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the leave of the Court transact the business with which he is so entrusted. The rule was passed to facilitate the work of the Court, and to obviate the unnecessary postponements of cases, and is one which has, we believe, worked well. For many years it has been in existence without objection being made to it.

As to the objections now made to it by the District Judge, they refer more to its posssible abuse than to its legality. With reference to them it must be remarked that the rule is merely permissive with the leave of the Court. If a client objected, the Court would doubtless see reason to the contrary, and so if it considered that the rule was being abused. It was certainly never intended to allow experienced pleaders to transact their clients' business by the agency of inexperienced juniors, but only to avoid unnecessary adjournments in unimportant matters when the pleader engaged by the party is temporarily absent. We answer the question in the negative.

Order accordingly.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Tyabji.

1897.
February 23.

DHOLIDAS ISHVAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* FULCHAND CHHAGAN AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Marriage—Contract of marriage—Contract to pay money to a father for giving his child in marriage—Public policy.

A contract which entitles a father to be paid money in consideration of giving his son or daughter in marriage is against public policy and cannot be enforced in a Court of law.

SECOND appeal from the decision of Gilmour McCorkell, District Judge of Ahmedabad, confirming the decree of Ráo Sáheb V. M. Mehta, Second Class Subordinate Judge of Ahmedabad.

Suit for recovery of damages for breach of a marriage contract.

The defendants were the minor son and the widow of one Chhagan Purshotam, deceased. The plaintiff alleged that Chhagan in his life-time had contracted to give his daughter Ganga in marriage to his (the plaintiff's) son, and the plaintiff now sued to

* Second Appeal, No. 735 of 1896.

recover Rs. 805 as damages in breach of that contract. The following statement of facts is taken from the judgment of Tyabji, J.:—

"The plaintiff had a son, and one Chhagan Purshotam had a daughter, and it was agreed between the plaintiff and Chhagan that Chhagan should give his daughter in marriage to the plaintiff's son and should also pay to the plaintiff the sum of Rs. 337 for *peheramni* and Rs. 51 for *purat*, making together Rs. 388. In furtherance of this agreement the plaintiff gave to Chhagan's daughter a *kudda* worth Rs. 15. Chhagan having died, and his widow and son having refused to carry out the agreement, this suit was brought. The Subordinate Judge passed a decree in favour of the plaintiff for the value of the *kudda*, but refused to allow the plaintiff's claim to the Rs. 402 for *pulla* given by the plaintiff to the other girl, whom the plaintiff's son afterwards married, on the ground that the plaintiff would, according to his own admission, have been obliged to pay the same amount of *pulla* to Chhagan's daughter if the agreement had been carried out. He also rejected *in toto* the plaintiff's claim to the Rs. 388, on the ground that the agreement by Chhagan to pay any such sum to the plaintiff was immoral and against public policy.

"On appeal, the District Judge agreed with the Subordinate Judge and confirmed the decree on the ground that the agreement to pay the *peheramni* and the *purat* to the plaintiff was void."

The plaintiff preferred a second appeal.

Goverdhanram M. Tripathi, for the appellant (plaintiff).

Girdharlal H. Mehta, for the respondents (defendants).

FARRAN, C. J.:—The plaintiff in the suit out of which this appeal arises, sued to recover damages from the defendants, the widow and son of one Chhagan Purshotam, for breach of a contract, whereby Chhagan agreed to give his daughter in marriage to the plaintiff's son. The agreement provided that Chhagan should pay the plaintiff Rs. 337 as *peheramni* and Rs. 51 as *purat* at the time of the marriage.

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The plaintiff, when the marriage contract was broken, married his son to another girl to whom he gave Rs. 402 as *pulla*, but he received no *peheramni* from the father of the bride. He admitted that he would have had to pay the same sum as *pulla* to Chhagan's daughter had the original contract been carried out, so that on that account the breach of the contract caused him no loss. The only damages which he could show as arising out of the defendants' breach of Chhagan's contract were, therefore, loss of the *peheramni* and *purat* which Chhagan had agreed to pay to him at the time of the marriage. The lower Courts have held that the agreement, in so far as it stipulated that the plaintiff should be paid Rs. 388 on the marriage of his son, was contrary to public policy and void under section 23 of the Contract Act.

The argument for the appellant is twofold: (1) that *peheramni* thus paid to the father of the bridegroom at the marriage is, in reality, made as a provision for the bridegroom, or bridegroom and bride (as *pulla* is given as a provision for the bride) and does not constitute a payment to the father for his own benefit; and (2) that the payment of *peheramni* to a father upon the marriage of his son is a customary caste payment regulated by the usages of the caste, and that there is nothing immoral or contrary to public policy in a father stipulating for such a payment, or for its amount.

As to the first argument, I think it is plain upon the pleadings, and it was so understood in both the lower Courts, that the claim was made by the plaintiff in his own right, and not by him suing on behalf of his son. The extracts which Mr. Goverdhanram has read to us from Borradaile's Caste Customs show that *peheramni* on occasions of marriage is sometimes given to the bridegroom and sometimes to his father, and at times to his other relations to secure their approval of the marriage, or to disarm their opposition to it. There is no ground, therefore, for the contention that it should be assumed that the *peheramni* in the present case is sued for by the father on behalf of his son. We must, I think, take it, as the lower Courts have done, that the plaintiff is suing on his own account and that the contract was that it should be paid to him. Were it otherwise, it is the son who should sue for damages under this head, and not the father.

The suit is, I think, in effect, though not in form, a suit to give effect to the agreement of the father for *pheramni* on the marriage of his son. The question, therefore, directly arises whether a contract which entitles a father to be paid *pheramni* on the marriage of his son is against public policy. When a father or other guardian of a boy or girl has to betroth his ward, his primary and only consideration ought to be the happiness and welfare of the child. The stipulating for a monetary payment for himself is, or may be, I think, an incentive to the parent or other guardian to have regard to other considerations than the child's happiness in marrying him or her into another family. The danger is manifestly less obvious in the case of a father seeking a wife for his son than in that of a father seeking a husband for his daughter, but in principle it would be difficult to distinguish between the two. Such an agreement would clearly be invalid under English law. The principal authorities are collected by Jardine, J., in *Dulari* v. *Vallabdas* [1].

Such contracts do not appear to me to be less opposed to public policy because the children to be married are of tender years and have no voice in the matter. The duty imposed on the parent is, I think, even more direct and imperative in such cases. The English law has been followed in our High Court by Jardine, J., in *Dulari* v. *Vallabdas* (*supra*) and by Scott, J., in an earlier case there referred to, and I think that we ought also to follow it. The decision on the reference in *Joyeswar* v. *Panch Kauri* [2] is somewhat opposed to this view. There the *pun* money had been paid to the brother of the girl who was to be married. The marriage having gone off, the intending bridegroom sued to recover it back, and it was held that he could do so. There was no argument, and the judgment, for which no reasons are assigned, was based upon the particular circumstances of the case. It was not, I think, intended as a decision that such *pun* money could be recovered in an action by the brother. This case was followed in *Ram Chand Sen* v. *Audaito Sen* [3], but Garth, C. J., expressed in his judgment in the latter case a strong opinion that a suit to enforce such an agreement would

(1) I. L. R., 13 Bom., 126. (2) 5 B. L. R., p. 395.
(3) I. L. R., 10 Cal., 1054.

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not lie. The other cases cited before us—*Umed Kika* v. *Nagindas*[1]; *Mulji* v. *Gomti*[2]; *Rambhat* v. *Timmayya*[3]—have no direct bearing upon the question which I am considering. They decided that damages, if suffered, can be recovered for the breach of such a contract as the present, and that money paid or ornaments given for the benefit of the bride or bridegroom, or of both, can be recovered by suit if the marriage contract is broken.

As to the argument of Mr. Goverdhanram that to enforce such a payment is merely giving legal effect to a legal caste custom, I think that there is a great distinction between a father contracting for a sum to be received by him on the marriage of his child and receiving a customary present upon such an occasion. The latter is a voluntary payment enforceable possibly by caste rules and regulations, but not affording ground for an action at law. The former is the reduction to the form of a binding agreement of a custom harmless in itself so long as it is voluntary and in accordance with caste rules, but capable of abuse and opposed to public policy when it takes the shape of a contract which the Courts are called upon to enforce. If this Court were to enforce such a contract when the agreed amount is small and in accordance with caste principles, it would be impossible, I think, to treat other contracts of a similar kind, but differing only in amount, as unenforceable. I would confirm the decree appealed from with costs.

TYABJI, J.:—In this case the plaintiff sued to recover Rs. 790 as damages for the breach of a contract of marriage, and Rs. 15 as the value of a *kudda* ornament given to the intended bride. The sum of Rs. 790 was made up as follows:—*viz.*, Rs. 337, which was agreed to be paid to the plaintiff as *pekeramni*, Rs. 51 which was agreed to be given to him as *purat* at the time of the marriage, and Rs. 402 which was the amount of the *pulla* which had to be paid to another girl after the breach of the defendant's agreement.

The facts of the case are as follows (His Lordship stated the facts as above set forth and continued:—)

(1) 7 Bom. H. C. Rep. (o. c. J.), 122. (2) I. L. R., 11 Bom., 412.
(3) I. L. R., 16 Bom., 673.

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On appeal, the District Judge agreed with the Subordinate Judge, and confirmed the decree on the ground that the agreement to pay the *peheramni* and the *purat* to the plaintiff was void.

The only question argued before us was, whether the lower appellate Court was right in holding that the agreement, so far as the *peheramni* and the *purat* to the plaintiff were concerned, was invalid.

In considering this question it must be remembered that the plaintiff was the father of the intended bridegroom, and, therefore, stood in the position of a guardian. We take it to be quite clear, that under the English law an agreement to pay money to a father in consideration of his giving his child in marriage would be considered as being against public policy, and would not be enforced.—See Fonblanque's Treatise of Equity, Vol. I, p. 260, (5th Ed.), *Duke of Hamilton* v. *Lord Mohun*[1], *Osborne* v. *Williams*[2], and the cases collected under *Scott* v. *Tyler* in White and Tudor's Leading Cases in Equity (7th Ed.), Vol. I, p. 535. The same doctrine has been applied by the Bombay High Court to the cases of Hindu fathers and guardians. In *Jaikisondas* v. *Harkisondas*[3], Green, J., followed and applied the injunction of Manu, where it is laid down (section 51):—"Let no father who knows the law receive a gratuity, however small, for giving his daughter in marriage, since the man who through avarice takes gratuity for that purpose is a seller of his offspring." Again in *Pitamber* v. *Jagjivan Hansraj*[4], Scott, J., said: "Was this contract, in so far as it promised money payment for the negotiation of a marriage by a third party, immoral and contrary to public policy? In England such a contract would not be enforced at law—*Kean* v. *Potter*[5]. It would be held to be against public policy and public interest as having a tendency to cause matrimony to be contracted as a mere matter of bargain and sale, a 'kidnapping into conjugal servitude', as one of the Judges expressed it." See also *Dulari* v. *Vallabdas Pragji*[6] where Jardine, J., approved and followed Scott, J.'s decision.

(1) 1 P. Will., pp. 118 and 120.
(2) 18 Ves. Jun., 379.
(3) I. L. R., 2 Bom., 9 at p. 15.
(4) I. L. R., 13 Bom., 131, foot note.
(5) 3 P. Will., p. 76; Story's Eq. J., Plac. 260-261.
(6) I. L. R., 13 Bom., 126.

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The above authorities seem to me to establish conclusively that a promise to pay money to a Hindu father, in consideration of his giving his son or daughter in marriage, cannot be enforced in a Court of law. It is no doubt true, however, that the Asura form of marriage, which is legal among the lower castes, is nothing more than the purchase of a wife from her father by the husband. It has, therefore, been contended that so long as such a form of marriage is permitted, payment of money to the father of a boy or girl cannot be illegal and must be enforced. I agree, however, with Scott, J., in thinking that this argument is not well-founded, for though the Asura form of marriage when actually performed may be recognized as valid, it does not follow that an agreement for such a marriage would be legally enforced. Manu himself denounces it strongly, and lays it down in section 24 that "the ceremonies of Asura must never be performed." I think, therefore, that though the money if actually paid to the father in consideration of the marriage cannot be recovered back when once the marriage is solemnized, it by no means follows that a suit to recover the money, where it has not been paid, would lie. It is no doubt true that it has been held by the High Court of Calcutta that a suit will lie to recover money paid to the father or guardian if the contract for the marriage is broken: see *Jogeswar* v. *Panch Kauri* [1] and *Ram Chand Sen* v. *Audaito Sen* [2]. It must be observed, however, that in this last case Garth, C. J., drew a distinction between a case to enforce an agreement for payment such as this is and a case to recover back money already paid such as was before him. There the defendant in consideration of a hundred rupees had promised to give his minor daughter in marriage to the plaintiff; the defendant failed to fulfil his part of the promise, and the plaintiff brought the suit to recover the money which he had paid as consideration for the promise, and Garth, C. J., at p. 1055 observed:—

"In this case I have grave doubts whether the opinion of the Judge of the Small Cause Court" (who had held that the suit was not maintainable as being contrary to public policy) "is not correct: and if we were now asked to enforce an agreement to

(1) 5 Beng. L. R., 395. (2) I. L. R., 10 Cal., 1054.

pay *pon* to a girl's father in consideration of his giving her in marriage, I should have wished to refer the case to a Full Bench. But the facts are these. The plaintiff paid Rs. 100 to the defendant No. 1 in consideration of his giving his daughter to him in marriage, and the defendant No. 2, who is a brother of the defendant No. 1, was a party to the contract. After the money was paid, the defendant No. 1 failed to fulfil his promise and gave his daughter in marriage to some one else. The plaintiff now seeks to recover back his moneys, and the defendant attempts to take advantage of the illegality of the contract by way of a defence to the claim. Under these circumstances I consider that the case referred to *Jogeswar* v. *Panch Kauri*(1) is directly in point, and apart from the question whether the contract is illegal, the justice of the claim is entirely with the plaintiff. Upon the authority of that case, therefore, and because it is manifest justice that the defendants should not be allowed to retain the money, I agree that the claim should be decreed.

"Had the question been whether as against the plaintiff we could enforce payment of the Rs. 100 to the defendant No. 1, I should have doubted very much whether we ought to do so. In England, a bargain of this kind, for payment of money to a father, in consideration of his giving his daughter in marriage, is considered to be a marriage brokerage contract and illegal as against public policy. . . And without going the length of saying at present, that I consider such contracts to be illegal in this country, I certainly should be disposed, as at present advised, to hold that they were so far void as to be incapable of being enforced by the rules of equity and good conscience."

I am of opinion that the distinction drawn by Garth, C.J., is clear and well-founded, and that, though payment of money once made to a father cannot be recovered if the marriage is performed, as in the case of an Asura marriage, and that though it can be recovered if already paid when the marriage is not performed, as in the cases before the Calcutta High Court, yet no suit will lie to enforce the payment if not already made as in the cases before Scott and Jardine, JJ. This conclusion will, I think, be

(1) 5 Beng. L. R., 395.

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found to reconcile all the cases which are to be found on the subject (see *Rambhat* v. *Timmayya*[1], *Umed Kika* v. *Nagindas*[2], *Mulji Thakersey* v. *Gomti*[3], *Ranee Lallun Monee Dossee* v. *Nobin Mohun Singh*[4] and *Amratlal* v. *Bapubhai*[5]).

Applying the above principles to the present case, it seems to me that the plaintiff must fail, from whatever point of view his claim is considered. If Chhagan's promise to pay the *peheramni* and the *purat* to the plaintiff was the consideration for the plaintiff giving his son in marriage to Chhagan's daughter, it is void as being contrary to public policy; for I can see no distinction between the father of a girl and the father of a boy, so far as this point is concerned. If on the other hand the *peheramni* and the *purat* formed no part of the consideration, but was an independent collateral arrangement, sanctioned or recognized by the caste—if, in other words, it was not to be the consideration for the marriage, but merely as a voluntary gift or present to the plaintiff as the bridegroom's father, I see nothing in it which can be properly considered immoral or against public policy. It is the practice among most communities in India to make presents not only to the bride and the bridegroom but also to their parents and relations, and nothing which I have said in this judgment is intended to convey that I look upon such a practice as improper or vicious from a moral point of view, however much I may deprecate it on other grounds. It is obvious, however, that even in this view of the case, which is, however, not the view taken by the lower Courts, the plaintiff must fail; for, a promise to make a present or gift being without consideration cannot be enforced in a Court of law. In this connection I may observe that the distinction between the Bombay and the Calcutta cases will be more intelligible, and the apparent conflict between them will be better reconciled, if we remember that in the Bombay cases the payment was the direct consideration for the marriage, whereas in the Calcutta cases it was more in the nature of a gift or present made in contemplation of the marriage, on the understanding that it was to become absolute and complete if the

(1) I. L. R., 16 Bom., 673.
(2) 7 Bom. H. C. Rep. (o. c. j.), 122.
(3) I. L. R., 11 Bom., 412.
(4) 25 Cal. W. R., 32.
(5) P. J. for 1887, p. 207.

marriage actually took place, but was to be returned if it was broken off. It is true that this is not directly stated to be the ground on which the Calcutta decisions were based, but it seems to me to be the ground on which they can be best supported consistently with the doctrine that it is illegal for a father to receive money in consideration of giving his child in marriage, as laid down in the Bombay cases.

It was, however, contended before us that though the *peheramni* and the *purat* was ostensibly to be given to the plaintiff, yet he was to receive it in reality for the benefit of his son, and can, therefore, be recovered. It is a sufficient answer to this argument to say that the suit is brought by the plaintiff personally, and not on behalf of his son, and that there is nothing in the case to support this contention. It is clear that presents such as *peheramni* and *purat* are often made to the father and other relations of the boy for their own benefit (see 2 Borradaile's Gujarát Caste Rules, p. 597, Question 25), and there is nothing in the case to show that these were intended for the plaintiff's son rather than for the plaintiff personally. For the above reasons, we must hold that the promise to pay the *peheramni* and the *purat* to the plaintiff personally cannot be enforced, and we must, therefore, confirm the decree with costs.

Decree confirmed with costs.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Tyabji.

SHANKAR BISTO NADGIR AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* NARSINGRAV RAMCHANDRA JAHAGIRDAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1897. *February* 24.

Possession—Symbolical possession obtained in execution of former decree—Fresh suit against the same defendants to obtain actual possession.

A plaintiff who has obtained only symbolical possession in execution of a former decree is entitled to maintain a fresh suit against the same defendant to obtain real possession.

APPEAL from the decision of Ráo Bahádur Gangadhar V. Limaye, First Class Subordinate Judge of Dhárwár.

* Appeal, No. 155 of 1895.