

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sadasiva Ayyar.

VAIKUNTARAMA PILLAI (MINOR BY GUARDIAN MUTHAMMAL)
(SECOND DEFENDANT), APPELLANT,

1914.
March 25
and April 2.

v.

AUTHIMOOLAM CHETTIAR (PLAINTIFF), RESPONDENT.*

*Mortgage by minor—Settlement of all property by mortgagor after majority—
Fraud of creditors—No fraudulent misrepresentation as to age—Liability to
refund—Mortgagee, if a creditor—Transfer by mortgagee—Attestation by mort-
gagor—Endorsement of payments by mortgagor—Suit against mortgagor and
his son—Estoppel of mortgagor—Suit not maintainable against the son—
Transfer of Property Act (IV of 1882), sec. 53—Subsequent creditors, if
included.*

The plaintiff sued on a mortgage bond executed by the first defendant during his minority in favour of the third defendant who transferred it to the fourth defendant who again transferred it to the plaintiff. After attaining majority the first defendant executed a settlement transferring all his property to his mother and his wife on behalf of his minor son, the second defendant, stipulating only for maintenance for himself. The first defendant, after attaining majority, had endorsed payments on the mortgage deed, and attested the transfer of the same by the third defendant to the fourth defendant. It was found by the lower Appellate Court that the settlement was intended to be operative but that it was executed by the first defendant with intent to defeat and delay his creditors. It was also found that there was no fraud or misrepresentation by the minor as to his age when he borrowed on the mortgage. The plaintiff contended that the first defendant was bound to refund the amount advanced on the mortgage to the third defendant, and that he was consequently a creditor entitled to set aside the settlement. The first defendant admitted the plaintiff's claim. The second defendant, who contested the suit, preferred the Second Appeal.

Held, where a minor has obtained money by misrepresenting his age, that amounts to fraud and he may be made to refund it, but, in the absence of fraud, a refund cannot be ordered.

As there was no fraud or misrepresentation by the minor as to his age when he borrowed money on the mortgage, he could not have been ordered to refund, and the third defendant was not one of his creditors at the date of the settlement; consequently the plaintiff was not competent to sue under section 53 of the Transfer of Property Act to set it aside.

The admission of the first defendant during the suit, his endorsement of payments on the mortgage and his attestation of the transfer deed could not give the plaintiff the right to set aside the settlement as against the second defendant.

* Second Appeal No. 1631 of 1911.

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Quare.—Whether subsequent creditors are included under section 53 of the Transfer of Property Act.

Per SADASIYA AYYAR, J.—A person does not actually become a subsequent or prior creditor by reason of the estoppel of the debtor.

An estoppel cannot overrule a plain provision of law. The statutory provision that a minor is incompetent to incur a contractual debt cannot be overruled by an estoppel.

SECOND Appeal against the decree of F. D. P. OLDFIELD, the District Judge of Tinnevely, in Appeal No. 418 of 1910, preferred against the decree of K. S. RAMASWAMI SASTRI, the District Munsif of Tinnevely, in Original Suit No. 596 of 1906.

The material facts appear from the judgment of the High Court.

C. V. Anantakrishna Ayyar for the appellant.

T. R. Ramachandra Ayyar and *M. V. Duraiswami Ayyangar* for the respondent.

WALLIS, J.

WALLIS, J.—This is a suit by the plaintiff on a mortgage executed by the first defendant during minority in favour of the third defendant who transferred it to the fourth defendant who again transferred it to the plaintiff. The transfer by the third to the fourth defendant was attested by the first defendant after he had attained majority. Before the date of the attestation but after he attained majority the first defendant executed a settlement transferring all his property to his mother and wife on behalf of his minor son stipulating only for maintenance for himself. The District Judge has found that the settlement was intended to be operative, but that it was executed by the first defendant with intent to defeat and delay his creditors, and there is no ground for questioning these findings. But he has also found that the plaintiff was a person defrauded, defeated or delayed by the settlement, so as to be entitled to set it aside under section 53 of the Transfer of Property Act. From the decision an appeal has been preferred by the son, the second defendant. It has been contended before us that the first defendant at the date of the settlement was a debtor of the third defendant for the money advanced to him on mortgage during minority as he was bound to refund it.

Where a minor has obtained money by misrepresenting his age, that amounts to fraud and he may be made to refund it, but I think it is now settled that, in the absence of fraud, a refund cannot be ordered. This would appear to have been the rule

in England even before the Infants' Relief Act of 1874 which makes contracts entered into by minors void by statute as the Contract Act does in India. In England there is an express decision on the point by the Court of Appeal in *Levens v. Brougham*(1), and the earlier decision of the Court of Appeal in *Ex parte Jones*(2), to which Sir GEORGE JESSELL was a party, is to the same effect. All the cases have been reviewed recently by LUSH, J., in *Stocks v. Wilson*(3), where it is shown on an examination of all the authorities that the ground, on which equity interferes to make a person of full age return money or property which he obtained during minority, is fraud. In that case as in the earlier case of *Ex parte The Unity Joint-Stock Mutual Banking Association*(4), fraud was found and a return ordered. As regards Indian cases it seems sufficient to refer to the well-known decision in *Mohiri Bibee v. Dharmodas Ghose*(5), in which their Lordships held that minors' contracts are void and not voidable and that section 65 of the Indian Contract Act has no application to them and in which they cited with approval the observations of ROMER, L.J., in *Thurston v. Nottingham Permanent Benefit Building Society*(6): "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." That is to say in the absence of fraud, an infant is not estopped from pleading minority in answer to a suit for the return of the money advanced to him during minority. This has also been expressly decided by the Allahabad High Court in *Kanha Lal v. Babu Ram*(7). The finding in the present case is that there was no fraud or misrepresentation by the minor as to his age when he borrowed on a mortgage from the third defendant. Consequently he could not then have been ordered to refund, and therefore the third defendant was not one of his creditors at the date of the settlement. Both the lower Courts, however, have held that this does not debar the plaintiff from setting aside the settlement. The District Munsif relies on the fact that the first defendant always treated the third defendant as a creditor,

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(1) (1909) 25 Times L.R., 265.

(3) (1913) 2 K.B., 235.

(5) (1903) I.L.R., 30 Calc., 539.

(2) (1831) 18 Ch.D., 109.

(4) (1858) 3 G. & J., 63.

(6) (1802) 1 Ch., 1 at p. 13.

(7) (1911) 8 All. L.J., 1058.

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endorsed payments on the mortgage after he attained majority, attested its transfer to the fourth defendant, and lastly admitted the plaintiff's claim in this suit. The District Judge apparently takes the same view. Now as regards the present question, the admission of the first defendant during the suit, cannot give the plaintiff the right to set aside the settlement as against the second defendant. It has not been found or contended before us, that the settlement was void on the ground, that it was intended to defraud subsequent creditors as distinct from creditors existing at the date of the settlement, and in these circumstances it appears unnecessary to consider whether the plaintiff would be entitled as a subsequent creditor by estoppel of the first defendant to avoid it. The plaintiff was not a creditor of the first defendant at the date of the settlement. There is no doubt a dictum in *Holmes v. Penney*(1), that where debtor makes a settlement in fraud of his creditors and pays them off and a new set of creditors stand in their places the settlement would be void against them also, but this proceeds upon the language of the Statute of Elizabeth, which is for the protection of "creditors or others," not "creditors" only, which words are not reproduced in the Transfer of Property Act and besides, the plaintiff in this case cannot be said to stand in the place of the creditors at the date of the settlement. In these circumstances I think the plaintiff is not entitled to set aside the settlement and that the appeal must be allowed and the suit as against the second defendant and the plaintiff second schedule property is dismissed with costs throughout. The memorandum of objection is dismissed with costs.

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—I entirely agree. Even if the first defendant were estopped by some conduct of his from denying as against the fourth defendant that he (first defendant) owed money to the third defendant on the mortgage deed, this would not create a real debt on the date when the estoppel arose. Estoppel only prevents a man from pleading the real state of facts but does not make the false state of facts which the Court has got to assume as true (*as between the estopped man and the man in whose favour the estoppel works*) to become for all purposes a true state of facts. So far as the second defendant was

(1) (1856) 3 K. & J., 90 at p. 100; s.c., 69 E.R., 1035 at p. 1032.

concerned, no such debt as he was bound to discharge by the obligation imposed under the Hindu Law on a Hindu son really arose at any time even after the date of the settlement, by reason merely of his father's becoming estopped by the said father's conduct from denying that he owed a debt to the third defendant or to the third defendant's assignee (fourth defendant). An estoppel cannot overrule a plain provision of law [see *Aurumugam Chetti v. Duraisinga Devar*(1)]. In this case, the plain statutory provision that a minor is incompetent to incur a contractual debt cannot be overruled by an estoppel. The fourth defendant does not actually become a subsequent creditor or a prior creditor by reason of the estoppel, but the first defendant is estopped from denying that there was a prior debt due by him to the third defendant and that estoppel works in favour of the fourth defendant and against the first defendant. In this view, it is unnecessary to go into the question whether a future creditor can get rid of a voidable but real transfer under section 53 of Act IV of 1832: that is a question on which I feel grave doubts whether the current of authorities is really consistent and whether the observations in some of the decisions are sound and in consonance with justice and convenience.

K.R.

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(1) (1914) I.L.R., 37 Mad., 33 at p. 44.
