1918

SURAJ BHAN v. HASHMI BEGAM.

that if the sale-deed had been silent about payment to the creditor of the vendors and that the vendee of his own motion had paid off the creditor, he could not have pleaded such payment as a set-off against the purchase-money. We think that exactly the same reasoning applies to the present case. According to the sale-deed the only sum which the vendee was requested to retain out of the purchase-money and pay to the creditor was the sum of Rs. 8,150. The payment of the balance was a payment gratuitously made. We have already pointed out that the property mortgaged to secure the sum due to the creditors was no part of the property sold. It may be, of course, that the plaintiffs have benefited by the payment to the creditor, but this by itself is no sufficient ground to entitle the defendant to set it off against the plaintiff's claim. We dismiss the appeal *with costs.*

Appeal dismissed.

1918

April, 11.

Before Mr. Justice Piggott and Mr. Justice Walsh.

RADHE SHIAM (PLAINTIFF) *v.* BEHARI LAL (DEFENDANT).*

Act No. IX of 1872 *(Indian Contract Act), section* 65 *- Minor—Minority successfully pleaded as a defence to a suit—Disallowance of costs—Appeal—Competence of appellate court to interfere with the discretion of the court below as to allotment of costs.*

Where the Judge has given his reasons and all the circumstances are before the Court of Appeal, the Court of Appeal can, if satisfied that the Judge's discretion has not been judicially exercised, interfere with it and make the order which the court below ought to have made.

It is no ground for giving costs against a successful defendant that the defendant pleaded that he was a minor at the time when the transaction upon which the suit was based was entered into, there being nothing to suggest that the plaintiff had been misled as to the real age of the defendant by any action or statement on the part of the latter.

THE plaintiff sued the defendant upon a mortgage bond, for sale of the property comprised therein. The defendant pleaded that he was a minor at the time when the bond was executed, and he succeeded in that plea. The suit was dismissed. Nevertheless, the court refused to allow the defendant his costs on the ground that the defendant was "mostly responsible for the litigation." The plaintiff appealed to the High Court against

* First Appeal No. 238 of 1915, from a decree of Gokal Prasad, Subordinate Judge of Allahabad, dated the 30th of September, 1915.

the dismissal of his suit, and the defendant filed a cross-objection on the question of the disallowance of his costs.

The Hon'ble Dr. *Tej Bahadur Sapru* (with whom were Mr. *B. E. O'Conor* and Babu *Sital Prasad Ghosh*), for the appellant.

Munshi *Gokul Prasad* and Pandit *Radha Kant Malaviya*, for the respondent.

PIGGOTT and WALSH, JJ.:—This is an appeal from a decree dismissing a suit in effect by two judgments, dated respectively the 13th of September, 1915, and the 30th of September, 1915, on what were really two preliminary points. The suit was brought upon a mortgage-deed for sale of the property hypothecated in respect of a default made by the defendant at an early stage of the transaction. The plaintiff chose to shelter himself behind the legal arguments of counsel and did not go into the box, and at present there is nothing before us to show why and how the defendant was persuaded, in January, 1915, to enter into a fresh transaction at compound interest with security, in order to get rid of some comparatively recent unsecured liabilities which are not even shown to have borne compound interest. We do not know either, whether the defendant ever received a single rupee in respect of this transaction. The uncontradicted evidence of the defendant is that he did not, and the general conduct of the plaintiff raises some inference that he would not advance a rupee more than he was obliged.

Two grounds are raised in appeal against the judgments which I have mentioned: each deals really with a separate judgment. By the fourth ground of appeal it is contended that the defendant, as to whom it has been found that he was a minor, is estopped by his fraudulent misrepresentation from relying upon this defence. The law is well settled, and this point has been disposed of by the learned Subordinate Judge in an excellent judgment, in which he relies very largely upon the recent decision of the English Court of Appeal in a considered judgment of three Lords Justices in *Leslie Limited* v. *Sheill* (1). That decision, by the way, has been recently approved by the

(1) (1914) 3 K. B., 607.

1918.

RADHE SHIAM v. BEHARI LAL.

Privy Council—see *Mahomed Syed Ariffin* v. *Yeohooi Gark* (1)—in a case which was cited to us for another purpose. The learned Judge of the court below cites a passage from the judgment of Mr. Justice A. T. LAWRENCE, who was then sitting in the Court of Appeal, to the following effect:—"Wherever the infant requires, as a plaintiff, the assistance of any court, it will be refused until he has made good his fraudulent representation. Wherever the infant is still in possession of any property which he has obtained by his fraud he will be made to restore it to its former owner." So far Mr. Justice LAWRENCE was giving expression to the equitable principle recognized in England and adopted in the case relied upon by Dr. *Sapru*, *Jagar Nath Singh* v. *Lalta Prasad* (2). "But", continues Mr. Justice LAWRENCE, "I think that it is incorrect to say that he can be made to repay money which he has spent merely because he received it under a contract induced by his fraud." And that was in substance the decision of the Court of Appeal which has been consistently followed by the courts in India. The contention as to the legal proposition therefore fails, and we agree with the judgment of the court below on this point. We desire, however, to add, lest it should be supposed that this decision conveys any reflection upon the defendant, that not only has no fraudulent representation been found against the defendant, but it has not even been alleged. There is a faint suggestion in paragraph (*c*) of the reply which the plaintiff made to the written statement where the defendant set up his minority, at page 9 of the printed book, which suggests that the defendant put forward some active misrepresentation with regard to his age in the form of a document. It is not alleged that that was done fraudulently, and, applying the principle which has always been applied by Courts of Justice in a case of this kind, this point really ought not to have been allowed to have been argued by the plaintiff at all. The plaintiff, as we have said, was not called, and there is no suggestion from first to last by any positive evidence of any active misrepresentation by the defendant before the contract was entered into. Further than that, it would be necessary for the plaintiff to establish that he was induced by such misrepresentation, if in

(1) (1916) 2 A. C., 575, 582. (2) (1908) I. L. R., 31 All., 21.

fact it had been made. One's experience of these cases in courts is that persons who carry on money-lending business, like the present plaintiff, and enter into similar transactions, are not as a rule so much influenced by the statements of their respective debtors as by a desire to get inexperienced young men into their clutches and to make as much profit out of them as the Law will permit, or as the fear of criminal charges, or other consequences of that kind, may prevent the debtors from resisting. As we have already said, we are inclined to think that the plaintiff himself entertained grave doubts as to the age of the defendant, and therefore it is unlikely that he was influenced by anything the defendant had said to him. So much for the point raised in the fourth ground of appeal, which is dealt with in the latter of the two judgments.

With regard to the other point, namely, the judgment of the 13th of September, 1915, on the pure question of fact as to the actual age of the defendant one really cannot improve upon the able and careful analysis of the evidence contained in the judgment itself. Out of respect to the arguments addressed to us, however, we will add this. It seems to us that the evidence with regard to the defendant's actual age is overwhelming. The best evidence, of course, is the evidence of a minor's parents. In this case the mother was dead, but it so happened that she made an application in 1900 with reference to her child, who, if the rest of the evidence be believed, had been born only three years before. It is almost impossible that she could have been mistaken at that time, and no reason of any kind is suggested why she should have desired to mislead anybody. The sister, who was a *parda-nashin* lady and was called on commission, gave strong and clear evidence, which we have no reason to suppose to be dishonest and which was not shaken by a long and determined cross-examination. The brother's evidence is much to the same effect. In the result the family evidence in this case is peculiarly strong and clear. It is therefore unnecessary to say anything about the weight or admissibility of horoscopes and other matters of that kind which have been much discussed. As against such evidence as exists in this case, expert evidence, horoscopes and medical certificates are of very little, if any, value. In this case they are in our opinion

1916

RADHE SHIAM v. BEHARI LAL.

of no value whatever. The appeal fails on both grounds and must be dismissed with costs.

The matter, however, does not rest there. There is a cross-objection by the defendant upon the ground that he has been deprived of his costs. We agree with Dr. *Sapru* that this is a matter for the discretion of the trial court. At one time it was thought that a Court of Appeal would never interfere with the exercise of such discretion, but where the Judge has given his reasons and all the circumstances are before the Court of Appeal, it is now settled that the Court of Appeal can, if satisfied that the discretion has not been judicially exercised, interfere with it and make the order which the court below ought to have made. We think that there was really no evidence to support a finding that the defendant was "mostly responsible for this litigation." The presumption usually is that a plaintiff is responsible for a suit which he has brought into court. In this case the plaintiff was in a peculiar hurry to bring the case into the court. We cannot agree with the ground upon which the learned Subordinate Judge has proceeded. It has been held by the English Court of Appeal that the mere fact that a defendant relies upon a right which a Statute gives him is not a sufficient ground for depriving him of his costs. Some people think that in the ordinary sense of the word it is a shabby thing to rely upon a Statute of limitation, or the Gaming Act, or a defence of infancy, but it has been distinctly held that neither of those matters is good ground for depriving a defendant of his costs. In the case which was relied upon by the appellant and was referred to in argument [*Leslie Limited* v. *Sheill* (1)] the defendant was deprived of his costs, even of that part of the suit on which he succeeded. He had been found guilty by a jury of fraudulently deceiving the money-lender. There is nothing of that kind in this case. The plaintiff has chosen to come into court with a hopeless case. The defendant has succeeded in establishing a legal defence. We see no reason why the costs should not follow the result.

The appeal is dismissed with costs and the cross-objections are allowed. We modify the decree of the court below by allowing the defendant his costs throughout.

Appeal dismissed.

(1) (1914) 3 K. B., 607.