APPELLATE CIVIL.

1878
January 2.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

KANAHI RAM (PLAINTIFF) *v.* BIDDYA RAM (DEFENDANT).*

Hindu Law—Guardian and Minor—Act XXI of 1850*—Caste—Marriage—Medical Examination.*

A Hindu who has been deprived of caste by the members of his brotherhood on account of intending, for a money-consideration, to give his infant daughter in marriage to a man both old and impotent, does not, under Hindu law, thereby forfeit his right as guardian to the custody of such daughter. Even if there were a rule of Hindu law which, in such a case, inflicted a forfeiture of such right, such rule could not, with reference to the provisions of Act XXI of 1850, be enforced.

Where accordingly, because a Hindu had been deprived of caste for the reason above-mentioned, a person sued to have the custody of the infant himself as her guardian in lieu of her father, and as such to be declared empowered to arrange for her marriage to a suitable husband, basing his suit on Hindu law, *held* that such suit was not maintainable.

Held also that the lower Courts properly refused to cause the intended husband in this case to be medically examined as to his alleged impotency, he not being a party to the suit, and there being no provision of law authorising such a procedure.

THIS was a suit for possession of Ram Piari, minor daughter of the defendant. The plaint stated that the defendant desired, contrary to Hindu law, to give his daughter in marriage to a very old and impotent man, having taken Rs. 400 from him; that the members of his caste had deprived the defendant of caste, and he had thereby lost his right to the protection of his daughter and to give her in marriage, which right had accrued to the plaintiff, the son of the defendant's uncle; and the plaintiff claimed an injunction restraining the intended marriage, and a declaration of his right to give the defendant's daughter in marriage to a fit and proper person. The Court of first instance dismissed the suit as unmaintainable, and on appeal by the plaintiff the lower appellate Court affirmed the decree of that Court.

* Special Appeal, No. 560 of 1877, from a decree of G. E. Watson, Esq., Judge of Aligarh, dated the 14th May, 1877, affirming a decree of Munshi Man Mohan Lal, Munsif of Aligarh, dated the 11th May, 1877.

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KANAHI RAM v. BIDDYA RAM.

On special appeal by the plaintiff to the High Court it was contended that the suit was maintainable, and that the lower Courts had improperly rejected the plaintiff's application to have the intended husband examined by the Civil Surgeon, in order that it might be ascertained whether or not he was physically fit for marriage.

Pandits *Ajudhia Nath* and *Nand Lal*, Lala *Harkishen Das*, and Babu *Oprokash Chandar*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Munshi *Hanuman Prasad*, for the respondent.

THE following judgments were delivered by the Court:

PEARSON J.—This case has been argued before us at great length, and the conclusion at which I have arrived, after consideration of all that has been said on both sides, is that the suit as brought is not maintainable. The appellant has, in my opinion, failed to show that, because the defendant has been put out of caste by the members of his brotherhood on account of his intending to give his infant daughter, aged eleven years, in marriage to a man by name Phunda Ram, said to be more than seventy years old and impotent, in consideration of receiving from him about Rs. 400, he (the defendant) has, according to Hindu law, lost his right as guardian to the custody of the said girl; and such a contention, even were it supported by Hindu law, must be disallowed in reference to the provisions of Act XXI of 1850. The claim on the appellant's part on the basis of that contention to have the custody of the girl himself as her guardian in lieu of her father, and as such to be declared empowered to arrange for her marriage to a suitable husband, cannot therefore be conceded. Assuming that, in a suit properly brought for that purpose, and on proof of Phunda Ram's physical disqualification for marriage, the Courts could interfere so far in the matter as to restrain the defendant from marrying his daughter to that person, it would not be necessary to proceed so much further as to deprive the defendant of his rights or to relieve him of his duties as a father. The lower appellate Court has held the assertion respecting Phunda Ram's impotency not to be substantiated. It is urged that the lower Courts should have caused Phunda Ram to be examined by the Civil Surgeon, but no provision of law authorising such a procedure has been pointed out. Phunda Ram was not even

a party to the suit. It has been stated in the course of the argument before us that under Hindu law a marriage may be dissolved on the ground of the bridegroom's impotency. If this statement be correct, it is satisfactory to think that, should the defendant insist in carrying out his intention, the girl may, if entitled to claim it, have a remedy at law. Although the appellant may not have been entitled to bring this suit as her guardian or to claim her guardianship, his action in the matter is attributable to commendable motives, and in dismissing his appeal, not without reluctance, I would dismiss it without costs, and in affirming substantially the decrees of the lower Courts, I would modify them in so far as they order the costs of the defendant to be paid by the plaintiff.

STUART, C.J.—I have taken a little time to consider this case, for I confess I was anxious, if I possibly could, to give the plaintiff the remedy he seeks. In our order of the 13th June last (1) it is justly remarked "that the marriage of a girl eleven years old to a man of seventy years old is, on the face of it, an immense injury to the girl, and an extreme abuse of the father's authority as her guardian," and having heard the case out, in fact and in law, I still adhere to that remark, and I would, if I could, prevent this marriage. But I regret to say that, having fully considered it in all its bearings, as well with respect to the peculiar principles and precepts of the Hindu law as on the other legal grounds which were maintained at the hearing, I have arrived at the same conclusion as that expressed by Mr. Justice Pearson. No doubt it would have been better if the old man Phunda, the would-be-bridegroom, had been a party to the original suit, but it is too late to consider that now, even if he had been prejudiced by the order we now make. So far, however, as he is concerned the result is substantially favourable to him, although I should be glad to learn that the marriage does not take place.

I also agree with Mr. Justice Pearson that this appeal should be dismissed without costs of the Courts below. I would order each party to bear his own in both.

(1) This was an order granting, under s. 493 of Act VIII of 1859, an injunction restraining the defendant from carrying out the intended marriage, pending the determination of this special appeal.