

1886

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CIVIL.12 B. 110=
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349.

Hindu law—Marriage—Guardianship—Custody—Right of father to give his daughter in marriage—Conduct of father forfeiting such right—Suit by a father to restrain his wife from giving their daughter in marriage without his consent.

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ORIGINAL CIVIL.

Before Mr. Justice Farran.

NANABHAI GANPATRAV DHAIRYAVAN (*Plaintiff*) v. JANARDHAN
VASUDEV AND RAMABAI (*Defendants*)* [12th June, 1886].

The plaintiff and Ramabai, the second defendant, were husband and wife belonging to the Prabhu caste, and lived together in the house of the first defendant, who was Ramabai's father, until the year 1830. In 1877 a daughter Sonabai had [111] been born to them. In 1880 the plaintiff was convicted of theft, and sentenced to two years' imprisonment. At the end of his term of imprisonment he did not return to live with his father-in-law, but went to reside in his own father's house, where in 1884 he requested his wife Ramabai to join him with their daughter Sonabai. Ramabai refused, and she and Sonabai continued to live in the house of the first defendant, her father. The plaintiff then married a second wife. In November, 1885, Sonabai having attained nine years of age—an age at which it is customary for Prabhus to seek husbands for their daughters—demanded his daughter Sonabai from the defendants, who, however, refused to deliver the girl to the plaintiff. In May, 1886, the plaintiff filed this suit against the defendants, complaining that they were about to have his daughter Sonabai married to her cousin without his (the plaintiff's) consent. He prayed that he might be declared entitled to the custody of his daughter, and for an injunction against her marriage without his consent. On filing this suit he obtained a *rule nisi* for an injunction against the defendants.

Held that, pending the hearing of this suit, he was entitled to the injunction asked for.

[R., 35 M. 728=11 Ind. Cas. 570=21 M. L. J. 600=10 M.L.T. 57=(1911) 2 M.W.N. 285.]

THE plaintiff was the husband of the second defendant, who was the daughter of the first defendant, and he sued to recover possession of his (the plaintiff's) daughter Sonabai, and to restrain the defendants from having her married without his assent.

The plaintiff stated that the plaintiff and the defendants belonged to the Prabhu caste of Hindus in Bombay, and the plaintiff had married the second defendant in or about the year 1869. The only issue of that marriage had been a daughter, named Sonabai, who was born in November, 1877, and was, therefore, at the date of this suit about nine years of age.

Prior to the year 1880 the plaintiff had been living with his wife and her father in the house belonging to the latter, but in that year he ceased to reside there, and went to live elsewhere. His wife (the second defendant), subsequently refused to live with him, and in consequence he married a second wife in June, 1884, and since that time resided with her in his father's house.

In December, 1885, the plaintiff through his solicitors addressed a letter to the defendants, calling upon them to hand over to the plaintiff his daughter Sonabai, and stating that he proposed to give her away in marriage during the then approaching marriage season. The defendants declined to give up the child.

* Suit No. 210 of 1886.

The plaintiff complained that the defendants had been endeavouring to contract a marriage for his daughter Sonabai [112] without his consent, and that, having failed to obtain a husband for her, they now (as he was informed) proposed to give her in marriage to a son of the deceased sister of Ramabai (the second defendant), viz., one Anandrav Dadaji, without the consent of the plaintiff, and that the said marriage was to be celebrated very soon. The plaintiff stated that he was not willing that the proposed marriage should take place; and he alleged that it was contrary to the custom and usage of the Prabhu community, and that the defendants had no right to give his daughter in marriage to any person without his consent. He further submitted that he alone was entitled to have the custody and guardianship of his daughter, and that he was willing to receive the second defendant into his house, and to live with her as his lawful wife, in case she was desirous of accompanying Sonabai to his residence.

He prayed that it might be declared that he, as father and natural guardian of Sonabai, was entitled to her custody, and that the defendants might be restrained from marrying her to any person without his consent.

The plaintiff filed this suit on the 13th May, 1886, and on the same day obtained a *rule nisi* for an injunction, calling on the defendants to show cause why they should not be restrained from solemnizing the marriage of Sonabai with Anandrav Dadaji, or with any other person, without the plaintiff's assent thereto.

In their affidavits the defendants stated that the plaintiff in the year 1880 had been convicted of theft, and had been sentenced to imprisonment for two years; that since his discharge from prison he had been in destitute circumstances, and incapable of maintaining his wife and daughter, who had, consequently, resided with and been maintained by the first defendant. They contended that no respectable person would negotiate with the plaintiff for the purpose of getting his daughter in marriage; and that this was the reason of their refusal, in 1885, to give up the girl to the plaintiff. They further set forth that there was very great difficulty experienced by members of their caste in finding eligible husbands for their daughters, and that very large premiums were often required, and that the plaintiff would be unable to pay [113] any premium whatever. They submitted that the marriage, which they proposed between Sonabai and Anandrav Dadaji, was, in all respects, a fit and proper marriage; and that it should be forthwith celebrated, as the first defendant, who was an old man, was willing and able to bear all the attendant expenses. They denied that the proposed marriage was contrary to the usage of the Prabhu community. They further stated that the plaintiff was then maintained by his father, being entirely destitute of means; that he was of a profligate character, and unfit to be entrusted with the custody and guardianship of his daughter.

The rule now came on for hearing.

Macpherson, for the defendants, showed cause.—The Court has a discretion in granting or withholding an injunction. This is a case in which the Court ought not to interfere on the application of the plaintiff. He has been convicted of a criminal offence. He has not for years supported his wife Ramabai or his daughter Sonabai, and they have lived with the first defendant. The plaintiff has no means to support them, and is not in a position to negotiate a proper

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marriage for Sonabai. The defendants are acting solely for the best interests of Sonabai. The plaintiff's only object in this suit is to thwart them. The father's assent is not essential to the validity of his daughter's marriage—Mayne's Hindu Law, paras. 80, 81. If the plaintiff is not entitled to the custody of his child, he should not get this injunction—Simpson on Infants, p. 136 *et seq.*; *Ex parte Warner* (1). As to the marriage proposed by the defendants, the plaintiff states no tangible objection to it. In exercising its discretion, the Court will have regard to the interests of the girl—Specific Relief Act I of 1877, s. 52; Kerr on Injunctions (2nd ed.), pp. 3, 5. As to the propriety of the proposed marriage, see Mandlik's Hindu Law, pp. 409, 425, 440.

Starling, for the plaintiff, *contra*.—There is clearly a doubt as to the propriety of the proposed marriage, and the Court will, therefore, grant the injunction. The plaintiff has a legal right to give his daughter in marriage. A good reason must be given before he is deprived of this right. His poverty is no reason; [114] nor is the fact that he was some years ago convicted of an offence. There has been no desertion and no abandonment.

JUDGMENT.

14th June. FARRAN, J.—The parties to this suit are Hindus of the Prabhu caste, and the object of the plaint, as stated in its prayer, is to obtain a declaration (1) that the plaintiff, as the father and natural guardian of his daughter Sonabai, is solely entitled to her custody, and to keep her under his immediate care and protection; (2) that the defendants, or either of them, are or is not entitled to give the said Sonabai in marriage to Anandray Dadaji, or any other person, without the assent of the plaintiff; and an order that the defendants, or either of them, may be decreed to deliver up the custody of the said Sonabai to the plaintiff. The plaint also prayed that the defendants might be restrained by injunction from solemnizing the intended marriage of the said Sonabai with the said Anandray Dadaji, or with any other person, without the plaintiff's assent.

The facts are practically admitted, and are these:—

In the Christian year 1869 the plaintiff was married to the defendant Ramabai, who is the daughter of the defendant Janardhan Vasudev. After their marriage the plaintiff and the defendant Ramabai lived together—sometimes in the plaintiff's father's house and sometimes in that of the defendant Janardhan Vasudev. In the year 1877 the defendant Ramabai gave birth to a daughter Sonabai, who is the subject of the present application. Ramabai and the plaintiff were then living in the house of Ramabai's father, and they continued to reside there together until the year 1880.

In that year the plaintiff and his brother were accused by the defendant Janardhan Vasudev of the theft of certain ornaments, and were, by the Presidency Magistrate, Mr. Nana Moroji, convicted of that offence. The plaintiff was sentenced to two years' rigorous imprisonment. After the expiration of his term of imprisonment the defendant did not return to live with his father-in-law, and probably would not have been permitted to do so; and apparently for some time he did not return to his own father's house, but he eventually did so; and in the year [115] 1884 he requested his wife Ramabai to come and live with him there with their daughter Sonabai. The house of the plaintiff's father was then, as

it is now, a very small one, and there were several inmates living therein. The plaintiff was in very poor circumstances—almost, if not altogether, dependent on his father, and Ramabai preferred the ample accommodation and luxurious mode of life afforded to her in her father's house, to taking up her abode with the plaintiff's father in his small and crowded house, and there sharing the poverty and disgrace of the plaintiff. The plaintiff then married a second wife. It is not alleged that the plaintiff ever treated his wife Ramabai, or their daughter, with unkindness. He appears to have been attached to them both. In November, 1885, Sonabai entered upon the ninth year of her age—an age at which it is customary for Prabhus to seek husbands for their daughters, and in December of that year the plaintiff through his solicitors addressed the following letter to his wife Ramabai and her father:—

“ Sir and Madam,—Under instructions received from our client, Mr. Nanabhai Ganpatrav Dhairyavan, the son-in-law of you Janardhan Vasudevji, and the husband of you, Ramabai, we have to call upon you and each of you to send and deliver over the safe custody of the body of his (our client's) daughter Sonabai, now of the age of eight years, to his house at Parel, No. 36, next to the western gate of the Government House, within four days from the service hereof on you. Our client proposes to give his said daughter away in marriage during the approaching marriage season. In default of compliance with the above requisition therefore our client will be compelled to proceed further in the matter, as he may be advised, at your costs.”

The defendants by their letter of the 3rd December declined to accede to that request. The plaintiff in his affidavit of the 12th June, paragraph 7, says that at this time he had secured a husband for Sonabai in the person of one Morshvar, and refers to the affidavit of Narayan Vasudev Kirtikar in support of his statement; but I think that, though there may have been some conversation about the matter, no actual negotiations upon the subject were entered into. This particular alliance is not referred [116] to in the plaintiff's letter of the 2nd of December which I have just read. Beyond the writing of that letter the plaintiff took no steps to enforce the return of Sonabai to him until the present proceedings.

The plaint was accepted on the 13th of May last in vacation and on the same day I granted a rule *nisi* and an *interim* injunction restraining the defendants from solemnizing the intended marriage between Sonabai and one Anandrav Dadaji, or any other person, without the plaintiff's assent. I granted that rule upon the affidavit of the plaintiff, which stated as follows:—

“ 2. I further say that on the 18th instant I received a letter from one Babaji Cashinath, the husband of the first daughter of the said defendant Janardhan Vasudevji, asking me to see him on the subject of the intended marriage of my daughter Sonabai.

“ 3. On the 11th instant I, in company with my brother, called upon the said Babaji Cashinath at his office on the subject of the said letter, when he informed me that my said daughter Sonabai was to be given in marriage to Anandrav Dadaji, and the same was to be solemnized on the 13th instant. I, therefore, strongly protested against such a thing being done without previously having obtained my consent; whereupon the said Babaji Cashinath said that the defendant Janardhan Vasudevji was determined to have it solemnized on the 13th instant.

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"4. I further say that, if the defendants above named are not restrained by an *interim* injunction, they will get my said daughter Sonabai married, and I will be permanently deprived of my right as her natural father and guardian."

Cause was shown by the defendants against that rule on the 12th instant by Mr. Macpherson on behalf of the defendants; while Mr. Starling, for the plaintiff, urged that it should be continued until the hearing. The question I have to determine is, whether that injunction should now be dissolved, or whether it should be made absolute until the suit comes on for final decision.

I have given the matter anxious consideration, because its decision, even at this stage, is fraught with important consequences to the parties and to the girl Sonabai. On behalf of [117] the plaintiff it is said that, if I dissolve the injunction, the defendants will, without his consent, at once marry his daughter to her cousin Anandrav Dadaji, and that he will be for ever deprived of his right, as a father, to marry his daughter Sonabai to a husband of his own choice, and that Sonabai will be for ever united to a husband of whom he, the plaintiff, does not approve. The discharge of the rule will, therefore, operate as a decision of the suit, and the plaintiff will be deprived of his right to appeal, a marriage performed under such circumstances being final—*Bai Rulyat v. Jeychund Kewul* (1).

On behalf of the defendants it is urged that Sonabai is now in the ninth year of her age, and that a suitable husband has been found for her; that, having regard to the star under the influence of which she was born, if she is not married in the present Hindu month of *Jyeshtha*, she cannot be married during the next two years, by reason of the absence of an auspicious day; that before that she may attain puberty; and that her not being married before that event will entail disgrace upon herself and her family. It is also said that her grandfather is old, and may not live until the girl attains her eleventh year, and that, in fact, having regard to the circumstances of the plaintiff, the difficulty of finding a husband in the Prabhu caste, and the chance of the girl's attaining puberty before her eleventh year, if Sonabai is not at once married, she may never be married at all. It is also said that, if I make the rule absolute, an appeal from it cannot be heard before the expiry of the present marriage season, which will end in the current month of *Jyeshtha*. Were it not for these considerations put forward on the part of the defendants, I should at once, after having heard the arguments of counsel, having regard to the impossibility of the marriage tie, once made, being severed, have made the rule absolute. Feeling their weight I postponed my decision until I had given the matter the fullest consideration I could give to it at this stage of the case.

As one ground for forbidding altogether the marriage of Sonabai with Anandrav Dadaji to be solemnized, it is urged [118] by the plaintiff that they are first cousins, being respectively the daughter and son of two sisters, and that such a marriage is forbidden by the Shastras, and is opposed to the usage of the Prabhu caste. Upon a point of this kind the custom of the caste is the rule by which I ought to be guided; (see the authorities quoted in Mandlik's Hindu Law, pp. 409—435 and 440); and upon the affidavits I have come to the conclusion that, according to that custom, the proposed marriage is not illegal, though it is of an unusual character: so unusual that the defendants have only been able to specify one instance

(1) Bellassis' Rep., (1840—48) 43.

of its occurrence in their community. The fact of its being so very unusual should have weight given to it in considering the plaintiff's objection to the marriage; but I do not think that it alone is sufficient to justify me, under the circumstances I have referred to, in making the rule absolute.

Cause was shown against the rule in the following manner:—It was admitted by Mr. Macpherson, and indeed could not be denied, that by Hindu law the father is the proper person to give his daughter in marriage, and that under ordinary circumstances the conduct of the defendants in disposing of Sonabai in marriage without her father's consent would be indefensible; but it was said that the plaintiff was a convicted felon, and was in poor circumstances, and was unable to provide a proper house for his wife Ramabai and her daughter, and his means were not such as to enable him to get his daughter married. It was difficult in all cases, it was said, to find suitable husbands for girls in the Prabhu community, owing to the scarcity of eligible boys; but it was impossible for the plaintiff to do so, owing to his antecedents and his inability to gloss them over by bestowing a sufficient dowry upon Sonabai. It was argued that the plaintiff had thus forfeited his right as a Hindu father, or, at any rate, that the Court should not assist him in asserting his right to the injury of Sonabai. "The Court should stay its hand." The work of Mr. Simpson on Infants (p. 136 *et seq.*) was referred to, as showing that under special circumstances the Court of Chancery in England actually went so far as to restrain a father from exerting his parental right to the custody [119] and care of his children to the detriment of the latter, and the case of *Ex parte Warner* (1) was especially relied on. Mr. Macpherson contended that, if the plaintiff was not entitled to the custody and care of Sonabai, as these authorities showed that he was not, those who had her under their care, namely, her mother and maternal grandfather, had the right to dispose of her in marriage, and a marriage effected by them would be a valid marriage, citing for the latter proposition *Bai Rulyat v. Jeychund Kewul* (2).

If upon this rule I had to consider whether the father or the mother of Sonabai was the person entitled to her custody, I should have to look more closely into the authorities referred to by Mr. Simpson than I have been able to do since the argument of the rule. At present I incline to think that a single offence by the father, such as an offence of theft, unconnected with the domestic relations, would not justify the Court in assuming that his house was not the proper home for his children, even though that home should not be as spacious and well appointed as the house of the mother's father, in which the mother resides. But I do not think that question need now be decided; as it appears to me that it is not a necessary consequence, that because a father who has been once convicted of theft cannot offer to his wife and child a home in which the Court would compel them to reside, therefore the father is not to have a voice in the choice of a husband for his daughter, or is to be held to have lost his right to give his daughter in marriage to the husband of his choice. The one proposition does not seem to me to involve the other. I am supported in this view by a passage in the judgment of the Court in *Maharanees Ram Bunsee v. Maharanees Soobh Koonwaree* (3). "So far as the formal issues framed by the Court of first instance are concerned, the right of guardianship was deemed to be the main issue, the pleader of the

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(1) 4 Bo. Ch. C. 101.

(2) Bellassis' Rep. (1840—48), 43.

(3) 7 W.R.C.R. 321 (323).

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parties apparently considering that whoever was legally entitled to the guardianship of the minor was also entitled to give her away in marriage. The Deputy Commissioner himself was, however, aware that, [120] the real issue was as to the right to give the girl in marriage; and we cannot admit that the person who has the right of guardianship of a female minor is necessarily the person who has the right of disposing of her in marriage. It appears to me rather that, while in certain cases the two rights will be found to go together, in other cases they will be found to be severed, and to vest in different persons. We are led to this conclusion by the fact that, whereas the mother is unquestionably entitled to be guardian failing the father, she does not stand next to the father as regards the right of giving her daughter in marriage; because it is laid down in the Mitakshara that, in the first instance, the father is to perform the initiatory ceremony such as the marriage of his daughter: in default of him the grandfather; on failure of the grandfather, the brother; the uncle and his son (next in order); and that on failure of all the persons above enumerated, the mother has the right of disposing of her in marriage."

The plaintiff has not deserted his wife or his daughter. He has offered them a house, and entreated them to join him in it. It is true that it is small and poor, and that the plaintiff only shares it jointly with his father and brother. I, by no means, blame the defendant Ramabai for refusing to share that house with the plaintiff. The conduct of the plaintiff has been such as to debar him of the right to blame her. I sympathise with the defendants in their desire to find a husband and a home for Sonabai; but, in the absence of authority, I am unable, on a rule of this kind, to hold that the plaintiff has forfeited his parental right to give his daughter in marriage, or that the defendants are justified in marrying her without her father's consent, and against his wish. That important question must be determined when the case comes to a hearing.

The next question which arises for consideration is, whether assuming that, as an abstract proposition, it is not shown that the plaintiff has forfeited his parental right, his conduct and delay are not such as to justify the Court in refusing to grant him a temporary injunction, under s. 493 of the Code of Civil Procedure (Act XIV of 1882), and leaving him to assert his right [121] at the hearing? Though I may entertain doubts as to whether the plaintiff in filing this suit is not influenced by a feeling other than a desire for what he considers to be for his daughter's welfare, I do not consider that it is proved that such is the case. His father Ganpatrav Pandurang has offered to provide a husband for Sonabai, and that father's right to give Sonabai in marriage is clearly superior to that of the defendants: see the case already referred to (*Maharanees Ram Bunsee v. Maharanees Soobh Kunwari* (1)). The marriage of Sonabai with her mother's sister's son is of such a character according to the Hindu Shastras, and is of so unusual a nature even in the Prabhu caste, as may well render it (though not unlawful) displeasing to the plaintiff. The plaintiff may feel that the proposed marriage of Sonabai into the family of her maternal grandfather may, in effect, sever the bonds of connection between him and his daughter by reason of the animosity which exists between the plaintiff and the father of Ramabai. To forego such feelings in consideration of his daughter's welfare is a course to which I might advise, but cannot compel the plaintiff. I must disregard sympathy in deciding a case of this nature. It is said I have a discretion in the matter. The plaintiff's delay has been

(1) 7 W.R. C.R. 321.

urged upon me as a reason for its exercise. If it were established to my satisfaction that there had been delay on the part of the plaintiff, and that the defendants' or even Sonabai's interests had suffered therefrom, I should gladly exercise it, but I cannot say that there has been any undue delay. The defendants do not appear to have kept the plaintiff informed as to their negotiations for Sonabai's marriage, and it was apparently not until after his conversation with Babaji Cashinath that the plaintiff knew that the marriage between Sonabai and her cousin was about to take place. That was on the 11th May. Before that the plaintiff had not led the defendants to believe that he would consent to any marriage they might agree upon, nor do I think that the defendants could reasonably have drawn that conclusion from the plaintiff's not following up his letter of the 2nd December by active proceedings in Court. Lastly, it is not made out to [122] my satisfaction that there is any well-grounded reason to fear that, if Sonabai be not married during the present marriage season, she may be condemned to a life of perpetual celibacy.

The affidavits of Anand Gangadhar Joshi, Pandurang Bhaskar Joshi, and Vishnu Mahadev Thosar on the subject are extremely guarded, and are sufficiently met by the affidavit of the plaintiff and of others not replied to. I make the rule absolute until the hearing. The costs will be costs in the cause.

Rule absolute.

Attorneys for the plaintiff: Messrs *Balkrishna and Dikshit.*
Attorneys for the defendants: Messrs *Winter and Burder.*

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Before Mr. Justice Farran.

NANABHAI GANPATRAV DHAIRYAVAN AND ANOTHER, (*Plaintiffs*) v.
ACHRATBAI AND OTHERS (*Defendants*).^{*} [2nd July, 1886.]

Hindu Law—Ancestral property—Burden of proof where property alleged to be ancestral—Property derived by a son from his mother where it originally formed part of his father's estate.

Where a Hindu by will leaves property to another which is afterwards alleged to be ancestral by members of the testator's family, the burden of proving it to be ancestral rests on the plaintiff. There is no presumption of Hindu law as to its character.

Pandurang Mankoji, a Hindu, died in 1831, having by his will bequeathed all his estate to his wife Parvati and his three minor sons, Vithoba, Govind, and Ganpatrav, and directed as follows:—"In the event of my wife's demise previous to my sons attaining their full age of twenty-one years, to entitle them to claim their respective shares of whatever may be left after marrying, &c., then I direct my surviving executors will secure my property and divide the whole among such sons, or the survivors of them. Subsequently to the testator's death his widow Parvati managed his estate, and probate of his will was granted to her alone in January, 1832. In 1836 she bought the V. property for Rs. 2,801. There was no evidence to show out of what funds this property was bought, but the deed of sale stated that it was assigned to "Parvati, widow and administratrix of the late Pandurang Mankoji, her heirs, executors, administrators, and assigns." In 1845 the eldest son Vithoba separated from the family, and gave a release to his mother Parvati. In 1854 she purchased the P. property for Rs. 8,452, the

^{*} Suit No. 138 of 1834.

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