APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Jackson, Mr. Justice Sundaram Chetti and Mr. Justice Mockett.

VENKATACHALAM PILLAI (SECOND DEFENDANT), APPELLANT,

1932, August 22.

v.

SETHURAM RAO *alias* LAKSHMIKANTHA SASTRIAR AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Minor—Contract of sale by a guardian on behalf of, containing a covenant to repurchase if vendee desired to sell—Completed contract or standing offer—Whether mutuality existed when guardian agreed to sell on behalf of minor—Specific performance—Enforceability.

A acting as the guardian of a minor, *B*, sold to *C* some land belonging to *B* by a registered sale-deed which contained the following covenant: "If it happens that you (*C*) or your heirs have to sell the property to others, then you must sell it to *B* or his heirs for the same price and also for such price as may be determined by arbitrators in respect of any building that may be constructed on the land." In a suit for specific performance of the above agreement to resell the property brought by *B*, after he attained majority, against *C's* heirs,

held, (1) that it was not merely a standing offer on the part of the vendee but a completed contract, and (2) that, inasmuch as *B* was a minor when the contract was entered into, it was for want of mutuality unenforceable by either party in a suit for specific performance since it was an executory contract, and the fact that such a contract was for the benefit of the minor did not alter the position.

APPEAL against the judgment and decree of the District Court of West Tanjore at Tanjore in Appeal Suit No. 224 of 1927 preferred against the judgment and decree of the Court of the District Munsif of Tanjore in Original Suit No. 423 of 1926.

* Second Appeal No. 1118 of 1929.

VENKATA-CHALAM PILLAI v. SETHURAM RAO.

K. Desikachari for appellant.—The suit was for specific performance of a contract. The plaintiff was a minor when his guardian sold the property to the first defendant's father under a registered sale-deed which contained a clause giving the minor an option to repurchase the property in a certain contingency, which in effect gave the minor an option of first refusal. It is merely a standing offer on the part of the vendee which could be withdrawn by the vendee before it is accepted ; see *Papa Naidu* v. *Munisamy Aiyar*(1), *Alagirisami* v. *Kothia Gounder*(2) and *Munuswami Nayudu* v. *Sagalaguna Nayudu*(3). If this submission is not correct then the covenant is merely an independent personal covenant given by a guardian on behalf of a minor. Such a covenant could not be enforced ; see *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*(4). Moreover it is not an executed contract but an executory one inasmuch as the minor has to pay the price when he takes back the property. There is want of mutuality. In *Narayana Rao* v. *Venkatasubba Rao*(5) it was held that a guardian could not bind a minor by such a covenant. Even if the plaintiff tenders the price there is no obligation on the part of the first defendant to sell unless he chooses to do so. No time limit is fixed for the enforcement of this contract. It also offends the rule against perpetuities as laid down in section 14 of the Transfer of Property Act; see *Kolathu Ayyar* v. *Ranga Vadhyar*(6).

[SUNDARAM CHETTI J.—If the covenant should be held to be unenforceable for want of mutuality, this question need not be considered.]

Salem Ramaswami Iyer for *T. Appaji Row* for first respondent.—There was a completed contract on the date of the sale by the guardian which was capable of enforcement on the happening of an event, viz., when the vendee made up his mind to sell; see *Sakalaguna Nayudu* v. *Chinna Munuswami Nayakar*(7). In such a contract when the vendee makes up his mind to sell the property what he does is to call upon the other party to perform his portion of the contract, i.e., to exercise his option of repurchase. If he chooses to avail himself of the

(1) (1922) I.L.R. 46 Mad. 30. (2) (1931) M.W.N. 957.
(3) (1925) I.L.R. 49 Mad. 387.
(4) (1911) I.L.R. 39 Calc. 232, 237 (P.C.).
(5) (1919) 38 M.L.J. 77. (6) (1912) I.L.R. 38 Mad. 114.
(7) (1928) I.L.R. 51 Mad. 533. (P.C.).

option, then he has to refund the consideration received by him. As a result of his exercising the option obligations may arise. There is no obligation under the original covenant to pay. These are not onerous obligations in the eye of the law because they are merely options which might be taken advantage of or not. It is this aspect of the case that distinguishes this case from *Mir Sarwarjan* v. *Fakhiruddin Mahomed Chowdhuri*(1). See *Raghava Chariar* v. *Srinivasa Raghava Chariar*(2). Cases dealing with options to repurchase are exceptions to the rule which says that mutuality between parties is a condition precedent to the granting of specific performance; see Halsbury's Laws of England, Vol. XXVII, page 10, paragraph 14. As regards the point whether section 14 of the Transfer of Property Act is infringed, it is clear that, under section 54 of the Transfer of Property Act, no interest in land flows from a contract of sale of land. On the last point, in Indian Law there is no distinction between legal and equitable estates; see *Rani Chhatra Kumari Devi* v. *Mohan Bikram Shah*(3). See also *Aulad Ali* v. *Ali Athar*(4).

[SUNDARAM CHETTI J.—We do not want to hear you further on this point.]

K. Desikachari replied.

The JUDGMENT of the Court was delivered by

SUNDARAM CHETTI J.

SUNDARAM CHETTI J.—This second appeal arises out of the suit filed by the plaintiff (first respondent) for specific performance of an agreement to resell the plaint-mentioned site. The plaintiff's case is that the suit site belonged to his adoptive father, that it was sold during the minority of the plaintiff by his natural father as his guardian to first defendant's father on 14th December 1912 under a registered sale deed, that there is a stipulation in the sale deed for the re-conveyance of the property to the plaintiff and his heirs for the original price itself, that in violation of that contract the first defendant sold the property to the

(1) (1911) I.L.R. 39 Calc. 232 (P.C.).
(2) (1916) I.L.R. 40 Mad. 308 (F.B.).
(3) (1931) 61 M.L.J. 78 (P.C.). (4) (1927) I.L.R. 49 All. 527 (F.B.).

VENKATACHALAM PILLAI v. SETHURAM RAO.

SUNDARAM CHETTI J.

second defendant on 6th December 1923, that this sale is not binding on the plaintiff, and that he is entitled to enforce specific performance of the agreement to resell on tendering the purchase-money and get a conveyance in his favour. The defendants attacked the plaintiff's claim on several grounds and contended that he was not entitled to specific performance of the alleged agreement. The first Court gave a decree in plaintiff's favour, which was confirmed by the lower appellate Court.

In this second appeal preferred by the second defendant, three main contentions have been raised on his behalf in order to show that the plaintiff could not claim specific performance of the plaint-mentioned agreement. The first is, that the agreement contained in the sale deed, Exhibit A, was not a completed contract but only an offer by the vendee to resell the property to the vendor, which could become a completed contract only on acceptance of the offer by payment of the price, and that, the offer having been at an end by the sale of the property to the second defendant, there was no subsisting offer for acceptance by the plaintiff and as such there was no contract of which specific performance could be claimed on the date of the suit. The second is, that, even if it should be held that there was a completed contract on the date of Exhibit A itself, it was not competent for the guardian of the minor plaintiff to bind him by a contract for the purchase of the site and, as the minor was not bound by that contract, there was no mutuality and consequently specific performance of such a contract is unenforceable in law. The third is, that the stipulation for resale as contained in Exhibit A is void as it is obnoxious to the rule against perpetuities as laid down in section 14 of the Transfer of Property Act.

The covenant in question contained in the sale-deed, Exhibit A, is substantially as follows :—

"If it happens that you or your heirs have to sell the property to others, then you must sell it to the plaintiff or his heirs for the above price and also for such price as may be determined by arbitrators in respect of any building that may be constructed upon the land."

There is some dispute as regards the construction of this clause. It may be understood to mean that, on the happening of the contingency, namely, the determination of the vendee or his heirs to sell the property and thus part with it, the vendee must sell it to the plaintiff or his heirs and that the latter must also purchase it as per the terms of the covenant. In the absence of any words to signify that the repurchase was only optional with the plaintiff or his heirs, it would not be unreasonable to hold that under this contract the vendee was bound to make the offer for resale and the vendor was equally bound to buy it, and we are prepared to hold accordingly. The learned District Judge, however, construed this clause in a different way and was of opinion that, though there was an obligation on the part of the vendee to resell, the vendor's was only an option to repurchase. It is on the basis of this construction that the learned Advocate for the appellant contends that the agreement in question was not a completed contract, but only a standing offer on the part of the vendee. The decision in *Papa Naidu* v. *Munisamy Aiyar*(1) would be on all fours with the present case and doubtless supports his contention. Following the English decisions in *Helby* v. *Matthews*(2) and *Dickinson* v. *Dodds*(3) the learned Judge held that there was a binding offer to resell on the part of the vendee and no agreement to buy on the

(1) (1922) I.L.R. 46 Mad. 30. (2) [1895] A.C. 471.
(3) (1876) 2 Ch. D. 463.

VENKATACHALAM PILLAI v. SETHURAM RAO.

SUNDARAM CHETTI J.

part of the vendor but only an option to repurchase. The view expressed in *Helby* v. *Matthews*(1) that until acceptance of the offer there was no completed contract was adopted. It is also said that an offer would be at an end by the death of the promisor or by the promisor selling it to a third party, the sale being known to the promisee before acceptance. A similar question arose for consideration in the case of *Alagirisami* v. *Kothia Gounder*(2). This case was decided by RAMESAM J. sitting as a single Judge, and he was also a party to the decision in *Munuswami Nayudu* v. *Sagalaguna Nayudu*(3). The learned Judge seems to have adopted the same view by construing the contract as one consisting of an undertaking by the vendee to make the offer for resale whenever he thought of selling the property, and by stating that the vendor who had only an option to repurchase cannot sue for specific performance of the contract but may sue for damages if there was consideration for the contract. But the soundness of this view seems to be shaken by the pronouncement of their Lordships of the Privy Council in an almost similar case; *Sakalaguna Nayudu* v. *Chinna Munuswami Nayakar*(4). In that case the counterpart to the sale-deed provided that the vendee should reconvey the property to the vendor after a period of 30 years from that date, in case the vendor wished to have the property again and upon his paying a sum of Rs. 10,000. It is thus clear that the vendor had the option of repurchasing the property or not. Their Lordships have held that it was not a case of a mere standing offer by the vendee which could ripen into a contract to buy and sell only on the acceptance of that offer by the vendor by tender of the

(1) [1895] A.C. 471.
(2) (1931) M.W.N. 957.
(3) (1925) I.L.R. 49 Mad. 387.
(4) (1928) I.L.R. 51 Mad. 533 (P.C.).

purchase-money. On the other hand, it was distinctly held that there was a completed contract between the parties even on the date of the counterpart document (27th January 1891) and that the right of the vendee under that contract was assignable to a stranger. This decision of the Privy Council was given in an appeal against the decision in *Munuswami Naydu* v. *Sayalaguna Naydu*(1), to which RAMESAM J. was a party. It looks as if this decision of the Privy Council was not brought to the notice of the learned Judge when hearing the case reported as *Alagirisami* v. *Kothia Gounder*(2). We should now take it that the matter is concluded by the decision of the Privy Council, and, on the strength of that authority, it must be held that there was a completed contract between the parties on the date of Exhibit A itself, even adopting the construction put upon the covenant in Exhibit A by the lower appellate Court and urged for acceptance by the learned Advocate for the appellant. The plea that the stipulation in question was not a completed contract and therefore specific performance could not be enforced is unsustainable. This disposes of the first point raised by the appellant.

Coming now to the second point, the contention put forward on behalf of the appellant appears to rest on a much firmer ground. The leading authority on this point is the decision of the Privy Council reported as *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*(3). In that case, the guardian of a minor entered into an agreement with another for the purchase of certain immovable property by the minor. The minor after attaining majority sued for specific performance of that

(1) (1915) I.L.R. 49 Mad. 387. (2) (1931) M.N.N. 957.
(3) (1911) I.L.R. 39 Calc. 232 (P.C.).

VENKATA-CHALAM PILLAI v. SETHURAM RAO.

SUNDARAM CHETTI J.

contract. Their Lordships have laid down the principle of law in the following passage found on page 237:

"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 immovable 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."

The present case is in our opinion governed by the aforesaid decision. The agreement for resale contained in Exhibit A being an executory contract without mutuality, it is unenforceable by either party in a suit for specific performance. An attempt has been made by the learned Advocate for the first respondent to get over the effect of this decision by urging that the first Court has found that this contract was for the benefit of the minor and therefore this fact should enable him to enforce specific performance of the contract. But in the case dealt with by their Lordships of the Privy Council it was found that the contract was validly entered into and was for the benefit of the minor and was even ratified by him. Still, their Lordships held that there was no mutuality and on that ground declared the contract to be invalid and unenforceable. The validity or the enforceability of such a contract does not therefore depend upon the question whether it was conducive to the benefit of the minor or not. That being so, the argument on the first respondent's side is unacceptable.

It is urged on behalf of the first respondent that, inasmuch as there was an undertaking on the part of the vendee to resell with only an option on the part of the plaintiff to repurchase, the contract may be deemed

to be a unilateral contract with no reciprocal obligations and only in favour of the minor plaintiff. Reference was made to the Full Bench decision of this High Court in *Raghava Chariar* v. *Srinivasa Raghava Chariar*(1). The specific question decided in that case is that a mortgage executed in favour of a minor who has advanced already the whole of the mortgage money is enforceable by him. It has also been held that a sale to a minor under similar circumstances is quite good. But, on a careful perusal of that decision, it is clear that the mere fact that a sale or a mortgage is in favour of a minor is not enough to hold that it is valid and enforceable. Where a mortgage or sale has been effected as a completed transaction in favour of the minor and it does not involve the performance of any onerous act by the minor by reason of any contractual obligation in respect of the sale or mortgage, such a sale or mortgage would not be invalid. This is clearly indicated in the following passage on page 313 in the judgment of WALLIS C.J.—

"The question then is whether it makes any difference that the transfer in favour of the minor by way of sale or mortgage is made in consideration of a price paid or a loan advanced by the minor. No doubt according to their Lordships' decision in such a case, the minor could not bind himself by contract to pay the price or advance the mortgage money; but when he has done so and the vendor or mortgagor has executed a registered conveyance in his favour, is there any reason why the transfer in his favour should not take effect?"

It is also said by SRINIVASA AYYANGAR J. that the transfer in favour of the minor cannot be void unless the transfer is conditional on the passing of consideration and the consideration did not pass (page 336). If the test laid down in that decision is adopted, the position in the present case is this. In the first place,

(1) (1916) I.L.R. 40 Mad. 308, 313 (F.B.).

VENKATACHALAM PILLAI v. SETHURAM RAO. — SUNDARAM CHETTI J.

this is not a case where a registered conveyance has been executed in favour of the plaintiff in pursuance of the original contract. On the strength of that contract, the plaintiff seeks to get a conveyance by specifically enforcing that contract. Even granting that under the contract an option to repurchase was reserved to him, want of mutuality must be judged as on the date of that contract. On exercising his option in favour of the repurchase, he has to pay the price mentioned in Exhibit A and also pay such price as may be determined by arbitrators in respect of any building constructed on the land. That being so, how can it be said that under this contract the vendee should simply execute a reconveyance in favour of the plaintiff who has no sort of corresponding obligation? It is true that no building was constructed upon the land and the necessity for payment of the price as fixed by arbitrators has not arisen, but still the plaintiff has to pay the original price for the site. That being so, the Full Bench decision in *Raghava Chariar* v. *Srinivasa Raghava Chariar*(1) is of no avail to the plaintiff. On the authority of the Privy Council decision in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*(2), it must be held that the contract in question is void for want of mutuality and specific performance of such a contract is unenforceable by either party.

The plaintiff's claim must fail on the aforesaid short ground, and it is therefore unnecessary to discuss the third point raised on behalf of the appellant. If the contract embodied in Exhibit A does not create an interest in immovable property, as is clear from the statutory provision in section 54 of the Transfer of Property Act, the case cannot come under section 14

(1) (1916) I.L.R. 40 Mad. 308 (F.B.) (2) (1911) I.L.R. 39 Calc. 232 (P.C.).

thereof. There is some conflict of judicial opinion on this point and several decisions have been cited at the Bar. As the decision on the second point is sufficient for the disposal of this appeal, it is unnecessary to discuss this question.

In the result, the second appeal should be allowed as the plaintiff is not entitled to sue for specific performance of the plaint-mentioned agreement, and his suit is therefore dismissed with costs of second defendant in all the Courts.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

K. V. SRINIVASATHATHACHAR (PETITIONER—SECOND PLAINTIFF), APPELLANT,

1932, August 26.

v.

NARAVALUR SRINIVASATHATHACHAR (RESPONDENT—DEFENDANT), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 54—Applicability of—Portion of undivided estate—Partition of—Decree for, if falls within sec. 54.

Section 54 of the Code of Civil Procedure refers to the partition of an estate assessed to the payment of revenue and not necessarily to the partition of such an estate accompanied by apportionment of the revenue.

Where the plaintiff and the defendant are entitled to a portion of an undivided estate, a decree directing that that portion should be divided into two equal halves does not fall within the terms of section 54. A share of an estate is not equivalent to a share of a portion of an estate; when the decree relates to the separate possession of a share of a portion, that decree does not fall within the terms of section 54.

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* Appeal against Order No. 112 of 1931.