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such dispossession of the defendants from the lands of the *durputni* by the plaintiff as to entitle the defendants Nos. 2 and 3 to claim suspension of rent or proportionate abatement thereof, and to retry the appeal in the light of the above observations.

The decree against defendant No. 1 for rent up to Pous 1327 B.S. will stand. The appellants are entitled to costs here and in the Courts below against the plaintiff.

RANKIN C. J. I agree.

S. M.

Decree modified.

APPELLATE CIVIL.

Before Page and Graham JJ

FULI BIBI

v.

KHOKAI MONDAL*.

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Aug. 12.

Minor—Estoppel—Cancellation of document—"Those who seek equity must "do equity"—Void document—Evidence Act (I of 1872), s. 115—Specific Relief Act (I of 1877), s. 41—Code of Civil Procedure (Act V of 1908), O. XXXII, r. 1.

Where two minors, the appellants, executed a *kobala* by which they transferred for value to the respondents their shares of a *ryoty* interest in certain lands that they had inherited, a suit was brought by the appellants against the respondents for a declaration that they were entitled to

*Appeal from Appellate Decree, No. 1360 of 1925, against the decree of Moulvi Osman Ali, Subordinate Judge of Nadia, dated March 11, 1925, confirming the decree of Bakulal Biswas, Munsif, Chuadanga, dated March 5, 1924.

their respective shares in the property, and joint possession with their co-sharers whom they impleaded as *pro formâ* defendants :—

Held, (*i*) that section 41 of the Specific Relief Act was not *ad rem*, for it applied to proceedings in which the plaintiff was seeking "the cancellation of an instrument," whereas in the present suit the appellants were not seeking the cancellation of the *kobala*, which was void and might be disregarded by the appellants as a nullity :

Mohori Bibee v. *Dharmodas Ghose* (1) and *Bejoy Gopal Mukerji* v. *Krishna Mahishi Debi* (2) referred to.

(*ii*) that the equitable doctrine that "those who seek equity must do "equity" did not apply to this transaction :

Thurston v. *Nottingham Permanent Benefit Building Society* (3) followed

(*iii*) that where a suit is brought by a minor plaintiff to the knowledge of, and without objection from, the defendant, and the plaintiff becomes a major before the suit is heard and decided, it is not a nullity, and is maintainable.

SECOND APPEAL by Fuli Bibi and others, the plaintiffs.

This second appeal arose out of a suit for a declaration of shares, for joint possession, damages and mesne profits. The appellants, Fuli Bibi and Amini Bibi, were two minor girls when they executed a *kobala* by which they transferred, on receipt of a part payment, to the respondents their shares of a certain property which they had inherited. The respondents *inter alia* contended that they were entitled to receive back the money that they had paid to the appellants in consideration of the property that they were about to sell to them.

Dr. Radha Binode Pal and *Babu Bhupendra Kishore Basu*, for the appellants.

Mr. Santosh Kumar Bose, advocate, and *Babu Radhika Ranjan Guha*, for the respondents.

(1) (1903) I. L. R. 30 Calc. 539. (2) (1907) I. L. R. 34 Calc. 329.
(3) [1902] 1 Ch. 1.

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PAGE J. On the 21st January 1920, the appellants Fuli and Amini, who were minors, executed a *kobala* by which they transferred to the respondents their shares of a ryoti interest in certain lands that they had inherited. Fuli was born on the 21st December 1902, and Amini on the 7th March 1905. It was alleged by the respondents that Rs. 950 was paid as consideration for the transfer, and both the lower Courts have held that part, but not the whole, of this sum was received by or on behalf of the appellants.

On the 24th January 1923, the appellants brought the present suit against the respondents, claiming a declaration that they were entitled to their respective shares in the property, and joint possession with their co-sharers, whom they impleaded as *pro formâ* defendants. They also claimed damages and mesne profits against the respondents. When the suit was filed the appellants' mother Bhadi was joined as a co-plaintiff, but subsequently she withdrew her claim. The trial Court dismissed Fuli's claim and decreed Amini's claim in part; but the lower Appellate Court rejected the claims of both of the appellants, and dismissed the suit with costs. From that decree the appellants have preferred the present appeal.

The *kobala* in suit was executed by Fuli, and on behalf of Amini by her husband as her guardian. But as the husband of a minor is not her guardian under Mahomedan Law, and the lower Appellate Court has found that both Fuli and Amini were minors at the time when the *kobala* was executed, it was conceded that the *kobala* was null and void as against both the appellants.

At the trial Fuli stated—

"I went to the Sub-Registrar for registering the document as he found "me minor. He then asked my mother about my age, and said that if "she stated my age as major he could register it. My mother then told "my age as 17 to 18 years to him".

Now, it is admitted that Fuli would not be estopped by a misrepresentation as to her age made by her mother, *Ram Charan Das* v. *Joy Ram Majhi* (1), and there is no finding, and no evidence to justify a finding, that either Fuli or Amini herself made any representation as to her age to the respondents, or that Fuli's conduct was such as would render her amenable to the rule of estoppel by negligence [*Gregg* v. *Wells* (2), *Freeman* v. *Cooke* (3)]. The interesting question that was much canvassed at the hearing of the appeal, whether a minor is a "person" within section 115 of the Evidence Act (I of 1877), therefore, does not arise. *Brohmo Dutt* v. *Dharmodas Ghose* (4), *Dadasaheb Dasarathrao* v. *Bai Nahani* (5), *R. Leslie* v. *Sheill* (6). There being no evidence or finding that either of the appellants was guilty of misrepresentation or fraud *primâ facie* the appellants are entitled to succeed.

Two contentions, however, have been raised by the respondents in support of the decree of the lower Appellate Court; (*i*) that as a condition precedent to passing a decree in their favour the Court ought to require the appellants to repay to the respondents the monies which they respectively have received as consideration for the transfer, either under section 41 of the Specific Relief Act (I of 1877) or pursuant to the principle that "those who seek equity, must do equity", (*ii*) that as the suit was instituted by Amini who was then a minor, and not by her next friend acting in her name, she is not entitled to any relief in the suit which, so far as she is concerned, must be treated as a nullity.

(1) (1912) 17 C. W. N. 10.
(2) (1839) 10 A. & E. 90.
(3) (1848) 2 Ex. 654.
(4) (1898) I. L. R. 26 Calc. 381.
(5) (1917) I. L. R. 41 Bom. 480.
(6) [1914] 3 K. B. 607.

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The answer to the first contention is not far to seek. Section 41 of the Specific Relief Act is not *ad rem* for it applies to proceedings in which the plaintiff is seeking "the cancellation of an instrument" whereas in the present suit the appellants are not seeking the cancellation of the *kobala*, which is void and may be disregarded by the appellants as a nullity. *Mohori Bibee* v. *Dharmodas Ghose* (1), *Bijay Gopal Mukerji* v. *Krishna Mahishi Debi* (2). The attempt of the respondents to pray in aid of their case the equitable doctrine that "those who seek equity must do "equity" is countered by the decision in *Thurston* v. *Nottingham Permanent Benefit Building Society* (3). In that case the plaintiff, a minor, in order to be enabled to purchase some land, and to complete the building of houses in course of erection thereon, applied to the defendants for a loan, and executed a mortgage of the property in their favour to secure advances up to a limit of £1,200. On attaining her majority the plaintiff brought a suit against the defendants in which she claimed a declaration that the mortgage was void, and that she was entitled to possession of the mortgaged property. The defendants did not allege that the plaintiff had been guilty of any fraud or misrepresentation in connection with the transaction. It was held that to the extent to which the money advanced by the defendants had been paid to the vendor to complete the purchase the plaintiff could not affirm the purchase and repudiate the advance, and that she must repay to the defendants the money so advanced. The defendants contended, however, that the plaintiff ought to be compelled to refund also the monies advanced by the Society upon

(1) (1903) I. L. R. 30 Calc. 539. (2) (1907) I. L. R. 34 Calc. 329.
(3) [1902] 1 Ch. 1.

the security of the mortgage after the purchase had been completed. This contention was rejected, Romer L. J. observing that—

" the short answer is, that a Court of equity cannot say that it is " equitable to compel a person to pay any monies in respect of a transaction " which, as against that person, the Legislature has declared to be void ". (*ibid* p. 13).

The law thus enunciated by Romer L. J. has been affirmed *in ipsissimis verbis* both by the House of Lords (1) and by the Privy Council, *Mohori Bibee* v. *Dharmodas Ghose* (2), see also *Guru Shiddswami* v. *Parawa* (3), and concludes the matter against the respondents.

In support of their second contention, which prevailed in the lower Appellate Court, the respondents relied upon the language in which Order XXXII, rule 1 is couched; and urged that all proceedings in a suit instituted by a minor, and not by the minor's next friend in his or her name, are void and of no effect, and, therefore, that Amini's suit must fail. In my opinion, however, there is no substance in this contention. The policy of the Legislature in enacting Order XXXII was that where a minor has instituted a suit in his own name the proceedings in normal cases should not be treated as abortive, but that an opportunity should be given to constitute the suit in the regular manner.

" The reason why no proceeding can be taken by an infant without " the assistance of a next friend is, as stated in Daniell's Chancery Practice, " 6th edition, p. 105 ' on account of an infant's supposed want of discretion, " ' and his inability to bind himself, and make himself liable for costs.' " And it would seem that the rule was intended for the protection and " benefit of defendants ; for it has been held that when a defendant waives " this benefit and protection the suit may proceed without a next friend."

(1) [1903] A. C. 6.

(2) (1903) I. L. R. 30 Calc. 539, 549.

(3) (1919) I. L. R 44 Bom. 175.

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per Sale J. in *Durga Mohun Dass* v. *Tahir Ally* (1).

But the ground upon which protection is afforded to a defendant in a suit instituted by a minor is removed when the defendant at all material times is aware, or has received notice, of the minority of the plaintiff, and yet elects to proceed to trial and take his chance of obtaining a decree in his favour on the merits without raising any objection to, or issue upon, the maintainability of the suit; and prefers the objection for the first time on appeal when the trial has gone against him. These, however, are the circumstances obtaining in the present case; for it would appear that the respondents, one of whom is a close relation of the appellants, were fully aware of the age of each of the appellants, and, at any rate after the additional plaint was filed, cannot be heard to say that they had not received notice of the dates upon which Fuli and Amini respectively were born. Moreover, before the suit was heard Amini had attained her majority, and become bound by the decrees and orders passed therein. Too often in this country is a suit won or lost because the form has been allowed to swallow up the substance of the case. No doubt, rules and regulations are necessary, and useful when sensibly applied. But let there be too rigid an adherence to the technicalities of the law and litigation tends to become as uncertain in its event as a game of chance; to the detriment of justice, and the consternation of litigants. That ought not to be. This contention of the respondents, to my mind, is misconceived, and cannot be sustained either on principle or on authority: *Kamalakshi* v. *Ramasami Chetti* (2), *Durga Mohun Dass* v. *Tahir Aly* (1).

(1) (1894) I. L. R. 22 Calc. 270, 274.

(2) (1895) I. L. R. 19 Mad. 127.

For these reasons, the appeal must be allowed; the decree of the lower Appellate Court set aside, and the decree of the trial Court varied. Each of the appellants is declared entitled to an one anna ten gandas one kara and $6\frac{2}{3}$ dantis share of the property in suit, and to joint possession thereof with their co-sharers. No sum is awarded to the appellants for damages or mesne profits. The respondents will pay the appellants' costs in all the Courts.

GRAHAM J. I agree.

Appeal allowed.

B. M. S.