APPELLATE CIVIL.

Before Edgley J.

MANMATHA KUMAR SHAHA

v.

EXCHANGE LOAN COMPANY, LTD.*

1936

May 27, 28; June 5.

Minor—Contract by minor—Fraud—Misrepresentation by minor as to age—Estoppel—Equitable relief—Discretion of Court—Indian Evidence Act (I of 1872), s. 115.

A minor, who by false and fraudulent representation as to his age, induces a person to enter into a contract with him, is not estopped from pleading his minority to avoid the contract.

Khan Gul v. *Lakha Singh* (1) followed.

Though not liable under the contract, the Court has a discretion in equity to direct the minor to return the benefit he has received by false representation to the person he has deceived.

Dhanmull v. *Ram Chunder Ghose* (2) dissented from.

Mohori Bibee v. *Dharmodas Ghose* (3) referred to.

SECOND APPEAL by the defendant.

The facts of the case and arguments in the appeal are sufficiently set out in the judgment.

Sarat Chandra Basak, Senior Government Pleader, and *Nabadweep Chandra Shaha* for the appellant.

Bama Prasanna Sen Gupta for the respondent.

Cur. adv. vult.

EDGLEY J. In the suit, out of which this appeal arises, the plaintiff company sued the defendants on a promissory note alleged to have been executed by defendant No. 1, who alone contested the suit. It

*Appeal from Appellate Decree, No. 87 of 1935, against the decree of Ramesh Chandra Sen, Subordinate Judge, 3rd Court of Dacca, dated June 19, 1934, affirming the decree of Lala Jogesh Chandra, Munsif, 2nd Court, Dacca, dated Mar. 29, 1934.

(1) (1928) I. L. R. 9 Lah. 701. (2) (1890) I. L. R. 24 Cal. 265.
(3) (1903) I. L. R. 30 Cal. 539; L. R. 30 I. A. 114.

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was said that defendant No. 1 had borrowed the sum of Rs. 300 from the plaintiff company and had agreed to pay interest at the rate of 3 per cent. per mensem. The total amount claimed was Rs. 624. The execution of the promissory note was admitted, but the main defence was to the effect that, at the time of the execution of this document, defendant No. 1 was a minor. The suit was decreed by both Courts.

The findings of the lower appellate Court are to the effect that the appellant was a minor at the time when he executed the promissory note, that he knew that the period of his minority had been extended, that the plaintiff company did not know that the defendant No. 1 was a minor and that this defendant obtained the loan from the plaintiff company by falsely and fraudulently representing that he was not a minor.

The defendant No. 1 has now appealed to this Court and the main contention urged on his behalf is that he was incompetent under the law to contract at the time when he executed the promissory note and that even if it be admitted that he obtained the loan upon a fraudulent misrepresentation of facts, he is nevertheless under no liability to the plaintiff company in respect of this transaction.

The first point which arises for consideration in connection with this appeal is whether, under s. 115 of the Indian Evidence Act, the minor is estopped, by reason of his representation to the effect that he was a major, from pleading his minority in order to avoid the contract.

The question of the applicability of s. 115 of the Indian Evidence Act in the case of minors was considered in the case of *Brohmo Dutt* v. *Dharmo Das Ghose* (1). In that case Maclean C. J. held that this section had no application to the case of a minor on the ground that the term "person" in s. 115 meant a person who is of full age and competent to enter

(1) (1898) I. L. R. 26 Cal. 381, 394.

into a contract and that, as a minor cannot be estopped by a deed or by the recitals in a deed, it would be incongruous to hold that he could be estopped by a parole declaration. In agreeing with the Chief Justice, Ameer Ali J. stated :—

> It follows, therefore, that when the present law declares that an infant shall not be liable upon a contract, or in respect of a fraud in connection with a contract, he cannot be made liable upon the same contract by means of an estoppel under s. 115. I, therefore, agree that there is no estoppel whatsoever in this case founded upon any representation or alleged representation on the part of the plaintiff.

Brohmo Dutt's case came before the Judicial Committee of the Privy Council on appeal in 1903: *Mohori Bibee* v. *Dharmodas Ghose* (1). In deciding that appeal their Lordships of the Judicial Committee held that a person, who, by reason of infancy, is incompetent to contract, cannot make a contract within the meaning of the Indian Contract Act and where he purports to do so, his alleged contract is void. The question of estoppel under s. 115 of the Indian Evidence Act was raised before the Judicial Committee, but Sir Ford North in his judgment left the question open as is indicated in the following passage :—

> 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.

The learned advocate for the respondent company places some reliance upon the decision of Caspersz and Chatterjea JJ. in the case of *Surendra Nath Roy* v. *Krishna Sakhi Dasi* (2). In that case the decision of the appeal apparently turned upon the question whether Bijay Gobinda Shaha Chaudhuri, one of the plaintiff's vendors, was a minor at the time when he conveyed certain property to the plaintiffs.

(1) (1903) I. L. R. 30 Cal. 539 (545); (2) (1911) 15 C. W. N. 239, 243. L. R. 30 I. A. 114 (122).

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With regard to this point the learned Judges remarked that the conduct of Bijay in connection with this transaction might amount to misrepresentation and legal fraud on his part. They go on to say :—

> If there was misrepresentation by Bijay operating to deceive, and if the plaintiffs were deceived by it, we think that Bijay would be bound by the transaction. There should be a clear finding on the point.

It appears from the judgment in *Surendra Nath Roy's* case that the learned Judges relied mainly in support of their decision upon some observations of the Court of appeal in the case of *Saral Chand Mitter* v. *Mohun Bibi* (1). It appears, however, from the report in *Saral Chand Mitter's* case that no question relating to the applicability of s. 115 of the Evidence Act arose for decision in that case. Jenkins J. who tried the case in the Court of first instance held that a certain money lender named Lakshmi Narayan had been deceived into making a loan by the defendant's fraudulent misrepresentation. He refused to make a personal decree against the defendant for the repayment of the money advanced, but gave the plaintiff an ordinary mortgage decree and he held that the plaintiff's right to succeed notwithstanding the defendant's infancy arose from the applicability of a principle of equity which treats fraud as a bar to the plea of disability. Jenkins J.'s line of reasoning was approved by the Court of appeal consisting of Maclean C. J. and Macpherson and Trevelyan JJ. and in upholding Jenkins J.'s judgment Maclean C.J. made the following observations :—

> There is not, so far as I can discover, any distinction between the law in India and the law in England upon this subject. In my judgment, there is a current of cases decided in the Courts of Equity in England, dating back for 150 years or more, which show that, in Equity, an infant cannot take advantage of his own fraud. I think it is established that in cases of fraud by an infant the protection which the law throws around him is taken away: in other words, that the defence of infancy cannot be successfully pleaded in defence of a fraud perpetrated by the infant.

(1) (1898) I. L. R. 25 Cal. 371, 392, 394.

His Lordship then went on to say :—

I think the cases establish that, in a case like the present, the defendant, though at the time when he entered into the contract he was an infant, is not entitled to take any advantage resulting from his own fraud.

It must be remembered that the case of *Surendra Nath Roy* v. *Krishna Sakhi Dasi* (1) was clearly distinguishable on the facts from the case out of which the present appeal arises and, having regard to the line of reasoning which seems to have been adopted by the learned Judges in that case, it can hardly be taken to go further than to reiterate the general principle laid down in *Saral Chand Mitter's* case to the effect that an infant is not entitled on equitable principles to take any advantage from his own fraud.

In 1928, the leading cases decided by the Courts in India were reviewed by a Full Bench of the Lahore High Court in the case of *Khan Gul* v. *Lakha Singh* (2). One of the questions referred to the Full Bench in that case was whether a minor, who, by falsely representing himself to be a major, had induced a person to enter into a contract, was estopped from pleading his minority to avoid the contract. After an exhaustive review of the leading cases on this point, including the decisions of this Court, the learned Chief Justice observed :—

It will be seen from the foregoing discussion that not only the English law, but also the balance of the Judicial authority in India, is decidedly in favour of the rule that, where an infant has induced a person to contract with him by means of a false representation that he was of full age, he is not estopped from pleading his infancy in avoidance of the contract; and though s. 115 of the Indian Evidence Act is general in its terms, I consider for the reasons, which I have already given, that it must be read subject to the provisions of the Indian Contract Act, declaring a transaction entered into by a minor to be void. My answer to the first question referred to us is, therefore, in the negative.

This decision of the Lahore High Court was cited with approval by Buckland J. in the case of *Saradaprasad Das* v. *Binaykrishna Datta* (3). I am entirely

(1) (1911) 15 C. W. N. 239. (2) (1928) I. L. R. 9 Lah. 701, 713.
(3) (1930) I. L. R. 58 Cal. 224.

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in agreement with the views expressed on this point by the learned Chief Justice of the Lahore High Court and it follows that, in my opinion, the minor defendant is not estopped by s. 115 of the Indian Evidence Act from pleading his minority to avoid the contract in respect of which he was sued.

The further question arises, however, for consideration as to whether the minor defendant is entitled to retain any benefit which he has received under the contract or, in other words, whether he should not be compelled to refund the consideration money obtained by him through his fraudulent misrepresentation. Clearly, his liability, if any, would not be *ex contractu*, but could only arise with reference to principles of equity. On behalf of the appellant some reliance was placed upon the decision of this Court in the case of *Dhanmull* v. *Ram Chunder Ghose* (1), in which it was held that, in a case where an infant had obtained a loan upon a false representation that he was of age, no suit to recover the money could be maintained against him. The correctness of that decision was, however, doubted by the Court of appeal in *Saral Chand Mitter's* case in which the principle was definitely adopted that an infant is not entitled to take any advantage resulting from his own fraud.

The question as to a minor's liability in respect of compensation was raised in the case of *Brohmo Dutt* v. *Dharmo Das Ghose* (2), but it was found in that particular case that the defendant had not been actually misled. In this connection Maclean C. J. stated:—

> Then, we are asked to exercise the discretionary powers vested in us under ss. 28 and 41 of the Specific Relief Act. That is a matter for the discretion of the Court; the learned Judge in the Court below has exercised his discretion adversely to the appellant, and I see no reason which would justify us in differing from that conclusion. On the contrary I do not think that in a case of this class where a

(1) (1890) I. L. R. 24 Cal. 265. (2) (1898) I. L. R. 26 Cal. 381, 389-90.

man, who has been told that the person with whom he is dealing is a minor, still chooses to lend his money, "justice requires" that it should be returned to him.

When this case was considered on appeal by the Judicial Committee of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (1), the question as to the liability of the minor to return the money advanced to him was further considered and on this point Sir Ford North's observations were as follows:—

> Another enactment relied upon as a reason why the mortgage money should be returned is s. 41 of the Specific Relief Act (I of 1877), which is as follows:—
>
> Section 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."
>
> Section 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.

It would appear, therefore, that the Judicial Committee have, in effect, recognised the principle that the Courts in India have an equitable discretion to direct the refund of money which an infant may have obtained by his own fraud provided the lender is actually deceived by the fraud perpetrated by the minor.

It may of course be argued that jurisdiction to order restitution only exists in cases in which the minor invokes the order of the Court as a plaintiff, but, as Sir Shadi Lal C. J. has pointed out in *Khan Gul's* case (2), cited above:—

> It is difficult to understand why the granting of an equitable remedy should depend upon a mere accident, namely, whether it is the minor or his adversary who has taken the initiative in bringing the transaction before the Court. The material circumstances in both cases are exactly the same. A contract has been entered into with an infant and as it is an invalid transaction, it must be cancelled.

(1) (1903) I. L. R. 30 Cal. 539 (549); L. R. 30 I. A. 114 (125). (2) (1928) I. L. R. 9 Lah. 701, 719, 721

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His Lordship goes on to say :—

All that can reasonably be said is that the Court, in deciding whether relief against fraud practised by an infant should or should not be granted, will consider, along with other circumstances of the case, the fact that the infant is a defendant and not a plaintiff. But there is no warrant either in principle or in equity for the general rule that the relief shall never be granted because the infant happens to be a defendant.

It is of course true that the Judicial Committee of the Privy Council decided *Mohiri Bibee's* case before the decision of the Court of appeal in England in the case of *R. Leslie, Limited* v. *Sheill* (1). In that case the Court of appeal adopted the view that to direct an infant who had obtained a loan on a false representation as to his age to refund the amount of the advances would be an indirect way of enforcing a void contract. This, however, is not the view which appears to have been generally adopted by the Courts in India and, as pointed out by Sir Shadi Lal C. J. in *Khan Gul's* case cited above :—

It must be remembered that, while in India all contracts made by an infant are void, there is no such general rule in England. For instance, a contract for necessaries is not affected by the Infants Relief Act, 1874, and can be validly entered into by an infant. There should, therefore, be greater scope in India than in England for the application of the equitable doctrine of restitution.

It is, however, argued by the learned advocate for the appellant that the decision of the English Court of appeal in the case of *R. Leslie, Limited* v. *Sheill* (1) should be adopted as the law of India having regard to certain observations made by the Judicial Committee of the Privy Council in the case of *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (2). The appeal in question was from the Supreme Court of the Straits Settlements and the observation upon which reliance is placed is as follows :—

A case of fraud by the appellant on the subject of his age was set up, but it cannot be doubted that the principle recently given effect to in the case of *R. Leslie, Limited* v. *Sheill* (1) would apply, and such a case would fail.

(1) [1914] 3 K. B. 607. (2) (1916) L. R. 43 I. A. 256, 263-4.

It appears, however, from the report in *Syedol Ariffin's* case, that the sole question for consideration in the appeal was whether or not a certain statement should be treated as admissible in evidence. This being the case, as pointed out by Sir Shadi Lal C. J. in *Khan Gul's* case the observations of the Privy Council in *Syedol Ariffin's* case must be regarded as *obiter dicta* and, though entitled to great respect, are not absolutely binding on the Courts in India. Further, these observations certainly cannot be taken to override what appears to have been an express recognition by the Judicial Committee in *Mohiri Bibee's* case of the principle that in appropriate cases the Courts in this country are empowered to order restitution by minors on equitable grounds.

In my opinion, therefore, the minor should not be allowed to retain the benefit which he has received as a result of his fraudulent misrepresentation and I consider that on equitable principles in a suit properly framed he might be called upon to refund the consideration money which had been received by him. It is, however, clear as stated above that his liability in this respect arises not *ex contractu* but on equitable considerations and the plaintiff could not, therefore, in any event claim interest on the loan, because the liability to pay interest would arise on one of the stipulations of the contract.

It appears, however, from the pleadings in the case, out of which this appeal arises, that the plaintiff has based his claim on the contract and that he has not put forward an alternative claim for restitution of the consideration money. Order VII, r. 7 of the Civil Procedure Code requires that every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative. The circumstances of the case, out of which this appeal arises, indicate that the defect in the plaint, such as it is, arose from a *bona fide* misunderstanding of the law on this subject and, this being the case, I think the

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plaintiff should now be allowed to amend his plaint, if so advised. It is urged that an amendment of the plaint by allowing the plaintiff to set up an alternative case for restitution would, in effect, alter the nature of the suit. I find, however, that a similar question arose in *Saral Chand Mitter's* case, cited above. In the Court of first instance, Jenkins J. had allowed the plaintiff by amendment to set up an alternative case and, with regard to this matter, the Court of appeal held that it was the intention of the legislature to afford ground for a final decision upon the subjects in dispute so as to prevent further litigation and that Jenkins J. was perfectly right in allowing, in the manner he did, the amendment of the plaint.

Having regard to the considerations mentioned above, this case will be remanded to the lower appellate Court for rehearing after allowing the plaintiff to amend his plaint if he so desires. It will then be for the lower appellate Court, if necessary, after allowing the appellant also to amend his pleadings and taking such further evidence as may be necessary to rehear the appeal and also to look carefully into the conduct of the plaintiff company and ascertain whether a case for restitution of the consideration money on equitable grounds has been made out.

The judgment and decree of the learned Subordinate Judge are, therefore, set aside and this appeal is remanded to the lower appellate Court for rehearing in accordance with the directions contained in this judgment. Costs will abide the final result.

Case remanded

G. K. D.