APPELLATE CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Bennet

MAIDA (DEFENDANT) *v.* KISHAN BAHADUR SINGH AND OTHERS (PLAINTIFFS)* 1934 *January*, 25

Guardian and Ward—Sale by guardian with sanction of District Judge—Security bond against defect of title executed by guardian—Sanction illegally granted and sale avoided by minors—Suit by vendee for damages—Personal liability of guardian—Warranty of title—Breach of warranty—Transfer of Property Act (IV of 1882), section 55(2)—Pardanashin *woman—Covenant of personal liability when enforceable against her—Burden of proof.*

A guardian selling the property of his minor ward with the sanction of the District Judge is not, apart from any covenant personally binding the guardian, personally liable for damages to the vendee if the latter is deprived of the whole or part of the property in consequence of the sanction of the District Judge to the sale being found to be invalid. Any covenants found in the deed executed by the guardian as such should be considered to be covenants binding on the minor, if such covenants are valid. Merely because the guardian acts on behalf of the minor he does not incur any vicarious liability on the failure of the transaction by reason of the District Judge's sanction being held to be ineffective. But if the guardian has expressly or by necessary implication agreed, in his personal capacity wholly apart from his capacity as guardian of the minor, to indemnify the vendee, he would be personally liable.

The mother of two minor sons was their certificated guardian, and she obtained the permission of the District Judge to sell the minors' property. A sale deed was executed by her as guardian of the two minors and also by an adult son in respect of the shares of all three sons. Simultaneously with the sale deed the mother as guardian of the minors, as well as the adult son, executed a security bond indemnifying the vendees against any loss or interference caused by any act of "us, the executants". The minors, on attaining majority, sued to avoid the sale of their shares, and they succeeded on the ground that the permission given by the District Judge was defective in law and invalid. On a suit by the vendees for damages, it was *held* that the covenant in the security bond could not be construed as if the guardian incurred a personal

*First Appeal No. 398 of 1930, from a decree of Jagannath Singh, Subordinate Judge of Basti, dated the 31st of May, 1930.

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liability to indemnify the vendees; it was clearly intended to bind the minors whom she represented; and that if the intention of the parties had been that the guardian would be personally liable it would have been clearly and expressly so mentioned. Further, assuming that the clause in question or a corresponding clause in the sale deed could be construed as implying a personal liability of the guardian, it could not be enforced against her, a pardanashin woman, in the absence of proof that the effect of the clause had been explained to and understood by her.

Held, further, that assuming that the guardian could be considered to be the "seller" and that sub-section (2) of section 55 of the Transfer of Property Act was otherwise applicable, she could not be deemed to have contracted with the buyers that she had power to sell otherwise than under the authority of a permission granted by the District Judge. The permission was expressly recited in the sale deed, and the vendees were fully aware of the nature and extent of her authority. No liability founded on section 55(2) could arise, therefore, in this case. Further, even if any such liability could arise, it would be incurred only in her capacity as guardian, and the vendees could recover from her in that capacity, i.e. from the property of her minor wards.

Dr. *K. N. Katju* and Mr. *Bankey Bihari*, for the appellant.

Dr. *K. N. Malaviya*, for the respondents.

NIAMAT-ULLAH and BENNET, JJ.:—This appeal was preferred by one Musammat Maida who was the principal defendant in the suit out of which it arose. She died during the pendency of the appeal and is now represented by her son Qutubullah and the heirs of the other son Wali Muhammad, who also died during the pendency of the appeal.

The suit was brought by the plaintiffs Kishan Bahadur Singh and three others for recovery of Rs.6,249-12 as damages for certain property having passed out of their possession. The property had been transferred to them by Musammat Maida acting as the guardian of her minor sons Qutubullah and Wali Muhammad under a sale deed dated the 30th of July, 1908.

The circumstances which led to the present litigation are not in dispute. One Namdar died in 1907, leaving his widow Musammat Maida and three sons, Chhedi Qutubullah and Wali Muhammad. Chhedi died in 1915 and is now represented by his heirs, defendants 2 to 4. At the time of Namdar's death and for some time after it Qutubullah and Wali Muhammad were minors. Namdar left shares in several villages. Musammat Maida was appointed guardian of the person and property of her minor sons by the District Judge of Gorakhpur. Namdar was indebted to certain persons. An application was made on behalf of Musammat Maida for permission to transfer the four annas and two pies and two suls share said to belong to her minor sons. The sale was to be made in favour of the present plaintiffs in respect of six annas four pies share belonging to the three sons of Namdar. The District Judge granted permission to Musammat Maida to sell the minors' share. He did not himself make any inquiry as regards the necessity for the alienation but asked a Munsif to investigate and report. On receipt of the Munsif's report the District Judge sanctioned the sale, which was effected on the 30th of July, 1908. On the same date an agreement was executed by Musammat Maida and her son Chhedi, Musammat Maida acting as the guardian of her sons Qutubullah and Wali Muhammad. A share in another village was hypothecated as collateral security. The agreement provided that "If any interference or loss is caused in the share sold or the sale consideration of the vendees by any act of us, the executants, or our heirs, the vendees shall be at liberty to recover the sale consideration together with damages, penalty and costs incurred in court with interest at the rate of annas 4 per rupee per annum to be calculated from the date of execution, from all the rights, interests and zamindari items appertaining or that may appertain to our 6 annas share in mauza Pakri . . ." The vendees obtained possession of the

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share sold to them under the deed to which reference has already been made.

In 1922 Qutubullah and Wali Muhammad instituted a suit for cancellation of the sale deed executed on their behalf by their mother and for recovery of possession of two-third of the property covered by the sale deed, alleging fraud and collusion on the part of the vendees and pleading want of authority on the part of Musammat Maida to transfer their share. Among other pleas the vendees put forward the plea of limitation. The court of first instance negatived the plaintiffs' case of fraud and collusion but held that the sanction given by the District Judge for the sale made by Musammat Maida on behalf of her minor sons was not a valid sanction as it contravened the provisions of sections 30 and 31 of the Guardians and Wards Act. . . . It was eventually held by the High Court in appeal that the permission given by the District Judge was not in accordance with law and, therefore, invalid. In that view the sale was declared to be voidable at the option of the minors and was set aside in respect of the minors' share in the property conveyed by the sale deed.

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The present suit was brought by the vendees on the 7th of June, 1928, claiming damages.

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It should be observed that no part of the plaintiffs' claim is based on any covenant contained in the sale deed and importing personal liability of Musammat Maida. In course of the trial or of the arguments before the trial Judge the plaintiffs appear to have relied upon a clause in the sale deed which according to them made Musammat Maida personally liable for damages in case the vendees were deprived of any portion of the property sold to them or loss was otherwise occasioned to them.

The learned Subordinate Judge held that as each of the three sons on whose behalf the sale deed in favour

of the plaintiffs was executed had a distinct share, and as Chhedi's share conveyed by the sale deed is in possession of the plaintiffs who have not been deprived of any part of it, they cannot claim any damages against defendants 2 to 4. The plaintiffs' claim as against them was, therefore, dismissed. A decree was passed against Musammat Maida for Rs.3,105-6 which represented her liability in respect of the shares of Qutubullah and Wali Muhammad as to which the sale had been set aside.

The judgment of the learned Subordinate Judge so far as it decrees the plaintiffs' claim against Musammat Maida is somewhat sketchy. It does not discuss any of the questions that have been argued before us. Musammat Maida's liability arising from the fact that she executed the sale deed and the agreement in favour of the plaintiffs is assumed rather than judicially determined.

It was argued before us that Musammat Maida merely acted as guardian of her minor sons in executing the sale deed and the agreement in question and that she did not incur any personal liability. It was contended that apart from any personal undertaking a guardian is not liable for damages to the vendee if the latter is deprived of part of the property sold by the guardian on behalf of his or her infant ward. In so far as the plaintiffs may be relying upon any personal undertaking of Musammat Maida, it was argued by the appellants that there is nothing in the sale deed and the agreement which can be construed as imposing a personal liability on her. In any case, it was urged, that if such a liability arises on a proper construction of the two documents, there is no evidence to establish that Musammat Maida, who was a pardanashin lady, understood that she was incurring a personal liability in a transaction in which she acted in a purely representative capacity.

On the general question whether a guardian selling the property of his minor ward is liable for damages

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to the vendee if the latter is deprived of the whole or part of the property in consequence of the permission of the District Judge conferring authority on the guardian to transfer being found to be invalid, I am clearly of opinion that apart from any covenant personally binding the guardian, he or she is not liable personally for damages to the vendee. From the very nature of the case such liability cannot be inferred. The guardian professes to act on behalf of others whose estate he or she is entitled to manage. Any covenants found in the deed executed by the guardian as such should be considered to be covenants binding on the minor if such covenants are valid. Merely because the guardian acts on behalf of the minor he or she does not incur any vicarious liability on the failure of the transaction in consequence of a competent court subsequently declaring that the permission of the District Judge under which he or she acted was ineffective for conferring upon him or her the power to transfer. We cannot read into a deed executed by the guardian in her representative capacity a clause to the effect that in case any loss is occasioned to the vendee the person and the property of the guardian would be liable. We should not be understood as laying down that in no case is the person and property of the guardian liable. If the guardian has expressly or by necessary implication agreed to indemnify the vendee, in his personal capacity wholly apart from his capacity as guardian of the minor whose interest he represents, he would be liable.

Of the rulings cited before us, *Shet Manibhai Premabhai* v. *Bai Rupaliba* (1) has some resemblance to the case before us. In that case the plaintiff having lent a sum of money to the guardian of his infant son, brought a suit against the minor represented by the same guardian, and a consent decree was passed. Subsequently the minor, on coming of age, had that decree set aside. The plaintiff then sued the guardian for

(1) (1899) I.L.R., 24 Bom., 166

refund of the sum advanced by him, alleging that the guardian had represented that she had authority to incur the debt on behalf of the minor and to bind his estate, whereas she had actually no such authority. It was held that the plaintiff could not recover, there having been no such misrepresentation as would support an action for a breach of warranty. It was also held that "Assuming there was a representation, the only possible representation, if the case be treated as coming within section 235 of the Contract Act, was that the defendant represented that she was the agent of her son. But as the plaintiff knew that the son was an infant, he must have been aware that any representation that defendant was her infant son's duly authorised agent was incorrect, for an infant cannot appoint an agent, and consequently no warranty, such as would support a suit, could arise out of such a representation." The foundation of the plaintiff's action in that case was an alleged misrepresentation by the guardian. It was however held, on the assumption that there was a misrepresentation, that the truth being known to the creditor he could not sue for breach of warranty. The case was also argued with reference to section 235 of the Indian Contract Act which provides for cases in which an unauthorised person acts on behalf of another, representing that he had the requisite authority. I do not think that section 235 of the Indian Contract Act is in terms applicable to a case in which the position of the guardian, who is not in all respects the agent of the minor, is to be considered.

In *Sabir Husain* v. *Farzand Hasan* (1), decided by a Bench of this Court, it was held: "There is no rule of general law in force in this province which justifies an inference that a guardian, entering into a contract on behalf of his minor son, renders himself liable as surety, in the absence of an express contract to that effect; nor is there anything in the Indian Evidence Act

(1) (1933) I.L.R., 56 All., 401.

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which justifies a presumption from the circumstances of such a case that a guardian makes himself personally liable." This was a case in which a Muhammadan father had contracted the marriage of his minor son and agreed to pay a certain amount of dower. In a suit by the heirs of the wife for recovery of dower against the estates of the husband and also of his father, both having died in the meantime, the question arose whether the father, who had acted as the guardian of the son on the occasion of the latter's marriage, was liable. In our opinion the principle on which the decision in that case proceeded is applicable to the case before us, so far at any rate as the general aspect of the question is concerned. The learned advocate for the respondents referred us to *Adikesavan Naidu* v. *Gurunatha Chetti* (1), in which a manager of a joint Hindu family had agreed to sell immovable property belonging to himself and the minor members of the family. The manager failed to perform the contract, as it was found that the minors were not bound by it. The opposite party sued the manager for damages, who was held to be liable. We do not think that that case is any authority for the proposition contended for in the present case. The manager of a joint Hindu family agreeing on behalf of the family also agrees on his own behalf. Any breach of the agreement to which he was a party personally rendered him liable because he had expressly agreed to do what he failed to do. In the case before us it is in controversy whether Musammat Maida gave any personal undertaking. If it be found that she did she may be held to be liable.

As already stated the plaintiffs' suit is mainly founded on the agreement executed almost simultaneously with the sale deed. It purports to be on behalf of the minor sons of Musammat Maida represented by her as their guardian, and by the adult son Chhedi. A share in certain property other than that transferred by the sale

(1) (1916) I.L.R., 40 Mad., 338.

deed was hypothecated and it was covenanted that "We, the executants, therefore, . . . give in writing that if any interference or loss is caused in the share sold or the sale consideration of the vendees by any act of us, the executants, or our heirs, the vendees shall be at liberty to recover the sale consideration together with damages, penalty and costs incurred in court, with interest, etc . . . from all the rights, interests and zamindari items appertaining or that may appertain to our six annas share in mauza Pakri . . . as well as from our other movable and immovable properties and persons." I do not think this covenant can be construed as if Musammat Maida incurred a personal liability to compensate the vendee. It was clearly intended to bind the minors whom she represented. One of their properties was specifically hypothecated and the general liability of their person and property was also declared. The words "we, the executants" clearly refer to the sons. There is nothing else in the agreement which can be construed as implying a personal liability of Musammat Maida.

The sale deed contains the following covenant: "We or the minors or the heirs, etc. have not, nor shall have in future, at any rate, any objection regarding the receipt of money or in respect of possession and occupation. If for some reason, or owing to any act on our part, there arises any defect in the share sold, the vendees and their heirs are at liberty to recover possession of the share sold in any way possible, and to recover the amount of consideration with interest, damages and costs, etc. from the persons and movable and immovable properties of us and the minors." Except for an argument which we shall presently mention, the same considerations apply to this clause as to that occurring in the agreement. It is, however, pointed out that the words "we" and "us" in addition to the "minors" imply that the undertaking was given by Chhedi and Musammat Maida. We do not think that it was the intention of the

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executants of the sale deed to declare that Musammat Maida would be liable otherwise than as guardian of her minor sons. The clause is loosely worded, but in our opinion the words "we" and "us" which are the translation of the vernacular "*hamare*" have reference to one of the executants, namely, Chhedi. All that the clause means is that Chhedi and the minors are bound as stated in the clause. The word "*hamare*" is sometimes loosely used for one individual. If it had been the intention of the parties to the deed to provide that Musammat Maida would be personally liable, it is inconceivable to us that that intention would not have been expressly mentioned and should have been left to be inferred from dubious expressions like those referred to. Moreover the clause makes the executants liable on damage resulting to the vendee from any action of their own. It is not said that anything was done by Musammat Maida which deprived the vendee of part of the property sold.

In this connection it was argued by the learned advocate for the appellants that if this clause bears the interpretation which is sought to be put upon it, the plaintiffs must show that it was explained to Musammat Maida and that she fully understood that by executing the sale deed she was incurring a personal responsibility. It is said that Musammat Maida was a pardanashin lady and that any clause adversely affecting her cannot be enforced against her unless it is shown by satisfactory evidence that she had full knowledge of its nature and effect upon her interest. In our opinion this contention has force, if Musammat Maida be considered to be a pardanashin woman. [After discussing the evidence] In our opinion the case must be decided on the hypothesis that she was pardanashin.

Assuming Musammat Maida to be a pardanashin woman and assuming that the clause occurring in the sale deed to which reference has been made can be

rightly construed as implying a personal liability of Musammat Maida, the plaintiffs have in our opinion made no attempt to establish that the clause was explained to and was understood by Musammat Maida in that sense. In *Amarnath Sah* v. *Achan Kuar* (1) it was observed by their Lordships of the Privy Council: "But there is no evidence that she was told that amongst the somewhat profuse heap of words conferring ordinary powers on a general attorney there lurked just three words having a far different effect, the effect, namely, of subjecting her expectant estate to a burden which she was gratuitously undertaking. There is no evidence that at this time she knew anything about a prior mortgage." It can be similarly urged with considerable force in the present case that Musammat Maida could not be expected to realise the effect of the words "we" and "us" as is now sought to be given to them. There is absolutely no evidence that her attention was drawn to that particular clause. It is true that the registration endorsement mentions the fact that the deed as a whole was read and explained to her, but in our opinion the explanation of the deed was wholly inadequate if her attention was not drawn to this particular clause and she was not definitely told what it meant, assuming that the sub-registrar himself was conscious of the meaning which is now put upon it. For these reasons we hold that in the first place the clause properly construed does not imply any personal undertaking by Musammat Maida, and assuming it does, it cannot be enforced against her in the absence of evidence that it was explained to her and she understood that its effect was what is now said to be.

Reference was made in course of the argument to section 55 of the Transfer of Property Act. It was argued that Musammat Maida, who should be considered to be the "seller", is to be deemed to have contracted "that the interest which the seller professed to transfer

(1) (1892) I.L.R., 14 All., 420 (426-427).

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to the buyer subsisted, and that she had power to transfer the same." Reliance is placed upon sub-section (2) of section 55. It should, however, be borne in mind that the presumption arising under that sub-section is subject to a contract to the contrary. Assuming that Musammat Maida can be considered to be the seller and that sub-section (2) of section 55 is otherwise applicable, we do not think she can be deemed to have contracted with the plaintiffs that she had power to transfer otherwise than under the authority of a permission granted by the District Judge. The permission is expressly recited in the sale deed. Any authority which Musammat Maida had to execute a sale deed on behalf of her minor sons is derived from the provisions of the Guardians and Wards Act and the permission given by the District Judge. The plaintiffs were fully aware of the nature and extent of her authority. With their eyes open they took a sale deed from Musammat Maida without scrutinising the legality of the permission under which she was acting. Apart from this, in our opinion, in so far as Musammat Maida can be said to have incurred any liability under section 55(2), she did so in her capacity as guardian, and if the vendees are entitled to recover any compensation they should do so from her in that capacity, that is, from the property of her minor wards. The minors who were held not to be liable could not be bound by any implied covenant such as this. The effect of such an implied covenant is to bind the minors if the sale is valid. The sale having been set aside they or their property cannot be liable under an implied covenant.

The proviso to sub-section (2) of section 55 has an important bearing on this aspect of the case. It is as follows: "Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered, or whereby he is hindered from transferring it." Musammat Maida had

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undoubtedly a fiduciary character in relation to the sale deed executed by her. She should be deemed to have given a limited warranty in terms of the proviso, namely, that the seller (Musammat Maida) had done no act whereby the property was encumbered or whereby she was hindered from transferring it. It is not suggested that she had done anything which curtailed her power of transfer. Any limitations on her power which proved fatal to the sale arose from the defective certificate granted by the District Judge for which she cannot be held responsible.

In the view of the case we have taken Musammat Maida did not render herself personally liable for damages to the plaintiffs who were deprived of the property considered to belong to the minors. In our opinion their suit as against her should have been dismissed. Accordingly we allow the appeal, set aside the decree appealed from so far as it is against Musammat Maida, and dismiss the plaintiffs' suit with costs as against her.

MISCELLANEOUS CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Bennet

VIJAYANANDA GAJPATIRAJ KUMAR OF VIZIANAGRAM *v.* COMMISSIONER OF INCOME-TAX*

1934 *January*, 30

Hindu law—Impartible raj*—Whether a younger son or brother in a* raj *is a member of a Hindu undivided family—Madras Impartible Estates Act (Madras Act II of* 1904*), section* 4*—Right to maintenance—Custom—Presumption—Whether maintenance allowance is a sum received as a member of a Hindu undivided family—Income-tax Act (XI of* 1922*), section* 14(1)*—Income-tax Act, section* 4(3)(viii)*—Agricultural income—Whether maintenance received from a zamindari estate is "agricultural income" of the recipient.*

By a deed of trust executed by the late Maharaja of Vizianagram, making over the possession and management of the estate to the trustee, an allowance of Rs.5,000 a month was

*Miscellaneous Case No. 426 of 1933.