1915.

DALPAT-SINGJI v. RAISINGJI.

HEATON, J.:—I wish to add only a few words in the matter of the conduct of the Revenue Officers which has been brought to our notice. I wish to say that in my opinion these Officers acted with perfect propriety. They obtained the legal opinion of their local advisers. They then endeavoured on the strength of that opinion to persuade this young Talukdar to make some provision for a very unfortunate man and in so doing it seems to me that they were acting very properly. But the document which this young Thakore signed, was, it seems to me, merely a written record of a declaration. It was not in its true sense an agreement at all. In so far as it had any formal character, it was merely a declaration made before the Collector. Obviously it was not intended to be a final declaration because a more formal deed was to follow.

I agree in the order proposed by my learned Colleague.

Decree affirmed.

R. R.

APPELLATE CIVIL.

1915.

March 30.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Batchelor.

KESHAV HARGOVAN (ORIGINAL DEFENDANT), APPELLANT, *v.* BAI GANDI, MINOR, BY HER NEXT FRIEND, HER FATHER, PAKHALI MOTI KALA (ORIGINAL PLAINTIFF), RESPONDENT, AND KESHAV HARGOVAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* BAI GANDI, MINOR, BY HER FATHER MOTI KALA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu Law—Dissolution of marriage—Custom of caste—Custom authorising either spouse to divorce the other on payment of a sum of money fixed by the caste—Custom immoral and cannot be recognised by the Court—Indian Contract Act (IX of 1872), section 23.

A custom, stated to exist among Hindus of the Pakhali caste by which the marriage tie can be dissolved by either husband or wife against the wish of the

*Second Appeals Nos. 1001 of 1913 and 80 of 1914.

divorced party, the sole condition attached being the payment of a sum of money fixed by the caste, cannot be recognised by the Court. It must be regarded as immoral or opposed to public policy within the meaning of section 23 of the Indian Contract Act (IX of 1872) and is equally repugnant to Hindu Law, which regards the marriage tie as so sacred that the possibility of divorce on the best of grounds is permitted only as a reluctant concession.

Reg. v. *Karsan Goja* and *Reg.* v. *Bai Rupa*[1] followed.

SECOND appeals against the decision of E. Clements, District Judge of Ahmedabad, confirming the decrees passed by Keshavlal V. Desai, Joint Subordinate Judge of Ahmedabad, in two suits Nos. 267 and 603 of 1912.

These were two cross suits, one (suit No. 603 of 1912) brought by the husband against his minor wife for restitution of conjugal rights and the other (suit No. 267 of 1912) by the wife against the husband for dissolution of marriage. The parties belonged to Pakhali caste which was divided into two factions. In the year 1899 plaintiff Keshav was married to defendant, Bai Gandi, who was 15 years of age at the date of the suit No. 603 of 1912. Bai Gandi had not lived with Keshav as he belonged to opposite faction. Keshav, therefore, sued her for restitution of conjugal rights. It was contended on her behalf that marriage in parties' caste was a simple contract subject to a condition sanctioned by custom; that it may be put an end to at the wish of the wife subject to a payment of money; that according to the resolution of the caste a husband was bound to divorce a wife on offer of Rs. 94 to caste Patel by the wife's side; that an amount of Rs. 28 out of this was to be paid to the husband; that the fixed amount of Rs. 94 was offered to the leaders of the faction to which defendant belonged; that the amount was not accepted.

Relying upon the caste custom and the resolution, Bai Gandi by her next friend, her father, filed a suit (No. 267 of 1913) against her husband, Keshav, for dissolution of marriage. Therein defendant, Keshav, contended that

[1] (1864) 2 Bom. H. C. R. 124.

1915.

KESHAV HARGOVAN v. BAI GANDI.

he did not admit the custom set up; that the divorces were given in parties' caste if both the parties were willing and not otherwise; that the Court could not entertain a suit of this nature.

The Subordinate Judge found that the custom in the caste of giving divorces was proved and that it could be acted upon according to law. He, therefore, allowed Bai Gandi's suit for dissolution and dismissed that of Keshav for restitution of conjugal rights.

Keshav filed two appeals Nos. 335 and 336 of 1913 to the District Court at Ahmedabad and in both the appeals the decrees of the Subordinate Court were confirmed.

Keshav, thereupon, preferred two second appeals to the High Court.

G. N. Thakor for the appellant (in both the appeals):—I contend that the custom alleged, even if held established, is one which the Courts will refuse to recognise. It is against public policy and against the spirit of Hindu Law. The lower Courts have misunderstood the effect of the various rulings referred to. These decisions leave no doubt that a custom such as is pleaded in this case cannot be recognised. I rely on *Reg.* v. *Karsan Goja* and *Reg.* v. *Bai Rupa*[1]; *Uji* v. *Hathi Lalu*[2]; *Rahi* v. *Govinda*[3]; *Reg.* v. *Sambhu Raghu*[4]; *Narayan Bharthi* v. *Laving Bharthi*[5].

The case of *Sankaralingam Chetti* v. *Subban Chetti*[6] is quite different. It permits divorce only by *mutual agreement*. The Courts have gone the length of convicting persons marrying without having their prior marriage validly dissolved.

(1) (1864) 2 Bom. H. C. R. 124.
(2) (1870) 7 Bom. H. C. R. (A. C. J.) 133.
(3) (1875) 1 Bom. 97.
(4) (1876) 1 Bom. 347.
(5) (1877) 2 Bom. 140.
(6) (1894) 17 Mad. 479.

G. K. Parekh for the respondent (in both the appeals):—The cases cited do not establish that a custom by which a woman can get her divorce on payment according to caste usage is invalid. A remarriage without a divorce may be invalid, but no case expressly says that such a divorce if permitted by usage cannot be granted. In the present case there being a custom compelling a divorce such a divorce should be allowed on the strength of the custom proved: see *Sankaralingam Chetti* v. *Subban Chetti*[1]; *Jukni* v. *Queen-Empress*[2].

SCOTT, C. J.:—These appeals are brought in two suits. the one being a suit for the restitution of conjugal rights, and the other a suit for dissolution of marriage. The plaintiff in the suit for restitution is the adult husband of the defendant, a minor, who has attained the age of puberty. The duty is imposed by Hindu Law upon the wife to reside with her husband: see *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh*[3]. There is no evidence that he has been guilty of such conduct as would justify his wife in claiming the protection of the Court. The defence is that the defendant is no longer the plaintiff's wife and it is to obtain a declaration to that effect that the cross suit has been brought in her name. It is claimed that by virtue of a caste custom the minor wife can by the expression of her desire so to do accompanied by a payment of money, the greater part of which goes to the caste and a small portion to the unwilling husband, free herself from the marriage tie. Whether such a custom could be recognised by the Court in the case of an adult wife will be discussed later in this judgment. The plea in the wife's written statement is that the marriage is a contract subject to a condition sanctioned by custom, that it may be put an end to at the wish of

(1) (1894) 17 Mad. 479. (2) (1892) 19 Cal. 627.

(3) (1901) 28 Cal. 751.

1915.

KESHAV HARGOVAN v. BAI GANDI.

the wife subject to a payment of money. We cannot accept the position that marriage among Hindus is only a contract, but even if it were so, it could only be a contract when concluded between adults capable of contracting. That is not the case here, and it is probable that the child wife who is put forward as paying money for the caste and for the repudiated husband is merely a pawn in a game between those who are the real instigators of her suit and the opposite party in the caste who dispute the existence of the alleged custom.

The parties are Hindus of the Pakhali caste. It appears that, factions having broken out in the caste, and the husband and his father-in-law taking different sides, the wife is anxious to divorce the husband. She claims to be entitled to do so by virtue of a caste-custom which authorises either spouse to divorce the other, against that other's will and with or without any assignable reason, on payment of a sum of money fixed by the caste from time to time. The lower Courts have passed a decree in the wife's favour, holding that the custom set up was proved, and that it is not opposed to public policy. Having regard to the recency of the caste resolutions purporting to affirm this custom, to the incompetence of the caste to pronounce marriages void, and to the recitals in various deeds to the effect that these *farkats* were executed with the consent of both spouses, we doubt very much whether the inference that the alleged custom is legally established can be supported by the evidence on the record. But we prefer to put our judgment on the broader ground that the alleged custom, assuming it to be proved, must be regarded as immoral or opposed to public policy within the meaning of section 23 of the Indian Contract Act. In our opinion this view is apparent from a consideration of the mere character of the custom set up, and it

is also to be supported by the decisions of this Court.

The custom pleaded is, as we have said, a custom by which the marriage tie can be dissolved by either husband or wife, against the wish of the divorced party, and for no reason but out of mere caprice, the sole condition attached being the payment of a sum of money fixed by the caste. That sum admittedly is liable to alteration from time to time at the will of the caste: Rs. 55 today, it may be Rs. 5 tomorrow. We need only say that in our opinion it is impossible for the Court to recognise any such custom as this; it is opposed to public policy as it goes far to substitute promiscuity of intercourse for the marriage relation, and is, we think, equally repugnant to Hindu Law, which regards the marriage tie as so sacred that the possibility of divorce on the best of grounds is permitted only as a reluctant concession. The requirement of the payment of a sum of money, on which the learned District Judge relies, seems to us to be immaterial, and we can see no substantial distinction between the recognition of this custom and the declaration that the tie of marriage does not exist among Hindus of the Pakhali caste.

As to the cases, it was laid down as early as 1876 in *Reg.* v. *Sambhu Raghu*[1] that "the Court does not recognise the authority of the caste to declare a marriage void, or to give permission to a woman to remarry." It is true that this ruling was not followed in *Jukni* v. *Queen-Empress*[2], but there the learned Judges found that the husband had relinquished his wife, so that this decision is of no authority on the present facts. In *Reg.* v. *Karsan Goja* and *Reg.* v. *Bai Rupa*[3], which were criminal cases, the question was whether a woman of

(1) (1876) 1 Bom. 347.
(2) (1892) 19 Cal. 627.
(3) (1864) 2 Bom. H. C. R. 124.

1915.

KESHAV HARGOVAN v. BAI GANDI.

the Talapda Koli caste was punishable under section 494, Indian Penal Code, or whether she could successfully plead a caste-custom under which a married woman was permitted to leave her husband and contract a second marriage without the husband's consent; and the Court said that "such a caste-custom, even if it be proved to exist, is invalid, as being entirely opposed to the spirit of the Hindu Law." That decision was given in 1864, and, so far as we are aware, has never since been doubted. It is, we think, direct authority in favour of the view that the custom which is set up in the present appeal, and which in essentials is indistinguishable from that pleaded in the case of 1864, cannot be recognised by the Court. The decision in *Reg.* v. *Karsan Goja* and *Reg.* v. *Bai Rupa*[1] was approved and followed by Sir M. Westropp C. J. and Melvill J. in *Narayan Bharthi* v. *Laving Bharthi*[2]. We may refer also to *Uji* v. *Hathi Lalu*[3], decided in 1870, where it was held that a custom which authorised a woman to contract a second marriage without a divorce, on payment of a certain sum to the caste, was an immoral custom which should not be judicially recognised. The custom in the present case seems to stand on no higher position; for if the mere payment of money to the caste cannot serve to validate a remarriage without a divorce, the same reasoning would make it insufficient to validate a divorce without the consent of the other spouse, as the effect in the dissolution of the marriage bond would be substantially the same in both cases.

On these grounds we are of opinion that in the wife's suit for dissolution of marriage the appeal must be allowed and the suit dismissed with costs throughout. Mr. Gokuldas for the wife has read affidavits declaring

(1) (1864) 2 Bom. H. C. R. 124. (2) (1877) 2 Bom. 140.
(3) (1870) 7 Bom. H. C. R. (A. C. J.) 133.

1915.

KESHAV HARGOVAN v. BAI GANDI.

that since the lower Court's decree the wife has contracted a second marriage with another man, but that fact appears to us to have no relevance to the only question raised in the appeal, the question, namely, whether she was entitled to divorce her first husband by virtue of the caste-custom.

In the husband's suit for restitution of conjugal rights, the only defence now made is the divorce based on the alleged custom, and, since that fails, the suit must be decreed with costs throughout.

Decrees reversed.

J. G. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1915.

March 31

KHATIJA, DAUGHTER OF MAHAMADALLI ABDULALLI (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHEKH ADAM HUSENALLY VASI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Court-Fees Act (VII of 1870), section 7, clause IV (f) and section 11—Suit for accounts and administration—Valuation of the suit for purposes of court fees.

In a suit for accounts and administration of the estate by the Court, the claim was valued at Rs. 130 for purposes of court fees and at Rs. 30,00,000, for purposes of jurisdiction and pleader's fees. It was contended on behalf of the defendants that the suit had not been properly valued for purposes of court fees inasmuch as the suit was not an administration suit but was in effect a claim by the plaintiff for her share in the estate. This contention found favour with the lower Courts which held that the suit was not for administration and the stamp duty was payable on the value of plaintiff's share in the property which amounted to Rs. 67,968-12-0.

On appeal to the High Court,

* First Appeal No. 23 of 1914.