

MANU/PR/0049/1903

Equivalent Citation: 7CWN441, (1903)L.R. 30 I.A. 114, 30M.I.A.114

BEFORE THE PRIVY COUNCIL

Decided On: 04.03.1903

Appellants: **Mohori Bibee and Ors.**

Vs.

Respondent: **Dharmodas Ghose**

Hon'ble Judges/Coram:

Lord Macnaghten, Lord Davey, Lord Lindley, Sir Ford North, Sir A. Scoble and Sir A. Wilson

JUDGMENT

Sir Ford North

1. On the 20th of July 1895 the Respondent Dharmodas Ghose executed a mortgage in favour of Brahmoo Dutt, a money-lender carrying on business at Calcutta and elsewhere, to secure the repayment of Rs. 20,000 at 12 per cent, interest on some houses belonging to the Respondent. The amount actually advanced is in dispute. At that time the Respondent was an infant ; and he did not attain 21 until the month of September following. Throughout the transaction Brahmoo Dutt was absent from Calcutta, and the whole business was carried through for him by his attorney Kedar Nath Mitter, the money being found by Dedraj, the local manager of Brahmoo Dutt. While considering the proposed advance Kedar Nath received information that the Respondent was still a minor ; and on the 15th of July 1895 the following letter was written and sent to him by Bhupendra Nath Bose, an attorney :--

Dear Sir,

I am instructed by Sm. Jogendranundinee Dasi, the mother and guardian appointed by the High Court under its Letters Patent of the person and property of Babu Dharmodas Ghose, that a mortgage of the properties of the said Babu Dharmodas Ghose is being prepared from your office. I am instructed to give you notice, which I hereby do, that the said Babu Dharmodas Ghose is still an infant under the age of 21, and anyone lending money to him will do so at his own risk and peril.

Kedar Nath positively denied the receipt of any such letter ; but the Court of first instance and the Appellate Court both held that he did personally receive it on the 15th July ; and the evidence is conclusive upon the point.

2. On the day on which the mortgage was executed, Kedar Nath got the infant to sign a long declaration which he had prepared for him, containing a statement that he came of age on the 17th of June ; and that Babu Dedraj and Brahmoo Dutt, relying on his assurance that he had attained his majority, had agreed to advance to him Rs. 20,000. There is conflicting evidence as to the time when and circumstances under which that declaration was obtained ; but it is unnecessary to go into this, as both Courts below have held that Kedar Nath did not act upon, and was not misled by, that statement ; and was fully aware at the time the mortgage was executed of the minority of the Respondent. It may be added here that Kedar Nath was the attorney and agent of

Brahmo Dutt, and says in his evidence that he got the declaration for the greater security of his "client." The infant had not any separate legal adviser.

3. On the 10th of September 1895 the infant by his mother and guardian as next friend commenced this action against Brahmo Dutt stating that he was under age when he executed the mortgage, and praying for a declaration that it was void and inoperative, and should be delivered up to be cancelled.

4. The Defendant Brahmo Dutt put in defence that the Plaintiff was of full age when he executed the mortgage that neither he nor Kedar Nath had any notice that the Plaintiff was then an infant ; that even if he was a minor, the declaration as to his age was fraudulently made to deceive the Defendant, and disentitled the Plaintiff to any relief; and that in any case the Court should not grant the Plaintiff any relief without making him repay the moneys advanced.

5. By a further statement the Defendant alleged that the Plaintiff had subsequently ratified the mortgage ; but this case wholly failed, and is not the subject of appeal.

6. Mr. Justice Jenkins, who presided in the Court of first instance, found the facts as above stated, and granted the relief asked. See MANU/WB/0074/1898 : 2 C. W. N. 330 : s. c. I. L. R. 25 Cal. 616 And the Appellate Court dismissed the appeal from him. See MANU/WB/0050/1898 : 3 C. W. N. 468 : s. c. I. L. R. 26 Cal. 881 Subsequently to the institution of the present appeal Brahmo Dutt died, and this appeal has been prosecuted by his executors.

7. The first of the Appellants' reasons in support of the present appeal is that the Courts below were wrong in holding that the knowledge of Kedar Nath must be imputed to the Defendant. In their Lordships' opinion they were obviously right. The Defendant was absent from Calcutta and personally did not take any part in the transaction. It was entirely in charge of Kedar Nath, whose full authority to act as he did is not disputed. He stood in the place of the Defendant, for the purposes of this mortgage ; and his acts and knowledge were the acts and knowledge of his principal. It was contended that Dedraj, the Defendant's Gomastha, was the real representative in Calcutta of the Defendant, and that he had no knowledge of the Plaintiff's minority. But there is nothing in this. He no doubt made the advance out of the Defendant's funds. But he says in his evidence that "Kedar Babu was acting on behalf of my master from the beginning in this matter," and a little further on he adds that before the registration of the mortgage he did not communicate with his master on the subject of the minority. But he did know that there was a question raised as to the Plaintiff's age ; and he says "I left all matters regarding the minority in the hands of Kedar Babu."

8. The Appellants' counsel contended that the Plaintiff is estopped by sec. 115 of the Indian Evidence Act (I of 1872) from setting up that he was an infant when he executed the mortgage. The section is as follows:--"Estoppel. When one person has by his declaration act or omission intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."

9. The Courts below seem to have decided that this section does not apply to infants ; but their Lordships do not think it necessary to deal with that question now. They consider it clear that the section does not apply to a case like the present, where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is

known to both parties, and their Lordships hold, in accordance with English authorities, that a false representation, made to a person who knows it to be false, is not such a fraud as to take away the privilege of infancy [Nelson v. Stocker 4 De G. and J. 458 (1859)]. The same principle is recognised in the explanation to sec. 19 of the Indian Contract Act, in which it is said that a fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

10. The point most pressed, however, on behalf of the Appellants was that the Courts ought not to have decreed in the Respondent's favour without ordering him to repay to the Appellants the sum of Rs. 10,500 said to have been paid to him as part of the consideration for the mortgage. And in support of this contention sec. 64 of the Contract Act (IX of 1872) was relied on.

11. "Sec. 64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received."

12. Both Courts below held that they were bound by authority to treat the contracts of infants as voidable only, and not void ; but that this section only refers to contracts made by persons competent to contract, and therefore not to infants.

13. The general current of decision in India certainly is that ever since the passing of the Indian Contract Act (IX of 1872) the contracts of infants are voidable only. This conclusion, however, has not been arrived at without vigorous protests by various Judges from time to time ; nor indeed without decisions to the contrary effect. Under these circumstances their Lordships consider themselves at liberty to act on their own view of the law as declared by the Contract Act, and they have thought it right to have the case re-argued before them upon this point. They do not consider it necessary to examine in detail the numerous decisions above referred to, as in their opinion the whole question turns upon what is the true construction of the Contract Act itself. It is necessary therefore to consider carefully the terms of that Act, but before doing so it may be convenient to refer to the Transfer of Property Act, IV of 1882, sec. 7 of which provides that every person competent to contract and entitled to transferable property. is competent to transfer such property in the circumstances, to the extent, and in the manner allowed and prescribed by any law for the time being in force. That is the Act under which the present mortgage was made, and it is merely dealing with persons competent to contract ; and sec. 4 of that Act provides that the chapters and sections of that Act which relate to contracts are to be taken as part of the Indian Contract Act, 1872. The present case therefore falls within the provisions of the latter Act.

14. Then, to turn to the Contract Act, sec. 2 provides (e) Every promise and every set of promises, forming the consideration for each other, is an agreement. (g) An agreement not enforceable by law is said to be void. (h) An agreement enforceable by law is a contract. (i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract.

15. Sec. 10 provides "All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration, and with a lawful object,

and are not hereby expressly declared to be void."

16. Then sec. 11 is most important, as defining who are meant by "persons competent to contract;" it is as follows :--"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which "he is subject." Looking at these sections their Lordships are satisfied that the Act makes it essential that all contracting parties should be "competent to contract," and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. This is clearly borne out by later sections in the Act. Sec. 68 provides that "If a person incapable of entering into a contract or any one whom he is legally bound to support is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person." It is beyond question that an infant falls within the class of persons here referred to as incapable of entering into a contract ; and it is clear from the Act that he is not to be liable even for necessaries, and that no demand in respect thereof is enforceable against him by law, though a statutory claim is created against his property. Under secs. 183 and 184 no person under the age of majority can employ or be an agent. Again under secs. 247 and 248, although a person under majority may be admitted to the benefits of a partnership, he cannot be made personally liable for any of its obligations ; although he may on attaining majority accept those obligations if he thinks fit to do so. The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant. Their Lordships are therefore of opinion that in the present case there is not any such voidable contract as is dealt with in sec. 64.

17. A new point was raised here by the Appellants' counsel founded on sec. 65 of the Contract Act, a section not referred to in the Courts below, or in the cases of the Appellants or Respondent. It is sufficient to say that this section, like sec. 64, starts from the basis of there being an agreement or contract between competent parties ; and has no application to a case in which there never was, and never could have been, any contract.

18. It was further argued that the preamble of the Act showed that the Act was only intended to define and amend certain parts of the law relating to contracts, and that contracts by Infants were left outside the Act. If this were so, it does not appear how it would help the Appellants. But in their Lordships' opinion the Act, so far as it goes, is exhaustive and imperative ; and does provide in clear language that an infant is not a person competent to bind himself by a contract of this description.

19. Another enactment relied upon as a reason why the mortgage money should be returned is sec. 41 of the Specific Relief Act (I of 1877) which is as follows :--"Sec. 41. On adjudging the cancellation of an instrument the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require." Sec. 38 provides in similar terms for a case of rescission of a contract. These sections no doubt do give a discretion to the Court, but the Court of First Instance and subsequently the Appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the Respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised.

20. It was also contended that one who seeks equity must do equity. But this is the last point over again and does not require further notice except by referring to a recent decision of the Court of Appeal in *Thurstan v. Nottingham Permanent Benefit Building Society* L. R. (1902) 1 Ch. 1 (1901) ; on appeal, L. R. (1903) App. Cas. 6 since affirmed by the House of Lords. In that case a female infant obtained from the Society of which she was a member part of the purchase-money of some property she purchased ; and the Society also agreed to make her advances to complete certain buildings thereon. They made the advances and took from her a mortgage for the amount. On attaining 21 she brought the action to have the mortgage declared void under the Infants Relief Act. The Court held that, as regards the purchase-money paid to the vendor, the Society was entitled to stand in his place and had a lien upon the property ; but that the mortgage must be declared void and that the Society was not entitled to any repayment of the advances. Dealing with this part of their claim Lord Justice Romer says, at p. 13 "The short answer is that a Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which as against that person the Legislature has declared to be void." So here.

21. Their Lordships observe that the construction which they have put upon the Contract Act seems to be in accordance with the old Hindu Law as declared in the laws of Manu, Ch. VIII, 163 ; and Colebrooke's Dig. liii 2, Vol. II, p. 181 ; although there are no doubt decisions of some weight that before the Indian Contract Act an infant's contract was voidable only, in accordance with English law as it then stood. The appeal therefore wholly fails ; and their Lordships will humbly advise His Majesty that it should be dismissed. The Appellants must pay the costs of the appeal.

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