

APPELLATE CIVIL.

Before Mr. Justice Farran and Mr. Justice Candy.

KA'SHIBA BIN NARSA'PA NIKADE (ORIGINAL PLAINTIFF), APPELLANT,
v. SHRIPAT NARSHIV, DECEASED, BY HIS SON AND HEIR RA'MCHANDRA
AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1894.
August 28.

Domicil—Widow's domicil—Capacity to contract—Law—Law of domicil regulates capacity to contract—Minor—Contract by a minor—Liability of minor—Contract Act (IX of 1872), Secs. 11, 128—Principal and surety—Surety of a minor—Liability.

The domicil of a widow is the same as that of her husband, unless she has changed it after his death.

By the law of England the question of the capacity of a person to enter into a contract is decided by the law of his domicil. This principle of English law is adopted by section 11 of the Contract Act (IX of 1872).

A minor cannot be sued on a bond executed by him during minority and not ratified by him after his majority.

A surety to a bond passed by a minor for moneys borrowed for purposes of litigation not found to be necessary, is liable to be sued on it whether the contract of the minor is considered to be void or voidable.

SECOND appeal from the decision of C. G. W. Macpherson, District Judge of Belgaum, reversing the decree of Ráo Sáheb R. G. Bhadbhade, Subordinate Judge of Chikodi.

The plaintiff sued to recover Rs. 1,194-12-0 due on a bond, dated 29th November, 1887, executed by the first defendant, who was a minor. The second defendant and his son, the third defendant, were sureties.

Defendant No. 1 (Lakshmibái) did not appear at the hearing of the suit. Defendant No. 2 was dead. The third defendant (Rámchandra) contended that the bond was void, as the first defendant was a minor when it was executed, and that he, therefore, was not liable as surety. He also contended that the suit was not maintainable in the Court at Chikodi, as the first defendant resided at Kolhápur (outside British territory) where the bond was executed.

The Subordinate Judge found that though the first defendant, the executant of the bond, resided at Kolhápur, the suit was maintainable in the Chikodi Court, inasmuch as the third defend-

* Second Appeal, No. 403 of 1892.

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ant resided within its jurisdiction; that as the parties resided within British territory, and the place of payment being obviously the creditor's residence, the validity of the contract must be tested by the law of British India; that the bond was voidable at the instance of the first defendant, but was not void, and that the deceased second defendant and his son, the third defendant, being sureties on the bond, they were liable to the plaintiff's claim. He, therefore, passed a decree awarding the claim with costs.

The defendants preferred separate appeals. The Judge found that the first defendant was subject to English law, and that by that law she was a minor when she executed the bond, and was, therefore, not liable upon it, as she had not ratified it after attaining majority. He held that as the first defendant was not liable, the third defendant, being a surety, was not liable, and he accordingly reversed the decree.

The plaintiff preferred a second appeal.

Vikáji, with *Gokuldás K. Párek*, for the appellant (plaintiff).

Lang (Advocate General), with *Mahádeo C. Apte*, for respondent No. 1 (defendant No. 3).

Inverarity with *Dhondu M. Sauzgeri*, for respondent No. 2 (defendant No. 1).

The following authorities were cited in the argument:—Story's Conflict of Laws, articles 82, 637 (a); Westlake on Private International Law, p. 45, article 353; Tudor's Leading Cases, p. 284; Chitty on Contracts, pp. 209, 586, 687; Addison on Contracts (8th Ed.), p. 127; Parson's Law of Contracts, Vol. I, p. 329; Indian Contract Act (IX of 1872), Secs. 11, 64, 126, 128; Mayne's Hindu Law, arts. 191, 196; *Cooper v. Cooper*⁽¹⁾; *Hari Rá v. Jitan Rám*⁽²⁾; *Fatima Bibi v. Debnauth Sháh*⁽³⁾; *Mahmed Arif v. Saraswati Debya*⁽⁴⁾; *Hanmant Lakshman v. Jayaráo Narsinh*⁽⁵⁾.

FARRAN, J.:—This was a suit on a bond executed by the defendant Lakshmibái to secure payment to the plaintiff of Rs. 1,000 and interest. The defendant Lakshmibái was the widow of

(1) 13 App. Ca., p. 88.

(3) I. L. R., 20 Cal., 508.

(2) 3 Beng. L. R., 426.

(4) I. L. R., 18 Cal., 259.

(5) I. L. R., 13 Bom., 50.

Shidbjiráo N. Nimbalkár, a British subject, who had his domicile in British India. At the time of execution she was staying in Kolhápur. She was then admittedly under the age of eighteen years, but would seem, though there is no express finding upon the point, to have completed her sixteenth year. The money was borrowed in connection with a suit about her *desyat* property. The District Judge states in his judgment that the litigation was not shown to be necessary. The defendant Rámchandra's father, since deceased, joined in the bond. Its terms, so far as they related to him, were as follows:—"Security for the recovery of this amount is myself (namely) Shripat Narsinha Diwanji, inhabitant of Chikodi. The abovenamed Shrimant Matoshri Báí Sáheb will pay the amount as agreed above. Should she fail to pay, I will pay the abovementioned amount personally without pleading her excuse and take back this bond. If it is not so paid, you should get it paid off from my income." The defendant Rámchandra also executed the bond to show his consent to it and undertook to pay it if his father did not.

At the original hearing, the defendant Lakshmibái did not appear. Rámchandra appeared and pleaded that Lakshmibái was a minor when the bond was given, and that his father Shripat and he were not, therefore, liable upon it. The Subordinate Judge passed a decree against the defendants. Both appealed, and the District Judge, in appeal, dismissed the suit against both. The present is an appeal by the plaintiff against the decision of the District Judge.

The first question which arises for consideration is by what law the minority of Lakshmibái and her consequent ability to contract are to be determined. As she was a widow of a domiciled British subject, and is not shown to have changed her domicil since his death, it must be taken that her domicil, when she executed the bond, was in British India. Now it has been long a fertile source of controversy whether, according to English law, the capacity of a minor to bind himself by personal contract ought to be determined by the law of his domicil or by the *lex loci contractus*. It is so stated by Lords Watson and Macnaghten in *Cooper v. Cooper* ⁽¹⁾ in the House of Lords. In the same

(1) 13 App. Ca., pp. 105, 107.

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case Lord Halsbury, after saying that there is a singular concurrence of opinion amongst jurists upon the question, says that the capacity to contract is regulated by the law of domicil, citing Story's Conflict of Laws, pl. 64. It was not necessary to decide the point in that case, as the domicil of the lady who entered into the contract and the *lex loci contractus* were the same. However, in *Sottomayor v. De Barros* ⁽¹⁾ the Court of appeal laid it down as a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil. Westlake considers the English law to be now settled on that footing: Priv. In. L. (3rd Ed.), p. 43. The framers of the Contract Act in section 11 seem to have adopted the same view. This was also what the contracting parties themselves thought and intended, as they made their contract on paper impressed with a British stamp. We must, therefore, hold that Lakshmibái was a minor at the time when she entered into the contract in question, being governed by the provisions of Act IX. of 1875.

The same reasoning also shows that the enforceability or otherwise of her contract must be determined by the provisions of the Contract Act in so far as they relate to her capacity to contract. These provisions in their relation to minors have been the subject of judicial comment and decision in several cases. In this Court it has been laid down that a minor can sue upon a bond passed in his favour—*Hanmant v. Jayarao* ⁽²⁾. That carries with it the broader proposition that where the consideration for a contract on the part of the infant is wholly executed he can sue to obtain the benefit of such contract. No reasons are given by the Court for its decision. The ruling in *Sashi Bhusan v. Jadu Nath* ⁽³⁾ was probably followed. It was there ruled that the law under the Contract Act was the same as the law in England, where a contract entered into with a minor is only voidable at the option of the minor.

On the other hand, in the latest case, we believe, on the subject Norris, J., expressed a strong opinion that a minor in British India cannot contract at all—*Fatima v. Debnauth* ⁽⁴⁾. It had

(1) L. R., 3 P. D., p. 5.

(2) I. L. R., 11 Calc., p. 552.

(3) I. L. R., 13 Bom., p. 50.

(4) I. L. R., 20 Calc., p. 508.

been previously held in the Calcutta High Court that the conveyance of an infant not avoided by him in his lifetime was valid—*Mohamed Arif v. Sarasvati* ⁽¹⁾. That was really a decision on section 7 of the Transfer of Property Act, but the Judges in coming to it purported to follow *Sashi Bhausan v. Jadu Nath* (*supra*), which was a ruling on the Contract Act. In the view we take of this case it is not necessary for us to decide whether the contract of a minor under the Contract Act is void or voidable.

In the case of Lakshmibái, who, as we have held, must be considered to have been a minor at the time she executed the bond, it has not been shown that she has ratified her contract since she has attained her majority. The suit as against her has, therefore, been properly dismissed.

Shripat was also domiciled in British India, as is the plaintiff. The contract of Shripat shortly expressed amounted to this:—If the minor lady does not satisfy the bond, I will do so without pleading her excuse. By English law it is clear that Shripat would be liable under such a contract. The proposition is thus expressed in Chitty on Contracts (12th Ed., p. 588): “But the rule that a party cannot be liable on a contract of guarantee unless the principal be also liable, is in some cases true in form or words rather than in substance. Thus, in the case of a guarantee to answer for the price of goods, not necessaries, to be sold to an infant or other person incompetent to contract, there is no doubt that the party guaranteeing, though professedly contracting only in the character of a surety, would be responsible: for either he could not urge the incapacity of the supposed principal, or he might by construction of law be himself treated as the principal.” The same law is laid down in De Colyar on Guarantees, p. 85, where he cites the cases of *Harris v. Huntbach* ⁽²⁾ and *Duncomb v. Tickridge* ⁽³⁾. The judgment of Foster, J., in the former case and the reasoning of the Court in the latter fully bear out his statement of the law. The other text books are to the same effect—Addison on Contracts (9th Ed.), p. 31; Parson’s Law of Contracts, Vol. II, p. 4, an American work.

(1) I. L. R., 18 Calc., p. 259.

(2) 1 Barrow, 373.

(3) Aleyne, p. 94.

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English law on this subject is thus applied to infants whose contracts are by that law voidable only. The Contract Act does not contain any provision which prevents the same view being taken here. Section 128, which has been relied on for that purpose, only explains the *quantum* of a surety's obligation when the terms of the contract do not limit it as they often do. This is clear both from the language of the section itself and from the illustration. Neither has any reference to the nature of the obligation of the principal. There is nothing unlawful, immoral or even improper in lending money to a minor, and we can see no reason, in the absence of enactment to the contrary, why a person cannot contract to guarantee the performance by a third person of a duty of imperfect obligation.

The case is perhaps still more clear if the promise of the infant to repay the money is void. In that case the contract of the so-called surety is not a collateral, but a principal, contract. It is a conditional promise founded upon valuable consideration. It is like the case of a person who, to appease the anger of a child, requests another to lend a guinea to the child to play with, and promises, if the child loses or does not give back the coin, to make it good to the lender. The promise in such circumstances is clearly that of a principal, and not of a surety, and the situation is not altered by its being called a guarantee. That case differs from the present in degree only, and not in principle, if the promise of Lakshmibái was void. This is the principle upon which Foster, J., really decided *Harris v. Huntback* (*supra*), and the Court gave judgment in the old case of *Duncomb v. Tickridge* (*supra*), though for the reason given by De Colyar in his treatise the latter case cannot be treated as a binding authority.

The same distinction was taken in *Goodman v. Chase* ⁽¹⁾. There the defendant, in consideration that the plaintiff would discharge A. B., whom he had taken under a writ of *ca sa*, promised to pay A. B.'s debt. The discharge of A. B. from custody operated as a release of the debt of A. B. The promise of the defendant did not come into operation until the debt of A. B. was released. The undertaking of the defendant was, therefore, held to be that of a principal, and not collateral. *Butcher v.*

(1) 1 B. and A., p. 297.

Stewart⁽¹⁾ and *Bird v. Gammon*⁽²⁾ are instances of the same kind. See *Birkmyr v. Darnell*⁽³⁾. Whether, therefore, the promise of Lakshmibái contained in her bond be voidable or void, the result is the same. Shripat in either case was liable.

So far as the defendant Rámchandra Shripat's son is concerned, we must set aside the decree of the District Court, and restore that of the Subordinate Judge, with costs throughout on the defendant Rámchandra. The decree of the District Court in so far as it dismisses the suit against the defendant Lakshmibái will be affirmed, with costs.

(1) 11 M. and W., 857.

(2) 3 Bing., N. C., 883.

(3) Smith L. C., Vol. I, p. 336.

CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* JANA'RDHAN DA'MODHAR DIKSHIT.*

Penal Code (Act XLV of 1860), Sec. 499—Defamation—Publication—Mode of publication defamatory though the imputation be true.

Under section 499 of the Indian Penal Code (Act XLV of 1860) the person who publishes, and the person who makes, an imputation are alike guilty of defamation.

A Court may find that an imputation is true and made for the public good, but on considering the manner of the publication, (*ex. gr.*, in a newspaper), it may hold that the particular publication is not for the public good, and is, therefore, not privileged.

THIS was an application by the accused for the exercise of the High Court's Revisional Jurisdiction under section 439 of the Code of Criminal Procedure (Act X of 1882).

The accused had been convicted of defamation under the following circumstances:—

The complainant, Hari Vináyak, was an inspector in the service of the Thána Municipality. The accused, who was a Municipal Commissioner, sent a letter, dated the 8th November, 1893, to the Municipal Secretary, the material portion of which was to the following effect:—

*Criminal Application for Revision, No. 269 of 1894.

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