

1913
April, 1.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Ryves.
WALIDAD KHAN AND OTHERS (PLAINTIFFS) v. JANAK SINGH
(DEFENDANT).*

Act No. IX of 1972 (Indian Contract Act), section 11—Minor—Sale—Minor vendee subsequently dispossessed by third party—Right of vendee to recover purchase money from vendor.

Where certain zamindari property was sold to persons who were minors at the time of sale, and the purchasers were subsequently ousted on suit by third parties, it was held that the purchasers were at any rate entitled to recover from the vendors the sum which they had paid as purchase money. *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri* (1) and *Mohori Bibee v. Dharmodas Ghose* (2) distinguished.

THE facts of this case were as follows :—

The respondent sold certain zamindari property to the plaintiffs appellants and received Rs. 800, the sale price. The vendees were minors at the time. At the date of the sale, the respondent had no subsisting title to the property. The true owners of the property brought a suit for cancellation of the sale deed and for recovery of possession. The suit was decreed, and the property thus passed out of the plaintiffs' possession. The plaintiffs then brought the present suit against the respondent for refund, "under the terms of the sale-deed and also under the law," of Rs. 800, together with interest, and for the costs incurred by them in defending the former suit. The Munsif decreed the suit in full, except for a reduction of the amount claimed as interest. On appeal the District Judge, holding that the sale transaction was void on account of the vendees' minority, dismissed the suit entirely. The plaintiffs appealed to the High Court.

Dr. *Surendra Nath Sen*, for the appellants :—

The lower appellate court has dismissed the suit on the authority of the ruling in *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri* (1). That case is distinguishable. There, the suit was for specific performance of the contract to sell. Here the sale had taken place, consideration had passed and possession had been delivered. The contract has been executed and the matter has passed beyond the domain of mere agreement. There is a fundamental distinction between a contract and a conveyance, and the

* Second Appeal No. 764 of 1912 from a decree of H. E. L. P. Dupernex, District Judge of Farrukhabad, dated the 15th of March, 1912, reversing a decree of Jotindra Mohan Basu, Munsif, dated the 2nd of September, 1911.

(1) (1911) 9 A. L. J., 33; L. R., 39. (2) (1903) I. L. R., 30 Calc., 539, I. A., 1; I. L. R., 39 Calc., 232.

rights of parties to the two transactions are quite different; *Rashik Lal v. Ram Narain* (1). A transfer in favour of a minor was upheld in the case of *Meghan Dube v. Pran Singh* (2). In that case, no doubt, the minor was not the sole mortgagee; but he was at least one of the mortgagees. After the sale had taken place the plaintiffs were deprived of the property by reason of defect in their vendor's title. They are entitled to refund by the vendor of the purchase money. I rely on the principle of the ruling in *Dattaram Govindbhai v. Vinayak Balkrishna* (3). The plaintiffs are seeking a refund of the purchase money, not on the ground that they were minors at the date of the sale, but on the ground that the purchased property has passed out of their hands through the fault of their vendor. The vendor fraudulently represented himself to be the owner of the property to which he had no subsisting title. He cannot be allowed to take advantage of his own fraud. Therefore, apart from the warranty of title contained in the sale-deed, the plaintiffs are entitled to a refund on grounds of equity.

Munshi *Gulzari Lal* (with him Babu *Satya Chandra Mukerji*),
for the respondent:—

The suit is based on a covenant of title contained in the sale deed. The ground of the suit is either this express contract or an implied contract of covenant of title. The plaintiffs were minors when this contract was made and the question is whether they can enforce it. As has been laid down in the case of *Mohori Bibee v. Dharmodas Ghose* (4), a contract with a minor is absolutely void and unenforceable. Even if it be assumed that the minors were represented by a guardian during the negotiation relating to the sale, still, under the ruling of the Privy Council in 9 A. L. J., cited above, the minors cannot enforce the contract. Then, a sale necessarily involves the idea of a contract. It presupposes a previous mutual agreement and consequently a sale to a minor is void; *Navakoti Narayana Chetti v. Logalinga Chetty* (5). As to the contention that the respondent's conduct amounted to a fraud, there was neither any allegation of fraud nor have the

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(1) (1912) I L. R., 84 All., 273.

(3) (1903) I. L. R., 28 Bom., 181.

(2) (1907) I. L. R., 30 All., 63.

(4) (1908) I. L. R., 30 Cal., 539.

(5) (1900) 19 M. L. J., 752.

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courts arrived at any finding on this point. The suit is not based on tort but upon the agreement in the sale deed.

Dr. *Surendra Nath Sen*, replied.

GRIFFIN and RYVES, JJ :—On the 17th of November, 1905, the defendant Janak Singh sold certain zamindari property to the plaintiffs, who were then minors. On a suit by third parties the plaintiffs were dispossessed. The plaintiffs, having been unable to obtain a refund of the purchase money from the defendant, brought this suit for its recovery and also for the costs incurred in the litigation with the third parties. In defence it was pleaded, *inter alia*, that the contract was null and void, the plaintiffs having been minors at the date of the execution of the sale deed. The first court decreed the suit in part, namely, for the principal of the sale consideration Rs. 800 ; Rs. 119 in respect of the costs in the former litigation, and Rs. 260 as interest on the purchase money at 8 annas per cent. per mensem. The defendant appealed, eight grounds being taken in the memorandum of appeal. The lower appellate court disposed of the appeal on one ground only. In the opinion of that court the case was concluded by the decision of their Lordships of the Privy Council in *Mir Sarwanjan v. Fakhruddin Mahomed Chowdhuri* (1). We think it desirable to set out exactly what was decided by their Lordships in that case, inasmuch as the report of the case, as it appears in the Allahabad Law Journal, is not quite correct (2). Their Lordships state :—“ 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 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 lower appellate court dismissed the plaintiffs' suit. The

(1911) L. R., 39 I. A., 1 ; 9 A. L. J.,

(36) ; I. L. R., 39 Cal., 292.

(2) But cf. errata slip attached to
A. L. J., No. 19 of 1911.—Ed.,

plaintiffs come here in second appeal. Various grounds have been pressed before us. It appears to us that the decision of the Privy Council, referred to above, and the decision in *Mohori Bibee v. Dharmodas Ghose* (1) do not support the decision arrived by the court below. In the latter case it was decided that a money-lender, who had advanced money to a minor on the security of a mortgage, could not enforce the mortgage against the minor, and their Lordships held that justice did not require an order for the return of the money advanced to him with full knowledge of his infancy. We must draw a distinction between the facts which were before their Lordships in *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri* (2) and the facts of the present case. In the case before their Lordships, they had to deal with an agreement to sell. Here we have before us a contract which has been executed. The sale has actually taken place. The plaintiffs have paid the consideration money. They obtained possession of the property, but were subsequently dispossessed. It cannot be said that, in the altered state of affairs which has arisen since the deed of sale, the plaintiffs have not acquired a good cause of action for recovery of the purchase money. So far as the case has been argued before us, we are unable to see any reason why the plaintiffs should be debarred from recovering from the defendant the purchase money which the latter received from them as consideration for the property to which, it has been found, he had no title. It would, it appears to us, be highly inequitable to allow the defendant to retain the plaintiffs' money in his possession, and to hold that the plaintiffs could not recover from the defendant simply because they happened to be minors at the date of the sale. It is quite possible that the transaction might have been of such a nature that the defendant made himself liable under the criminal law for cheating, and it would be strange indeed that a vendor, who might have been held guilty of an offence of cheating, should not be held liable to refund to the plaintiffs the money out of which they have been defrauded. The court below decided the case on a preliminary point, and, as we are unable to agree with the decision, we allow this appeal, set aside the decree of the lower appellate court and remand the case to that court with directions to readmit the

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appeal to its original number in the register and dispose of it according to law. Costs of this appeal will be costs in the cause.

Appeal decreed and cause remanded.

REVISIONAL CRIMINAL

Before Mr Justice Ryves.

EMPEROR v. AZMAT SHAH KHAN AND OTHERS.*

Criminal Procedure Code, sections 517 and 520—Appeal—Jurisdiction—Power of appellate court to pass orders regarding property in respect of which an offence has been committed

Held that section 520 of the Code of Criminal Procedure gives to an appellate court the same power as the court which originally tried a case to pass orders under section 517 of the Code. *Baloram Gogai v. Ohintaram Kohla* (1) followed. *In re Devidin Durgaprasad* (2) distinguished.

IN this case two persons named Azmat Shah and Krishnanand were given licences to manufacture *katha* (catechu) in a village and both of them put down pits for that purpose. There was a dispute between the two as regards the *katha* manufactured, and Azmat Shah forcibly took possession of it from Krishnanand and in doing so caused wrongful restraint to certain persons who were opposed to his doing so. Azmat Shah and some others were convicted by the court of Assistant Sessions Judge of Bareilly and sentenced to three years' rigorous imprisonment each. On appeal to the Court of the Sessions Judge the conviction was upheld but the sentences passed were reduced. The appellate court further ordered that as it was not satisfied that the whole of the *katha* recovered was that taken from Krishnanand, the parties were to be left to establish their claims to it in the Civil Court. The accused applied to the High Court in revision.

Mr. C. Ross Alston, for the applicants.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown; Mr. A. H. C. Hamilton, for the opposite party.

RYVES, J:—On the facts found in this case I cannot interfere with the conviction. But I think that the sentence, even as modified by the learned Sessions Judge, is under the circumstances of the case unnecessarily severe. I accordingly maintain the

*Criminal Revision No. 192 of 1913 from an order of H. N. Wright, Sessions Judge of Bareilly, dated the 10th of February, 1913.

(1) (1904) 9 C. W. N., 549.

(2) (1897) L. L. R., 22 Bom., 844.