ALLAHABAD HIGH COURT

Ajudhia Prasad

Vs

Chandan Lal

(Sulaiman, J.)

11.05.1937

JUDGMENT

Sulaiman, C.J.

1. This is a second appeal arising out of a suit for sale on the basis of a mortgage deed dated 15th October 1925 executed by the defendants in favour of the plaintiffs. The defendants pleaded that they were minors at the time of the mortgage deed, a certificated guardian having been appointed for them, and also pleaded that there was no necessity for contracting the debt. In the rejoinder the plaintiffs denied that the defendants were minors and also asserted that the defendants were liable to pay the amount under Section 68, Contract Act. The issues framed by the trial Court related to the minority of the defendants, the object of the debt and its proper attestation and consideration. The trial Court found that the defendants were more than 18 years of age but under 21 years, and that there was no evidence of representation either by the defendants or their father Sital Prasad. The Court held that the plaintiffs could not recover the amount under Section 68, Contract Act. The lower appellate Court held that the defendants were in fact minors, being under 21 years of age, and also held that the marriage expenses for which the money was said to have been advanced were not "necessaries," and therefore Section 68 had no application. But it held that the respondents and their father not only concealed the fact that there was already a guardian appointed for the minors, but the father even went to the length of declaring before the Sub-Registrar that his younger son was over 18, and that the dishonest suppression of the fact that the executants were under his own guardianship indicated to the plaintiffs that they were dealing with persons competent to contract, and then remarked: "Thus in my opinion there was a fraudulent misrepresentation made by or on behalf of the respondents."

2. Following the ruling of the Full Bench of the Lahore High Court in *Khan Gul v. Lakkha Singh*[1] it decreed the claim for the recovery of the amount with interest at the contracttual rate and future interest and in default for sale of the mortgaged property. Two of us before whom this appeal came up for disposal have referred the following question of law to this Full Bench:Where money has been borrowed by two minors under a mortgage deed at a time when they were

minors, more than 18 years but less than 21 years of age, under a fraudulent concealment of the fact that the executants were minors because a guardian had been appointed for them under the Guardians and Wards Act, can the mortgagee in a suit brought against them get a decree for the principal money under Section 65, Contract Act or under any other equitable principle, and can he also get a decree for sale of the mortgaged property.

3. In the meantime the Bench also called for a finding on another point which will be disposed of by the Division Bench separately. The majority of the learned Judges of the Lahore Full Bench based their decision on a supposed rule of equity and not on any particular section of any Act. But in the course of the arguments before us the plaintiff's claim has been based on various alternative grounds which it may be convenient to take up seriatim : It is first argued that the case is covered by Section 65, Contract Act. No doubt the Contract Act draws a distinction between an agreement and a contract. Under Section 2(g) an agreement not enforceable by law is void, while under (h) an agreement endorsable by law is a contract. Section 65 deals with agreements discovered to be void and contracts which become void. A possible view might have been that Section 65 applies even to minors and that they can in every case, whether there is mistake, misrepresentation, fraud or not be ordered to restore any advantage that has been received or make compensation for it to the person from whom the minors received it. This would result in a suit being decreed for recovery of money received by a minor on a bond or promissory note even though the contract itself is void. The other view is that the Con. tract Act deals with agreements which may be void on the ground, for instance, that they are opposed to public policy or prohibited by law or they may be void because one of the parties thereto is not competent to contract, and Section 65 was really intended to deal with agreements which from their very nature were void and were either discovered to be void later or became void, and not agreements made by persons who were altogether incompetent to enter into an agreement, and the agreement was therefore a nullity from the very beginning. There is no section which in so many terms says that an agreement by a minor is void. Indeed, it was held in some earlier cases that it was only voidable see *Saral Chand Mitter v. Mohun Bibi*[2]

4. The question directly arose before their Lordships of the Privy Council in the leading case in *Mohori Bibee v. Dharmodas Ghose*[3] In that case the plaintiff had brought a suit for a declaration through his next friend that a mortgage deed executed by him was void and inoperative and should be cancelled because he was a minor at the time of its execution. The plaintiff had attained the age of 18 years but had not attained the age of 21 and a certificated guardian had been appointed for him. The defendant had taken a long declaration in writing from the plaintiff as to his age and had advanced a large sum of money to him on that assurance. The defendant's agent Kedar Nath was aware of the fact that the minor was under 21 years of age but apparently the mortgagee himself was personally not. Their Lordships first held that the knowledge of the agent must be imputed to the defendant and then repelled the contention that the plaintiff minor was estopped by Section 115, Evidence Act, from setting up his minority on the ground that the defendant must be deemed to have known the real facts and so was not misled by the untrue

statement. The point was next pressed before their Lordships of the Privy Council that before decreeing the plaintiff's claim he should be ordered to repay to the defendant the sum which had been paid to him. Their Lordships accordingly ordered that this point should be re-argued before them. It was on this account that their Lordships took up the consideration of Section 64, Contract Act, and after examination of Sections 2, 10 and 11 held that the Contract Act makes it essential that all contracting par. ties should be competent to contract and that a person who by reason of his infancy is incompetent to contract cannot make a contract within the meaning of the Act. Their Lordships then referred to Section 68, Contract Act, and pointed out that under the Indian Law even for the necessaries supplied to a minor he is not made personally liable for them, but that the only statutory right that is created is against his property. Their Lordships also examined Sections 183, 184, 247 and 248 in order to emphasize the position of a minor and then remarked:The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant. Their Lordships are therefore of the opinion that in the present case there is not any such voidable contract as is dealt with in Section 64.

5. Their Lordships distinctly held that the agreement made by a minor was void and not only voidable, thereby overruling the previous rulings of the Calcutta High Court. The learned Counsel for the defendants then relied on Section 65, Contract Act. With regard to this plea their Lordships made the following observation:A new point was raised here by the appellants' counsel founded on Section 65, Contract Act, a section not referred to in the Courts below, or in the oases of the appellants or respondent. It is sufficient to say that this section, like Section 64, starts from the basis of there being an agreement or contract between competent parties; and has no application to a case in which there never was and never could have been any contract.It was further argued that the Preamble of the Act showed that the Act was only intended to define and amend certain parts of the law relating to contracts, and that contracts by infants were left outside the Act. If this were so, it does not appear how it would help the appellants. But in their Lordships' opinion the Act so far as it goes is exhaustive and imperative; and does provide in dear language that an infant is not a person competent to bind himself by a contract of this description.

6. Their Lordships then proceeded to consider Sections 41 and 38, Specific Relief Act. As the minor himself was the plaintiff, their Lordships remarked that these sections no doubt gave a discretion to the Court, but the Courts below in the exercise of their discretion had come to the conclusion that as the defendant had knowledge of the infancy, justice did not require an order for the return of the money. Their Lordships saw no reason for interfering with the discretion so exercised. Their Lordships then took up the rule of equity that a person who seeks equity must do equity, and referred to the decision of the Court of appeal in (1902) 1 Ch 1, which was affirmed by the House of Lords in *Thurstan v. Nottingham permanent benefit Building Society*[4] There the Society had advanced to a female infant the purchase money of some property she purchased and had also agreed to make her advances to complete certain buildings thereon. On attainment of

majority she brought an action to have the mortgage declared void. It was held that:
The mortgage must be declared void and that the Society was not entitled to any repayment of the advances.

7. In that particular case, however, the Society had in fact obtained possession of the building; it was, therefore, held that the Society was entitled to have a lien upon the property. Their Lordships quoted the dictum of Lord Romer:The short answer is that a Court of equity cannot say that it is equitable to compel a person to pay any monies in respect of a transaction which, as against that person the Legislature has declared to be void.

8. This case meets many of the points which have been urged on behalf of the plaintiffs. Their Lordships distinctly held that both Sections 64 and 65 presuppose the existence of a contract within the meaning of the Act which is either void or becomes void, and that they have no application to the case where one of the parties was incompetent by reason of his minority. As regards Section 65, their Lordships distinctly said:This section (Section 65) starts from the basis of there being an agreement or contract between competent parties; and has no application to a case in which there never was, and never could have been, any contract.

9. Where, therefore, one of the parties is a minor and is incapable of contracting so that there never is and can never be a contract, Section 65 can have no application to such a case as that section starts from the basis of there being an agreement of contract between competent parties. This is as clear a pronouncement as can be, and it is impossible to whittle down its effect either by suggesting that it was not necessary in that case to go into that question or that their Lordships meant to refer to only a portion of Section 65, namely, "where the contract becomes void" and not to the portion "where the agreement is discovered to be void", in laying down its inapplicability. The clear rule laid down is that neither Section 64 nor Section 65 deals with a case where a party is incompetent to enter into a contract at all, and that in such a case, therefore, there would be no question of ordering him to restore the advantage which he has received or to make compensation for what he has received.

10. The rule so laid down has, of course, been followed unanimously by all the High Courts in India for the last 35 years. The learned Counsel for the respondents has not been able to show a single case of any High Court in India where Section 65 has been applied against a minor and a decree passed against him when he is a defendant on the ground that his contract had been void. Indeed, if such a view were to prevail, the result would be that all agreements by minors would have to be enforced indirectly against them, no matter whether there had been any mistake, misrepresentation or fraud or not; and a decree passed for restoration of the money advanced to a minor would be almost the enforcement of his liability to pay. And the decree would have to be a personal decree. This would amount to nullifying the effect of the protection which the Legislature has given to minors. It would make a minor personally liable for restoration of the advantage and payment of compensation, although Section 68, which provides for the special

case of liability for necessaries, confines such liability to the minor's property and exempts his person. If we were to enforce directly the supposed liability of the minor to restore the advantage, a wide door would be opened for mischief, and persons would be free to deal with minors with the full confidence that even if the worst comes to the worst, they would get back full compensation for what they were risking. Such an inter, predation of the section would involve drastic consequences, which could not have been the intention of the Legislature. It may be noted that the Contract Act has been amended since 1923 from time to time and various amendments have been introduced. The Legislature must be deemed to have been aware of the inter, predation put on Section 65 by the Lordships of the Privy Council, which was followed loyally and consistently by all the High Courts in India. The fact that it has not thought fit to amend the section is an indication that the Legislature has seen nothing in this interpretation to disapprove of. Even the learned Judges of Lahore in the Full Bench case Khan Gul Lakkha Singh *(A.I.R. 1928 Lah. 609(Supra)*, which is the sheet anchor of the plaintiffs, did not think it proper to rely on Section 65 of the Act, although they took pains to discover a ground for decreeing the claim. Indeed it appears that the learned Counsel at the Bar did not even venture to urge that Section 65 was applicable.

11. In *Kamta Prasad v. Sheo Gopal Lal*[5] a Bench of this Court following the ruling in *Mohori Bibee v. Dharmodas Ghose*[6] held that Sections 64 and 65, Contract Act, apply only to contracts between competent parties and are not applicable to a case where there is not and could not have been any contract at all. There too, in the absence of any material to show that justice required the return of the amount, the learned Judges did not think it fit to impose any such condition on the plaintiff who had been a minor as could have been done under Section 41, Specific Relief Act. In *Kanhai Lal v. Babu Ram*[7] a Bench of this Court held that Sections 64 and 65, Contract Act, did not apply nor did Section 41, Specific Relief Act, apply to a case where the suit was brought against a defendant minor on a promissory note executed by him, although he had misrepresented his age to the plaintiff. Again in *Kanhayalal v. Girdhari Lal7*[8] a suit on a promissory note against a defendant who had represented himself to be of full age was dis. missed. In *Doulatuddin v. Dhaniram Chhutia*[9]*,* there was a suit for specific performance and, in the alternative, for refund of the amount against a person who had been a lunatic at the time of the contract. It was held that Section 65 had no application to such a case nor would the Court act under Section 38 or Section 41, Specific Relief Act. It was held further that it was not equitable to compel him to pay the amount when he had been a lunatic.

12. In *Radhey Shiam v. Bihari Lal*[10] it was held that a minor cannot be made to repay money which he has spent merely because he received it under a contract induced by his fraud and the English case in *Lesley Ltd. v. Shiell*[11] was followed. The learned Judges agreed with the observations made in Lesley Ltd. v. Shiell *(1914) 3 K.B. 607(Supra)*(Supra) which had been approved by their Lordships of the Privy Council, but they considered it fair to add (lest it be supposed that their decision conveyed any reflection upon the defendant) that no fraud had been really alleged or proved. That observation which was made to clear the character of the defendant

did not in any way detract from the value of the ruling which was given. In Bindeshri Bakhsh Singh v. Chandika Prasad A.I.R. 1927 All. 242(Supra), it was held by a Division Bench of this Court that a person who had executed a bond whilst a minor could not, unless he had attained majority, by executing a second bond of similar purport, ratify or confirm the former bond because the minor's contract was void. The case in Gregson v. Raja Sri Aditya Deb (1899) 17 Cal. 223 which was a case of a disqualified proprietor whose transactions were voidable, was distinguished. In view of these authorities it is impossible to hold that Section 65 can be availed of by the plaintiffs against the defendants. The second ground urged is that there is some sort of estoppel against the minors in view of the appellate Court's guarded finding that there was a fraudulent representation made by or on behalf of the defendants. But when the contract itself was void the plea of estoppel must fail. No estoppel can be pleaded against a statute. If the Contract Act declares that the contract by a minor is void nothing can prevent the minor from pleading that such a con. tract is void on the ground of his minority. In Mohori Bibee v. Dharmodas Ghose *(1903) 30 Cal. 539(Supra)* it was not necessary for their Lordships to decide the question of estoppel, as there could be none when the defendant had been constructively aware of the minority. But their Lordships, as already pointed out, quoted the remark of Romer, L.J. that a Court of equity cannot say that it is equitable to compel a person to pay any monies in respect of a transaction which as against that person the Legislature has declared to be void. In Thurstan v. Nottingham Permanent Benefit Building Society (1902) 1 Ch. 1 at p. 10, it had been observed by the House of Lords that:The money...was really an advance to this lady during her minority and secondly she was not liable for the repayment of it and the mortgage which she granted for the repayment of that money was ineffectual as an obligation.

13. The previous English cases were reviewed by Lord Sumner in Lesley Ltd. v. Shiell *(1914) 3 K.B. 607(Supra)*, who observed at p. 619:

There is no fiduciary relation : the money was aid over in order to be used as the defendant's own and he has so used it and, I suppose, spent it. There is no question of tracing it, no possibility of restoring the very thing got by fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a Court of law would have done so, and I think that no ground can be found for the present judgment, which would be an answer to the Infants' Relief Act.

14. Kennedy, L.J. at p. 621 remarked:

Be that as it may, I am certainly of opinion that in the present case, where the defendant is an infant, the cause of action is in substance ex contractu and is so directly connected with the contract of loan that the action would be an 'indirect way of enforcing that contract.

15. He further observed:

There is no case in which I can find that a Court of Equity has given judgment against an infant in circumstances like the present, that is to say, in which it has interfered on the ground of the fraud of the infant, whereby he induced the making of the contract of loan, to order the infant to pay the plaintiff a sum equal to the sum borrowed under the void contract, and so, in effect, to the

amount of the principal lent : to give validity as against the infant to a void contract.
16. Lawrence, J. remarked:
It would be a simple thing for those who prey upon infants to obtain from them materials which could be used to support a charge of fraud as easy as obtaining the usual promissory note. The result would be that the infant would have both to establish his infancy and to face a charge of fraud.
17. A distinction was drawn in the case where the infant requires as a plaintiff the assistance of any Court which would be refused until he made good his fraudulent representation. This opinion was approved of by their Lordships of the Privy Council in Mahomed Syedol Arffin v. Yeoh Ooi Gark A.I.R. 1916 P.C. 242, at pp. 263 to 264, where their Lordships observed:
A case of fraud by the appellant on the subject of his age was set up, but it cannot be doubted that the principle recently given effect to in the case of R. Lesley v. Shiell *(1914) 3 K.B. 607(Supra)* would apply, and such a case would fail.

18. This was a clear approval of the rule laid down in Lesley Ltd. v. Shiell *(1914) 3 K.B. 607(Supra)* although their Lordships thought it fit to add that the statement made by the minor as to his age that he believed that he was over 21 years of age could not be justly criticised as fraudulent. That observation was obviously made in the interest of the defendant so as to dear his character, and in no way affects the approval expressed by their Lordships of the rule laid down in Lesley Ltd. v. Shiell *(1914) 3 K.B. 607(Supra)*. More recently in Sadiq Ali Khan v. Jai Kishori A.I.R. 1928 P.C. 152 two minors had executed a mortgage deed for whom a certificated guardian Qasim Ali had been appointed. It was found that Qasim Ali Khan by concealing the guardianship proceedings from the mortgagee and passing off the minors as majors of 18 or upwards had induced the mortgagee to furnish the money which he then required and had thus committed a fraud on him. In spite of that their Lordships allowed the appeal and dismissed the plaintiff's suit against the minors holding:The fact of minority being established at the date of the execution by the mortgagors of the deed founded on is sufficient for the decision of the case; such a deed executed by minors being admittedly a nullity according to Indian law, and incapable of founding a plea of estoppel.

19. On no other ground could the plaintiff succeed in that case. The rules of equity that can be applied are well, recognized rules which have been accepted in England. It is hardly open to an Indian Court to invent a new rule of equity for the first time contrary to the principles of the English law. If the law in England is clear and there is no statutory enactment to the contrary in India, one should hesitate to introduce any supposed rule of equity in conflict with that law. In *Gaurishankar Balmukund v. Chinnumiya*[12], a judgment-debtor had executed a mortgage of some property during the period of the Collector's management when he had no power to make the mortgage under Section 325-A, Civil P.C. (Act 14 of 1882). Their Lordships observed with regard to the argument that the mortgage was inoperative in respect of the residue as follows:The limitation suggested is that there still remained in the judgment-debtor a power to mortgage the property so as to become operative over any residue that might arise to the latter after the

Collector's regime had ended. It is a fact that the Collector's regime has now ended, but it is also the fact that pending his regime, namely on 22nd July 1892, the mortgage which is now founded upon was granted.

20. Although the regime had ended and the in competency had ceased to exist, their Lordships held:In short the sole point in this appeal is whether a declaration by statute that a judgment-debtor shall be incompetent to mortgage his property is or is not to be read in the exact and plain sense which the words imply.

21. Their Lordships dismissed the plaintiff's appeal and did not give him any compensation. Cases like Jagar Nath Singh v. Lalta Prasad (1909) 31 All. 2(Supra)1, where the plaintiff minor himself seeks relief for cancellation of a document or rescission of a contract are of course to be distinguished because there he is seeking equity and must do equity. In such cases Courts have always imposed the condition upon him to restore the benefit. The case in *Harnath Kunwar v. Indar Bahadur Singh*[13] is easily distinguishable, as that was a case of a transfer of an expectancy and was therefore not a saleable property under Section 6, T.P. Act. It was not a case where the transferor was incompetent by reason of minority from transferring it, but was one where the transfer was inoperative because he had no interest capable of transfer. Section 65, Contract Act, therefore clearly applies to such a case, as no question of in competency on the ground of minority at all arose. Similarly Gregson v. Raja Sri Aditya Deb (1899) 17 Cal. 223 was a case of a disqualified proprietor who after having emerged from a state of disability took up and carried on transactions while he was under disability in such a way as to bind himself to the whole. The defendant had done that and more than that, for not only had he taken, and retained the benefit of the plaintiff's payment but he had afterwards exacted from the plaintiff a part of the consideration which was to move from him. It was on those findings that their Lordships held that the defendant was bound by the contract (p. 231).

22. The majority of the learned Judges in the Full Bench case of the Lahore High Court Khan Gul Lakkha Singh *(A.I.R. 1928 Lah. 609(Supra)*, have based the decision exclusively on principles of equity. Sir Shadi Lal, C.J. conceded that the transaction entered into by the minor was absolutely void and could not be recognized by law as had been laid down in Mohori Bibee v. Dharmodas Ghose *(1903) 30 Cal. 539(Supra)*. The learned Chief Justice considered that in Mahomed Syedol Arffin v. Yeoh Ooi Gark A.I.R. 1916 P.C. 242, there was nothing which can even be-treated as an obiter dictum on the subject of estoppel and that as their Lordships had held that no fraud had been established, it was clear that no case of estoppel was either set up or decided in that case. With great respect, the learned Chief Justice apparently omitted to note that their Lordships of the Privy Council had expressed their clear approval of the ruling in Lesley Ltd. v. Shiell *(1914) 3 K.B. 607(Supra)* and laid down that a case of fraud would fail. The further finding that no fraud had been established was by way of an addition obviously to clear up the defendant's character. The rule laid down by their, Lordships cannot be disposed of on the supposition that the question did not arise as no fraud-had been established. The learned Chief Justice conceded that when a contract had been induced by a false representation; made by an

infant as to his age, he was; liable neither on the contract nor in tort because tort which can sustain an action for damages must be independent of the contract and no person can evade the law conferring immunity upon an infant by converting the contract into a tort for the; purpose of charging the infant. Where I an action in reality is an action ex contractu but disguised as an action ex delicto, it cannot be enforced. The learned Chief Justice considered several English oases which had been decided before Lesley Ltd. v. Shiell *(1914) 3 K.B. 607(Supra)*. But the decision of the Court of appeal should be considered to be the latest pronouncement.

23. The learned Chief Justice remarked that he was unable to follow the distinction pointed out in Lesley Ltd. v. Shiell *(1914) 3 K.B. 607(Supra)* and thought that there was no real difference between restoring property and refunding money, except that the property can be identified, but cash cannot be traced. That there is a clear difference is well recognized in England. Where a contract of transfer of property is void, and such property can be traced, the property belongs to the promise and can be followed. There is every equity in his favour for restoring the property to him. But where the property is not traceable and the only way to grant compensation would be by granting a money decree against the minor, decreeing the claim would be almost tantamount to enforcing the minor's pecuniary liability under the contract which is void. The distinction is too obvious to be ignored. The learned Chief Justice has distinguished the case of Mohori Bibee v. Dharmodas Ghose *(1903) 30 Cal. 539(Supra)*, where restitution was not allowed on the ground that the party who had lent the money to the minor was aware of the minority. But that part of the judgment of their Lordships was with reference to a claim by the minor under the Specific Relief Act, in which oases the Court would have a discretion to impose terms before granting the decree. It would absolutely have no application to the converse case where the defendant is being sued and is not himself asking for any relief. I regret I am unable to appreciate the applicability of the remark of Lord Kenyon quoted by the learned Chief Justice that the protection given by law to the infant "was to be used as a shield and not as a sword". Surely when the defendant is being sued and sets up the plea of minority, he is not using his minority as a sword, but is merely using it as a shield. I am unable to agree that because such a ' defence would deprive a creditor of his money, the defendant infant is using his minority as a sword.

24. In the same way I am, with great respect, quite unable to agree with the view propounded in that case that the equitable jurisdiction of the Court to order restitution is no more applicable to a case to which the minor is a plaintiff than to an action in which he is a defendant; apparently the entire basis of the judgment is that as there is authority for imposing conditions on a minor to refund the consideration when he is suing as plaintiff for the rescission or cancellation of his void contract, there is an equal justification for passing a decree for money against him when he is being sued by his creditor, though he is a defendant. With utmost respect, I would say that such a view would be contrary to the great preponderance of authority both in England and in India and would ignore the well recognized distinction between the position of a minor when suing as a plaintiff and when he is being sued as a defendant. Tek Chand, J. also held that the minor is not estopped from pleading his minority in avoidance of the contract, but on the other question he

agreed with the learned Chief Justice. The learned Judge conceded that there are dicta in several English decisions that this jurisdiction to make restitution in integrum is limited to those cases only in which it is possible to compel the minor to restore the property in specie which he had obtained by fraud, and that the Courts, while holding a contract to be void, cannot order him to refund the money which he has received under it. He has also conceded that Sections 39 and 41, Specific Relief Act, relate to those cases only in which the minor is the plaintiff, and ultimately concluded that there was no justification for making' a distinction between the cases where the minor is the plaintiff and where he is the defendant. Two other learned Judges merely agreed with the learned Chief Justice. Harrison, J. delivered a dissenting judgment and pointed out that Cowern v. Neild (1912) 2 K.B. 419, is authority for the proposition that unless and until the fraud can be dissociated from the contract, the plaintiff's suit must fail. He quoted the remark made by Lord Sumner in Lesley Ltd. v. Shiell *(1914) 3 K.B. 607(Supra)*:It was thought necessary to safeguard the weakness of infants at large, even though here and there a juvenile knave slipped through.

25. The learned Judge rightly pointed out that Section 41, Specific Relief Act, had no application because in a suit against an infant there is no question of the cancellation of an instrument and when the minor is a plaintiff, there is a well known principle that he who seeks equity must do equity, and therefore held that no suit of this nature, being in its essence contractual, can lead to an order for restitution by the infant on the ground of his having dishonestly induced the plaintiff to contract with him and to pay him money. The view of the learned dissenting Judge is in accordance with the opinions expressed in numerous cases. To pass a decree against a minor enforcing his pecuniary liability would, while holding that the contract is void and unenforceable, at the same time be passing a decree against him on the footing that he had entered into the contract and has not carried out its terms. There is no rule of equity, justice and good conscience which entitles a Court to enforce a void contract of a minor against him under the cloak of equitable doctrine.

26. Lastly it has been suggested that the mortgage transaction may be upheld under Section 43, T.P. Act, particularly because that section has been amended and the words fraudulently or" have been added before the words erroneously represents." But the section can have no application to a case where there has been no transfer at all. In the first place, it is doubtful whether the words authorized to transfer" can mean "competent to transfer." The section refers to "transfer" because it says such transfer shall...operate", which would imply that there must be a transfer and not a void transaction. In any case, it is quite obvious that the section refers to a transfer made by an unauthorized person who subsequently acquires interest in the property transferred. A minor, though he may not be competent to transfer his property, possesses an interest in his property, which may be transferred by his guardian under certain circumstances. When he attains majority he does not subsequently acquire any interest in his property; the interest has remained vested in him all along. The section, therefore, can have no application to the case where a minor has made a mortgage during his minority and a suit is brought to enforce the mortgage against him after he

has attained majority. The section is based on the principle of estoppel, which cannot be pleaded against a statute so as to prejudice a minor who enjoys the protection of the law. It was observed in Barrow's case In re Stapleford Colliery Co. (1880) 14 Ch. D. 49 at p. 4411 by Bacon, V.C.:

But the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract inter partes, and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament.

27. It follows that the mortgage deed cannot be enforced on any such ground. I would allow the appeal and dismiss the suit.

Thorn, J.

28. I concur.
Bennet, J.

29. I agree with the judgment of the learned Chief Justice.

Cases Referred.

1A.I.R. 1928 Lah. 609
2(1898) 25 Cal. 371 at p. 385
3(1903) 30 Cal. 539
4(1902) 1 Ch. 1
5(1904) 26 All 342
6(1903) 30 Cal. 539
7(1911) 8 A.L.J. 1058
8(1912) 9 A.L.J. 103
9A.I.R. 1917 Cal 566
10A.I.R. 1919 All. 453
11(1914) 3 K.B. 607
12A.I.R. 1918 P.C. 168
13A.I.R. 1922 P.C. 403