

1937

Present : Poyser and Soertsz J.J.

SHORTER & CO. v. MOHAMED.

166—D. C. Colombo, 2,197.

Muslim minor—Mortgage bond executed with consent of father—Validity of bond—Fraudulent misrepresentation regarding age—Contract valid under Roman-Dutch law.

Under the Muslim law a mortgage bond executed by a minor with the consent of his father is valid. Under the Roman-Dutch law a minor who falsely represented himself to be of full age is bound by his contract.

A PPEAL from a judgment of the District Judge of Colombo.

Rajapakse (with him *Wickremanayake*), for first added defendant, appellant.

H. V. Perera (with him *J. R. Jayawardene*), for plaintiff, respondent.

D. S. L. P. Abeysekere (with him *Olegasagaram*), for second defendant, respondent.

Cur. adv. vult.

April 23, 1937. POYSER J.—

The plaintiffs, a firm carrying on business in England, sued the defendant, a Muslim, on the mortgage bond A and have been given judgment for the sum of Rs. 9,918.73. This mortgage bond was executed to secure the payment of goods supplied by the plaintiffs to the defendant, and it was admitted in the lower Court that goods of the nett value of Rs. 9,918.73 had been supplied. It was also admitted in the lower Court that the defendant did not attain the age of 21 till May 14, 1935, and was consequently a minor when the bond in question was executed.

The defence was that the said mortgage bond was void and of no effect against the defendant as he was a minor when he executed it.

The District Judge has found that the following are the circumstances under which the bond was executed. The plaintiffs, had prior to its execution, business dealings with the defendant, but such dealings had ceased owing to the defendant's indebtedness to the plaintiffs. The defendant and his father were anxious to continue business and the bond in question was drawn up by Mr. Vethecan, a Notary and Proctor of long standing, on the instructions of the defendant's father. The defendant and his father came to the Notary's office for the execution of the bond and the Notary, noticing that the defendant had a youthful appearance, asked if he was twenty-one, and the defendant replied that he was, and his father said nothing.

The bond was then executed by the defendant and forwarded to the plaintiffs and business relations were then resumed between them.

In view of these findings the District Judge has found in answer to issue 2, that the defendant did fraudulently represent he was a major and was debarred from setting up the plea of minority. I do not think there is the slightest doubt that the Judge was correct in finding that the bond was fraudulently executed. Apart from the evidence of the Notary, other evidence and all the circumstances of the case indicate that the defendant and his father were anxious to renew business relations with the plaintiffs and the bond was executed by the defendant under the expectation that it would be held to be void if sued upon, on account of the defendant being a minor.

In view of these findings of fact, which are amply supported by the evidence, the question that arises on this appeal is whether the bond is in law enforceable. Mr. Rajapakse argued that Muslim law must be applied to decide this point as the defendant is a Muslim. Mr. Perera did not agree and argued that Muslim law is not applicable when only one of the parties is a Muslim and the Roman-Dutch law must consequently be applied.

It was at one stage suggested by Counsel that this appeal should stand over until the determination of S. C. 22/D. C. Colombo, 24,309. In that case the following four questions of law were referred to a Bench of three Judges, viz., (1) Whether Muslims are governed by the Roman-Dutch law, so far as their contractual capacity is concerned. (2) If not, whether they are governed by their own law or by Ordinance No. 7 of 1865? (3) The effect of the case of *Narayanan v. Saree Umma*¹. (4) If the Roman-Dutch law is applicable, is it open to a minor to plead minority as a defence to an action on a contract to which he is a party without a counter-claim for a rescission of the contract?

I think, however, for the following reasons, that this case can be decided without the determination of any of the questions reserved for a Bench of three Judges. Assuming firstly, that Muslim law is applicable, and that a Muslim attains his majority at the age of twenty-one and not when he attains discretion, the plaintiff is still, in my opinion, entitled to recover the amount claimed. On this point the District Judge held, and correctly so, in my opinion, on the authority of *Amir Ali (4th ed.) vol. II., p. 278*, as follows:—"Where, therefore, a Muslim minor enters into a contract with the consent of his natural guardian the contract is valid. The disability arose because he was under the *patria potestas* but when the father gave his consent then the contract was valid.

This view is supported in Hamilton's *Hedaya, vol. III., p. 469*, the material passage being "The acts of an infant are not lawful unless authorised by his guardian, nor the act of a slave unless authorised by his master—and the acts of a lunatic who has no lucid intervals are not at all lawful. The acts of an infant are unlawful, because of the defect in his understanding; but the licence or authority of his guardian is a mark of his capacity whence it is that in virtue thereof an infant is accounted the same as an adult".

In view of these authorities and the fact that the father not only gave his consent to the execution of the bond but was mainly instrumental in securing its execution, there is no doubt in my mind that if Muslim law is applied, the plaintiffs are entitled to succeed.

Further, if Roman-Dutch law is applied the plaintiffs are also entitled to succeed and there is ample authority for this proposition. One case only need be cited, viz., *Ahamadu Lebbe v. Amina Umma*² in which it was held that "where a minor by falsely representing himself to be of full age deceived a person and induced him to purchase his immovable property the conveyance was valid".

The following passages occur in the judgment of Jayewardene A.J., at p. 450:—"The view of the Roman-Dutch law thus was that the remedy of *restitutio in integrum* should not be granted to a minor, who was fraudulent, fraud supplying the want of age.

"The same principle was adopted in the Roman-Dutch law. Van Leeuwen states that the "decree of reinstatement is not granted to those who committed fraud, as for instance, if they have lied in saying that they were of age. (Van Leeuwen's *Cens. For. pt. i., bk. IV., ch. 43*)

¹ (1920) 21 N. L. R. 439.

² (1928) 29 N. L. R. 449.

“ According to Professor Lee, restitution is refused when a minor has fraudulently misrepresented his age (*Introduction to Roman-Dutch Law* by R. W. Lee, p. 43). He quotes two cases—*Johnston v. Keiser* and *Vogel & Co. v. Greentley*—which are not available locally. He also refers to the Ceylon case of *Wijesuriya v. Ibrahims*¹. In that case it was held that a minor, who falsely represented himself to be a major and deceived the other contracting party, was bound, and the sale of a piece of land of the minor was held to be good. Hutchinson C.J. refused to allow the minor to obtain the benefit of the fraud which he had committed, and Middleton J. held that a fraudulent minor should not expect the Courts to extract him from a position in which his own improbity had placed him.”

For the above reasons I am of opinion that whether Muslim or Roman-Dutch law is applied the plaintiff is entitled to succeed and the appeal must consequently be dismissed with costs.

SOERTSZ J.—I agree.

Appeal dismissed.
