APPELLATE CIVIL.

Before Mr. Justice Glover and Mr. Justice Romesh Chunder Mitter.

1875
July 5.

IN THE MATTER OF GUNPUT NARAIN SINGH.*

Act VIII of 1859, *ss.* 92 *and* 93—*Interim Injunction—Suit for specific Performance of Contract to give in Marriage—Hindu Law—Ceremonies of Betrothal.*

Sections 92 and 93 of Act VIII of 1859 are not applicable to a suit for specific performance of a contract to give in marriage, and the Court will not grant an interim injunction to restrain the defendant from making another marriage with a third person.

Per GLOVER, J.—A suit for specific performance of a contract to give in marriage will not lie: the remedy is an action for damages for breach of the contract. The ceremony of betrothal does not by Hindu law amount to a binding irrevocable contract of which the Court would give specific performance.

THE petitioner instituted a suit in the Court of the Subordinate Judge of Gya against Mussamut Rajan Kooer, widow of Baboo Pertab Narain Singh, and mother and guardian of Mussamut Bacha Kooer, for specific performance of a contract to give her daughter in marriage to Jagat Narain Singh, the minor son of the petitioner, and for obtaining possession of the person of the said Bacha Kooer. The allegation of the petitioner was that the ceremonies of betrothal (*Shagoon* or *Borachaka*) had been performed followed by the ceremony of *tilak*, and that the marriage contract being then irrevocable and complete, the plaintiff was entitled to have the ceremony of *Shoomungalee* or the final ceremony performed, and to obtain possession of the girl. The defendant subsequently entered into negotiations for the marriage of her daughter to another person, and performed certain ceremonies with a view to the celebration of such a marriage. The petitioner therefore applied to the Subordinate Judge of Gya to issue an interim injunction under

* Motion, No. 735 of 1875, from an order of the Subordinate Judge of Gya, rejecting an application for injunction, dated the 23rd June 1875.

s. 93, Act VIII of 1859, to restrain the defendant from celebrating the marriage of her daughter with any other person than the petitioner's son, until the said suit had been determined.

The Judge refused to grant the injunction, on the grounds that s. 93 was not applicable to a suit of the kind; and that by Hindu law, the performance of the ceremony of betrothal was not sufficient to make the contract of marriage complete and irrevocable, and therefore the Court could not, in a suit, brought for a breach of the contract, issue an injunction to restrain the defendant from giving her daughter to any one else. He referred to Macnaghten's Hindu Law, p. 60; Cowell's Lectures on Hindu Law, 1870, p. 163, last para., and authority cited in note; Shama Charan's Vyavastha Darpana, pp. 646—648 and particularly Vyavasthas 386 and 387, and *Umed Kika* v. *Nagíndas Narotamdas* (1).

The petitioner thereupon applied to the High Court by a petition setting forth the above facts, and praying for a rule calling on Rajan Kooer to show cause why the order of the Subordinate Judge should not be set aside, and the injunction asked for issued.

Baboo *Kalimohun Doss* (with him Baboo *Hurrihar Nath*) for the petitioner contended that, after betrothal, the marriage contract was valid and binding; that consequently a suit could be brought to enforce such a contract, and that in such a suit an injunction might be granted as prayed for. He referred to Menu, ch. iii, v. 43; ch. viii, v. 227, ch. ix, vv. 47, 71 and 99; 1 Macnaghten's Hindu Law, p. 58; 1 Strange's Hindu Law, p. 37; Colebrooke's Digest, vol. ii, pp. 482, 484, 485, vv. 165 note, 169, 170 note, 171 and note.

The following judgments were delivered:—

GLOVER, J. (after shortly stating the facts, continued):—Against this order the petitioner has appealed, and in support of his contention Baboo Kalimohun Doss has drawn our attention to certain texts of Hindu law as set out in Menu,

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to show that betrothal is really a marriage, and that a girl once promised to a particular man could not be given in marriage to another; we have also been referred to 1 Strange's Hindu Law, Macnaghten's Hindu Law, and Colebrooke's Digest.

The right of the petitioner to have an injunction *pendente lite* depends on the nature of the remedy which a Civil Court would give in the suit, and if it could be shown that a decree for a specific performance would necessarily follow proof of the petitioner's betrothal to the girl, an injunction might properly be granted, as without it the suit might, and very probably would, be infructuous.

But I agree with the Subordinate Judge that s. 93, Civil Procedure Code, was never meant to apply to cases like this. As a general rule, a decree for specific performance of a contract is given only where an award of damages would be an incomplete relief, and the breach of promise to marry or to give in marriage is one to which a money penalty has in England at least (1) always been considered adequate. And if the matter is to be settled on the principles of equity and good conscience, it can hardly, I think, be said that the Courts in this country should interfere to enforce a marriage between parties one of whom is unwilling, whilst the other can obtain a money remedy for his disappointment. The authorities which have been quoted in support of the arguments that Hindu law demands the carrying out of a marriage when certain anterior ceremonies have been performed, do not, it seems to me, go farther than to declare it usually wrong to break such engagements.

I have not been able to discover any case like this decided on this side of India (2), but the question was very fully discussed in the Bombay High Court in the case of *Umed Kika* v.

(1) In *Jogeswar Chakrabati* v. *Panch Kauri Chakrabati*, 5 B. L. R., 395, it was held that, on breach of a promise to give in marriage, a suit to recover a sum paid as consideration would lie in the Civil Courts; but see *per* Markby, J., in *Asgar Ali Chowdhry* v. *Mahabat Ali*, 13 B. L. R., App., 34, where the remedy for breach of a contract to give in marriage is discussed.

(2) See a reference to the point in *Nowbut Singh* v. *Mussamut Sad Kooer*, 5 N. W. P., H. C. Rep., 102.

Nagandas Narotamdas (1), and it was there decided that the Court would not order specific performance (the girl not being a party to the suit), or compel the father to carry out a marriage with the person to whom the daughter had been betrothed. The Court also held that a betrothal was not, according to Hindu law, an actual and complete marriage. It was shown in that case that there was no precedent for the contention that specific performance had ever been decreed in cases like the present. The authorities quoted (five cases in all), not going beyond this, that, in case the promise was not carried into effect within a certain limited period, the defendant should pay a certain sum by way of damages.

I quite agree with what the learned Judges of the Bombay High Court say on this point, and the absence of any authority in favor of the petitioner points strongly to the conclusion that such a case as this has never been considered one in which anything more than a money award of damages should be decreed.

The case of *Aunjona Dasi* v. *Prahlad Chandra Ghose* (2) does not seem to apply. In that suit it was held that a suit by a Hindu mother to declare the marriage of her daughter with the defendant was null and void would lie in the Civil Court. I was of a contrary opinion at the time; but granting that such a suit will lie, how does that affect the present case? It is not averred by the petitioner that his marriage was ever actually completed.

With regard to the effect of betrothal, the reference made to the Vyavastha Darpana applies to Bengal only; but even there, according to the authorities quoted in vyavastha 386 (p. 646), betrothment is not considered marriage irrevocable; for, as a matter of fact, a girl betrothed to a man, who dies before actual and complete marriage, can afterwards be married to another man, and this seems a complete answer to the allegation.

The judgment of the Bombay High Court refers to the Mitakshara, and that is the law which applies to the case before us. By that law, ch. ii, s. 11, v. 27, retractation of betrothal is

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punishable by a fine to the king, and may in some cases be made without any penalty, provided good cause be shown, and one, if not the only, good cause, is said to be the coming of a "preferable suitor."

It appears to me, therefore, that as the plaintiff would fail in a suit for specific performance of the marriage (I do not wish to prejudge matters, but that is my opinion), he ought not to obtain an injunction to prevent the girl's guardian making other matrimonial arrangements. I think that the Subordinate Judge was right, and that this application should be refused.

MITTER, J.—Without expressing any opinion upon the question, whether a suit of this nature will lie or not, I also think that this application ought to be refused. I reject it upon the grounds that the matter does not come within the purview of either s. 92 or s. 93 of Act VIII of 1859; and, if it did, the petitioner should not be allowed to question the order of the lower Court in this form, when he has under the law the right to appeal in a regular way.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Phear.

IN THE MATTER OF OMRITOLALL DEY.

1875
Sept. 9.

Small Cause Court, Calcutta, Constitution of—Act IX of 1850 *and Act XXVI of* 1864*—Writ of Habeas Corpus, Return to—Privilege from Arrest—Witness—Undertaking by Prisoner not to sue.*

The Small Cause Court in the Presidency town is not a Court of co-ordinate jurisdiction with the High Court, but a Court of inferior jurisdiction and subject to the order and control of the High Court. Therefore, where on a prisoner being brought up to the High Court on a writ of habeas corpus ad subjiciendum, the return of the jailor stated that the prisoner was detained under a warrant of arrest issued in execution of a decree of the Small Cause Court, *Held*, that the return was not conclusive, but the prisoner was entitled to show by affidavit that he was privileged from arrest at the time he was taken into custody (1).

(1) As regards the question whether the truth of a return can be controverted by affidavit, see *In the matter of Gunesh Sundari Debi*, 5 B. L. R., 418; and *In the matter of Khattija Bibi*, Id., 557.