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the estate and his position that he should succeed in removing the defendant from the management. Had the plaintiff withdrawn himself from their influence, and the defendant continued under it, their conception of their legal position might have been modified. When the managers say that after the *Dassará* of 1883 the defendant never interfered in the management, they are speaking to a fact. I think they slightly exaggerate in saying so; but, after all, it only shows that the defendant kept within the lines which she had marked out for herself on the *Dassará* day. The letters, written to her and by her when on her pilgrimage or absent from Bombay, show that her servants looked up to her as their mistress in the last resort, and do not, I think, show that they or she considered that she had abandoned that position. Weighing the evidence as a whole, I have come to the conclusion that I must find the sixth and seventh issues in favour of the defendant. The plaintiff's alternative case, as made in the eighth issue, must now, if persisted in, be proceeded with.

Attorneys for the plaintiff:—Messrs. *Crawford and Buckland.*

Attorneys for the defendant:—Messrs. *Craigie, Lynch, and Owen.*

ORIGINAL CIVIL.

Before Mr. Justice Jardine.

1887. *February 18.*

MULJI THA'KERSEY AND TWO OTHERS, (PLAINTIFFS), *v.* GOMTI AND KASTUR, (DEFENDANTS).*

Marriage—Betrothal—Breach of promise of marriage—Reciprocal contingent contract—Damages—Upariyáman—Halái Bhátiá caste.

The plaintiffs alleged that by a written agreement dated the 18th March, 1882, the first defendant and her deceased son, Ladhá, agreed that the second defendant, Kastur, who was the daughter of the first defendant, should be given in marriage to the second plaintiff, who was the son of plaintiff No. 1; and that the betrothal of these two persons took place accordingly. The agreement was executed by the said Ladhá, as eldest male member of his family, in the name of his deceased father. In pursuance of this agreement, the plaintiffs paid to the first defendant Rs. 700 as "*upariyáman*," and they presented Kastur with ornaments and clothes of considerable value. The plaintiffs complained that the first defendant sub-

*Suit No. 391 of 1886.

sequently refused to carry out the contract of marriage, and had married her daughter, Kastur, (defendant No. 2), to another person. They claimed in this suit to recover the ornaments and clothes, together with the Rs. 700 paid to the first defendant as "*upariyáman*" and Rs. 10,000 as damages. The first defendant was sued both in her personal capacity and as heir and legal representative of her son, Ladhá. The first defendant pleaded that neither she nor the second defendant were bound by the betrothal agreement, as they were not parties to it; that the contract had been a contingent contract, inasmuch as her son, Ladhá, had agreed to give Kastur, (defendant No. 2), in marriage to the second plaintiff only on condition that he (Ladhá) should obtain in marriage Utam, the daughter of the third plaintiff, and that Ladhá and Utam were accordingly betrothed; that Ladhá had died in 1884, and that the contract had been thereby determined; that she had been willing to renew it, and had proposed that a younger son of hers, (Javer), should be accepted as the husband of Utam, but that the plaintiffs had declined this offer.

In proof of her allegation, that the contract was a reciprocal contingent contract, the first defendant relied upon the following clause in the agreement:—"At the time when the marriages are to take place, the marriages of the two girls are to be performed together. When you shall give your daughter in marriage, I also am at the same time to give my daughter in marriage."

Held, that the agreement of betrothal was not a reciprocal contingent contract; and that the first defendant had committed a breach of the agreement by not giving her daughter, Kastur, (defendant No. 2), in marriage to the second plaintiff; and that the plaintiffs were entitled to recover from the first defendant the value of the ornaments and the Rs. 700 paid by the plaintiffs as "*upariyáman*," together with Rs. 600 damages for the breach of contract. The second defendant being a minor, was held not liable, and the suit as against her was dismissed.

THE first plaintiff was the father of Purshotam Mulji and Premji Mulji, (plaintiffs Nos. 2 and 3).

The second defendant (Kastur) was the daughter of the first defendant, (Gomti).

The plaint stated that by an agreement dated the 16th March, 1882, Gomti and her deceased son, Ladhá Purshotam, agreed that Gomti's daughter, Kastur, (defendant No. 2), should be given in marriage to the second plaintiff, (Purshotam Mulji), and that the betrothal of these two persons took place accordingly. The written agreement was executed by the said Ladhá Purshotam, as eldest male member of his family, in the name of his deceased father.

In pursuance of this agreement, the plaintiffs paid to Gomti Rs. 700 as *upariyáman*, and presented ornaments of the value

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of Rs. 501 to Kastur, (defendant No. 2). They also presented to Kastur additional ornaments of the value of Rs. 100 and clothes of the value of Rs. 300.

The plaintiffs complained that the first defendant, Gomti, subsequently refused to carry out the contract. Whereupon the plaintiffs brought the matter before the caste; but, in defiance of the expressed opinion of the caste, Gomti had effected a marriage between Kastur and another person, named Jivráj Nánji, from whom she had received a sum of Rs. 4,000.

The plaintiffs accordingly sued to recover from the defendants the above-mentioned ornaments and clothes, or their value, and the sum of Rs. 700, with interest. They also claimed Rs. 10,000 damages from the breach of the contract, alleging that they had suffered in credit and reputation by the conduct of the defendants, and that they would have to incur the expense of Rs. 5,000 in order to get another bride for the second plaintiff.

The first defendant, Gomti, filed a written statement, in which she pleaded that neither she nor her daughter, (defendant No. 2), were bound by the betrothal agreement, not having been parties to it. She further alleged that, from the document itself, it appeared that the contract entered into had been a contingent contract, and that her son, Ladhá, had agreed to give Kastur, (defendant No. 2), in marriage to Purshotam, (plaintiff No. 2), only on condition that he, (Ladhá), should obtain in marriage Utam, the daughter of Premji, the third plaintiff, and that Ladhá and Utam were accordingly betrothed; that Ladhá had, however, died in 1884, and the contract had been thereby determined; that she had been willing to renew it, and had subsequently proposed for this purpose that Ladhá being dead, a younger son of hers, (Javer), should be accepted in his place by Premji as the husband of Utam, but that this proposal had been declined. She alleged that such an arrangement was usual under such circumstances among the Bhátiá caste of Amreli and the neighbourhood, and that the caste had sanctioned her proposal.

With regard to the ornaments claimed by the plaintiffs, she alleged that they had been returned to the first plaintiff.

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Gomti was made defendant in the suit both in her personal capacity and as heir and legal representative of her son, Ladhá Purshotam.

Lang and *Russell* for the plaintiffs.

Defendant No. 1 in person.

The following authorities were referred to:—*Bastin* v. *Bidwell*[1]; *Edge* v. *Boileau*[2]; Contract Act IX of 1872, sec. 53; Steele's Customs, pp. 24, 25; Mayne's Hindu Law, para. 88.

JARDINE, J.:—The parties are of the Halái Bhátiá caste and residents of Káthiáwár. The plaintiffs belong to Amreli, in H. H. the Gáikwár's territory, and the defendants to Kálávád, in the State of Jámnagar, though living in a house at Junágad in March, 1884, when a daughter of each family was betrothed to one of the sons of the other family. Certain payments and presents to the betrothed girls were made according to custom. About October, 1884, Ladhá, the son of defendant Gomti, who had been betrothed to Utam, daughter of one of the plaintiffs, died. The plaintiffs in the course of a fortnight, (as defendant Gomti admits), returned to her such ornaments as she had presented for Utam, and took a receipt for them in a formal manner before attesting witnesses.

The plaintiffs were admittedly able and willing to perform the marriage of Purshotam, the betrothed son of their house, with the defendant Gomti's daughter, Kastur. But Gomti herself refused to give Kastur in marriage to her betrothed, unless plaintiff's family would provide a wife for her surviving son, Javer, and pay the expenses of the marriage. These terms were declined by the plaintiffs.

It is necessary to explain that, according to the evidence, there is a scarcity of marriageable girls among the Halái Bhátiás in Káthiáwár, and that, among people of the position of the parties to this suit, an expenditure of about Rs. 5,000 seems to be usually incurred in getting a son married, unless the boy's father arranges, as in the present case, to give a daughter or other relation in marriage to a boy of the other family, when the expenditure of

(1) L.R., 18 Ch. Div., 238. (2) L.R., 16 Q. B. Div., 117.

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ready money is reduced to about Rs. 1,500. It may thus be inferred that a marriageable girl is valued at about Rs. 3,000 or Rs. 3,500; and there is evidence, which I believe, that Gomti afterwards contracted Kastur in marriage to a Bhátiá in Bombay for Rs. 4,000.

These reciprocal arrangements or double contracts are said to be common among the people of only moderate fortunes; they are somewhat mercenary in their character, and appear, therefore, if I may trust Mr. Lakhmidás Khimji's evidence on this matter of sentiment, to be rarer among the higher members of the Halái Bhátiá community, who also attach greater binding importance to betrothals than their less cultivated caste-men do.

In some cases, as in the present, the conditions of the betrothal, or some of them, are put into writing in the shape of an agreement. Except one clause, on which I have to place a construction, there is nothing in the agreement between the parties to show that it was their intention to provide that if one of the four betrothed persons died, so as to render one of the marriages impossible, the parties should be released from the promise to carry out the other marriage. The agreement was made at Junágad. Gomti urges in her written statement that the contract consists of reciprocal promises to be simultaneously performed; that both marriages were to be solemnized at the same time; and her argument is that as the death of Ladhá has made the marriage of him with Utam impossible, she is not obliged to give Kastur to the plaintiff, Purshotam. She was willing to do this if the plaintiffs would give a girl of their house to her son, Javer, or pay Rs. 5,000, the cost of getting him married. She thinks it inequitable that she should part with her daughter even to the betrothed bridegroom without getting an equivalent. When I pointed out to her that no such provision was expressed in the written agreement, she replied: "The opposite view would cause me loss in three ways. I would lose my son, my daughter, and a girl for my boy." The plaintiffs say: "That is her misfortune; it might have happened to us," while admitting that, if Kastur had been given in marriage to Purshotam, they would have gained a benefit in securing a girl on cheap terms.

Gomti has tried to prove a general rule among the caste, in Káthiáwár, by which her contention would be supported. She deposes to several instances, but it would be unsafe to infer that the parents acted under stress of any custom having the force of law. It is more probable that, in the events that happened, each tried to make good or reasonable terms appropriate to the special circumstances, a certain amount of fair dealing and respect to the feelings of the community being secured by the authority of the caste, as may be inferred from the action of the parties, and the Mahájans or heads of the caste in this case. From the vague and contradictory evidence, it would be unsafe to infer the existence of any custom, or even a prevailing sentiment; and I, therefore, will exclude this part of the evidence in considering this particular contract of betrothal, the conditions agreed to in writing, and those which may be treated as implied.

Both parties in their pleadings rely on the written agreement, which was executed on the same day as the betrothals, which are mentioned as already effected. After three clauses dealing with some payments and presents comes the following:—

"At the time when the marriages are to take place, the marriages of the two girls are to be performed together. When you shall give (your daughter) in marriage, I also am at the same time to give (my daughter) in marriage."

Gomti pleads that this is a reciprocal contingent contract; while Mr. Russell has argued, for the plaintiffs, that the above clause deals with a mere matter of convenient arrangement, *viz.*, the performing of the marriages at the same time, which might save trouble and expense.

If the transaction be regarded merely as a bargain, and the girls as objects of barter, the argument of Gomti has some weight. But this view of betrothal and marriage is inadequate, and inconsistent with Hindu law and forensic principle; besides, it is not supported by the written agreement, which does not specify the girls as objects of value or set-off. If the real intention of the parties was that, if one of the four betrothed persons died in the interval, the whole contract should be void, we might reasonably

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expect to find a clear expression of the intention, as in the case of *Atmárám Kesoor* v. *Sheolál Mulookchund*(1); and more especially as the agreement states that the defendant's family had received Rs. 700 as "*upariyáman*," a word meaning "over and above," and used for a premium paid in consideration of the girl being older than usual, and thus more available for marriage and more appreciated than one younger. The two girls were not of equal value; and Gomti's contention would be inequitable unless she offered to return this "*upariyáman*," which she has not done. What Gomti did, was to break off the contract when she found that she had not gained what she had expected. But her mere expectations and hopes are no part of the contract. I see no reason, on full consideration, to treat the clause of the written agreement as more significant than other promises of the same kind. It is a convenient and common thing for several couples to get married on the same day, and to agree to this among themselves. But it would be absurd to hold, in the absence of a condition to that effect, that the death of one of those who had plighted troth, should revoke all the other promises to marry. It would be equally wrong to allow, without liability to compensate in damages, one party to a contract to break it, because subsequent events had made it unprofitable. In the present case, there was no incapacity on the part of Gomti or Kastur. The case thus resembles *Robinson* v. *Davison*(2) less than *Hall* v. *Wright*(3), where it was held by the majority of the Judges that, in the absence of a special provision, the plea of the defendant, that he was afflicted with a dangerous disease and incapable of marriage without danger to his life, was no defence to an action for damages for breach of promise.

For these reasons I find, on the first issue, that the agreement of betrothal was not a reciprocal contingent contract; on the fourth issue, that the plaintiffs were always ready and willing to carry out the contract until prevented by the act of Gomti; and on the fifth issue, that defendant Gomti committed a breach of the agreement by not giving Kastur in marriage to plaintiff Purshotam, and that she was not justified by any custom or caste rule in her refusal.

(1) 1 Borr., 397. (2) L. R., 6 Ex., 269. (3) E. B. & E., 746.

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The liability of the defendants is the next matter for consideration. The plaintiffs claim the value of the ornaments and clothes which were presented for the use of Kastur at and subsequent to the betrothal, on the understanding that she would be married into their family. The agreement contains a clause providing that each family is to give back these ornaments and clothes. A witness has explained it to mean that each bride was to bring with her to her husband's house these articles: so that they were to come back to the donor's family, and not to be kept by the bride's parents. The plaintiffs returned the ornaments which had been presented to them; and Gomti admits, and other witnesses say, that when a betrothal is broken off, this return of ornaments is customary.

I hold it proved by the plaintiff Premji and his account book that the value of the ornaments was Rs. 562. Gomti says that they were returned to the plaintiffs' people at Wadhwán camp for the purpose of repair. But she produces no receipt, and her own witness, Gangá, contradicts her. She herself is not trustworthy in her assertions, and it seems improbable that these ornaments would have been parted with in the informal way she describes. Besides, her own people could have got the repairs made. I, therefore, find the third issue against her.

As regards the presents of clothes, there is evidence that they are given to wear; and if much worn, are not reclaimed nor returned. The evidence of the number and value of clothes given to Kastur is vague; and although I do not say that the plaintiffs have made false statements, I cannot be certain about the quantity, and I think it probable they have been worn out. They were not given on a fraudulent misrepresentation: so the case differs from *Asgar Ali* v. *Mahabad Ali*[1]. I think, however, the loss, which I may roughly estimate at Rs. 100, may be considered in the award of damages.

I find it proved by Premji and his accounts and the recital in the agreement that the defendant Gomti received Rs. 700 as "*upariyáman*." It is plain, from her own statements, that she was then and since managing the matter, as a Hindu widow often does.

(1) 13 Beng. L. R. Appx., 34.

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I will, therefore, decree payment of the sums of Rs. 562 and 700 by her. These are my findings on the second issue. As authority and precedent, I take the judgment in *Umed Kiká* v. *Nagindás*[1], which has been cited by Mr. Russell. It has not been contended that Kastur, a minor under her mother's control, is liable, in her personal capacity, for the breach of contract, or as representing her family; and the evidence being that the ornaments and money were received by Gomti, I find that Kastur is not liable for their value.

There remains the question of damages for the injury which, a number of witnesses say, occurs when a breach of contract of betrothal takes place. The case just quoted, is a precedent for such an award. The circumstances of the case and the social condition of the parties must be considered. It appears that Gomti took Kastur to Bombay after her refusal to give her in marriage. Plaintiff Premji followed, and complained to the caste, who, as shown by the minutes of the meeting of the 6th March, 1885, and the handbill of the 8th March, 1885, which publishes the resolution of the caste, held a meeting in the hall of the New Cloth Market, when Gomti appeared, and the Mahájans ordered that the dispute should be referred to the decision of the Mahájans of Gondal, in Káthiáwár, evidently supposing that these latter were the best judges of a dispute in deciding which local habits and feelings might have to be considered. It was also ordered that Kastur should not be given in marriage to any one, pending the decision of the Gondal Mahájans. Gomti says this went in her favour; but her statement is not corroborated, and I do not believe it. The parties appeared before the Gondal Mahájans, but apparently no decision had been come to, when, having returned to Bombay, Gomti gave Kastur to a Bhátiá at Mátunga, named Jivráj Nánji, as his wife, for which act they were all three put out of caste by the Bombay Mahájans. It is to be noted that the *interim* order of the Bombay Mahájans of the 6th March, 1885, was assented to by Gomti, and also on the 8th March by the Kutchi division of the Bhátiá caste before whom it was placed. On the 15th July, Gomti admits that she said in

[1] 7 Bom. H. C. Rep., O. C. J., 122.

presence of the caste that she had received Rs. 4,000 from Jivráj. She is stated to have allowed them to take down the numbers of the currency notes. She now denies receipt of Rs. 4,000, and explains her previous statement by saying that Jivráj's promise was as good as his money. But I believe she did receive it, as she told the caste. It is highly improbable, under the circumstances, that such a woman would have parted with her daughter to a husband without getting ample compensation.

One of the plaintiffs accuses her of mercenary motives throughout; and I find it proved that she has, in fact, received two dowries—first from the plaintiffs, then from Jivráj. She has broken the contract of betrothal, and then broken her promise to the Bombay Mahájans and the plaintiffs that she would wait till the decision had been passed at Gondal. She has attempted by false statements to deprive the plaintiffs of the return of their presents. In fine, I see no redeeming feature in her conduct. She has been wanting in fair dealing with the plaintiffs; and there is nothing to show that her action has been guided by prudent consideration for her daughter. It has not been suggested that Purshotam was in any way ineligible, or that Jivráj was a "preferable suitor" (Mitákshara, Ch. II, s. 11, p. 27); or that he is a better bridegroom, endowed with religious, worldly and amiable qualities," for whose sake Nárada, (Jolly's Institutes, Ch. 12, p. 30) allows a betrothal to be broken off. It is true that the defendants have not had the advantage of counsel, but no such justification has been suggested, and I refrain from giving any opinion on the application of these texts of the Hindu law.

The plaintiffs have claimed Rs. 10,000 as damages in addition to the "*upariyáman*," ornaments, and clothes. But it is clear that Purshotam can get himself married without going to any such expense under any circumstances; the defendant has pleaded that Utam is as available to be given in marriage as when she was betrothed to Gomti's son, and thus a cheap arrangement may be negotiated. As the case proceeded, Mr. Russell confined the claim for damages to the loss of credit and reputation which the joint family has sustained. To quote Green, J., in the case already cited, I think they must necessarily have sustained some damage

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of that nature. They have had to appear, in pursuit of their rights, before the caste here and at Gondal; and thus must have added publicity to the other annoyance and vexation. On considering these circumstances, and the reasons on which the learned Judges made the award in *Umed Kika* v. *Nagindás* (1), I fix the amount to be paid by Gomti, as damages for breach of the contract of betrothal, at Rs. 600. The case is one of somewhat general importance, and probably its difficulty was felt by the caste tribunals to which the parties resorted; and as the amount of damages cannot be fixed with mathematical exactness, I certify that the suit was one fit to be brought in the High Court.

I now dismiss the suit as against the defendant Kastur, and decree that the defendant Gomti pay the total of the several items Rs. 562, 700, and 600, *viz.* Rs. 1,862, and the costs of the suit and interest on the judgment at six per cent. *per annum*.

Attorneys for the plaintiffs :—Messrs. *Crawford and Buckland*.

Defendant Gomti in person.

(1) 7 Bom. H. C. Rep., O. C. J., 122.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1886. *November 15.*

RA'MCHANDRA YASHVANT SIRPOTDA'R, (ORIGINAL DEFENDANT), APPELLANT, *v.* SADA'SHIV ABA'JI SIRPOTDA'R AND ANOTHER, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Limitation—Co-sharer—Adverse possession—Possession of one co-sharer when adverse—Mortgage—Mortgage by three co-sharers—Redemption by one of several mortgagors—Right of the other mortgagors to sue for redemption—Period of limitation for such suit.

In 1847 the property in dispute was mortgaged by three co-sharers, D., A., and R. In 1859, R. alone redeemed the property, and mortgaged it again to a third person.

In 1882 the heirs of D. and A. brought a suit to redeem the whole of the property, or their portions of it. The defence to the suit was that it was barred by limitation, being brought more than twelve years after R. had redeemed the pro

* Second Appeal, No. 328 of 1884.