(1924) 07 BOM CK 0014

Bombay High Court

Case No: None

Rose Fernandes		APPELLANT
	Vs	
Joseph Gonsalves		RESPONDENT

Date of Decision: July 24, 1924

Acts Referred:

- Contract Act, 1872 - Section 73

Citation: (1924) ILR (Bom) 673

Hon'ble Judges: Taraporewala, J

Bench: Single Bench

Judgement

Taraporewala, J.

This suit has been filed by the plaintiff, who has now attained majority, for recovering damages for breach of a contract of marriage made by the defendant with her and her father. There is no dispute as to the facts in the case and although the defendant''s counsel in his cross-examination tried to elicit facts with a view to show that the contract of marriage was by mutual consent cancelled or abandoned, the defendant has not ventured to go into the witness-box or lead any evidence to substantiate the said allegation. I must, therefore, take it that the contract of marriage, which is admitted by the defendant, was subsisting at the date the defendant admittedly married another lady in the year 1921 and that he has committed a breach of the contract. The defendant''s counsel, however, has taken up a point whish, if decided, in defendant''s favour, goes to the very root of the case. The point is that the contract in suit was either made by the defendant with the plaintiff or by the defendant with the plaintiff''s father, that if it was made by the defendant with the plaintiff, the contract is void as having been made with a minor on the authority of Mohori Bibee v. Dharmodas Ghose (1903) 30 Cal. 539 ; and on the other hand, if the contract was made by the defendant with the plaintiff''s father, the plaintiff cannot maintain the suit, she not being a party to the'' contract. If either of the points is decided in favour of the defendant, the suit will necessarily

fail.

2. Now, as to how the contract was entered into, there is no doubt in my mind that the contract was entered into by the defendant with the plaintiff''s father as the guardian of the plaintiff. No doubt the plaintiff was a consenting party; but she could not herself have entered into the-contract, she being then only about 13 years of age, The facts proved as to the making of the contract are as follows: The plaintiff''s father and the defendant were employed in the docks and thus the defendant came to know the plaintiff. He asked, the plaintiff''s father to give the plaintiff in marriage to him and he also asked the plaintiff to marry him. Both plaintiff and plaintiff''s father agreed. This was about a month or so before the writing of May 26, 1919, passed by the defendant. It appears that on that day the defendant desired that the plaintiff should go out with him as his fiancee. The plaintiff''s father objected. Thereupon the defendant passed the writing which has been put in as Exhibit A whereby he agreed to marry the plaintiff, within 2 years and to pay Rs. 2,000 by way of damages if he failed to do so. He gave the said writing to the plaintiff''s father as the natural guardian of the plaintiff, and the plaintiff''s father thereupon allowed the plaintiff to go out with the defendant as desired by him. Upon these facts I hold that a contract of marriage was entered into between the defendant on the one hand and the plaintiff''s father on the other acting as guardian of the plaintiff and on her behalf.

3. The next question for consideration is whether the father can enter into such a contract as guardian of the minor on her behalf so as to bind her and whether such a contract is for the benefit of the minor. Both here and in England many contracts for marriage are made while one of the parties is a minor. In England the question arose as to whether in a case where one of the contracting parties was a minor, the minor could claim damages for breach of such a contract. The question was decided in Holt v. Ward (1732) 2 Str. 937 and that is good law up till now. The Court had there no difficulty in arriving at that conclusion, because in England the contracts of minors at that date were held under common law to be voidable and not void, that is to say, the minor could enforce performance of the contract as against the other adult party, but the adult party could not enforce it against the minor. Thereafter the Infants Relief Act of 1874 was passed which made certain contracts by minors mentioned therein void. That Act, however, left contracts of marriage untouched and therefore even today in England, contracts for marriage made by a minor are voidable and not. void. In India up to the decision of the Privy Council in Mohori Bibee v. Dharmqdas Ghose (1903) 30 Cal. 539 although with some conflict, it was held that the contracts of minors were voidable. If that had been the state of law, there would have been no difficulty whatsoever in this case but, on the wording of the Indian Contract Act, their Lordships of the Privy Council held that all contracts of minors were void and not merely voidable. The question there was of a contract entered into by the minor himself and It was a contract with regard to property. Whether their Lordships of the Privy Council would have applied the same principle

to a contract of marriage is to my mind very doubtful; and, so far as I am concerned, unless there is an authority on the point which is absolutely binding on me, I am not prepared to hold that the contract of marriage made on behalf of a minor by a person who is the natural guardian of the minor and who is the only person, who could enter into such a contract is void. The principle on which I hold the contract in this case valid is the principle which has been laid down subsequent to the Privy Council decision in cases where the Courts in India have tried to give the force of contract to an assignment made by the guardian of a minor on his behalf, where the guardian has power to enter into such agreement so as to bind the minor and the agreement is for the minor''s benefit. There are other cases in which the Courts in India have tried to enforce the contract of an adult party with a minor against the adult-party where the consideration proceeding from the minor has been completely executed and nothing has been left to be done by the minor and the only tiling left is the performance of the contract by the adult party. Mr. Justice Srinivasa Ayyangai'' in Raghava Chariar v. Srinivasa Raghava Chariar (1916) 40 Mad. 308 enunciates that principle. I may say at once that there is no question here of the minor having carried oat her part of the contract and the only part remaining to be carried out being the promise on the part of the adult party. The promise of the plaintiff to marry had still to be carried out so that at the date of the suit there was the promise of the plaintiff which was executory and not executed. Mr. Poonawala, however, referred me to certain observations at page 324 of that report to be found in the judgment of Mr. Justice Srinivasa Ayyangar, which are to the effect that "where consideration moves from a third party, there can scarcely be any doubt that a promise made to a minor by an adult would be enforceable by him".

4. And as an example, he says:

If...a father gives consideration mid requires the promisor to pay money or do some other thing for the benefit of his minor son, the minor son can enforce that promise.

5. Further on he says:

Where the consideration for the promise of (lie adult is a promise by the minor, inasmuch as the minor cannot make a promise enforceable in law, the consideration necessarily fails, and the promise of the adult does not therefore become a contract.... If, however, at the time when the promise of the adult is sought to be enforced by the minor, the minor has performed his promise and that performance has been accepted by the adult, I should hold that the. minor can enforce the promise.

6. It is not necessary for me for the purposes of this case to express my assent to or dissent from the said observations of Mr. Justice Srinivasa Ayyangar but in view of the decision of the Privy Council in Mohori Bibee v. Dharmodas Ghose (1903) 301 Cal. 539 it appears to me doubtful whether even where the promise of the minor is performed by him the agreement of the minor can be held to be a contract

enforceable at law so far as the adult party is concerned. As to the consideration proceeding from the adult enabling the minor to sue, there is no doubt that in this case the main consideration proceeds from the minor even though the consent to the marriage by the father is held to be a part of the consideration. The case, therefore, can only fall under the principle first stated by me, namely, that where a contract is made by a guardian of the minor so as to be binding on the minor and which is for the benefit of the minor there is an enforceable contract in law and the minor can enforce it. I must say that the decisions in England are more favourable to a minor inasmuch as the minor is held to be entitled to sue the adult party on a breach of promise of marriage while mutuality is denied to the adult party so that the adult party cannot sue the minor on a breach of the contract by the minor; and under the Infants Relief Act of 1874, I find the Legislature has gone so far to protect the infants that it has by Section 2 enacted that in the case of any contract be a minor it cannot be ratified by the minor on attaining majority. It was so held in Coxhead v. Mullis (1878) 3 C.P.D. 439 . The position in India would be different as, on the authority of the decision of the Privy Council in Mohori Bibee v. Dharmodas Ghose (1903) 30 Cal. 539 I cannot hold that the contract is only voidable where it is made-by the guardian for the benefit of the minor so as to bind the minor and that, therefore, the minor can sue on such a contract but cannot be sued on it. Bat that is a result which in my opinion does not justify me in refusing the partial relief which I can give to the minor plaintiff in the suit, namely, to hold that the contract of marriage made by the natural guardian is binding on the minor, and is for the minor''s benefit and is, therefore, a contract enforceable by both parties.

7. Now, as to the guardian having powers to make a contract binding on the minor, there is a decision of the Privy Council in Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri (1911) 39 Cal. 232. There the contract was for the purchase of Immovable property on account of the minor. Their Lordships of the Privy Council held that neither the manager of the minor''s estate nor the minor''s guardian had any authority to make such a contract so as to bind the minor or the minor''s estate. That case deals only with the minor''s right in property which in my opinion the minor would be as eligible to exercise after be attained majority and which need not necessarily be exercised during his minority by any person on his behalf. There might be instances where it would be beneficial to the estate of the minor to sell his property or to invest his moneys in the purchase of property. In such a case the adult person who takes an interest in the minor can have himself appointed statutory guardian of the minor and with the sanction of the Court can do the acts necessary for the benefit of the minor. In my opinion the question of marriage is quite different from the question of an interest in property, particularly in this country, as every one knows marriages take place in most cases before the attainment of majority especially by girls. It is considered in this country a sacred and essential duty of the parents and guardians, particularly of girls, to see that they are settled down in life by a proper marriage. It is only recently that we and ladies,

and that too only among the advanced communities, taking to the learned professions. However, if the opinion of the majority in this country is considered, it will be that ladies should get married and be settled in life and discharge the duties of wife and mother which are in their opinion as essential to the-well-being of the community as the duties which are performed by males and which are now in rare cases performed by females. It may be stated that the parties here are Native Christians or Goans. The girl is a Goan Homan Catholic and the defendant is an East Indian Roman Catholic. Both are converts from Hinduism and, as is well known in these Courts, the converts still observe many of the customs of the Hindus and in some cases even the caste distinctions which prevail among the Hindus. Although the Goans were converted to Christianity hundreds of years ago, so far as customs, manners and habits are concerned they still follow those of their Hindu ancestors and among them marriage is considered to be the primary duty of the parents of a girl. If, therefore, the Courts were to hold that the parents of girls cannot make binding contracts on their behalf in my opinion it would lead to very great hardship and it would really be going against the customs, the manners and the habits of the people. I consider these Indian Christians and Goans, so far as the duty of making a contract of marriage is concerned, on the same footing as Hindus or Mahomedans and other communities in India and on that footing I come to the conclusion that; it is the duty of parents to make a contract of marriage for their daughters and that, therefore, they can make a binding contract on behalf of their daughters.

8. The second essential as I have pointed out is that the contract should be for the benefit of the minor and that point I find was discussed in the case of Holt v. Ward 2 Stra. 937 and even the Judges in England came to the conclusion that marriage was for the benefit of the minor. There is no question that in India it would be considered to be for the benefit of the minor. The principle which I have just enunciated is stated in Pollock & Mulla''s Contract Act at page 75 under the heading of specific performance. Mr. Judah for the defendant contended that the observations of the learned authors at that page refer only to Immovable property as they are put under the heading of "Specific Performance". I do not agree with Mr. Judah. The principle is the same whether the contract is in respect of Immovable property or in any other respect. Specific performance is merely a relief and not the cause of action; the cause of action is the broach of the contract. In some cases there may be a relief by specific performance and in others there may not be; and it is in the discretion of the Court whether to give relief by way of specific performance or not. The principle, therefore, to my mind is the same whether we apply it to contracts in respect of Immovable property or other contracts. The principle which the Court has to consider is this: has the guardian power to enter into the contract on behalf of the minor so as to bind the minor; and, secondly, whether the contract is for the benefit of the minor. If either o&#65533; the two essentials is wanting, there would not be ft contract enforceable at law, and, if both these essentials are present, it would be a contract enforceable at law. By this decision I make the

contract binding on the minor which is not done in England. But to my mind, considering the difference between the social customs and manners of people in England and in this country, there is much less hardship and much less harm in my holding that the natural guardian of a minor is entitled to make a contract of marriage binding on the minor than to hold otherwise; as to hold otherwise would mean that no one could make a contract of marriage for his minor daughter, for fear that the other party may at any time put an end to it without incurring any liability. The breach of a promise of marriage has much more serious consequences in India in the case of girls inasmuch as the chances of the girl making another good match are seriously affected. I for my part am not disposed to read that result in the Privy Council judgment. In my opinion it would be revolutionizing the manners and customs of the people here if I were to hold that a contract of marriage could not be entered into by a natural guardian for a minor girl. I may here refer to a decision of a single Judge of this Court, Mr. Justice Kemp, in Abdul Razak v. Mahomed Hussein (1916) 42 Bom. 499. It is the decision of a single Judge and is, therefore, not binding on me. There the suit was filed against the father of the girl claiming damages for breach of a contract of marriage entered into by the father of the girl with the plaintiff. The parties there were Mahomedans and there was no question of a minor suing in that case. The claim was made by the plaintiff against the father of the minor defendant and the only question discussed there was whether any damages could be awarded to the plaintiff on the same footing as they are awarded in England on a breach of a contract of marriage. An issue was raised as to whether a suit for a breach of promise of marriage could lie under Mahomedan law and that was decided in favour of the plaintiff. On the question of damages Mr. Justice Kemp came to the conclusion that the two contracts were so different in their nature that the principles applicable in assessing damages to a breach of a contract of marriage entered into between the father of the minor girl with the other major party would be quite different from the principles applicable to the case of a breach of promise of marriage in England, although he held that all consequential damages if proved u/s 73 of the Indian Contract Act to flow as the ordinary result from the breach would be recoverable by the plaintiff. I do not agree with Mr. Justice Kemp if he meant to hold that no damages are ordinarily suffered by the wronged party on a breach of contract of marriage among Mahomedans or other Indian communities in their position. As I have stated the harm, is greater to the girl in the Indian communities than to a European female, and if such breaches are allowed to be made without any penalty either on the ground that there is no enforceable contract or that there are no damages, the consequences would be very serious as far as minor females are concerned.

9. There is a decision of the Privy Council in Khwaja Muhammad Khan v. Husaini Begam (1910) 32 All. 410 which has some bearing on the point in question. There also the parties wore Mahomedans. The suit was brought by the plaintiff who at the time of the contract was a minor for enforcing a contract entered into between the

defendant and the father of the plaintiff; and the question was raised as to whether the plaintiff who was not a party to the contract could maintain the suit. Their Lordships of the Privy Council differentiated the decision in Tweddle v. Atkinson (1861) 1 B.&d S. 393 and held on the facts of the case that, a charge having been created on the Immovable property in favour of the plaintiff, the plaintiff was entitled as the party in whose favour the charge was created to maintain the suit. That is on the principle which is well recognised in English law that if under a contract a trust is created in favour of a party who is not a party to the contract, such party can enforce the benefit-under the contract as a cestui que trust. The decision in this case, therefore, cannot be of any help to the plain tiff. The observations of their Lordships, however, at page 413 are important in so far as they support the conclusion at which I have arrived, that in this country marriages are contracted for minors by parents and guardians and that they are so validly contracted. Their Lordships observe as follows (p. 413):

Their Lordships desire to observe that in India and among communities circumstanced as the Muhammadans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common-law doctrine was applied to agreements or arrangements entered into in connection with such contracts.

10. The common law doctrine here referred, to is that laid down in Tweddle v. Atkinson (1861) 1 B. & S. 393 namely, that a stranger to the consideration of a promise cannot maintain the suit on the contract.

11. Mr. Judah for the defendant referred to Dunlop Pneumatic Tyre Co. Limited v. Self ridge and Co. Limited [1915] A.C. 847 in support of his contention that a stranger to the consideration of a contract'' cannot maintain the suit. The question has been fully discussed in Pollock & Mulla''s Contract Act at pages 19 to 25 and, besides the judgment of the Privy Council, there is the authority of a Division Bench of this Court in the case of Shankar Vishvanath v. Umabai (1913) 37 Bom. 471 which decision is binding on me, to the effect that a person who is not a party to the contract cannot maintain a suit on the contract. It appears from the notes of the learned authors that an attempt was made by the Madras High Court to get round the decision in Tweddle v. Atkinson (1913) 37 Bom. 471 and to follow an older judgment in Dutton v. Poole (1660) 2 Lev. 210. But the later decisions clearly show that that attempt had not had the approval of the Courts in India in subsequent cases. As there is a judgment of this Court binding on me, I need not go into the question any further.

12. There is one more Bombay decision to which I should like to refer and that is Purshotamdas Tribhovandas v. Purshotamdas Mangatdas (1896) 21 Bom. 23. That decision was given before the decision of the Privy Council in Mohori Bibee''s case (1903) 30 Cal. 539 . The principle, however, on which that decision proceeds is not in my opinion affected by the judgment of the Privy Council. The only difficulty that I

have felt all along is whether the principle applied in the case of Hindus by the Courts, viz., that the natural guardian can enter into a contract of marriage on behalf of a minor, tan be applied to the Groans and the Indian Christians. Mr. Justice Candy held in that case, that if the father of a minor girl entered into a contract of marriage on behalf of the minor he could not plead in defence of a suit for damages for breach of that contract that the minor girl was unwilling to marry the plaintiff and that he could not force the minor girl to marry and that the contract was impossible of performance and therefore he could not be held liable in damages. I find some very useful observations in that case at page 33 which go to support my conclusion in this case. Mr. Justice Candy there considers contracts made in England by fathers on behalf of their minor sons of apprenticeship and he says:

A contract of a father to give his daughter in marriage is antilogous to the contract of a father apprenticing his son and binding himself for the performance by his son of all and every covenant on his part.

13. Then further on he says that in those contracts excepting where the Court finds on the facts that the contract was impossible of performance the contract was held to be binding on the father and that the father -could not claim to be relieved from his obligation on the ground that the son or ward was unwilling to serve as contracted.

14. The question there considered was not the liability of the minor but of the father. But what I am concerned with here is the well recognized principle that the father can enter into a binding contract for the benefit of his minor child which contract is enforceable at law. A contract of apprenticeship is held to be good because it is considered to be for the benefit of the minor; in the same way a contract of marriage is for the benefit of the minor, and I see no reason why a father should not be held to have power to make a contract of marriage on behalf of his minor child. I have not been able to find in the English reports a single case where the father has entered into a contract of marriage on behalf of his minor child. However, to my mind in India the Court would be justified in applying the principles of contracts of apprenticeship in England in so fears to hold that the contract of marriage in India stands on the same footing as being one for the benefit of the minor and being one which the father can enter into on behalf of the minor. Neither a contract of personal'' service nor a contract of marriage can be ordered to be specifically performed so that in either case the apprentice or the girl cannot be compelled to carry out his or her part of the contract against his or her wishes. However, if it is an enforceable contract, the other result, namely, the liability in damages of the party making the breach of the contract, would follow. It may be that in the case of a minor that liability may have to be satisfied by the natural guardian or father of the minor defendant and the Court may come to the conclusion that the minor defendant should not be ordered to pay out of his or her own estate anything to the other party by way of damages. However, I need not go

further into other contingencies and complications which might arise as a result of this decision. I am quite content to decide on the facts of this case and to my mind it would be a denial of justice if the defendant after the conduct on his part as proved in the case, viz., moving about with the plaintiff as his fiancee for 2 years, should be allowed to break the contract with impunity and without having to pay damages for his wrongful act.

15. There are two more cases to which I would refer and one of them is directly in point, namely, Muhammad Omar v. Budha (1906) P.R. No. 3 of 1909. There also it seems the learned Judge felt the same difficulty and hardship and he came to the conclusion, in my humble opinion rightly, that the minor was entitled to maintain the suit for damages for breach of a contract of marriage made by the minor''s father during his or her minority. The learned Judge has relied in support of his conclusion on a judgment of the Punjab Chief Court in Daropti v. Jaspat Rai (1904) P.R. No. 49 of 1905. That case was not the case of a minor but the case of a party, who was not a party to the contract suing on the contract and the learned Judges there tried to get round the decision in Tweddle v. Atkinson (1861) 1 B. & S. 393 in a very ingenious manner different from the attempt made by the Madras High Court to which Pollock & Mulla have referred in their commentary already mentioned by me. I cannot, however, follow the judgment of the Punjab Court in Daropti v. Jaspat Rai (1904) P.R. No. 49 of 1905 because a Division Bench of this Court has decided that a person who is not a party to the contract cannot maintain a suit. The Punjab Chief Court held that the suit was maintainable on the ground that contrary to the principle of English Common law, "consideration," as defined in the Contract Act, need not proceed from the promisee, but may proceed from a third person, and that the consideration in the suit had proceeded partly from the promisee and partly from the third party who had sued on the contract and that, therefore, the principle in Tweddle v. Atkinson (1861) 1 B. & S. 393 which laid down that a stranger to the consideration could not sue on the contract, could not apply as the plaintiff was not a stranger to the consideration. The decision in Muhammed Omar v. Budha (1906) P.R. No. 3 of 1909 is not merely based on the principle laid down in Daropti v. Jaspat Rai (1904) P.R No. 49 of 1905. The learned Judge tried to get support for his conclusion from the said judgment. Even though that support is not available to me, I can rely on the, reasoning in Muhammed Omar v. Budha (1906) P.R. No. 3 of 1909 that in this country contracts for marriage of minors are entered into by parents or guardians and it would be a great hardship and denial of justice if such contracts were held to be absolutely void so as to deprive the minors of any relief in respect of them. On all these considerations I find that this suit is maintainable by the plaintiff and that she is entitled to claim damages for breach of contract of marriage in this suit.

16. As to the quantum of damages, in England the question is one solely for the decision of the jury. I am hero acting in that capacity. In these breaches of contracts various facts have to be considered. As stated in Halsbury''s Laws of England, Vol.

XVI, p. 277: "The damages in an action for breach of promise of marriage are not measurable by any fixed standard, and are almost entirely in the discretion of the jury. The injury to the affections of the plaintiff, the prejudice to his or her future life and prospects of marriage, the rank and condition of the parties, and the defendant''s means, are all matters to be taken into consideration".

17. Leaving aside the question of injury to the affections of the plaintiff in this case, I do hold that the fact that the defendant went about with the plaintiff as his fiancee for a period of about two years when she was between LH and 15 years of age must prejudice seriously her future life and prospects of marriage. Mr. Judah tried to contend that the plaintiff was too young to be affected by the fact of defendant going about with her. IN my opinion in this country where girls attain puberty at a very early age, i.e., 13 to 14, it cannot seriously be contended that the plaintiff was a mere child. She was sufficiently grown up to understand very well what marriage meant to her. I have also taken into consideration the fact that probably in the community of the plaintiff there would not be many eligible husbands of the means and position of the defendant. The evidence as to the defendant''s means which is not contradicted is that the defendant is earning about Rs. 250 to 300 per month. I have on the other hand taken into consideration the fact that the defendant quarreled with the plaintiff''s parents and that he was prohibited from entering the house where plaintiff lived and that social relations ceased between the two families. The plaintiff''s father and mother said, in their evidence that they knew that the defendant was still meeting the plaintiff outside the house and they allowed it in the belief and hope that the defendant would marry the plaintiff as promised by him. The version of the plaintiff''s father and mother as to the origin of the quarrel, viz., that it was due to defendant wrongfully asking for the return of the writing given by him is not contradicted. So far as the plaintiff is concerned I do not see why her right to claim damages should be prejudiced to any appreciable extent by reason of the quarrel between the defendant and the plaintiff''s parents.

18. There is one more point to be considered on the question of damages. The writing given by the defendant says that if ho did not marry the plaintiff within two years, he would pay Ks. 2,000 by way of damages. If that amount was payable to the father the stipulation would certainly be void, but the amount is in my opinion clearly payable to the plaintiff as damages under the said writing.

19. The question whether the damages therein mentioned are a penalty or not, does not arise in view of Section 74 of the Contract Act. Whether the sum is & penalty or liquidated amount mentioned as payable in the case of a breach of contract, I have to decide on the facts what damages the plaintiff has suffered. If they do not amount to the sum mentioned in the agreement whether it he by way of penalty or not, the plaintiff is not entitled to recover the same. Considering all the facts and further considering that this is the first case of its kind so far as I know in Bombay, I think the ends of justice would be met by allowing the sum of Rs. 1,000 as damages

to the plaintiff with costs.

20. I also order that all the Court fees payable by the plaintiff shall be paid by the defendant.