MANU/LA/0462/1928

Equivalent/Neutral Citation: AIR1928Lah609, 111Ind. Cas.175

IN THE HIGH COURT OF LAHORE

Decided On: 02.04.1928

Khan Gul and Ors. **Vs.** Lakha Singh and Ors.

JUDGMENT

Shadi Lal, C.J.

1. The questions, which have been formulated for decision by the Full Bench, are in these terms:

> (1) Whether a minor, who, by falsely representing himself to be a major, has induced a person to enter into a contract, is estopped from pleading his minority to avoid the contract.
>
> (2) Whether a party, who, when a minor, has entered into a contract by means of a false representation as to his age, whether he be defendant or plaintiff, in a subsequent litigation, refuse to perform the contract and at the same time retain the benefit he may have derived therefrom.

2. As regards the minor's capacity to enter into a contract, there was some uncertainty prior to 1903 as to whether a minor's contract was void or voidable. But all doubt on the subject has been dispelled by the judgment of their Lordships of the Privy Council in Mohori Bibee v. Dharmodas Ghose [1903] 30 Cal. 539, which declares that a person who, by reason of infancy is, as laid down by Section 11, Contract Act, incompetent to contract, cannot make a contract within the meaning of the Act. The transaction entered cannot be recognized by law.

3. The question arises whether an infant is precluded by the rule of estoppel from showing the invalidity of a transaction of this description. Now, the doctrine of estoppel is embodied in Section 115, Evidence Act, which runs as follows:

> When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

4. There is a conflict of judicial opinion as to whether an infant comes within the ambit of the section; the Bombay High Court holding that an infant is not excepted by the language of the section, vide Ganesh Lal v. Bapu [1897] 21 Bom. 198; Dadasaheb Dasrathrao v. Bai Nahani [1917] 41 Bom. 480 and Jasraj Bastimal v. Sadasiv Mahadev Walekar MANU/MH/0072/1921 : A.I.R. 1923 Bom 169; while the Calcutta High Court has adopted the opposite view: vide Dhurmo Dass Ghose v. Brahmo Datt [1898] 25 Cal. 616 which view was endorsed on appeal by a Division Bench of the same Court in Brahmo Dutt v. Dhurmo Dass Ghose [1899] 26 Cal. 381. In the latter Calcutta case Maclean, C.J., sought to get over the comprehensive language of Section 115 by holding that the term "person" in that section applies to "one who is of full age and competent to enter into a contract." It will be observed that the expression "person" is

used twice in that section, and it is clear that if in the first portion of the section it means a person sui juris, it must have the same meaning when used again in the same section. The interpretation placed upon the word "person" by the Calcutta High Court would, no doubt, help the minor in so far as he would be able to repel the plea of estoppel when it is urged against him; but he must, at the same time, forego the benefit accruing from the doctrine of estoppel and cannot invoke the plea for his own advantage. If the word "person" means only a person competent to enter into a contract, then the section cannot be used to the advantage of the minor any more than to his detriment; in other words the doctrine of estoppel, as enacted by Section 115, must be treated as non-existent in so far a person under disability is concerned.

5. That a minor cannot set up the plea of estoppel as against an adult is obviously an absurd result. Now, it is a cardinal rule governing the interpretation of statutes that when the language of the legislature admits of two constructions, the Court should not adopt a construction which would lead to an absurdity or obvious injustice. But I do not think that there is any ambiguity in the term "person." In construing statutes, and indeed all written instruments, it is the duty of the Court to adhere to the grammatical and ordinary sense of the words; and the expression "person," when used in its ordinary sense, includes every person whether sui juris or under a contractual disability. As pointed out above, the same word is used again in Section 115, and there can he no doubt that it cannot, in that connexion, bear any restricted meaning. Indeed the term "person" is to be found also in Section 116, which deals with the estoppel of a tenant as against his landlord, and in numerous other sections of the Evidence Act, e.g., Sections 5, 8, 10, 112, 118, 122 and 139; and a perusal of those sections leaves no doubt that it is intended to include minors as well as other persons under disability.

6. I must, therefore, hold that the language of Section 115 is comprehensive enough to include a minor; and if the matter rested there, I would say that an infant, who has induced another person to deal with him by falsely representing himself as of full age, should not be allowed to deny the truth of his representation. But the rule of estoppel is a rule of evidence and must be read along with and subject to the provisions of other laws. The law of estoppel is a general law applicable to all persons, while the law of contract relating to capacity to enter into a contract is directed towards a special object; and it is a well established principle that, where a general intention is expressed by the legislature, and also a particular intention, which is incompatible with the general one, particular intention is considered an exception to the general one: per Best, C.J. in Churchill v. Crease 5 Bing 177. This rule applies whether the general and special provisions are contained in the same statute or different statutes. Now, when the law of contract lays down that a minor shall not be liable upon a contract entered into by him, he should not be made liable upon the same contract by virtue of the general rule of estoppel. I do not go so far as to say that the language of Section 115, would, if given its full scope, render absolutely nugatory the law declaring the incapacity of a minor to make a contract; for there may be instances in which a contract though entered into with a minor has not been induced by any misrepresentation made by him and no question of estoppel can arise in such cases. There can, however, be no doubt that the rule of estoppel would take away in many cases the protection which the legislature has deliberately created for the benefit of the minors, and would make them liable on a transaction which has no existence in the eye of the law. The Court should struggle against repugnancy and should construe an enactment as far as possible in accordance with the terms of the other statute which it does not expressly modify or repeal.

7. Now, both the statutes can stand together, if we apply the general rule of estoppel, as enacted by Section 115, Evidence Act, subject to the special law imposing disability

upon the contractual capacity of an infant. This construction which recognizes an exception to the general rule, avoids all repugnancy and does not lead to any absurdity or injustice.

8. It is to be observed that, so far as the English law is concerned, there is no authority for the proposition that a contract, which is void under the statute on the ground of infancy, can be enforced simply because it has been entered into on the faith of a false representation as to age which the minor is precluded from denying. In the case of Levene v. Brougham [1909] 25 T.L.R. 265, the plea of estoppel was raised against the minor but was rejected by the Court of appeal. It must be remembered that, as observed by their Lordships of the Privy Council in Sarat Chunder Dey v. Gopal Chunder Laha [1893] 20 Cal. 296, Section 115, Evidence Act, has not enacted as law in India anything different from the law of England on the subject of estoppel and the English decisions are therefore, relevant to the discussion of the subject before as.

9. In India the rule against the application of the doctrine of estoppel to a contract void on the ground of infancy has been adopted, not only by the Calcutta High Court, but also by the High Courts at Madras, Allahabad and Patna: Vide Vaikuntarama Pillai v. Authimoolam Chettiar [1915] 38 Mad. 1071, Jagar Nath Singh v. Lalta Pershad [1909] 31 All. 21 and Ganganand Singh v. Rameshwar Singh MANU/BH/0054/1927 : A.I.R. 1927 Pat. 271. A Division Bench of the Lahore High Court has however, favoured the view taken by the Bombay High Court in Wasinda Ram v. Sita Ram [1920] 1 Lah. 389. I am not aware of any judgment of the Privy Council which gives expression to the considered view of their Lordships on the subject. In the case of Mohoree Bibee v. Dharmodas Ghose [1903] 30 Cal. 539, which was an appeal from the judgment of the Calcutta High Court in Brahmo Datt v. Dhurmoo Dass Ghose[1899] 26 Cal. 381 their Lordships refrained from expressing their opinion and disposed of the question by making the following observations:

> The Courts below seem to have decided that this section (Section 115) does not apply to infants but their Lordships do not think it necessary to deal with that question now. They consider it clear that the section does not apply to a case like the present, where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement.

10. Nor is there anything in the judgment in Mahomed Syedol Ariffin v. Yeoh Ooi Gark A.I.R. 1916 P.C. 242, which can be treated even as an obiter dictum on the subject of estoppel. That case was heard by the Privy Council on an appeal from the Supreme Court of the Straits Settlements and dealt with the Strait Settlements Ordinance (3 of 1893), which is in similar terms to the Indian Evidence Act. It was sought to establish the liability of the infant for damages on the ground of a fraudulent statement, but their Lordships held that no fraud had been established. It is clear that no case of estoppel was either set up or decided in that case.

11. It will be seen from the foregoing discussion that not only the English law, but also the balance of the judicial authority in India, is decidedly in favour of the rule that where an infant has induced a person to contract with him by means of a false representation that he was of full age, he is not estopped from pleading his infancy in avoidance of the contract and, though Section 115, Evidence Act is general in its terms, I consider for the reasons, which I have already given, that it must be read subject to the provisions of the Contract Act, declaring a transaction entered into by a minor to be void. My answer to the first question referred to us is, therefore, in the negative.

12. Coming now to the second question: I am clear that when a contract has been induced by a false representation made by an infant as to his age, he is liable neither on the contract nor in tort, if the tort is directly connected with the contract and is the means of effecting it and parcel of the same transaction: The Liverpool Adelphi Loan Association v. Fairthurst [1854] 9 Ex. 422. It is true that infancy does not constitute a valid defence to an action on tort, but the tort, which can sustain an action for damages must be independent of the contract and must not be another name for the breach of the contract. No person can evade the law conferring immunity upon an infant from performing a contractual obligation by converting the contract into a tort for the purpose of charging the infant. As observed by Byles, J., in Burnard v. Haggie [1863] 32 L.J.C.P. 189,

> one cannot make an infant liable for the breach of a contract by changing the form of action to one ex delicto.

13. The Court has to look at the substance, and not at the form, of the action; and if it finds that the action is in reality an action ex contractu but disguised as an action ex delicto, it would decline to enforce the claim. Indeed, it has been repeatedly held in England that when an infant has induced a person to contract with him by making a false statement that he was of full age, the infant is not answerable either for the breach of the contract or for damages arising from the tort committed by him.

14. But a false representation by an infant that he was of full age gives rise to an equitable liability. The Court, while relieving him from the consequences of the contract may in the exercise of its equitable jurisdiction restore the parties to the position which they occupied before the date of the contract. If the infant is in possession of any property which he has obtained by fraud, he can be compelled to restore it to his former owner. The matter is, however, debatable: if the benefit acquired by him consists of money which is not earmarked, has the Court of equity authority to make him liable for the payment, to the defrauded person, of a sum equal to the amount of which the latter has been deprived by the former? The equitable jurisdiction is founded upon the desire of the Court to do justice to both the parties by restoring them to the status quoante, and there is no real difference between restoring the property and refunding the money except that the property can be identified but cash cannot be traced.

15. The doctrine of restitution finds expression in Section 41, Specific Relief Act. Suppose, A, an infant, executes an instrument of mortgage in favour of B for Rs. 1,000 borrowed by B by making a false representation as to his age. This instrument is void, and Section 39, which expressly applies, not only to a voidable but also to a void, instrument, allows A to move the Court to adjudge it to be void and order it to be delivered up and cancelled. Then cornea Section 41, by which it is provided that on adjudging the cancellation of the instrument the Court may require A, to whom such relief is granted, to make any compensation to B which justice may require. It is beyond question that under this section the Court has the discretion to impose terms upon A and to compel him to pay Rs. 1,000 as compensation to B. The statute nowhere says that pecuniary compensation should not be allowed, when the award thereof would be tantamount to a repayment of the money borrowed on the strength of a void transaction. Indeed, the Courts in India have ordered the minor to refund the money received by him before allowing him to recover the property sold or mortgaged to the other party.

16. In Jagar Nath Singh v. Lalta Pershad [1909] 31 All. 21 the minor, who, by making fraudulent representation as to his age, had induced the defendant to purchase property

from him, was held liable in equity to restore to the purchaser the benefit he had obtained before he could recover possession of the property sold. The same rule was followed in Balak Ram v. Dadu [1910] 76 P.R. 1910, where the plaintiff was directed to refund the purchase money as a condition precedent to his obtaining possession of the property. In Saral Chand Mitter v. Mohan Bibi [1898] 25 Cal. 371, the minor was required to refund the money borrowed by him on the foot of a mortgage.

17. It is true that in the case of Mohori Bibee v. Dharmodas Ghose [1903] 30 Cal. 539 restitution was not allowed, but the party, who had lent the money to the minor, was aware of the minority; and their Lordships of the Privy Council, while recognizing that Section 41 does give a discretion to the Court, did not see any reason for interfering with the discretion of the lower Courts which, on the facts of the case, had declined to direct the return of the money.

18. There are some English cases in which an infant repudiating a transaction was held liable in equity to return the benefit he had obtained by reason of his fraud. In re King Ex Parte, The Unity Joint Stock Mutual Banking Association[1858] 3 G. & J. 63, a person, who had lent money to an infant on the faith of a fraudulent representation as to age, was held entitled to prove in his bankruptcy. Lord Justice Knight Bruce, while deciding that in equity the liability of the borrower had been established, made the following pertinent observations:

> The question is whether in the view of a Court of equity, according to the sense of decisions not now to be disputed, he has made himself liable to pay the debt whatever, be his liability or nonliability at law. In my opinion we are compelled to say that he has.

19. Cowern v. Nield [1912] 2 K.B. 419 was a case in which it was decided that an infant trader, who had entered into a contract for the sale of goods and failed to deliver them after receiving their price, was not liable on the contract, but that:

> if the plaintiff can prove that the defendant obtained his money by fraud, the action can be maintained.

20. The Court of appeal accordingly ordered a new trial:

> in order 'that the plaintiff may have an opportunity of proving if he can, that his money was obtained from him by the defendant by fraud.

21. In Stocke v. Wilson [1913] K.B. 235 an infant, who had obtained furniture from the plaintiff by falsely stating himself to be of age, and had sold part of it for Â£.30 was directed to pay this amount as part of the relief granted to the plaintiff.

22. A different view was, however, taken by the Court of appeal in R. Leslie Ltd. v. Sheill [1914] 3 K.B. 607. In that case an action for the recovery of advances made to an infant on the faith of his fraudulent representation as to his age was dismissed, because the cause of action was held in substance ex contractu. The learned Judges of the Court of appeal distinguished the judgment in The Unity Joint Stock Mutual Banking Association [1858] 3 G. & J. 63 on the ground that it expressed the law in bankruptcy and did not lay down a doctrine of general application. With all respect, I am unable to follow the distinction. Either the liability to return the benefit obtained by fraud exists or it does not exist. If it does not, then the mere fact that the quondam infant has been subsequently adjudged a bankrupt cannot bring it into existence. If, on the other hand, the infant is in equity liable to return his ill-gotten gains his liability holds good, even if

he is not subsequently adjudged to be an insolvent. It must be remembered that the relief springs, not from the circumstance that the borrower is adjudicated a bankrupt, which may be a pure accident, but from the rule of equity that a person should not be allowed to take advantage of his own fraud. It would be sheer injustice if an infant should retain, not only the property which he has agreed to sell or mortgage, but also the money which he has obtained by perpetrating fraud. As stated by Lord Kenyan in Jennings v. Rundall [1799] 8 T.R. 335, the protection given by law to the infant "was to be used as a shield and not as a sword." It must be remembered that, while in India all contracts made by an infant are void, there is no such general rule in England. For instance, a contract for necessaries is not affected by the Infants Belief Act, 1874, and can be validly entered into by an infant. There should, therefore, be greater scope in India than in England for the application of the equitable doctrine of restitution.

23. It is, however, argued that this jurisdiction can be exercised only when the minor invokes the aid of the Court as a plaintiff. If he asks the Court to cancel a transaction brought about by his own fraud, he cannot complain if the Court does justice to both the parties; and, while granting him the relief the Court compels him, at the same time, to return the advantage which he has acquired in pursuance of the void transaction. But if the minor happens to occupy the position of a defendant in an action involving the cancellation of the transaction of the above description, he should not, it is urged, be required to make restitution.

24. It is difficult to understand why the granting of an equitable remedy should depend upon a mere accident, namely, whether it is the minor or his adversary who has taken the initiative in bringing the transaction before the Court. The material circumstances in both the cases are exactly the same. A contract has been entered into with an infant and, as it is an invalid transaction, it must be cancelled. The Court, however, finds Ghat the infant has, by practising fraud upon the opposite party, received property or money; and that justice requires that he should not retain the benefit derived by him from a transaction which has been declared to be ineffectual against him. The transaction has been wiped out. It is only fair that both the parties should revert to their original position. These considerations are, in no way, affected by the circumstance that one party and not the other, has moved the Court in the first instance. There is neither principle nor justice which would warrant a discrimination.

25. The equitable jurisdiction of the Court to order restitution rests purely upon the principle of justice, and that principle is no more applicable to a case in which he is a defendant. But when we come to the case law, we find it in an unsatisfactory state. The decisions of the High Courts in India show that when the minor succeeds in an action 'brought by him, he is ordinarily required to restore the benefit obtained by him by committing fraud. The same unanimity is not, however, found in cases in which he occupies the role of a defendant. In some cases of this character restitution has been allowed, e.g., Saral Chand Mitter v. Mohun Bibi [1898] 25 Cal. 371, but there are several cases in which relief has not been granted against frauds committed by minors when they were defendants. The language of Sections 39 and 41, Specific Belief Act, no doubt shows that the jurisdiction conferred thereby is to be exercised when the minor himself invokes the aid of the Court. The doctrine of restitution is not, however, confined to the cases covered by that section. That doctrine rests, upon the salutary principle that an infant cannot be allowed by a Court of equity to take advantage of his own fraud. It is possible that, though the Court ordinarily imposes terms upon an infant guilty of fraud if he seeks its aid as a plaintiff, it may decline to exercise its equitable jurisdiction if he happens to be a defendant. All that can reasonably be said is that the Court, in deciding whether relief against fraud practised by an infant should or should

not be granted, will consider, along with other circumstances of the case, the fact that the infant is a defendant and not a plaintiff in the case. But there is no warrant either in principle or in equity for the general rule that the relief shall never be granted in a case where the infant happens to be a defendant.

26. No such distinction seems to have been drawn in the English cases. Indeed, Stocks v. Wilson [1913] K.B. 235 was a case in which the infant was the defendant, and yet he was held liable to refund to the plaintiff, the price of the furniture received from the latter. Similarly in Cowern v. Nield [1912] 2 K.B. 419 the action was brought against the infant but it was never suggested that the circumstance of his being a defendant should make any difference in his liability.

27. The exact form which the relief should take must depend upon the peculiar circumstances of each case, but the contract or any stipulation therein should never be enforced. The remedy by way of restitution may sometimes involve the payment of a sum of money equal to that borrowed under the void contract. The grant of such relief is not, however, an enforcement of the contract, but a restoration of the state of affairs as they existed before the formation of the contract. The Court, while giving this relief, has not to look at the contract or to give effect to any of the stipulations contained therein. Indeed, the relief is granted, not because there is a contract which should be enforced, but because the transaction being void does not exist and the parties should revert to the condition in which they were before the transaction. This is not a performance of the contract but a negation of it. For example, the contract may provide for the payment of interest at a certain rate, but the Court does not give effect to such stipulation or to any other term of the contract. The defrauded party gets, not the remedy on the contract, but the relief in equity against fraud. The mere fact that the result of granting the relief is similar to that flowing from the performance of one or more of the terms of the contract cannot constitute an adequate ground for refusing the relief, if the Court considers that justice requires that it should be granted. As stated by Knight Bruce, V.C., in Stikeman v. Daivson [1881] 1 G. & S 90 in what cases in particular a Court of "equity will thus exert itself is not easy to determine". If the infant has obtained property by fraud the Court will require him to restore it to its owner. In other cases, his estate or he, after attaining majority, may be held liable for the return of the pecuniary advantage acquired by him by fraud.

28. For the aforesaid reasons my answer to the second question is that an infant though not liable under the contract, may in equity, be required to return the benefit he has received by making a false representation as to his age.

Broadway, J.

29. I concur with the learned Chief Justice.

Dalip Singh, J.

30. I concur with the learned Chief Justice.

Harrison, J.

31. On the first question of whether a minor who has made a false representation as to his age is estopped from pleading his minority, I agree with the learned Chief Justice in holding that he is not estopped from doing so.

32. On the second question it appears to me that deplorable as the result may be the

minor cannot be compelled to make restitution where the result of his misrepresentation has been the passing of money as opposed to goods. In the first place the contract is void and has no legal existence. Doubtless an action in tort can succeed, if it be shown that the tort is independent of the contract. Great reliance has been placed on Cowern v. Nield [1912] 2 K.B. 419, but all that this authority lays down is: that if it can be established that there has been an independent tort the action will succeed. That case was sent back for a new trial in order that the plaintiff might have an opportunity of proving, if he could, that his money was obtained from him by fraud, but the judgment has been relied on by counsel for the proposition that where a contract has arisen as the direct consequence of a fraudulent statement, an action may still succeed on the basis of that fraud. It appears to me that what is laid down is precisely the contrary proposition, and that unless and until the fraud can be dissociated from the contract, the plaintiff's suit must fail. In this case there can, I think, be no doubt that the substance of the cause of action is contractual. Had the fraud or misstatement of the defendant not led to a contract, we would have heard no more about it The only reality in the tort was the fact that it was the origin or the cause of the void contract. In consequence of the misrepresentation a contract was made and it is, therefore, equally true to say that had there been no tort, there would have been no contract and that had there been no contract, there would have been no tort, for there would merely have been an infructuous attempt to deceive as opposed to a successful fraud. It follows that the suit is not based upon a tort and Cowern v. Nield [1912] 2 K.B. 419 does not help us. The question remains of whether the defendant can be denied the right of pleading that the contract is void except upon definite terms, which would obviously be that he should restore the benefit he has received in consequence of his dishonesty. To quote from the judgment of Lord Sumner in Leslie Ltd. v. Sheill [1914] 3 K.B. 607:

> It is perhaps a pity that no exception was made where, as here, the infant's wickedness was at least equal to that of the person who innocently contracted with him, but so it is. It was thought necessary to safeguard the weakness of infants at large, even though here and there a juvenile knave slipped through.

33. In the following paragraph it is explained that to a claim for return of the principal money paid to the infant under the contract that failed there are at least two answers: the first the infancy itself being at common law the answer before 1874. I take it that in India this is the answer still. Section 41, Specific Belief Act, is invoked and relied upon as affording an analogy for ordering restoration. This runs as follows:

> On adjudging the cancellation of an instrument the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

34. In the first place there is no question of the cancellation of an instrument but the assertion of the fact that the contract was void from the start and had no legal existence. In the second place, Section 41, Specific Belief Act, appears to me merely to enunciate and give effect to the well-known principle that he who seeks equity must do equity. In this case the infant asks for no equitable relief, but on the contrary he pleads the substantive law and states the self-evident fact that the contract on which the suit is based had no existence. Whatever may be the consequences where an infant seeks an equitable relief, I do not think the analogy has been established and I do not think that Section 41, Specific Belief Act, throws any light upon or affords any assistance to the decision of the present question. I realize how deplorable it is that a dishonest infant should be able to keep what he has obtained by his dishonesty, but the matter appears to be one for the legislature, and I am of opinion that until and unless the legislature

sees fit to move, no suit of this nature, being in its essence contractual, can lead to an order for restitution by the infant on the ground of his having dishonestly induced the plaintiff to contract with him and to pay him money.

Tek Chand, J.

35. This reference to the Full Bench gives rise to the following three points, which it will be convenient to deal with separately:

> (i) Is a party, who, when a minor, has induced another to enter into a contract with him by falsely representing himself to be of age, estopped from plea-ling his minority in avoidance of the contract?
>
> (ii) In the event of the answer to the first question being in the negative, can he avoid the contract and at the same time retain the benefit derived by him therefrom?
>
> (iii) Will the answer to (i) be affected by the circumstance that he is a plaintiff or a defendant in the action in which this question arises?

36. I shall take up (i) first. It was contended by the learned Counsel for the appellant that this question is concluded in his favour in consequence of the decisions of their Lordships of the Privy Council in Mohori Bibi v. Dharmodass [1903] 30 Cal. 539 and Mahomed Syedol Ariffin v. Yeoh Ooi Gark A.I.R. 1916 P.C. 242. An examination of these cases, however, shows that this contention is baseless. It is no-doubt true that in Mohori Bibee's case [1903] 30 Cal. 539 the question was raised before Jenkins, J., who dealt with the case as the Court of first instance on the original side of the Calcutta High Court in Dharmo Dass Ghose v. Brahmo Butt [1898] 25 Cal. 616 and on appeal three Judges of that Court discussed it at great length: Brahmo Butt v. Bharmo Bass [1899] 26 Cal. 381. But on the matter going up before the Judicial Committee this question did not arise, as their Lordships found on the facts that the party dealing with the minor had not been misled by the alleged misrepresentation made by the minor. It was found on the evidence that at the time when the contract was entered into the representee in that case had full knowledge of the fact that the representor was in reality a minor and it was accordingly held that there could be no estoppel where the truth of the matter was known to both parties. The real question decided in that case was that having regard to the provisions of Section 11, Contract Act, a contract entered into by a minor was void and not merely voidable as had been hitherto erroneously held in a number of cases in India.

37. The question appears to have been argued before their Lordships in Mahomed Syedol Ariffin v. Yeoh Ooi Gark A.I.R. 1916 P.C. 242 which was an appeal from the Straits Settlements, where the statute in force is identical in terms with Section 115, Evidence Act. But the actual decision, in that case also proceeded on a different point, their Lordships finding on the facts that the representation which was alleged to have been made by the minor could not be justly characterized as fraudulent. There is, however, a remark in the judgment of Lord Shaw to the effect that the plaintiff's case, based on the minor representing himself to be of age:

> would have failed on the principle recently given effect to in the case of Leslie Ltd. v. Shiell [1914] 3 K.B. 607.

38. The remark is clearly in the nature of an obiter dictum and though entitled to great respect cannot be said to be decisive of the matter.

39. The question is, therefore, not directly covered by any authoritative pronouncement of their Lordships of' the Privy Council and it is open to us to come to our own conclusion on it. It is admitted that the matter has to be decided in reference to Section 11, Contract Act, and Section 115, Evidence Act. As already pointed out the former section has been authoritatively interpreted in Mohori Bibee's case [1903] 30 Cal. 539 as meaning that a contract entered into by a minor is void. There can, therefore, be no room for controversy on that point. The difficulty, however, arises when, in an action brought in respect of such a transaction, the opposite party urges that the plea that the contract was void ought not to be heard as the transaction had been brought about by the minor representing himself to be of age and on that misrepresentation the opposite party has parted with his money or property. In other words the question is what is the effect on such a case of Section 115, Evidence Act, which runs as follows:

> When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

40. The question has arisen in several cases in India, but as pointed out by the learned Judges of the Division Bench there is a serious conflict of judicial opinion on it. It is, therefore, necessary to review the leading Indian cases on the subject so as to properly appreciate the reasons in support of the two rival views.

41. Beginning with our own Court, we find that the rulings, though few in number, are not uniform. In Wasinda Ram v. Sita Ram [1920] 1 Lah. 389 the plaintiff sued to recover the amount due on a bond which the defendant had, during minority, executed falsely representing himself to be of age. Chevis, Offg. C.J., who delivered the principal judgment, held that Section 115, Evidence Act, applied to the case and that the defendant could not be heard to plead his minority to escape from the consequences of the transaction-which he had himself brought about by false representations. He definitely dissented from the view of the Calcutta High Court (which I shall presently discuss) that the word "person" in the first line of Section 115 must be interpreted as meaning a person sui juris and does not include a minor. LeRossignol, J., in agreeing with his learned colleague, thus expressed himself:

> It is true that a contract made with an infant is no contract, but is void ab initio, but that is not a matter of which Courts must take cognizance suo motu, and if Section 115, Evidence Act, prohibits the tender of the plea (and I see no reason to suppose that it does not) then the plea may not be tendered.

42. The question next arose in Harji Mal v. Abdul Halim [1920] 60 I.C. 267 before LeRossignol, J., sitting singly. The learned Judge reiterated his former opinion and upholding the plea of estoppel decreed the suit on a promissory note on which the defendant had, during minority, obtained a loan falsely representing himself to be of age. A contrary view was, however, taken two years later by Moti Sagar, J., (also sitting in Single Bench) in Kapura v. Arjun Singh: A.I.R. 1923 Lah. 511, where a minor had sued to set aside a sale executed by him during minority which it was found he had persuaded the vendee to enter into on a fraudulent misrepresentation that he was sui juris. The learned Judge refused to follow Wasinda Ram v. Sita Ram [1920] 1 Lah. 389, being of the opinion that the authority of that ruling had been considerably shaken if not altogether annihilated by the remarks of their Lordships of the Privy Council in Mahomed Syedol Ariffin v. Yeoh Ooi Gark A.I.R. 1916 P.C. 242 where Leslie v. Sheill

[1914] 3 K.B. 607 had been approved. He accordingly held that the plaintiff was not estopped from pleading the invalidity of the contract by reason of his minority, even though he had himself induced the contract by false representation.

43. The view taken in Wasinda Ram v. Sita Ram [1920] 1 Lah. 389, is in accord with that which had been uniformly accepted as correct by the Bombay High Court. The first case of that Court which needs notice is Ganesh Lala v. Bapu [1897] 21 Bom. 198, where Jardine and Ranade, JJ. held that Section 115, Evidence Act, made no exception in the case of infants and that an infant who had represented himself to be of full age and had sold property to the defendant by falsely representing himself to be of full age was estopped from subsequently pleading that the contract was void by reason of his minority and that he could not maintain his suit to set aside the sale on that ground. This ruling was followed in Dadasaheb Dasrath Rao v. Nahani [1917J 41 Bom. 480, where Beaman and Heaton, JJ. definitely dissented from the Calcutta view that a minor was not a "person" within the contemplation of Section 115, Evidence Act. At p. 483 it was remarked that the rulings to the contrary:

> reveal a constant confusion of thought between what is true estoppel and what may be that effect of fraudulent misrepresentation by a minor.... We are not, however, concerned with any considerations proper to the latter point, Estoppel is a law of allegation and proof and if we are right in our interpretation of Section 115 then defendant 2, being a "person" within the contemplation of that section and having by direct declaration intentionally caused the plaintiff to believe that he was a major, is precluded absolutely from denying the truth of that assertion, that is to say, he might not plead-much less prove-that at the time the conveyance was executed he was in fact a minor. The point is not, as seems too often to be assumed, what would be the effect upon such a transaction of minority as a fact, but it is this that if the law of estoppel be correctly and strictly enforced the Court is not to know that defendant 2 was in fact a minor at all. The whole trial must proceed upon the footing of that being true which he represented and caused the plaintiff to believe to be true, viz., that he was a major. Fraudulent misrepresentation is upon a totally different footing. In the large majority of cases of fraudulent misrepresentation it is the party who has suffered by it who desires the truth to be known and to obtain relief on that basis. That of course is a doctrine wholly outside the law of estoppel proper and should never be confused with it.

44. In Jasraj Bastimal v. Sadashiv Mahadev MANU/MH/0072/1921 : A.I.R. 1923 Bom 169, the plaintiff sued on a promissory note on which he had advanced money to the defendant who was under age at the time, but who had fraudulently represented himself to be a major. The plea of minority was not allowed to be urged and the defendant was held to be estopped, it being laid down that the fact that the present suit was for recovery of money and did not relate to immovable property, as Dadasaheb Dasrath Rao v. Bai Nahani [1917J 41 Bom. 480, did not make any difference, the rules of evidence being exactly the same with regard to suits relating to promissory notes. The principle of these rulings has also been accepted by the Bombay Court is Fazul Bhoy Jaffar v. Credit Bank of India Ltd. [1915] 39 Bom. 331, and Gurushiddswami v. P.D. Narendra [1920] 44 Bom. 175, though the actual decision in each of those cases proceeded on other points. It will thus be seen that the Bombay High Court has given full effect to the plea of estoppel, and has refused to put a narrow interpretation on the word "person" in Section 115 so as to exclude from its connotation all persons described under the Contract Act to be incompetent to contract.

45. This view has not, however, found favour in Calcutta. The first case of that Court which requires notice is Dhanmull v. Ram Chunder Ghose [1897] 24 Cal. 265 where Petheram, C.J., and Prinsep and Pigot, JJ., held that a suit to recover money advanced as a loan to an infant upon his false representation that he was of age could not be maintained against him there being no obligation binding upon him, which could be enforced upon the contract either at law or in equity. It was remarked that;

> no doubt an infant will not be allowed to take advantage of his own fraud and may be compelled to make specific restitution, when that is possible, of anything he has obtained by deceit. But this does not come within either principle. If we, as a Court of equity as well as of law, were to allow the plaintiff to recover in this suit, it would amount to restraining a defendant from setting up the plea of infancy in an action on a contract by reason of his having made a fraudulent misrepresentation dans locum contractui; and in no case has this ever been done.

46. It may be noted that though the loan in question had been secured on a mortgage, it was admitted at the Bar on behalf of both parties that the plaintiff was not entitled to a mortgage decree, and the dispute was confined to the right of the promisee to obtain a personal decree only. It is also noteworthy that the case was decided in 1890, but its publication was prohibited by order of one of the Judges constituting the Bench and it did not find its way in the Reports till 1897.

47. Next we come to the case of Saral Chand Mitter v. Mohun Bibi [1898] 25 Cal. 616 which was first heard by Jenkins, J., on the original side, whose judgment is printed at pp. 372 to 386 of the report. That was a suit to obtain a decree on a mortgage, which had been effected on the false representation made by the defendant that he was of age. It was pleaded by the defendant that notwithstanding his fraud, infancy was a complete answer to the claim. Jenkins, J. in, an exhaustive judgment held that the disability of the defendant could not be successfully used in defence of fraud. He accordingly passed a decree for the sum due recoverable only from the mortgage property. The learned Judge distinguished the case of Dhanmull v. Ram Chand Ghose [1897] 24 Cal. 265 on the ground that the only question before the Court in that case was the right of the mortgagee to obtain a personal decree and that his right to enforce the mortgage by foreclosure or sale had not been considered. It may also be mentioned that the learned Judge started with the assumption (which was in accord with the view then prevailing in Calcutta) that a contract entered into by a minor was not void but merely voidable. It is doubtful if the decision would have been the same, if the contract had been treated as void, which must now be the case in view of the Privy Council decision in Mohori Bibee v. Dharmodas [1903] 30 Cal. 539. The judgment of Jenkins, J., was appealed against and affirmed by Maclean, C.J., and Macpherson and Trevelyan, JJ., who doubted the correctness of Dhanmull v. Ram Chand Ghose [1897] 24 Cal. 265 and held;

> that in cases of fraud by an infant the protection which the law throws around him is taken away; in other words, that the defence of infants cannot be successfully pleaded in defence of a fraud perpetrated by the infant.

48. The question arose again before the same learned Judge (Jenkins, J.) presiding over the original side of the Court in Dharmo Dass Ghose v. Brahmo Dutt [1898] 25 Cal. 616, to which reference has already been made. There the plaintiff sued to have a mortgage-deed executed by him cancelled on the ground that at the time of its execution he was a minor. In reply the defendant mortgagee pleaded that the loan was

induced by a fraudulent misrepresentation as to his age, made by him to the defendant's attorney. It was, however, found as a fact that the said attorney had been made aware of the plaintiff's minority before the transaction was completed. No question of estoppel, therefore, really arose in the case. The learned Judge, however, proceeded to consider the point which had been raised before him that fraud and deceit were not necessary to the success of the defendant's plea of infancy and which was supported by Certain remarks in Ganesh Lala v. Bapu [1897] 21 Bom. 198. Dissenting from this view he held that the general law of estoppel as enacted by Section 115, Evidence Act, would not apply to an infant unless he had practised fraud operating to deceive, in which case the Court administering equitable principles will deprive a fraudulent minor of the benefit of a plea of infancy. As no fraud had been established in the case, the suit was decreed. The mortgagee's appeal was heard by Maclean, Prinsep and Ameer Ali, JJ., Brahmo Dut v. Dhurmo Dass [1899] 26 Cal. 381, who upheld the finding of fact of the trial judge that the defendant-appellant's attorney was not misled by the alleged representation by the plaintiff-respondent as to his age. The learned Judges, however, proceeded to consider the plea of estoppel and laid down the proposition that Section 115, Evidence Act, had no application to contracts by infants. At p. 88 the learned Chief Justice remarked:

> The term "person" in Section 115 is amply satisfied by holding it to apply to one who is of full age and competent to enter into a contract, and I cannot bring myself to think that it could have been the intention of the legislature by such a general expression, to institute such a grave change in the law of estoppel in relation to minors.

49. The point was further developed by Ameer Ali, J., at p. 394, in the following words:

> To hold that an infant may be estopped in regard to contracts by conduct or misrepresentation would be practically to sweep away all the limitations the law has imposed on the capacity to contract; and a person labouring under disability could be enabled to enlarge by his own act his legal capacity to contract. In the Liverpool Adelphi Loan Association v. Fairhurst (20), it was held that a person under a disability to contract was not, liable upon the contract, nor for a wrong arising out of or directly connected with the contract, and which is the means of effecting it and parcel of the same transaction. The same principle was followed in Bartlett v. Welles [1862] B. & S 386. It follows, therefore, that when the present law declares that an infant shall not be liable upon a contract, or in respect of a fraud in connexion with a contract, he cannot be made liable upon the same contract by means of an estoppel under Section 115.

50. As pointed out already this case went on appeal before the Privy Council in Mohori Bibi v. Dharma Das Ghose [1903] 30 Cal. 539 and was decided against the plaintiff on the ground that he knew the truth of the matter and consequently no question of estoppel really arose. At p. 545 Sir Ford North specifically stated that in view of this finding their Lordships did not think it necessary to deal with the question as to whether Section 115 applied to infants or not.

51. In Surendra Nath Roy v. Krishna Sakhi Dasi MANU/WB/0589/1910 : 15 C.W.N. 239 the vendor, while over 18 but below 21 years of age and being 'himself aware that his minority had been extended by reason of an order under Section 7, Guardians and Wards Act, had sold the property to the plaintiffs, who were not aware of that fact. Caspers and N.E. Chatterjee, JJ., remanded the case for enquiry, whether the vendee

was in fact deceived and whether there was misrepresentation and legal fraud on the vendor's part. They expressed the view that if such misrepresentation and fraud was in fact established, the quondam minor would be estopped from taking advantage of his minority to show that the conveyance by him was inoperative. But in the absence of such fraud he cannot be held liable. In Ram Charan Das v. Joy Ram Mejhi MANU/WB/0459/1912 : 17 C.W.N. 10 the point was again raised but not definitely decided, though Mukerji, J., expressed the opinion that the proposition that there can never be an estoppel against an infant, is too broadly stated and requires qualifications in the cases of fraud. The last Calcutta case is Golam Abdur v. Hem Chandra 20 C.W.N. 418, in which on the finding that the representation by the minor was not fraudulent, N.R. Chatterjee and Newbould, JJ., repelled the plea of estoppel and held that:

> the law of estoppel must be read subject to other laws such as the Indian Contract Act

and that a minor

> cannot be made liable upon a contract by means of an estoppel under Section 115, Evidence Act.

52. In view of their finding that the representation in that case was not fraudulent they did not think it necessary to decide whether a man can be estopped when the minor intended to deceive the opposite party and the latter was in fact deceived.

53. It will thus be seen that the rulings of the Calcutta Court on this point are not uniform. The balance of authority, how ever, appears to be in favour of the view that while generally speaking the plea of estoppel cannot prevail against a minor he may be estopped in cases where the representation made by him was fraudulent and has in fact resulted in defrauding the representee. It must, however, be borne in mind, as has been pointed out already, that the only considered decisions of that Court, in which this conclusion was arrived at, were given at a time when it was erroneously believed that a minor's contract was voidable and not void.

54. At Allahabad the question appears to have been first considered in Jagar Nath Singh v. Lalta Prasad [1909] 31 All. 21, where Banerji, J., held that:

> the law of estoppel can only be applied subject to other provisions of law, and therefore, when, as held by the Privy Council, a contract by a minor is void under the provisions of the Contract Act, the law of estoppel cannot be invoked in aid to validate that which is void under the law.

55. He, however, held that on equitable grounds the quondam minor must restore the benefit he has derived as a result of his fraudulent representation. But the learned Judge took care to point out that the liability to restitution attached to the minor, not on the ground of estoppel, but because "an infant shall not take advantage of his own fraud." The other member of the Bench, Richards, J., however, took a different view of the facts and held that the representation in question was not fraudulent. Another Bench of this Court (Richards and Tudball, JJ.) in Kanhaiya Lal v. Babu Ram [1911] 8 A.L.J. 1058 held that in a suit brought for recovery of money on a promissory note, the defendant was competent to plead his infancy although he had misrepresented his age to the plaintiff at the time of the execution of the promissory note. The same view was taken by Karamat Husain and Chamier, JJ. in Kanhaya v. Girdhari Lal [1912] 9 A.L.J. 103 and by Richards, C.J. and Banerji, J., in Dhara Singh v. Gyan Chand [1918] 16 A.L.J. 441, though in this latter case the High Court refused to set aside the decree

against the minor on the ground that the case had come up before it on the revision side.

56. The first Madras case which needs notice is Vaikunta Rama Pillai v. Authimoolam Chettiar [1915] 38 Mad. 1071, where, after citing with approval an obiter dictum to the same effect in Arumugam Chetti v. Durasinga Tevar [1914] 37 Mad. 38, it was held that the plain statutory provision that a minor is incompetent to incur a contractual debt cannot be overruled by an estoppel. Again in Raghavayya v. Subbayya [1918] 7 M.L.W. 124 Courts-Trotter and Seshagiri Ayyar, JJ., held that a sale-deed executed by a minor is liable to be cancelled by him after attaining majority, but that the Court before granting him possession can put him on terms. Reference was made to Leslie v. Shiell [1914] 3 K.B. 607 and Mahomed Syedol Ariffin v. Yeoh Ooi Gark A.I.R. 1916 P.C. 242; and the decision in Dadasaheb Dasiathrao v. Bai Nahani [1917) 41 Bom. 480 was dissented from. The same view was taken in Guruswamy Pantulu v. Budhkaran Lal [1919] 10 M.L.W. 225 though the point is not discussed in any detail. The latest Madras case is Venkataramayya v. Punnayya MANU/TN/0408/1925 : A.I.R. 1926 Mad. 607, where Reilly, J. followed, though not without hesitation, the previous rulings of the Court and repelled the plea of estoppel, but directed the quondam minor to refund the consideration retained by him.

57. The same view has also found favour with the Rangoon and Patna High Courts. See Maung Tin v. Ma Lun A.I.R. 1927 Rang. 108 and Ganganand Singh v. Ramashwar Singh A.I.R. 1927 Pat. 271. In the latter case, Das J., held (Adami, J. concurring) that a minor is not bound in law by a contract into which he had entered, even if he induced the other party to enter into it by a fraudulent misrepresentation that he was of age; but where the infant had obtained an advantage by falsely stating himself to be of full age, equity would restore his ill-gotten gains and release the party deceived from obligations or acts induced by the fraud. In order to create this liability, however, the representation must be express and fraudulent and will not be constituted so by mere inference suggested by or drawn from the infant's conduct.

58. The Sindh Judicial Commissioner's Court at Karachi for a time followed the decisions of the Bombay High Court and up held the plea of estoppel in several cases: see Sobhanmal Pohumal v. Bachal [1916] 9 S.L.R. 214 and Lunidomal Khiloomal v. Ghanumal Jamna Das [1920] 14 S.L.R. 104. But a Full Bench of that Court has recently taken the contrary view in Mt. Hari v. Roshan A.I.R. 1923 Sind 5, and has held that Section 115 is inapplicable to such a case.

59. The above review of the authorities shows that the consensus of judicial opinion in India is decidedly against giving effect to the plea of estoppel in such cases. This has been definitely ruled in Allahabad, Madras, Patna, Rangoon and Karachi; and the Calcutta. High Court, while taking the same view on the general question, has in some decisions qualified the proposition by holding that the minor may be estopped where the representation was fraudulent and the representee had in fact been deceived. In our own Court the rulings are not uniform, but the latest decision is in accord with the view taken by the majority of the other Courts. In the Bombay High Court, however, the contrary opinion still holds good, according to which the quondam minor is debarred from setting up the minority in avoidance of the contract. Now I may say at once that I have no hesitation in accepting the reason given by Beaman, J., in Dadasaheb Dasrathrao v. Bai Nahani [1917] 41 Bom. 480, for dissenting from the view taken by Maclean, C.J., and the other Judges of the Calcutta High Court in Brahmo Dutt v. Dharmo Das Ghose [1899] 26 Cal. 381 that the word "person" in Section 115 must be taken to have been used as meaning only a person sui juris. In my opinion neither the

context nor the general scheme of the Evidence Act nor the established canon of interpretation of statutes warrants such a restricted meaning being put on the word. In the absence of there being anything in the definition clauses or other parts of the Act to indicate that a technical meaning has been imposed on the word, it must be taken to cannot what it does in ordinary plain English. Secondly in S.. 115 itself the word "person" is found twice--at one place in reference to the representor (or the person of incidence as he is called by American lawyers) and at the other in reference to the representee (or the person of inference). Now it is not suggested that the legislature intended to use the same word in two different senses in the same section. If, therefore it has the same meaning in both places, and is to be taken to mean only a person sui juris, the startling result will follow that even in those cases in which the minor is the person of inference (representee) and has acted to his detriment on the belief of the representations made to him by an adult, he shall not be allowed to take advantage of the doctrine of changed situations and shall be debarred from putting forward the plea of estoppel against the opposite party. So far as I am aware such a contention has never been put forward and cannot possibly be accepted as correct. Then again we find the word "person" in several other sections of the Act, e.g., Sections 8, 10, 112, 116, 118, 122 etc, and it is conceded that in none of them it can be given a restricted meaning so as to exclude minors. This being so, the well-settled rule of construction must be applied that the same words are to be prima facie construed in the same sense in different parts of the same statute: per Chitty, J., in Spencer v. Metropolitan Board of Works [1883] 22 Ch. D. 142. I am, therefore, of opinion that Section 115 cannot be held to be inapplicable on this ground.

60. Nor am I prepared to accept the argument which seems to have appealed to the learned Judicial Commissioners of Sind in the Full Bench case, above cited, to the effect that as under Section 115 the representor must intentionally cause or permit another person to believe a certain thing to be true and to act upon such belief, and as it is only a person of mature judgment who can be supposed to have such an intention the section cannot apply to a minor. It will be sufficient to say that this construction is opposed to the decision of their Lordships of the Privy Council in Sarat Chander Dev v. Gopal Chander Laha [1893] 20 Cal. 296, where it was held that the term "intentionally" has been advisedly used in the Indian Act for the purpose of declaring the law in India to be precisely the same as the law of England, according to which it is not the real intention of the representor which matters, but what has to be seen is whether he has so conducted himself that a reasonable man would take the representation to be true end believe that it was meant that he should act upon it.

61. This brings us to the remaining but really substantial point, viz, whether the specific provision of the substantive law (Section 11, Contract Act), which declares a minor's contract to be void, can be rendered nugatory by a general provision embodying the rule of estoppel found in a procedural Code like the Evidence Act. In order to find a satisfactory answer to this question two fundamental principles must be borne in mind. The first is embodied in the great maxim generalia specialibus non derogant, which has frequently been applied to resolve the apparent conflict between provisions of the same statute or of different statutes. In such cases wherever there is a particular enactment and a general enactment and the latter, taken at its most comprehensive sense, would overrule the former, the particular statute must be operative: Pretty v. Solly [1857] 26 Beav 606 and its provisions must be read as excepted out of the general: Dryden v. Overseers of Putney [1876] 1 Ex. D. 223 and Taylor v. Corporation of Oldham [1877] 4 Ch. D. 395. The second is that where a particular act is declared to be void and unlawful by statute a party cannot by representation, any more than by other means, raise against him an estoppel so as to create a state of things, which he is under a legal

disability from creating. As pointed out by vice-Chancellor Bacon in Barrow's case [1880] 14 Ch. D. 432:

> The doctrine of estoppel cannot be applied to an Act of parliament. Estoppel only applies to a contract inter parties, and it is not competent to the parties to a contract to estop themselves or anybody else in the face of an Act of Parliament...I am of opinion that as between the parties to this contract there was no estoppel, they contracted to do a thing which in the result it was unlawful to do.

62. On the same principle it has been held that a corporate body cannot be estopped from denying that they have entered into a contract, which it was ultra vires for them to make: see Canterbury Corporation v. Cooper [1909] 100 L.T. 597.

63. In this connexion I think it is legitimate to seek guidance from the English law, for though in India the law on the subject of estoppel has been codified, it has been held by their Lordships of the Privy Council in Sarat Chunder Dev v. Gopal Chandar Lala [1893] 20 Cal. 296 that the law enacted in Section 115 relating to estoppel doer not differ from the English law on the subject. In Levene v. Brougham [1909] 25 T.L.R. 265 it has been held by the Court of appeal that such a contract being void under the Infants Relief Act, the defendant was not estopped from relying on the statute by the fact that he had made a misrepresentation as to his age. Then there is the much cited case of Leslie v. Shiell [1914] 3 K.B. 607 where, however, the question of estoppel was not raised or discussed, it being assumed that a suit to enforce the contract as such would not lie and the real points raised and decided were that in such a case an action delicto for damages on the basis of deceit will not lie, nor can the creditor recover from the defendant the amount as money "had and received" by him for the plaintiff's benefit. The Court of appeal, reaffirming the rule laid down in numerous cases that an infant is not answerable ex delicto, as the tort is directly connected with the contract, which the infant is entitled to avoid. Therefore, this case also supports, though indirectly, the conclusion arrived at in Levene v. Brougham [1909] 25 T.L.R. 265 and is of particular value as having been approved by the Privy Council in the obiter dictum in Mahomed Syedol Arrifin v. Yeoh Ooi Gark A.I.R. 1916 P.C. 242 already referred to.

64. I am, therefore, of opinion that both on principle and authority, the first question referred to the Full Bench must be answered in the negative and it must be held that the minor is not estopped from pleading his minority in avoidance of the contract. I wish, however, to remark that while this is my well considered opinion on the point I have arrived at it after a great deal of hesitation, for I find that there exist weighty considerations for the opposite view which has in support of it the high authority of eminent Judges in England, India and America and of several learned authors who have made a special study of the subject. In view of this serious divergence of opinion on the subject, I venture to think that it is high time for the legislature to intervene and set the controversy at rest as has been done in several States in America: see American Cyclopedia of Law in Procedure, vol. 32, p. 611 and Curpus Juris vol. 81, p. 1005, et seq. The question is frequently arising and in the absence of an authoritative pronouncement by their Lordships of the Privy Council there does not appear to be much chance of unanimity of judicial opinion on it.

65. The next question to be decided resolves itself into two parts:

> (a) Whether the quondam minor can avoid the contract and at the same time retain the benefit derived by him therefrom; and,

(b) whether the matter is in any way affected by the circumstances that he is a plaintiff or a defendant in the action in which the question arises.

66. On both these points again there is considerable conflict of judicial opinion though, speaking for myself, I do not feel the same difficulty here as I do on the first question. It has been argued for the appellant that the contract being void and the Court being incompetent to enforce it or to grant relief in an action ex delicto arising from the deceit practised by the minor, it follows as a matter of course that it has no jurisdiction to order restitution or repayment of the consideration for this would be doing the same thing in another garb. In my opinion this argument is fallacious and ought to be rejected. In ordering restitution the Court is not enforcing a void contract but is restoring the parties to the status quo ante. The necessary consequence of the declaration that the contract is void is to wipe it off entirely out of consideration, to treat it as if it never had any existence, and the Court, while granting the minor this relief is not powerless to adjust the equities between the parties and can make the fraudulent minor restore what he has obtained by the very contract which he is now seeking successfully to avoid. This is in accord with equity, justice and good conscience and appears to have been recognized for a long time by the Courts in England. It is no doubt true that there are dicta in several English decisions that this jurisdiction to make restitution in integrum is limited to those cases only in which it is possible to compel the minor to restore the property in specie which he had obtained by fraud and that the Courts, while holding a contract to be void, cannot order him to refund the money which he has received under it. It is not, however, necessary to discuss the decisions which bear on the point and which it is not always easy to reconcile as in India jurisdiction of Courts to require a party at whose instance an instrument has been adjudged to be void to make any compensation to the other party, which justice may require, has been expressly recognized by the legislature in Sections 39 and 41, Specific Relief Act. It will be noticed that this power to grant compensation is not confined to those cases only in which the instruments related to transfer of property, nor is the mode in which compensation is to be given defined. The discretion of the Courts in the matter seems to be absolutely unfettered. They might, therefore, in appropriate cases, while adjudging a deed, executed by a minor to be void, order refunds of the monetary consideration received by him under the contract and in addition make him restore any other benefit which he has derived therefrom.

67. It is no doubt true that Sections 39 and 41 relate to those cases only in which the minor is the plaintiff; but that does not affect the question of jurisdiction of the Courts to grant equitable relief, either by way of restitution of the property in specie or by refund of the money with or without interest. Of course, whether compensation is to be granted at all and if so to what extent and in what form are matters to be determined by the Courts in each particular case according to its peculiar facts and circumstances. But it does not seem to me to be open to doubt that the Courts in this country possess the powers to compel the fraudulent minor to restore the benefit derived by him from a void contract. This was recognized by Chief Court in Balak Ram v. Dadu [1910] 76 P.R. 1910 and, so far as I am aware, has been accepted all along as correct law: see also Kupura v. Hardit Singh, MANU/LA/0424/1923 : A.I.R. 1923 Lah. 510. 'The same view has been taken at Allahabad: see Jagan Nath Singh v. Lalta Parsad [1909] 31 All. 21, and Lila Dhar v. Piarey Lal MANU/UP/0364/1921 : A.I.R. 1921 All. 326, at Madras in Vikuntarama Pillai v. Authimoolam Chettiar [1915] 38 Mad. 1071, and Raghavyya v. Subhayya [1918] 7 M.L.W. 124, at Patna in Ganganand Singh v. Rameshwar Singh A.I.R. 1927 Pat. 271; and by the High Court of Calcutta in Saral Chand Mitter v. Mohun Bibi [1898] 25 Cal. 616.

68. It remains now to notice the subsidiary question whether the power of the Court to order restitution is limited to those cases only in which it has been moved by the minor himself; whether before or after attaining majority, or whether the Court can grant relief also when he is the defendant. On this question again the authorities are not uniform, but after giving the matter my fullest consideration I am of opinion that there is no justification for making such a distinction. It is no doubt true that Section 41, Specific Relief Act, relates to those cases only where the minor is the plaintiff, but its terms are not exhaustive and I fail to see why the equitable jurisdiction of the Court should be affected by the fact that the minor comes before it as a defendant. The Court exercises this power to do complete justice between the parties by restoring them to the position which they occupied before the' void contract was entered into and the mere circumstance, that the minor is arrayed before it on one side or the other, ought not to make any difference.

69. For the foregoing reasons my answer to the reference is:

(1) That in the circumstances stated in the question the quondam minor is not estopped from pleading his minority in avoidance of the contract.

(2) that he cannot in subsequent litigation refuse to perform the contract and at the same time retain the benefit which he had derived therefrom.

(3) It makes no difference whether in such litigation he is the plaintiff or the defendant.