

Analyzing the contracts of marriages from the lens of
R. Fernandez v. J. Gonsalves

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KEY REFERENCES

- *R. Fernandez v. J. Gonsalves* AIR 1925 Bom 97.
- *Prem Adib v. Raj Rani* AIR 1949 (36) Bom 215
- *Khwaja Muhammad Khan v Husaini Begam* I.L.R. (1910) All. 410
- *Balfour v. Balfour* [1919] 2 K.B. 571 CA

ABSTRACT

The case of *Fernandez v. Gonsalves* is a fascinating study of consent, capacity, and consideration in Indian Contract Law. While the case upholds the necessity of having a valid consideration for the performance of any promise, it also offers a polarizing approach on the aspect of consideration. As consideration need not flow from the promisee, a question which arises is whether the consent of the third party from whom the consideration flows is essential for the performance of the contract. This paper analyzes the enforceability of a contract of marriage and the repercussions of the immateriality of consent of the third party while enforcing performance of the contract.

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INTRODUCTION

The judgement of *R. Fernandez v. J. Gonsalves*² (henceforth referred to as '*Fernandez*')³ was delivered on 14th July 1924. The plaintiff was Rose Fernandez (represented by advocate Poonawala) and the defendant was Joseph Gonsalves (represented by advocate Judah). The judgement was delivered by Taraporewala, J in the Bombay High Court. The case primarily deals with a minor's right to enforce a contract of marriage and the Doctrine of Privity, where the petitioner is not a party to the agreement. The plaintiff, who had attained the age of majority at the time of filing the suit, sought to recover damages from the breach of a contract of marriage, which the defendant had entered into with the plaintiff and her father. The judgement clearly states the facts of the case-

“The plaintiff's father and the defendant were employed in the docks and thus the defendant came to know the plaintiff. He asked the plaintiff's father to give the plaintiff in marriage to him and he also asked the plaintiff to marry him. Both plaintiff and plaintiff's father agreed. This was about a month or so before the writing of May 26, 1919, passed by the defendant. It appears that on that day the defendant desired that the plaintiff should go out with him as his fiancée. The plaintiff's father objected. Thereupon the defendant passed the writing..., whereby he agreed to marry the plaintiff within two years and to pay Rs. 2,000 by way of damages if he failed to do so. He gave the said writing to the plaintiff's father as the natural guardian of the plaintiff, and the plaintiff's father thereupon allowed the plaintiff to go out with the defendant as desired by him.”

The defendant breached the contract in 1921 by marrying another lady and the plaintiff sought damages from this breach. It must be noted that the suit was filed in the very same year, 1921, by which time the plaintiff had attained majority, although she was a minor when the contract was made.

The court was presented with several issues, primarily concerning privity and capacity. However, this essay will only focus on the treatment of contracts to marry in context of its binding effect on the minor, and the consequences this decision has on family and personal law, the idea of consideration under S. 2(d) and the glaring gaps which the judgement leaves in its ratio, while comparing the facts and the decision.

THE ASPECT OF BENEFIT WHICH MIGHT BIND A MINOR

The judge holds that there was a contract of marriage between the defendant and the plaintiff's father, who was acting as the minor's guardian on her behalf. Having cited *Mohori Bibee v. Dharmodas Ghose*⁴ ('*Mohori Bibee*') in the judgement, Taraporewala, J. upholds that the contract with a minor is void. Therefore, the only other alternative which exists is that the

² *R. Fernandez v. J. Gonsalves* AIR 1925 Bom 97 (India).

³ In this essay, the word Section has been abbreviated as 'S.' and all Sections pertain to The Indian Contract Act, 1872.

⁴ *Mohori Bibee v. Dharmodas Ghose* (1903) 30 ILR Cal. 539 (India).

agreement between the plaintiff's father and the defendant should be valid for such marriage to be enforceable. The precedent of *Mohori Bibee* is open to several interpretations. S. 11 of *The Indian Contract Act 1872* (henceforth referred to as 'the Act') clearly states those who have capacity to contract- an important requisite being that the contracting party must have attained the age of majority. S. 10 declares that the contracts, entered by those parties not competent to contract, shall be void. *Mohori Bibee* enunciates the contract with a minor to be void *ab initio*.

The other requirements of S. 10 of the Act for both these cases are fulfilled as there is free consent for lawful consideration and object. The discrepancy between *Mohori Bibee* and this case lies because *Mohori Bibee* was a contract of property while *Fernandez* is a contract of marriage. While *Mohori Bibee* does not have a third party involved, *Fernandez* does. The plaintiff was a third party from whom consideration, in the form of the very act of getting married to him, moved towards the defendant at his desire. S.11 of the Act deals only with the competency of the parties in a contract, not with third parties. Thus, as there is no explicit mention of the capacity of the third party to provide consideration to the promisor in a contract, the minor's act of marriage could be considered as valid consideration being provided for the promise, despite the age of the minor. Also, as another consideration involves the guardian's promise to have his daughter married, which places an obligation on the third party (the minor plaintiff), which is binding in nature. Taraporewala, J. examines whether a contract, where the minor is not a party, can bind a third party, the third party being a minor. The court examines the case of *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*⁵ whether it was held that a contract entered by a guardian could not be made binding on a minor. That case however also dealt with a transfer of property. This is a case where marriage is concerned. Usually, Common law permits that guardians can make contracts for the benefit of the minor, as mentioned in *Holt v. Ward, 1732*⁶. The primary concern is whether marriage will be considered a 'benefit' for the minor.

The benefit in this case is determined not by legal precedents and judicial doctrines, but by a basic understanding one derives from other disciplines, primarily history and sociology. The judgement must be analyzed in context of the Indian society pre-independence. Child marriage was a common phenomenon. It might seem draconian and against the interest of public policy in today's developed society, but the judgement was given considering the common rituals and traditions practiced in the society of 1920s. The judge clearly states that marriage is considered a "sacred and essential duty of the parents and guardians, particularly of girls, to see that they settle down in life by proper marriage." The judge remarks that it is more common for women in the society to get married and serve in domesticity rather than take up a profession, the latter scenario mostly being visible in the 'advanced communities'. The judge also remarks that this inference is drawn from the 'opinion of the majority in this country', who earnestly believe that women should be married after an age and 'discharge the duties of wife and mother, which are essential to the well-being of the community'. The inference might seem misogynistic, but it must

⁵ *Mir Sarwarjan v. Fakhruddin Mohamed Chaudhuri* (1911) 39 Cal. 239 (India).

⁶ *Holt v. Ward* [1732] 2 Starn.,937

be noted that a judgement is often delivered after considering the social and cultural factors at play and how apt the case would be to the society at large, which is why sometimes, a woman can be forced to enter into a contract of marriage which is deemed socially acceptable.

As this is a contract of marriage, there is a conflict between the Indian Contract Act and the personal law governing marriages in that the community, *The Indian Christians Marriage Act, 1872*. A takeaway from this judgement is that the judge does not refer to this personal law which can also imply that “Indian courts struggled with the implications of these decisions as they ran against traditional practice and personal law of the Hindus and Muslims.”⁷ Though this judgement does not deal with the provisions of the personal laws, it upholds the traditional practice among Hindus and communities following Hindu customs. The judge also admits the dilemma he faces as the parties are Christians, but his reasoning might imply that he chooses the customs prevalent in the region amongst most communities rather than customs prevalent in that religion across the world. The judge also investigates the ethnic background of the parties involved. The plaintiff is a ‘Goan Roman Catholic’ and the defendant is an ‘East Indian Roman Catholic’. The judge comments that the parties were from communities who have ‘converted from Hinduism’, and therefore they still observe many customs ‘which prevail among Hindus’. Though such religious conversions took place several years ago among the communities in question, some primary customs are still prevalent and practiced in both ethnicities- one being that ‘marriage is considered to be a primary duty of the parents of a girl’. The judge observes that the common custom prevalent is having the daughter in a family married by the age puberty sets in. It is also observed in the judgement that the situations of England and India cannot be compared, considering the ‘difference between the social customs and manners of people’. Marriages of girls in any Indian family involves greater hardship and if this particular contract between the plaintiff’s father is not held valid, then the following might be the repercussions- a) No one would enter into a contract of marriage as a fear or apprehension might exist that the ‘other party may at any time put an end to it without incurring any liability’. b) As most girls get married in their adolescence (when they are minors) and if such contracts of marriages are declared void or invalid, then it skews the chances of ‘another good match’ in the future.

This author believes that this aspect of the ruling can be opposed as the personal laws for Christians already exist, especially the *Indian Christians Marriage Act, 1872*. However, the judge only applies principles of contract law and does not acknowledge the personal law. What is even more appalling is that the decision to treat Christians as a community who still practice Hindu traditions and thus use the approach one would have used for Hindu parties, although the parties clearly state they have converted to Christianity and should be governed by principles of Christian personal laws and practices. The argument of differentiating Indian and English law would have been valid if the parties were Hindus, as the religion and personal laws are quite irrelevant in

⁷ Shivprasad Swaminathan & Ragini Surana, *Minors’ Contracts: A Major Problem with the Indian Contract Act, 1872*, 10 Statute Law Review 1 (2018).

England. However, the parties are Christians and therefore, the universal presence of the religion in both the places make this reasoning weak.

Taraporewala, J. finally says that it would be ‘revolutionizing’ on his part to hold that the natural guardian of the minor couldn’t enter into a contract of marriage for the benefit of the minor, as the normalcy and perpetuity of a common social norm would be broken. Therefore, the contract of marriage, for the benefit of the minor, between the plaintiff’s father and the defendant was held valid and binding on the minor. This raises an important question- can contract law be considered in matters of family and domestic relations? The choice of the word ‘revolutionizing’ might be deemed as an exaggeration in today’s context as no such contracts are formed which bind the minor to marriage, due to the abolishment of child marriage and establishment of age limits; but, in the 1920s, it was customary for the parents to have their wards married. This author believes that marriage was more of a social ritual than an individual choice of the couple. Therefore, if one considers domestic relations and follows *Balfour v. Balfour*⁸, then the arrangements between a husband and wife will not be considered as legally binding. However, in the opinion of this author, if the conditions in India are examined, then it will be noticed that the prevalent patriarchal system often makes women the target of unanticipated and prejudiced injustices in their domestic and social lives, for which the woman must be allowed to seek the legal remedy.

BENEFIT AND CONSIDERATION

The aspect of benefit was also dealt with in the case of *Raj Rani v. Prem Adib*⁹(‘*Prem Adib*’). The contract in dispute was a contract of services which the plaintiff’s father had entered with the defendant. The plaintiff, a minor, was to work in the film sets of the defendant for specified wages for a year. However, the defendant refused to pay the minor after 2 months from the formation of the contract. In the ratio *decendi*, Desai, J. in the Bombay High Court¹⁰ compared the contracts of service binding a minor with the contracts of apprenticeship and marriage which also bind a minor. The question of ‘benefit’ was explored and in the judgement of *Prem Adib*, it was held that a contract of apprenticeship can be binding on the minor under *The Apprentices Act, 1850* as the purpose for such contract was to provide technical and special knowledge which would be beneficial to the minor in the long run. However, the same could not be said for marriages and services. No such statutory provision exists for services and marriages, and in both cases, the ‘benefit’ received by the minor will be considered. For understanding the distinction in the judgement, the purpose of each of the contracts must be analyzed. Apprenticeship contracts are meant for training and vocation, contracts of services are in the form of a bargain or monetary transaction. A contract of marriage is not a mere bargain, it has social and cultural implications. Marriage is a significant domestic and social phenomenon for the individuals, their families and

⁸ *Balfour v. Balfour* [1919] 2 K.B. 571 CA

⁹ *Raj Rani v. Prem Adib* AIR 1949 (36) Bom 215 (India).

¹⁰ *Khwaja Muhammad Khan v Husaini Begam* I.L.R. (1910) All. 410, 12 Bom. L.R. 638 (India).

the community they belong to. With marriages and services, the natural guardian does not always have the position of a 'trustee' to bind the minors into contracts of services and marriages.

The aspect of consideration was thus explored. S. 2(d) of the Act requires consideration in the form of an 'act, abstinence or promise' to move from the 'promisee' or 'any other person' at the 'desire of the promisor'. In fact, if the contract of marriage between the plaintiff's father and the defendant is valid, then the consideration on behalf of the plaintiff's father involves a promise of having his daughter married to the defendant within 2 years. As consideration can move from a third party towards the promisor, the minor's act of marriage would be valid consideration, especially because of the social factors. The reason is further explained towards the end while determining damages. The defendant's advocate had argued that the plaintiff was too young to be affected by such breach, due to which damages should be reasonably low. The judge however clearly denotes that thirteen or fourteen years of age is quite significant for her prospects of marriage and the minor was 'grown up' enough to understand the importance of marriage in her society, and she has to rely on her guardian to enter a contract of marriage as she does not have the legal capacity. It must be noted that consent was mutual as the plaintiff had already agreed to the marriage when the defendant had inquired.

CONSENT OF THE THIRD PARTY

The case raises an important question on the consent of the third party. S.2(d) states that consideration can be provided by third parties, however the section is silent on whether the element of free consent (requisite for parties to a contract under S.10 of the Act) needs to be present even in the case of a third party providing consideration at the desire of the promisor. Here, the element of force perhaps might not be accounted for, owing to the social practices prevalent in those times where the guardian had a social obligation to have the daughter married at an age to a suitor who was accepted by the guardian. The present times have clear age restrictions for marriage; however, the period being analyzed here lack such restrictions. Therefore, the minor's act of marrying the defendant at the latter's desire is regarded as acceptable consideration. This is in contrast to the judgement of *Prem Adib*, where it was held that the guardian's promise to engage the minor for employment was not valid consideration, neither was the minor's act of performing the contract as the minor cannot be bound by a contract of services, unlike contracts of marriages and apprenticeships. Therefore, the main conclusion which one can arrive by comparing the cases of *Fernandez* and *Prem Adib* (where the judgement of *Fernandez* was binding as it was a precedent of the same court) is that the contracts of marriage and apprenticeship entered into by the minor's guardian will be valid consideration and binding on the minors as the aspect of future 'benefit' can be attributed to such a contract, while a contract of services need not bind the minor to perform such obligations.

While discussing consent of the minor, it is important to also look at a hypothetical scenario. Suppose the minor had refused consent for the marriage, and despite refusing, she was forcefully

married. Had she sued for the marriage to be dissolved under family law, would the court honour a perfectly valid contract? There are no clear answers to this. If the minor refuses the marriage, the defendant should be entitled to damages from the plaintiff's father following the strict principles of breach in contractual arrangements¹¹. If this is the case, any third party can refuse providing consideration to the promisor in a contract, if it deems that such consideration is being provided without its consent. If the third-party refuses to perform their part in a contract (to which they are not privy), then the liability has to be borne by the promisee. In case of a failure to perform the promise by the minor's guardian, the guardian shall be held liable for the damages and not the minor. And, if the minor has performed their part of the contract and the adult party hasn't, then the minor might enforce the performance of such contract under *Fernandez*, provided there is a social aspect involved.¹²

CONCLUSION

Therefore, to conclude from the above evidence, this essay claims that holding the contract of marriage beneficial and binding upon the minor shows the flawed treatment of the contract law in a matter that also concerns family law. The *ratio decendi* reveals several loopholes and conflicts in determining the validity of the consideration moving from a minor. The case also serves as an example that reveals a lacuna in the interpretation of S. 2(d) of the Act regarding the element of free consent of the third parties providing consideration to the promisor. Ultimately, the case is an interesting study in the field of law and society, whereby statutory interpretation is influenced by the presence of certain social norms and practices.

¹¹ The Indian Contract Act, 1872, § 73.

¹² Muhammad Omar v. Budha (1906) P.R. 3.