BENSON, OFFG. C.J., AND KRISHNASWAMI AIYAR, J.

SUBRAMANIA AIYAR v. GOPALA AIYAR.

Virupakshapa Ganeshapa(1), *Krishto Kishori Chowdrain* v. *Radha Romun Munshi*(2) commends itself to us. The decision in *Jambu Ramaswami Bhagavathar* v. *Sundaraja Chetti*(3) proceeds on a different ground, namely, that a suit against the drawer maintainable at the date of institution does not cease to be so because it is barred as against the acceptor when he is subsequently added as a party defendant. We must therefore dismiss the appeal against the defendants Nos. 1 to 3, but, as regards the other defendants, the decrees of the Courts below must be reversed and the suit remanded to the Court of First Instance for disposal according to law. There is no question of personal liability. The liability of the property given as security has alone to be determined. With reference to the issues raised the appellants will pay the costs of the defendants Nos. 1 to 3 throughout. The costs of the other parties will be provided for in the revised decree.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

1909. October 21. November 16.

NAVAKOTTI NARAYANA CHETTY AND ANOTHER (DEFENDANTS NOS. 1 AND 3), APPELLANTS,

v.

LOGALINGA CHETTY (PLAINTIFF), RESPONDENT.*

Minor, sale in favour of, void.

A sale in favour of a minor is void.

Mohori Bibee v. *Dharmodas Ghose*, [(1903) I.L.R., 30 Calc., 539], followed.

SECOND APPEAL against the decree of F. H. Hamnett, District Judge of South Arcot, in Appeal Suit No. 72 of 1906, presented against the decree of S. A. Swaminatha Sastri, District Munsif of Tindivanam, in Original Suit No. 422 of 1904.

The facts of this case are sufficiently stated in the judgment.

A. Ramachandra Ayyar for appellants.

P. Sambanda Mudaliyar for respondent.

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(1) (1883) I.L.R., 7 Bom., 146.
(2) (1886) I.L.R., 12 Calc., 330.
(3) (1903) I.L.R., 26 Mad., 239 at p. 242.
* Second Appeal No. 225 of 1907.

JUDGMENTS—BENSON, J.—The question for decision in this second appeal is whether the sale evidenced by exhibit A is void. The District Judge has held that as the sale was made to a minor (the first defendant) it is void under the ruling of the Privy Council in the case of *Mohori Bibee* v. *Dharmodas Ghose*(1). I think that the decision of the District Judge is right. A sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised (section 54, Indian Contract Act), and it is, in my opinion, impossible to conceive of a price being settled except as the result of an agreement between the parties. In other words a sale necessarily involves the idea of a contract as its foundation and the Privy Council has held that a contract by a minor is not merely voidable at the option of a minor but is void.

The second appeal therefore fails and is dismissed with costs.

KRISHNASWAMI AYYAR, J.—The question raised in this case is one of considerable importance. The Privy Council has decided that a contract by a minor is void. It does not follow from this that a promise made to a minor in return for a past consideration and not for a reciprocal promise is necessarily void. It is not stated that the acceptance of a promise made by an adult requires competency to contract on the part of the acceptor. Suppose an adult person promises to pay a boy a sum of Rs. 10 for an errand that the boy has executed for him. Can it be said that the promise is not enforceable? Section 2 of the Indian Contract Act defining consideration says "when at the desire of the promisor the promisee or any other person has done or abstained from doing or does or abstains from doing or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise." This no doubt is at variance with the English Law. See the notes to *Lamphegh* v. *Brathwait*(2). But whatever limitations may be imposed upon the language of the Act, they cannot invalidate a promise made in return for a past consideration which has moved from the promisee at the request of the promisor, though it did not originate with a view to the subsequent promise, see *Sindha Shriganpatsingji* v. *Abraham* alias *Vajir*(3). This being so, how does the matter stand in the

(1) (1903) I.L.R., 30 Calc., 539. (2) Smith's 'Leading Cases,' Vol. 1, page 151.
(3) (1896) I.L.R., 20 Bom., 755.

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case of a promise to a minor? It is difficult to see any distinction when the consideration is not a reciprocal promise. However this may be, the question arises what the effect of the Privy Council decision is upon a sale of property to a minor. Section 7 of the Transfer of Property Act nullifies a transfer of property by the minor. There is no general provision in the Act as regards the validity of a transfer to a minor. Clause (*h*) of section 6 of the Act requires for the validity of a transfer that it should be made to a person legally not disqualified to be a transferee. It is nowhere stated that a minor is so disqualified. The fact that he can be a donee under section 127 of the Transfer of Property Act is sufficient to refute the notion that a minor cannot be a transferee. It remains however a question to be solved whether a minor can purchase property. A sale is defined by section 54 of the Transfer of Property Act as "a transfer of ownership in exchange for a price paid or promised or part paid and part promised." In order to complete a transaction of sale there must be two things: a transfer of ownership and a price paid or promised in exchange. The mere fact that some money was already due to the minor will not make it a price unless the minor agrees to treat it so. If, on the other hand, there is a promise to pay a price that would be invalid as a minor's contract and there can be no sale at all without a price. In the case either of money already due to a minor or of a promise to pay by him, the minor's contract to make it a price is essential to convert the mere transfer of ownership into a sale. There can be no sale therefore unless there are mutual agreements in its inception. A sale is often spoken of as a contract of sale with reference to the mutuality of obligations. It must invariably be preceded by a contract for the sale of the property which as defined by section 54 is a contract that the sale of such property shall take place on terms *settled between the parties*. Section 55 again imposes liabilities on the buyer in the absence of a contract to the contrary. The imposition of these liabilities involves the notion of competency to contract which the opening words of the section also suggest. It being therefore impossible to conceive of a sale without a reciprocal promise past or concurrent, I must come to the conclusion that there is no legal sale in this case.

In Sheppard and Brown's 'Commentaries on the Transfer of Property Act' the following sentence occurs: "It is apprehended

a mortgage may validly be made in his (minor's) favour" and reliance is placed on *Behari Lal* v. *Beni Lal*(1). No opinion however is expressed with reference to a sale. Whether the observation is correct with reference to a mortgage and the case is good law after the Privy Council decision it is not necessary to express any opinion. It may be that the execution of a mortgage does not always require a reciprocal promise past or present on the part of the mortgagee. When there is no such promise, it may well be that a mortgage by a person competent to contract in favour of a minor is valid. The decisions in *Amirthathammal* v. *Periasami Pillai*(2) and *Baijnath Singh* v. *Pallu*(3) presuppose a valid sale and confirm the vendor to the remedy of recovering the purchase-money on default by the purchaser. The case of *Meghan Dube* v. *Pran Singh*(4) does not touch the present question. All that is decided was that a sale in the name of a minor but to the family of which he was a member was valid.

Reference was made at the bar to the English Law and the decision in *Thurston* v. *Nottingham Permanent Benefit Building Society*(5) was relied on; with reference to the latter it is enough to quote the words of Cozens Hardy, L.J., at page 13 to refute the appellant's argument. He says "The first was a contract for the purchase of the land. This was voidable only and not void and has been adopted and confirmed by the plaintiff since she attained 21 under this contract and as a legal consequence of it there arose a vendor's lien for unpaid purchase-money." These observations clearly distinguish the case from the law in India. Pollock on Contracts, seventh edition, page 64, was also referred to. The learned author there says: "It seems to follow that no property will pass to the infant by the attempted contract of sale and that if he pays the price or any part of it before delivery of the goods he may recover it back, as indeed he might have done before the Act (Infant's Relief Act). For the contract was voidable and he was free to rescind it within reasonable time. But it does not follow that if the goods are delivered no property passes, or that if they are paid for the money may be recovered back. At all events an infant who has paid for goods and received

(1) (1881) I.L.R., 3 All., 408.
(2) (1909) I.L.R., 32 Mad., 325.
(3) (1908) I.L.R., 30 All., 125.
(4) (1908) I.L.R., 30 All., 63.
(5) (1902) 1 Ch., 1.

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and used them cannot recover the money back." The above passage based upon the construction of the Infant's Relief Act and the history of that legislation cannot afford any guide to the ascertainment of the law in India. Indeed the judgment of Lord Coleridge, C.J., in *Valentini* v. *Canali*(1) puts the matter on grounds of natural justice which section 1 of the Infant's Relief Act could not be deemed to violate, says His Lordship "No doubt the words of section 1 of the Infant's Relief Act are strong and general. But a reasonable construction should be put upon them. The construction which has been contended for on behalf of the plaintiff would involve a violation of natural justice. When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back money which he has paid." And again "The object of the statute would seem to have been to restore the law for the protection of infants upon which judicial decisions were considered to have imposed qualifications." Before the Infant's Relief Act the position was thus with reference to infants' contracts in England. Simpson on the Law of Infants says at page 4: "The acts of an infant fall under three heads according as they are (1) void, (2) voidable at the election of the infant or those claiming under him, (3) binding on him as fully as if he had attained 21." The last class which related to transactions beneficial to the minor was left untouched by the Act. It did not affect class 1 either. And to state it shortly it rendered the acts falling under class 2 void. Before the Act the law with reference to an infant's purchase is stated thus in Dart's 'Vendors and Purchasers,' Volume 1, page 32. "An infant can purchase but on his attaining 21 he may at his option adopt or abandon the contract" and again an infant after attaining majority must, if he intend to abandon his contract, do so within a reasonable time to be determined on the circumstances in each case. If his election be to avoid the purchase, he ought to disclaim. What the effect of section 2 of the Infant's Relief Act will be upon the foregoing statement of the law, it is not easy to say. But the author of the well known work above referred to gives the wholesome advice that the only safe rule of practice is to have an entirely new contract, not one which is in terms or according to its fair contraction merely a confirmation of the

(1) (1889) L.R., 24 Q.B.D., 166.

previous voidable contract, but see *Edwards* v. *Carter*(1). The English Law therefore does not help us to a decision of the question of the validity of a sale in India.

The conclusion already expressed as to the invalidity of the sale in question remains unaffected. The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

RAMANJULU NAIDU, RECEIVER AND MANAGER, PALACE ESTATE, TANJORE (PLAINTIFF), APPELLANT.

v.

ARAVAMUDU AIYANGAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1909. October 27, 28. November 18.

Civil Procedure Code, Act XIV of 1882, *s.* 43—*Indian Contract Act IX of* 1872, *s.* 43—*Omission of part of cause of action in a suit against a joint promisor—Effect of such omission in subsequent suit against other promisors.*

The omission in a previous suit against one of several joint promisors of a part of the cause of action is no bar under section 43 of the Civil Procedure Code to a subsequent suit against another joint promisor for the portion so omitted.

The subsequent suit will not be barred by the rule laid down in *King* v. *Hoare* (13 M. & W., 494), as that rule is based on the merger of the cause of action in the judgment. There can be no such merger when the cause of action has not been sued upon.

The effect of section 43 of the Indian Contract Act on the rule laid down in *King* v. *Hoare*, that a judgment against one of several joint promisors is a bar to a suit against the others, considered.

SECOND APPEAL against the decree of T. T. Rangachariar, Subordinate Judge of Kumbakónam in Appeal Suit No. 97 of 1908, presented against the decree of N. Sundara Ayyar, District Munsif of Tiruvadi, in Original Suit No. 19 of 1907.

The facts for the purpose of this case are fully set out in the judgment.

T. R. Venkatarama Sastri for appellant.

T. V. Muthukrishna Ayyar for respondents.

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(1) (1893) A.C., 360.

* Second Appeal No. 1746 of 1908.