APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

VISVANATHAN (DEFENDANT), PETITIONER,

v.

SAMINATHAN (PLAINTIFF), RESPONDENT.*

1889. July 26. August 12.

Contract Act—Act IX of 1872, s. 23—Unlawful consideration—Marriage brokage agreement—Hindu law.

Plaintiff agreed to give his daughter in marriage to defendant's nephew in consideration of a payment of Rs. 400. It was not alleged that the money was to be a dowry or settlement for the bride. Rs. 200 were paid and defendant executed a bond for the balance. The marriage took place in the *asura* form. The plaintiff now sued on the bond:

Held, the consideration for the bond was not unlawful.

PETITION under section 25 of the Provincial Small Cause Courts Act, 1887, praying the High Court to revise the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in small cause suit No. 725 of 1888.

Suit on a bond. The bond was admitted, but the defendant pleaded that the consideration was unlawful, and also that the consideration had failed. The Subordinate Judge held that neither of these pleas was established, and passed a decree for the plaintiff.

The defendant preferred this petition.

Desikacharyar for petitioner.

Sivasami Ayyar for respondent.

The facts of the case and the arguments adduced on this petition appear sufficiently for the purpose of this report from the following judgments:—

WILKINSON, J.—This is a petition under section 25, Act IX of 1887, to set aside the decree of the Subordinate Judge of Kumbakonam in small cause suit No. 725 of 1888 as contrary to law.

The parties to the suit are Brahmans. The plaintiff's daughter was given in marriage to the defendant's brother's son. As a consideration for the marriage, the defendant paid the

* Civil Revision Petition No. 325 of 1888.

VISVANATHAN v. SAMINATHAN.

plaintiff Rs. 200 and executed a bond for Rs. 200. The plaintiff now sues to recover the money due under the bond. The defendant pleaded that the bond was executed for cash to be actually advanced and denied consideration. He further pleaded that the consideration, if such as was alleged by the plaintiff, was illegal. The Subordinate Judge found that the bond was executed under the circumstances alleged by the plaintiff, and that the consideration was not illegal.

Before us, it is argued that the contract was not enforceable, being (1) against public policy and (2) contrary to Hindu law.

No doubt it has been long held in England that all contracts or agreements for promoting marriages for reward (usually termed marriage brokage contracts) are utterly void. The principle on which the decisions have proceeded is that every contract relating to marriage ought to be free and open, whereas marriage brokage contracts necessarily tend to a deceit on one party to the marriage, or on the parents and friends, and to the promotion of marriage by hirelings, instead of by the mediation of friends and relatives. Now I very much doubt whether these principles can be made applicable to this case. In this country marriages take place while the contracting parties are infants, incapable of making any choice of their own, and the consideration may often be received by the father for the use and benefit of the child. That, as remarked by the Subordinate Judge, marriages in the *asura* form are widely prevalent in Southern India was observed by Strange so long ago as 1830 and is not denied at the bar. The paucity of decisions is in favor of the contention that the moral consciousness of the people is not opposed to the practice. In consideration of the father of a girl giving his consent to the betrothal of his daughter, a sum of money is paid by the relatives of the would-be bridegroom to the father. Is this immoral or opposed to public policy? Under all circumstances I see no reason for so holding. Where the wife is immature, as is the case in nearly every marriage in this country, it is the custom that she should reside with her parents, and they maintain her as a matter of affection, but not of obligation. If the father is poor and the relatives of the husband well to do, what immorality can there be in the latter giving to the former a sum of money for the maintenance of the girl-bride? It is true that in the passage quoted by

the Subordinate Judge,* Manu prohibits a father from receiving a gratuity for giving his daughter in marriage, but the prohibition appears to be based on the necessity which then existed of commanding fathers not to sell their offspring. In the present case there is no question of sale, and there is nothing to show that the plaintiff "through avarice" accepted the money in order to spend it on himself only. In the present state of society, I am not prepared to hold that the receipt by a Hindu father of money in consideration of his giving his daughter in marriage is in every case without distinction immoral or contrary to public policy. Each case must be decided on its own merits. I may remark that the facts in *Dulari* v. *Vallabdas Pragji*(1) are not on all fours with this case, and that the dictum of Garth, C.J., in *Ram Chand Sen* v. *Audaito Sen*(2) was unnecessary for the decision of the case and opposed to the opinion of Beverley, J., who sat with him.

As to Hindu law, we have been referred to no authority by which the *asura* form of marriage is condemned. In his Commentary on Hindu law, Siromani † points out that the *asura* form is the same as the *arsha* (which he classes as one of the approved forms), the only difference being that the form is called *asura*, if any other property than cattle is taken by the father of the bride. In the absence of any authority that the *asura* form of marriage is contrary to custom and so is not binding, I would hold that the marriage of the plaintiff's daughter was not contrary to Hindu law. The relationship of husband and wife is created, not by the form of marriage, but by the recitation of mantras prescribed by the holy scriptures. There is, says Siromani, no difference of opinion among Hindu jurists as to the necessity of mantras and ceremonies in order to create the relation of husband and wife.

This petition, therefore, fails and is dismissed with costs.

PARKER, J.—The facts found are that the plaintiff agreed to give his daughter in marriage to the defendant's nephew in consideration of a payment of Rs. 400. Rs. 200 was paid in cash and a bond for the balance given by the defendant. The marriage took place. The plaintiff now sued on the bond for the balance due to him. It is not alleged that the money was pro-

---

* *See* Mayne's Hindu Law, 4th ed., § 78. † *See* p. 80.

(1) I.L.R., 13 Bom., 126. (2) I.L.R., 10 Cal., 1054.

VISVANATHAN v. SAMINATHAN.

mised as a dowry or settlement for the bride. The marriage was in the *asura* form.

The defendant pleaded that the consideration was illegal, but the Subordinate Judge decreed the claim. He held that, though the practice was prohibited by Manu, and though it was sinful for rich parents to receive a price for a daughter, it was otherwise with poor parents who had not means otherwise to meet the necessary expenses which they had to incur.

The *asura* form of marriage was in its origin simply a marriage by purchase. The *arsha* form, which is one of the approved forms, is a survival from the *asura*, and in it the price paid for the girl dwindled down to a gift of nominal value or to a present received by the parents for the benefit of the bride. The present marriage is not alleged to be in the *arsha* form. The *asura* form is absolutely forbidden by Manu and Narada, though, as a matter of fact, it is admittedly prevalent in Southern India.

I do not doubt as to the existence of the custom, and it is significant that there should be so few cases in which the legality of the consideration has been called in question in the Courts.

In *Juggessur Chuckerbutty* v. *Panchcowree Chuckerbutty*(1) a small cause suit was brought by the plaintiff to recover a sum of money paid to the defendant in consideration of a promise made by the latter to give the former his sister in marriage, which contract had been broken and the girl married to another. The Subordinate Judge, in referring the case, held that, according to English law, the contract would be invalid and contrary to public policy, and was further of opinion that in India the practice of demanding from the suitor a "pun," the amount of which goes entirely to the parent's benefit, none of it being in the nature of a settlement upon the wife, must undoubtedly tend to induce the exercise of parental influence from corrupt motives and encourage the buying and selling of women. The High Court of Calcutta did not discuss the question, but merely observed that, under the circumstances stated, an action to recover back the money paid to the defendant will lie.

In *Rance Lallun Monee Dossee* v. *Nobin Mohun Singh*(2) a Hindu contracting a second marriage agreed to confer on the party whose sister was to be his second wife, a taluk which was to

(1) 14 W.R., 154. (2) 25 W.R., 32.

be carved out of his estate, and, until it was carved out, to make a yearly payment of a fixed sum. The High Court observed that the document on which the plaintiff's case was based having been executed more than fifty years ago, it was a great deal too late to inquire whether there was consideration for the deed, and even if there was any, whether the agreement was not contrary to public policy. The Judges intimated an opinion that the special agreement made was not without consideration or contrary to public policy, but, observing that the moneys stipulated for under the agreement having been paid for the last fifty years, the defendants were not at liberty at that late period to attack the origin of the contract and ask the Court to allow them to repudiate it.

The case of *Ram Chand Sen* v. *Audaito Sen*(1) is similar to *Juggessur Chuckerbutty* v. *Panchcowree Chuckerbutty*(2), and the Judges followed that decision. It was, however, intimated by Garth, C.J., that had the action been by the father to recover money promised as "pun" by the bridegroom he would have been disposed to hold that such a contract (even in this country) would be incapable of being enforced by the rules of equity and good conscience. Beverley, J., however, held that there was nothing immoral in such contracts since they were recognized by the customs of the country and not prohibited by law.

These decisions were considered by Jardine, J., in *Dulari* v. *Vallabdas Pragji*(3) in which the plaintiff prayed for leave to sue as a pauper to recover Rs. 2,500, which the defendant had agreed to pay her for giving him a girl in marriage, whom however he had subsequently seduced without marriage. The learned Judge held that the plaintiff was not a pauper and under section 407, clause (*c*), that her allegation did not show a right to sue, since such contracts were immoral and against public policy even in the present state of matrimonial relations in India, and should not be enforced in the Courts of Law. A similar decision by Scott, J., in 1884 was referred to and followed.

None of these decisions are exactly on all fours with the present. *Juggessur Chuckerbutty* v. *Panchcowree Chuckerbutty*(2) and *Ram Chand Sen* v. *Audaito Sen*(1) were actions brought by the bridegroom to recover money paid, the consideration for which

(1) I.L.R., 10 Cal., 1054. (2) 14 W.R., 154.
(3) I.L.R, 13 Bom., 126.

VISVANATHAN v. SAMINATHAN.

had failed, and the remarks of Garth, C.J., which would bear upon the present case were extra-judicial; the decision in *Ranee Lallun Monee Dossee* v. *Nobin Mohun Singh*(1) proceeded upon the ground that lapse of time had made the origin of the contract immaterial; in the case before Jardine, J., though the plaintiff did stand in *loco parentis*, the decision proceeded upon the double ground that plaintiff was not a pauper, while the case before Scott, J., was really a suit by a matrimonial agent.

The *asura* form of marriage, though disapproved by Hindu writers, is still recognized as a valid form, and the practice of parents taking money from the bridegroom or his family in consideration of the marriage is not prohibited by law. The question is, ought the Courts to treat it as immoral or opposed to public policy (section 23, Indian Contract Act). Having regard to the customs of the country, it appears to me impossible to lay down a hard and fast general rule. No doubt there may be cases in which such contracts might be held immoral and opposed to public policy, *e.g.*, for the payment of money as a consideration for the marriage of very young children to old and debauched men. But in many cases the payment may really tend to facilitate the marriage in a legitimate way. Each case must, I think, be judged on its own merits and according to its special circumstances, and it is for the defendant to allege and prove those special circumstances which will invalidate the contract. There is no such allegation or proof in the present case.

On these grounds, I concur in dismissing the petition with costs.

---

(1) 25 W.R., 32.