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railway company in this case to exonerate themselves by satisfying the Court of their carefulness, both generally and in respect of the plaintiffs' goods, notwithstanding that they were unable to prove the exact cause of the fire. If that is so, then I think, upon the evidence, that they have exonerated themselves *quoad* the outbreak of the fire, but not *quo ad* the steps taken to extinguish it.

Attorneys for the appellants: *Messrs. Captain & Vaidya.*

Attorneys for the respondents: *Messrs. Little & Co.*

Decree reversed.

H. S. C.

APPELLATE CIVIL.

Before Sir Narayan Chandavarkar, Kt., Acting Chief Justice, and Mr. Justice Batchelor.

1912.
July 1.

BAI RAMKORE AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* JAMNADAS MULCHAND (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Testator's direction to his brother to get his daughters married—Betrothal by the brother—Marriage of the daughter by her mother and maternal uncle with another person—Suit by the brother to recover damages which he had to pay to the betrothed husband for breach of contract—The right of the testator's brother to give in marriage no more than the right under the Hindu law and subject to the limitations of that law—Right of the mother as legal guardian.

A testator in his will directed that his brother should get his minor daughters married with the testator's money. The brother accordingly got one of the daughters betrothed to H. Subsequently the girl's mother and maternal uncle got the girl married to C. The testator's brother, thereupon, brought a suit against the mother, maternal uncle and C to recover damages which he had to pay to H for breach of contract.

Held, that the suit was not maintainable. The plaintiff's right under his brother's will was not absolute and exclusive. The right was no more than the right under the Hindu law, and subject to the limitations under that law. According to the text of *Yajnyavalkya* the persons entitled to give a girl in marriage were "the father, paternal grandfather, brother, kinsman (*sakulya*) and mother" in the order stated. The text only dealt with the bare right to give a girl in marriage. It did not

* Appeal No. 1 of 1912 from order.

deprive the mother of her right of legal guardianship but only specified who could make a gift in marriage. The paternal male relations of the girl were placed above the mother for the purpose of the gift, because women were dependent and they could not perform certain ceremonies essential to or usual in a marriage. The text did not say that the mother was to have no voice at all and might be altogether set at naught where there were paternal male relations of the girl competent to give her in marriage.

APPEAL from order passed by J. E. Modi, Joint First Class Subordinate Judge of Surat with appellate powers, remanding a case to the Court of Beram N. Sanjana, Joint Subordinate Judge, for findings on certain issues.

The facts stated in the plaint were as follows :—

One Mancharam Mulchand, an inhabitant of Surat, died in September 1904 after having made a will which contained a direction to his two brothers, Jamnadas and Chaganlal, the latter since deceased, to maintain the testator's widow, Bai Ramkore, and to perform the marriages of his two minor daughters, Mangli and Chanchli, by expending money out of the testator's property. Jamnadas, accordingly, got Mangli betrothed to one Hiralal on her attaining the age of thirteen years. Thereafter Jamnadas having learnt that in spite of Mangli's betrothal, her mother Bai Ramkore and her maternal uncle Maganlal Dayaram were arranging to get the girl married to one Chandulal Dullabhdas in whose family Maganlal was able to secure a wife for himself, he made an application, dated the 18th December 1906, to the District Judge, under the Guardian and Wards Act (VIII of 1890) for obtaining a formal declaration of his guardianship of the person of Mangli and for securing her custody from Bai Ramkore and Maganlal Dayaram, and on the same day obtained an *interim* order, directing Bai Ramkore and Maganlal Dayaram to place the girl in the custody of Bhikhabhai Motiram and not to marry her until further orders. On the 19th April 1907 the District Judge disallowed the application of Jamnadas but kept the *interim* order in force till the 27th April in order that Jamnadas may have time to move the Civil Court. While the *interim* order was in force, Bai Ramkore and Maganlal took Mangli to Bombay and there married her to Chandulal

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Dullabhdas on or about the 21st April 1907. Thereupon Jamnadas applied to the District Court to take penal measures against Bai Ramkore and Maganlal for disregarding the *interim* order, but that Court refused to entertain the application reserving to itself the right to take such action as might appear proper after the contemplated civil suit of Jamnadas was disposed of. In June 1907 Hiralal, to whom Mangli was betrothed, served a notice on Jamnadas, demanding Rs. 2,000 as damages for non-fulfilment of the betrothal contract. On the suggestion of Jamnadas the demand was referred to arbitration and the arbitrators passed an award, directing Jamnadas to pay Rs. 1,000 to Hiralal as damages. He accordingly paid the amount to Hiralal in July 1907 and brought the present suit against Bai Ramkore, Maganlal Dayaram and Chandulal Dullabhdas, as defendants 1, 2 and 3 respectively, for the recovery of Rs. 1,000 which he had to pay to Hiralal owing to defendants' conduct. The plaintiff based his right to give Mangli in marriage upon the direction contained in his brother's will, upon Hindu law and upon a custom of the caste to which the parties belonged.

Amongst the several defences raised, one common to all the defendants was that if the plaintiff's betrothal contract became impossible on account of circumstances beyond the plaintiff's control as alleged in the plaint, the plaintiff was not liable to make good any damage to Hiralal and if he did, it was only a voluntary payment and could not be recovered from the defendants.

Defendant 1 further answered *inter alia* that she had no knowledge of her husband's will and that if the plaintiff entered into the betrothal contract, of which she was not aware, he had no right to do so without her knowledge and consent.

Defendant 2 alleged that he had not taken any part in bringing about Mangli's marriage.

Defendant 3 answered that as his marriage with Mangli took place at Bombay, no suit could lie against him in the Court at Surat.

The Subordinate Judge found that the deceased Mancharam had made a will as alleged in the plaint, that the will did not give any greater power to the plaintiff than he could claim under the Hindu law, that the power which the plaintiff had under the Hindu text law was not such that under the present day circumstances he could claim to exercise it independently of, or against the wishes of the mother and the maternal uncle under whose guardianship the girl actually resided, that any caste custom purporting to give a greater right in this respect to a paternal uncle as against the mother and the maternal uncle in whose guardianship the girl actually resided, than that allowed by Text Law would be against the interests of the minor and not recognizable by Civil Courts, that the existence or non-existence of the District Court's order, forbidding defendants 1 and 2 from giving away the girl in marriage did not affect the question of defendants' liability to the plaintiff for damages, that there were no elements in the case constituting "conspiracy" between the defendants in the legal conception of that word, that the *interim* order being in force on the date of the marriage, the conduct of the defendants did not amount to a disregard of the order of the District Court, that no damage had legally resulted to the plaintiff and he had no right to recover any damages which he might have paid to Hiralal, and that defendant 3 not having made an application under section 20, old Civil Procedure Code (Act XIV of 1882), must be deemed to have acquiesced in the institution of the suit at Surat. The Subordinate Judge, therefore, dismissed the suit.

The plaintiff having appealed, the appellate Judge found that the Subordinate Judge was wrong in disposing of the case on issues of law only under Rule 2, Order XIV of the Civil Procedure Code (Act V of 1908), that the plaintiff did not under the will of his brother get the sole power of giving his nieces in marriage without consulting their mother, that the plaint disclosed a conspiracy between the defendants, that legal damage was caused to the plaintiff by the acts of the defendants, and that it was an error to hold that a caste custom giving the paternal uncle the power of performing the marriage of his niece was against public policy as being prejudicial to the

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minor bride's interest. On the strength of the said findings the appellate Judge remanded the case to the Subordinate Judge for the determination of the following issues :—

(1) Whether the plaintiff has under the customary law the right that he claims to give his minor niece in marriage? And from which defendant?

(2) Was there any conspiracy between any of the defendants to harm the plaintiff's right?

(3) And has that caused any harm to plaintiff?

(4) What damages can the plaintiff recover and from whom?

If the first Court finds it necessary to do so, it may get the plaint amended regarding the particulars of the alleged custom.

Against the said order of remand the defendants appealed.

P. B. Shingne for the appellants (defendants) :—The order of remand is wrong. The custom alleged by the plaintiff, if allowed to prevail, is against Hindu law and should not be recognised. The plaintiff could have successfully pleaded by way of valid defence to the claim of Hiralal that the performance of the betrothal contract made with him had become impossible owing to no fault of the plaintiff. The plaintiff had no cause of action against us. Under the Hindu law the plaintiff had no legal right to proceed against the mother of the girl or any other person acting in the interest of the girl. It might be that what he did was in accordance with the direction in his brother's will, but the will did not clothe him with an absolute right.

L. A. Shah for the respondent (plaintiff) :—Our brother's will gave us the power to give the girl in marriage. Such a power can be validly delegated according to law. We were not bound to consult the girl's mother. According to texts and case law we had the right to exercise the power and any person obstructing us in the exercise of that right would be responsible to us in damages and otherwise also. That being so, there was a cause of action existing in our favour: *Khushalchand Lalchand* v. *Bai Mani*[1], *Shridhar* v. *Hiralal Vithal*[2], *S. Namasevayam Pillay* v. *Annammai Ummal*[3], Mandlik's Hindu Law, page 169.

(1) (1886) 11 Bom. 247. (2) (1887) 12 Bom. 480.

(3) (1869) 4 Mad. H. C. R. 339.

Shingne in reply :—The texts only mention the persons who can exercise the power of giving a girl in marriage. The texts are directory and do not give a legal right to the persons enumerated.

CHANDAVARKAR, ACTING C. J. :—The suit, which has led to this appeal, was brought by the respondent to recover from the three appellants damages incurred by him on account of the giving in marriage of his niece, Mangli, a minor, by appellants Nos. 1 and 2 to appellant No. 3, in contravention of the betrothal of the girl to one Hiralal, settled by the respondent as her lawful guardian.

The respondent is the paternal uncle of the girl. By a will of her father he and his brother were authorised to get the girl married. Accordingly, the respondent (the other brother having died) betrothed the girl to one Hiralal. But appellants Nos. 1 and 2, who are respectively mother and maternal uncle of the girl, gave her in marriage to appellant No. 3.

The respondent complains that in consequence of that marriage he was unable to perform the contract of betrothal into which he had entered with Hiralal; that Hiralal demanded Rs. 2,000 as damages for the breach; and that the dispute was finally settled by an award of arbitrators under which he had to pay Rs. 1,000 to Hiralal as damages.

This sum he claims in his plaint from the appellants.

The respondent bases his claim upon his right to give the girl in marriage, (1) under the Hindu law, (2) under the will of the girl's father, and (3) in virtue of a custom of the caste to which the parties belong.

The right claimed under the Hindu law arises out of a text of Yajnyavalkya adopted by Vijnaneshwara in the Mitakshara and by Nilakantha, author of the Vyavahara Mayakha, in his Samskara Mayukha. According to that text, the persons entitled to give a girl in marriage are, "the father, paternal grandfather, brother, kinsman (*sakulya*), and mother," in the order stated. It follows from this text that the paternal uncle of the girl (who in this case is the respondent) had the right to give her in marriage before the mother. But to entitle the

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respondent to damages from the mother for having given the girl in marriage so as to exclude his right, regard must be had to the nature of the right itself and it must be established that the right is absolute and exclusive. The text only deals with the bare right to give a girl in marriage. Under the Hindu law, when her father dies, leaving her mother, the mother becomes the legal guardian of the girl. The text cited above does not deprive the mother of this right of guardianship but only specifies who can make a gift of her in marriage. The paternal male relations of the girl are placed above the mother for the purposes of that gift, because women are dependent and, moreover, they cannot perform certain ceremonies essential to or usual in a marriage. Even when, in default of paternal male relations, the mother makes the gift, she has to employ some one of her caste to act on her behalf at the marriage and perform the ceremony of giving which is called *kanyadana*. This is well-explained in the *Dharma Sindhu*: " where the mother has to give her daughter in marriage, she herself must perform the ceremony of *nandi shradda*. All other ceremonies she must get performed by a Brahmin." See also to the same effect Sir Gooroodass Banerjee's Hindu Law of Marriage and Stridhan, 2nd Edition, p. 45. The text of Yajnayavalkya does not say that the mother is to have no voice at all and may be altogether set at naught where there are paternal male relations of the girl, competent to give her in marriage. Had that been the intention of the Hindu law, there would have been express texts to that effect. We cannot infer such intention, by mere implication, because that would lead to very undesirable results, especially in the present state of Hindu society. In that case, any distant male relation of the girl on the father's side might give her in marriage, whether he be interested in her and whether he be really anxious for her welfare or not, without consulting, and having regard to the wishes of, the person most interested, that is, the mother, who is the natural guardian of the girl. In the absence of the authority of express texts binding on us, the Hindu law-givers should not be held to have contemplated the total exclusion of the mother

from her right as guardian to be consulted as to the choice of a husband for her daughter. This view is substantially supported by the judgment of the Madras High Court in *S. Namasevayam Pillay* v. *Annammai Ummal*[1]; and it is a conclusion which fits in with the principle of the judgment of this Court in *Shridhar* v. *Hiralal Vithal*[2]. Any other conclusion would be highly prejudicial to the best interests of Hindu family life and to the welfare of minor girls, whose marriages are made in many cases the source of profit by greedy relations.

The respondent also claims his right under the will of the girl's father. The provision in the will, giving the right, is merely to the effect that the respondent and his brother, to whom the testator devised his property, should get the girl married (*parnave*) by expending money out of the testator's property with due regard to his *status*. The right under the will is no more than the right under the Hindu law and is, therefore, subject to the same limitations. Whether, if the testator had enlarged that right and removed the limitations by his will, it would have been a valid provision legally enforceable is a question which does not arise in the present case; and, therefore, we refrain from expressing any opinion on it.

The respondent further asserts his right under a custom of his caste. But that right also, according to the allegation, is the same as that under the Hindu law and is, therefore, governed by the same considerations.

The nature of the right claimed by the appellant being not absolute but of a qualified character, and there being no allegation in the plaint that before betrothing the girl to Hiralal, he had consulted her natural guardian, *i. e.*, her mother, and chosen the bridegroom with due regard to the interests of the girl and the mother's wishes, it follows that he had no right to enter into the contract and consequently he has no cause of action as against any of the appellants.

(1) (1869) 4 Mad. H. R. 339. (2) (1887) 12 Bom. 480.

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On these grounds the order of remand of the lower appellate Court must be reversed and the decree of the Court of first instance, dismissing the suit with costs, must be restored with the costs of this appeal and of the appeal to the District Court on the respondent.

Order of remand reversed.

G. B. R.

APPELLATE CIVIL.

Before Sir Narayan Chandavarkar, Kt., Acting Chief Justice, and Mr. Justice Batchelor.

1912.
July 5.

VELCHAND CHHAGANLAL (ORIGINAL DECREE-HOLDER), APPELLANT, *v.* LIEUT. E. BOURCHIER, NORTH STAFFORDS REGIMENT (ORIGINAL JUDGMENT-DEBTOR), RESPONDENT.*

Civil Procedure Code (Act V of 1908), section 60, clause (2) (b)—Army Act, 1885, (Stat. 44 and 45 Vict.), section 136—Officer in the British Army serving in India —Money decree—Execution—Salary not liable to attachment.

Section 60, clause (2) (*b*) of the Civil Procedure Code (Act V of 1908) leaves the provisions of the Army Act, 1885, (Stat. 44 and 45 Vict.) untouched.

Section 136 of the Army Act, 1885, (Stat. 44 and 45 Vict.) amended in 1895 provides that the salary of the officer in the British Army serving in India shall be paid to him without deduction unless the Legislature in India has directed to the contrary in that behalf.

There is no law in India which expressly or by necessary implication directs that such officer's salary is liable to attachment in execution of a decree.

SECOND appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad, confirming the order passed by M. J. Yajnik, Joint Subordinate Judge, in execution of a decree, *Darkhast* No. 188 of 1911.

The plaintiff obtained a money-decree for Rs. 1,502 against Lieut. E. Bourchier, Second North Staffordshire Regiment, Peshawar, and in execution sought to realize the decretal amount by presenting a *darkhast*. A prohibitory order was, therefore, issued to the Officer Commanding the Regiment

* Second Appeal No. 788 of 1911.