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## MINORS AND THE DOCTRINE OF MUTUALITY

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Two recent decisions—one of the Patna High Court, *Ram Bilas v. Lokenath*<sup>1</sup>, and the other of the Bombay High Court, *Raj Rani v. Prem Adib*<sup>2</sup>—refer to the application of the doctrine of mutuality in suits based on contracts entered into on behalf of minors.

As there was no express reference to the rule of mutuality in the provisions of the Specific Relief Act (Act No. I of 1877) it was supposed at one time that the rule had no application to India, *Krishnaswami v. Sundarappayyar*<sup>3</sup>, *Khairunnassa Bibi v. Loke Nath Pal*<sup>4</sup>. Since the decision of the Privy Council in *Mir Sarwarjan v. Fakruddin*<sup>5</sup>, it must be taken as settled law that the doctrine of mutuality applies to India. In that case a contract for the purchase of immoveable property was entered into by the minor's guardian and was for the benefit of the minor. The minor brought the suit for specific performance. When the case was pending in appeal in the High Court, he attained majority and ratified the contract. The Calcutta High Court decreed the suit for specific performance. But their Lordships of the Privy Council reversed the decision observing as follows: "It is not within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property and they are further of opinion that as the minor in the present case was not bound by the contract, *there was no mutuality* and that the minor who has now reached his majority cannot obtain specific performance of the contract." (*Italics ours.*)

Thus it is clear that an executory contract for the transfer of immoveable property in favour of a minor is not capable of specific performance.

In *Venkatachalam Pillai v. Sethuramarao*<sup>6</sup> dealing with an agreement of resale contained in a sale deed executed by a guardian and sought to be enforced by the

1. (1948) I.L.R. 27 Pat. 143.

2. A.I.R. 1949 Bom. 215.

3. (1894) 5 M.L.J. 164 : I.L.R. 18 Mad.

4. (1899) I.L.R. 27 Cal. 276.

5. (1911) 21 M.L.J. 1156 : L.R. 39 I.A. 1 : I.L.R. 39 Cal. 232 (P.C.); reversing I.L.R. 34 Cal. 163 (F.B.).

6. (1932) 64 M.L.J. 354 : I.L.R. 56 Mad. 433 (F.B.).

minor after attainment of majority, the Madras High Court observed: "The validity or enforceability of such a contract does not therefore depend upon the question whether it was conducive to the benefit of the minor or not." The contract was held to be unenforceable specifically as it was lacking in mutuality. That such a contract is not specifically enforceable against the minor or even a subsequent transferee of the property who had notice of the earlier contract had also been laid down in various cases, *Singara v. Ibrahim*<sup>1</sup>; *Abdul Hug v. Md. Tahya Khan*<sup>2</sup> and *Ramakrishna v. Kasivasi Chidambara*<sup>3</sup>.

It may, therefore, be taken as well settled that an executory contract for the purchase of immoveable property entered into by a guardian on behalf of the minor is not capable of specific performance either at the instance of the seller or at the instance of the minor purchaser. It cannot be enforced against the minor because, as pointed out by the Privy Council<sup>4</sup>, "it is not within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property." It is not enforceable by the minor for want of mutuality since the discretionary relief of specific performance cannot be granted unless the remedy is mutual and the contract is such that, at the time it was entered into, it could have been enforced by either of the parties to it against the other of them.

The question whether the rule in *Mir Sarwarjan's case*<sup>4</sup> is equally applicable to a contract of sale entered into by the guardian was left open in *Swarath Ram, Ram Sarani v. Ram Ballabh*<sup>5</sup>, where the Allahabad High Court observed as follows:

"Sir Tej Bahadur Sapru has put in argument that the principle in that case is equally applicable whether a minor be a purchaser or a vendor of an immoveable property and that in either case the element of mutuality being wanting no suit for specific performance can be brought by or against the minor. We need not decide this point as we are satisfied that the case must fail on other grounds." It was found in that case that the person who purported to enter into the contract of sale on behalf of the minors had no authority in law to bind them.

The instant decision of the Patna High Court, *Ram Bilas v. Lokanath*<sup>6</sup> seeks to extend this rule to the case of a contract by the guardian for the sale of the minor's property. The decree for specific performance granted by the lower appellate Court was sought to be supported on the ground that the contract was entered into by the guardian of a Hindu minor for purposes of necessity. This argument was rejected by the Patna High Court with the observation that "the doctrine of legal necessity is part of the law relating to the transfer of immoveable property and not part of the law relating to contracts." (*Italics ours.*)

The relevancy of the doctrine of legal necessity has, however, been recognised in the case of contracts entered into by the manager of a joint Hindu family. Such contracts when they are within the powers of the manager are specifically enforced against the minor members as well<sup>7</sup>. The Calcutta High Court has taken a contrary view in *Nripendra v. Ekbarali*<sup>8</sup>, but that view is against the current of decision and conflicts with an earlier decision of the Calcutta High Court itself<sup>9</sup>.

1. (1946) 2 M.L.J. 103.  
2. A.I.R. 1924 Pat. 81.  
3. (1927) 54 M.L.J. 412.  
4. (1911) 21 M.L.J. 1156; L.R. 39 I.A. 1; I.L.R. 39 Cal. 232 (P.C.).  
5. (1925) I.L.R. 47 All 784.  
6. (1948) I.L.R. 27 Pat. 143.  
7. *Hari Charan Kuar v. Kaula Rai*, (1917) 2 Pat. L.J. 513 (F.B.); *Tribeni Prasad v. Jai*

*Narayan*, A.I.R. 1937 Pat. 425; *Lakshmayya v. Venkateswarlu*, (1946) 2 M.L.J. 207; *Adinarajana v. Venkatasubbiah*, (1937) 2 M.L.J. 653; *Narayana Chetty v. Muthia Chettiar*, (1924) 46 M.L.J. 575; I.L.R. 47 Mad. 692; *Rama Rao v. Suganchandra*, I.L.R. (1946) Nag. 116.  
8. (1929) I.L.R. 57 Cal. 268.  
9. *Srinath Bhattacharjee v. Jotindra*, A.I.R. 1926 Cal. 445.

These decisions bearing on the enforceability against minor coparceners of contracts of sale entered into by joint family managers did not appear to the Patna High Court to permit of analogical extension to cases of ordinary guardians. The Patna High Court accordingly observed: "The argument from analogy is, however, always dangerous, and there is in any case, no very real or close analogy between the position of the karta of a joint Hindu family and the guardian of a Hindu minor." This was also the view of the Allahabad High Court in *Mt. Dhapo v. Ram Chandra*<sup>1</sup>, where Suláiman, C.J., observed:

"In the case of a mere guardian the property of the minor is not vested in him at all and he is acting merely as the agent of the minor who would not otherwise be capable of acting. In the case of the managing member the contracting party is the whole family as one unit acting through the manager, whereas in the case of a minor owner the contracting party is the minor who, however, acts through his guardian."

The case of an ordinary guardian being distinguishable from that of a joint family manager, the Patna High Court in the instant case concluded that the guardian's contract lacks mutuality in spite of the fact that it was supported by a justifying necessity. Reliance is placed for this conclusion on a decision of the Madras High Court in *Kasivasi Chidambara v. Ramakrishna*<sup>2</sup>. In that case Devadas, J., passed a decree for specific performance against a minor in respect of his guardian's contract to sell his property. The ground of the decision was that the purchase money was to be applied in discharge of debts of the minor's father which the minor was bound to discharge. This decree was reversed in Letters Patent Appeal where Wallace, J., pointed out that although the minor had been under an obligation to pay the debts of his father "he had not been under an obligation to do so by selling or mortgaging his immoveable property."

That the decision of the Privy Council in *Mir Sarwarjan v. Fakruddin*<sup>3</sup> need not be confined to a contract of purchase entered into by the guardian and is to be extended to a contract of sale as well and that the question of necessity or benefit is not relevant in this connection has been the view adopted in a number of judicial decisions, *Srinath Bhattacharjee v. Jotintra*<sup>4</sup>; *Abdul Huq v. Md. Yahia Khan*<sup>5</sup>; *Nripendra v. Ekbarali*<sup>6</sup>.

The instant decision of the Patna High Court<sup>7</sup> is in accord with this preponderant trend of authority. It supersedes an earlier decision of the Patna High Court in *Brahmandeo v. Haro Singh*<sup>8</sup>, where Wort, J., decreed specific performance of a contract of sale made by the guardian on the finding that there was legal necessity to support the transaction.

A recent decision of the Privy Council, *Subrahmanyam v. Subbarao*<sup>9</sup> to which apparently the attention of the Patna High Court was not drawn in *Ram Bilas v. Lokanath*<sup>7</sup> has considerably shaken the authority of the long catena of decisions noticed above. In the case before the Privy Council the mother as the guardian of her minor son entered into an agreement for the sale of the minor's lands. The intended transferee was put in possession pursuant to the contract. The minor, however, sued by his next friend for recovery of possession of the properties. The

1. (1934) A.L.J. 1028.  
 2. A.I.R. 1924 Mad. 863.  
 3. (1911) 21 M.L.J. 1136 : L.R. 39 I.A. 1 :  
 I.L.R. 39 Cal. 232 (P.C.).  
 4. A.I.R. 1926 Cal. 445.  
 5. A.I.R. 1924 Pat. 81.

6. (1929) I.L.R. 57 Cal. 268.  
 7. (1948) I.L.R. 27 Pat. 149.  
 8. A.I.R. 1935 Pat. 237.  
 9. (1948) 2 M.L.J. 222 : L.R. 75 I.A. 115 :  
 I.L.R. 1949 Mad. 141 (P.C.).

defendant vendee relied upon the doctrine of part performance embodied in section 53-A of the Transfer of Property Act (Act IV of 1882). The Madras High Court held that section 53-A could not be invoked by the defendant as the minor plaintiff was not a 'transferor' as contemplated by that section. This decision was reversed by the Privy Council. Referring to the power of the guardian to enter into the contract of sale the Privy Council observed: "Their Lordships entertain no doubt that it was within the powers of the mother as guardian to enter into the contract of sale of 29th November, 1935, on behalf of the respondent for the purpose of discharging his father's debts, and that if the sale had been completed by the execution and registration of a deed of sale, the respondent would have been bound under Hindu Law." The conclusion of their Lordships is thus formulated: "It would appear, therefore, that the contract in the present case was binding upon the respondent from the time when it was executed. If the sale had been completed by a transfer, the transfer would have been a transfer of property of which the respondent, not his mother, was owner. *If an action had been brought for specific performance of the contract, it would have been brought by or against the respondent and not by or against his mother.*" (*Italics ours.*)

It may also be noticed that Lord Morton of Henryton in the above case expressly refers to and approves a passage in Pollock and Mulla's Commentary on the Indian Contract and Specific Relief Acts, 7th Edition, page 70, where the learned authors observe that in the case of a contract entered into on behalf of a minor by his guardian, "the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and, further it is for the benefit of the minor. But if either of these two conditions is wanting, the contract cannot be specifically enforced at all." That the first of these conditions is wanting in the case of a contract by the guardian for the purchase of immoveable property on behalf of the minor is perfectly clear from *Mir Sarwarjan's case*<sup>1</sup>. That neither of the two conditions need be wanting when the contract is for the sale of the minor's immoveable property is equally clear from the latest decision of the Privy Council in *Subrahmanyam v. Subbarao*<sup>2</sup>. A contract for the purchase of immoveable property can rarely be demonstrably for the benefit of the minor's estate or for legal necessity, but the same cannot be said of a contract for sale of the minor's property. This seems to be the basis for drawing a distinction between contracts for the purchase of property and contracts for sale entered into on behalf of minors.

Closely allied to the question of specific enforceability of a contract entered into by a guardian on behalf of minors is the question whether damages can be recovered in respect of such a contract. The non-availability of the remedy by way of specific performance does not necessarily mean that the contract is void for a party may be entitled to damages even in cases in which want of mutuality may preclude the remedy by way of specific performance<sup>3</sup>. A different view has commended itself to the Bombay High Court in *Raj Rami v. Prem Adib*<sup>4</sup>.

The facts on which the recent Bombay decision is based are simple. The father of a minor girl entered into a contract of service on her behalf with the defendant whereunder the minor was to be employed as an artist for the production of a film and was to be paid a salary. When the defendant committed a breach of the contract the suit was instituted by the minor plaintiff for recovery of damages. The contract of service was found to be beneficial to the minor but the claim to damages was held to be unsustainable on the ground that the contract was void.

1. (1911) 21 M.L.J. 1156; L.R. 39 I.A. 1; I.L.R. 39 Cal. 232 (P.C.).

2. (1948) 2 M.L.J. 22; L.R. 73 I.A. 115; I.L.R. 1949 Mad. 141 (P.C.).

3. *James Jones & Sons v. Tankerville*, (1909) 2 Ch. 440; *Zebunnissa Begum v. Danagher*, (1935) 70 M.L.J. 477; I.L.R. 59 Mad. 942.

4. A.I.R. 1949 Bom. 215.

The general rule in regard to service contracts is that they are incapable of specific performance. In *Ramchandra v. Chinubhai*<sup>1</sup>, the plaintiffs sought to enforce specifically an agreement by which the defendant who was the managing agent of a mill, promised to employ them as co-agents. The agreement was held to be lacking in mutuality since if the plaintiffs declined to act as co-managing agents, the defendant could not have compelled them to do so. The plaintiff could not, therefore, have the remedy of specific performance. The considerations of public policy which impel the Court to negative the relief of specific performance in such a case have been clearly expressed by Fry, L.J., in *Francesco v. Barnum*<sup>2</sup>, where he observes: "For my own part, I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of mankind that the rule of specific performance should be extended to such cases. I think the courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery; and therefore, speaking for myself, I should lean against the extension of the doctrine of specific performance and injunction in such a manner."

A contract of service, therefore, though both the contracting parties may be *sui juris*, is not susceptible of specific performance. In such a case, however, it cannot be doubted that the remedy of damages is available to the aggrieved party under section 73 of the Indian Contract Act<sup>3</sup>. The question now for consideration is whether the fact that one of the parties is a minor acting by his guardian makes any difference in principle so as to render untenable a claim to damages by or against the minor as the case may be. To answer this question it is necessary to consider whether the contract is void or can be treated as valid in certain circumstances. If it is void of course no claim to damages can be founded on it.

As to this question in *Raj Rani v. Preñ Adib*<sup>4</sup>, Desai, J., observed as follows:

"If then a minor cannot sue on a contract of service entered into by him personally, is he entitled to sue for obtaining practically the same relief, simply because the contract has been entered into for and on his behalf and for his benefit by his guardian? I have already referred to the fact that a minor cannot employ an agent, and, therefore, it cannot be said that the contract was entered into 'for and on his behalf' in that sense. The expression 'for his benefit' is easily understood when one is speaking of a minor's contract in English Law, for there the contract is held binding on the minor, if it is for the benefit of the minor. But according to Indian Law the contract is not binding on the minor, and therefore on the ground of mutuality one should hesitate considerably before such a contract is held binding on the other party. I am prepared to concede that such contracts of service may be 'for the benefit of the minor'. But are they therefore binding on the other party? Or is the minor entitled to sue in respect of such contracts?" Both the questions thus raised were answered in the negative.

In England it is now well settled that beneficial contracts of service entered into by the minor or on his behalf by his guardian are binding on the minor. In *Clements v. London and North Western Railway Company*<sup>5</sup>, an infant, upon entering the service of a railway company as a porter, agreed to join the company's own insur-

1. A.I.R. 1944 Bom. 76; 45 Bom. L.R. 1075.  
2. (1890) 45 Ch. D. 430.  
3. *Hochster v. De La Tour*, (1853) 2 E. & B. 678; 95 R.R. 747; Illustrations to S. 39, Indian

Contract Act.

4. A.I.R. 1949 Bom. 215.  
5. (1894) 2 Q.B. 482.

ance scheme and to relinquish his right of suing for personal injury under the Employers' Liability Act, 1880. The scheme was more favourable to him than the Act since it covered more accidents for which compensation was payable, though on the other hand it fixed a lower scale of compensation. It was held that the agreement as a whole was manifestly to the advantage of the infant and was binding on him. In *Doyle v. White City Stadium, Ltd.*<sup>1</sup>, it was held that a contract between an infant boxer and the British Boxing Board of Control, under which the infant received a licence to box that enabled him to gain proficiency in his profession, was so closely connected with a contract of service as to be binding. Indeed in *Roberts v. Gray*<sup>2</sup>, Hamilton, L.J., treats beneficial contracts of service entered into by the minor virtually as contracts for necessaries. While benefit to the minor is thus the key note to the validity of this type of contract, it must not be supposed that in England as a rule any agreement is binding upon an infant merely because it is for his benefit. A trading contract, for instance, is an exception to this rule and is not binding upon the minor however much it may be for his benefit.<sup>3</sup> Phillimore, J., has stated the law accurately in *Coveorn v. Nield*<sup>4</sup>, where he observes: "I am satisfied from the authorities which have been cited to us that the only contracts which, if for the infant's benefit, are enforceable against him are contracts relating to the infant's person, such as contracts for necessaries, food, clothing, lodging, contracts of marriage, and contracts of apprenticeship and service." Thus contracts for necessaries, contracts of marriage, contracts of apprenticeship and beneficial contracts of service are four exceptional cases under the English Law where a minor is bound by his contract in spite of the general disability of infancy.

Turning to the Indian Law, since the decision of the Privy Council in *Mohori Bibes v. Dhurmodas Ghose*<sup>5</sup>, it is indisputable that a minor's contract is absolutely void. Contracts entered into by guardians on behalf of their minor wards have also been characterised by some learned Judges as void<sup>6</sup>. Thus in *Ram Bilas v. Lokenath*<sup>7</sup>, Shearer, J., referring to a contract entered into by a Hindu mother on behalf of her minor son observed: "It is true that in this particular case, the contract was not entered into by the minor personally but was entered into by his mother as his guardian and on his behalf. This, however, can make no difference because a person who is himself under a legal disability and incapable of making a valid contract cannot bind himself by getting an agent to make the contract for him." (*Italics ours.*) There is an obvious fallacy in this reasoning for the position of a guardian cannot be assimilated to that of an agent for the present purpose. A minor owing to his contractual incapacity cannot appoint an agent, but for precisely the same reason a guardian has to function to supplement the minor's defective capacity. Further the authority of an agent is defined by the principal, but that of the guardian is delimited by the law. Moreover, the argument that because the minor is not bound by his agent's acts, he cannot be bound by the contracts of his guardian proves too much. Even in India not all contracts of the guardian can be regarded as ineffective to bind the minor.

Even in India there can now be no doubt that a guardian's contract for the minor's necessities<sup>8</sup> is binding on the minor. A contract of marriage entered into by the guardian on behalf of the minor can give rise even in India to a claim

1. (1935) 1 K.B. 110.  
 2. (1913) 1 K.B. 520 at 529.  
 3. *Mercantile Union Guarantees Corporation v. Ball*, (1937) 2 K.B. 498.  
 4. (1912) 2 K.B. 419 at 422.  
 5. (1902) L.R. 30 I.A. 114; I.L.R. 30 Cal. 539 (P.C.).  
 6. *Venkatachalam v. Sethuram*, (1932) 64

M.L.J. 354; I.L.R. 56 Mad. 433 (F.B.); *Ramakrishna v. Chidambara*, (1927) 54 M.L.J. 412.

7. (1948) I.L.R. 27 Pat. 149.  
 8. *Annamalai v. Muthuswami*, (1939) 1 M.L.J. 792; I.L.R. (1939) Mad. 891; *Raxmal Singh v. Vadilal*, (1894) I.L.R. 20 Bom. 61; *Bhanul Sahu v. Baijnath*, (1907) I.L.R. 35 Cal. 390.

for damages<sup>1</sup>. Apprentices contracts are governed by the Apprentices Act (XIX of 1850). Of the four types of contract referred to in *Cowern v. Nield*<sup>2</sup> as binding on a minor it is thus clear that in India the first three types are equally binding on a minor when the contracts are entered into by his guardian acting on his behalf. We are left with beneficial contracts of service which are held to be binding in English law but which in the instant decision of the Bombay High Court<sup>3</sup> have been held to be not binding on the minor though they are entered into not by the minor directly but through the intervention of his guardian. Is it the law that in India a guardian cannot make a valid contract on behalf of the minor in respect of a matter as to which in England the minor even without the guardian's intervention can enter into a contract so as to bind himself?

In considering the answer to this question it is well to bear in mind the observations of Varadachariar, J., in *Zebunnissa v. Mrs. Danagher*<sup>4</sup> to the following effect: "It is true that under the Indian Law, a minor has no capacity to contract and his contract is therefore void. *But when the contract has been entered into by a guardian there is no question of want of 'capacity'*. The minor may not be bound by the contract if it is in excess of the guardian's powers or not beneficial to the minor. But that is not the same thing as saying that it is void, in the sense that the other party to the contract can ignore it." (*Italics ours.*)

This at once disposes of the difficulty felt in the instant decision of the Bombay High Court<sup>3</sup> that such a contract is destitute of consideration as the promise of the minor to render services cannot legally be regarded as consideration for the contract. The want of the minor's contractual capacity cannot vitiate the contract when *ex hypothesi* he does not directly come into the picture at all and only acts through his guardian who has legal competency to act for him. If a guardian's contract to sell the immoveable property of the minor is not wanting in consideration there is no reason why his covenant to procure the personal services of the minor should not serve as consideration for the contract of service. The more difficult question, however, is whether the guardian has the power to bind the minor at all by a personal covenant of that description.

From the observations of Varadachariar, J., already cited it is clear that the binding nature of the contract in such a case depends upon the personal law of the parties and the scope of the guardian's power to bind the minor by his contracts. In this connection it is necessary to canvass the scope of the rule laid down by the Privy Council in *Waghela Raj Sanji v. Shakh Masludin*<sup>5</sup> that the guardian cannot bind the minor by any purely personal covenant. In that case the mother and guardian of a minor conveyed certain villages which were part of a *taluqdari* estate in liquidation of debts which were chargeable upon the estate and, stating that those villages were rent free, covenanted that if the villages should be assessed to Government revenue she, the guardian, and her minor son, the ward, would be liable to pay the purchaser the amount of such Government revenue. Those villages were later declared assessable to revenue and the question then arose as to whether the minor could be made liable to repay the amount which the purchaser of the villages had been called upon to pay. Holding that so far as the suit was founded on the personal liability of the minor taluqdar, it must fail, the Privy Council observed as follows: "Now it was most candidly stated by Mr. Mayne, who argued

1. *Fernandez v. Gonsalves*, (1924) I.L.R. 48 Bom. 673; 26 Bom. L.R. 1035; *Khimji v. Lalji Karamsi*, (1940) 43 Bom. L.R. 35; but see *Mulji Thakersey v. Gombi and Kastur*, (1887) I.L.R. 11 Bom. 412; *Ma Proa v. Manag Hmat Gyi*, A.I.R. 1939 Rang 86.

2. (1912) 2 K.B. 419 at 422.

3. A.I.R. 1949 Bom. 215.

4. (1935) 70 M.L.J. 477; I.L.R. 59 Mad. 942.

5. (1887) L.R. 14 I.A. 89; I.L.R. 11 Bom. 551 (P.C.).

the case on behalf of the respondent, that there is not in Indian Law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English Law. In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English Law if found applicable to Indian Society and circumstances. Their Lordships are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India. *They concur that it would be a very improper thing to allow the guardian to make covenants in the name of his ward so as to impose a personal liability upon the ward.*" (*Italics ours.*)

Again in *Indur Chunder Singh v. Radha Kishore Ghose*<sup>1</sup>, a covenant to pay rent contained in an onerous lease taken by the adoptive mother of the minor lessee was held to be unenforceable against the minor and the Privy Council observed: "The contention that the mother and widow of Gopal Mohan Ghose had power to bind the minor by contract was abandoned in the Court below and their Lordships are of opinion that such a contention could not be sustained."

These decisions of the Privy Council apparently support the conclusion that in no case can the guardian of a minor enter into a contract so as to bind the minor without purporting to charge the estate. They were so understood by the Bombay High Court in *Maharana Shri Rammalisingji v. Vadilal Vakhatchand*<sup>2</sup>, where it was held that a simple money debt incurred by the guardian on behalf of the minor cannot be enforced against the minor's estate unless it was incurred for necessities supplied to the minor so as to attract section 68 of the Indian Contract Act. The same view was taken by the Calcutta High Court in *Bhawal Sahu v. Baijnath Pertab Narain*<sup>3</sup>.

Applying the principle of the decision in *Waghela Rajsingji v. Shekh Masluddin*<sup>4</sup>, the Allahabad High Court in *Swarath Ram, Ram Saran v. Ram Ballabh*<sup>5</sup> came to the conclusion that a contract of sale entered into by the guardian cannot be enforced against the minor since such a contract creates no charge on the estate and can give rise only to a personal liability. Sufficient has already been said to indicate that this view of the Allahabad High Court is not maintainable in view of the decision of the Privy Council in *Subrahmanyam v. Subba Rao*<sup>6</sup>.

As against the two decisions of the Judicial Committee above mentioned we have the clear pronouncement by the same august authority in *Imbandi v. Mut-saddi*<sup>7</sup>, that a guardian can bind a minor's estate by contracts entered into for the latter's benefit. This related to a Mohammadan minor. But dealing with a Hindu minor, the Privy Council observed in the well-known case of *Hunooman Persaud v. Mussumat Baboos*<sup>8</sup> that the power of the manager for an infant heir to charge an estate not his own is a qualified power and enunciated the doctrine of necessity or benefit to lay down the limits of that power. Dealing with the position of the lender the Privy Council said: "Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived." Though their Lordships were there dealing with a secured creditor, there are no compelling reasons to restrict these observations to such creditors alone.

An attempt to reconcile the apparent conflict between the two lines of decision of the Privy Council above noticed was made by a Full Bench of the Madras

1. (1892) L.R. 19 I.A. 90; I.L.R. 19 Cal. 307 (P.C.).

2. (1894) I.L.R. 20 Bom. 61 at 74.

3. (1907) I.L.R. 35 Cal. 320.

4. (1887) L.R. 14 I.A. 89; I.L.R. 11 Bom. 351 (P.C.).

5. (1925) I.L.R. 47 All. 784.

6. (1948) 2 M.L.J. 22; L.R. 75 I.A. 115; I.L.R. 1949 Mad. 141 (P.C.).

7. (1917) 35 M.L.J. 422; L.R. 45 I.A. 73; I.L.R. 45 Cal. 878 (P.C.).

8. (1856) 6 M.I.A. 393.



High Court in *Ramajogayya v. Jagannadhan*<sup>1</sup>. In that case Sethagiri Ayyar, J., referring to the decision of the Privy Council in *Waghela Raja Sangji v. Sheikh Masludin*<sup>2</sup> and the passage therein which has been extracted *supra* observed: "I do not think it was intended to lay down by this statement that no rule to the contrary under the Hindu law would be countenanced. The term Indian law was meant to apply to the statute law of the land and not to Hindu or Mohammadan law. I am therefore of opinion that the rule laid down in *Waghela Raja Sangji v. Sheikh Masludin*<sup>3</sup> was not intended to affect the Hindu Law liability of the minor." The true rule applicable to the liability of the estate in respect of the guardian's contracts is thus formulated: "No decree should be passed against the minor or his estate on a contract entered into on his behalf by a guardian under which covenant no charge is created on the estate *except* in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject."

In the Full Bench case a mortgage executed by the guardian turned out to be ineffectual as the property was inalienable. It was held that nevertheless the debt could be enforced against the minor's estate having been incurred for legal necessity.

The principle that any liability to which the minor would be subject under the Hindu law is not the less a liability because it was incurred by his guardian on his behalf was re-affirmed by another Full Bench of the Madras High Court in *Satyannarayana v. Mallayya*<sup>4</sup>. These decisions were understood by Venkataramana Rao, J., in *Muthuswami v. Annamalai*<sup>5</sup> to mean that a guardian cannot bind his ward personally by a simple contract debt, by a covenant or by any promise to pay money or damages unless such promise is made merely to pay or keep alive a debt for which the ward's property was previously liable under the personal law. Even if a contract is supported by legal necessity, according to this view, the minor's estate cannot be made liable unless at the date of the contract the estate was already liable and the purpose of the contract was only to keep alive that liability. This view was corrected by the Letters Patent Bench in *Annamalai v. Muthuswami*<sup>6</sup>. Mr. Justice Krishnaswami Ayyangar delivering the judgment of the Letters Patent Bench pointed out that *Hunooman Persaud's case*<sup>7</sup> lays down the true test for deciding the binding character even of a simple contract debt. If the debt in question is one coming within the doctrine of benefit or necessity of the minor or his estate, it is binding on the minor's estate though no charge is thereby created on any part of the minor's property. The existence of a 'pre-existing liability' is no doubt sufficient to support the contract but it is only illustrative of the general doctrine of necessity. It was accordingly held that a natural guardian has authority to contract debts and make the minor liable without charging the estate for necessary purposes of the minor. This liability though referred to as a personal liability is not such in the English Law sense of the word "in the sense that the person of the minor even after majority can be arrested in execution. A personal liability arising out of the contract of the guardian is a liability of the minor's estate only."

On the basis of a decision of the Privy Council in *Zamindar of Polavaram v. Maharajah of Pithapur*<sup>8</sup>, an argument was advanced in *Sudarsanrao v. Dalayya*<sup>9</sup> that the Full Bench decision in *Ramajogayya's case*<sup>1</sup> must be regarded as wrong law. In *Zamindar of Polavaram v. Maharajah of Pithapur*<sup>8</sup>, the Privy Council set aside a decree granted by the Madras High Court against the general assets of a minor

1. (1918) 36 M.L.J. 29 : I.L.R. 42 Mad. 185 (F.B.).

2. (1887) L.R. 14 I.A. 89 : I.L.R. 11 Bom. 551 (P.C.).

3. (1924) 68 M.L.J. 540 : I.L.R. 58 Mad. 735 (F.B.).

4. (1936) 44 L.W. 775.

5. (1938) 1 M.L.J. 792 : I.L.R. (1939)

Mad. 891.

6. (1948) 2 M.L.J. 22 : L.R. 75 I.A. 115 : I.L.R. (1949) Mad. 141 (P.C.).

7. (1856) 6 M.I.A. 393.

8. (1936) 71 M.L.J. 347 : L.R. 63 I.A. 304 : I.L.R. 59 Mad. 910 (P.C.).

9. (1943) 1 M.L.J. 339 : I.L.R. 1944 Mad. 218.

on the basis of a guardian's covenant to pay contained in a mortgage invalid for want of proper attestation. This decision of the Privy Council only lays down, as explained by Mr. Justice Patanjali Sastri in *Sudarsanarao v. Dalayya*<sup>1</sup>, that if the minor is not personally liable no decree can be passed against his assets and not that in no case can the minor be made liable on a contract entered into by the guardian without charging the minor's estate. The principle of *Ramajogayya v. Jagannadhan*<sup>2</sup> was once again reaffirmed and it was held that a contract by the guardian to pay maintenance to the minor's paternal grandmother is binding on the minor and can be enforced against the minor's estate<sup>3</sup>. Recently the Nagpur High Court also in *Pandurang Dahke v. Pandurang Gorle*<sup>4</sup> has applied the same principles as the Madras High Court and held that a promissory note by the mother as the natural guardian of her minor son for purchase of bulls and cotton seed required for purposes of cultivation was enforceable against the estate of the minor.

It is thus clear that there is a definite cleavage of judicial opinion between the Allahabad, Bombay and Calcutta High Courts on the one hand and the Madras and Nagpur High Courts on the other. According to the view which has found support in the Allahabad, Bombay and Calcutta High Courts a guardian cannot bind his ward's estate except by a document purporting to bind it. As stated by the Calcutta High Court in *Bhavai Sahu v. Baij Nath*<sup>5</sup> "A guardian cannot bind his ward personally by a simple contract debt, by a covenant, or by any promise to pay money or damages, but this broad proposition is subject to the modification that the promise will not bind the minor unless it has been made merely to keep alive a debt for which the ward's property is liable". If the contract is in respect of necessaries, the minor's estate would be bound if the circumstances mentioned in section 68 of the Contract Act exist, i.e., if the case is one of supply of necessaries to the minor. On this view a beneficial contract of service entered into by the guardian for the minor's benefit can give rise to no enforceable claim at the instance of the minor. Even if the term 'necessaries' in section 68 of the Contract Act is to be given a wider meaning as including not merely "meat, drink, apparel and such other necessaries". But as stated in *Coke upon Littleton*, paragraph 172-a, and accepted by the English decisions, as including "good teaching or instruction, whereby he may profit himself afterwards," that section contemplates only a claim for reimbursement out of the minor's estate after the 'necessaries' have been supplied to the minor. That section does not recognise any enforceable claim to damages by the minor in respect of an executory contract even in respect of necessaries. So it is clear that the view expressed by the Allahabad, Bombay and Calcutta High Courts in the decisions already noticed does not countenance any action by the minor for damages in respect of a breach by the employer of a contract of service by the minor entered into on the latter's behalf by his guardian. The question whether, assuming that an action is maintainable, such action can be maintained at all by the minor without impleading the guardian who actually entered into the contract was raised in the instant decision of the Bombay High Court<sup>6</sup>. The question was answered in the negative though a distinction is sought to be drawn between a contract of service and other contracts such as a contract of marriage. That this view is unsound would be clear from the decision of the Privy Council in *Subrahmanyam v. Subbarod*<sup>7</sup>, where the Privy Council observed, as has already been stated, that an action for specific performance of an executory contract of sale entered into by the guardian of the respondent "would have been by or against

1. (1943) 1 M.L.J. 339; I.L.R. 1944 Mad. 218.

2. (1918) 36 M.L.J. 291; I.L.R. 42 Mad. 185 (F.B.).

3. I.L.R. (1947) Nag. 299.

4. (1907) I.L.R. 35 Cal. 340.

5. A.I.R. 1949 Bom. 215.

6. (1948) 2 M.L.J. 22; I.L.R. 75 LA. 115; I.L.R. 1949 Mad. 141 (P.C.).

the respondent and not by or against the mother," who had actually entered into the contract on behalf of the minor-respondent. What applies to a suit on the contract for specific performance should equally apply to a suit for damages based on the contract.

The more liberal view as to the powers of the guardian which has found favour with the Madras High Court is that the guardian can bind the minor's estate by his personal contracts and covenants provided the contract, is covered by the doctrine of necessity or benefit enunciated by the Privy Council in *Hunooman Persaud's case*<sup>1</sup>. On this view a debt incurred by the guardian for the first time to meet the needs of the minor or his estate can be recovered by the creditor from the minor's estate.

It may be observed in this connection that Jagannadha Tarkapanchanana has expressed an opinion in the *Vivadabhangamava* in support of this view commenting on a text of Cautyayana. In *Colebrooke's Digest*, Vol. I, page 16, the position is thus stated: "If there be guardians of the minors, namely, their maternal uncles or the like; and these take up a loan from a money-lender, for the benefit of the minor, executing a deed in the Ward's name and their own; in that case the loan may be legally advanced after ascertaining that the guardian does not act fraudulently; although no text occurs to this purport, it is proved by the frequent practice of good men."

That this view of the Madras High Court is not confined merely to contracts relating to the borrowing of money is clear from *Chockalingam Chettiar v. Muthukaruppan*<sup>2</sup>, where the contract of partnership for extension of the family money-lending business was held to be binding on the minor members.

Indeed in *Ramanathan v. Palaniappa*<sup>3</sup>, Krishnaswami Ayyangar, J., observed: "It is not in our opinion a pre-existing liability alone that enables a guardian to enter into a contract binding on behalf of the minor; but all those facts and circumstances of necessity or benefit which ordinarily justify an alienation under Hindu Law would support a contract as well." Though their Lordships were there dealing with a contract of loan, there is no reason to restrict these observations to such contracts alone.

The decision of the Privy Council in *Watson & Co. v. Sham Lal Mitter*<sup>4</sup>, where the Privy Council upheld an arrangement entered into by the guardian for enhancement of rent payable by the minor tenant for his holding and gave effect to the kabuliyat for enhanced rent as one binding on the estate of the minor also suggests that in regard to contracts as in regard to alienations the true test of the binding character of the guardian's transaction is the existence of necessity or benefit.

A contract for service undoubtedly may very often be the means of securing livelihood to the minor and may be beneficial to him. No doubt, there are bound to be some stipulations against the interest of the minor in a contract of service. Indeed as observed by Desai, J., in the instant decision of the Bombay High Court<sup>5</sup> "contracts of service like other contracts to be carried out in future involve a certain element of speculation. It may be that a contract of service by a minor, which is beneficial at the date it is entered into, may by reason of change of circumstances not be beneficial to him at a future date." While there is this aspect of the matter, it cannot be doubted that it is but one of the considerations to be taken into account by the Court in judging the true nature of the contract. The true approach to a

1. (1856) 6 M.L.A. 393.

2. (1938) 2 M.L.J. : 758 : I.L.R. 1938 Mad.

1019.

3. I.L.R. (1939) Mad. 776.

4. (1887) L.R. 14 I.A. 178 : I.L.R. 15 Cal. 8 (P.C.).

5. A.I.R. 1949, Bom. 215.

question like this is indicated by Fry, L.J., in *De Francesco v. Barnum*<sup>1</sup>: "I approach the subject with the observation that it appears to me that the question is this: Is the contract for the benefit of the infant? Not is any particular stipulation for the benefit of the infant? because it is obvious that the contract of apprenticeship, or the contract of labour must, like any other contract contain some stipulations for the benefit of the one contracting party and some for the benefit of the other. It is not because you can lay your hand on a particular stipulation which you may say is against the infant's benefit, that therefore the whole contract is not for the benefit of the infant. The Court must look at the whole contract, having regard to the circumstances of the case, and determine, subject to any principles of law which may be ascertained by the cases, whether the contract is or is not beneficial."

If then it can be said of a contract of service that it is necessary and beneficial to a particular minor in the circumstances of a particular case, can the liberal view as to the powers of a guardian taken by the Madras High Court be pressed into service to affirm its validity? The question has not directly arisen for decision, but in *Pollard v. Rouse*<sup>2</sup>, the Madras High Court did consider the effect of a contract of apprenticeship and service entered into by guardians on behalf of minors. There Wallis, J., cited with approval the decision in *De Francesco v. Barnum*<sup>1</sup> and rejected the contention that the contracts which came up for consideration in that case were void. No doubt, there can be no question of specific performance in such cases for want of mutuality of remedy. But if the contract is not to be treated as void, certain consequences will flow from the contract. It can for instance sustain a suit by the employer against a third party for enticing away the employee and for an account in respect of his earnings. It can likewise be the basis of an action for damages by the minor employee.

From the foregoing considerations it is respectfully submitted that the view of law which has found favour with the Patna High Court in *Ram Bilas v. Lokenath*<sup>3</sup> requires reconsideration. The statement of law to be found in the latest edition of *Mayne's Hindu Law*<sup>4</sup> that "it is not within the competence of a manager of a minor's estate or of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase or for the sale of immoveable property" (*Italics ours*) is submitted to be too widely expressed. A contract of sale entered into by the minor's guardian, for the reasons already stated, admits of specific performance if it is within the doctrine of legal necessity. Further, want of mutuality does not *per se* render a contract void. The validity of the guardian's contract is to be judged with reference to the scope of the guardian's power to enter into a contract on behalf of the minor. Thus a contract of service entered into by the guardian on behalf of the minor is not specifically enforceable for want of mutuality, but may nevertheless in certain circumstances be valid so as to give rise to a claim for damages. There are no compelling considerations to negative a power to the guardian under the personal law, for instance, of the Hindus, to enter into contracts so as to bind minors in circumstances in which under the English Law a minor can *eo nomine* enter into a contract so as to bind himself. In this view the conclusions of the Bombay High Court in *Raj Rani v. Prem Adib*<sup>5</sup> are also, it is respectfully submitted, of a debatable character and require reconsideration.

1. (1890) 45 Ch. D. 430.  
2. (1910) I.L.R. 33 Mad. 283.  
3. (1948) I.L.R. 27 Pat. 143.

4. Mayne: Hindu Law (11th Ed.), 292.  
5. A.I.R. 1949 Bom. 215.