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*Privy Council Appeal No. 102 of 1918.*

Ma Hnit and others - - - - - *Appellants*

*v.*

Hashim Ebrahim Meter and another - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, UPPER BURMA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 28TH OCTOBER, 1919.

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*Present at the Hearing :*

LORD ATKINSON.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* SIR JOHN EDGE.]

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This is an appeal from a decree, dated the 16th August, 1916, of the Additional Judge of the Court of the Judicial Commissioner, Upper Burma, which affirmed a decree, dated the 10th August, 1912, of the Additional Judge of the District Court of Magwe. Maung Po Ya and his wife Ma Hnit were originally the plaintiffs in the suit in which this appeal arises. Maung Po Ya has died, and Ma Hnit on her own behalf and as his legal representative has brought this appeal.

Maung Po Ya on the 24th March, 1909, by an agreement in writing contracted to sell to Hamed Ebrahim Madari an oil well No. 2076, at Natsin Quarter, Twingon, for Rs. 40,000, of which Rs. 5,000 were paid as earnest money, Rs. 15,000 were to be paid at the expiration of 45 days from the date of the agreement, and at the expiration of such 45 days for the balance of Rs. 20,000 and interest thereon, Madari was to re-mortgage for a term of six months to Po Ya two oil wells as security. The earnest money and the Rs. 15,000 were paid by Madari to Po Ya, and it was subsequently arranged between the parties that instead of the

mortgage Madari should give to Po Ya a promissory note for Rs. 20,000 and interest thereon. In pursuance of that arrangement, Madari on the 7th May, 1909, gave to Po Ya and Ma Hnit the following promissory note :—

“ Yenangyaung.

“ The 7th May, 1909.

“ The 4th Waning of Kason, 1271.

“ Rs. 20,000.

“ On demand we the undersigned Ali Hashim Meter and guardian, Fatima Bibi, do hereby promise to pay to Twinza Ko Po Ya and Ma Hnit or order the sum of Rs. 20,000 (twenty thousand) with interest at Re. 1/- per cent. per mensem.

“ Fatima Bibi,

“ Guardian of Ali Hashim Meter.

“ Ahmad Madari.”

It is stated in the appellants' case and may possibly be the fact that Maung Po Ya and his wife Ma Hnit were the owners of the oil well, but if they were, their legal title to the well was incomplete until after this suit had been instituted. Fatima Bibi, who is one of the respondents to this appeal, is the wife of Hamed Ebrahim Madari, and is stated in the respondents' case to have been a minor at the date of the note. Ali Hashim Meter is a nephew of Hamed Ebrahim Madari, and was a minor at the date of the promissory note. He is represented in this appeal by Hashim Ebrahim Meter, who is described as the guardian of Ali Hashim Meter, but their Lordships do not know whether or not Hashim Ebrahim Meter is the legally appointed guardian of Ali Hashim Meter. Their Lordships have been informed by Counsel that Ahmed Madari, who signed the promissory note, is Hamed Ebrahim Madari. Hashim Ebrahim Madari may be, and possibly is, Hamed Ebrahim Madari.

It is stated in the appellants' case that the promissory note was executed by Hashim (Hamed) Ebrahim Madari in the benami names of Ali Hashim Meter and Fatima Bibi. In a counter-claim, which will be again referred to, Hamed Ebrahim Madari alleged that he in the names of Ali Hashim Meter and Fatima Bibi had purchased the oil well from Maung Po Ya. However that may have been, the names of Ali Hashim Meter and Fatima Bibi do not occur in the agreement in writing of the 24th March, 1909.

The promissory note was dishonoured. Thereupon this suit, No. 13 of 1911, was brought upon the promissory note in the District Court of Magwe by Maung Po Ya and Ma Hnit against Ali Hashim Meter and Fatima Bibi to recover from them Rs. 21,160 principal and interest alleged to be due by them under the promissory note. In the plaint it was alleged that the “ two defendants had executed and signed ” the promissory note. Subsequently, on the 3rd February, 1912, Maung Po Ya presented a petition to the District Court, in which he stated :—

“ 1. In this case, in the presence of the first and second defendants, and with their consent, their representative Hamed Ebrahim Madari signed (the promissory note).

“2. Therefore, under Order VI, rule 17, I pray that I may be allowed to amend the plaint as follows, namely: ‘In the plaint I have stated that Ali Hashim Meter and Fatima Bibi signed; in place of this statement, insert the statement that in their presence and with their consent, their Attorney Hamed Ebrahim Meter signed.’”

Their Lordships do not know what order, if any, was passed on the petition of the 3rd February, 1912. It will be observed that the plaintiffs were suing on a promissory note alleged to have been made in their favour by a minor through his alleged guardian, and that the defendants are the minor and the alleged guardian, who apparently was a minor when the promissory note was made. There is nothing in the record before the Board to suggest how Fatima Bibi could have been even the natural guardian of the minor, or that she had been appointed by the Court his guardian in the suit, or how a minor could legally be a party to the contract.

No written statement appears to have been filed in answer to the suit by Ali Hashim Meter or by Fatima Bibi, but Hamed Ebrahim Madari, alleging himself to be the guardian of Ali Hashim Meter and of Fatima Bibi, filed on his own behalf a “cross claim,” which was a counter-claim, and it was admitted to the record of the suit as a counter-claim.

In his counter-claim, Hamed Ebrahim Madari referred to Maung Po Ya as the “defendant,” and alleged:—

“1. In suit No. 13 of 1911 of this Court, defendant (Maung Po Ya) has made a false claim against first defendant, Ali Hashim Meter, and second defendant, Fatima Bibi, on a promissory note. Defendant (Maung Po Ya) came to me and said that oil well No. 2076 at Natsin Quarter, Twingon, belonged to him and asked me to buy it outright for Rs. 40,000.

“Accordingly, on the 24th March, 1909, the 4th waxing of *Hnaung Tagu*, 1270, by mutual consent, the accompanying document (the agreement in writing of the 24th March, 1909) was executed and signed, and I paid Rs. 5,000 as earnest money, and then paid another sum of Rs. 15,000; total, Rs. 20,000.

“2. After the execution of the agreement and payment of the earnest money, Maung Po Ya asked me to execute a promissory note for the balance of Rs. 20,000 on interest at Rs. 1/- per cent. per mensem, and said that he would deliver the oil well No. 2076 to me by means of a registered document. I trusted him, and therefore signed the promissory note for Rs. 20,000 produced by Maung Po Ya in Court, the money being the balance of the price of the oil well which I had purchased in the names of my son (in fact, his nephew) Ali Hashim Meter, the first defendant, and my wife, Fatima Bibi, the second defendant, who is a *purda nashin* woman.

“3. After the execution of the promissory note, I asked Maung Po Ya to deliver the oil well No. 2076 to me. But Maung Po Ya said that he would deliver it to me by means of a registered document, only on my payment of the interest due on the promissory note for Rs. 20,000. Accordingly I had to pay him another sum of Rs. 4,000 as interest on that promissory note for Rs. 20,000.

“4. After the payment of the said Rs. 4,000 as interest, Maung Po Ya did not deliver the well to me. Therefore, in order to sue for the delivery of the well which I had already purchased and paid for I made enquiries in the office concerned, and found that the well No. 2076 belonged to one Maung Hla and not to Maung Po Ya. I therefore asked Maung Po Ya to repay Rs. 24,000, the earnest money and interest paid by me, and cancel the original agreement and the promissory note, but he would not do so. . . .

"7. Wherefore, I pray that the defendant's (Maung Po Ya's) suit against my wife and son (nephew) on the promissory note may be dismissed with costs, and that a decree, with costs, may be granted me directing defendant (Maung Po Ya)

" (a) To repay to me earnest money	...	20,000 Rs.
" Interest	... ..	4,000 ,,
" Total Rs.	... ..	24,000

and future interest."

The counter-claim is signed " Almed Ebrahim Meter, guardian of Ali Hashim Meter and for Fatima Bibi."

In the same suit (No. 13 of 1911) Maung Po Ya filed a written statement as a defence to the counter-claim. In his written statement Maung Po Ya challenged Madari's right to file a counter-claim in the suit thus :—

"1. In suit No. 13 of 1911, the plaintiffs are myself and Ma Hnit, and defendants are Fatima Bibi and Ali Hashim Meter. In the cross claim by Madari, I alone am made defendant. Thus the parties are not the same, and therefore the cross claim should not be made in the same suit. If plaintiff wishes to make any claim, he should institute a separate suit."

Maung Po Ya was apparently under the impression that if the parties to the suit and to the counter-claim had been the same, the Court would be competent to deal with the counter-claim on the merits. The Additional Judge of the District Court on the 29th April, 1912, framed the following amongst other issues :—

"1. Whether the defendants' cross claim was maintainable ?"

The ruling of the Additional Judge of the District Court on that issue is best given in his own words, as follows :—

"So far as the cross claim is concerned, it is admitted by the parties that the sum of Rs. 20,000 and interest paid by the defendants to Maung Po Ya were to account of the price of oil well, and as such the defendants' cross claim for return of the money is quite maintainable. This is my answer to first issue."

On the merits of the counter-claim the District Judge expressed himself thus :—

"According to the agreement, Exhibit I, the plaintiff, Po Ya, was to convey the well in the event of the defendants executing a mortgage of their two wells for Rs. 30,000 (Rs. 20,000 being balance due for purchase of the well in dispute and Rs. 10,000 was the amount for which the defendants have already mortgaged before the said two wells to Maung Po Ya), but both the parties admitted that the agreement to execute the mortgage on two wells was substituted by an agreement to execute a promissory note for Rs. 20,000 only, and that accordingly the defendants executed the promissory note for Rs. 20,000, and have since paid interest. The defendants have therefore performed their part of the contract embodied in the agreement, Exhibit I, and this fact is also established by the said agreement being in the possession of the defendants. It now remains for the plaintiff, Maung Po Ya, to perform his part of the contract by conveying the well to defendants, but there was not a particle of evidence to show that he ever offered the well. In fact, he was not in a position to transfer the well until a few days after the institution of this suit, when the well was transferred

into his name. . . . The act of Po Ya in delaying the transfer of the well to the defendants for so long a period as over two years after the execution of the promissory note, Exhibit A, therefore amounts to failure on his part to perform his part of the contract and as such the agreement, Exhibit I, becomes voidable at the option of the defendants, and Po Ya is now bound to return all the money which he has received from the defendants to account of the well."

As to the claim on the promissory note, the Additional District Judge expressed himself thus :—

"Further, considering that the well has not been conveyed as yet to the defendants, and that no mention was made in the plaint that Po Ya had any intention of making over the well before he is actually paid for the promissory note, Exhibit A, I hold that the promissory note was one without consideration, and the plaintiffs' claim on the said promissory note must under any circumstances fail."

The Additional District Judge dismissed the suit, and on the counter-claim made a decree for the defendants to the suit against Maung Po Ya for Rs. 23,800 with costs.

The plaintiffs appealed to the Court of the Judicial Commissioner, Upper Burma. Before the appeal was heard, Maung Po Ya died and his widow Ma Hnit was duly appointed his legal representative. The Additional Judicial Commissioner did not consider whether the counter-claim was competent, and taking the same view of the facts and the law as had been taken by the Additional District Judge, he dismissed the appeal. From that decree this appeal has been brought.

Each of the Courts below omitted to consider whether a minor is a person competent to contract. Under the Indian Contract Act, where a minor purports to contract his alleged contract is void and not merely voidable ; he is a person who is not competent to contract. See *Mahori Bibi and another v. Dhurmodar Ghose*, 30 I.A. 114. See also *Mir Sarwarjan v. Fakhruddin Mahomed Choudhuri and others*, 39 I.A. 6. Ali Hashim Meter certainly was a minor, and Fatima Bibi apparently was a minor when the promissory note was made. The suit should have been dismissed on that ground if there was no other ground for dismissing it. Although the appointment by a Court of a guardian for the suit of a minor defendant sued on a contract which purported to have been made by him would not get over the difficulty that he was incompetent to contract, no guardian for the suit appears to have been appointed by the Court, although each of the Judges below ought to have seen from the proceedings before them that Ali Hashim Meter and Fatima Bibi were minors. They ought to have observed that Hamed Ebrahim Madari described himself in his counter-claim as their guardian. These Judges ought also to have considered the form of the promissory note upon which Fatima Bibi was sued as a principal, and whether, even if she had been of full age at the date of the promissory note, she had made herself liable on it.

Even assuming for the purpose of argument, but not deciding, that the practice as to filing of counter-claims is the

same in India as in England, this counter-claim is bad, inasmuch as Hamed Ebrahim Madari, who counter-claimed, is not a defendant to the suit.

Their Lordships will humbly advise His Majesty that this appeal so far as it relates to the dismissal of the suit should be dismissed, and that so far as it relates to the counter-claim should be allowed, and the counter-claim be dismissed with costs in the Courts below. There will be no costs of this appeal.

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In the Privy Council.

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MA HNT AND OTHERS

vs.

HASHIM EBRAHIM METER AND ANOTHER.

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DELIVERED BY SIR JOHN EDGE.