

BOMBAY HIGH COURT

Ramchandra Balwant Tilak

Vs

Narasinha Chintaman Kelkar

(Patkar and Broomfield, JJ.)

28.11.1930

JUDGMENT

Patkar, J.

1. [His Lordship after setting out the facts of the case proceeded:] On appeal it is contended on behalf of the appellants, first, that the suit against the minor should be dismissed as he has not done anything himself so as to justify the award of injunctions against him. With regard to appellant No. 1 it is contended that the trust-deed and the rent-note on which the plaintiffs' suit is based are invalid, and assuming that they are valid, the alleged misdeeds were the innocent acts of the original defendants as landlords, and are not sufficient in law to warrant a decree for injunctions against appellant No. 1.

2. I. shall first deal with the case of minor appellant No. 2. The learned First Class Subordinate Judge held that an injunction could be given against a minor and that defendant No. 1 as the guardian of the minor son of defendant No. 2 denied the rights claimed by the plaintiffs, and that if no injunction was granted against the minor defendant, it was likely that defendant No. 1 or some one on behalf of defendant No. 2 would again cause obstruction to the plaintiffs and the plaintiffs might be obliged to bring a fresh suit.

3. According to Halsbury's Laws of England, Vol. XVII, para. 326, page 143, an injunction may be granted against an infant. Reliance is placed on behalf of the respondents on the decision in the cases of *Lempriere v. Lange*¹ and *Woolf v. Woolf*² In Lempriere's case a lease was obtained by a minor on the false representation that he was a major, and an action was brought for rescission of the lease and for an injunction against the minor against selling the furniture on the premises, and the Court awarded rescission of the lease, and granted an injunction against the minor restraining him from selling the furniture. In Woolf's case a minor carried on business similar to that carried on by the plaintiff and an injunction was granted to restrain the minor defendant from representing that the business carried on by him was connected with the business carried on by

the plaintiff, and it was further held that infancy could not protect him from paying the costs of the suit. In *Chubb v. Griffiths*³ the defendant, a minor, sold articles and declared that they were manufactured by the plaintiff Chubb, and it was held that he having done that was not at liberty to say that he was ignorant of the fact and that he was bound to make a proper inquiry before he made so positive a representation. In *Mahraraj Bahadur Singh v. Paresh Nath Singh*⁴ it was held that a minor is not responsible for a tort committed by the manager of his estate provided the tortious act was not in connection with the management of the estate. In that case a decree for damages was set aside on the ground that the minor could not be held liable for a tort committed by a person who happened to be his manager, but the decree for injunction was allowed to stand on the ground that people in the employ of the minor committed acts of destruction complained of and that the same work of destruction might be repeated. It would, therefore, appear from the decided cases that minority per se is not a ground for refusing an injunction, but before an injunction can be granted against a minor, it must be shown that the acts were done by him personally or by some one on his behalf or at his instance.

4. It appears that defendant No. 1 made an application, Exhibit 158, probably on account of the change in his mental attitude owing to the suicide of his brother and wished to have the case decided ex parte. It appears from Exhibit 104, at an earlier stage of the suit, that an application was made by the plaintiffs that notice should be served on the mother of the minor appellant No. 2 if she was willing to serve as guardian. On the notice, Exhibit 106, the mother of the minor made an endorsement on July 26, 1928, that she had no objection to defendant No. 1 being appointed guardian of the son of the original defendant No. 2. After defendant No. 1 made the application, Exhibit 158, on January 5, 1929, giving up the defence of the suit, the learned Subordinate Judge recorded the application, and called on the plaintiffs to state what they wished to do as regards the minor defendant No. 2. On the plaintiffs' application, Exhibit 161, dated January 10, 1929, notice was sent to the mother and the maternal uncle of the minor inquiring if they would act as guardian of the minor, and notices were served on the mother and the maternal uncle, and they were called upon to appear in person or by a pleader. It is stated that the maternal uncle informed the Court that he was not willing to act as guardian. The mother received the notice but did not inform the Court whether she was willing to act as guardian. On January 26, 1929, the plaintiff's pleader applied that defendant No. 1's name should not be removed and that he should continue as the guardian and the suit should be proceeded with.

5. It is urged on behalf of appellant No. 2 that his interests were sacrificed by his guardian defendant No. 1; and that a proper guardian, the Nazir of the Court, ought to have been appointed and the guardian should have been allowed to lead evidence. It is doubtful that even if the Nazir of the Court had been appointed a guardian, he would, in the circumstances of the present case, have received sufficient instructions to go on with the case. It cannot, therefore, be said that the

learned Subordinate Judge was wrong in not appointing the Nazir of the Court as guardian. But it is clear that the mother did not inform the Court that she was unwilling to act as guardian, and the Court did not give any notice to the mother that in case she did not appear, the case would be decided against the minor ex parte. Under Order XXXII, Rule 11, where the guardian of a minor does not do his duty or where other sufficient ground is made to appear, the Court may remove him and may make such orders as to costs as it thinks fit. It would have been better in the present case if the learned Judge had sent a notice to the mother informing her of the consequences of her non-appearance, There is no doubt that the minor's interests have been sacrificed by defendant No. 1 giving up the defence of the suit, and allowing the decision of the case to go against himself and his minor ward without leading any evidence in the case. The case, therefore, on behalf of the minor was not placed before the Court as it ought to have been done.

6. It appears from the evidence on the record that all the acts and misdeeds were alleged to have been done by defendant No. 1 and by original defendant No. 2, the father of the minor. There is no evidence in the case that the minor did any act or that the acts which had been committed by original defendants Nos. 1 and 2 were done at the instance of the minor or on his behalf. The mere fact that defendant No. 1 filed a written statement on behalf of the minor son of defendant No. 2 raising the same contentions as he himself raised in his written statement is not a sufficient ground for the award of an injunction against the minor son of defendant No. 2. In Woodroffe on Injunctions, 5th Edition, page 34, it is stated:--In so far as an Injunction is in its nature a remedy against an individual, it will be issued only in respect of acts done by him against whom it is sought to be enforced. Thus an Injunction cannot be obtained against executors on account of acts done by their testator. They may be sued for an Injunction in respect of a wrong done by themselves, but they cannot be so sued in a representative character. And for the same reason, namely, that an Injunction is an order directed to a person, it does not run with the land.

7. In *Kirk V. Todd*⁵ where the action for damages and injunction against the executors for tort committed by the testator was dismissed, Hall V. C. observed (page 487):--

It appears to me that as regards the injunction which is asked for, the objection is fatal, and must prevail, the injunction being in its nature a remedy against an individual, I am unable to restrain the executors in respect of acts done by their deceased testator, the acts not being continuing acts in the statutory sense.

8. Under these circumstances, I think that the decree awarding the injunctions against the minor cannot stand. I would, therefore, dismiss the plaintiffs' suit with costs throughout against the minor appellant No. 2.

9. With regard to appellant No. 1, it is urged on his behalf that the trust-deed and the rent-note are

invalid in law. It is urged that the trust deed is not valid as there are no beneficiaries indicated in the trust-deed with certainty and the purpose of the trust-deed is also not specified. It is said that the properties revert to the settlors Nos. 1 and 2, and therefore, the trust-deed is invalid, The trust-deed, Exhibit 125, is a public trust and the public are the beneficiaries according to the trust-deed, and the purpose of the trust-deed is indicated in paragraph 1 as political education of the public. On the evidence on the record the trust-deed cannot be held to be invalid.

10. It is urged in appeal that the deed of gift passed in favour of the original defendants on April 7, 1909, was concealed from their knowledge when the trust-deed was taken from them. There is no evidence to support the allegation. It appears from the endorsement on the deed of gift that it was produced by the original defendants in suit No. 610 of 1921 on September 9, 1921. The defendants were aged twenty-eight and twenty-six in 1920 when the trust-deed was passed.

11. It was contended in the written-statement that the trust-deed was obtained by the plaintiffs by misrepresentation and undue influence, Mr. Ketkar, Exhibit 166, and Vidwans, Exhibit 174, prove that there was no undue influence or misrepresentation exercised on the defendants when the trust-deed was executed. That evidence is uncontradicted and unchallenged by cross-examination and may be presumed to be true. The trust-deed, therefore, is not shown on the evidence on the record to be invalid.

12. The rent-note, Exhibit 126, on which the plaintiffs base their claim, is said to be invalid and not binding on the ground that it is for an indefinite period and therefore void, and reliance is placed on the decision in the case of *Municipal Corporation of Bombay v. Secretary of State*⁶ It is urged on the other hand that this point was not taken in the lower Court nor in the memorandum of appeal and ought not to be allowed to be taken for the first time in appeal. Further, it is urged that the word *aniyomit*, which is translated as "indefinite", means unlimited or unrestricted, and therefore the lease is not for an indefinite period but is for an unlimited period and therefore permanent, and that the Court should look to the surrounding circumstances in order to ascertain the intention of the parties, and that the rent-note must be read with the trust-deed which provides that a permanent lease is to be passed by the settlors in favour of the trustees.

13. In the trust-deed the word used is *nirantar*, that is, permanent, and the lease provided for is *nirantar*, that is, a permanent lease, whereas the word used in the rent-note to denote the duration of the lease is *aniyomit* which means either indefinite or unrestricted or unlimited. It appears from the rent-note read as a whole that the period of the lease is to extend so long as the Kesari and Maralha institutions are in existence. If the plaintiffs wanted to have a permanent lease from the defendants they should have used the word *nirantar*, i.e., permanent, instead of the ambiguous word *aniyomit* i.e., indefinite or unlimited or unrestricted, in order to denote the period of the lease. I think that the lease is not a permanent lease. The period, in my opinion, extends so long

as the Kesari and Maratha institutions are in existence. The question is whether such a lease is valid according to law. In *Municipal Corporation of Bombay v. Secretary of State* it was held that if the alleged disposition purported to be a transfer of the right to enjoy the property neither for a certain time nor in perpetuity, then it was an attempt to create by lease an interest unknown to the law and as such was bad. The lease relied upon by the Municipal Commissioner in that case was based on the Government Resolution of December 9, 1865, in which the Government were pleased to sanction the application of the Municipal Commissioner for a site for stabling as expressed in para. 8 of his letter. Para. 8 of the letter of the Municipal Commissioner requested permission to erect on such land stables of wood and iron with rubble foundations, to be removed at six months' notice, on other suitable ground being provided by Government. In that case there was no fixed term of the lease and the duration fixed by the lease was very vague, and was liable to be determined by six months' notice on other suitable ground being provided by Government. It did not indicate with sufficient clearness the person who was to decide the suitability of the land to be provided by Government. Under these circumstances, assuming that it was a lease, it was held that it was not a transfer of the right to enjoy the property for a certain time expressed or implied or a transfer of such right in perpetuity, and, therefore, it was held that it was an attempt to create by lease an interest unknown to the law and was as such bad. In the present case the transfer of the right to enjoy the property is impliedly certain for it is to last till the Kesari and the Maratha institutions are in existence.

14. This point was not raised in the lower Court and was allowed to be raised in appeal as it went to the root of the matter, for if the lease is invalid, the plaintiffs could not succeed in getting the injunctions against the defendants. In *Lingangowda v. Basangowda* a point of law given up in the High Court was allowed to be raised before the Privy Council so long as it was a pure point of law and it was not unfair to raise it. Under Order XLI, Rule 2, the appellant can, with the leave of the Court, be heard in support of any objection not set forth in the memorandum of appeal.

15. In Foa's *Law of Landlord and Tenant*, 6th Edition, page 115, it is stated:--

The habendum in a lease must point out the period during which the enjoyment of the premises is to be had; so that the duration as well as the commencement of the term must be stated. The certainty of a lease as to its continuance must be ascertainable either by the express limitation of the parties at the time the lease is made, or by reference to some collateral act which may, with equal certainty, measure the continuance of it, otherwise it is void. If the term be fixed by reference to some collateral matter, such matter must either be itself certain (e g. a demise to hold for 'as many years as A, has in the manor of B,') or capable before the lease takes effect of being rendered so.

16. In *Great Northern Railway Company v. Arnold*⁷ a lease to last during the pendency of the war,

the rent being paid weekly, was held valid, and it was further held that even if a lease for years must be for a period of time which was certain or which could be rendered certain, yet as the intention of the parties was that the tenancy should be for the period of the war and as this intention could have been carried out by a lease extending over a long period but terminable at the end of the war, effect must be given to that intention and the landlord could not recover possession. Similarly, the intention of the parties in this case could have been carried out by a lease extending over a long period terminable at the end of the Kesari and Maratha institutions.

17. In *Mahomed v. Ezekiel*⁸ it was held that the lease which was to last as long as the pendency of the mortgage was not bad as being for an indefinite period. The point, however, did not arise for decision in that case as it was held that the agreement did not amount to a lease.

18. According to the decision in *Vaman Shripad v. Maki*⁹ a lease to enure during the life-time of the lessee would be valid. In *Abdulrahim v. Sarafalli* it was held that a lease was valid so far as it created an interest to enure during the lifetime of the lessees who were the managers of the firm, but that a lease could not enure so long as the defendants' firm lasted, Abdulruhim's case was considered in *Indian Cotton Co. v. Raghunath*¹⁰ where it was held that a lease to last during the lifetime of a company, which is a legal entity, would be valid, though a lease during the lifetime of the firm would not be valid as the firm is not a legal entity. Following the principles deducible from the above-mentioned cases, it would appear that a lease which is to enure during the lifetime of the Kesari and Maratha institution would be valid.

19. It is contended on behalf of the appellants that the Kesari and Maratha institution is not a legal entity, for the institution is not registered. We cannot go into the question as to whether the Kesari and Maratha institution is a legal entity, for the question was not raised in the lower Court and the point is not likely to be decided unless fresh evidence is gone into, On the materials on the record and in the absence of any evidence to the contrary I would hold that the Kesari and Maratha institution is a legal entity, and on the authority of the cases referred to above would hold that the lease which is to enure during the lifetime of that institution would not be invalid, [After referring to points not material to this report, his Lordship concluded:]

20. The result, therefore, is that I would allow the appeal of appellant No. 2 and dismiss the plaintiffs' suit against the minor appellant No. 2 with costs throughout.

21. As regards appellant No. 1, I would vary the decree of the lower Court by deleting the injunction restraining appellant No.1 from obstructing the plaintiffs in extending the existing building by erecting new structures over the open space in continuation of the existing buildings to a reasonable extent and from making obstruction to the plaintiffs in making additions and alterations therein. I would delete the word "occasionally" in the injunction with regard to the

removal of the chain and bolt of the main gate and the dindi, and impose two conditions on the plaintiffs that they should give a duplicate key or keys to appellant No. 1 and make provision for opening the gate whenever required at night by appellant No. 1 and by persons visiting his place. In other respects the decree of the lower Court will stand. Appellant No. 1 should get one-third of the costs of the appeal from the respondents and pay two-thirds of the costs of the respondents. The order of costs in the lower Court to stand.

Broomfield, J.

1. I have had the advantage of perusing the judgment of my learned brother and only desire to refer briefly to a few points in the case.

2. Mr. Thakor for the appellants placed in the forefront of his argument the contention that no decree ought to have been passed against the minor defendant No. 2. In this contention, I think, he is clearly right. An injunction can be given against a minor, as the learned trial Judge says, but only in circumstances which would justify an injunction against an adult. That is to say, in the present case, it must be shown either that the minor has himself committed some of the tortious acts complained of by the plaintiffs or that there is a reasonable apprehension that he is likely to do so. Defendant No. 2 is a boy of nine years of age. There is no suggestion that so far he has done anything whatever to annoy the plaintiffs, and the apprehension that he is likely to interfere with their rights in the future is based solely on the fact that defendant No. 1 as his guardian ad litem put in a written statement on his behalf supporting the case of the other defendants. I have no hesitation in holding that that is not enough to justify an injunction against him.

3. As regards Mr. Thakor's contention that the acts complained of by the plaintiffs are trivial acts such as a reasonable man would not object to, we can only go by the pleadings and the evidence placed before the Court, and I think it is impossible to read the pleadings and the evidence without feeling satisfied that the plaintiffs' rights under the trust-deed and the rent-note have been persistently interfered with by the defendants, i.e., defendant No. 1 and the original defendant No. 2, who maintained, as Mr. Thakor still maintains on their behalf, that they were perfectly entitled to act as they did. It appears that these defendants considered that they had a grievance against the plaintiffs for excluding them from a share in the management of the press, and that they deliberately made themselves a nuisance by pursuing what might be called a policy of pinpricks, It was admitted that defendant No. 1 and his brother the original defendant No. 2, had a peculiar mentality and I am satisfied that the plaintiffs were driven to this litigation. There is no reason to think that they would go out of their way to bring trivial and unnecessary charges against the sons of Mr. Tilak. The plaintiffs, therefore, have a right to be protected, although, as my learned brother has pointed out, the injunctions granted by the trial Court require to be modified in some respects.

4. As regards the trust-deed and the rent-note, the only ground on which they were seriously attacked in the trial Court was that they were executed by the defendants owing to misrepresentation and undue influence. No attempt was made to substantiate this allegation. The evidence on the record disproves it and Mr. Thakor practically dropped it. In its stead he put forward a new contention, not mentioned in the memorandum of appeal, that the lease evidenced by the rent-note is invalid in law as not being for a certain period within the meaning of Section 105 of the Transfer of Property Act. The rent-note, Exhibit 126, provides that the demised premises are to remain with the lessees so long as the Kesari and Maratha institution is in existence, and the institution referred to, as the trust-deed, Exhibit 125, shows, is an amalgamation of the two presses for the promotion of the political ideas of Mr. Tilak. Mr. Bahadurji for the respondents argued that it should be regarded as a lease in perpetuity. The answer to that is that the trust-deed expressly refers to the contingency of the institution coming to an end and provides that in that case the property is to revert to the settlors. Moreover, the rent-note expressly says that the period is indefinite (aniyamit). That is a word which, it seems, could not appropriately be used of a permanent lease. If we look at the actual terms of the lease, we are bound to say, I think, that it is intended to be a lease for the duration of the institution, and what we have to decide is whether it is possible to give effect to a lease of that kind. Various cases were referred to, which my learned brother has mentioned. None of them can be said to be closely analogous. The nearest parallel perhaps is the case of *Indian Cotton Co. v. Raghunath (1930) 33 Bom. L.R. 111(Supra)*, where it has been held that a lease of land for five years with a covenant for renewal as long as the tenant, a registered company, should require the land was a valid lease for so long as the company lasted, My learned brother holds that it follows from the cases cited by him, and in particular, I suppose, from the last mentioned case, that a lease for the duration of an institution such as the Kesari and Maratha institution is a valid lease. With great respect I am unable to go so far as to hold that such a lease can be regarded as valid in the sense that it complies with the technical requirements of Section 105 as to certainty. *Indian Cotton Co. v. Raghunath* is itself a new departure and I doubt if it would be safe to extend its application. But the case of *Great Northern Railway Company v. Arnold (1916) 33 T.L.R. 114(Supra)* suggests another way of looking at the matter and a means of getting over the difficulty. In that case there was a lease of premises at a weekly rent for the duration of the War, i.e., the Great War of 1914. It was held by Mr. Justice Rowlatt that even if a lease for years must be for a period of time which was certain or which could be rendered certain, yet as the intention of the parties was that the tenancy should be for the period of the War and as this intention could have been carried out by a lease extending over a long period but terminable at the end of the War, effect must be given to that intention and the plaintiffs, i.e., the landlords, could not recover possession. I do not think that the learned Judge decided that the lease was a valid lease in the sense that it complied with the technical requirements of the law as to certainty. The ratio decidendi seems to have been

that as the intention of the parties was perfectly clear and as they might have given effect to that intention by putting the lease in a different form, i. e., by making a lease for a long term of years defeasible on the War coming to an end, therefore the Court would construe it in that sense and would not allow a merely technical flaw to frustrate the agreement. Similarly, in the present case as there is no doubt as to what the parties intended, I think it is open to us to construe this lease as a lease for a long term of years, or even as a perpetual lease, (such a lease being valid under the law of this country), subject to the limitation that it is to come to an end when the Kesari and Maratha institution comes to an end. I should prefer to deal with the matter in this way rather than to make any pronouncement as to what amounts to a certain period within the meaning of Section 105 of the Transfer of Property Act. However, the result is the same in either case, namely, that the plaintiffs are entitled to be maintained in their position as lessees, and I agree with the order proposed by my learned brother.

Cases Referred.

1(1879) 12 Ch.D. 675

2[1899] 1 Ch. 343

3(1865) 35 Beav. 127

4(1904) I.L.R. 31 Cal. 839

5(1882) 21 Ch. D. 484

6(1904) I.L.R. 29 Bom. 580, s.c. 7 Bom. L.R. 27

7 (1916) 33 T.L.R. 114

8(1905) 7 Bom. L.R. 772, 785

9(1879) I.L.R. 4 Bom. 424

10(1930) 33 Bom. L.R. 111