

APPELLATE CIVIL

Before Nasim Ali J.

HARIMOHAN

v.

DULU MIYA.*

1934

June 6, 7.

Minor—Bond—Fraud and misrepresentation—Lender, suit by—Equitable relief—Indian Contract Act (IX of 1872), s. 65—Specific Relief Act (I of 1877), s. 41.

Where the defendant was a minor at the time the bond was executed and the money advanced to him and there was not any fraudulent misrepresentation on his part about his age when he executed the bond, in a suit for return of the money lent considered as damages for tort,

held that the lender could not get any relief, even if it were permissible, in spite of the observation of the Judicial Committee in *Yeoh Ooi Gark's* case (1), to maintain that the power to give equitable relief was more extensive in British India than in England, as had been held by the Lahore High Court in the case of *Khan Gul v. Lakha Singh* (2), or in other words, that courts in British India could give equitable relief apart from cases, which did not come either under section 65 of the Contract Act or section 41 of the Specific Relief Act.

English and Indian decisions, including *R. Leslie, Limited v. Sheill* (3) and *Dhurmo Dass Ghose v. Brahmo Dutt* (4), referred to and followed.

SECOND APPEAL by the plaintiff.

The facts of the case and the arguments in the appeal appear sufficiently in the judgment.

Atulchandra Gupta and *Jitendrakumar Sen Gupta* for the appellant.

Shyamaprasanna Deb for the respondents.

NASIM ALI J. This is an appeal by the plaintiff in a suit for recovery of money on a mortgage bond. The substantial defence of the defendant was that

*Appeal from Appellate Decree, No. 2493 of 1931, against the decree of Raikishore Majumdar, First Additional Subordinate Judge of Noakhali, dated May 23, 1931, affirming the decree of F. Karim, Additional Munsif of Lakshmipur, dated March 26, 1930.

(1) (1916) L. R. 43 I.A. 256.

(3) [1914] 3 K.B. 607.

(2) (1928) I. L. R. 9 Lah. 701.

(4) (1898) I. L. R. 25 Calc. 616.

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he was a minor at the time of the loan and as such plaintiff was not entitled to any relief. The courts below have found that the defendant No. 1 executed the mortgage bond and borrowed the money. It has been further found by the courts below that defendant No. 1 was a minor at the time when the bond was executed and the money was advanced. The courts below have also found that there had been no fraudulent misrepresentation on the part of the defendant No. 1 about his age at the time when he executed the bond. On these findings the courts below have dismissed the suit. Hence the present appeal by the plaintiff.

The first point urged on behalf of the appellant is that the finding of the lower appellate court, that there had been no fraud by the minor, is wrong, inasmuch as it was the duty of the defendant to disclose to the plaintiff at the time of the transaction that his minority was extended by the appointment of a guardian under the Guardian and Wards Act. Reliance was placed on a decision of this Court in the case of *Surendra Nath Roy v. Krishna Sakhi Dasi* (1) in support of this contention. In *Dhurmo Dass Ghose v. Brahma Dutt* (2), Jenkins J. held that fraud operating to deceive must be found as a fact and whether in any particular case there was such fraud must depend on its own circumstances. It must be shown to the satisfaction of the court by the party who alleges fraud that he was deceived into action by this fraud. In the present case, it has not been found that plaintiff was not aware of the minority of the defendant at the time of the transaction. On the other hand, the finding of the lower appellate court is that, from the circumstances of the case, it was the duty of the creditor to have enquired about the minor at the time when the money was advanced. It has not been found also that, at the time when the minor executed the bond and received the money, he was aware that his minority was extended under the law.

(1) (1911) 15 C. W. N. 239.

(2) (1898) I. L. R. 25 Calc. 616.

It has not been proved in this case that the defendant held himself out as being of age or that the plaintiff was deceived by any misrepresentation on the part of defendant No. 1. Under these circumstances, the courts below were right in holding that there had been no fraud or misrepresentation on the part of the defendant No. 1.

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The next point urged in support of the appeal is that on the facts found by the courts below they should have held that the defendant was bound to make restitution to the plaintiff of the benefit received by him. It is argued that, as the minor received the money under the bond which is void, he is bound to return the money which he received from the plaintiff. It is now well-settled that a plaintiff cannot base his claim for restitution under section 65 of the Indian Contract Act. See the case of *Mohori Bibee v. Dharmodas Ghose* (1), *Motilal Mansukhram v. Maneklal Dayabhai* (2) and *Punjabhai v. Bhagwandas Kisandas* (3). The plaintiff is not also entitled to get any compensation under section 41 of the Specific Relief Act. Section 41 embodies the equitable principle that he who seeks equity must do equity.

But 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. *Thurstan v. Nottingham Permanent Benefit Building Society* (4).

This law has been affirmed by the House of Lords in the case of *Nottingham Permanent Benefit Building Society v. Thurstan* (5), and by the Privy Council in the case of *Mohori Bibee v. Dharmodas Ghose* (1). It was, however, argued, on the authority of the latter decision (1), that, in a proper case, the court, in the exercise of its discretion, might require the minor to return the money advanced to him, under the provisions of section 41 of the Specific Relief Act. In

(1) (1903) I. L. R. 30 Calc. 539 ;

L. R. 30 I. A. 114.

(2) (1920) I. L. R. 45 Bom. 225.

(3) (1928) I. L. R. 53 Bom. 309.

(4) [1902] 1 Ch. 1, 13.

(5) [1903] A. C. 6.

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that case, however, the minor sought the equity. In the present case, the minor does not invoke the aid of the equitable jurisdiction of the court. Plaintiff, therefore, in my opinion, is not entitled to get any compensation under section 41 of the Specific Relief Act.

It was, however, contended that the defendant No. 1 was liable for damages in tort. But there can be no liability in tort in this case, as the courts below have negatived fraud on his part. Further "you cannot convert a contract into a tort to enable you to sue an infant". [*Jennings v. Rundall* (1); *R. Leslie, Limited v. Sheill* (2)]. If the tort is directly connected with the contract and is the means of effecting it and is a parcel of the same transaction, the minor is not liable in tort. See the case of *Khan Gul v. Lakha Singh* (3).

It is, however, contended by the appellant, on the authority of the above decision of the Full Bench of the Lahore High Court, that the doctrine of restitution is not confined to cases under section 41. It was contended that there was no warrant either in principle or in equity for the general rule that the relief should never be granted in a case where the infant happened to be a defendant. Shadilal C. J. relied for this proposition on two cases:—1st, *Stocks v. Wilson* (4); and 2nd, *Cowern v. Nield* (5). So far as the first case is concerned, it appears that the ground of the decision in that case was the English doctrine of following property. The decision of Shadilal C.J., therefore, goes beyond the English doctrine. So far as the second case is concerned it would appear, from an examination of that case, that the decision in that case ultimately rested on the principle that, if there had been an independent tort, the action would succeed. Reliance was also placed upon a decision of the Madras High Court in the case of *T. R. Appaswami Ayyangar v. Narayanaswami Ayyar* (6).

(1) (1799) 8 Term. 335; 101 E. R. 1419.

(2) [1914] 3 K. B. 607.

(3) (1928) I. L. R. 9 Lah. 701.

(4) [1913] 2 K. B. 235.

(5) [1912] 2 K. B. 419.

(6) (1930) I. L. R. 54 Mad. 112.

In that case, however, the minor was the plaintiff. Consequently the provisions of section 41 of the Specific Relief Act were directly attracted.

On the other hand, Lord Sumner in the case of *R. Leslie, Limited v. Sheill* (1) observed as follows :—

So long ago as *Johnson v. Pye* (2) it was decided that, although an infant may be liable in tort generally, he is not answerable for a tort directly connected with a contract which, as an infant, he would be entitled to avoid. One cannot make an infant liable for the breach of a contract by changing the form of action to one *ex delicto*." * * * * * In the case of an infant it was held for a similar reason that he could not be made liable for a fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him. * * * * * If the action should be maintainable all the pleas of infancy would be taken away, for such 'affirmations are in every contract'. * * * * * It was thought necessary to safeguard the weakness of infants at large, even though here and there a juvenile knave slipped through. * * * * * I think that the whole current of decisions down to 1913, apart from *dicta* which are inconclusive, went to show that, when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation, entered into while he was an infant, even by means of a fraud. This applies even to *In re King, Ex parte Unity Joint Stock Mutual Banking Association* (3). Restitution stopped where repayment began. * * * * * The money was paid over in order to be used as the defendant's own and he has so used it and, I suppose, spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a court of law would have done so.

The principle of this decision was applied by the Judicial Committee to a case from the Straits Settlement where the minor mortgaged his property. See the case of *Mahomed Syedol Ariffin v. Yeoh Ooi Gark* (4). There cannot be any doubt, therefore, that the defendant No. 1 cannot be compelled to refund the money, which he obtained on the basis of the void contract. It may however, be, pointed out that in all these cases it was proved that the minor obtained the money by a fraudulent misrepresentation about his age. So far as the present case is concerned I have already pointed out that the plaintiff has failed to

(1) [1914] 3 K. B. 607, 611, 612, 618, 619. (3) (1858) 3 DeG. & J. 63;

(2) (1876) 1 Sid. 258 : 82 E. R. 1091. 44 E. R. 1192.

(4) (1916) L. R. 43 I. A. 256.

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show that there had been any fraud on the part of defendant No. 1.

Reliance is also placed upon another equitable principle, namely, that no man can take advantage of his own fraud and consequently it was argued that the defendant was bound to return the money which he obtained from the plaintiff. In fact, that is the principle on which Shadilal C.J. proceeded in the case of *Khan Gul v. Lakha Singh* (1). The same principle appears to have been applied in the case of *Dhurmo Dass Ghose v. Brahmo Dutt* (2). Jenkins, J. in that case observed as follows :—

It is unquestionably within the power of the court administering equitable principles to deprive a fraudulent minor of the benefits flowing from the plea of infancy, but one who invokes the aid of that power must come to the court with clean hands, and must further establish to the satisfaction of the court that a fraud was practised on him by the minor, and that he was deceived into action by that fraud.

It has been already pointed out that the plaintiff, in this case, has failed to show that really the defendant No. 1 committed any fraud or that he has come to court with clean hands. Under these circumstances, even if it is permissible, in spite of the observation of the Judicial Committee in *Yeoh Ooi Gark's* case (3), to maintain that the power to give equitable relief is more extensive in India than in England, as has been held by the Lahore High Court in the case of *Khan Gul v. Lakha Singh* (1), or in other words that courts in British India can give equitable relief apart from cases, which do not come either under section 65 of the Contract Act or section 41 of the Specific Relief Act, plaintiff in the present case cannot get any relief in view of the findings of fact, which have been arrived at by the courts below. The courts below, in my opinion, were, therefore, right in dismissing the plaintiff's suit.

The appeal is, accordingly, dismissed. There will be, however, no order for costs.

Appeal dismissed.

G. S.

(1) (1928) I. L. R. 9 Lah. 701.

(2) (1898) I. L. R. 25 Calc. 616, 622.

(3) (1916) L. R. 43 I. A. 256.