APPELLATE CIVIL.

Before Mukherjea J.

1937

May 27, 28.

RAM JASH AGARWALA

v.

CHAND MANDAL.*

Hindu Law—Marriage of infant—Usage—Expenses of marriage, if legal necessity—Liability of creditor—Child Marriage Restraint Act (XIX of 1929), ss. 5, 6.

There is no rule of Hindu law sanctioning early marriage of male children and there is no duty upon parents or guardians to marry their sons or male wards before they attain majority.

The practice of early marriages of Hindu minors may be sanctioned by usage; but it has been disapproved by the passing of the Child Marriage Restraint Act of 1929.

There is no legal necessity justifying alienation of the minor's properties to meet the expenses of the minor's marriage.

Advancing money by a creditor to enable an infant to marry in violation of the Act is not by itself punishable under the law and does not bring the creditor within the mischief of ss. 5 and 6 of the Act.

Pan Mal Lodha v. *Gad Mal Lodha* (1) referred to.

APPEAL FROM APPELLATE DECREE by the plaintiff.

The material facts of the case and the argument in the appeal appear in the judgment.

Gopendra Nath Das for the appellant.

Gopendra Krishna Banerji for the respondent.

MUKHERJEA J. This appeal is on behalf of the plaintiff and it arises out of a suit to enforce a simple mortgage bond executed on April 26, 1931. The two defendants are two brothers and the mortgage was executed by defendant No. 1 himself and by the

*Appeal from Appellate Decree, No. 1510 of 1935, against the decree of Kshirodeshwar Banerji, Subordinate Judge of Burdwan at Asansol, dated June 13, 1935, affirming the decree of Surendra Nath Palit, Munsif of Asansol, dated Oct. 5, 1934.

(1) (1936) I. L. R. 63 Cal. 1153.

mother as guardian of defendant No. 2 who was still a minor at the date of the suit. The bond recites that the money was necessary to defray the marriage expenses of defendant No. 2. The defence was that there was no execution and attestation and no payment of consideration and that the marriage of the infant was not a legal necessity which would justify his guardian in mortgaging any portion of his estate. In the trial Court, after the hearing was closed, the trial Judge allowed another point to be raised by the defendant as a pure question of law, namely, that the money being lent for the purpose of helping a child marriage which was in contravention of the Child Marriage Restraint Act of 1929 the consideration for the loan was illegal and hence the plaintiff could not succeed in the suit. The trial Court came to the conclusion that the marriage of the minor was not a legal necessity which would justify an alienation of the minor's estate and as the consideration was illegal, because it was calculated to defeat the provisions of the Child Marriage Restraint Act, there could be no decree against the minor. As against the adult defendant a simple money-decree for Rs. 300 was given without any interest. The plaintiff took an appeal to the Court of appeal below which affirmed the judgment of the lower Court and dismissed the appeal. It is against this decision that the present Second Appeal has been preferred.

Mr. Das, who appears on behalf of the appellant, has raised a two-fold contention. In the first place, he has argued that the marriage of defendant No. 2, even though he was a minor, was a justifying necessity according to Hindu law which justified the guardian in mortgaging his property and in support of this contention he has relied upon the decision of the Bombay High Court in the case of *Sundrabai* v. *Shivnarayana* (1). In my opinion, this contention cannot be accepted. It is true that marriage is a sacrament or *sangskâr* in Hindu law and the only *sangskâr* for those who are not twice-born.

(1) (1907) I. L. R. 32 Bom. 81.

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The Hindu law, however, does not sanction early marriages of males and the text of Manu which is the authority on this point lays down the law as follows :—

> Let a man of thirty years marry an agreeable girl of twelve years or a man of thrice eight years a girl of eight years ; one marrying earlier deviates from duty.
>
> Manu Ch. IX. v. 94.

The text of Manu has been explained by his annotators as prescribing no limit of age for the marriage of males but as recommending that the bridegroom should be older than the bride. Be that as it may, it cannot be said that there is a rule of Hindu law which makes it a duty on the part of the parents or guardian of a minor male to marry his ward or child before his attaining the age of puberty. With regard to daughters the position is different and there is an express text which lays down that if a girl be not given in marriage when she has reached the twelfth year, her mother and father as well as her brothers go to the infernal region (See Yama, 22 and 23). Mr. Justice Chandravarkar, in the case referred to above, adverted to the fact that the Hindu law neither sanctioned early marriages of males nor, in fact, made it a duty on the part of the parents and guardians to marry their sons and wards before they attain the age of majority. The learned Judge, however, was of opinion that such practice was sanctioned by usage and on the footing of usage the practice was held to be valid. It is certainly one thing to say that it is permissible in law or usage to marry a boy who is still an infant and another thing to say that it is a pressing necessity which justifies the guardian in alienating the minor's property for that purpose.

I am of opinion that, after the Child Marriage Restraint Act of 1929 was passed, it cannot be held that the usage which has been disapproved of by the legislature would furnish a ground upon which a case of imperative legal necessity could be built up. I

hold, therefore, that the Courts below were perfectly right in holding that there was no pressing necessity which justified the alienation of the minor's property.

The other question which has been raised by Mr. Das relates to the propriety of the decisions of the Court below which have concurrently held that the consideration for the marriage was illegal within the meaning of s. 23 of the Indian Contract Act. The question, as I have stated above, was not raised in the written statement nor was there any issue framed upon it. The Child Marriage Restraint Act undoubtedly does not render the marriage invalid. If it is celebrated in India those promoting it or permitting it will incur certain penalties provided by the Act. As Panckridge J. said in the case of *Pan Mal Lodha* v. *Gad Mal Lodha* (1), the legislature has introduced certain penal provisions with a view to show its disapproval of such marriages apparently on the ground of this being socially injurious. But the question is—supposing a creditor advances money to enable an infant to marry in violation of the Act, is the consideration rendered illegal under the provision of s. 23 of the Indian Contract Act? Obviously, the creditor himself does not come within the mischief of s. 5 or s. 6 of the Child Marriage Restraint Act which penalises those who perform, conduct or direct a child marriage or does any act to promote the marriage or permits it to be solemnised. It seems to me, therefore, that the advancing of money by a creditor is not something which is *per se* made punishable under the law. It may be said, however, that by advancing the money to the lawful guardian of the minor for the purpose of promoting an infant marriage which the law disapproves of and for which penalty has been prescribed for the promoter and the guardian the creditor was doing something which might directly enable the promoter to defeat the provisions of the law. I do

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not think it is necessary for me to express any final opinion upon this point. For, as I read the bond, it is not clear from the recitals of the same that the money was actually taken for conducting or celebrating the marriage of the infant, and it may be that the marriage was already celebrated and the money was borrowed for the purpose of defraying the expenses which had been incurred long before. There is no evidence either one way or the other upon this point and if really the money was not advanced for the purpose of enabling the guardian to conduct or to promote the marriage I do not think it comes within the mischief of s. 23 of the Indian Contract Act.

As this question was not raised by the defendant at any stage of the suit and as there is no evidence upon this point, it is impossible for me to say upon the materials on the record that the matter does definitely come within the mischief of s. 23 of the Indian Contract Act. I would, therefore, vary the decree of the lower appellate Court to this extent, namely, that there would be a mortgage decree in place of a simple money decree against defendant No. 1 alone. Defendant No. 2 or his property cannot be made liable as there was no necessity justifying the loan. The mortgage money would carry interest at the rate of 9 per cent. per annum from the date of the bond up to the date of the expiry of the period of grace which is fixed at three months from this date. After the period of grace is over interest will run at 6 per cent. per annum.

Subject to this variation the appeal is allowed and the decree of the lower appellate Court would be modified accordingly. I make no order as to costs of this Court as well as of the lower appellate Court. The plaintiff will be entitled to the costs of the trial Court.

A. K. D.

Appeal allowed.