APPELLATE CIVIL.

Before Justice Sir Shah Muhammad Sulaiman and Mr. Justice Boys.

RAMDIN HAZARI LAL (PLAINTIFF) *v.* MANSARAM MURLIDHAR (DEFENDANT).* 1929 *June*, 25.

Act No. VIII of 1890 (*Guardians and Wards Act*), *sections* 27, 30—*Powers of certificated guardian—Starting a new speculative business—Contract with guardian beyond his powers is voidable—Wagering contracts—Forward contracts for purchase of goods—Act No. IX of* 1872 (*Contract Act*), *sections* 30, 64, 65.

Where the certificated guardian of a minor, who had inherited an ancestral business of trading in cloth and money-lending, started on behalf of the minor an entirely new business of dealings in sugar and entered into forward contracts of a highly speculative character for the sale of sugar, and it was not even alleged that there was any pressure of necessity to do so: *He'd*—

The certificated guardian had no power to start on behalf of the minor a new and speculative business. The powers and duties of a certificated guardian were governed by section 27 and other provisions of the Guardians and Wards Act; and the action of the guardian in question could not be regarded as one for "protection or benefit of the property" within the meaning of that section. The position of a guardian was somewhat analogous to that of a trustee.

A contract entered into with the certificated guardian of a minor, which is beyond the authority of such guardian, is, by analogy with section 30 of the Guardians and Wards Act, a voidable contract and not a void transaction; and, under section 64 of the Contract Act, the party rescinding it must restore any benefit, e.g., earnest money, already received thereunder.

Every forward contract is to some extent speculative, but is not necessarily a wagering contract. The recognized

*First Appeal No. 102 of 1923, from a decree of Aghor Nath Mukerji, Judge, Small Cause Court, exercising the powers of a Subordinate Judge, of Cawnpore, dated the 25th of November, 1922.

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test to be applied is whether at the time of entering into the contract there was a definite agreement or understanding between the parties that the performance of the contract by delivery of goods was not to be demanded, but that differences in price only should become payable. The mere fact that there was a boom in speculation regarding the particular commodity at about the period of the contract, and that in many cases obligations were being settled by the payment of differences, would not prove that the contract was a wager.

Sanyasi Charan Mandal v. *Krishnadhan Banerji* (1), *Sukdedoss Ramprasad* v. *Govindoss* (2), *Kong Yee Lone & Co.*, v. *Lowjee Nanjee* (3), *Chinnaswami Reddi* v. *Krishnaswami Reddi* (4) and *Zinda* v. *Mt. Roshnai* (5), followed.

Sir *Tej Bahadur Sapru* and Dr. *Kailas Nath Katju*, for the appellant.

Messrs. *Uma Shankar Bajpai* and *Muhammad Abdul Aziz*, for the respondent.

BOYS, J. :—This is a plaintiffs' appeal arising out of a suit for damages for breach of contract and the refund of earnest money.

The plaintiffs' case was that they entered into certain contracts with the firm of Mansaram Murlidhar, the defendant, for the purchase of sugar; that they paid the sum of Rs. 11,750 of the total earnest money on seven contracts, and that they received only certain small quantities of sugar on some of the contracts by means, not apparently of actual physical delivery of the sugar, but of delivery orders; that the firm was now owned by Ramsaran, a minor son of Murlidhar, the last original proprietor who died in 1912, the said minor being represented by his certificated guardian Mst. Janki Kunwar; that the contracts were entered into between the 15th of March, 1919, and the 18th of June, 1919; that some of the contracts were actually signed by Ramcharan, a

(1) (1922) I. L. R., 49 Cal., 560. (2) (1927) I. L. R., 51 Mad., 96.
(3) (1901) I. L. R., 29 Cal., 461. (4) (1918) I. L. R., 42 Mad., 36.
(5) A. I. R., 1928 Lah., 250.

minor son-in-law of Mst. Janki Kunwar, the certificated guardian, and that some were signed by a *munib*, Sheolal, and that all the contracts were negotiated by the principal *munib*, Bhawani Shankar.

The defence began by a total denial of everything and the further case as set up may be broadly stated as follows: that the sugar business was a new business and that as such the certificated guardian had no power to start it; that in fact the certificated guardian never did start it but such acts as were done by Ramcharan, Sheolal and Bhawani Shankar were done without the authority of the proprietors of the firm and were done in their own interest; and, lastly, that the contracts were in any case wagering contracts and as such void, and the plaintiffs could not even ask for the return of their earnest money, supposing the payment of such to have been even proved.

* * * * *

The first issue was decided in the plaintiffs' favour, that Ramsaran was the sole proprietor of the defendant firm, and being a minor was properly represented by his mother as certificated guardian and the suit as framed was maintainable. No further contention has arisen before us in regard to this issue.

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The grounds of appeal and the arguments thereon have raised before us what I think may be reduced to five main questions:—

(1) Had the certificated guardian power to start these dealings in sugar?

(2) Were the persons who negotiated and signed the contracts acting on behalf of the firm or acting only on their own behalf?

(3) Was the earnest money alleged to have been paid actually paid, and if so, can it be held

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to have reached the proprietor of the firm and are the plaintiffs entitled to recover it?

(4) Were the contracts wagering contracts?

(5) To what relief, if any, are the plaintiffs entitled?

Boys, J.

The first question may be disposed of briefly. It is beyond dispute, and no suggestion has been made to the contrary, that in the time of the last proprietor, Murlidhar, and for seven years after his death, the business of the defendant firm was confined to dealing in cloth and money dealings, commonly known as "*len den*", and that the firm did not enter into, nor was its name used to cover, dealings in sugar until the beginning of 1919. It is beyond dispute, therefore, that a new business was started in the beginning of 1919. The absence of any power in a certificated guardian to start such a new business, at any rate without the sanction of the court, is in my view settled by the decision of their Lordships of the Privy Council in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (1). In that case the original owner of the firm died leaving five sons, three of them majors, two of them minors, one of the latter of whom came of age during the proceedings. The father had left two businesses, one dealing with fuel-wood and the other with rice and other articles. The family was governed by the Dayabhaga law. Nilratan, the eldest brother and the *karta* of the family, was appointed guardian of the minors. He started a new business in rice at a new place, Orphanganj. This new business, which also dealt in rice, was found as a fact not to be merely an extension of the ancestral business, but to be a new business. Their Lordships did not themselves discuss the powers of a *karta* or of a certificated guardian to start on behalf of the minors in the family and to incur

(1) (1922) I. L. R., 49 Cal., 560.

responsibility for a new business, but they said at page 568: "The inability of a *karta* to impose on a minor coparcener the risks and liabilities of a new business started by himself is fully discussed by both courts, and their Lordships agreeing with the conclusion at which they have arrived on this point do not deem it necessary to enter on a further discussion of this aspect of the case." Their Lordships do not, therefore, lay down directly any proposition of law in this respect themselves. To ascertain to what propositions they gave their assent it is necessary to refer to the judgement of the High Court at Calcutta, reported in *Krishnadhan Banerji* v. *Sanyasi Charan Mandal* (1). Their Lordships of the High Court held on the facts of the case that the starting of the Orphanganj business could not be justified on the ground of necessity, assuming that, had there been necessity, that necessity would have been a justification. They further held that the embarking of a new and speculative trade by the *karta* of a family cannot be said to be for the benefit of the estate. These are, as I understand, the judgements, the propositions of law, material to the present case, with which their Lordships of the Privy Council declared their agreement so far as the powers of a *karta* are concerned. I am unable to distinguish the material facts of this case from the material facts of the case I have been considering, in so far as these propositions are concerned. It cannot be seriously contended, in view of the mass of evidence on the record, that the starting of a new sugar business on behalf of the firm of Mansaram Murlidhar was in the nature of a speculation. In the present case we are immediately concerned with the powers of a certificated guardian. Their Lordships of the Calcutta High Court said further that "whatever the powers of a *karta* may be, the powers of a guardian are more limited", and described a guardian as being in

(1) (1919) 23 C. W. N., 501.

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the position of a trustee. It is true that their Lordships of the Privy Council did not specifically express their agreements with these observations of the High Court at Calcutta, they made no reference to them, but I think it may be taken that the powers of a certificated guardian are in this respect at least not wider than those of a *karta*. I would hold, therefore, that the certificated guardian had not in the present case any power, assuming that she purported to exercise such power, to start a new and speculative business. This, however, may not conclude the matter before us.

The second question that arises is whether Ramcharan and Sheolal in executing, and Bhawani Shankar in negotiating, the contracts were acting on their own behalf under cloak of the name of the firm, or were acting on behalf of the firm and to the knowledge and with the sanction of Mst. Janki Kunwar, even though she had no power to give such sanction. We have had the whole of the evidence laid before us. [After a detailed examination of the evidence the learned Judge arrived at the finding that these three persons were acting on behalf of the firm and with the knowledge and consent of Mst. Janki Kunwar. It was also found that the earnest money was paid to and was received by the firm.]

The fourth question is whether the defendant can show that these were wagering contracts. If he can, the plaintiffs' suit must be dismissed, even though the findings hitherto arrived at might entitle him at least to a recovery of the money paid by him. There can be no question but that the contracts in question were of a speculative nature. But that is not sufficient. I am unable to take this case out of the decision of their Lordships of the Privy Council in *Sukdedoss Ramprasad* v. *Govindoss* (1). Their Lordships there said, after holding that the mere fact that the contracts were of a highly

(1) (1927) I. L. R., 51 Mad., 96.

speculative nature was insufficient in itself to render them void as wagering contracts,—"The authorities cited show that to produce that result there must be proof that the contracts were entered into upon the terms that the performance of the contracts should not be demanded, but that differences only should become payable. Now, in the present case no such definite agreement or understanding was proved. . . . . The law does not affect to enforce mere courtesies." In the present case, counsel for the defendants has been unable to refer us to a single line in either the documentary or the oral evidence that points to any agreement when these contracts were made that actual delivery could not be forced upon or demanded by either side respectively. The most that he has been able to show is that there was a boom in sugar speculation at about the period of these contracts and that in many cases obligations were being settled merely by the payment of differences. On the other hand, there is the definite contract proved between the defendants and Begg Sutherland for the actual delivery of 150 bags of sugar. It would be idle for us to speculate on the meaning of this transaction, for on behalf of the defendants no explanation at all is offered. The defence therefore that these were wagering contracts must fail.

The fifth and final question is, to what relief, if any is the plaintiff entitled? On the conclusions which we have hitherto arrived, the plaintiff would *prima facie* at least be entitled to a refund of the money which was received by the firm, even though he may not be entitled to enforce further his contracts or the consequences of the breach thereof. The relevant provisions of the law are to be found in section 64 of the Contract Act and section 30 of the Guardians and Wards Act. We are not dealing here with the case of a contract made with a minor direct, but a contract made with a certificated guardian. We think that by analogy with section 30 of the Guardians

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and Wards Act the contract was clearly not a void contract but was a voidable contract, and under that section the party rescinding the contract must, if he has received any benefit thereunder from the other party to the contract, restore such benefit so far as may be. On behalf of the defendant it has been contended that it would have to be proved that the money received in this case was received not merely by the guardian but by the minor on whose behalf the guardian acted. This is so, but the question whether the benefit reached the minor need not necessarily be proved by direct evidence. It may be established also by inference from the general facts of the case. For the same reasons that we have given in arriving at our conclusion that the money was paid and received to and on behalf of the firm we hold that the inference is justified that it was received by the minor. It is manifest that direct evidence that the money reached the pocket of the minor could not in many cases possibly be available. The minor might and probably would be of such tender age that no such physical transaction would be possible. It would reach the minor by being credited in the books of the firm of which he is proprietor. We need not labour the conclusions to be drawn in this case from the failure to produce the account-books.

We are satisfied therefore that there is no force in the objection that it has not been established that the money if paid, as we have held it to have been paid, reached the proprietor of the firm. We see no reason therefore why the plaintiff should not have the benefit of the provisions of section 64 of the Contract Act. We have further been referred to the cases of *Chinnaswami Reddi* v. *Krishnaswami Reddi* (1) and *Zinda* v. *Mt. Roshnai* (2). We hold then that the plaintiff is entitled to recover the earnest money paid.

(1) (1918) I. L. R., 42 Mad., 36. (2) A. I. R., 1928 Lah., 250.

I would set aside the decree of the lower court and give the plaintiff a decree for the sum of Rs. 11,750 with costs, at 6 per cent. interest from the date of suit and dismiss the rest of the claim.

SULAIMAN, J. :—I concur in the conclusion arrived at by my learned brother and would only like to add a few words.

Admittedly Murlidhar did no other business than in cloth and money-lending. On his death his minor son became the sole proprietor of the business. The sugar transactions were a complete departure from the ancestral trade and the old line of business. They were also transactions of a highly speculative nature. The business of the firm was being carried on, on behalf of the minor, by his mother Mst. Janki Kunwar who was the certificated guardian. I have no hesitation in holding that Mst. Janki Kunwar the guardian had no authority to start an entirely new business of a speculative character. The duties of a certificated guardian are governed by the provisions of section 27 and his powers regulated by the Act. No doubt a guardian may do all acts which are reasonable and proper for the realization, protection and benefit of the property of the minor of which he is appointed a guardian. His position is somewhat analogous to that of a trustee. Ordinary proprietors do sometimes select investments of a speculative character, but it is not open to a trustee or guardian to hazard the money of the minor in the same way. He cannot be allowed to start an entirely new business of a risky character. Such a course, when not compelled by pressure of necessity (e.g. when the ancestral business is about to fail), cannot be regarded as one for the protection or benefit of the property within the meaning of the section. That the powers of a certificated guardian are limited in this way is amply made

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out by the authority of *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (1). That was a case under the Dayabhaga law where no question of a *karta* of a joint Hindu family as conceived under the Mitakshara law arose. The person who started the new business was a certificated guardian of the minor. Their Lordships clearly laid down that though a minor may be admitted to the benefit of partnership he cannot be made personally liable for any obligation of the firm, though his share in the property of the firm is liable: section 247 of the Contract Act.

That the transactions in dispute in the present case were of a highly speculative character, depending on the rise and fall of the market price several months afterwards, admits of no doubt. It has not been suggested that there was any pressure at all on the guardian to enter into such transactions. They were accordingly wholly unjustified and unauthorized.

As to the question whether the transactions were of a gambling nature, I agree that the finding of the learned Subordinate Judge must be accepted. The fact that these contracts were of a highly speculative character would be insufficient in itself to render them void as wagering contracts. Every forward contract is to some extent speculative but is not necessarily a gambling one. The recognized test is whether the parties agree that there would not be any demand for the delivery of the goods. In *Kong Yee Lone and Co.* v. *Lowjee Nanjee* (2), their Lordships of the Privy Council laid down that "if the circumstances are such as to warrant the legal inference that they (parties) never intended any actual transfer of goods at all but only to pay and receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction but a wager on the

(1) (1922) I. L. R., 49 Cal., 560. (2) (1901) I. L. R., 29 Cal., 461 (467)

rise or fall of the market." The same principle has been reaffirmed by their Lordships in the recent case of *Sukdedoss Ramprasad* v. *Govindoss* (1), where it is laid down that to produce the result of a wager there must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded, but that differences only should become payable. This later case is further an authority for the proposition that the mere fact that in a particular case no delivery actually took place and differences only were paid on previous occasions would not necessarily show that the contract was a wagering one, if at the time when the contract was originally entered into there was no understanding that delivery would not take place. In the present case there is no satisfactory evidence at all to prove any agreement or understanding between the parties that delivery would not be called for and only differences would be paid.

There remains the question of the refund of the earnest money paid by the plaintiff. The point was not put forward prominently in the court below.

The defendant who is the proprietor of the firm is a minor and is being sued by the plaintiff. The minor is represented by his guardian for the purposes of this suit. So far as the proceedings relating to the suit are concerned he is not entitled to claim any special privilege or concession on account of his minority. In the conduct of the suit he is bound by the act of his guardian.

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The only question that remains for disposal is whether the refund of the earnest money paid can be legally ordered. A contract made with a minor direct is undoubtedly void: *Mohori Bibee* v. *Dharmodas Ghose* (2). It would therefore be difficult to order a refund in such a

(1) (1927) I. L. R., 51 Mad., 96 (101) (2) (1903) I. L. R., 30 Cal., 539.

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case under section 65, unless the case is covered by section 68 also; *Motilal Mansukhram* v. *Manekkal Dayabhai* (1). But the contracts in the present case were not entered into with the minor himself but with his certificated guardian. If the guardian had no authority to enter into these contracts, the contracts were voidable. They could not be specifically enforced against the minor when the want of authority was established. Even in cases of an alienation of property belonging to the minor made by his guardian the transaction is only voidable under section 30 of the Guardians and Wards Act, and is not absolutely void. By analogy the present transactions were at their very worst voidable.

Section 64 of the Contract Act would therefore be directly applicable and the party rescinding a voidable contract has to restore the benefit already received : *Chinnaswami Reddi* v. *Krishnaswami Reddi* (2) and *Zinda* v. *Mt. Roshnai* (3).

There can therefore be no doubt that Rs. 11,750, which were paid as earnest money and have gone into the coffers of the firm on our finding, must be restored.

Unlike section 65, section 64 does not use the word "compensation" but only uses the word "benefit". I do not think that the minor can be called upon, at any rate in this case, to pay interest on the earnest money advanced, but we have power under section 34 of the Civil Procedure Code to award interest *pendente lite* and future.

I would accordingly allow this appeal and grant the plaintiffs a decree only for Rs. 11,750 with interest at six per cent. per annum *pendente lite* and future till realisation.

(1) (1920) I. L. R., 45 Bom., 225. (2) (1918) I. L. R., 42 Mad., 36.
(3) A. I. R., 1928 Lah., 250