



2015

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Wadhwa, Anirudh (2015) "Mathai Mathai v. Joseph Mary: A Step Backwards?," *National Law School Business Law Review*. Vol. 1: Iss. 1, Article 10.

Available at: <https://repository.nls.ac.in/nlsblr/vol1/iss1/10>

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MATHAI MATHAI V. JOSEPH MARY: A STEP BACKWARDS?

*Anirudh Wadhwa**

Indian law relating to contracting with minors has remained fundamentally unchanged since the 1903 decision of the Privy Council in Mohori Bibee v. Dharmodas Ghose, ILR (1903) 30 Cal 539 (PC). Subsequent High Court decisions carved out certain exceptions to the rule in Mohori Bibee, the most important of which was the “executed contract” exception which implied that contracts which were completely executed on the minor’s side so that there were no further liabilities on his part, could be enforced by the minor for the reason that nothing further remained to be done by him. In the recent decision of Mathai Mathai v. Joseph Mary, (2015) 5 SCC 622 the Supreme Court has revisited this area of law and has done away with the executed contract exception to Mohori Bibee as being based on an “erroneous interpretation” of Mohori Bibee. This note examines the legal import of the decision in Mathai Mathai, and in particular, whether that decision necessarily follows from the decision in Mohori Bibee.

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INTRODUCTION

Indian law relating to contracting with minors has remained fundamentally unchanged since the 1903 decision of the Privy Council in *Mohori Bibee v. Dharmodas Ghose* (“*Mohori Bibee*”).¹ Subsequent High Court decisions carved out certain exceptions to the rule in *Mohori Bibee*, the most important of which was the “*executed contract*” exception. In the recent decision of *Mathai Mathai v. Joseph Mary* (“*Mathai Mathai*”),² the Supreme Court has revisited this area of law and has done away with the executed contract exception to *Mohori Bibee* as being based on an “*erroneous interpretation*” of *Mohori Bibee*. In this note, I examine the legal import of the decision in *Mathai Mathai*, and in particular, whether that decision necessarily follows from the decision in *Mohori Bibee*.

The structure of the note is as follows – in Part I, I provide a brief introduction of the law relating to contracts with minors. In Part II, I analyse the decision of the Privy Council in *Mohori Bibee*, which remains the *locus classicus* on the subject in Indian law. In Part III, I analyse the various exceptions to the *Mohori Bibee* rule developed through the years by the various High Courts. In Part IV, I analyse the decision of the Supreme Court in *Mathai Mathai*, and I conclude in Part V with some comments.

I. THE LAW ON CONTRACTING WITH MINORS

The law provides certain special rules for contracts with minors. The presumption is that minors are legally incompetent to give consent, and thus, are in need of protection in their dealings with other persons. Under common law, two basic principles can be said to govern the law relating to contracts with minors – *first*, a minor is legally incapable of contracting as he is unable to provide the requisite consent, and thus he is required to be protected in his dealings with other persons. *Second*, the law must mitigate the hardships that come with this rule so that adults dealing fairly with minors are not caused unnecessary hardships. Under this principle, certain contracts with minors are valid and enforceable, yet others are voidable at the option of the minor.³ English common law also stands modified by statutes that deal with the subject.⁴

¹ *Mohori Bibee v. Dharmodas Ghose*, ILR (1903) 30 Cal 539 (PC).

² *Mathai Mathai v. Joseph Mary*, (2015) 5 SCC 622 : .

³ See Trietel, THE LAW OF CONTRACT, ¶ 12-002 (Edwin Peel ed., 12th edn. 2007).

⁴ See Minors’ Contract Act, 1987 (Eng.).

Indian law however, is slightly different, being codified in Sections 10, 11, and 68 of the Indian Contract Act, 1872 (“Contract Act”). Section 10 of the Contract Act provides that “*all agreements are contracts if they are made by the free consent of the parties competent to contract...(emphasis supplied)*”⁵ Section 11 of the Contract Act provides that “*every person is competent to contract who is of the age of majority according to the law to which he is subject...(emphasis supplied)*”⁶ Under Indian law, the age of majority is regulated by the Indian Majority Act, 1875. Section 3 of that Act provides that “*every person domiciled in India shall be deemed to have attained his majority when he shall have completed his age of 18 years.*” In case however, a guardian has been appointed with respect to a minor, this age of majority is deemed to be attained on completing the age of 21 years.⁷ Section 68 of the Contract Act deals with contracts for necessities, and provides that “*if a person, incapable of entering into a contract... is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.*”⁸

A literal reading of the provisions, particularly Section 11, requires being of the age of majority according to one’s personal law as a necessary element of contractual capacity. However, the language leaves unclear the nature of agreements entered into by minors since Section 11 approaches the issue from the standpoint of *capacity* and not *incapacity*. Prior to 1903 therefore, there existed confusion as to whether such agreements with minors were void or merely voidable. It was in the context of this legal uncertainty that the issue arose in 1903 before the Privy Council in *Mohori Bibee*.

⁵ S. 10, Indian Contract Act, No. 9, Acts of Parliament, 1872 [hereinafter “Contract Act”] states –

“What agreements are contracts.—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.”

⁶ S. 11, Indian Contract Act, 1872 states – “Who are competent to contract.—Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.”

⁷ S. 3, Indian Majority Act, No. 9, Acts of Parliament, 1875.

⁸ S. 68, Indian Contract Act, 1872 states –

“Claim for necessities supplied to person incapable of contracting, or on his account.—If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.”

II. UNDERSTANDING THE DECISION OF THE PRIVY COUNCIL IN *MOHORI BIBEE*

The facts of *Mohori Bibee* are as follows – the agent of the defendant advanced money to the plaintiff, a minor. This advance was secured by mortgage of a property belonging to the plaintiff. The plaintiff subsequent to receipt of the money, commenced an action to get the mortgage declared as void. It was proved during the course of trial that the fact of infancy of the plaintiff was within the knowledge of the agent of the defendant, and the same was thus attributable to the defendant. There was therefore no question of the defendant being misled by any false statement made by the plaintiff. The argument made by the defendant was however that the cancellation of the mortgage could not be ordered without ordering the plaintiff to repay the defendant the sum paid to him as part of the consideration for the mortgage. In support of this contention, the defendant relied upon Section 64 of the Contract Act that requires restitution from the party at whose option a contract is voidable and who so lawfully rescinds such “*voidable contract*.”⁹ The Privy Council analysed the issue of whether the remedy of restitution under Section 64 applicable to a “*voidable contract*” is also available in a case where the defence of infancy is raised, and noted that the same would turn on whether contracts with a minor are treated as void or merely voidable. In this context it was held –

“The general current of decision in India certainly is that ever since the passing of the Indian Contract Act (IX, of 1872), the contracts of infants are voidable only. This conclusion, however, has not been arrived at without vigorous protests by various judges from time to time, nor indeed without decisions to the contrary effect. Under these circumstances, their Lordships consider themselves at liberty to act on their own view of the law as declared by the Contract Act, and they have thought it right to have the case reargued before them upon this point. They do not consider it necessary to examine in detail the numerous decisions above referred to, as in their opinion the whole question turns upon what is the true construction of the Contract Act itself. (sic)”

⁹ S. 64, Indian Contract Act, 1872 states –

“Consequences of rescission of a voidable contract.—When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is the promisor. The party rescinding a voidable contract shall, if he had received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.”

The Privy Council contrasted the foundation of the rule in Indian law as being distinct from that in common law and held –

“Their Lordships observe that the construction which they have put upon the Contract Act seems to be in accordance with the old Hindu Law as declared in the laws of Manu, ch. viii. 163; and Colebrooke’s Dig. iii. 2, vol. ii. p. 181; although there are no doubt, decisions of some weight that before the Indian Contract Act, an infant’s contract was voidable only in accordance with English law as it then stood. (sic)”

On this premise, and upon an analysis of the wording in the provisions of the Contract Act, the Privy Council in *Mohori Bibee* held that contracts entered into by minors are void and not merely voidable in these terms –

“Looking at these sections, their Lordships are satisfied that the Act makes it essential that all contracting parties should be “*competent to contract*,” and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. This is clearly borne out by later provisions of the Act. Section 68 provides that, “*if a person incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.*” It is beyond question that an infant falls within the class of persons here referred to as incapable of entering into a contract, and it is clear from the Act that he is not to be liable even for necessaries, and that no demand in respect thereof is enforceable against him by law, though a statutory claim is created against his property... The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant. Their Lordships are, therefore, of the opinion that in the present case there is not any such voidable contract as is dealt with in Section 64. (sic)”¹⁰

The Privy Council also rejected the argument that restitution or compensation could be possible under Section 65 of the Contract Act,¹¹ which is

¹⁰ *Mohori Bibee v. Dharmodas Ghose*, ILR (1903) 30 Cal 539 (PC).

¹¹ S. 65, Indian Contract Act, 1872 states –

“Obligation of person who has received advantage under void agreement, or contract that becomes void.—When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.”

applicable where an “*agreement is discovered to be void, or when a contract becomes void*” and held –

“A new point was raised here by the appellants’ counsel, founded on s. 65 of the Contract Act, a section not referred to in the Courts below, or in the cases of the appellants or respondent. It is sufficient to say that this section, like s. 64. starts from the basis of there being an agreement or contract between competent parties, and has no application to a case in which there never was, and never could have been, any contract.”¹²

III. EXECUTED CONTRACT EXCEPTION TO *MOHORI BIBEE*

Mohori Bibee appears to lay down an uncompromising rule. Contracts with minors are void *ab initio*, and even the provisions under the Contract Act requiring restitution are not applicable in such cases because they presume existence of an agreement or contract between competent parties.¹³ This may be contrasted with the position in common law, where contracts with minors are, in general, voidable at the instance of the minor, though binding upon the other party. Exceptions to this rule in common law are contracts for necessities, and certain other contracts such as contracts of service and

¹² *Mohori Bibee v. Dharmodas Ghose*, ILR (1903) 30 Cal 539 (PC).

¹³ In case however a person is subject to a fraud orchestrated by a minor, the Court can in *equity* order restitution from the minor. This was also recognised in *Mohori Bibee*, however the Court did not so order because it was held, as a matter of fact, that the Defendant had specific knowledge of the infancy of the Plaintiff. In this context one may note S. 33 of the Specific Relief Act, 1963, which lays down the statutory rule requiring restitution in case either the Plaintiff or the Defendant pleads lack of competency to contract. *See* S. 33, Specific Relief Act, 1963 which states –

“Power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable.—

- (1) On adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted, to restore, so far as may be any benefit which he may have received from the other party and to make any compensation to him which justice may require.
- (2) Where a defendant successfully resists any suit on the ground—
 - (a) that the instrument sought to be enforced against him in the suit is voidable, the court may if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it;
 - (b) that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under section 11 of the Indian Contract Act, 1872 (9 of 1872), the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby.”

apprenticeship, if they are clearly for the minor's benefit – such contracts are good and binding upon an infant.

One situation however where the rigour of *Mohori Bibee* was held not to apply was the case of executed contracts. It was in fact the rule even prior to *Mohori Bibee*, that contracts which were completely *executed* on the minor's side so that there were no further liabilities on his part, could be enforced by the minor for the reason that nothing further remained to be done by him. The decision of the Court in such cases only operated to confer rights and not liabilities upon the minor and as such only protected the interests of the minor. Thus, it was held by the Bombay High Court as far back as 1888, that a minor could sue under a bond in his own favour.¹⁴ This exception continued even subsequent to *Mohori Bibee*. For instance, a Full Bench of the Madras High Court held in *A.T. Raghava Chariar v. O.A. Srinivasa Raghava Chariar*¹⁵ that a mortgage in favour of the minor, where he has advanced the whole of the mortgage amount, could be enforced by him. This was also the position taken by the Patna High Court.¹⁶ These cases of executed contracts may be distinguished from a case where the contract is merely executory and thus imposes obligations upon the minor; for instance, in *Pramila Balidas*, it was held that a lease in favour of a minor will be void as it imposes obligations upon him to pay rent and to perform covenants.¹⁷

In practice, the distinction between executory and executed contracts could be tough to draw. In certain situations, it is difficult to conclude that there might be no further liabilities on or obligations to be performed by the minor. For instance, in *Abdul Ghaffar*¹⁸, the executed contracts exception was applied to a case where the minor plaintiff who had supplied goods to the defendant, had sued the defendant for the price. The verdict did not consider that there exist various covenants and warranties that might operate to impose liability upon the minor plaintiff in the event that such goods were defective or did not meet the required criterion. Of course, one could always distinguish between cases where minors have paid money and completely performed their obligations (such as, under a mortgage or bond) and no further liability of the minor exists or could exist, and situations like in *Abdul Ghaffar* of sale of goods, where it is *possible* for such liability of a minor to arise. This could be a good reason to not apply the executed contracts

¹⁴ *Hanmant Lakshshman v. Jayarao Narsinha*, ILR (1889) 13 Bom 50.

¹⁵ *A.T. Raghava Chariar v. O.A. Srinivasa Raghava Chariar*, AIR 1917 Mad 630 (FB).

¹⁶ *Madhab Koeri v. Baikuntha Karmaker*, ILR (1919) Pat 561; *Satyadeva Narayan Sinha v. Tirbeni Prasad*, AIR 1936 Pat 153.

¹⁷ *Pramila Balidas v. Jogesber Mandal*, AIR 1918 Pat 626 : (1918) 3 Pat LJ 518.

¹⁸ *Abdul Ghaffar v. Piare Lal*, ILR (1935) 16 Lah 1.

exception to such latter cases, but that does not detract from the sound legal and policy basis of the exception itself.

The policy reasoning behind the exception is apparent enough. If the exception were to be discarded, it would follow that the law relating to the contracts of minors meant for their protection, would in numerous cases have exactly the opposite effect and result in manifest injustice. To take a simple instance, if a minor sent a money order to a shopkeeper towards payment for certain selected goods to be forwarded, the shopkeeper having knowledge of the status of the minor, could keep the money and refuse to deliver the goods. In this case, the shopkeeper might be within his right in refusing to complete the contract entered into with a minor, but justice demands that the shopkeeper who has accepted the money having knowledge of the status of the minor cannot now refuse to perform obligations voluntarily undertaken by him.¹⁹ The demands of justice would be no different if the shopkeeper who did not initially have such knowledge but having acquired it later, attempts to use that to get out of the bargain.

The exception is also justifiable by a reading of the statutory scheme of the Contract Act. A ‘contract’ is defined in Section 2 of the Contract Act and its definition is built upon the series of elements which go towards making such contract, viz. proposal, acceptance, promise, promisor, promisee, consideration and agreement. Promises forming the consideration or part of the consideration for each other are defined as reciprocal promises. An agreement enforceable in law is a contract.

Out of the various definitions in Section 2, it is useful to particularly consider the definitions of “*consideration*,” “*agreement*,” and “*reciprocal promises*.” Section 2(e) of the Contract Act provides that “*every promise and every set of promises, forming the consideration for each other, is an agreement*.” Consideration is defined in Section 2(d) of the Contract Act as “*when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise*.” Section 2(f) provides that “*promises which form the consideration or part of the consideration for each other, are called reciprocal promises*.”

Thus, it may be seen that the statutory scheme provides that *every promise* is an agreement. It is not essential that the consideration for the agreement be another promise (that is only required for reciprocal promises) – and

¹⁹ See the example discussed in *Madhab Koeri v. Baikuntha Karmaker*, ILR (1919) Pat 561.

consideration could also include any act or abstinence *done* at the desire of the promisor. A promise made by an adult in favour of a minor is thus an agreement by the adult. If the consideration for such an agreement is a reciprocal promise by the minor, the whole thing is void – for instance, in *Mohori Bibee*, the agreement which the plaintiff sought to enforce was a *promise by a minor*; which was held to be void. In *Pramila Balidas*, the decision that the lease in favour of a minor was void was based on a *promise by a minor*, as an element in the agreement. If the consideration for the agreement by an adult is not a promise, however, but is something actually done by the minor, there seems no bar in the statute and no reason in principle why the result should not be a valid contract.²⁰ The same is also the principle discernable from a reading of Section 58 of the Transfer of Property Act, 1882 (“TP Act”) which defines a “mortgage”. It provides that mortgage is “*the transfer of an interest in specific immoveable property for the purposes of securing the payment of money advanced or to be advanced (emphasis supplied),*” that is to say, it takes effect as a transfer either when money has been advanced, or there is a promise to advance such money (or both). The exception thus applies where payment of money has already been advanced by the minor and no question of a “*promise to pay*” on the part of the minor arises.

IV. DECISION OF THE SUPREME COURT IN *MATHAI MATHAI*

The recent decision of the Supreme Court in *Mathai Mathai* appears to do away with the executed contracts exception to *Mohori Bibee*. The facts of the case are simple. The Appellant pleaded that his mother had advanced Rs. 7,000 (the amount given to her as dowry upon marriage) to the uncle of the Appellant, who in turn had mortgaged certain land as collateral security to her. The Appellant further contended that his mother had been in possession of the said land for more than fifty years. On the strength of both these facts, the Appellant filed an application to be declared as a deemed tenant under Section 4A of the Kerala Land Reforms Act, 1963, in terms of which he would be entitled to a purchase certificate and would have a statutory right to purchase the said land at a pre-determined rate. Various arguments were raised on the side of the Respondents. It is noteworthy that as a matter of undisputed fact, the mother of the Appellant was a minor (15 years) when she executed the mortgage deed with her uncle, though this was never the

²⁰ See also the discussion in *Satyadeva Narayan Sinha v. Tirbeni Prasad*, AIR 1936 Pat 153. Of course, if the minor is incapable of performing any act or assenting to the proposal in terms of S. 2(b) of the Contract Act, say if he is an infant, then the executed contracts exception will not be applicable. See S. 2(b) of the Contract Act which states – “*When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.*”

subject of any argument before the forums below, nor was this issue raised by the Respondents before the Supreme Court. On the basis of this fact *inter alia* the Supreme Court ultimately rejected the case of the Appellant.

The Supreme Court specifically noted the facts of the case, and referred to the decision in *Mohori Bibee* and also the decisions of the “*many courts*” laying down the executed contracts exception (as above), and ultimately held that they represent an “*erroneous application of the law.*” It would be useful to quote the reasoning of the Supreme Court in full –

“Many courts have held that a minor can be a mortgagee as [mortgage] is transfer of property in the interest of the minor. We feel that this is an erroneous application of the law keeping in mind the decision of the Privy Council in *Mohori Bibee* case. *As per the Indian Contract Act, 1872 it is clearly stated that for an agreement to become a contract, the parties must be competent to contract, wherein age of majority is a condition for competency.* A deed of mortgage is a contract and we cannot hold that a mortgage in the name of a minor is valid, simply because it is in the interests of the minor, unless she is represented by her natural guardian or guardian appointed by the court. *The law cannot be read differently for a minor who is a mortgagor and a minor who is a mortgagee as there are rights and liabilities in respect of the immovable property would flow out of such a contract on both of them.* Therefore, this Court has to hold that the mortgage deed... is void *ab initio* in law and the Appellant cannot claim any rights under it. (sic) (emphasis supplied)”

The above paragraph reveals that the characterisation by the Supreme Court of the rule in *Mohori Bibee* as being uncompromising (and treating as void *ab initio* even contracts where minors are transferees), is based on the fact that “*rights and liabilities in respect of the immovable property would flow out of such a contract on [the minor].*” In this context, two preliminary comments are necessary.

First, Mathai Mathai cannot be an authority for the proposition that minors can never be a party to a contract at all. If the decision is read as authority for *such* proposition (viz. that a minor cannot be a party to a contract at all), it would lead to absurd consequences. Minors would be unable to enforce a contract where a contract is entered into for his benefit without imposition of any liability upon the minor, and where the entire consideration has been paid or promised to be paid by a third party (say his father). It should make no difference that the contract is entered into with the minor, or with somebody else for the benefit of the minor, as long as no liabilities are

sought to be imposed upon the minor by reason of such contract. Similarly, one can also consider Section 25 of the Contract Act which lays down the rule that agreements made without consideration are void, but provides certain exceptions.²¹ Section 25(x) provides an exception to the requirement of consideration in cases where there is a written and registered agreement on account of natural love and affection between parties in a near relation. It would be patently absurd if the ratio of *Mohori Bibee* (on the strength of the bare reasoning quoted above in *Mathai Mathai*) is extended to such cases and it is held that a minor cannot be a party to even such a contract at all.

Second, and at best, the decision in *Mathai Mathai* can be said to be an authority only in respect of those types of executed contract cases, where minors are transferees of immovable property *and* liabilities in respect of the transaction are imposed upon the minor consequent to an executed document. *Mathai Mathai* does not at all deal with those cases of executed contracts where there is no transfer of property involved (for instance, bonds executed in favour of the minor). To the extent that the executed contracts exception to *Mohori Bibee* has been developed by the High Courts, in such cases they would, it is submitted, continue to be good law.

However, even for these limited types of cases involving transfer of property for which *Mathai Mathai* does appear to be an authority, it is submitted that the reasoning in the decision is unsound and its understanding of *Mohori Bibee* overbroad for the following reasons:

²¹ S. 25, Contract Act, 1872 states –

“Agreement without consideration, void, unless it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law.—An agreement made without consideration is void, unless— —An agreement made without consideration is void, unless—

- (1) it is expressed in writing and registered under the law for the time being in force for the registration of [documents], and is made on account of natural love and affection between parties standing in a near relation to each other; or unless
- (2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless.
- (3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. In any of these cases, such an agreement is a contract. Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made. Explanation 2.—An Agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.”

First, the decision in *Mathai Mathai* does not at all consider the argument (set out above) that what is sought to be enforced in cases of executed contracts where the minor is a transferee is not a “*reciprocal promise*” involving any agreement by the minor but only the agreement of the other person, which is supported by the consideration of an already *executed* act by the minor. The courts in such cases do not and are not required to enforce any agreement of the minor; but only to judicially recognise the *fact* of the minor performing the act that is the consideration for the promise by the other person. This is in no way different from the situation where a minor is the promisee under any of the situations in Section 25 of the Contract Act; for instance, if a person has voluntarily done something for the promisor under Section 25(2) it seems inconceivable that a Court would refuse to *recognise* that *act*, and refuse to enforce the contract just because such a person happens to be a minor. *Mohori Bibee*, it is submitted, deals only with a case where the minor was the mortgagor and where the promise by the minor was a necessary part of the agreement sought to be enforced, and as such, the *ratio* of *Mohori Bibee* should be read as being restricted to such cases only. As set out above, it would be a strange consequence of the rule that is based on the rationale of protecting the interests of minors, if they are to take nothing under transfers in consideration for which they have already parted with their money and fulfilled their obligations.

Second, the decision in *Mathai Mathai* does not consider the scheme of the Transfer of Property Act, under which there is a clear distinction between prohibitions attaching to minors being *transferors* and *transferees* of immovable property. In this context, it would be useful to note Section 7 of the TP Act, which requires that a *transferor* of the property can only be a “*person competent to contract*” Thus, as per this provision, a minor cannot be a *transferor* of immovable property, which also is consistent with and explains the decision in *Mohori Bibee* where the minor was the *mortgagor* of the immovable property in question. Section 6 of the TP Act however deals with *transferees* and Section 6(h)(3) of the TP Act provides that the transferee must not be a “*legally disqualified transferee*.” Legally disqualified transferees are prescribed under the Act, for instance, under Section 136 of TP Act, which provides that judges, legal practitioners, and officers connected to the court are disqualified from dealing in actionable claims. There is nothing in the TP Act according to which it can be said that a minor is disqualified to be a *transferee*, except in the case of onerous gifts dealt with under Section 127, which provides that “*a donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.* (emphasis supplied)”

Even the special provision in Section 127 of the TP Act is consistent with the general proposition that minors can be donees of a property without even needing to make an election, as long as no *onerous conditions* (or liabilities) are attached to such gift; and even where such onerous conditions are attached, they can still assent to such gift and upon achieving the age of majority, elect to keep it. A similar theme appears to run through the other legislation that contain special provisions relating to minors. For instance, under Section 184 of the Contract Act, a minor can be an agent, however he cannot be made responsible to his principal.²² Similarly, as per Section 30 of the Partnership Act, 1932,²³ minors can be admitted to the benefits

²² See *L.C. DeSouza, In re*, AIR 1932 All 374.

²³ S.30, Partnership Act, No. 9, Acts of Parliament, 1932 states –
“Minors admitted to the benefits of partnership.—

- (1) A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the partners for the time being, he may be admitted to the benefits of partnership.
- (2) Such minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts of the firm.
- (3) Such minor’s share is liable for the acts of the firm, but the minor is not personally liable for any such act.
- (4) Such minor may not sue the partners for an account or payment of his share of the property or profits of the firm, save when severing his connection with the firm, and in such case the amount of his share shall be determined by a valuation made as far as possible in accordance with the rules contained in section 48: Provided that all the partners acting together or any partner entitled to dissolve the firm upon notice to other partners may elect in such suit to dissolve the firm, and thereupon the court shall proceed with the suit as one for dissolution and for settling accounts between the partners, and the amount of the share of the minor shall be determined along with the shares of the partners.
- (5) At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, such person may give public notice that he has elected to become or that he has elected not to become a partner in the firm, and such notice shall determine his position as regards the firm: Provided that, if he fails to give such notice, he shall become a partner in the firm on the expiry of the said six months.
- (6) Where any person has been admitted as a minor to the benefits of partnership in a firm, the burden of proving the fact that such person had no knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie on the persons asserting that fact.
- (7) where such person becomes a partner,—
 - (a) his rights and liabilities as a minor continue up to the date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership, and
 - (b) his share in the property and profits of the firm shall be the share to which he was entitled as a minor.
- (8) Where such person elects not to become a partner,—
 - (a) his rights and liabilities shall continue to be those of a minor under this section up to the date on which he gives public notice,
 - (b) his share shall not be liable for any acts of the firm done after the date of the notice, and

of a partnership, though cannot be held personally liable for any obligation of the firm. The Negotiable Instruments Act, 1881 also provides for similar treatment for minor drawers and indorsers.²⁴ All these provisions are consistent with the intention of the legislature being in conformity with the general proposition that although no liability can be attached to minors or their actions, the law recognises acts done by minors and they are entitled to take advantage of benefits and exercise rights available to them consequent to such actions.

Third, Mathai Mathai seems to conflate the distinction between rights and liabilities attached to *holding* of property by a minor, and those rights and liabilities which flow consequent to a *contract* dealing with such property. It is trite that minors are entitled to ownership of immovable properties in their own name. Minors can acquire interest in such properties by way of intestate succession, bequest as well as a gift (subject of course to the special requirements in cases of “*onerous gifts*” in Section 127 above). No doubt rights and liabilities follow from and consequent to such ownership – however, the same is equally applicable to minors as well as non-minors. The law protects minors only where such rights and liabilities follow consequent to a contract. In the event the contract is executed from the side of the minor, viz. the minor is a mortgagee, nothing further is required to be done by the minor and no liability attaches to the minor as a consequence of such contract (although there might be liability attaching to the minor as a consequence of being in possession of such property, where the mortgage is say a usufructuary one, but that liability is no different from the liability attaching where the minor has ownership over and is in possession of any other property as well). Of course, if it is the case that there are certain conditions imposing liability upon the minor even where the minor is a mortgagee, such contracts would be void. But that would have been the case even prior to *Mathai Mathai*, and the blanket holding in that decision that no distinction can be drawn between minors as mortgagors and mortgagees is, it is respectfully submitted, incorrect.

(c) he shall be entitled to sue the partners for his share of the property and profits in accordance with sub-section (4).

(9) Nothing in sub-sections (7) and (8) shall affect the provisions of section 28.”

²⁴ See S. 26, Negotiable Instruments Act, No. 26, Acts of Parliament, 1881, states – “Capacity to make, etc., promissory notes, etc. – Every person capable of contracting, according to the law to which he is subject, may bind himself and be bound by the making, drawing, acceptance, indorsement, delivery and negotiation of a promissory note, bill of exchange or cheque. Minor. A minor may draw, indorse, deliver and negotiate such instrument so as to bind all parties except himself. Nothing herein contained shall be deemed to empower a corporation to make, indorse or accept such instruments except in cases in which, under the law for the time being in force, they are so empowered.”

CONCLUSION

For a judgment of such significant import, the decision in *Mathai Mathai* is surprisingly bereft of reasoning. It is difficult to consider the holding of the Supreme Court on the point of capacity of minors as being mere *obiter dicta*, as that is the first reason given by the Court to reject the appeal, and the observations are not made merely in passing. However, the Court could have always avoided getting into this issue given that neither of the parties had ever raised it in any of the forums below, nor did it appear that this point was argued by any party even before the Supreme Court. Having chosen to entertain this argument, the prior decisions of the various High Courts on this subject should have at least been considered, and distinguished or expressly overruled. There is an inherent logic to the executed contracts exception to *Mohori Bibee* – and a reading of *Mohori Bibee* in *Mathai Mathai* that appears to render all contracts with minors as being void *ab initio* is over broad, and with respect, requires re-consideration.

