

judicial separation, and is sufficient evidence, in the first place, of the marriage of the parties ; and, in the second place, of the cruelty, on which the decree is founded. There is further evidence now of the identity of the parties to the present proceedings, and, further, of the fact that the respondent is now living in adultery with a woman, who is not the petitioner. Under these circumstances the petitioner has sufficiently made out a case for dissolution of marriage. There must be a decree *nisi* for dissolution of the marriage, with costs to be taxed on scale No. 1.

Attorneys for the Petitioner: Messrs. *Orr, Robertson & Burton.*

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APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

JUGUL KISHORI CHOWDHURANI, MINOR, REPRESENTED BY HER
GUARDIAN, PEARY CHURN SARKAR AND ANOTHER (DEFENDANTS) v.
ANUNDA LAL CHOWDHURI AND ANOTHER (PLAINTIFFS). *

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March 7.

Specific performance—Suit for specific performance of a contract against a minor—Contract entered into by a guardian with the sanction of the Court—Act XL of 1858, section 18—Guardians and Wards Act (VIII of 1890), section 31.

In a suit to enforce specific performance of a contract against a minor, entered into by a guardian appointed under Act XL of 1858 with the sanction of the Court, it was not shown that the contract was for the benefit of the minor. *Held*, that a decree for specific performance of a contract should not be made against the defendant while an infant.

Flight v. Bolland (1) and *Silsher Chand v. Dulputty Singh* (2) referred to.

Held also, that although the jurisdiction to decree specific performance is discretionary, it must be judicially exercised, and no Court would, even if it could, make a decree for the specific performance of a contract, unless the contract was shown to be for the infant's benefit.

* Appeal from Appellate Decree No. 2139 of 1893, against the decree of J. F. Bradbury, Esq., District Judge of Pubna and Bogra, dated the 27th of September 1893, affirming the decree of Babu Shambhu Chandra Nag, District Judge of Pubna and Bogra, dated the 15th of September 1892.

(1) 4 Russ., 298.

(2) I. L. R., 5 Calc., 363.

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THIS appeal arose out of an action brought by the plaintiffs to enforce specific performance of a contract against a minor, entered into by her guardian appointed under Act XL of 1858 with the sanction of the Court. The plaintiffs' allegation was that one Kishendra Narayan Chowdhuri died, leaving certain immoveable properties, and his widow, who was a minor, became entitled to and held possession of those properties. The father of the widow obtained a certificate under Act XL of 1858, and became the guardian of the person and property of the minor. In order to pay off debts contracted by the deceased husband of the minor, as well as to meet the expenses of a lawsuit brought by the mother-in-law against the minor, the guardian made a contract with the plaintiffs agreeing to grant them a *putni* settlement in respect of three *mehals* belonging to the minor, and sanction for the lease was obtained from the District Judge. The plaintiffs further alleged that a portion of the consideration money agreed to be paid was received by the guardian, but notwithstanding this he, without their knowledge, and in violation of the contract, granted a *putni* of the said three *mehals* to defendants Nos. 2 and 3.

The defendants Nos. 2 and 3 pleaded that the plaintiffs had no cause of action against them; that the guardian of the minor did not enter into any contract with the plaintiffs, but, on the other hand, in the month of May 1891, he agreed to grant them a *putni* of the disputed properties at an annual *jama* of Rs. 497-4-8, and for a consideration of Rs. 2,200, and obtained the sanction of the Judge to this arrangement; and that, after this contract, the said guardian, in collusion with the plaintiffs, agreed to grant a lease to them for a small consideration, which he could not legally do.

On behalf of the minor defendant, amongst other matters, it was pleaded that the guardian had no power to do any act prejudicial to her interest, and that she could not be bound by any such Act.

The Subordinate Judge decreed the suit of the plaintiffs, holding that the contract was complete, and it was not prejudicial to the interests of the minor. On appeal, the District Judge confirmed the judgment of the Subordinate Judge.

From this decision the defendants appealed to the High Court.

Dr. *Rash Behari Ghose* and *Babu Kisory Lal Sarkar* for the appellants.

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Babu Sreenath Das and *Babu Saroda Churn Mitter* for the respondents.

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Dr. *Rash Behari Ghose*.—The Court below was wrong in allowing a decree for the specific performance of a contract against the minor. It has been held in the case of *Flight v. Bolland* (1) that an infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual. The remedy not being mutual, a Court cannot pass a decree for specific performance of a contract against a minor. Want of mutuality has always been deemed a sufficient ground for refusing specific performance of a contract. The mere fact that the guardian, with the sanction of the Judge, has entered into a contract with a third party, does not affect the position of the minor. In the case of *Sikher Chund v. Dulputty Singh* (2), at page 370 of the report, Prinsop, J., said: "The fact that a guardian may have improperly sold property belonging to his ward, and may have embodied this transaction in a written instrument, cannot, in my opinion, affect the position of a minor seeking to recover that property, merely because a written instrument was executed. That instrument was between the guardian and the third party. If the guardian had exceeded his authority, the instrument is not the act of the minor, and it would not be incumbent on him to sue to set it aside, as in the case of one who has himself executed an instrument the validity of which he impugns." The guardian has acted improperly in this case, and the minor is not bound by his act, notwithstanding a sanction from the Judge was obtained. The Court below has not found that the contract was for the benefit and advantage of the minor, and consequently a decree for specific performance ought not to be passed against him.

Babu Sreenath Das for the respondents.—Section 18 of Act XL of 1858 deals with the management of the minor's estate by the guardian; and management includes the power of mortgaging or even selling, and there can be no doubt that management includes the power of letting out properties on lease. The guardian,

(1) 4 Russ., 298.

(2) I. L. R., 5 Calc., 363.

1895 after having taken out a certificate under the Act, can, with the sanction of the Court, grant a perpetual lease. Section 27 of Act VIII of 1890 goes to show that the guardian may do any act which is reasonable and proper for the benefit and maintenance of the estate. Section 29 provides that, in order to grant a lease for a term beyond five years, the guardian must take permission of the Court, and section 31 deals with the manner in which permission is to be taken. [BANERJEE, J.—Section 31 says that it shall recite the necessity and the advantage. MACPHERSON, J.—We are in the dark as to what the necessity and advantage are ?] When permission is granted, this Court ought to take it that it was for the benefit of the estate. Here permission was granted, and it must be presumed that it was granted by the Judge for the advantage of the minor. If the Judge does not recite the necessity upon the order, but if he, being satisfied as to the necessity and advantage to the minor upon the evidence, grants permission, could it be said that the sanction is void ? I submit not.

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The next question is, whether the suit is maintainable. It is a suit founded upon a contract made by a party legally authorized to enter into it, and, therefore, it is maintainable. When, under a sanction from the Court, the guardian enters into a contract, it is a valid one. The argument, that no suit for specific performance of a contract can be maintained against a minor, is not tenable. There is no analogy between the case of *Sikher Chand v. Dulputty Singh* (1) and this case. What Garth, C.J., said in that case was that a "purchaser who buys in good faith under an order of the Court, acquires a good title to the property sold, unless the minor, or those claiming under him, can show at a future time that the sale was fraudulent or improper." He decided that in such cases the *onus* would be upon the minor.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows :—

In this case a decree has been made against the infant defendant Jugul Kishori Chowdhurani, who is the appellant before us, for the specific performance of a contract made on her behalf, and with the sanction of the District Judge, by Peary Sarkar, her

father and guardian duly appointed under the provisions of Act XL of 1858.

The main point taken is that the suit for specific performance is not maintainable against the infant. No relief is asked for against her guardian, who is not in his own person a party to the suit.

The contract sought to be enforced is for a *putni* lease of certain properties belonging to the infant, at an annual rent of Rs. 487-4-8, on the payment of a bonus of Rs. 1,400. The facts found are these: The estate, which the infant inherited from her husband, being involved in debt, the defendant Enayatoolla agreed with the guardian to pay a bonus of Rs. 2,200, and to take a *putni* lease of the properties at an annual rent of Rs. 498-6-11. This arrangement was sanctioned by the District Judge on the 2nd June 1891, but Enayatoolla afterwards refused to take the lease, on the ground, as the Judge finds, that the title of the infant was threatened. The contract, now in question, was then made as between the plaintiffs and the guardian; and on the 25th July 1891, the District Judge made an order, in modification of his order of the 2nd June, sanctioning the arrangement. In August the plaintiffs paid Rs. 143 in satisfaction of two bonds executed by the infant's husband, and also paid the guardian a sum of Rs. 150 out of the bonus money. The guardian refused, however, to carry out the contract, and reverted to the old arrangement with Enayatoolla, which was carried into effect by two registered instruments on the 10th of August. The Judge finds that no part of the bonus of Rs. 2,200 was paid, and considers that the payment, which is sworn to by Enayatoolla and admitted by Peary Sarkar, was only set up to make it appear that the terms of the sanction had been complied with, and that the arrangement with Enayatoolla was more to the infant's benefit than the arrangements with the plaintiffs.

We know of no case in which a decree for specific performance has been made against an infant. In *Flight v. Bolland* (1) it was held that an infant could not maintain a suit for specific performance of a contract, the remedy not being mutual, and it being a general principle of Courts of Equity to interfere only where the remedy is mutual.

(1) 4 Russ., 298.

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It is unnecessary to consider whether, under the Contract Act, the contract of an infant is void, or only voidable at his instance. A contract, so long as it is voidable, cannot be specifically enforced, and an infant cannot ratify, so as to be bound by the ratification.

Here, however, the contract was made, not by the infant, but by the guardian on the infant's behalf. A guardian has, under the Hindu law, a qualified power of dealing with the property of an infant under his charge. He can, in case of necessity, sell, charge, or let it for a long term. But the infant is not absolutely bound by the act of the guardian; he could, on attaining majority, recover the property, if it had been disposed of without legal necessity; and in the case of an uncertificated guardian, the burden of proving legal necessity would, generally speaking, be on the person asserting it.

It is said that, as in this case, the guardian was appointed, and the contract sanctioned, by the District Judge, acting under statutory powers, there was a complete contract enforceable against the infant. A guardian appointed under Act XL of 1858, or Act VIII of 1890, cannot, without the sanction of the Court, give a lease for a period exceeding five years. If he does give it, the transaction is voidable at the instance of any other person affected by it. Section 31 of the Act (VIII of 1890) enacts that sanction shall not be granted, except in case of necessity, or for an evident advantage to the ward, and prescribes the procedure to be followed. The effect of the sanction was considered in the case of *Sikher Chund v. Dulputty Singh* (1). There the infant, on attaining majority, sued to recover the property, which had been sold by her guardian with the sanction of the District Judge. The case is an authority for this, that such a suit would lie; but that the sanction is *prima-facie* proof that the transaction was good and binding, and that it was for the plaintiff to show that there was no legal necessity for it, or that it was fraudulent or illegal.

In our opinion, if it is open to the infant on attaining majority to question the transaction, a decree for specific performance cannot, or at all events should not, be made against him while an infant.

(1) I. L. R., 5 Calc., 363.

More than this. The jurisdiction to decree specific performance is discretionary, although the discretion must be judicially exercised. No Court would, even if it could, make a decree for the specific performance of a contract affecting an infant, unless the contract was shewn to be for the infant's benefit. It is not the case of any one that this contract should be enforced for the infant's benefit. The plaintiffs wish to enforce it against the infant for their own benefit, and the guardian says it is against the interest of the infant. The Judge thinks that, if the bonus of Rs. 2,200 was paid, the contract would not be for the infant's benefit; but he finds that it was not paid. The defendants, however, assert payment, and the guardian, acting for the infant, admits receipt of the money. The decision that it was not paid will not bind the guardian, or any of the defendants, as between themselves. It will not prevent the alleged payers from suing to recover the money, or the infant from charging her guardian with the receipt of it. The issue in the first Court was whether the contract was prejudicial to the infant, and this appears to have been more considered than the question whether it was for the infant's benefit that the contract should be enforced. We think it is not a case in which a decree for specific performance should have been made under any circumstances. It is unnecessary to consider whether the plaintiffs could get any relief against the guardian. It is enough to say that they are not entitled to the relief claimed as against the infant.

The appeal is decreed with costs in all the Courts. Decrees of the lower Courts set aside.

S. C. G.

Appeal allowed.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

ABZUL MIAH (DEFENDANT No. 1) *v.* NASIR MAHOMMED AND OTHERS
(PLAINTIFFS). *

1895

March 7.

Jurisdiction of Civil Court—Public right of way—Special injury—Cause of action—Right of Suit.

In a suit for the removal of an obstruction in a public pathway, it was

* Appeal from Appellate Decree No. 224 of 1893, against the decree of Babu Atul Chunder Ghose, Subordinate Judge of Sylhet, dated the 13th of November 1892, affirming the decree of Babu Akhoy Kumar Mitter, Sudder Munsif of that District, dated the 25th of August 1891.

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