APPELLATE CIVIL.

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice E. M. Nanavutty.

KUNWAR GAURI SHANKAR RAO (DEFENDANT-APPELLANT) *v.* JWALA PRASAD AND ANOTHER (PLAINTIFFS) AND ANOTHER, (DEFENDANT) (RESPONDENTS.)* 1930 *February*, 25.

Pleadings—Case not raised in pleadings and issues—Court, whether justified in making a new case for parties and basing his decision on pleas not raised—Ratification of contract, essential elements of—Minor's contract—Contract by minor, validity of—Agent for a principal not undisclosed, liability of, for a void contract—Second appeal—New case, whether can be allowed to be set up in second appeal.

Where the plaintiff brought a suit for the recovery of Rs. 3,338-10-0, the price of goods sold, on the allegation that the purchase was made by defendant No. 1, who was a minor at the date of the sale, and his manager defendant No. 2; that both the defendants had gone to the plaintiff's shop and the contract was settled with both and there was nothing in the pleadings or issues either to suggest that the estate was a party to the contract or that it was made for legal necessity and the defendant No. 2 had no power to make purchases over Rs. 200 without consulting the mother of defendant No. 1 who was also his guardian, *held*, that the courts were wrong in basing their decision on the findings that the contract was made with the estate and was for legal necessity when no such case was raised in the pleadings and when the defendant No. 1 had no opportunity to answer any such pleas.

The contract by defendant No. 1 being void and illegal as he was a minor and the defendant No. 2 having no authority to make the contract and there being no evidence that the Rani, who was the mother and the guardian of defendant No. 1, had been consulted or had authorised the purchase, there could be no valid ratification by her in absence of the proof of her knowledge of

* Second Civil Appeal No. 311 of 1929, against the decree of Pandit Shyam Manohar Nath Sharga, 3rd Additional District Judge of Lucknow, dated the 12th of August, 1929, modifying the decree of M. Humayun Mirza, Subordinate Judge of Lucknow, dated the 20th of November, 1928.

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the transaction. *La Banque Jacques Cartier* v. *La Banque d'Epargne De La Cite Et Du District De Montreal* (1), and *Marsh* v. *Joseph* (2), relied on.

Held further, that as the position of defendant No. 2 could not at the very best be anything more than that of an agent for a principal who was not undisclosed and who was a minor and as such incompetent to make a contract the plaintiffs were not entitled to a decree against him, the contract being wholly void *Ganga Prasad* v. *Hayat Mohammad* (3), distinguished.

A plaintiff cannot be allowed to set up a new case in second appeal particularly when it would involve questions of fact, evidence in respect of which is wholly wanting.

Mr. *M. L. Saksena*, for the appellant.

Mr. *Radha Krishna*, for the respondents.

SRIVASTAVA and NANAVUTTY, JJ. :—This is a second appeal by the defendant No. 1, Kunwar Gauri Shankar Rao, taluqdar of Nimgaon in the Kheri district. It arises out of a suit for recovery of the price of an electric plant and certain accessories alleged to have been supplied to the defendant-appellant. The plaintiffs are the proprietors of a firm styled the British and American Electric Co., dealing in electric plants and fittings. Their case was that the defendant-appellant purchased from them on credit an electric plant with accessories and other articles for Rs. 3,338-10-0 and that they made a cash advance of Rs. 30. They also claimed Rs. 294 as interest, total Rs. 3,662-10-0. They admitted receipt of Rs. 900 and claimed to recover the balance of Rs. 2,762-10-0. Subsequently they impleaded Mr. W. Macgregor, manager of the Nimgaon estate as defendant No. 2, on the allegation that the purchases in suit had been made through him and claimed that if

(1) (1887) 13 A.C., 111. (2) (1897) 1 Ch. 213.
(3) (1919) 22 O.C., 109.

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the defendant No. 1, be not held liable for the whole or any portion of the claim, a decree for the same, be passed against the defendant No. 2. Rani Surat Kuar who is the certificated guardian of defendant No. 1, filed a written statement raising various pleas. One of these pleas was that defendant No. 1, was a minor and as such incompetent to make any valid contract. She also pleaded that the manager, defendant No. 2, had no power to make any purchases. The defendant No. 2, denied his being a party to the contract and said that his only concern with the transaction in suit was that he had as a servant of the estate, settled the price of the engine when there arose a dispute about it between the contracting parties. For the rest he adopted the pleas raised on behalf of defendant No. 1. The plaintiffs admitted that the defendant No. 1, was a minor when the contract in suit was entered into but pleaded by way of rejoinder that the contract in question had been "ratified by the guardian of the defendant No. 1 as she sent Rs. 900 towards the price."

The learned Subordinate Judge of Lucknow who tried the suit rejected most of the defences raised on behalf of the defendants. He found that the contract was in fact made between the estate of defendant No. 1, represented by the manager, on the one hand and the plaintiffs on the other, and that the manager's act even though unauthorized at first was ratified by the subsequent conduct of the mother of defendant No. 1. He fixed the total price of the goods supplied at Rs. 2,819-4-0 only and allowed interest at 12 per cent per annum. After deducting the sum of Rs. 900 paid to the plaintiffs he gave them a decree for Rs. 2,168-13-0. The defendant No. 1 appealed against the decree passed in the plaintiffs' favour and the plaintiffs also filed cross-objections. The learned Additional District Judge agreed with the trial court that the contract had been entered into by the defendant No. 2 as the manager of the estate

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and had subsequently been ratified by the certificated guardian of defendant No. 1 who was in charge of the estate. He also found that the purchases in question had been made in connection with the marriage of defendant No. 1's sister which constituted a legal necessity. In the result he dismissed the appeal. As regards the cross-objections he found that the goods purchased were worth Rs. 3,338-10-0 as alleged by the plaintiff and that they were entitled also to future interest from the date of the first court's decree. He modified the decree accordingly.

The main contention urged on behalf of the defendant appellant is that the courts below have completely ignored the pleadings and made out an entirely new case for the plaintiffs in holding that the contract was made with the estate and that it was for legal necessity. We think that the contention is well founded. We have read and re-read the plaint as well as the statement made by the plaintiffs' pleader in the course of oral pleadings recorded by the court on the date of issues. We fail to discover one word therein which might even remotely suggest that the contract was made with the estate or that it was for any necessity. All that was alleged was that the purchase was made by defendant No. 1 "through defendant No. 2" and that "the contract was settled by both the defendants and they had both gone to the plaintiffs' shop for the purpose." The issues which were framed on this point and in respect of which the parties went to trial were in the following terms :—

(1) Whether the plaintiffs sold things per list attached to the plaint to the defendant No. 1 through the agency of the defendant No. 2 for Rs. 3,338-10-0 as alleged?

(2) (*a*) Whether the defendant No. 1 was bound by the contract and whether his guardian ratified it?

(3) (*b*) If not, whether the defendant No. 2 is liable personally to the plaintiffs to make good the price?

There is nothing in these issues either to suggest that the estate was a party to the contract or that it was made for legal necessity. Sital Prasad, plaintiff No. 2 was the only witness examined on the plaintiffs' behalf. The learned counsel for the plaintiffs-respondents has not been able to refer us to anything in the statement of this witness which could support the view that the estate was a party to the contract. All that he did say was that the installation was required in connection with the marriage of the sister of the defendant No. 1. Defendant No. 2 was examined as witness on his own behalf. He denied making any contract with the plaintiffs and said that he had authority to make purchases only up to Rs. 200 without consulting the Rani. There is nothing in his evidence to suggest that the purchases in question were made with the consent of the Rani or on behalf of the estate. It is striking that not a single question was put to the defendant No. 2 in cross-examination about the alleged necessity. We are under the circumstances constrained to hold that the courts below have acted wrongly in basing their decision on the findings that the contract was made with the estate and was for legal necessity when no such case was raised in the pleadings and when the defendant No. 1 had no opportunity to answer any such pleas.

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It was also argued on behalf of the appellants that the contract by the defendant No. 1 who was a minor being void, no question of ratification arises and that even if it did there was absolutely no evidence to establish the alleged ratification. We are of opinion that this contention also must succeed. As pointed out above there is absolutely no evidence to show that the estate was a party to the contract or that it was entered into on behalf of or with the consent of the Rani. If the contract was

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entered into by the defendant No. 1, then it was clearly void and illegal as at the time of the making of the contract he was admittedly a minor. If on the other hand the contract, in spite of his having denied it on oath, is supposed to have been entered into by defendant No. 2, even then according to his statement which stands unrebutted he had no authority to make purchases in excess of Rs. 200 without consulting the Rani. There is no evidence about the Rani having been consulted or having authorized the purchases. It follows therefore that he had no authority to make the contract. In any case we are satisfied that the finding of the lower court on the question of ratification is incorrect and cannot be accepted. The mother of defendant No. 1 is admittedly a *pardanashin* lady. There is absolutely no evidence to show that she had any knowledge of the transaction. In *La Banque Jacques Cartier* v. *La Banque d'Epargne De La Cite Et Du District De Montreal* (1), their Lordships of the Judicial Committee observed that "acquiescence and ratification must be founded on a full knowledge of the facts, and further it must be in relation to a transaction which may be valid in itself and not illegal and to which effect may be given as against the party by his acquiescence in and adoption of the transaction." Again in *Marsh* v. *Joseph* (2), it was observed that "to constitute a binding adoption of acts *a priori* unauthorized, these conditions must exist: (1) the acts must have been done for and in the name of the supposed principal, and (2) there must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were."

The plaintiffs in the oral pleadings already referred to pleaded ratification only on the ground that the defendant No. 1 had sent Rs. 900 towards the price. There

(1) (1887) 13 A.C., 111. (2) (1897) 1 Ch., 213 (246).

is absolutely no evidence to bring this home to the defendant No. 1. The lower courts have however relied upon the fact mentioned in the oral evidence that the electric fittings were made in the house occupied by the mother of defendant No. 1. In the absence of any evidence at all to prove her knowledge of the transaction we are unable to make any inference of ratification from it. We are therefore of opinion that the plaintiffs had entirely failed to prove that the contract in question was ratified by the mother of the defendant-appellant.

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The learned counsel for the plaintiffs-respondents also tried to support the decree passed in the plaintiffs' favour by reference to sections 68 and 70 of the Contract Act. No such case was set up in any of the courts below and we find ourselves unable to allow them to set up this new case at such a late stage more particularly when it involves questions of fact, evidence in respect of which is wholly wanting.

Lastly he argued that if the plaintiffs' case as against defendant No. 1 must fail, they might be given a decree against defendant No. 2. The position of defendant No. 2, so far as we can judge from the pleadings and evidence, cannot at the very best be supposed to be anything more than that of an agent for a principal, who was not undisclosed and who was a minor and as such incompetent to make a contract. Supposing it to be so the learned counsel for the plaintiffs has been unable to refer us to any authority which would in such a case entitle the plaintiffs to a decree against the agent when the contract is wholly void. Reliance was placed on *Ganga Prasad* v. *Hayat Mohammad* (1) but this case deals with the liability of a surety and is quite distinguishable.

The result therefore is that we allow the appeal, set aside the decision of the lower appellate court and dismiss the plaintiffs' suit. In the circumstances of the case we direct that the parties will bear their own costs throughout.

Appeal allowed.