Bench decision. This Court, in a recent
decision, has held that the principle can be applied
to cases where a contract is entered into by a member
of Hindu joint family under Bengal School. It is
sufficient to refer to the decision of Mr. Justice
Greaves and Mr. Justice Mukerji in the case of
Srinath Bhattacharya v. Jatindra Mohan Chatterji
(2). It has been argued, however, on behalf of the
respondent, that, even if it be assumed that the con-
tract, in so far as it affects the infant’s share, could
not be enforced, the contract could be enforced with
variation, except with reference to the share of the
infant in the property contracted to be sold. I think
this contention of the respondent must be given effect

(1) (1911) I. L. R. 39 Calc. 232;

(2) (1925) 30 C. W. N. 263.

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to. On an examination of the evidence, it appears that the share of defendant No. 3 in the property contracted to be sold is one-sixth, and we do not think that the contract is of such an indivisible character that no specific performance could be ordered with variation.

In these circumstances, the proper decree to make in this case is to vary the decrees of the courts below, by allowing a decree to the plaintiff, not in respect of the entire disputed properties, but in respect of five-sixths of the said properties. Decrees of the courts below will be varied accordingly.

With regard to the second point taken, *viz.*, that, there being no evidence and no allegation that defendant No. 5 was not a *bonâ fide* purchaser for value without notice, the suit for specific performance must fail. It is sufficient to state that defendant No. 5 died a year before the date when an application was heard by this Court, at the instance of the other appellants, as to whether the heirs of defendant No. 5 should or should not be brought on the record of this case as respondent. The application by the heirs themselves, which was put before this Court, was never served on the respondent and he had no opportunity of meeting the allegations made in that application, that the heirs of defendant No. 5 did not know that their mother defendant No. 5 had filed this appeal to this Court. There is no order of this Court by which the heirs of defendant No. 5 had been substituted as appellants in the present appeal. It must, therefore, be taken that, so far as defendant No. 5 is concerned, the appeal has abated. It is not, therefore, necessary to consider the second point taken by the learned advocate for the appellants.

The result is that the decrees of the courts below are varied in the way which we have indicated, being limited to five-sixths of the disputed property. Parties will have costs of this appeal in proportion to their success.

JACK J. I agree.

A. A.

Decree varied.

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