MINOR'S CAPACITY TO SUE FOR BREACH OF PROMISE OF MARRIAGE — WHAT IS SAUCE FOR THE GOOSE IS NOT SAUCE FOR THE GANDER

V. Rajaswary v. *V. Balakrishnan*

By section 11 of the Contracts (Malay States) Ordinance, 1950, every person is competent to contract who is of the age of majority according to the law to which he is subject.[1] This means that a minor is not competent to contract. Against the English common law background of infants' contracts, some of which were void and others only voidable,[2] the proposition is capable of two construction. But the law in India, and by judicial importation the law in the Malay States, does not recognise the mutable character of infants' contracts under the common law. In 1930, the Privy Council in the case of *Mohori Bibee* v. *Dhurmodas Ghose*[3] denied the existence of such dual classification. Infants now being absolutely incompetent to contract, all contracts to which they are parties are void *ab initio.* He can therefore neither sue on it nor be sued on it. It also follows that ratification of such a contract is not possible.

On the face of it, the sweeping generality of the principle would seem to permit of no exceptions. Section 136[4] of the Ordinance, if anything, adds further support for this view. But, as Holmes once remarked, "general propositions do not decide particular cases"; and situations can arise, and have arisen, which make it unjust or unreasonable that the determination of the issue should be concluded by the mechanical application of such a general proposition. And, in order to accommodate such situations, judges are not perturbed by the violence to the *elegantia juris,* which, in an abstract context, they worship in detachment. Logical consistency may be imperative in deductive reasoning and desirable in its application to the working out of legal principles. But, judges are not mere automatons, and what is logically compelled may not be what is reasonable in the circumstances. This is one aspect of the judicial process which never fails to escape the attention of the more able and discerning lawyer, the discreet throwing overboard of undesirable rules of law.

The problem posed by the case of *V. Rajaswary* v. *V. Balakrishnan*[5] is a neat illustration of this facet of the judicial process. The core of the problem was whether a female minor could sue the defendant, an adult, for breach of promise of marriage. The parties to the proceedings were Ceylonese Hindus and the intended marriage was arranged, as is the custom of the community. If the point for decision were *res integra, Mohori Bibee's* case would seem to be decisive against giving a right to the minor to sue on a contract into which she has no capacity to enter in the first place. Again, if the marriage were not an arranged one, *Mohori Bibee's* case would give the same answer and on principle this seems obvious.[6]

1. See, Age of Majority Act, 1961, ss.3 and 4.
2. Under the common law marriage contracts are only voidable — *Holt* v. *Ward* (1732) 2 Stra. 937. The Infants' Relief Act, 1874 applies to contracts to marry.
3. (1930) 30 Cal. 539; followed in the Malay States in *Teh Suan* v. *Ang Thuan* (1911) 2 F.M.S.L.R. 43 and *Tan Hee Juan* v. *Teh Boon Kiat* (1933-34) F.M.S.L.R. 156.
4. Section 136 reads: "Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent."
5. Civil Suit No. 123 of 1957; to be reported in (1961) M.L.J.
6. In *Maung Tun Aung* v. *Ma E Kyi* A.I.R. 1936 Rang. 212, the Full Bench of the High Court of Burma held that a Burman Buddhist who is under the age of 18 is not competent to enter a valid or binding contract to marry *in futuro,* and the Burmese Buddhist law has no application in such a case. Commenting on this case in *Ma Pwa Kywe* v. *Maung Hmat Gyi* A.I.R. 1939 Rang. 86, Mya Bu J. said at p. 87: "That case was one in which the alleged promisor was a minor at the time of the making of the alleged promise; but considering the line of reasoning leading to that decision I have no doubt that the proposition that a Burman Buddhist who is under the age of 18 is not competent to enter into a valid or binding contract to marry *in futuro,* is applicable as well to a case where the promisor is a major and the promisee is a minor, for a marriage is a matter to which there must be two parties and there cannot be a valid contract to marry unless there are reciprocal promises between them amounting to an agreement to marry in *futuro.*"

However, the institution of arranged marriages is age-old in India with the result that the legal problems raised by this institution have received somewhat exhaustive treatment in Indian courts. Briefly, in respect of arranged marriages, the legal position of minors seems to be as follows:

1. Marriage contracts entered into by the guardians on behalf of the minor do not come within the principle laid down in *Mohori Bibee's* case — *Fernandes* v. *Gonsalves.*[7] There are three reasons for this exception. Firstly, arranged marriages had existed for hundreds of years in India and it is difficult to believe that the Indian legislature intended the Indian Contracts Act to apply to such contracts and to deny the minor any remedy for their breach.[8] Secondly, it is also very doubtful whether the Privy Council in *Mohori Bibee's* case would have applied the principle it laid down to a contract of marriage. Thirdly, the social concomitant of this institution, as analysed by Taraporewala J. in *Fernandes* v. *Gonsalves,* is that in India it is the "sacred and essential" duty of parents to make marriage contracts for their daughters and therefore parents can make binding contracts on behalf of their minor daughters.[8] Therefore, the strict letter of the law must be modified to meet the demands of local exigencies.[9]

It is submitted that none of these three reasons rests on solid foundations. The first two are based on challengeable hypotheses: the supposed intentions of the Indian legislature and the Privy Council. The third reason is open to the objection that the demands of a social system are not necessarily decisive of, in this case, the legal capacity of guardians to make contracts binding on their wards. The law does not impose a duty on parents to marry off their infant daughters. Being merely a social obligation as such, its effectuation cannot make any difference to the legal capacity of parents to contract on behalf of their daughters or the capacity of the minor to sue on a contract to which she is incompetent to enter into by herself. Nevertheless, despite its tenuous basis, *Fernandes* v. *Gonsalves* is accepted throughout India.[10]

2. Contracts of betrothal entered into on behalf of minors by their guardians and shown to be for their benefit are enforceable at the instance of the minors: *Khimji Kuverji* v. *Lalji Karamsi.*[10]

7. A.I.R. 1925 Bom. 97, 48 Bom. 673. The parties in this case were Roman Catholic Goans but were treated on the footing as Hindus, observing Hindu customs.

8. This is also one of the grounds relied on by Good J. in the case under discussion. Strictly speaking, his inquiry should have been directed to finding out what was the intention of the legislature of the Federation of Malaya in enacting s.11 of the Contracts (Malay States) Ordinance, 1950. The intention of the Indian legislature is not under examination in the present context.

Moreover, it is doubtful, to what extent, a Court here can take into account local customs in interpreting legislation which is intended to govern certain types of transactions, irrespective of the community which makes them. See *Lee Joo Neo* v. *Lee Eng Swee 4* Ky. 325; *Khoo Hooi Leong* v. *Khoo Chong Yeo* (1930) S.S.L.R. 127, P.C.; *Re Chia Eng Say* [1951] M.L.J. 119; in which the Courts were precluded from considering any contrary customs there may be amongst the local inhabitants. *Cf. Karpen Tandil* v. *Karpen* (1895) 3 S.S.L.R. 58.

9. "If therefore the Courts were to hold that the parents of girls cannot make binding contracts on their behalf ... it would lead to a very great hardship and it would really be going against the customs, the manners and the habits of the people." : Taraporewala J. in *Fernandes* v. *Gonsalves.* His lordship relied on a passage in *Khawaja Muhammad Khan* v. *Husaini Begam* (1910) 32 All. 410 where the Privy Council said: "Their Lordships desire to observe that in India and among communities circumstanced as the Muhammedans, 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."

In this case 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 plaintiff's father and the defendant: the question raised was whether the plaintiff, who was not a party to the contract, could maintain the suit. The Privy Council applied the trust concept and held that the plaintiff could enforce the benefit under the contract as a *cestui que trust.*

10. See also *Khimji Kuverji* v. *Lalji Karamsi* A.I.R. 1941 Bom. 129; *Daniel* v, *Mariamma* A.I.R. 1951 Mad. 466.

On the assumption that the principle in *Dunlop* v. *Selfridge* [11] applies in India,[12] a minor's right to bring an action in such circumstances can only be derived from his status as a *cestui que trust.*[13] Though arising from contract, his rights are only equitable and this clearly is not a real exception to the general rule that a stranger to a contract cannot sue on it. Whether this is an exception to the other general rule that minors are absolutely incompetent to contract we shall see.

It may be remarked that the application of the trust concept, though perhaps desirable, to evade settled principles of contract law seems totally unreal in many cases. In the first place, whether a given set of facts will give rise to a trust or a contract is difficult enough to decide. [14] The whole question is one of the intention of the parties. [15] [And the only certain intention in marriage contract cases is that the agreement be carried out. An intention to create a trust must be discovered in the surrounding circumstances; yet] and more often than not, such intention is nothing more than a figment of the judge's imagination.[16] Secondly, if the guardian is deemed to be a trustee for the purpose of allowing the minor to sue on the contract, what is he trustee of? Not the pecuniary benefit arising from the possible award of damages for breach because this would be putting the cart before the horse. The only asset he can hold on trust is the bare promise of marriage. This can hardly be construed as the segregation of assets and their devotion to a function.[17]

A final criticism of the rule stated is that,[18] leaving aside for the moment the question whether marriage contracts should be treated on a different footing, if the guardian purports to contract on behalf of the minor, it is really the minor's contract and is absolutely void. If it is to be treated as the guardian's contract, then only he can sue on it.

3. If the defendant is a minor, he or she cannot be sued: *Mulji Takersey* v. *Gomti,*[19] this being in consonance with the recognized rule that a guardian has no right to enter into a personal covenant which could be enforced against the minor.

In view of *Gomti's* case, it is difficult to see how Taraporewala J. could hold, in *Fernandes* v. *Gonsalves,* that the guardian had the power to enter into the contract of marriage on behalf of the minor *so as to bind the minor.* [20]

To recapitulate on the Indian position, a minor suing an adult defendant for breach of promise of an arranged marriage has to fulfil two conditions: first, the guardian must have authority to make a contract binding on her,[21] and second, it

11. Section 2 of the Contracts Act which departs from the English rule that consideration must move from the promisee does not help. It contemplates that all parties to the contract must be *sui juris.* Anyway, the minor is not a party to the contract.

12. *Jamna Das* v. *Ram Autar* (1912) 34 All 63, P.C.

13. See note 9.

14. Compare *Aschkenasy* v. *Midland Bank Ltd.* (1934) 50 T.L.R. 209 with *Harmer* v. *Armstrong* [1934] Ch. 65.

15. *Re Empress Engineering Co.* (1880) 16 Ch. D. 125, at p. 129 (Jessel M.R.).

16. Though an intention to create a trust can be discovered from the surrounding circumstances. *Re Schebsman* [1944] Ch. 83; *Vandepitte'e case* [1933] A.C. 70. P.C.; *Green* v. *Russell* [1959] 2 Q.B. 226; [1959] 2 All E.R. 525.

17. M. Lepaulle — *Traite theorigue et pratique des trusts,* p. 23.

18. See Pollock & Mulla (8th ed. 1957), p. 73.

19. (1887) 11 Bom. 412.

20. *Gomti's* case was not cited in *Fernandes* v. *Gonsalves.*

21. An argument from analogy founded on contracts of apprenticeship is plausible. "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." Taraporewala J. But in *Raj Rani* v. *Prem Adib* A.I.R. 1949 Bom. 215, it is pointed out that contracts of apprenticeship are only valid only by virtue of legislation. Contracts of service, however, do not stand on the same footing, *ibid.*

must have been entered into for her benefit. The unsatisfactory nature of this rule has been demonstrated and to this may be added two more observations. The first is that the benefit in question is that of the infant and not of the guardian. The difficulty of deciding whether a marriage contract is entered into for the benefit of the minor is obviated by the assumption which the Indian courts take that however young the girl is, the contract is *prima facie* for her benefit. In many cases this is an assumption which bears little relation to reality. The second is that there is nothing in the Indian Contract Act corresponding to the rule in English law which makes a contract for the infant's benefit enforceable; all contracts made by an infant in India are void.

To come back to *V. Rajaswary* v. *V. Balakrishnan,* Good J., faced squarely with the issue, elected to follow, with some hesitation, the decisions in *Fernandes* v. *Gonsalves* and *Khimji Kuverji* v. *Lalji Karamsi* in order to extricate himself from a position of having to follow the clear principle laid down in *Mohori Bibee's* case. His lordship was of the opinion that the Indian judges "were right in distinguishing marriage contracts entered into by minors from other classes of contracts."[22] He therefore held that the contract was valid and the plaintiff entitled to sue the defendant for the breach of it.

The learned judge's line of reasoning seems to suggest that the matter really boils down to which line of authority one wants to follow. It is respectfully submitted that it is not as simple as that. There is more in the judicial process than the mere selection of convenient cases to follow.[23] Firstly, no investigation was made, or offered by counsel, as to the true juridical basis of the decision in *Fernandes* v. *Gonsalves* and *Khimji Kuverji* v. *Lalji Karamsi.* It is not too clear whether these two decisions constitute a real exception to the rule that infants' contracts are absolutely void and the rule that he who is not a party to a contract cannot sue on it, or whether they are only applications of the trust concept in order to allow the infant to sue. The above analysis of the Indian cases indicates the probabilities to be weighted in favour of the latter view.

If this is correct, then secondly, the plaintiff can only sue on the contract if two conditions are fulfilled: one, the guardian must have authority to make binding contract on behalf of the minor, and two, the contract must have been for her benefit. The first is a question of law, or mixed law and fact, and the second a question of fact. It is to be noticed that Good J. in the instant case did not make any inquiry in this direction.

In the result, the decision in *V. Rajaswary* v. *V. Balakrishnan* places the female infant who is to be married off in a better position than her sister who has to marry herself off. Whether this sort of inequality should be allowed in modern society is beyond the scope of this note. But the law does compensate the female infant born in the institution of the arranged marriage for the disadvantages she suffers in consequence.

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22. Presumably what the learned judge meant was "marriage contracts entered into by guardians on behalf of minors." Juridically, there would seem to be no difference between marriage contracts and other types of contracts; consequently, the judge's 'rightness' cannot, in a sense, be a legal judgment, but a sociological one.

23. By way of analogy, one may point out the admirable undertaking of the High Court of Australia in reformulating the fundamental principles relating to the liability of occupiers to trespassers, in *The Commissioner for Railways* v. *Cardy* (1960) 34 A.L.J.R. 134.