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The irregularity of the District Judge's order has thus clearly led to no failure of justice, and falls under section 578 of the Civil Procedure Code. The order of dismissal must, therefore, be upheld, and the claimant referred to the only remedy open to him under Act X of 1870.

Costs on appellant.

Order confirmed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

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MULCHAND KUBER (ORIGINAL PLAINTIFF), APPELLANT, *v.* BHUDHIA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Marriage—Marriage of a girl without her father's consent—Suit by father to have marriage declared void—Factum valet—Applicability of the doctrine to marriage.

Under the Hindu law a duly solemnized marriage cannot be set aside in the absence of fraud or force, on the ground that the father did not give his consent to the marriage.

The texts relating to the eligibility of persons who can claim the right of giving a girl in marriage, are directory and not mandatory.

SECOND appeal from the decision of E. H. Leggatt, Assistant Judge of Ahmedabad.

Suit by a father to have the marriage of his daughter (defendant No. 2) to the first defendant declared null and void.

The parties to this suit were Lewa Kunbis by caste. Plaintiff was a resident of Ahmedabad. In consequence of some dispute in the family, his wife (defendant No. 3) left his house and went to live with her mother at Gomtipur, a village about two miles distant from Ahmedabad. She took with her his infant daughter Mahalaxumi (defendant No. 2) who was about 3½ years old.

Thereupon the plaintiff applied to the District Court to obtain the custody of his child and for an injunction restraining his wife from disposing of her in marriage.

This application was rejected. Shortly afterwards the girl was given in marriage to defendant No. 1 by her mother (defend-

* Second Appeal, No. 249 of 1897.

ant No. 3) without the consent of the plaintiff and in defiance of his wishes.

The plaintiff then filed this suit praying for the custody of his daughter and for a declaration that her marriage with the first defendant was null and void.

The defendants pleaded (*inter alia*) that the plaintiff had given his consent to the marriage of his daughter, that the match was a fit and proper one, and under the Hindu law a marriage once performed could not be annulled.

The Subordinate Judge held that the girl was given in marriage without the plaintiff's consent or knowledge, that the marriage was celebrated in fraud of his rights, and that the doctrine of *factum valet* was not applicable. He, therefore, passed a decree for the plaintiff, declaring the marriage null and void, and ordering the defendant to deliver up possession of the minor (defendant No. 2) to the plaintiff.

On appeal, the Assistant Judge held that, though the marriage was performed without the plaintiff's consent, it was not invalid on that account, in the absence of fraud on the part of the mother. He, therefore, reversed the first Court's decree and dismissed the suit. His reasons were as follows :—

"The Hindu law appears to be that the father has the right to perform the marriage ceremony and not the mother, but it also seems that a marriage once performed is valid, and nothing is said as to the father's consent. As is said in the case referred to, where the Legislature contemplates the invalidity of a marriage to which the father's consent is wanting, it lays down the law in express terms, and if it does not do so, it must be presumed that the father's consent is not absolutely necessary.

"I think, moreover, that I must take into account the fact that the father applied for an injunction restraining his wife from giving his daughter in marriage and failed to obtain the injunction. In refusing to grant his application, the Court gave so much colour to the mother's claim to be allowed to perform the ceremony as to negative any idea of fraud on her part. This being so, the question raised and left undecided by the High Court in the case referred to (I. L. R., 11 Bom., page 256) as to whether the Civil Court would set aside a marriage on the ground of fraud by the parties intermarrying, has no application and need not be discussed.

"There is not sufficient evidence to show that the marriage was in itself an improper one. The father may be able to sue the mother for the money

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received on account of the marriage of his daughter, on the ground that he was the only person entitled to give her in marriage, but this would not affect the validity of the marriage itself.

"Under the circumstances I think the marriage is valid and cannot be annulled.

"I, therefore, reverse the decision of the Subordinate Judge and dismiss the suit."

Against this decision the plaintiff appealed to the High Court.

Ganpat Sadashiv Rao for appellant:—It is found, as a fact, that the girl's marriage was performed without her father's consent and authority. Under the Hindu law it is the father's right to dispose of the girl in marriage; failing him the paternal relations have this right, and in their default, the mother. The mother thus stands last on the list of relations who by law are empowered to give a girl in marriage. So long as the father is alive, the mother has no authority to give away her daughter without his consent. A marriage performed without his consent is invalid —*Nundlal* v. *Tapeedas*[1]. It is a fraud on the father's right for the mother to usurp his authority and give their daughter away without his knowledge and consent. Such fraud vitiates the marriage contract and renders it null and void—*Anujona Dasi* v. *Prahlad Chandra*[2]. The doctrine of *factum valet* has no application to such a case, for the obvious reason that there is a complete absence of authority in the mother to give away the girl. The prohibition of the law is not merely directory, but mandatory. The cases of *Bace Rubyat* v. *Jeychund*[3] and *Khushalchand* v. *Bai Mani*[4] are distinguishable from the present case, because in both those cases the father had abandoned his wife and daughter, and acted in a manner showing that he waived his legal right to dispose of his daughter in marriage.

C. H. Setalvad for respondents:—According to the Hindu law a marriage once duly celebrated cannot be annulled. The consent of the father is not essential to the validity of the marriage. The case of *Khushalchand* v. *Bai Mani*[4] is conclusive on this point. See also *Bai Diwali* v. *Moti Karson*[5]. As to the question of

(1) 1 Borr., 16.
(2) 6 B. L. R., 243.
(3) Bellasis, (1840-48), 43.
(4) I. L. R., 11 Bom., 247.
(5) *Ante*, p. 509.

fraud, the lower Court finds, as a fact, that there is no proof whatever of any fraud, constructive or actual, on the part of the mother or any other person who brought about this match.

RANADE, J.:—The parties to this suit are Lewa Kunbis. Both the lower Courts have held that the marriage of appellant-plaintiff's daughter Mahalaxumi, aged 3½ years, with the minor respondent, himself a boy 7 or 8 years old, was celebrated by the child's mother and her maternal relations without the knowledge and consent of the appellant. The Court of first instance held that there were clear indications of fraud and concealment, and as the caste was one in which remarriages were permitted, it held that appellant was entitled to the declaration he sought in respect of setting aside the marriage, and the Court also awarded appellant's claim to the custody of the child.

In appeal, the Assistant Judge was of opinion that the circumstances of the case negatived the existence of fraud, and that the marriage was in other respects not an improper one. He further held that a marriage duly celebrated by the child's mother could not be set aside on the ground of the absence of the consent of the father, inasmuch as such consent was not absolutely necessary. The Assistant Judge accordingly dismissed the claim for the declaration sought, as also for the custody of the child.

The chief contention raised in appeal before us is that, under the circumstances of the case, the marriage was null and void, as the appellant's consent and authority were not secured prior to its celebration. The defence in the Court of first instance was made to rest on an allegation that the appellant was present at the time of the celebration. This defence broke down, and the decision was made to rest chiefly on the doctrine of *factum valet* to which the lower Court of appeal has referred in its judgment. This doctrine of *quod fieri non debuit factum valet*, or its Sanskrit equivalent, that "a thing cannot be made otherwise by a hundred texts," has been frequently referred to in our reports in connection with questions relating to marriage, adoption, alienation, and maintenance of widows—*Khushalchand* v. *Bai Mani* (1)

(1) I. L. R., 11 Bom., 247.

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Lakshmappa v. *Ramava*[1]; *Gopal* v. *Hanmant*[2]. The general principles underlying the maxim were laid down in *Lakshmappa* v. *Ramava*, and re-affirmed in *Gopal* v. *Hanmant* by Sir M. Westropp.

In the first of these judgments it is stated that the application of the maxim must be limited to cases in which there is neither want of authority to give or to accept, nor imperative interdiction. In cases in which the Shástra is merely directory, or only points out particular persons as more eligible than others, the maxim may usefully and properly be applied if the precept or recommended preference be disregarded. When the defect is one which can be described as one of the nature of *non potuit* rather than of *non debuit*, then the maxim does not apply—*Gopal* v. *Hanmant*. In the words of West and Bühler's Digest, p. 909 (*a*), "prohibition or injunction resting on the essential qualities or mutual relations of its objects is distinguished as indispensable from one going only to an incident or matter of degree, or to the ceremony, a defect in which does not generally vitiate the purposed transaction if the precept has been complied with as far as was reasonably practicable."

The distinction between directory and prohibitory injunctions being so clear, we have next to see how far the authority of the father to give his girl in marriage falls under one or the other class of injunctions. The decided cases to which reference was made in the course of the argument leave no doubt on this point. The case of *Nundlal* v. *Tupeedas*[3] may be left out, for it related only to a betrothal contract, and not to a completed marriage, and the only point decided in it was that contracts of betrothal to be binding must be made by or with the parents of the children. The next case in Bellasis' Reports (*Bace Rulyat* v. *Jeychund*) is more to the point. There, as here, the dispute was between husband and wife, and the girl was only 3 years old when her mother got her married. The Court held that a duly solemnized marriage could not be set aside on the ground that the father did not give his consent to the marriage. In a Bengal case—

(1) 12 Bom. H. C. Rep., 364. (2) I. L. R., 3 Bom., 273.
(3) 1 Borr., 16.

Modhoosoodun Mookerji v. *Jadub Chunder*[1]—it was held that a Koolin father was not such a natural guardian of his child as its mother, and that the absence of his consent would not invalidate a marriage duly solemnized by the mother. The Madras High Court came to a similar decision where the dispute was between the widowed mother and her husband's brother—*S. Namasevayam Pillay* v. *Annamai Ummal*[2]. This was also the view taken by the Calcutta High Court in *Brindabun Chandra* v. *Chundra Kurmokar* [3], where also the mother's right to dispose of a minor child was questioned by the uncle of the child on the authority of the Smruti texts, which give preference to such relations over the mother in this connection.

Most of these cases were reviewed and considered by this Court in *Khushalchand* v. *Bai Mani*, and by the Madras High Court in *Venkatacharyulu* v. *Rangacharyulu*[4]. In the first of these cases the operation of the maxim *factum valet* was considered, and Sir C. Sargent observed that, upon a true construction of the texts, the giving of the girl in marriage was not a right, but a duty to be discharged, and, in the absence of express words invalidating the gift in marriage, the consent of the person upon whom this duty devolves is not of the essence of the marriage, and if it is not, the maxim applies. It is true the learned Chief Justice expressed no opinion as to how far the presence of fraud would invalidate such a marriage, but there, as in the present case, there was no reason for interference, on the ground of fraud the existence of which the lower Court of appeal has expressly negatived in the present case.

The appellant's pleader contended that there was a constructive, if not a direct, fraud upon the father's authority. As the District Court did not grant the injunction which the husband had prayed against his wife, and, moreover, as the District Judge has found expressly that the marriage was not an improper one, there is not much room for presuming constructive fraud. Fraud and force, such as was alleged in the case of *Aunjona Dasi* v. *Prahlad Chandra Ghose*[5], must vitiate any transaction however solemnly celebrated

(1) 3 Cal. W. R., 191.
(2) 4 Mad. H. C. Rep., 339.
(3) I. L. R., 12 Cal., 140.
(4) I. L. R., 14 Mad., 316.
(5) 6 B. L. R., 243.

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by the observance of the usual ceremonies, and a suit to set aside the marriage will lie. But, in the absence of these elements, the maxim of *factum valet* will govern, as the texts only refer to the greater or less eligibility of the relations who can claim the right to make the choice and perform the ceremony. The custom of the caste is not shown to be adverse to the celebration of the girl's marriage at 3½ to a boy of 7, and no fraud can be presumed from the fact of this early celebration. The circumstance that remarriage is permitted by the rules of the caste is irrelevant in the decision of the question of the validity of the marriage.

On the whole, therefore, we must hold that the appellant-plaintiff's claim was properly dismissed by the lower appellate Court. We dismiss the appeal. Costs on appellant.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1897. *July* 26.

RATANCHAND (ORIGINAL DEFENDANT), APPELLANT, *v.* JAVHERCHAND (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Widow—Funeral expenses of widow—Husband's estate chargeable with such expenses.

Under the Hindu law the estate of the husband is liable for the funeral expenses of the widow; her *stridhan* cannot be charged with such expenses.

SECOND appeal from the decision of Rão Bahádur V. V. Paranjpe, First Class Subordinate Judge of Broach, A.P.

One Parbhudas Kalliandas died in July, 1875, leaving a childless widow, Bai Divali.

Bai Divali died on or about the 11th April, 1893. She left a will, bequeathing the whole of the property in her possession to her brother, the defendant.

The plaintiff thereupon filed this suit, as the nearest kinsman and reversionary heir of Parbhudas Kalliandas, to recover the property in dispute from the defendant.

The defendant pleaded (*inter alia*) that the whole of the pro-

* Second Appeal, No. 306 of 1897.