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v.  
THE GANGEE  
SUGAR  
WORKS, LD.

Under these circumstances we do not think that there are sufficient grounds why we should grant the certificate under clause (c).

The application fails and is dismissed with costs.

*Application dismissed.*

## APPELLATE CIVIL.

1915  
December, 23.

*Before Justice Sir Pramada Charan Banerji and Mr. Justice Walsh.*  
NARAIN DAS AND ANOTHER (PLAINTIFFS) v. MUSAMMAT DHANIA  
(DEFENDANT).\*

*Minor—Purchase of immovable property by minor—Suit by purchaser for possession of property purchased—Act No. IV of 1882 (Transfer of Property Act), sections 54 and 55.*

A minor is capable of purchasing immovable property; and where such a purchase has been completed by execution and registration of a sale-deed, he can sue to recover possession of the property purchased upon tender of the balance of the purchase money. Such a suit is not a suit for specific performance of a contract and no question of mutuality arises. *Mir Sarwarjan v. Fakhiruddin Mahomed Chowdhuri* (1) and *Mohori Bibee v. Dharmodas Ghose* (2) distinguished. *Shib Lal v. Bhagwan Das* (3), *Bajjnath Singh v. Paltu* (4), *Velayutha Chetty v. Govindaswami Naikien* (5), *Ulfat Rai v. Gauri Shankar* (6), *Munni Kunwar v. Madan Gopal* (7), *Baharuddin v. Rafaqat Husain* (8), *Raghunath Bakhsb v. Haji Sheikh Mahomed* (9) and *Muniya Konan v. Perumal Konan* (10) referred to. *Navakolli Narayana Chetty v. Logalinga Chetty* (11) dissented from.

THE facts of this case were as follows:—

A sale-deed of a house was executed by Musammat Radha and others in favour of Suraj Bhan, a minor. The consideration was expressed to be Rs. 1,350. The executants refused to have the deed registered, but it was compulsorily registered by order of the District Registrar. Suraj Bhan then sued for possession of the house. It was stated that out of the consideration of Rs. 1,350

\* Second Appeal No. 1359 of 1914, from a decree of O. F. Jenkins, District Judge of Agra, dated the 1st of August, 1914, confirming a decree of Shekhar Nath Banerji, Subordinate Judge of Agra, dated the 5th of May, 1914.

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| (1) (1911) I. L. R., 39 Calc., 232. | (6) (1911) I. L. R., 33 All., 657. |
| (2) (1902) I. L. R., 30 Calc., 539. | (7) (1915) I. L. R., 38 All., 82.  |
| (3) (1888) I. L. R., 11 All., 244.  | (8) (1913) 18 Indian Cases, 451.   |
| (4) (1908) I. L. R., 30 All., 125.  | (9) (1915) 18 Oudh Cases, 115.     |
| (5) (1907) I. L. R., 30 Mad., 524.  | (10) (1911) 24 M. L. J., 352.      |

(11) (1909) I. L. R., 33 Mad., 312.

a sum of Rs. 51 only, as earnest money, had been paid. The plaintiff signified his willingness to pay the balance of the consideration remaining due. Both the lower courts dismissed the suit on the ground that the contract entered into with a minor was void. The lower appellate court also remarked that there was a non-joinder of certain defendants. The plaintiff appealed.

Munshi *Damodar Das*, for the appellant:—

There is nothing to prevent a minor from being a transferee, or acquiring ownership of property. Under section 54 of the Transfer of Property Act, a registered instrument of sale passes the full title to the transferee and it is immaterial that a part of the price has remained unpaid; *Baijnath Singh v. Paltu* (1). As transferee and owner of the property a minor is entitled to recover possession thereof from any person who may be in possession. The present suit is one for possession, brought on the basis of the sale-deed which conferred ownership on the plaintiff; it is not a suit for specific performance of a contract. Although the sale-deed is expressed to be in favour of the minor, still there is a recital in it that the consideration has been received from Narain Das, the father and natural guardian of the minor. The receipt for the earnest money also shows that the negotiations for the sale were conducted and completed by Narain Das. The plaint also sets out that the sale was negotiated and concluded through Narain Das on behalf of the minor. The minor himself did not enter into any agreement or personal obligations. Any personal obligations arising out of the negotiation would have to be discharged by Narain Das. It has been ruled that under such circumstances a transfer in favour of the minor is valid and the minor can sue for possession; *Ulfat Bai v. Gauri Shankar* (2), *Munni Kunwar v. Madan Gopal* (3), *Muniya Konan v. Perumal Konan* (4), *Amer Chand v. Nathu* (5). In the case of *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri* (6), which is relied on by the lower court, the minor sued for specific performance of a mere contract to sell.

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(1) (1908) I. L. R., 30 All., 125.

(4) (1911) 24 M. L. J., 352.

(2) (1911) I. L. R., 33 All., 657.

(5) (1910) 7 A. L. J., 887.

(3) (1915) I. L. R., 38 All., 62.

(6) (1911) I. L. R., 39 Cal., 232.

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That ruling does not apply to the facts of the present case where ownership has passed to the minor by virtue of the sale-deed.

As to non-joinder, no necessary party has been left out from the array of parties.

Munshi *Kanhuiya Lal*, for the respondents :—

The present suit is not a suit for possession pure and simple. The plaintiff has to do something before he can ask for possession. Both the contracting parties have still to do something and the contract is not an executed contract. The suit is for specific performance of an executory contract. No specific performance can be obtained of a contract, any one of the parties to which is a minor, or, in other words, where anything remains to be done on a contract with a minor the doing of that thing cannot be legally enforced, as there is no mutuality in such a contract. A sale in its inception necessarily implies mutual agreements as to the terms thereof. There must be mutuality of obligations before a transaction of sale is completed. The imposition and incurring of those obligations involves the existence of competency to contract. A minor, therefore, cannot be a party to a sale transaction. Where the fundamental mutual agreement which forms the basis of a sale is void by reason of the incompetency of either party, the mere fact of the execution of a sale-deed cannot make the whole transaction valid; *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri* (1), *Mohori Bibee v. Dharmodas Ghose* (2), *Navakotti Narayana Chetty v. Logalinga Chetty*, (3). The ruling in I. L. R., 38 All., p. 62, is not in point on a question of contract. It is in my favour so far as the question of specific performance of a contract is concerned. That there was no mutuality of obligations would be obvious from the consideration that a suit by the defendant for the unpaid balance of the consideration would be forthwith defeated on the ground of the plaintiff's minority.

Munshi *Damodar Das*, in reply :—

The case in I. L. R., 33 Mad., 312, relied on by the respondent was not followed in the later Madras case in 24 M. L. J., 352, cited above.

(1) (1911) I. L. R., 39 Calc., 282.      (2) (1902) I. L. R., 30 Calc., 539 (547).

(3) (1909) I. L. R., 33 Mad., 312.

The following cases are also in my favour —

*Raghunath Bakhsh v. Haji Sheikh Muhammad Bakhsh* (1),  
*Bahaluddin v. Rafaqat Husain* (2) and *Shib Lal v. Bhagwan Das* (3).

BANERJI, J.—This appeal arises in a suit brought by Suraj Bhan, a minor, through his guardian and next friend, for possession of a house. It is stated in the plaint that Musammat Radha was the owner of the house and jointly with the defendant and Musammat Jeoni, now deceased, sold it to the plaintiff “through his father and guardian Narain Das” under a sale-deed, dated the 1st of April, 1912; that out of the amount of consideration for the sale they received Rs. 51 as earnest money; that they refused to have the sale-deed registered, but the plaintiff got it compulsorily registered; that Musammat Radha and Jeoni are dead and the defendant is in possession of the house; that the plaintiff repeatedly asked the defendant to receive the balance of consideration money, but the latter refused to take it and has withheld possession. It is further alleged in the plaint that the plaintiff is ready and willing to pay the balance of consideration and it is prayed that it be caused to be paid to the defendant.

The defendant, in her written statement, denied the execution of the sale-deed and pleaded that even if it was executed by Musammats Radha and Jeoni, she was not bound by it, that it was invalid and that no relief could be granted to the plaintiff on the basis of it.

The courts below have not tried the case on the merits. They have treated the suit as one for specific performance of a contract and have held that a minor being incapable of entering into a contract could not purchase property and that the plaintiff is, therefore, not entitled to maintain the suit. On this preliminary ground they dismissed the suit. The learned District Judge relies on the decision of their Lordships of the Privy Council in *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri* (4). In the argument before us the case of *Mohori Bibee v. Dharmodas Ghose* (5), also decided by their Lordships, has been referred to

(1) (1915) 18 Oudh Cases, 115.

(3) (1888) I. L. R., 11 All., 244.

(2) (1913) 18 Indian Cases, 451.

(4) (1911) I. L. R., 39 Cal., 232.

(5) (1902) I. L. R., 30 Cal., 539.

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on behalf of the respondent. In our judgement neither of these rulings has any bearing on the present case. In the case last mentioned the suit was brought against a minor to enforce a contract entered into by him. It was held that such a contract was void and could not be enforced. The former was a suit on behalf of a minor for specific performance of a contract to sell. It was held that such a contract could not be specifically performed. The suit before us is not a suit to enforce a contract against a minor and it is not a suit for specific performance of a contract. The court below is, in our opinion, wrong in holding that this is a suit for specific performance. The suit is not based on a contract; but is founded on the title acquired by the plaintiff under the sale-deed executed in his favour. The sale is referred to as evidence of his title. Where a contract has been made for sale of immovable property and that contract has not been completed by the execution of a sale-deed, no title in the property is vested in the purchaser until the execution of the sale-deed. This is provided in section 54 of the Transfer of Property Act in the following terms:—"A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property." In the case of a transaction which has not advanced beyond the stage of a contract to sell, the remedy is a suit for specific performance of the contract. Where, however, a sale-deed has been executed and, in the case of tangible immovable property of the value of one hundred rupees and upwards, registered, the title to the property vests in, and the ownership of it passes to, the purchaser. And as held in *Shib Lal v. Bhagwan Das* (1) and *Baijnath Singh v. Paltu* (2), this will be so even if the purchase money has not been paid. In such a case the remedy is not a suit for specific performance, but one for possession on the strength of the ownership acquired by virtue of the sale-deed. The present suit is a suit of this last description and not one for specific performance. A sale has been defined in section 54 of the Transfer of Property Act as "a transfer of ownership in exchange for a price paid or promised and part paid and part promised." Pre-payment of price is not a

(1) (1888) I. L. R., 11 All., 244.

(2) (1908) I. L. R., 30 All., 125.

condition precedent to the transfer of ownership and a transaction is none the less a sale if the price has not been paid in whole or in part. By section 55, sub-section (1) (f) of the same Act, it is provided that a seller is bound, on being so required, to give the buyer possession of the property sold. If the whole of the purchase money has not been paid the seller is entitled, under sub-section (3) of the same section, to withhold documents of title. He is also entitled, under sub-section (4), clause (b), to a charge for unpaid purchase money "upon the property in the hands of the buyer." This last clause assumes that the ownership of the property has passed to the buyer. It was held by the Madras High Court in *Velayutha Chetty v. Govindasawmi Naiken* (1), that the "lien of the unpaid vendor of land under section 55 of the Transfer of Property Act is non-possessory. He has only a right to retain the title deeds and to a charge for the unpaid purchase-money, but he cannot retain possession of the property sold against the vendee." As pointed out by the learned Judges, this view is also in consonance with the English law on the subject. (See Fisher on Mortgages, 6th Edition, § 505). It is thus clear that non-payment of consideration does not prevent the transfer of ownership to the buyer and does not entitle the seller to retain and withhold possession. No doubt, on equitable principles, the court will not make a decree for possession in favour of the purchaser without attaching to it a condition directing payment of the purchase money. This was done in the two cases decided by this Court to which we have referred above. But non-payment of the purchase money is, as shown above, immaterial, so far as the question of the vesting of title is concerned. In the present case it was alleged on behalf of the plaintiff that he was always ready and willing to pay the balance of purchase-money but that the defendant had refused to take it. It cannot, therefore, be said that non-payment of the purchase-money vitiates the title acquired under the sale-deed.

The next question to be considered is whether the fact of the minority of the plaintiff affects his right to maintain this suit. The Transfer of Property Act does not declare a minor to be incompetent to purchase property, and we have not been referred

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to any other statutory enactment which disqualifies him from doing so. On the contrary there is a mass of authority in favour of the view that a minor can acquire and hold property. The purchase of property by a minor through his guardian is very common in this country. It was held by this Court in *Ulfat Rai v. Gauri Shankar* (1) that there is "nothing in the Transfer of Property Act which makes a minor incapable of being the transferee of immovable property." The same view was held by the learned Chief Justice and RAFIQ J., in the recent case of *Munni Kunwar v. Madan Gopal* (2). The Calcutta High Court in *Bahaluddin v. Rafiqat Husain* (3) and the Judicial Commissioner of Oudh in *Raghunath Balksh v. Haji Sheikh Mahomed* (4) expressed the same opinion. The only decision to the contrary is that of the Madras High Court in *Navakotti Narayana Chetty v. Logalinga Chetty* (5). With great respect we are unable to agree with the learned Judges who decided that case. It is to be observed that the view taken in this case was not adopted by that Court in the later case of *Muniya Konan v. Perumal Konan* (6). In *Mohori Bibee v. Dharmodas Ghose* (7) and *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri* (8) their Lordships of the Privy Council did not decide that a minor could not purchase property, and we do not understand the effect of those rulings to be to declare him disqualified.

It was strenuously argued on behalf of the respondent that, although the fact of the purchaser in this case being a minor might not have precluded him from maintaining the suit, the circumstance that a great part of the consideration remained unpaid made a difference, that the seller was entitled to retain possession in enforcement of her lien for unpaid purchase money and that she could not sue the plaintiff for the balance of the purchase money, the contract by him to pay it being void by reason of his minority. As we have already pointed out, non-payment of consideration does not prevent a purchaser from acquiring title under his purchase and it is immaterial whether he is a minor or of full age. We have also shown above that the seller's lien for unpaid

(1) (1911) I. L. R., 33 All., 637.

(5) (1909) I. L. R., 33 Mad., 312.

(2) (1915) I. L. R., 33 All. 62.

(6) (1911) 24 M. L. J., 352.

(3) (1913) 18 Indian Cases, 451.

(7) (1902) I. L. R., 30 Calc., 539.

(4) (1915) 18 Oudh Cases, 115.

(8) (1911) I. L. R., 39 Calc., 252.

purchase-money does not entitle him to retain possession of the property sold. We have also pointed out that under the rulings of this Court the decree for possession in a case like this must be subject to the condition that the balance of the purchase-money should be paid by the plaintiff. There would, therefore, be no occasion for the defendant to sue for the purchase-money. Furthermore, the plaintiff's case is that he offered the purchase-money and has always been and still is ready to pay it. If, therefore, he was competent to purchase, the fact of non-payment of the purchase-money, under the circumstances alleged, cannot in law or equity deprive him of the right he has acquired in the property. Moreover the allegation in the plaint is that the purchase was made through the father and guardian of the plaintiff, and in the receipt for earnest money granted by the vendors, which has been produced by the plaintiff, it is stated that the purchase was made by Narain Das (the plaintiff's father and guardian) and that he would pay the balance of price. If this document is genuine, the purchase was made by the plaintiff's father for him and he would be liable for the purchase-money. No question of non-payment of such money therefore arises. In *Muniya Konan v. Perumal Konan* (1) two learned Judges of the Madras High Court observed that "it cannot be denied that a person may purchase property and hold it as trustee for a minor. There is no reason why he should not create a trust by purchasing it in the name of the minor. No contractual obligations are undertaken by the minor in such a case. Any personal obligations arising as between the vendor and the vendee would have to be discharged by the party contracting with the vendor." These remarks are applicable to the circumstances of this case. It cannot be said that the vendor would be in a worse position than the vendee and would be without remedy for the realization of the purchase-money.

For the reasons stated above we hold that the present suit is not one for the specific performance of a contract and no question of mutuality arises; that a minor is competent to purchase property; and that if the sale-deed relied upon by the plaintiff is genuine he has by virtue of it acquired a title to the property sold and is entitled to maintain the suit.

(1) (1911) 24 M. L. J., 352.

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Another ground on which the lower appellate court has decided against the plaintiff is that he has no cause of action against the defendant. This ground is wholly untenable. It is alleged in the 4th paragraph of the plaint that the defendant is in possession of the house claimed and this paragraph is admitted by the defendant in her written statement. There is, therefore, a clear cause of action against the defendant.

We, therefore, allow the appeal, set aside the decrees of the courts below and remand the case to the court of first instance for trial on the merits. Costs here and hitherto will be costs in the cause.

WALSH, J.—I agree with the judgement that has been delivered by my brother Mr. Justice BANERJI. Throughout the argument in Court it seemed to me that the contention on behalf of the respondent was right. It was not until my attention was drawn to section 55 of the Transfer of Property Act, that I could see an answer to what I regarded as the unassailable position taken up by the respondent and affirmed by the judgement in the court below. But looking at section 55 and particularly sub-section (3) and sub-section (4) (b), it is quite clear that provision is there made for a non-possessory lien in favour of the vendor; that is to say, by one part of the section, where there has been a failure to pay the whole of the purchase money, he is apparently entitled to withhold the documents of title, and further, where the title to the property has passed to the buyer, he has a charge upon the property for the unpaid purchase-money in the hands of the buyer. That is inconsistent with his withholding possession. Apart from that section, it seemed to me in the particular circumstances of this transaction, that the vendor was in rightful possession, and the vendor being in rightful possession, the purchaser could not obtain possession. Having regard to section 55, I am now satisfied that that view is fallacious and some trouble might have been saved if attention had been drawn to the section during the argument. It is another illustration of the importance of paying attention to the language of the Code. So long as you keep to the Code, you may make a false step but you are not likely to take the wrong road. The result in this particular case and in all such cases, is obviously to inflict what might be described as injustice upon the

vendor, because it is clear that a minor, under such circumstances as these, would have, and the minor in this particular case had, twelve years within which to exercise his option as to whether he would take possession or not, and during that time the vendor, who would be unable to sue for the purchase-money, would remain in possession of another person's property with certain obligations resting upon him, uncertain as to whether the transaction would ever be completed or not. There are possibly two answers to that. It may be said that a purchaser from a minor must take his chance, inasmuch as the law has set its face against minor entering into any obligations at all. Secondly, it may be presumed to be a somewhat rare occurrence that for a period of no less than two years there should be a purchaser who did not want the property and a vendor who did not want his money. There is probably something behind this case which further investigation will elucidate, and under the circumstances I am not sorry that the result of our decision is that the case goes down to the court of first instance for evidence to be taken on the merits and for the true facts to be investigated. I agree in the order passed.

*Appeal allowed and cause remanded.*

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## PRIVY COUNCIL.

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PARBHU DAYAL (PLAINTIFF) v. MAKBUL AHMAD AND OTHERS  
(DEFENDANTS)\*

And another appeal, two appeals consolidated.

[On appeal from the High Court of Judicature at Allahabad.]

*Civil Procedure Code, 1877, section 583—Decree for redemption reversed on appeal—Restitution—Jurisdiction of court to which application for restitution is made to award mesne profits which are not given by appellate court decree—Suit to redeem.*

A mortgagor sued for redemption of a usufructuary mortgage and obtained a decree from the Subordinate Judge, under which, on payment of the sum decreed to the mortgagee, he was put in possession of the mortgaged property; but the mortgagee appealed to the High Court, which increased the amount payable on redemption by a sum which the mortgagor failed to pay, and the mortgagee thereupon applied to the Subordinate Judge for possession and for mesne profits for the period during which he had been out of possession.

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\*Present:—Viscount HALDANE, Lord FARMOR, Lord WRENCHURCH, Sir JOHN EDGAR and Mr. AMER ALI. J.

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