

1933

*Present : Drieberg J. and Maartensz A.J.*MAJEEDA *v.* PARAMANAYAGAM.APPLICATION FOR *restitutio in integrum.**D. C. Colombo, 50,571.*

*Restitutio in integrum—Muslim married woman—Minor—Mortgage bond executed with husband—Relief from contract—Proof of damage.*

Where a Muslim woman married and under the age of twenty-one entered into a contract with the assistance of her husband,—

*Held*, that relief from the contract must be sought by way of restitution.

To obtain such relief there must be proof of damage, loss, or prejudice.

**T**HIS was an application for *restitutio in integrum.*

*N. E. Weerasooria* (with him *Nadarajah*), for petitioner.

*Chelvanayagam*, for the respondent.

*Cur. adv. vult.*

November 15, 1933. DRIEBERG J.—

The petitioner, the first defendant, is the wife of the second defendant. Judgment was entered against them on a mortgage bond executed by them by which the petitioner hypothecated land belonging to her. The judgment was obtained on a warrant of attorney to confess judgment given by the petitioner and her husband. The petitioner was born on August 28, 1913, and still is under twenty-one years of age. The application for restitution is made on the ground that when she mortgaged her property and granted the warrant to confess judgment she was a minor without the capacity to enter into such contracts. The petitioner is a Muslim and did not attain majority by marriage (*Narayanan v. Saree Umma*<sup>1</sup>).

<sup>1</sup> (1920) 21 N. L. R. 439.

The position is complicated by the fact that though for purposes of contract she is a minor, she is for the purposes of actions brought by or against her considered a person of full age. This is the consequence of section 502 of the Civil Procedure Code which enacts that for the purposes of chapter XXXV, which deals with actions by and against minors, a minor is deemed to have attained full age on attaining twenty-one years or on marriage or on obtaining letters of *venia aetatis*. There is nothing to exclude the application of this provision to Muslims and it follows therefore that no objection can be taken to her having been sued and judgment obtained against her as if she was of full age without the appointment of a person to be her guardian for the action and to act on her behalf in the conduct of the case.

If the petitioner had not given a power to confess judgment but had appeared on summons and consented to judgment she could not apply for the relief on the ground of her minority for she could have raised that defence in the action, the law regarding her as competent to protect her interests in an action without the assistance of a guardian. But Mr. Weerasooria contends that as the result of giving the power to confess judgment she had no opportunity of defending the action on the ground that she had no capacity to contract, that though she could not question the regularity of the proceedings in the action she could seek relief by restitution from the mortgage bond and the warrant to confess judgment upon which the judgment was obtained. She says she was not aware of the institution of the action until the property mortgaged was advertised for sale.

I see no reason why relief by restitution should not be available to a woman who though married is still a minor where the circumstances of the case justify it.

In the case of a minor a contract made without the assistance of a guardian, natural or appointed, is ordinarily *ipso jure* null and void, but where a minor contracts with the assistance of a guardian with the due observance of all the other essentials of a contract, relief from the contract must be sought by the process of restitution, and for this, among other conditions, it is necessary for the minor to prove that he has suffered serious loss, damage, or prejudice (*Maasdorp's Institutes of Cape Law* (1907 ed.), vol. III, pp. 14 and 59, and the other party to the contract is entitled to be indemnified and placed back in his original position.

It is not possible to regard a contract such as this by a married Muslim woman under the age of twenty-one in the same light as a contract by a minor, subject to the common law, made without the assistance of a natural or appointed guardian. Her husband joined her in the contract, her minority is not an absolute one for all purposes, for the law regards her as capable of appearing in Court without the assistance of a guardian—for the purpose of this application she is represented by a guardian *ad litem*, but it was open to her to have made the application without one. For the relief which she seeks by way of *restitutio in integrum* she has failed to make out a case, *in fact*, she has not attempted to do so. She does not say that she was not aware of the consequences of signing the bond or the warrant to confess judgment, nor does she suggest that she

did not obtain the full benefit of the loan. She relies solely on the bond being, as she contends, null and void. The respondent in his affidavit says that part of the consideration on the bond, which was for Rs. 1,750, was used in obtaining two days later an assignment to her husband of a lease on very advantageous terms, for which Rs. 850 was paid. It secured him, for a monthly pay of Rs. 25, property which gave a monthly rental of Rs. 45 and also the right to be paid at the end of the term a sum of Rs. 1,100 by the original lessee and held by the lessor. The petitioner's husband assigned his interest in this lease to the petitioner's father who is her guardian *ad litem* in these proceedings.

The application is dismissed with costs.

MAARTENSZ A.J.—I agree.

*Application dismissed.*

