

1916

EMPEROR
v.
GAYA BHAR.

conviction and the sentence and direct that the accused be forth-
with released.

Conviction set aside.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Lindsay.

KASTURI (DEFENDANT) v. PANNA LAL (PLAINTIFF).*

1916
May, 27.

Hindu Law - Marriage—Marriage of Hindu girl contracted by maternal uncle in the presence of paternal relatives—Injunction obtained by disqualified paternal relative to stay the marriage without reasonable and probable cause—Maintainability of suit for damages.

According to Hindu Law so long as there are competent paternal relatives in existence, the maternal relatives of a girl have no authority to give her in marriage; but in cases where the paternal relatives refuse to act or have disqualified themselves from acting, the maternal relatives acquire authority to contract marriage on behalf of the girl.

A Hindu girl who was living with her paternal aunt and paternal uncle was made over to her maternal uncle as the result of an agreement come to between the parties. Subsequently the paternal aunt applied to be appointed guardian of the person of the minor, which application was dismissed. After this the maternal uncle of the girl arranged for the marriage of the girl with a certain person. The paternal aunt then obtained a temporary injunction and got the wedding put off. The marriage, however, was accomplished with the person selected by the maternal uncle. The maternal uncle brought a suit to recover damages for the loss caused to him by the wrongful issue of the injunction and the postponement of the wedding. *Held* that under the circumstances of the case the maternal uncle was competent to enter into a contract of marriage on behalf of the girl, and a suit for damages lay. *Kasturi v. Chiranjil Lal* (1) referred to.

THE facts of this case were as follows:—

One Musammatt Chandrakala, an orphan of about 13 years of age, lived with her paternal uncle's widow, Musammatt Kasturi and another paternal uncle Ram Jiwan and his son Lalta Prasad. A complaint was lodged against them in the criminal court alleging that they were detaining the girl against her will and preventing her from going to live with her maternal uncle, Panna Lal. The matter was compromised on the agreement that she was to be allowed to go and live with Panna Lal. Thereafter she lived with Panna Lal. He negotiated a marriage for

* First Appeal No. 20 of 1916, from an order of Durga Das Joshi, first Additional Judge of Aligarh, dated the 15th of January, 1916.

(1). (1913) I. L. R., 35 All., 265.

her which was to take place on the 17th of June, 1915. A few days before this date Musammat Kasturi applied to the District Judge to be appointed guardian of the person of Musammat Chandrakala and also applied for an injunction against Panna Lal stopping the marriage. The Judge granted a temporary injunction and the marriage was stopped. Eventually Musammat Kasturi's application for guardianship was dismissed, the temporary injunction cancelled and the marriage performed on a subsequent date. Panna Lal then brought a suit against Musammat Kasturi for damages sustained by him in consequence of the upsetting of the arrangements for celebrating the marriage on the 17th of June, 1915. His case was that Musammat Kasturi had obtained the injunction without right and without probable and sufficient grounds. The main defence was that Panna Lal had no right whatever to enter into any contract of marriage on behalf of the girl, and so he had no cause of action for the suit. The Munsif tried all the issues arising in the case, with the exception of the one relating to the amount of damages, and dismissed the suit on the grounds that Panna Lal had no right to settle the marriage in supersession of the paternal relations of the girl and that Musammat Kasturi had not obtained the injunction in bad faith. The lower appellate court reversed these two findings of the Munsif and remanded the suit under order XLI, rule 23, for trial *de novo*. The defendant appealed against the order of remand.

Munshi *Panna Lal* (with him Dr. *S. M. Sulaiman*), for the appellant:—

The order remanding the suit under order XLI, rule 23, is bad in law. The parties produced evidence on all the issues. The court of first instance considered and decided all of those issues, excepting that which related to the measure of damages. Under these circumstances it cannot be said that the case was decided on a preliminary point, and the lower appellate court was not justified in remanding the suit for a trial *de novo*. Among the list of persons entitled under the Benares School of Law to give a girl in marriage no place is assigned to the maternal uncle by Yajnavalkya or by the Mitakshara. Even according to Vishnu and Narada Smritis the maternal grandfather and the maternal uncle come in after the paternal uncle and other

1916

 KASTURI
 v.
 PANNA LAL.

1916

KASTURI
v.
PANNA LAL.

paternal relation (*Sakulya*). Hence, so long as there is a paternal uncle or other paternal relation who comes within the category of a *Sakulya*, the maternal uncle of a girl is not competent to give her in marriage. Reference was made to the case of *Kasturi v. Chiranji Lal* (1). Panna Lal, therefore, had no right to settle the marriage of Musammat Chandrakala, in presence of her paternal uncle, Ram Jiwan and of his son, Lalta Prasad. The lower appellate court has found that Ram Jiwan was an outcaste, although the plaintiff had not come forward with that allegation. That fact, however, would not make the position of Panna Lal any better, for Lalta Prasad had a preferential right over him. The effect of the compromise was merely to allow the girl to go to her maternal uncle. It did not and could not transfer to him the right to give the girl in marriage. Her marriage had been arranged by Musammat Kasturi in consultation with Jiwan and Lalta Prasad. In negotiating a different marriage Panna Lal could not be deemed to have acted with the consent of the paternal relations. He was doing an unlawful and unauthorized act on his own initiative and he cannot claim damages for being prevented from doing it.

Munshi *Gokul Prasad*, for the respondent :—

It is not disputed that, ordinarily, a qualified and competent paternal relation has a preferential right of bestowing a girl in marriage over a maternal relation. But this right may be lost by a variety of circumstances. For example, if the paternal relations are incompetent or disqualified persons, or they neglect or refuse to do their duty, or arrange an unsuitable or improper match, or delegate their powers, the maternal relations become entitled to act. Having regard to the circumstances that, as the result of the compromise in the criminal case, the girl herself and all her property passed out of the control of the paternal relations into that of Panna Lal, that Ram Jiwan was an outcaste and so disqualified to act and that no objection had been raised to the proposed marriage, it cannot be said that Panna Lal was incompetent to enter into the contract of marriage for the girl. Panna Lal's act in negotiating the marriage was not such an improper or illegal act as would *ipso facto* vitiate or avoid the

(1) (1913) I. L. R., 35 ALL., 265.

transaction; it has been found that the match was a suitable one and that he was not acting from any bad motive. In any case Musammat Kasturi comes nowhere within the enumerated classes of relations who have a right to bestow a girl in marriage. She might possibly have such a right if her application for guardianship had succeeded; but that application was dismissed. She had no right whatever to stop the marriage either personally or through the instrumentality of an injunction order obtained by her. She is therefore liable for damages caused by her unlawful interference. In this view it is immaterial whether Panna Lal was or was not aware of any negotiations which the others might have been carrying on for the marriage of the girl. Having regard to the findings of fact that the marriage arranged by Panna Lal was a suitable one and that there was no bad faith, Musammat Kasturi acted without reasonable and probable cause in applying for the injunction.

As to the question whether the remand could or could not be made under order XLI, rule 23, the case of *Mata Din v. Jamna Das* (1), supports the order passed by the lower appellate court.

Munshi Panna Lal, was heard in reply.

PIGGOTT and LINDSAY, JJ. :—This is an appeal against the order of the First Additional District Judge of Aligarh passed in an appeal which was brought by the plaintiff respondent Panna Lal against a decree of the Munsif of Bulandshahr. The order which is complained of is one purporting to be under order XLI, rule 23, of the Code of Civil Procedure. The learned Additional District Judge has ordered the case to be remanded for trial, as he says, *de novo*, to the court of first instance. The defendant Musammat Kasturi has appealed against this order and the memorandum of appeal raises two questions, one relating to the form of the order passed by the court below and the other, a more important one, relating to the competence of the plaintiff Panna Lal to maintain this suit. We will deal first with the second question and in order to understand the matter at issue we may state the following facts. There were three brothers, Raghunandan Lal, Mahadeo Prasad and Ram Jiwan Lal. Of these Raghunandan Lal died in the year 1910, leaving a widow Musammat Ram

1916

 KASTURI
 v.
 PANNA LAL.

1916

KASTURI
v.
PANNA LAL.

Piari, who died after him in the month of June, 1914. Raghunandan Lal also left a daughter, Musammat Chandrakala, with whose affairs we are concerned in the present case. Mahadeo Prasad, another of the brothers, died in the year 1912, and his widow Musammat Kasturi is the appellant before us. The third brother Ram Jiwan Lal was alive at the time this suit was brought; he died during the pendency of the suit and is now, it is said, represented by his son, Lalta Prasad. It appears that after the death of her father the girl Chandrakala whose age is now about 13 or 14 years lived with her aunt, the appellant Musammat Kasturi. It is also said that Ram Jiwan Lal, the brother of the girl's father, lived in the same house. In the month of January, 1915, a complaint was made in the Criminal Court by one Rameshwar who had been married to an elder sister of the girl Musammat Chandrakala. The application was under section 522 of the Code of Criminal Procedure and was directed against Musammat Kasturi, Ram Jiwan Lal and the latter's son, Lalta Prasad. The allegation made in the Criminal Court was to the effect that these three persons were detaining the girl Chandrakala in their house against her will and were preventing her from going to live with her maternal uncle Panna Lal, who is the respondent in the present appeal. This dispute was put an end to in the month of January, 1915. A petition was filed before the Criminal Court in which it was stated that, by reason of the intervention of certain friends of the family, the parties had settled their dispute and the three accused persons had agreed that the girl was to go and take up her residence with her maternal uncle, Panna Lal, and that she was to be allowed to take her property with her. After the girl went to live with Panna Lal it appears that Panna Lal entered into a contract of marriage on her behalf with Rameshwar, who was the husband of the girl's deceased sister. Panna Lal, it is said, made all the arrangements for her marriage with Rameshwar and the 17th of June, 1915, was fixed as the date of marriage. A few days before the date Musammat Kasturi, the appellant, went to the District Judge of Aligarh and put in a petition asking that she might be appointed guardian of the person of the girl, Chandrakala. Simultaneously with this petition Musammat Kasturi filed another

petition in which she asked the court to issue an injunction restraining Panna Lal from having the marriage of the girl with Rameshwar performed on the 17th of June. A temporary injunction was issued by the District Judge, and the result was that Panna Lal was obliged to put off the marriage. The consequence of this is that present suit has been brought by Panna Lal in which he claims Rs. 1,000, as damages, on the allegation that the injunction which was sought against him by Musammat Kasturi was improperly sought and obtained and that by reason of postponement of the marriage he suffered damages, having made a number of costly arrangements for marriage ceremony. We may mention at this stage that since the 17th of June, 1915, the girl has as a matter of fact been married to Rameshwar, the man with whom the marriage contract had been made. The defence of Musammat Kasturi to this suit was to the effect that Panna Lal had no right whatever to enter into any contract of marriage on behalf of the girl, and that consequently it could not be said that she had applied for the injunction without reasonable and probable cause. In short her case was that Panna Lal had no cause of action for the suit.

The Munsif before whom the case was tried framed six issues. The first of these was whether or not the plaintiff had got any cause of action for the suit and was he entitled to maintain it. On this point the Munsif's finding was that the temporary injunction which was issued had given rise to a cause of action upon which the suit could be maintained, provided the plaintiff could show that he had suffered damage. The second issue was whether or not the plaintiff had any power to arrange the marriage of Musammat Chandrakala. On this point, after referring to certain authorities on Hindu Law, the Munsif was of opinion that the plaintiff had no right to make a contract of marriage in the presence of paternal relations. On the third issue the Munsif held that, assuming the plaintiff had authority to settle the marriage, it was not an unsuitable or improper one, although, as he said, the man Rameshwar with whom he contracted the marriage, was of no better status than one Piari Lal with whom, it is said, a previous arrangement for marriage had been made.

1916

KASTURI
v.
PANNA LAL.

1916

KASTURI
v.
PANNA LAL.

The fourth issue was whether the defendant obtained the injunction on wrong allegations and with a view to cause loss to the plaintiff. On this point the Munsif's finding was in favour of the defendant. He was not satisfied that the defendant obtained the interlocutory injunction in bad faith. Having decided these four issues the Munsif dismissed the case. He left undetermined two issues relating really to the amount of damages suffered by the plaintiff.

The fifth issue reads "Has the plaintiff suffered any loss owing to the injunction?" and the sixth issue reads "If yes, how much?"

On appeal the learned Additional District Judge has reversed the decree of the first court. He held that in the circumstances, which were made to appear in this case the plaintiff Panna Lal had authority to contract a marriage on behalf of the girl Chandrakala. He was also of opinion that Musammat Kasturi had no reasonable and probable cause for seeking this injunction from the Civil Court, and as a consequence of these findings he held that the Munsif should be directed to try out all that was left to be decided, viz. the amount of damages which was payable to the plaintiff. As regards the question of Panna Lal's authority to contract the marriage on behalf of the girl, it has been contended before us that, in the presence of paternal relations of the girl, Panna Lal, who is only the girl's maternal uncle, had no right to enter into this contract of marriage. There seems to be no dispute as to the law on the subject, and all the authorities have been referred to in a decision of this Court which is reported in *Kasturi v. Chiranjil Lal* (1). There can be no doubt that so long as there are competent paternal relatives in existence the maternal relatives of a girl have no authority to give her in marriage, and so *prima facie* it would appear that in the presence of Ramjiwan Lal, who was the girl's paternal uncle, Panna Lal had no power to arrange for her marriage to Rameshwar. It may, however, happen that the maternal relatives do acquire authority to contract the marriage on behalf of a girl, e.g. in cases where the paternal relatives refuse to act or have disqualified themselves from acting. And it is probably on this ground that the learned Additional District Judge came to the conclusion that Panna Lal

had in the circumstances of the case good authority to arrange for the girl's marriage. He pointed out that Ranjiwan Lal, the only surviving paternal uncle of the girl, was an outcaste and also referred to the fact that no objection had been raised to the proposed marriage. He further pointed out that in any case the defendant Musammat Kasturi was in no sense a really legal guardian of this girl under Hindu Law. We may refer again to the proceedings which were taken in the Criminal Court and which terminated with the compromise of the 15th of January, 1915. It seems to us that in view of those proceedings it is no longer open to Musammat Kasturi, or to the paternal relatives of the girl, to say that Panna Lal had no authority to act on the girl's behalf in this matter. We treat this compromise of the 15th of January, 1915, as amounting to an abdication of their functions by the paternal relatives. Ram Jiwan Lal, the girl's paternal uncle, and her cousin Lalta Prasad, the son of Ramjiwan Lal, were both parties to the compromise, and if, as stated in this compromise, they had decided on the advice of their own friends to surrender the girl to the guardianship of Panna Lal, we think it is no longer open to them, or to Musammat Kasturi either, to put up the case that Panna Lal had no authority to enter into this arrangement of marriage. Again, it has been pointed out that before the girl was made over to the custody of her maternal uncle a marriage had been arranged for her by Musammat Kasturi with the consent, it is said, of Ramjiwan Lal, and it is argued that having regard to this fact, Panna Lal was not competent to go behind the previous arrangement for marriage and to enter into a new contract. Panna Lal's story was to the effect that he had no knowledge of the earlier arrangement. In the court of the first instance, at any rate, he pleaded denial of this fact. Be that as it may, it seems to us that the fact that the girl had been previously betrothed to a man named Pearey Lal would not under the Hindu Law constitute any legal obstacle to her being betrothed to another man, Rameshwar. It has been conceded that all that happens in a case of breach of contract of this kind is that one of the parties acquires a right to sue for damages for the breach of contract. So far as Musammat Kasturi is concerned we think that she is out of court altogether, for in no way can it be said that she had any authority, as the

1916
 KASTURI
 v.
 PANNA LAL.

1916

KASTURI
v.
PANNA LAL.

widow of the girl's paternal uncle, to make arrangements for the girl's marriage. No doubt if she had succeeded in obtaining from the court of the District Judge of Aligarh an order for her appointment as guardian of the girl's person she would then have been vested with full authority to make arrangements for the girl's wedding. Her application to be appointed guardian was dismissed, and it appears to us that when she made the application she had no status whatever upon the basis of which she was entitled to go to the District Judge and ask for the issue of this injunction. No doubt in a case of this kind, which is based upon an allegation that the defendant has been guilty of abuse of process of the court, it is for the plaintiff to show that the defendant acted without reasonable and probable cause. On the facts which have been set out, and about which there is really no dispute, it is proved to us that the plaintiff sufficiently made out a *prima facie* case which threw upon Musammat Kasturi the burden of proving that she had reasonable and probable cause for the asking of this injunction. From what we have said it will be apparent that Musammat Kasturi had in fact no reasonable and probable cause for asking the District Judge to interfere in this matter. And we are satisfied from the evidence before us that her interference in this matter was not *bona fide* in the interest of the girl. It is important to notice here that in the application which Musammat Kasturi filed for the purpose of obtaining the temporary injunction not a word was said regarding the previous marriage contract arranged between the girl, Chandrakala and the man Piari Lal, and so Musammat Kasturi cannot be heard to justify her action on the ground that she was asking the Judge for an order which would protect her from liability in case there were afterwards any suit for the breach of contract of marriage with Piari Lal. We have no doubt therefore that on this part of the case the conclusion arrived at by the lower appellate court is quite correct.

We have now to deal with the other point which has been raised in the case, viz. the form of the order by which the learned Judge has remanded the case back to the first court. We have pointed out that six issues were framed in the case and four of them were decided. The last two are really one issue, viz. the

amount of damages which the defendant is liable to pay to the plaintiff. We are told that both parties gave all the evidence at the trial which they desired to produce. In these circumstances we fail to see why the learned Judge thought it necessary to pass his order under order XLI, rule 23, instead of under order XLI, rule 25, the latter being on the face of it the more appropriate rule in this case. The Munsif had merely omitted to try the issue relating to damages. There is on the record all the evidence upon which a decision on this issue can be reached. We think therefore that the proper order which should have been passed in a case of this kind was one under rule 25 directing the first court to come to findings on the 4th and 5th issues and to report them to the lower appellate court. We do not of course go the length of saying that the order which has been passed by the learned Additional Judge is an illegal order. We have been referred to a decision of this Court *Mata Din v. Jumna Das* (1), in which it has been held that it is competent to an appellate court to remand a case under section 562 of the Code of Civil Procedure, where the court of first instance having framed issues and recorded all the evidence, has decided the suit with reference to its finding upon one or more of the issues framed by it leaving other issues undecided. The provisions of section 562 of the old Code, which corresponds with order XLI, rule 23, of the present Code, have received a liberal interpretation in this judgement. We are, however, dealing here in first appeal with an order of the learned Additional Judge and it is open to us to alter the frame of the order if we think there are good grounds for doing so. It may be observed here that the result of sending the case back under order XLI, rule 23, will only result in further expense to the parties.

One of the results will be that after the decision given by the court of the first instance there will be another appeal to the court of the Additional Judge. Now that the parties have laid all their evidence before the court, we fail to see why they should be subjected to the chances of further litigation than is necessary.

We, therefore, allow the appeal to this extent that for the order of the court below passed under order XLI, rule 23, we

(1) (1905) I. L. R., 27 All., 691.

1916

KASTURI
v.
PANNA LAL.

substitute an order under order XLI, rule 25. The court of first instance will be directed, upon the evidence already on the record, to come to findings on the fifth and sixth issues and to return its findings on those issues to the lower appellate court. The learned Additional Judge after considering the findings will proceed to dispose of the appeal according to law. As regards costs we think the respondent is entitled to his costs in this Court.

Decree modified.

1916
May, 30.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

BHOJ RAJ (DEFENDANT) v. RAM NARAIN (PLAINTIFF)*

Pre-emption—Mortgage of property prior to the passing of Act No. IV of 1882.—Government revenue paid by mortgagee—Liability of pre-emptor to pay the amount of the revenue as a condition precedent to obtaining possession of property.

Under a mortgage-deed the mortgagor was liable to pay the Government revenue, and if he failed to do so, the mortgagee was to pay it and was entitled to recover the sum from the mortgagor and his other property. The mortgagor failed to pay the revenue which accordingly was paid by the mortgagee. Subsequently the property was sold to the mortgagee for the amount of the mortgage plus the amount of the revenue paid by the mortgagee. In a suit to pre-empt this sale, held that the pre-emptor was bound to pay the amount paid by the mortgagee for the revenue as a condition precedent to his obtaining possession of the property as well as the amount of the mortgage.

In this case the property in suit was mortgaged with possession so far back as 1873 to Bhoj Raj, defendant, for a sum of Rs. 3,000. There was a clause in the mortgage deed which was to the effect that the mortgagor would pay the Government revenue and if he failed to do so, the mortgagee would pay it and would be entitled to recover the sum from the mortgagor and his other property. The mortgagor failed to pay the Government revenue, and it was paid by the mortgagee. In the year 1911 the mortgagor sold the equity of redemption to the mortgagee, when the present suit to pre-empt the sale was instituted. The court of first instance decreed the suit: the lower appellate court modified the decree. The defendant vendee appealed to the High Court,

*Second Appeal No. 1882 of 1914, from a decree of H. E. Holme, District Judge of Aligarh, dated the 11th of September, 1914, modifying a decree of Banke Behari Lal, Subordinate Judge of Aligarh, dated the 20th of December, 1913.