LETTERS PATENT APPEAL.

Before Mr. Justice Mya Bu, and Mr. Justice Sharpe.

1937

Dec. 1.

A.R.M.N.A. CHETTYAR FIRM

v.

R.M.V.S. CHETTYAR AND OTHERS.*

*New question of law raised in court of last resort—Entertainment of the plea—Evidence to support the plea—Security bond by guardian-*ad-litem *of minors—Charge on minors' landed property—Transaction assailed in lower courts as fraudulent and collusive—Point of guardian's power to create charge raised only in High Court—Lack of necessary material to decide new point.*

A question of law raised for the first time in a court of last resort will receive consideration only if it is based upon facts either admitted or proved beyond controversy.

Chhote Lal v. *Chandra Bhan*, I.L.R. 45 All. 59; *Connecticut Fire Insurance Co.* v. *Kavanagh*, (1892) A.C. 473; *M.E. Moolla Sons, Ltd.* v. *Burjorjee*, I.L.R. 10 Ran. 242 (P.C.); *Skinner* v. *Nannihal Singh*, I.L.R. 35 All. 211 (P.C.), referred to.

A charge on landed property created under a security bond was challenged throughout the earlier proceedings on the ground that it was a fraudulent and collusive transaction within s. 53 of the Transfer of Property Act. It was only in the Letters Patent appeal that the appellant sought to set it aside on the ground that the property charged belonged to minors, and that their guardian-*ad-litem* had no power to deal with it for the purpose of obtaining a stay of execution proceedings. This new ground was merely touched upon in second appeal.

Held that there were not on the record sufficient facts for the Court to determine one way or the other whether the proceedings leading to the execution of the security bond were in the nature of a compromise within Order 32 of the Civil Procedure Code, and whether the trial Court had sanctioned the compromise, and therefore the new point raised could not be decided in a second appeal or in a Letters Patent appeal.

P. B. Sen for the appellant. A guardian-*ad-litem* of a minor represents the minor in a suit, but he has no power whatever to deal with or alienate any property of the minor. Only a guardian appointed under the Guardians and Wards Act can deal with the property of the minor, but even in his case restrictions are placed

* Letters Patent Appeal No. 3 of 1937 arising out of Special Civil Second Appeal No. 390 of 1936 of this Court.

upon his powers by the Act. Under O. 32, r. 6 of the Civil Procedure Code, a guardian-*ad-litem* cannot receive any money on behalf of the minor without leave of the Court. The provisions of O. 32 give no power of any kind to the guardian to deal with the minor's immovable property, and an executing Court has no jurisdiction to permit a guardian-*ad-litem* to charge a minor's property. *Mata Din* v. *Ahmad Ali* (1); *Imambandi* v. *Mulsaddi* (2); *Maung Thin Maung* v. *Ma Saw Shin* (3). Even a conveyance by the guardian of the property of the minor without the previous sanction of the Court which appointed him was held invalid, though the sale was effected with the sanction of the executing Court. *Dwijendra Mohan Sarma* v. *Manorama Dasi* (4). See also *Sarju* v. *District Judge of Benares* (5).

To bind a minor by a compromise decree it must be in accordance with the provisions of O. 32, r. 7, and it must be beneficial to the minor. In this case there is no advantage to the minors. See Sir Dinshah Mulla's Civil Procedure Code, p. 953.

There is sufficient material on the record to enable the Court to decide this legal point. There are the two petitions of the guardian-*ad-litem* and the Court's order granting the petitions and the bond executed by the guardian.

Bhattacharya for the 1st respondent. S. 29 of the Guardians and Wards Act cannot be taken into consideration when the Court is considering a compromise effected under O. 32, r. 7 of the Civil Procedure Code. *Chet Ram* v. *Bhim Sain* (6); *Biku Halwai* v. *Mohesh Halwai* (7).

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(1) I.L.R. 34 All. 213.
(2) I.L.R. 45 Cal. 878.
(3) I.L.R. 11 Ran. 193.
(4) I.L.R. 49 Cal. 911.
(5) I.L.R. 31 All. 378.
(6) A.I.R. (1930) Lah. 250.
(7) 8 C.L.J. 266.

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Only the minor can challenge the transfer of his property by his guardian to effect a compromise. It is not open to the creditor to do so. It is not at all clear from the record how and in what manner a compromise falling within O. 32 of the Code was arrived at. The appellant is raising for the first time a new point, to decide which there are no materials on the record.

MYA BU, J.—After a lengthy hearing of the arguments of the counsel in this case we find that the question for decision lies within a narrow compass.

The proceeding before us is a Letters Patent Appeal lodged upon a certificate granted by the learned Judge who decided the second appeal arising out of Civil Regular No. 4 of 1936 of the Subdivisional Court of Insein. The suit was one under Order XXI Rule 63 of the Civil Procedure Code instituted by the appellant against the four respondents, the first of whom had on the 30th August 1935 obtained a money decree against the second, third and fourth respondents as heirs and legal representatives of their deceased father in Civil Regular No. 61 of 1935 of the Township Court of Hlegu. At the time of the passing of the decree these three judgment-debtors were minors who were represented in Civil Regular No. 61 of 1935 by their guardian-*ad-litem* Muthuswamy. The first respondent on the 2nd September 1935, made an application for execution of the decree in Civil Execution No. 94 of 1935. The mode in which the execution was sought was stated in the petition :

"By attachment and sale of the following properties belonging to the judgment-debtors, as per particulars given below :

[His Lordship set out the description of the house and house-site sought to be attached.]

On the filing of this application the Court ordered issue of notice returnable on the 13th September.

At the time of the passing of the decree there were two other suits, one by the appellant, and the other by K.A.R.K. Chettyar Firm, instituted before the filing of the Civil Regular No. 61 of 1935, pending in the same Court. There was also pending in the same Court another suit being Civil Regular No. 77 of 1937 which was filed by the respondent firm after the institution of Civil Regular No. 61 of 1935. In each of these suits a money decree was claimed against the estate of the deceased father of the second, third and fourth respondents, and in all of them these respondents were represented by the same guardian-*ad-litem*, Muthuswamy.

In Civil Execution No. 94 of 1935 two applications were filed by Muthuswamy in his capacity as guardian-*ad-litem* of the minor on the 10th September 1935. In one of them he asked for time for payment of the decretal amount, till the 15th March 1936, stating that he was willing to give the property mentioned in the application for execution as security for the due payment, while in the other he prayed that leave might be granted to him to give that property as security. When these two petitions were presented to the Court the learned Judge ordered them to be put up with the case on the 13th September. On the 13th September the application for time for payment of the decretal amount till the 15th March 1936 was allowed while on the application for leave to give the property as security the word "Granted" was written. The result was that on the very day, namely, the 13th September, a security bond was executed by Muthuswamy as guardian-*ad-litem* of the judgment-debtors creating a charge upon the property mentioned in the application for execution and the bond was duly registered. This was admittedly the only asset of the estate of the deceased.

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On the 13th September the first respondent obtained a decree in Civil Regular No. 77 of 1937, and on the next day, the 14th September, the first respondent applied for execution of that decree in Civil Execution No. 97 of 1935 by attachment of the same property which is the subject matter of the security in the aforesaid bond, and for sale thereof, subject to the incumbrance created by the bond. By that time the appellant firm and the firm of K.A.R.K., having obtained their decrees, applied for execution thereof by attachment and sale of the same property and lodged their objection to the first respondent's prayer in Civil Execution No. 97 for sale of that property subject to incumbrance. In so doing they challenged the validity of the incumbrance created by the security bond on various grounds, but their objections were over-ruled and consequently the appellant firm filed the suit from which this appeal has arisen, under Order XXI, Rule 63 of the Civil Procedure Code.

The suit was based upon allegations tending to show the fraudulent and collusive nature of the transaction culminating in the execution of the security bond, the validity of which transaction was therefore attacked as being a fraudulent and collusive transaction. The main and the only idea underlying the appellant's case as made out in the plaint was that the transaction was of the nature voidable under section 53 of the Transfer of Property Act. No doubt, there are many suspicious elements in the transaction and if only section 53 of the Transfer of Property Act applied to the case there would have been little difficulty in the appellant's way of getting the transaction avoided. The appellant succeeded upon that footing in the Court of first instance ; namely, the Subdivisional Court of Insein, but on appeal by the first respondent, the learned District Judge pointed out that section 53 of the Transfer of

Property Act did not apply inasmuch as the transaction was between the debtor and the creditor. The learned District Judge accordingly reversed the decree of the Court of first instance.

Thereafter the appellant lodged the second appeal in this Court. One of the grounds raised in the memorandum of second appeal was that the security bond was void as being a transfer of property of the minors by a person who had no authority to convey the minors' property. In the course of the argument before the learned Judge who decided the second appeal, the learned Advocate did not abandon the points on which the District Court had given its decision against him. Consequently, there appears to have been considerable amount of discussion upon those points which, in the circumstances of the case, would only help to confuse the main issue before the learned Judge, but would not be sufficient to enable the Court to come to the conclusion that section 53 of the Transfer of Property Act would be of avail in favour of the appellant in the case.

When the learned Judge dismissed the second appeal the appellant made an application for a certificate under Clause 13 of the Letters Patent, stating as his main ground that the security bond was void inasmuch as it was executed by the guardian-*ad-litem* who had no authority to dispose of the minors' property. In granting the leave the learned Judge observed that the learned Advocate for the appellant in the course of his argument in the second appeal touched upon this point, which, to our mind, suggests that although the learned Advocate argued the point before the learned Judge in the course of the second appeal, yet he did not press the point as definitely and precisely as he should, but gave greater prominence to the other grounds which he raised in that appeal.

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Be that as it may, the point for our consideration is whether the question of the validity of the security bond as being a transfer of the minors' property by the guardian-*ad-litem* could be properly raised in the second appeal, and, consequently, in this Letters Patent Appeal. This question was not raised anywhere, or at any time, from the institution of the suit under Order XXI, Rule 63, up to the time that it came before this Court on second appeal.

In support of his contention that this point could be raised in the second appeal although it was not raised in any of the prior stages of the proceedings initiated by the plaint in the suit, the learned Advocate for the appellant relies on the principle enunciated by Lord Watson in *Connecticut Fire Insurance Company* v. *Kavanagh* (1), in the following words :

> " When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

This principle was adopted in the Privy Council case of *M.E. Moolla Sons, Limited* v. *Burjorjee* (2). In this case a claim was made by the respondent against the appellant company which was in liquidation for damages for breach of contract to purchase immovable property. The only question in issue in the Courts in

(1) (1892) A.C. 473. (2) (1932) I.L.R. 10 Ran. 242.

India was whether the agreement for sale (on the face of which the purchaser was one M.E. Moolla) had been entered into by Moolla on his own account or whether the company was an undisclosed principal of Moolla in respect of the agreement. Upon an appeal to the Privy Council by the liquidator he contended for the first time that the agreement was inoperative as it was unregistered. The facts before the Board indicated, but were insufficient to determine definitely, that there had been a course of conduct, or an agreement, on the part of the liquidator precluding him from raising any point in the proceedings except that as to the respective positions of the Company and Moolla in regard to the agreement in question, which had been dealt with by the Courts in India. In those circumstances, their Lordships held that the contention as to non-registration should not be considered by the Board.

The principle therefore is that a question of law raised for the first time in a court of last resort should receive consideration only if it is based upon facts either admitted or proved beyond controversy.

If the conveyance which is created by the security bond was in the nature of a private alienation there can be no dispute of the want of authority in the guardian-*ad-litem* merely as such to convey the minors' property and the conveyance would, upon that ground, be void and of no effect whatever ; but, in the circumstances in which the security bond was executed, the question as to its validity or not must depend upon circumstances which had not been brought to light in the course of the proceedings.

Under Order XXXII, Rule 7, sub-rule (1) :

"No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter

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into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian."

and under sub-rule (2) :

"Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor."

It is therefore contended on behalf of the first respondent that the proceedings leading to the execution by the guardian-*ad-litem* of the security bond was in the nature of a compromise, and the state of the facts before the Court is such that it cannot be definitely determined that the proceeding was not in the nature of such a compromise. The learned Advocate for the first respondent urges that the two applications of the 10th September 1935 should be taken together and not separately and that they were before the Court at the same time when the order of the 13th September was recorded in the diary and the word " Granted " written on the application for grant of leave to give the property as security. It is true, as pointed out by the learned Advocate for the appellant, that these documents and the orders passed thereon do not definitely show that the whole proceeding was in the nature of a compromise and the Court has nowhere expressly recorded that it was sanctioning an agreement or compromise on behalf of the minors ; but if these documents and the orders passed thereon are taken together a state of affairs is produced which will at least make it impossible for us to assert definitely that the proceeding was not in the nature of a compromise, and the word " Granted " was not written in the way of granting leave to the guardian-*ad-litem* to enter into the compromise, namely, the obtaining of postponement for payment of the decretal amount upon furnishing security of the very property which was made the subject matter of the security.

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In these circumstances, the question as to the validity or otherwise of the security bond executed by the guardian-*ad-litem* depends upon certain state of facts which the materials on the record are insufficient to enable us to determine definitely either one way or the other. That being the case, it follows, in my opinion, that the appellant should not be permitted in the second appeal, and much less now, to raise the question of law upon which he has founded the present appeal.

This appeal therefore fails and it is dismissed. The appellant will pay the respondents' costs in this appeal Advocate's fee eight gold mohurs.

SHARPE, J.—It is necessary in this case to examine quite briefly the history of the proceedings.

The appeal arises out of Civil Regular No. 4 of 1936 in the Court of the Subdivisional Judge, Insein. The relief there claimed by the plaintiff was for a decree declaring that the charge created on a certain house in favour of R.M.V.S. Chettyar Firm, who are the first respondents before us, was null and void against the plaintiff, namely, A.R.M.N.A. Chettyar Firm, who are the appellants before us, and other creditors of one Swaminathan deceased. The plaint makes it quite clear that the case there set up was one of fraud and collusion. The written-statement of the present first respondent denies that fraud and collusion and of the four issues framed the third issue was :

"Whether the security given by the guardian-*ad-litem* Muthuswamy in C.E. No. 94 of 1935 of the Township Court of Hlegu at Insein is fraudulent preference to the 1st defendant over all other creditors? If so what is its legal effect?"

The learned Subdivisional Judge, in the course of his judgment, dealt with the third issue very fully and came to the conclusion that the intention to defeat or

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delay the creditors of the transferor was clearly apparent from the conduct of Muthuswamy.

I am quite satisfied that before the Subdivisional Court the question of fraud and collusion was the only question that was really raised.

Then the matter went on appeal to the District Court and there the learned District Judge said in the course of his judgment "The main point in this appeal is whether section 53 of the Transfer of Property Act can be applied", section 53 of the Transfer of Property Act being the section dealing with fraudulent transfers. That, so far as the District Judge was concerned was the main point in the appeal before him and he dealt with it on that basis.

Then the matter came in special civil second appeal to the High Court from the decision of the District Judge.

It is true that the first ground of that appeal alleged that the guardian had no power to transfer or deal with the immovable property in question but in other grounds of appeal appeared again the allegation of fraud and collusion. In the course of his judgment in the second appeal Mr. Justice Spargo said

"the transaction is now attacked merely on the ground that it is a preference.";

and he also said

"For the appellant Mr. Sen was at pains to point out what he described as the suspicious nature of the manœuvres adopted by the R.M.V.S. firm."

He also said

"Mr. Sen claimed that his client is entitled to avoid the security bond because it preferred one creditor to another,"

and Mr. Justice Spargo added:

"He (that is to say, Mr. Sen) also referred to *Greender Chunder Ghose* v. *Mackintosh* (1). This case does not seem to me to afford

(1) I.L.R. 4 Cal. 897.

much help either, because the point for decision in the present case is whether the security bond can be declared null and void under section 53 of the Transfer of Property Act."

So there, in the second appeal, it has clearly been stated that the real contest was on the question of whether the security bond was null and void under section 53 of the Transfer of Property Act.

In his judgment Mr. Justice Spargo said first

"That section 53 of the Transfer of Property Act does not apply to this case is abundantly clear."

and later on :

"It is therefore abundantly clear that no relief can be granted to the plaintiff in this suit, which claims relief under section 53 of the Transfer of Property Act. Mr. Sen asked for permission to amend his plaint into a plaint asking for administration, having come round to the view that that was the proper form of the suit during the course of the argument. This I could not allow, because it is a suit of a totally different nature from the suit already filed."

So it appears that right up to that stage, the second appeal, in all three Courts the main decision sought was on the question of fraud and collusion.

Mr. Justice Spargo's judgment was delivered on the 31st May 1937 and it was not until almost a month later, that is to say on the 26th June, that Mr. Sen on behalf of the appellant filed an application for leave to appeal under Clause 13 of the Letters Patent. On the hearing of that application Mr. Justice Spargo made this entry in the diary when he gave leave to appeal :

"Mr. Sen says that the point that he wishes to take up is that a guardian-*ad-litem* has no power to dispose of the minors' property as Muthusami is said to have done in this case by giving it as security for the benefit of a creditor (R.M.V.S.). He touched upon this point in argument but has he says found other authorities since the case was argued. Leave to appeal under Section 13 of the Letters Patent granted."

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and then for the first time, as it seems to me, namely, four weeks after the disposal of the second appeal, the point which is really sought to be pressed before us crystallizes, for the first time, as I say.

In these circumstances, we must first of all consider whether it is right that the point brought up at this stage should be allowed to be argued.

The first authority to which I would refer is the case of *Connecticut Fire Insurance Company* v. *Kavanagh* (1), in which case, at page 480, Lord Watson, delivering the judgment of their Lordships' Board, said :

"When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

In the case of *Skinner* v. *Naunihal Singh* (2), a Privy Council decision, Lord Shaw, delivering the judgment of their Lordships, said at pages 220 and 221 :

"The Board has experienced considerable difficulty in permitting the alternative to be the ground of judgment now ; and it is only because, in their view, it may be possible, out of a large wreckage of procedure, to construct the material for a just decision of the true rights of the parties, and because upon the whole this may be in the parties' own best interests, that their Lordships refrain from *simpliciter* sustaining the appeals and dismissing the suits."

(1) (1892) A. C. 473. (2) (1913) I.L.R. 35 All. 211.

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And in *Chhote Lal* v. *Chandra Bhan* (1) in the joint judgment of Mr. Justice Kanhaiya Lal and Mr. Justice Sulaiman, this sentence appears at page 65 :

"It is not possible to say whether before the lower appellate court the title derived by inheritance was urged ; but the facts established are so plain that *prima facie* it would be doing injustice to deny to the plaintiff a right to which he is entitled on that basis."

From these authorities it is very easy to see upon what principle this Court should act in deciding whether a point can be raised in a Letters Patent Appeal which has not really been made before. The facts must be plain, so plain that there can really be no doubt about them. The evidence must establish beyond doubt that the facts, if fully investigated, would have supported the new point taken. In this case there is not what is referred to in *Skinner* v *Naunihal Singh* (2) as a large wreckage of procedure, but for reasons appearing in the judgment which my learned Brother has just delivered, I am bound to say that here, in my judgment, the facts are not so plain that *prima facie* it will be doing injustice to deny the appellants the right to which they claim to be entitled on the present point. I am not satisfied that the evidence, from which we are asked to decide this new point, establishes beyond doubt the facts, which, if fully investigated, would have supported that point. I am not satisfied either that there is here all the necessary material for the giving of a proper decision in this case.

For these reasons I agree with my learned brother that it is now too late for this appellant to seek to take this point, and this appeal will be dismissed.

(1) (1922) I.L.R. 45 All. 59. (2) (1913) I.L.R. 35 All. 211.