SUKKIRA v. PALANI. — LEACH C.J.

Lal(1). That was a case where a puisne mortgagee whose interest in the property was worth only Rs. 4,000 was applying for leave to appeal to the Privy Council from an order refusing to set aside the sale of the property ordered in a mortgage suit, the property being valued at over Rs. 10,000.

The application for leave to appeal will be dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Madhavan Nair.

1938, March 16.

RAGHUNATHAN, MINOR, BY HIS MOTHER AND NEXT FRIEND ANDALAMMAL (FIRST DEFENDANT), APPELLANT,

v.

P. N. RAVUTHAKANNI AND FIVE OTHERS (PLAINTIFF AND NIL), RESPONDENTS.*

Minor—Contract of sale of immovable property entered into by his guardian—Amount paid as earnest money in respect of—Return of—Minor, liable if.

A minor is not liable to return a sum of money paid to his guardian as earnest money in respect of a contract of sale of immovable property entered into by his guardian on his behalf, since the amount can only be treated as having been paid as security for the performance of a contract which in law is no contract at all.

Pathak Kali Charan Ram v. *Ram Deni Ram*(2) considered.

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* Appeal No. 347 of 1933.

(1) (1919) 4 P.L.J. 415.

(2) (1917) 2 P.L.J. 627.

APPEAL against the decree of the Court of the Subordinate Judge of Ramnad at Madura in Original Suit No. 69 of 1931.

T. M. Ramaswami Ayyar for appellant.

V. N. Venkatavaradachari for second respondent.

P. Rajagopalan for third to sixth respondents.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal raises the question of the liability of a minor to return a sum of money paid to his guardian as earnest money in respect of a contract of sale of immovable property entered into by the guardian on his behalf. On 20th August 1931 Andalammal, the mother and guardian of the appellant, agreed to sell to the respondent the minor's shares in a village. The price agreed upon was Rs. 7,125, of which Rs. 500 was paid in advance. It is common ground that certain creditors of the estate were pressing for the payment of their debts and the intention was to sell the minor's interest in the village to discharge these liabilities. The sale was not completed, and the property was sold by the mother to a third party, the second defendant in the suit out of which this appeal arises. The suit was for a decree for specific performance of the contract, but before the case came on for hearing it was realized that the Court could not grant this relief. An infant cannot contract in this country and a covenant by his guardian for the sale of immovable property cannot be enforced against him ; *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*(1)

(1) (1911) I.L.R. 39 Cal. 232 (P.C.).

RAGHUNATHAN v. RAVUTHA-KANNI. — LEACH C.J.

and *Ramajogayya* v. *Jagannadhan*(1). An application was then made for leave to amend the plaint by adding a prayer for the return of the earnest money. This application was granted, and at the trial the only question which was raised was whether the respondent was entitled to the return of the Rs. 500. The learned trial Judge held that he was, on the ground that the minor was liable, unless it could be shown that he had not received the benefit of the Rs. 500. On this basis he granted a decree for the return of the amount with interest. The appellant challenges the correctness of the decision. The second defendant is not concerned with this question, and has, therefore, not been made a party to the appeal.

It may be taken that it was necessary to sell this property of the minor for the purpose of paying off pressing creditors. This was alleged in the plaint and it was acknowledged in the appellant's written statement that he had to sell the property to the second defendant "owing to the pressing necessities of the creditors." It would appear that it was out of the money which the mother received from the second defendant that the debts were in fact discharged. What has become of the Rs. 500 paid to the appellant's mother by the respondent has not been disclosed. The learned Advocate for the appellant contends that there can be no decree for the return of earnest money paid under a void contract. On the other hand the learned Advocate for the respondent says that, as the contract was entered into in order to raise money to pay off creditors,

(1) (1918) I.L.R. 42 Mad. 185 (F.B.).

the Rs. 500 must be treated as having been paid to the guardian for necessaries or for his benefit.

In our opinion, the appellant is entitled to succeed. It is true that the guardian was compelled to sell the property of the minor to pay off debts for which the minor's estate was liable, and if a conveyance had been executed no doubt the respondent would have obtained a valid title to the property, but the Rs. 500 can only be treated as being security for the performance of a contract which in law was no contract at all. Earnest money is paid as a guarantee that the contract will be performed. JAMES L.J. so held in *Ex parte Barrell. In re Parnell*(1), where there was a contract for the sale of immovable property with a stipulation that a portion of the purchase money should be paid immediately, and his definition was accepted by the Court of Appeal in *Howe* v. *Smith*(2) and by the House of Lords in *Soper* v. *Arnold*(3). In the last-mentioned case Lord MACNAGHTEN observed:

> "The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a guarantee that the purchaser means business."

The price to be paid for the land in the present case was Rs. 7,125, and the Rs. 500 was paid as a guarantee that the respondent would pay the balance. It cannot be regarded as a payment to the appellant or to the appellant's guardian for any other purpose. The respondent says that the contract was not carried out because of the default of the appellant's guardian; on the other hand, the appellant puts the blame on to the respondent.

(1) (1875) L.R. 10 Ch. 512. (2) (1884) 27 Ch. D. 89.
(3) (1889) 14 App Cas. 4

RAGHUNATHAN v. RAVUTHA-KANNI.

LEACH C.J.

It matters not on whose shoulders the blame must be placed. All that we have to consider is the purpose for which this money was paid. The respondent's Advocate does not contend that a minor can be made liable for the return of earnest money paid under a void contract. He says that the payment must be treated as falling within section 68 of the Contract Act or as being for the benefit of a Hindu minor and therefore repayable under his personal law. We are unable to regard the payment as falling within section 68 or as being repayable under Hindu law on the ground that it was paid for the minor's benefit. We can only regard it as being paid by the respondent as a guarantee that he would fulfil his part of the contract and as far as we know it remained with the guardian for this purpose.

The learned Advocate for the respondent has referred us to *Pathak Kali Charan Ram* v. *Ram Deni Ram*(1), which was a case in which a minor member of a joint Hindu family had executed an agreement of sale of immovable property and had received an advance of Rs. 125 as earnest money. The object in selling the property was to defray the marriage expenses of the minor's brother. The Court treated the expenses as being necessary expenses and granted a decree for the return of the earnest money as the contract was not fulfilled. The learned Judges regarded the case as falling under section 68 of the Contract Act. They did not consider the question whether the earnest money should be treated as security for the performance of a void contract. We are unable to accept this decision as embodying a

(1) (1917) 2 P.L.J. 627.

correct statement of the law applying to a case like the one before us.

For these reasons the appeal will be allowed and the suit dismissed with costs in favour of the appellant in both the Courts. The costs of the appellant will include the fee paid to the Court-guardian and also the cost of the printed papers supplied to him.

G.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice,
Mr. Justice Madhavan Nair, Mr. Justice Varadachariar,
Mr. Justice Lakshmana Rao and Mr. Justice Stodart.

PERUMAL CHETTIAR (DEFENDANT), PETITIONER,

v.

KAMAKSHI AMMAL (PLAINTIFF), RESPONDENT.*

1938, February 10.

Promissory note insufficiently stamped—Money lent on—Suit to recover—Maintainability—Sec. 35 of the Stamp Act (II of 1899)—Sec. 91 of the Evidence Act (I of 1872)—Note and loan contemporaneous—Effect.

In regard to the question whether a person who has lent money on a promissory note can sue to recover the debt apart from the note, when the note is inadmissible in evidence owing to a defect in the stamping,

held by the majority of the Full Bench (STODART J. dissenting): Whether a suit lies on the debt apart from the instrument depends on the circumstances under which the instrument is executed. If the promissory note embodies all the terms of the contract and the instrument is improperly stamped no suit on the debt will lie. Section 91 of the Evidence Act and section 35 of the Stamp Act bar the way. But if it does not embody all the terms of the contract, the true nature of the transaction can be proved and, where an instrument has been

* Civil Revision Petition No. 883 of 1935.