PRIVY COUNCIL.

P. C.* 1896 *February* 26.

TULSI PERSAD BHAKT (DEFENDANT) *v.* BENAYEK MISSER (PLAINTIFF.)

[On appeal from the High Court at Calcutta].

Appeal to Privy Council—Original Court's decision, on fact, affirmed by the first Appellate Court—Question of fact—Question of law not arising —Civil Procedure Code (Act XIV of 1882), section 596.

The Appellate High Court had, by the decree now appealed from, affirmed upon the evidence the decision of the High Court in the original jurisdiction, as to the fact on which the judgment depended, *viz.*, whether the defendant had attained full age at the time when he had executed the first of two mortgages, for the foreclosure whereof the suit was brought. No question of law, either as to the construction of documents or any other point, was raised.

Held, that the present appeal could not be entertained (1).

APPEAL from a decree (21st March 1892) of the Appellate High Court, affirming a decree (10th March 1891) of the High Court in the Ordinary Original jurisdiction.

The appellant, a merchant in Calcutta, was the defendant in a suit brought against him by the respondent for the foreclosure of two mortgages, the first dated the 11th May 1885, and the second, a further charge, dated the 28th November 1885. The material facts, the proceedings in the suit, and the grounds on which it was decided by the Courts below, appear in their Lordships' judgment.

The decision of the case in both the Courts below rested on the finding of fact that the appellant was of full age when he executed the first mortgage; and it was not denied that, at the time when the further charge was executed, he was of full age. The finding of WILSON, J., in the Original jurisdiction, to that effect was affirmed by the Appellate Court (PETHERAM, C.J., PIGOT and PRINSEP, JJ.) The first Court fixed an issue as to whether there had been a ratification of the first mortgage by the defendant after attaining full age. This was framed because it might have been a relevant question had the finding been that, at the time of the execution

* *Present*: LORDS WATSON, HOBHOUSE, and DAVEY, and SIR R. COUCH.

(1) See *Nirbhai Das* v. *Rani Kuar*, I. L. R., 16 All., 274.

1896

TULSI PERSAD BHAKT v. BENAYEK MISSER.

of the first mortgage, the defendant was a minor. In case the finding that he was not a minor at that time should be reversed, the Court found that ratification had taken place, expressing its opinion on the law of the matter, that a minor's contract, though voidable by himself, was susceptible of ratification, as well since the passing of Act IX of 1872 (the Contract Act) as it had been before that Act became law.

Sir *W. H. Rattigan*, for the appellant, argued that there was error in the judgment of the High Court. A wrong inference had been drawn in the finding on the evidence that the appellant was of full age at the time of the execution of the mortgage of the 11th May 1885. The High Court had misconstrued documentary evidence in its reading of the appellant's horoscope. It was also submitted that, if the finding as to his age should be reversed, and thus the question of ratification be raised, there could not, as the law stood, be any ratification of a minor's agreement after his coming of age. The Indian Contract Act (IX of 1872), section 10, was referred to; and it was argued that, under that Act, no ratification could take place of what never had amounted to a contract at all. The fact of the receipt of consideration by the appellant was also contested. As to the question whether it was permissible to the appellant to appeal, after the confirmation of the judgment of the Court of first instance by the Appellate Court above it, on the issue relating to the appellant's age, reference was made to *Gopinath Birbar* v. *Goluck Chunder Bose* (1) decided as to section 296 of the Civil Procedure Code. If that decision was right, the High Court had rightly certified this appeal as a fit one. Reference was also made to *Ramgopal* v. *Shamskaton* (2) as showing that unsoundness in drawing conclusions might, under some circumstances, involve error in law; and *Tayammal* v. *Sasachalla Naiker* (3), as showing that the concurrence of two Courts upon a question of fact did not necessarily prevent this Committee from acting upon their own opinion of the effect of the evidence; and to *Goshain Tota Ram* v. *Rickmunee Bullub* (4), from which it appeared that, where the decision of two Courts below on a question

(1) I. L. R., 16 Calc., 292 *note*.
(2) I. L. R., 20 Calc., 93; L. R., 19 I. A., 228.
(3) 10 Moo. I. A., 429 (435, 436).
(4) 13 Moo. I. A., 77; 3 B. L. R., P. C., 34.

1896

TULSI PERSAD BHAKT v. BENAYEK MISSER.

of fact was founded on a conclusion plainly erroneous, their Lordships did not adhere to the general rule as to the concurrence of two Courts.

Mr. *A. Cohen, Q.C.*, and Mr. *C. W. Arathoon*, for the respondent, were not called upon.

Their Lordships' judgment was delivered by

LORD DAVEY.—The suit out of which this appeal arises was one for foreclosure of two mortgages made by the first defendant in the action, Tulsi Persad Bhakt, in favour of the present respondent. The first mortgage was dated the 11th of May 1885, and the second mortgage or further charge was dated the 28th of November 1885.

The principal defence, and the one upon which the learned Counsel for the appellant has principally addressed their Lordships, was that the appellant was a minor on the 11th of May 1885, at the date when the first mortgage was executed. It is obvious that that is a question of fact to be determined by the evidence, documentary and oral, given in the case.

The case stands in this way: There was evidence given that the defendant was of age at the date in question. Evidence was given, chiefly based upon a horoscope, and supplemented by the oral evidence of three or four witnesses, that the defendant was a minor at that date, the date on which his birth was put being the 2nd of June 1867.

The suit came, in the first instance, before Mr. Justice Wilson, sitting on the Original side of the High Court at Calcutta. Certain issues were stated and tried by the learned Judge, which are to be found in the judgment. The 9th issue was: "Was the first defendant at the date of the first mortgage a minor?" The learned Judge says: "The first question then is, was he an infant at the time of the execution of the mortgage? He was admittedly of age at the date of the further charge." The learned Judge then states, and comments upon, the evidence in favour of the first defendant having been of age at the date of that mortgage, and then he comments on the evidence against it. He says: "What have we against that?" and then he states the evidence which was given, and he says: "That, I must say, is very unsatisfactory evidence to counterbalance the

deliberate assertions of the first defendant himself, of the executors of his father's will, and the long series of acts on his part wholly inconsistent with the story that he was a minor at the time of the transaction. It is sought to confirm this evidence in two ways, and the first document that is used by way of confirmation is a horoscope which seems to me to be an extremely suspicious one." He concludes his observations in this matter, thus: "I have little doubt that it is a made-up document, and made up with singular indiscretion." Then he refers to evidence which has been given in confirmation of the inference sought to be drawn from the horoscope, and he concludes by saying: "I think therefore that the evidence is strong to show that, at the time this mortgage was executed, the first defendant was not an infant."

That judgment, as it appears to their Lordships, was a judgment, given by the learned Judge who tried the action and heard and weighed the evidence, on the effect of that evidence on his mind, and there does not appear to their Lordships to be any question of law whatever arising on the learned Judge's judgment.

An attempt has been made to say that there was misconstruction of documents, but, in their Lordships' opinion, that attempt has wholly failed. It is not a question of misconstruction of documents. It was simply treated by the Judge as a question of the weight to be attached to the evidence adduced before him.

When the case came before the High Court on appeal, the learned Chief Justice, Sir William Petheram, very carefully and very fully discussed all the evidence which was given in favour of the present appellant's case. He says, in the course of his judgment, commenting on that evidence: "I think that both these statements are false, and that they were made with the object of misleading the Court on this very question of the defendant's age," and he concludes his opinion on this part of the case by saying: "In my opinion the defendant has entirely failed to prove that he was a minor when he executed the mortgage for Rs. 20,000 on May 11th, 1885, and that this issue must be found for the plaintiff."

Their Lordships think that no question of law, either as to construction of documents or any other point, arises on the judgment of the High Court, and that there are concurrent

1896

TULSI PERSAD BHAKT v. BENAYEK MISSER.

findings of the two Courts below on the oral and documentary evidence submitted to them. That being so the present appeal cannot be entertained.

There were several other issues, but really no argument has been addressed to their Lordships upon them. There does not seem to be any ground whatever for impeaching the finding of the learned Judge, confirmed by the High Court, on the other issues that were raised, as to consideration for the mortgages, as to the defendant being so intoxicated at the time of the mortgages that he was unable to understand their nature, or that they were obtained by undue influence.

Under these circumstances their Lordships will humbly advise Her Majesty that the appeal be dismissed, and the appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Wrentmore & Swinhoe.*

C. B.

P.C.* 1896. *Feb.* 21 & 25 *and March* 20.

A. CASPERSZ, OFFICIAL RECEIVER (PLAINTIFF) *v.* KISHORI LAL ROY CHOWDHRI AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Master and Servant—Damage by cutting trees on land—Liability of employer not established on the facts, in respect of his servants injury to a third party—Variation of decree, asked by respondent, requiring cross appeal—Civil Procedure Code (Act XIV of 1882), section 561.

On a claim by the Official Receiver for damages for the wrongful felling and carrying away of trees growing on part of the estate held on trust by him, those acts, to the injury of the owners whom he represented, were proved against certain of the defendants holding some employment under others, who were made co-defendants with them in this suit. These co-defendants were not proved to have ordered such acts, nor was there any evidence that to cut or carry away timber was within the scope of the employment of any of the defendants. The co-respondent employers were not, therefore, under any legal responsibility in the matter.

In reference to whether the decree made against one of the respondents could be varied in his favour, he not having filed a cross-appeal, the rule prevailed that he could only be heard to support the decree, section 561 of the Civil Procedure Code not applying here.

* *Present:* LORDS WATSON, HOBHOUSE and DAVEY, and SIR R. COUCH.