

(1918) 05 CAL CK 0078
In the Calcutta High Court

Raja Narendra Lal Khan

APPELLANT

Vs

Hrishikesh Mukherjee and Others
 Debnandan
Mukherjee and Raja Narendra Lal Khan Vs Ramanath
Banerjee

RESPONDENT

Date of Decision : 31-05-1918

Acts Referred:

Betting and Loans (Infants) Act, 1892 — Section 5

Citation : AIR 1919 Cal 875 : 46 Ind. Cas. 765

Hon'ble Judges : Walmsley, J;N.R. Chatterjea, J

Bench : Division Bench

Judgement

Walmsley, J.—The suit from which these two appeals arise was based on a mortgage and a deed of further charge executed by-one Hrishikesh Mukherjee in favour of Rajah Narendra Lal Khan, the plaintiff.

2. For the purpose of understanding the questions that have to be answered, it will be convenient to begin with a narrative of the circumstances which led up to the execution of the two deeds.

3. One Rakhal Das Mukherjee left two sons, Bir Chandra Mukherjee and Janoki Nath Mukherjee. The elder son Bir Chandra died without issue in 1871, leaving a widow Janoki on May 5th, 1893, adopted Basanta, the son of Grish Chandra Chatterjee and gave him the name of Hrishikesh Mukherjee. In the same year Janoki executed an arpan-nama, purporting to create a trust for the benefit of certain Thakurs. In November 1895 Janoki executed a Will, and in the following month he died, leaving him surviving his widow Saratmani Debya, and the boy Hrishikesh. Saratmani applied for Probate of the Will and after some delay, she was granted Letters of Administration to her husband's estate. In December 1898, Bir Chandra's widow died, and the succession to his uncle's property opened out in favour of Hrishikesh. Then Saratmani applied to be appointed guardian of the boy's person and property, and a certificate was granted to her by the District Judge of Hooghli, on April 4th, 1899. In 1903, Hrishikesh married

Annapurna Debi, and on November 13th, 1905, a son named Debnandan Mukherjee was born to him.

4. In, 1907 Hrishikesh came to Calcutta and began a career of dissipation which brought him to an early grave. His extravagance called for ready money, and he found borrowing only too easy. It is not necessary to compile a complete list of the transactions into which he entered, supposing that were possible, but the following must be mentioned:

(1) A mortgage to Nogendra Nath Mullick for Rs. 25,000 on 4th October 1907.

(2) A promissory note in favour of Rama Nath and Surath Nath Banerjee for Rs. 6,000 on 3rd July 1908.

(3) A promissory note in favour of Bhabataran Bhattacharjee for Rs. 3,000 and Rs. 2,000, dated July 8th and 25th, 1908, respectively.

(4) A mortgage to Sundar Lal Misser for Rs. 10,000, dated 27th July 1908.

(5) A mortgage to Debendra Nath Sen for Rs. 40,000, dated 4th August 1908.

5. In the autumn of 1908 Hrishikesh made the acquaintance of the plaintiff Rajah Narendra Lal Khan and on February 5th, 1909, he took a loan of Rs. 15,000 from him on mortgage. Then began a struggle between the Banerjees who had lent Rs. 6,000 in July, and the Rajah. On February 9th, Hrishi executed a mortgage in favour of the Banerjees for Rs. 1,50,000 and on September 1st, 1909, another deed for Rs. 2,50,000 covering the sum due under the first deed, and further sums in cash. In November he executed a mortgage in favour of the Rajah for Rs. 55,000 and in December a promissory note for Rs. 12,000.

6. On January 23rd, 1910, if the date of birth in the guardianship proceedings is correct, Hrishikesh came of age and on January 24th he executed another mortgage in favour of the Banerjees, this time for Rs. 3,00,000, covering the sum due under the deed of September 1st, and further sums in cash; and a few days later he executed a deed of trust, in which he made provision for himself, his wife and his child, and for repayment of the sum due to the Banerjees. In March 1910, the Rajah brought a suit on his promissory note. Hrishikesh was again in difficulties, but he was still able to borrow small amounts, in April from one Sew Das Mahata, and in July from Prokash Chandra Dutta, among others. On July 21st, 1910, he executed a document which purports to revoke the deed of trust executed in January, and in the following month negotiations with the Rajah were carried on which led up to the deeds upon which this suit is based. On September 10th, 1910, Hrishikesh executed a deed of mortgage in favour of the Rajah for the sum of Rs. 1,60,000 and on October 8th, 1910, he executed a deed for a further sum of Rs. 20,000. These are the documents in suit. At the same time Hrishi executed other documents in favour of the Rajah: on September 10th, an agreement to sell an estate named Damodarpore alias Mirzamari, and on October 8th, a lease of the same property and, more important, on September 10th, an agreement to institute two suits, one against

the Banerjees for a declaration that the mortgage in their favour was void and inoperative, and the other for a declaration that the deed of trust had been duly revoked. It is clear that for the time being Hrishikesh was in the hands of the Rajah. In April 1911 he instituted suits at Midnapore in accordance with his agreement. The Banerjees replied by filing a suit on their mortgage at Alipore, and Hrishikesh was won over to their side: he withdrew from the suit that he had instituted at Midnapore for setting aside the mortgage in their favour, and he took no steps to resist the Banerjees' suit at Alipore. The Rajah, however, carried on the fight in both suits, until he came to an agreement with the Banerjees in February 1912; the terms were that the suit against the Banerjees should be dismissed and their suit on their mortgage be decreed: that the Banerjees should take an assignment of the mortgage and of the deed of further charge, i.e., the two deeds in suit. Accordingly Hrishikesh appeared at Alipore on May 17th, 1912, and admitted the mortgage, when a decree was passed against him. In execution of that decree some of his property including Mirzamari was sold on August 24th. Meanwhile the present suit was instituted on July 8th, 1912. Hrishikesh filed his written statement on August 31st.

7. One more suit may be mentioned. In April 1914, Hrishikesh filed a suit on the Original Side of this Court against the Banerjees, alleging that they had agreed to pay him a sum of Rs. 25,000 in cash, and a monthly allowance of Rs. 300 in consideration of his consent to the decree on the mortgage. This suit was dismissed.

8. We may now turn to the pleadings. The plaint simply recites the facts about the execution of the two documents, and asks for the usual mortgage decree. In reply Hrishikesh filed a written statement on August 31st, 1912, and he lived to give evidence on commission in March and April 1914. His case is that he was a minor when he executed the mortgages of February 2nd and November 24th, 1909, and the promissory note of December 24th, 1909, that he received little, if any, of the sums mentioned in those documents and in the subsequent mortgage of September 1910, that he was persuaded by false promises to execute the deeds of September 10th and October 8th, 1910, that he was allowed no opportunity to understand the agreements about the sale of Mirzamari and about the institution of suits, respecting the mortgage in favour of the Banerjees and the revocation of the deed of trust; that some of the property included in part 1 had been made debutter by Janaki, and that the remainder was still vested in Saratmani as executrix of Janaki's Will, that the deed purporting to revoke the deed of trust was not a genuine transaction, After his death another written statement was filed on November 2nd, 1914, on behalf of his minor son Debnandan: it adopted the defence set up by Hrishikesh, and laid special emphasis on the deed of trust, and the settlement therein of Rs. 300 a month on the minor child.

9. Saratmani Debya also filed a written statement: she referred to the arpan-nama, and to the Will, made by Janaki, and asserted that Hrishikesh had no

power to encumber any of the properties included in part 1; about the deed of trust she said nothing, because she had filed a petition assenting to a decree in the suit brought by Hrishikesh. The wife Annapurna Debi filed a written statement on the same day as Hrishikesh and it is on the same lines as that of her husband.

10. On these pleadings the following issues were framed--:

(1) Are Debnandan and the executrix of the estate of Janoki Nath Mukherjee, deceased, and the shebait of the debutter estate necessary parties to the suit?

(2) Was any consideration paid for the mortgage and further charge in suit? If so, how much and in what way?

(3) Had the defendant No. 1 any transferable interest in the properties mentioned in the plaint? Are some of those properties the subject of a religious endowment? Can the defendant No. 1 raise these questions?

(4) Is defendant No. 3 (a subsequent mortgagee) entitled to any relief in this, case?

(5) Are the said two deeds valid and binding?

(6) Was defendant No. 1 induced by the fraudulent misrepresentation of the plaintiff or his agent, as alleged in the written statement?

(7) Did defendant No. 1 have independent advice in connection with the said two deeds?

(8) Was the trust deed of the 29th January 1910 a valid and binding document? If so, was it validly revoked by the instrument of 21st July 1910?

(9) To what relief is the plaintiff entitled?

(10) Was two lakhs of rupees paid in satisfaction of the mortgages in suit and received by the plaintiff? If so, can the suit proceed?

11. On the first issue the learned Subordinate Judge held that the necessary parties had been brought on the record and we are no longer concerned with the contention to which the issue relates.

12. The third issue and the eighth have reference to the arpan-nama executed by Janoki and to a dedication contained in his Will, and to the deed of trust executed by Hrishi on January 29th, 1910. The learned Vakil who has appeared on behalf of the defendant-respondent has conceded that the questions raised in these issues should not have been discussed in a mortgage suit, and it is, therefore, no longer necessary to deal with them. We can only express regret that so much time should have been spent in the lower Court, on matters which lay outside the scope of the suit.

13. The other issues deal with the main, questions in the case. The learned

Judge did not discuss the evidence as to Hrishi's age, but treated it as admitted that he did not attain majority until January 23rd, 1910. In consequence he held that the Rajah could not claim so much of the sum mentioned in the mortgage-deed as was admittedly devoted to paying off debts incurred before January 23rd, 1910: he also disallowed a sum of Rs. 3,625 appropriated by the plaintiff's Solicitor for costs, and a further sum of Rs. 4,308-9-0 said to have been spent by the plaintiff's Solicitor. These sums in all amount to Rs. 99,180-1-0 out of the Rs. 1,60,000 mentioned in the mortgage-deed of September 10th he gave a decree for the balance, and for the entire sum of Rs. 20,000 mentioned in the deed of further charge. Regarding the allegations of fraud he held that there was much that was suspicious and unsatisfactory, but he could not find such fraud as would vitiate the whole transaction. On the last issue he held that the money was paid by the Banerjees in accordance with the agreement, by which the Rajah undertook to assign his rights under the mortgage deed.

14. The decision has resulted in two appeals, one by the plaintiff, and the other on behalf of Hrishi's minor son. Broadly stated, the plaintiff asks for a full decree for the whole amount stated in the mortgage-deeds, while the defendant urges that the suit should be dismissed on the grounds that the suit is not maintainable and that the transaction was vitiated by fraud.

15. It will be convenient to begin by considering the defendant's argument that the suit is not maintainable. It is urged that the settlement between the Rajah and the Banerjees amounted to satisfaction of the debts due on the two deeds. The terms of the arrangement are to be found in Exhibit 39, dated February 7th, 1912, and the agreement Exhibit 38, dated February 13th, 1912. From these documents it appears that the Banerjees paid the Rajah Rs. 2,01,400 and the Rajah undertook to assign the mortgage and further charge and his rights under other documents, when required, on receipt of the balance of Rs. 7,701 and also to aid the Banerjees in securing a decree upon the footing of the mortgage and further charge, and in the event of a decree not being obtained to refund the sum paid to him. No instrument has yet been executed and registered, so the transaction between the Rajah and the Banerjees remains an agreement to assign and has not ripened into an actual assignment. The Banerjees, therefore, are not entitled to sue on the two deeds as assignees. An attempt is made on behalf of the defendant to go behind the plain meaning of these documents by referring to some answers given by the Rajah in cross-examination. He was examined on commission at most inordinate length, and this subject was frequently raised. The passages to which reference is made are to be found in the answers recorded on June 12th and June 16th: the Rajah said he could not remember on what account the money was paid to him, then he said that it was paid as a deposit, but that the amount belonged to him, that it was to be paid for Hrishi; that the Banerjees agreed to pay him the money due to him as second mortgagee when they came to know about the truth of his claim. These are foolish answers to foolish questions. The agreement is perfectly explicit. The undertaking to assist in procuring a decree on the two deeds cannot be

reconciled with the suggestion that the money was paid in satisfaction of the debts due under them. A part from the clear meaning of the agreement, the whole history of the struggle between the two rival creditors makes it impossible to believe that the Banerjees would satisfy any of their victim's liabilities without putting themselves in a position to seek re-imbursement out of other property. I cannot find in the Rajah's evidence any reason for holding that the sum paid to him by the Banerjees was paid for anything but consideration for his agreement to assign the two deeds. The suit, therefore, is maintainable,

16. The next question for consideration is whether Hrishi was a minor when he took the loans from the Rajah in February, November and December 1909. As a guardian was appointed under Act VIII of 1890 he did not attain majority until he was twenty, one years old. For the plaintiff it is said that he was twenty-one in January 1908, for the defendant that he did not reach that age until January 1910. In other words, was he born on Magh 11th of 1293 or of 1295 B.S.? No issue was framed in the lower Court on the subject, and the learned Subordinate Judge speaks of Hrishi being "admittedly" a minor until January 1910, If he means that an admission was made orally in course of argument, I think he must have misunderstood what was said. It is not, however, necessary to go into that matter. The position now is that the learned Vakil for the plaintiff urges that Hrishi was of age in 1908, and he asks for a decision on the point.

17. Before dealing with the evidence it is necessary to refer to the pleadings. The mortgage-deed of September 10th was filed with the plaint, and the plaintiff asked for it to be treated as a part of the plaint. In it there is a very definite statement that Hrishi came of age on January 23rd, 1910; and the plaint nowhere suggests that that statement is wrong. In the defendants' written statement the assertion that the earlier loans were made while Hrishi was a minor is repeated again and again, and the assertion is accompanied with grave charges against the Rajah of trading on Hrishi's youth. The pleadings, therefore, do not give rise to any dispute about the question, and it is not surprising to find that no issue was framed. When, however, after a long interval, Hrishi and the Rajah were examined on commission they were both questioned about Hrishi's age when he executed the first documents in favour of the Rajah, and afterwards there was some evidence directed to the matter before the learned Subordinate Judge. For the defendants were produced the deed of gift by which Girish gave Hrishi in adoption, the Will executed by Janoki in which reference is made to the age of the adopted son, the certificate of guardianship granted to Saratmani Debya in 1899 and the order of the District Judge dismissing a suit instituted by Hrishi in 1909 for cancellation of the certificate. All these Exhibits were put in without objection, but it is now urged that none of them is admissible. If objection had been taken, Girish might have been called to prove the statements made in the deed of gift, and Saratmani Debya could have given at least an explanation of her grounds for saying that the boy was born in 1889. The Judge's judgment dismissing the suit of 1909 can hardly be said to touch the question and I doubt whether the statement in Janoki's Will can be used even to

corroborate the deed of gift. To the latter, however, I think great weight should be attached, because no one knew better than the father what the boy's age was. As for the suggestion that the age was understated deliberately, it seems most unlikely that Janoki would choose as heir to such considerable property a boy whose eligibility could be questioned.

18. It must be conceded that the evidence to show that Hrishī was born in 1889 is not very strong, but in the state of the pleadings and in the absence of an issue on the subject I think no more could be expected, and that such as it is, it is sufficient to discharge the onus.

19. Then in addition to this evidence, there are the repeated statements made by or on behalf of the Rajah on the subject. In August 1910 it is clear that the Rajah consulted eminent lawyers on the footing that Hrishī came of age in January 1910. Then come a series of documents in which the position taken up is that Hrishī was actually born in 1889, and that statements to the effect that he was born in 1887 were false. Among these documents are Hrishī's virtuous letter of September 7th, which is clearly not his own composition, the mortgage-deed of September 10th, the affidavit before the Presidency Magistrate on the same date, the affidavit sworn by Shoshi Bhusan De and Dina Nath Mukherjee, the petitions by the Rajah in the suit filed by Hrishī at Midnapur for cancellation of the Banerjees' mortgage, and the petitions by the Rajah in the suit brought by the Banerjees at Alipur. The statements contained in these last petitions deserve more detail. The suit at Midnapur was instituted by Hrishī in accordance with the agreement into which he entered with the Rajah on September 10th. It was tried in April of 1911. The plaint was prepared in the office of the Rajah's Solicitor, Hirendra Nath Dutt. When Hrishī wanted to withdraw the suit the Rajah applied to be made plaintiff in his stead, and in the first paragraph of the plaint as verified by the Rajah are these words: "He is informed and believes that Hrishī attained his majority on January 23rd, 1910," while in the fifteenth paragraph the gravamen of the charge against the Banerjees is set out as being that they had the mortgage executed by Hrishī on the very day after he attained majority. The written statement by the Rajah in the Alipur suit is couched in the same terms, and a petition verified by the Rajah's private secretary on the same day contains similar allegations. Not only are these statements extremely clear, but they were made when Hrishī had gone over to the enemy's camp by applying to withdraw his suit against the Banerjees.

20. In the face of these assertions, extending over a period of two years, it is hard to believe that the argument is pressed seriously, and, in my opinion, the Rajah is bound by his repeated admission that Hrishī was not of age until January 1910.

21. It is contended, however, that even though Hrishī may have been in fact a minor in 1909 he represented himself to be of age, and by such fraudulent representation induced the Rajah to lend him money, To this contention also it may be answered that the plaint does not say anything of the kind, and that no

issue was raised on the subject. Then there is Hrishi's affidavit of November 24th, 1909, drafted in the office of the Rajah's Solicitor. It is impossible to believe that such an affidavit was demanded by a man who believed his borrower to be of age. It is nothing but a clumsy--a very clumsy--attempt to shut the mouth of a youth whom the Rajah knew to be a minor. Hrishi was undoubtedly trying in 1909 to pass himself off as a major (see his suit for cancellation of the guardianship certificate) and he may have told the Rajah that he was of age, but the affidavit shows clearly that the Rajah did not believe him, and that if Hrishi tried to deceive him he failed in his efforts.

22. The next question that arises is whether the part of the consideration money of Rs. 1,60,000 representing the sums due on account of old loans was deducted at the time of the payment, or was actually made over to Hrishi and then returned by him voluntarily.

23. The Rajah's case is that the entire sum of Rs. 1,60,000 was placed in Hrishi's hands, and that he then of his own accord gave to his Solicitor Gyanendra Nath Dutt a sum sufficient to pay off these old debts. I have no doubt that the outward forms were such as to bear this appearance, but we must not be content with mere externals in such a matter. In the first place was it likely that Hrishi should adopt such an honourable course? He was a dull boy by nature, and for three years he had been living a life of debauchery and he was in dire straits for money, I think it was most unlikely that he should voluntarily pay off debts which he was told he need not pay and the evidence shows that the Rajah's adviser thought so. I refer to the carefully worded typewritten letter of September 7th, and the evidence of Purna Chandra Mitra as to how it came into being.

24. Then there is the direct evidence given by witnesses who played a large part in the transaction. The Rajah himself says that he agreed to lend Hrishi Rs. 1,60,000 on his agreeing to pay the whole amount of his previous debts to him. I refer to this statement as showing the expectation with which the Rajah went into the negotiations. Purna says that the Rajah told Hrishi to put this in writing. Hirendra understood that the money was to be lent only on the undertaking that the previous loans should be paid off, but Counsel advised that no mention of the old loans should be made in the mortgage. So confident were the Rajah and his advisers that the money would be paid that reconveyances in respect of the earlier mortgages were ready for execution by the Rajah that very day.

25. Next let us look at the circumstances. Hrishi was in great want of money. He could get no more from the Banerjees at any rate while he was negotiating with the Rajah. The deed of trust was an obstacle to big loans from other creditors, and during July and August he had only been able to raise small sums mainly from people who knew of the negotiations that were proceeding. A suit on the promissory note in favour of the Rajah was pending on the Original Side of this Court. Prokash Chandra Dutt, who had obtained a decree on his mortgage, had a warrant of arrest against Hrishi. One Kedar Nath Ghose, who had been in

constant attendance on Hrishikesh was arranging the loan: he had lent money during August and he is one of those who secured payment out of the Rajah's advance; and it was he who got Hrishikesh to write the letter of September 7th, and who afterwards helped to supply the detailed figures in the instructions for payment said to have been given by Hrishikesh. Another matter shows the relation between the parties at this time: Mirzamari was formerly owned by the Rajah's family and it is in evidence that he was anxious to re-gain it. On the very day that the mortgage was executed, Hrishikesh entered into an agreement to sell Mirzamari to the Rajah, although it was included in the mortgaged properties. The learned Subordinate Judge may be wrong in thinking that the Rajah's object throughout was to get hold of Mirzamari, but the agreement to sell executed on the same day as the mortgage strengthens the view that Hrishikesh was not a free agent. It seems to me that looking at the evidence and the circumstances, the conclusion is irresistible that the repayments were not voluntary, that they were made not because Hrishikesh was a man of high principles and wanted to deal honourably, but because the Rajah had him at his mercy and allowed him no option. The faithful way in which the Rajah's employees carried out the advice of the legal advisers does not help him, and the case must be regarded as though the sums due under the earlier deeds had been deducted expressly, and the mortgage-deed had recited that so much was represented by old debts and so much by a fresh advance.

26. Before considering the legal consequence of this finding it will be convenient to deal with the defendants' contention that the whole transaction was vitiated by fraud. The fraud alleged may be described as follows: that Kedar Nath Ghose was bribed by the Rajah to carry the negotiations to a successful end, and that the firm of G.N. Dutt and Co., while ostensibly acting as legal advisers to Hrishikesh, were really employed by the Rajah through Kedar Nath Ghose to make it appear that Hrishikesh was represented by competent Solicitors.

27. In order to investigate these charges it seems desirable to gather the information about the position of the persons concerned in the weeks preceding the execution of the mortgage-deed.

28. Of Hrishikesh little need be said: he wanted money and was reckless of the future if he could raise a loan by any means: he was chafing at the restraint that he had laid upon himself by the trust deed, and he was ready to agree to anything that should satisfy his immediate desires, and he had no regular legal adviser to help him. The Rajah was anxious about the large sum's which he had lent to Hrishikesh before January 1910: he wanted to make them secure but his rivals the Banerjees had forestalled him by the mortgage of January 24th, and by the trust deed. It was necessary for him to get Hrishikesh to regard him as his friend, and to procure a document which would enable him to fight the Banerjees. Kedar Nath Ghose was a broker by profession, and a hanger on of Hrishikesh. It may be inferred that every loan taken by Hrishikesh brought money to his pocket, and he was as indifferent as Hrishikesh to the future.

29. The firm of G.N. Dutt and Co. had a head-clerk named Bhabataran Bhattacharjee: this man had lent Hrishi Rs. 5,000 in July 1908; in September he sold his interest to Prakash Chandra Dutt, brother of the witness Bejoy Chandra Dutt, who is a partner in the firm. Prakash brought a suit on the promissory notes in August 1909, the plaint being drawn by G.N. Dutt and Co., and obtained a decree, and in June 1910 he had a writ of arrest prepared, but not made over to the Sheriff. The same Prakash lent a further sum of Rs. 2,000 to Hrishi in July 1910 and a deed of further charge was drawn up in the office of G.N. Dutt and Co. Kedar Nath Ghose was also a client of the firm; Bijoy had known him since 1900: and in August 1910 promissory notes for Rs. 3,500 and Rs. 2,300 in favour of Kedar were drawn up in the office of G.N. Dutt and Co, and executed by Hrishi. Moreover, G.N. Dutt and Co. acted for Sunder Lall Misser when Hrishi executed a mortgage in his favour in July 1908.

30. Another fact remains to be noticed affecting Kedar Nath Ghose and the Rajah. On August 25th the Rajah wrote to Hirendra Nath Dutt, his Solicitor, asking to pay Rs. 2,000 to Kedar, and saying that Kedar had executed a promissory note for the amount. On September 9th, he wrote a similar letter, the sum mentioned being Rs. 5,500. The letters have been produced, and the entries in Hirendra's cash-book but not the notes. (Regarding this last point it may be mentioned that the letters were produced after the Rajah's examination had been ended. Hirendra was recalled for further examination.) The cash-book entry regarding the sum of Rs. 5,500 runs: "On account of Rajah Narendra Lal Khan by cheque No. 650 to Kedar Nath Ghose Re Hrishikesh Mukherjee's mortgage." The same words "Re Hrishikesh Mukherjee's mortgage" appear in the docket on the back, of the letter. Hirendra says that the words are a mistake, and points out that if the sum had been paid as an instalment of the mortgage it would have been deducted next day. The suggestion of the other side is that there was no promissory note by Kedar, and that the money was a bribe paid by the Rajah to ensure completion of the arrangements.

31. The circumstances mentioned raise very grave suspicion, but the defence must bring home to the Rajah that (1) he procured the appointment of G.N. Dutt and Co. as Solicitors for Hrishi and (2) knew that they were a firm who could not properly act for him, and (3) actually paid the money to Kedar as bribe.

32. When we look for proof of the first two points, there is practically no evidence to be found. We know that Kedar was the first to tell Hirendra that G.N. Dutt and Co. would act for Hrishi, but that means very little. On the other hand it is pointed out that some of the corrections in the documents made by G.N. Dutt and Co. were in the interest of Hrishi, and the inference is that they were doing the best they could for him, and not playing into the hands of the Rajah. The learned Subordinate Judge was right in condemning the conduct of G.N. Dutt and Co., but as he says that is a matter between them and Hrishikesh, Because they were serving clients, Sunder Lall, Prokash and Kedar, whose interests were opposed to those of Hrishi, it does not follow that there was any sort of

conspiracy between them and the Rajah, or that the Rajah knew of these rival interests and on that account caused G.N. Dutt and Co. to be engaged.

33. Regarding the payment to Kedar I attach more importance to the absence of the promissory notes than to the entry in the cash-book. The latter is probably a mistake, as Hirendra says. Then supposing that the payment was a gift and not a loan, the reason for it must be sought in the Rajah's certainty that next day Hrishikesh would faithfully carry out his promise to repay the old debt. Such a gift would be an additional reason for disallowing the Rajah's claim to the extent of the sum represented by the minority debts, but it does not affect the balance. The payment is not creditable either to the Rajah or to Kedarnath, but I cannot see that it infects the whole transaction with fraud. A second line of defence is that even though it be held that the transactions are not vitiated by fraud, they are of the kind known as a "catching bargain".

34. The expression is one which has never been defined. Sir Frederick Pollock, however, (Principles of Contract 8th, edition, page 669) mentions four conditions which have generally been present in bargains against which relief has been given on this ground. He adds a cautionary remark that it is unsafe to assert that all of, them must concur, or that any one of them (except perhaps the first) is indispensable. Taking these conditions it is clear that the first is not present: Hrishikesh was not dealing with an expectancy, at any rate so far as the property mentioned in Parts II and III is concerned: the second is also wanting, for the terms cannot be regarded as extortionate and oppressive; as for the third there is no reason to believe that the sums stated to be lent exceeded the sums actually lent; and the fourth cannot be expected in a case where the borrower is in possession and not dealing with a mere expectancy. I may add that in looking at the second and third conditions I have not considered the sum that represents the minority debts. Here there is a case where all four conditions are wanting, and I think the defendant has failed to prove the existence of any circumstances, which would take their place. I, therefore, hold that the defendant cannot claim relief as against a catching bargain.

35. Here it is convenient to deal with the two smaller sums disallowed by the lower Court. The first is the sum of Rs. 3,625. In the particulars of payment is an item "Babu Hirendra Nath Dutt Rs. 4,000 for costs and Rs. 10,000 to be held by him as deposit". Hirendra says that the sum of Rs. 4,000 includes Rs. 2,500 for out of pocket costs and Rs. 1,500 for in-pocket costs: and he admits receipt of Rs. 600 at an earlier date. The stamp on the documents amounted to Rs. 975 and this is the only sum allowed by the learned Subordinate Judge. I think he is in error here, especially in his allusion to bills sanctioned by the Taxing Officer of the High Court. The mortgagor is liable for incidental costs, and a large sum must have been incurred. I think this sum of Rs. 3,625 should not have been disallowed.

36. The second sum is one of Rs. 4,303-9-0. This is a portion of the deposit of Rs. 10,000 and is said to have been spent on the suits which Hrishikesh undertook to

institute. The suits were instituted. There was nothing unreasonable in Hrishi being asked to institute them, and the suit against the Banerjees, if successful, would have been greatly to his benefit. The assignment of the balance as a definite sum, particularly as it was to one of the Banerjees, seems to show that Hrishi acquiesced in Herendra's account of his expenses, apart from the evidence showing that a Solicitor named Moses was then acting for Hrishi. I think, therefore, that the learned Subordinate Judge was wrong in disallowing this sum.

37. It has been urged that it was incumbent on respondent to show that the other creditors mentioned in Exhibit 42 had actually lent the sums mentioned to Hrishi which he repaid out of the Rs. 1,60,000 covered by the mortgaged-deed. But this is incorrect. It was no part of the respondent's duty to prove that full consideration was paid by those creditors.

38. Now I come to what I regard as the chief question in the case, namely, whether the fresh consideration which passed on September 10th, entitled the plaintiff to demand payment of the whole sum mentioned in the mortgage-deed of that date. The findings of fact necessary to this question may be recapitulated as follows:

39. Hrishi came of age on January 23rd, 1910: the mortgages of February 1909 and November 1909 and the promissory note were executed by him while he was a minor, and therefore the sums due on these were not recoverable from him; those sums were, however, deducted from the sum of Rs. 1,60,000 mentioned as consideration money in the mortgage of September 16th, although the Rajah's Solicitor went through the farce of handing over the entire amount, and receiving back the sum of Rs. 91,246-80. In short, the Rajah gave Hrishi a fresh advance of Rs. 68,753-8 0, and in return Hrishi executed a mortgage-deed for that sum plus Rs. 91,246-8 0 due on bonds executed by him during his minority. The question is "Can the Rajah recover the whole sum, or is he limited, as the learned Subordinate Judge has held, to the amount of the fresh advance?"

40. The question is a difficult one and English cases are likely to mislead, because under the Infants Relief Act of 1874 it is provided by Section 2 that "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy whether there shall or shall not be any new consideration for such promise after full age." This principle is reinforced by Section 5 of the Betting and Loans (Infants) Act of 1892. Before the Act of 1874, the only statutory enactment on the subject was Lord Tenterden's Act, by which no ratification of such a contract could be sued upon unless in writing and signed by the person to be charged. It was while this latter Act was in force in England that the Indian Contract Act was enacted.

41. It is now quite clear that under the Indian Contract Act a minor's agreement is void, and it follows that, being void, it is not capable of ratification. If there were room for doubt on this point, I think it would be sufficient to refer to

Section 25 of the Contract Act. That section does not include the renewal of an infant's promise apparently because an infant's promise does not give rise to an imperfect obligation, but is ab initio void. Hrishi, therefore, could not ratify the engagements made by him as a minor. It is, urged, however that the new consideration of some Rs. 60,000 is consideration that would support his promise to pay all his debts, both old and new, whether they could under the law be recoverable or not. We have been referred to three Indian decisions. Two are by the Madras Court, but they are of no help because in them there was no fresh consideration. The third is the case of *Musammatt Kundan Bibi v. Sree Narayan* 110 W.N.135, which was decided on the Original Side of this Court. The plaintiff had supplied the defendant with piece-goods for sale while he was a minor, and the defendant after attaining majority executed a deed by which he undertook to pay the plaintiff the sum of Rs. 7,450, being Rs. 7,373-4 0 due for goods supplied during minority and Rs. 76 12 0 advanced at the time of execution for necessary expenses. Mr. Justice Harington decreed the suit, remarking that there was new consideration for the defendant's promise, and that there was no satisfactory bar such as exists in the English Act just mentioned. Messrs. Pollock and Mulla commenting on this decision say, "We fail to see how either the forbearance to sue or the advance for, necessities could be regarded as a new consideration, and we are of opinion that the decree so far as it awarded to the plaintiff the price of the goods sold was erroneous in law."

42. Further I think the argument from the absence of an Infants Relief Act in India is unsound, because it overlooks the fundamental fact that in India an agreement by a minor is void not voidable, and as such it does not admit of ratification. It would, I think, be inconsistent with the general tenor and policy of the Contract Act to hold that though the agreements were void when they were made and cannot be ratified by the promisor on attaining majority, nevertheless the same result can be achieved by the promisor taking a trifling loan from the promisee and promising to pay off that sum and the old irrecoverable debts. I think we should be slow in holding that the provisions of the law can be circumvented in this easy way, and here I may refer to earlier passages of the judgment to show that there was a deliberate attempt made by the Rajah to escape from the very difficulty which is now said to be imaginary.

43. In my opinion the answer to the question must be that the fresh consideration does not operate to make the agreement valid in respect of the whole sum mentioned in it, and the plaintiff's right to recover must be limited to the amount of the fresh advance actually made, viz., Rs. 68,753-8-0.

44. For the defendant a second answer is put forward, and it is this, that at any rate in respect of the sum representing the minority debts he is entitled to relief on the ground of undue influence. The expression has not been defined exhaustively in the Contract Act, but I think that the circumstances mentioned in connection with the negotiations bring the case within the meaning of Section 16. At that time the Rajah must have appeared to Hrishi as his only friend, the

only man who could lend him more money and deliver him from the clutches of the Banerjees: while Hrishikesh was in sore need of money, "helpless, impecunious, and unprotected," to use the Rajah's own words, conscious that he had offended the Banerjees by revoking the deed of trust, and warned by Prakash Chandra's decree that the day of reckoning was at hand. When under these circumstances the Rajah insisted that Hrishikesh should agree to pay the debts contracted during his minority, particularly when he insisted that Hrishikesh should go through the farce of receiving the whole amount and then repaying more than half, I think no straining of language is needed to hold that the plaintiff exercised undue influence over Hrishikesh, so far as that part of the promise is concerned. It is true that this plea of undue influence was not taken expressly in the written statement or raised expressly in any of the issues, but the gist of the written statement is that the Rajah got hold of Hrishikesh and traded upon his vices, and so induced him to enter into the agreement.

45. In my opinion the decree of the lower Court should be affirmed except in regard to the two sums of Rs. 3,625 and Rs. 4,308-9-0. I would, therefore, dismiss the defendants' appeal, and decree the plaintiff's appeal to this extent only that from the sum of Rs. 1,60,000 mentioned in the deed of September 10th, there should be deducted the sum of Rs. 91,246-8. only and not the sum of Rs. 99,180-1-0 as ordered by the lower Court. Under the circumstances I think there should be no order as to costs in this Court. The learned Vakil who appeared on behalf of defendant No. 3 has asked for costs, but I do not think it is necessary to award him any.

N.R. Chatterjea, J.

48. I agree.