1945 *Present:* **Soertsz A.C.J. and Keuneman S.P.J.**

SIMAN NAIDE, Appellant, *and* ASLIN NONA, Respondent.

330—D. C. Kegalla, 2,844.

Minor—Sale of land by minor—Sanction of Court not obtained—Right of the minor to have sale cancelled by way of regular action—Onus of proof—Vendee's right to be indeminified.

A sale of immovable property by a minor without the sanction of a competent court is voidable, not void, and the minor may relieve himself from the consequences of the contract by way of regular action.

Where it has not been shown that the minor has derived substantial benefit he must be taken to have suffered the kind of loss or damage sufficient to enable him to obtain relief; the minor must, however, indemnify the defendant and put him back where he stood before he entered into the contract.

A Kandyan woman, who is under twenty-one years of age, does not obtain majority by marriage.

THE plaintiff, a married Kandyan woman, purported to transfer by deed to the defendant the land in dispute in this case. At the date of the transfer she was under twenty-one years of age. Her father and her husband were present at the sale, but the sanction of the Court had not been obtained. The land was sold for Rs. 500, which was a fair price in the market then prevailing. In this action the plaintiff sued to have the sale set aside on the ground that she was a minor at the time of the sale and that she was not benefited by the contract. At the date of the institution of the action, the land was worth Rs. 1,500.

H. V. Perera, K.C. (with him *S. R. Wijayatilake*), for the defendant, appellant.—A sale of land by a minor without the sanction of court is voidable and not void—*Silva v. Mohamadu* [1]; *James v. Solomon et al* [2]. The minor's remedy, however, is by way of *restitutio in integrum*, and serious and substantial damage to the minor, as a result of the contract, must be proved—*Majeeda v. Paramanayagam* [3]; *Voet 4.1.10 and 11; Voet 4.4.12, 13 and 16; 3 Maasdorp's Institutes, 678 (4th ed.).* The position of a contract, on behalf of a minor, by the guardian is fully considered in *Breytenbach v. Frankel* [4]. The minor in the present case has not proved serious loss. On the contrary she received full consideration on the contract.

L. A. Rajapakse, K.C. (with him *C. R. Guneratne*), for the plaintiff, respondent.—Where relief is sought for from the Supreme Court by way of *restitutio in integrum* a minor may have to establish serious loss. *Majeeda v. Paramanayagam* (*supra*) was such a case. But *restitutio* is necessary only in the case of a contract entered into by Court or by a guardian appointed by Court—3 *Maasdorp's Institutes (1907 ed.) pp. 58, 59.* The present case, however, is an ordinary action and once the plaintiff established her minority at the time of the contract and her readiness now to return the purchase price the burden shifted to the defendant

[1] *(1916) 19 N. L. R. 426.*
[2] *(1925) 3 Times 124.*
[3] *(1933) 36 N. L. R. 196.*
[4] *S. A. L. R. (1913) A. D. 390.*

to raise any of the exceptional defences permitted by law. *Ex facie* a minor has no contractual capacity—Wessels on Contracts, p. 236, ss. 695, 696; *1 Maasdorp's Institutes (5th ed.) 280.* A minor's contract in respect of immovable property without the sanction of court is void, and not merely voidable—*Manuel Naide et al. v. Adirian Hamy et al.*[1]; *Saibo v. Perera*[2]; Wessels on Contracts, ss. 787 (1) (*b*), 790, 780, 781 where reference is made to the leading case of *Nel v. Divine Hall Co*[3]. The burden of proving that an obligation has been incurred by a minor for his benefit lies upon the person who seeks to enforce it—*Voet 4.4.13.* It was not obligatory on the plaintiff to prove loss—*Muttiah Chetty v. Dingiria et al*[4]; *Dissanaike v. Elwes*[5].

S. R. Wijayatilake in reply.—*Manuel Naide et al. v. Adirian Hamy et al.* (*supra*) was considered in *Silva v. Mohamadu* (*supra*). The burden was on the plaintiff to show that the contract was detrimental to her—*Muttiah Chetty v. De Silva*[6].

Cur. adv. vult.

July 24, 1945. SOERTSZ A.C.J.—

The plaintiff-respondent, a married Kandyan woman, purported to transfer to the defendant-appellant, on deed of transfer No. 2,420 of August 1, 1943, the land in dispute in this case. At the date of the transfer she was under twenty-one years of age. Her father and her husband were present at the sale. She now sues to have the said deed set aside and declared void, for the defendant to be ejected therefrom and for her to be declared entitled thereto and placed in possession thereof, on the ground that she was a minor at the time of the sale, that she did not receive the consideration for which she gave the transfer, or any other benefit. According to the defendant she had sold the land for Rs. 500 to the defendant, and had received Rs. 350 in cash, the balance having been applied by the defendant to pay off a mortgage to which the land was subject at that time.

In the course of her evidence at the trial plaintiff found herself compelled to repudiate the averment in her plaint and to admit that she had received Rs. 350 and had utilized that sum in buying clothes for herself and her child and in medical treatment of the child. She also admitted the discharge of the mortgage. The evidence shows that at the date of the transfer she had been twice married. She had divorced her first husband, and had married the husband who, along with her father, was present at the Notary's office when she executed this deed. From the evidence one also gathers the fact that Rs. 500 was quite a fair price for the land at the time of the sale.

The learned trial Judge basing himself upon the Divisional Bench case of *Muttiah Chetty v. Dingiriya*[7] which ruled that a Kandyan woman does not become a major by marriage, held that although he found that she had the assistance of her husband and of her father, in and about the execution of the deed of transfer, she was entitled, nevertheless, to

[1] *(1909) 12 N. L. R. 259.*
[2] *(1915) 4 Bal. N. C. 57.*
[3] *S. A. L. R. 8 S. C. 16.*
[4] *(1907) 10 N. L. R. 371.*
[5] *(1909) 12 N. L. R. 291.*
[6] *(1895) 1 N. L. R. 358.*
[7] *10 N. L. R. 371.*

repudiate that deed for the simple reason that she was a minor at the date of its execution. He, accordingly, directed that decree be entered " declaring deed No. 2,420 of August 1, 1943, cancelled and void on plaintiff paying defendant the sum of Rs. 470, and ejectment. Defendant will pay plaintiff half costs of this action ". From this decree the defendant has appealed and the principal submission made to us in appeal was that the deed was not liable to be set aside for the reason that the plaintiff was benefited by her contract of sale. No point was made, nor could any point have well been made, of the fact of the assistance the plaintiff had received from her husband and her father. The sale had not been sanctioned by Court.

An examination of our law reports reveals the thoroughly unsatisfactory and illogical position in which many matters relating to the so-called contracts of minors stand. Justice de Sampayo invited attention to some of them in the case of *Silva v. Mohamadu* [1], and it appears clearly from a perusal of the cases he refers to that the uncertainty of the law is mainly due to the fact that it has been stretched or contracted to suit the merits or demerits of particular cases. *Wijesooria v. Ibrahimsa* [2] is a striking illustration as the criticism by Wessels of the rule there laid down clearly demonstrates (see Wessels' Law of Contract, p. 279 *et seq.*). What appeared to be hard cases have served to make bad or, at any rate, uncertain law and this tendency has derived support from the conflicting views of the Dutch Jurists themselves.

In regard to the present case, however, certain points must be taken to have been finally settled so far as our Courts are concerned. In regard to the question whether a minor attains the contractual capacity of majors by marriage whatever the position may be under the Roman-Dutch law (see Walter Pereira pp. 191-192) it is now definitely laid down that a *Kandyan* woman does not attain majority by marriage. It must also be regarded as settled law ever since *Silva v. Mohamadu (supra)* which followed the well-known South African case of *Breytenbach v. Frankel* [3] that a sale of immovable property by a minor without the sanction of a competent Court is voidable, not void, and that a minor may relieve himself or herself by *restitutio in integrum* or " some equivalent legal proceeding " (see *Silva v. Mohamadu* [4]).

The sole questions remaining for consideration in this case are firstly, whether a minor seeking such a remedy must show that she suffered damage or detriment, or whether she may be defeated by proof by the other party that she derived a benefit from the sale of this land, and secondly whether she should restore the other party to his original position as a condition precedent to her obtaining the relief she claims. The first of these questions would have depended for its answer, to a large extent, under the Roman-Dutch law system on the way in which she sought relief. If she sought it by way of *restitutio in integrum* it would appear from the very impressive reasoning in the judgment of Solomon J. in *Breytenbach v. Frankel (supra)* at page 400, that the onus lies on her

[1] *19 N. L. R. 426 at page 430.*
[2] *13 N. L. R. 195.*
[3] *S. A. L. R. 1913 A. D. page 390.*
[4] *19 N. L. R. at page 432.*

to prove damage, whereas if she brought a vindicatory action, she is entitled to succeed on mere proof that her property was alienated by the guardian—that was the case there—without the sanction of the Court. But, in this case a differentiating fact is that the alienation was not by a guardian but by the minor herself. What is the position in such a case? It is, in my opinion, reasonable to hold that in the case of a sale by the minor herself *restitutio* is the proper course, for as pointed out by Solomon J. " the authorities lay down explicitly that an alienation by *a guardian* of the immovable property of his minor without the sanction of the Court has no effect to transfer the dominium in such property. And the reason of the doctrine is clear, namely, that no one has the power to alienate property that does not belong to him. Consequently, when such an alienation has taken place, the dominium still remains in the minor, so that in order to recover his property it is not necessary for him to apply to the Court for a *restitutio in integrum* but he can bring a vindicatory action as the dominus of the property ".

It would follow from this that in a case like the present where the minor herself has alienated immovable property, her remedy ought to be by *restitutio* for she has purported to divest herself of her title, and she ought not to be allowed to be the judge in her own case as to the validity or invalidity of her alienation, and to sue *rei vindicatione* by assuming that the dominium is still in her, for as observed by Villiers C.J., although that might be logically sound " whether an act was void or voidable *the universal practice* appears to have been for the minor who repudiated the transaction to bring an action for *restitutio in integrum* " . . . (*Breytenbach v. Frankel*) (*supra*).

In our Courts, as far as I have been able to discover, applications for *restitutio in integrum* have always been made to the Supreme Court by minors as well as by persons of full capacity and have been confined to cases in which the application is based on the discovery of fresh evidence or on allegation that the applicant has been surprised into a position of prejudice and disadvantage in the course of a judicial proceeding. Minors seeking to be relieved from the consequences of contracts alienating land have always proceeded by regular action in which the prayer generally is that the deed be declared void and that the plaintiff be declared entitled to the land or to be placed in possession of it. This was pointed out by Ennis J. when he observed in *Silva v. Mohamadu* (*supra*) at page 428: " In Ceylon there is no distinction between the two actions (*i.e.*, *rei vindicatio* and *restitutio in integrum*), the prayer generally combining both, by asking that the deed be set aside or declared null and void, and by asking for a declaration of title and recovery of possession ".

A certain confusion of thought in some of our reported cases in regard to the burden of proof is evidently due to the position adopted by the Roman-Dutch law in that respect. If the minor proceeds by way of *restitutio in integrum* the onus lies on the minor to prove damage: if, however, he is in a safe position to proceed by way of *rei vindicatio*, all he need prove is minority and the party seeking to enforce the contract would have to prove that it was to the minor's benefit, that is to say,

very clear and singular benefit (*see Nel v. Divine Hall Co.*[1]). That certainly appears to be the position in regard to *ordinary* contracts and not to *contracts involving alienation of land* as one would infer from the observation of Solomon J. at page 400 of *Breytenbach v. Frankel (supra)*. Contracts of minors involving the alienation of land appear to be on a special footing. Lee (*Introduction to Roman-Dutch Law, p. 48*) says: " In the sphere of property law there is nothing to prevent a minor from acquiring ownership but he cannot alienate or charge his property without his parent's or tutor's authority, which in the case of the alienation or hypothecation of immovables is not sufficient without an order of Court ". He quote extensively from the Jurists in support of this. That is the law in Ceylon too (*e.g. Manuel Naide v. Adirian Hamy* [2]). If alienation of immovables has taken place without the sanction of the Court, the better opinion appears to be that the property is recoverable, benefit or no benefit, provided that, in most cases, the other party is put back in his original position. Be that as it may, in this case, the defendant has not shown that the minor derived any substantial benefit other than that she received what, in the market then prevailing, may be regarded as a fair price. That would hardly do, for the writers contemplate benefit described as *singulare emolumentum*. But, it is reasonable to suppose that, in a hybrid proceeding of this kind partaking both of the character of *restitutio in integrum* and of *rei vindicatio*, theoretically, at least, a certain onus lies on the minor as well as a certain obligation. In the words of Drieberg J. in *Majeeda v. Paramanayagam* [3], " it is necessary for the minor to prove that he has suffered serious loss, damage, or prejudice, and the other party to the contract is entitled to be indemnified and placed in his original position ". It seems to me that these apparently conflicting burdens placed on the other party and the minor respectively can, in a case like the present involving alienation of land, be reconciled to some extent by holding that where it has not been shown that the minor has been benefited as the recipient of some *singulare emolumentum* he must be taken to have suffered the kind of loss or damage sufficient to enable him to obtain relief. There is evidence in this case that in the market, at the date of the institution of the action, this land was worth Rs. 1,500. The other principle referred to by Drieberg J., however, holds good. The minor must indemnify the defendant and put him back where he stood before he entered into this contract.

I would, therefore, vary the decree entered by the trial Judge by directing that the plaintiff will be declared entitled to the land, the defendant ejected and the plaintiff restored to possession on her bringing into Court Rs. 500, the amount of consideration she received, and an additional sum of Rs. 350, value of the house built by the defendant on the land. Costs in the Court below as directed in the judgment of the trial Judge. Costs of appeal divided.

KEUNEMAN S.P.J.—I agree.

Decree varied.

[1] *8 S. C. p. 16.*

[2] *12 N. L. R. 259.*

[3] *36 N. L. R. 196.*