

in fact it operated as a deed of assignment within the meaning of section 130 of the Transfer of Property Act. If that be so, there is no question of priority of title, and the attachment therefore by the defendants-appellants has no meaning whatever.

For those reasons somewhat elaborately expressed I am of the opinion that the decision of the learned Judge in the Court below is right and the appeal fails and must be dismissed with costs.

MANOHAR LALL, J.—I entirely agree.

Appeal dismissed.

K. D.

FULL BENCH.

Before Harries, C.J., Wort and Manohar Lall, JJ.

BANKEY BEHARI PRASAD

v.

MAHENDRA PRASAD.*

1940.

KARNIDAN
SARDA
v.
SAILAJA
KANTA
MITRA.

WORT,
J.

1940.

April, 1, 2.

Contract Act, 1872 (Act IX of 1872), section 70—minor, whether can be sued under the section.

In the circumstances set out in section 70 of the Contract Act, 1872, the law implies a promise to pay.

As a minor cannot be sued on an express promise, it is clear that he cannot be sued on an implied promise.

Held, therefore, that the basis of a suit under section 70, Contract Act, 1872, being a contractual one, a minor cannot be sued under this section.

Mohori Bibee v. Dhurmodas Ghose(1), relied on.

Shahbaz Khan v. Bhangi Khan(2), followed.

K. R. S. V. Muthayya Chetti v. Narayan Chetti(3) (judgment of Reilly, J.), not followed.

*Appeal from Appellate Decree no. 1033 of 1936, from a decision of D. E. Reuben, Esq., i.c.s., District Judge of Gaya, dated the 20th July, 1936, reversing a decision of Babu Dwarka Prasad, Subordinate Judge, 3rd Court, Gaya, dated the 17th November, 1934.

(1) (1903) I. L. R. 30 Cal. 539; L. R. 30 Ind. App. 114.

(2) (1931) A. I. R. (Lah.) 344.

(3) (1928) A. I. R. (Mad.) 317.

1940.

BANKEY
BEHARI
PRASAD

MAHENDRA
PRASAD.

Query: Whether a co-sharer, who undertakes repairs of a joint property which the other co-sharers are under no legal obligation to do and have not agreed to his doing for them, is entitled to claim contribution from them under section 70 of the Contract Act, 1872?

Appeal by the plaintiffs.

The fact of the case material to this report are set out in the judgment of Harries, C.J.

The case was heard in the first instance by Dhavle, J. who referred it to a Division Bench.

The appeal then came up for hearing before Agarwala and Rowland, JJ. who delivered the following judgment:

AGARWALA AND ROWLAND, JJ.—This is an appeal by the plaintiffs from a decision of the District Judge of Gaya reversing a decision of the Subordinate Judge. The appeal arises out of a suit for contribution towards the cost of repairing a pyne. The plaintiffs, who are husband and wife, are co-sharer landlords in village Rampora Uber. Respondent no. 1 is also a co-sharer in that village and respondent no. 2 is a proprietor of village Klaskori. The pyne in question runs through both these villages and two others. The other co-sharer proprietors in these four villages were also impleaded as defendants in the suit. The plaintiffs alleged that in agreement with all the co-sharers they undertook and carried out the repairs of the Lalwa pyne in the years 1834 to 1839. The defendants denied that they had entered into any agreement with the plaintiffs for repairing the pyne. The trial Court accepted the defence on this point but found, however, that the pyne had in fact been repaired by the plaintiffs and that the defendants had benefited by it. Accordingly he decreed the suit holding that the defendants are liable by reason of section 70 of the Contract Act. Against that decision there was an appeal by the present respondents 1 and 2. Respondent no. 1 is a minor and it was contended on his behalf in the Court below, as it has been contended in this Court, that section 70 does not apply to the case of a minor. Respondent no. 2 contested the amount alleged by the plaintiffs to have been expended on the repairs. The lower appellate Court was dissatisfied with the plaintiffs' evidence regarding the amount expended in 1839. The finding of the Court below with respect to the actual amount expended by the plaintiffs is a finding of fact which must be accepted in second appeal.

With regard to respondent no. 1 the appellate Court upheld his contention that he was not liable by reason of section 70 of the Contract Act and exonerated him from any liability for the amount expended by the plaintiffs in the repair of the pyne. This decision has been challenged by the plaintiffs in this appeal.

The first question which arises is whether a co-sharer who undertakes repairs which the co-sharers are under no legal obligation to do and have not agreed to his doing for them, is entitled to claim contribution from them. If that question be answered in the affirmative, the next question is whether he is entitled to claim contribution against a minor co-sharer. The first of these questions was decided in favour of the plaintiffs by both the Courts below, but it is again raised by the respondent no. 1 in second appeal, and must be decided, as between him and the appellants. The second question was not raised in the first Court but was taken in the appeal to the District Judge where it was decided against the plaintiffs. Section 70 of the Contract Act provides :

"Where a person lawfully does anything for another person, or delivers anything to him not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered".

The findings in the case are that the pyne was in fact repaired by the plaintiffs and that the other co-sharers, including the minor respondent no. 1, benefited by those repairs. It may be assumed that the plaintiffs did not intend to benefit their co-sharers gratuitously.

These questions appear to us to be of importance and we, therefore, direct that the case be laid before the Chief Justice with a view to its being referred to a full Bench. This course seems to be all the more desirable in view of the fact that opinion in this Court on the first question is not unanimous. In *Ramdas v. Ram Babu*(¹) *Khaja Mohamad Noor und Saunders, JJ.* held that for the purposes of section 70 of the Contract Act it was necessary that the person from whom contribution is sought should have had the option of refusing to enjoy the benefit derived from the act of the plaintiff while in *Babu Bhagwati Saran Singh v. Maiyan Murat Mati Kuer*(²) *Ross and Fazl Ali, JJ.* held that in order to enable a person to recover money paid by him for another under section 70 it is not necessary to show that the person sought to be made liable had, before the benefit was conferred on him, an option of declining such benefit. As to the second question no authority of this Court is cited. Elsewhere, one view is taken in *Shahbaz Khan v. Bhangi Khan*(³) and the contrary in *K. R. S. V. Muthayya Chetti v. Narayana Chetti*(⁴).

On this reference.

Raj Kishore Prasad, for the appellants: By reason of section 70 of the Contract Act, 1872, a liability apart from contract, express or implied, is created, and the minor is liable to contribute towards the expenses incurred in repairing the pyne, the minor being a co-sharer in the village.

(1) (1935) 16 Pat. L. T. 649.

(2) (1931) I. L. R. 10 Pat. 528.

(3) (1931) A. I. R. (Lah.) 344.

(4) (1928) A. I. R. (Mad.) 317.

1940.

BANKAY
BEHARI
PRASAD
v.
MAHENDRA
PRASAD.

1940.

[WORT, J.—How is the minor liable?]

BANKEY
BEHARI
PRASAD
v.
MAHENDRA
PRASAD.

By reason of the provisions of the Bihar Tenancy Act, 1885, the co-sharer landlords had to effect the repairs of the pyne, and the pyne having been repaired, the liability to contribute extends to the minor co-sharer also.

[MANOHAR LALL, J.—Minor's estate may be liable but not the minor. How can you get a decree against the minor under section 70? A minor cannot enter into a contract even under the general law: See *Mohori Bibee's case*(1).]

Section 68 of the Act provides for such a case.

[MANOHAR LALL, J.—Section 68 is the only section that may apply. But you cannot come under that section as the present case is not one of supplying the minor with necessaries.]

[CHIEF JUSTICE.—Do you mean to suggest that the word "person" in the section includes a minor? Their Lordships of the Judicial Committee in *Mohori Bibee's case*(1) have expressly held that a minor cannot contract. Besides, these sections occur in Chapter V of the Act which is headed "Of certain relations resembling those created by contract." These sections seem to cover cases of implied contract, and would not, therefore, bind a minor who is incompetent to contract.]

Section 70 does not speak of a contract. It is an exception to the general rule. It is a supplemental provision.

[CHIEF JUSTICE.—See section 11 of the Act. A minor is not competent to contract and section 70 undoubtedly contemplates a case of an implied contract.]

K. R. S. V. Muthayya Chetti v. Narayan Chetti(2) supports the view that section 70 is applicable to

(1) (1908) I. L. R. 30 Cal. 589; L. R. 30 Ind. App. 114.

(2) (1928) A. I. R. (Mad.) 317.

minors. In our case the minor was benefited and the repair was not intended to be gratuitous. If the benefit is deemed to be personal then section 68 should apply. If the benefit is to the estate then I must sue the person representing the estate.

1940.

BANKEY
BEHARI
PRASAD
v.
MAHENDRA
PRASAD.

[CHIEF JUSTICE.—But you cannot sue a minor who is benefited. The observation in *Muthayya Chetti v. Narayan Chetti*(¹) is purely *obiter*. The point did not arise. The other learned Judge constituting the Bench did not express any opinion.]

[MANOHAR LALL, J.—In *Shahbaz Khan v. Bhangji Khan*(²) it has been expressly held that section 70 does not apply to minors.]

Section 70 is in very general terms. The contractual capacity of the person benefited is quite irrelevant for the purpose of the section.

[CHIEF JUSTICE.—If you are right, section 70 could be used to defeat section 11 altogether.]

Then the position resolves itself to this that the minor will have the advantage of the repair of the pyne without paying for it, or the pyne would never be repaired if the payment is insisted on in advance. The whole body of co-sharers will suffer for the sake of one.

[CHIEF JUSTICE.—That is a matter for the legislature.]

Sarjoo Prasad (with him *K. N. Verma, G. P. Singh* and *L. N. Sinha*), for the respondents, not called upon.

K.D.

Cur. adv. vult.

HARRIES, C.J.—This is a plaintiffs' second appeal from a decree of the learned District Judge of Gaya. The case came in the first instance before

(1) (1928) A. I. R. (Mad.) 317.

(2) (1931) A. I. R. (Lah.) 344.

1940.

BANKEY
BEHARI
PRASAD

v.

MAHENDRA
PRASAD

HARRIES,
C.J.

Dhavle, J., who referred it to a Divisional Bench. That Bench by an order, dated the 12th of February, 1940, directed that the case should be laid before the Chief Justice with a view to its being referred to a Full Bench. The matter has in consequence been heard by this Bench.

The suit giving rise to the appeal was brought by the plaintiffs to recover from the defendants a proportion of sums spent by the former in repairing a pyne which served both the plaintiffs and the defendants in the suit. The plaintiffs based their claim on section 70, Indian Contract Act. Defendant no. 4 in the suit was a minor, whereas defendant no. 7 was an adult.

The defendants pleaded that they could not be made liable to pay anything towards the cost of the repairs because they had not been consulted before such repairs were executed and had never had an opportunity of rejecting the benefit proposed to be conferred upon them by the plaintiffs. Defendant no. 4 also pleaded minority. The learned Subordinate Judge, who heard the case at first instance, decreed the plaintiffs' claim against all the defendants whereupon defendants nos. 4 and 7 appealed to the Court of the District Judge. The learned District Judge held that there was nothing in section 70, Indian Contract Act, which required the plaintiffs to give the defendants an opportunity of rejecting the proposed benefit before they could succeed in the suit. He further held that section 70 did not apply to the case of a minor and consequently allowed the appeal of defendant no. 4 and dismissed the suit against him in its entirety. Though he held that defendant no. 7 was liable he found that the claim was excessive and reduced the amount decreed. Defendant no. 7 has not appealed, but the plaintiffs have appealed, contending that they were entitled to the amount originally claimed against both defendants nos. 4 and 7.

1940.

 BANKEY
 BEHARI
 PRASAD
 v.
 MAHENDRA
 PRASAD.
 HARRIES,
 C.J.

The plaintiffs were co-sharers in a village called Rampur Über. Respondent no. 1, who was the minor defendant no. 4 in the suit, is a co-sharer with the plaintiffs in that village. Respondent no. 2, who was defendant no. 7 in the suit, is the proprietor of a village called Khaskhori. The pyne in question runs through both these villages and serves not only the plaintiffs-appellants but also both the respondents. The plaintiffs in their plaint alleged that in agreement with all the co-sharers they undertook and carried out the repairs to this pyne in the years 1334 to 1339 F. They alleged that the defendants had received the benefit of this work and consequently that they were bound to pay a proportionate share of the cost of repairs by reason of the provisions of section 70, Indian Contract Act. The defendants denied that they entered into any such agreement with the plaintiffs for repairing the pyne, and both the Courts below came to the conclusion that no such agreement had been entered into. The finding is that the plaintiffs themselves without consulting the defendants; repaired the pyne, but that they did not intend to confer a benefit gratuitously upon the defendants. Further, it is clear that the defendants obtained considerable benefit from these repairs, and the question arises whether the respondents can be made liable.

The Bench which heard this case was of opinion that two points were involved: (1) whether a co-sharer, who undertakes repairs which the co-sharers are under no legal obligation to do and have not agreed to his doing for them, is entitled to claim contribution from them; and, in the event of that question being answered in the affirmative, (2) whether a co-sharer is entitled to contribution against a minor co-sharer.

It will be convenient to deal, in the first place, with the question of minority.

1940.

Section 70, Indian Contract Act, is in these terms :

BANKEY
BEHARI
PRASAD
v.
MAHENDRA
PRASAD.

“ Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”

HARRIES,
C.J.

It will be seen that the section is in general terms and no exception is made on the face of it in favour of a minor. It has consequently been argued on behalf of the appellants that on the plain terms of the section it applies to a minor.

It is clear, however, that a minor is incompetent to contract. Section 11, Indian Contract Act, provides that—

“ Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.”

There appears at first to have been some doubt as to the meaning of this section with regard to minors, but all such doubt has been removed by a decision of their Lordships of the Privy Council in *Mohori Bibee v. Dhurmodas Ghose*(1). That case laid down that the Indian Contract Act makes it essential that all contracting parties should be competent to contract and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. It follows that if a minor enters into a contract, such a contract is void ab initio and cannot be sued upon.

Section 70, Indian Contract Act, is in Chapter V of the Act, and that Chapter is entitled “ Of certain relations resembling those created by contract ”. In my view section 70 sets out the circumstances in which a person receiving a benefit must be deemed to have impliedly agreed to pay compensation or to return the thing done or delivered to him. In the circumstances

(1) (1903) I. L. R., 30 Cal. 539; L. R., 30 Ind. App. 114.

set out in that section the law implies a promise to pay. If section 70 is an instance of an implied contract, then clearly a minor cannot be made liable on such a contract. If a minor cannot be sued on an express promise, it appears to me clear that he cannot be sued under an implied promise. An implied promise is nothing more than a promise which is inferred from certain circumstances. The basis of a suit under section 70 is, in my view, a contractual one, and consequently a minor cannot be sued under this section.

If a minor is liable in a suit under section 70, Indian Contract Act, an extremely curious result would follow. It is clear that if a minor agreed to buy a motor car and the same was delivered to him by a motor car dealer, the latter could not maintain an action for the price. If, however, the motor car was delivered by mistake or without any previous agreement to the minor without any intention of making a gift of the motor car and the minor used it for his own benefit, then he would be liable to make compensation to the extent of the value of the car or to return the car if section 70 applied to minors. In short, the minor would be under no liability to pay the price if he had promised to do so, whereas he would be under such liability if he had never made any promise. Such, in my view, could never have been the intention of the legislature.

Again if section 70, Indian Contract Act, applies to minors, then section 11 could be wholly defeated in many cases. For example, a minor cannot be sued on a contract to pay for luxurious goods supplied, but it could always be alleged that goods had been delivered to a minor without any intention of making a gift and that the minor had enjoyed the benefit of such goods. Such a case would fall within section 70, and the minor, though he could not be sued on the contract, could always be sued under section 70 for compensation in respect of the goods or for restoration

1940.

BANKEY
BEHARI
PRASAD
v.
MAHENDRA
PRASAD.
HARRIES,
C.J.

1940.

BANKEY
BEHARI
PRASAD
v.

MAHENDRA
PRASAD.

HARRIES,
C.J.

of the goods. It appears to me clear that if section 70 is held to apply to minors, then the latter can be made liable in cases of contract though section 11 in terms says that they are incompetent to contract.

Lastly, if section 70, Indian Contract Act, applied to minors, then section 68 of the Act appears to be wholly redundant. Section 68 deals with claim for necessaries and is in these terms :—

“ If a person incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.”

There can be no doubt that a minor is a person incapable of entering into a contract and is, therefore, a person to whom section 68 applies, though, of course, section 68 applies to persons other than minors such as lunatics. This section makes it clear that if necessaries are supplied to a minor, the person who supplies them is entitled to recover the cost from the property of the minor. If section 70 applied to minors, then section 68 is wholly unnecessary as far as minors are concerned, because the person who supplied the necessaries could recover under section 70 on the ground that the plaintiffs had delivered the goods to the minor not intending to do so gratuitously and that the minor had enjoyed the benefit thereof. The fact that the legislature has expressly dealt with “ necessaries ” in section 68 of the Act shows that section 70 was never intended to cover a case of the supply of such to minors. If section 70 does not entitle a person who supplies necessaries to recover from the minor, then obviously it cannot possibly be intended to cover a case of a supply of luxuries or things which cannot possibly fall within the category of “ necessaries ”.

In Mohori Bibee v. Dhurmodas Ghose⁽¹⁾ Sir Ford North, who delivered the opinion of the Board, observed at page 548 with regard to section 68, Indian

(1) (1903) I. L. R. 30 Cal. 589; L. R. 30 Ind. App. 114.

Contract Act : “ It is beyond question that an infant falls within the class of persons here referred to as incapable of entering into a contract; and it is clear from the Act that he is not to be liable even for necessaries, and that no demand in respect thereof is enforceable against him by law, though a statutory claim is created against his property ”.

1940.
 BANKEY
 BEHARI
 PRASAD
 v.
 MAHENDRA
 PRASAD.
 HARRIES,
 C.J.

It will be observed that the liability created in respect of the supply of necessaries is a liability which is limited to the property of the minor or other incapable person. The liability under section 70 of the Act is not so limited. That latter section simply states that the person who has received the benefit is bound to make compensation or to restore the thing done or delivered. It does not state that only the benefited person's property is liable for compensation. It follows, therefore, that if section 70 is applicable to goods supplied to a minor, then the liability of the minor would depend upon whether he was sued under section 68 or section 70 of the Act. If he was sued under section 68, the liability would be limited to the property of the minor, whereas if he was sued under section 70 there would be no such limitation.

There is little direct authority upon this question. In *K. R. S. V. Muthayya Chetti v. Narayan Chetti*(1) Reilly, J. expressed the view that section 70 was applicable to minors. Phillip, A.C.J., who was the other member of the Bench, expressed no opinion on the subject, and it is clear from the facts of the case that the point did not arise. Reilly, J.'s opinion is, therefore, purely obiter. A contrary view was taken by a Bench of the Lahore High Court in *Shahbaz Khan v. Bhangi Khan*(2) in which it was expressly held that section 70 did not apply to minors. In my judgment the view of the Bench of the Lahore High Court is the true one and should be followed.

(1) (1928) A. I. R. (Mad.) 317.

(2) (1931) A. I. R. (Lah.) 344.

1940.

I, therefore, agree with the finding of the learned District Judge upon this point.

BANKEY
BEHARI
PRASAD
v.
MAHENDRA
PRASAD.
HARRIES,
C.J.

As I hold that the minor could not in any event be sued for his proportion of the cost of the repairs to the pyne in question, the first question propounded by the Bench which heard this case does not arise. If by reason of minority respondent no. 1 is not liable, it matters not whether he had or had not an opportunity of refusing the proposed benefit. It is, therefore, unnecessary to express any opinion upon this point.

With regard to the appeal from the decree in so far as it affects the second respondent, little need be said. The learned District Judge reduced the amount which had been originally decreed by the learned Subordinate Judge. What the actual share of defendant no. 7 was is a pure question of fact and this Court cannot interfere with the findings of fact of the lower appellate Court if there was material before that Court upon which such findings could be based. There was such material in the present case and accordingly the finding of the learned District Judge on the question of amount is final and cannot be challenged.

For the reasons which I have given I hold that the learned District Judge was right and I would accordingly dismiss this appeal with costs.

WORT, J.—I agree and have very little to add. I propose to express briefly and in my own words the considerations which in my judgment apply to the determination of this case.

The most formidable argument advanced to us is that by reason of section 70 of the Contract Act, and quite apart from juridical and legal principles, a liability apart from contract, express or implied, is created. In my judgment that argument although attractive is one which cannot be accepted. As their

Lordships of the Judicial Committee of the Privy Council have pointed out in the case which has already been referred to by my Lord, *Mohori Bibee v. Dhurmodas Ghose*⁽¹⁾, the sections which we have to construe are a part of the Contract Act; and there appears to be no valid reason why it should not be held that those sections are to be construed on the footing of the principles underlying the Act. If there were any doubt at any time with regard to the matter, it is now quite clear that a minor cannot make a contract: indeed the Act itself so provides. Section 70 states the circumstances under which liability accrues to a person taking goods or accepting benefits which benefits have not been conferred gratuitously. As the section states, in those circumstances there is an obligation to compensate the person conferring those benefits. It is impossible to contend, in my judgment, that the circumstances as set out in the section do not impose what lawyers describe as a contract implied by law. Now, as my Lord has pointed out, if section 70 is to be construed in the manner suggested by the learned Advocate appearing on behalf of the appellants, then not only was section 68 of the Contract Act unnecessary and redundant, but further in one sense section 70 would be contradictory. It is impossible to impute to the legislature an intention to enact redundant or contradictory provisions. Sections 68, 69 and 70 as I have already stated, must be governed by the general principles underlying the Act. Section 68 circumscribes the liability of a minor both as regards liability itself and the method of imposing that liability. If it is correct (and in my judgment it is correct) to say that section 68 circumscribes the liability of the minor, section 70, on the construction which is sought to be placed upon it, immediately extends it and extends it in a most remarkable and, in my judgment, contradictory manner. Section 68 limits liability to necessities, section 70 imposes an unlimited liability.

1940.

DANKEY
BEHARI
PRASAD
v.
MAHENDRA
PRASAD.

WORT,
J.

(1) (1908) I. L. R. 30 Cal. 539; L. R. 30 Ind. App. 114.

1940. The construction sought to be placed upon section 70 is an impossible one, being opposed to the other provisions of the Contract Act. I am clear that section 70 indicates those circumstances in which there is an implied contract or obligation, implied by law, and it must be manifestly clear that a liability which cannot be imposed by an express contract cannot be imposed under an implied contract.

BANKEY BEHARI PRASAD v. MAHENDRA PRASAD. WORT, J.

In those circumstances I agree with my Lord that the appeal fails and that it must be dismissed with costs.

MANOHAR LALL, J.—I am also of the same opinion for the reasons given by my Lord the Chief Justice.

Appeal dismissed.

S. A. K.

FULL BENCH.

Before Fazl Ali, Dharle and Manohar Lall, JJ.

TIKA SAO

v.

HARI LALL.*

Transfer of Property Act, 1882 (Act IV of 1882), section 92, whether retrospective—Transfer of Property (Amendment) Act, 1929 (Act XX of 1929), section 63, meaning of—interpretation of statutes—principles applicable—mortgage—subrogation—puisne mortgagee paying up and redeeming earlier mortgages, whether entitled to use earlier mortgages as a shield only or can enforce his right as plaintiff in an action.

Per curiam: A mortgagee, who pays up and redeems the earlier mortgages as a part of the covenant in his mortgage, is not only entitled to use the earlier mortgages as a shield, but is entitled to claim subrogation so as to

* Appeal from Original Decree no. 159 of 1938, from a decision of Babu Bhuban Mohan Lahiri, Subordinate Judge of Patna, dated the 22nd December, 1937.

1940.

Feb. 6, 7, 8,

9.

March, 15,

18.

April, 12.