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Spencer v. Spencer (1) shows the advantage of having an affirmative decision about outstanding debts to prevent further litigation. I may add, that the plaintiffs consented to the award being remitted when Mr. Anderson's client first proposed that this course should be taken. The latter expenses having been caused by his contesting the validity of the award, I order that he pay his own and plaintiffs' costs. The other defendant to pay his own.

Attorneys for the plaintiffs:—Messrs. *Bomanji and Hormusji*.

Attorneys for the defendants:—Messrs. *Hore, Conroy, and Brown*.

13 B. 126 = 13 Ind. Jur. 265.

[126] ORIGINAL CIVIL.

Before Mr. Justice Jardine.

DULARI (*Petitioner*) v. VALLABDAS PRAGJI (*Respondent*).*

[15th August, 1888.]

Pauper—Petition for leave to sue as a pauper—Practice—Applicant must show a good cause of action—Civil Procedure Code (XIV of 1882), s. 407—Illegal agreement—Agreement against public policy—Guardian and ward—Agreement for marriage by a guardian to give a ward in marriage on payment of a sum of money.

The plaintiff applied for leave to sue as a pauper. She stated as her cause of action that a young girl had been left in her charge and had been maintained by her for a number of years; that in January, 1888, arrangements had been made with a Bhatia to get this girl married, and that she (the plaintiff) was to receive Rs. 2,500 on the marriage; that the defendant had also agreed to pay her (the plaintiff) Rs. 2,000 if she would give the girl to him in marriage; that before the marriage ceremony could be performed the defendant had induced the girl to quit the plaintiff's house for immoral purposes. She claimed Rs. 2,500 as damages, and prayed leave to sue as a pauper.

Held, following *Chatterpal Singh v. Raja Ram* (2) that the facts being clear and the law evident, the case might be finally disposed of on the plaintiff's application to sue as a pauper.

Held, also, that the alleged agreement on which the suit was brought, was immoral and against public policy, and that the action was not maintainable.

[F., 20 A. 299 (301); R., 22 B. 658 (661); 1 C.L.J. 261 (265); 4 Ind. Cas. 975 = 91 P.L.R. 1909 = 131 P.W.R. 1909; D., 16 B. 673 (674); 13 M. 83 (87).]

PETITION for leave to sue as pauper. The case now came on for the investigation of the petitioner's alleged pauperism.

The petitioner in her petition claimed to recover from the defendant a sum of Rs. 2,500. She alleged that at Gokul, in Upper India, a young girl, named Laxmibai, had been made over to her by Laxmibai's mother when she was dying. On the mother's death the petitioner had taken the girl and had ever since maintained her. The following paragraphs of the petition set forth the petitioner's alleged cause of action:—

"(4) That in the month of January last, arrangements had been made with a respectable Bhatia gentleman, to get the said girl married on payment to your petitioner of Rs. 2,500, in consideration of the expenses

* Pauper Petition, No. 20 of 1888.

(1) 2 Y. & J. 249.

(2) 7 A. 661.

incurred by your petitioner in maintaining the said girl and supplying her with all necessaries. That the respondent above named had also agreed with your petitioner to [127] pay her Rs. 2,000 if your petitioner gave the said girl in marriage to the said respondent, who is also a Bhatia by caste.

"(5) That subsequently the said respondent used to come to your petitioner's house, and before the marriage ceremony of the said girl could be performed he, the said respondent, induced the said girl to quit the house, and that the said girl actually did so, and has not yet returned to the house of your petitioner."

"(7) That your petitioner is now informed that the said girl was thus induced to leave the place by the respondent with the intention of having illicit intercourse without undergoing the necessary ceremonies of marriage.

"(8) That in consequence of the illegal conduct of the said respondent your petitioner has suffered loss of Rs. 2,500, which she would have received in consideration of her defraying maintenance and clothing charges of the said girl with the intended husband."

The following was the prayer of the petitioner:—

"(a) That your petitioner may be allowed to prosecute this suit against the respondent in *forma pauperis*.

"(b) That the said respondent may be ordered to pay to your petitioner Rs. 2,500 as damages for inducing the said girl to leave the house for immoral purposes without performing the necessary marriage ceremonies."

The petitioner appeared in person.

Davar, for the respondent.

JUDGMENT.

JARDINE, J.—I am satisfied, by the evidence of the money-lender Matapadan and his book, that the petitioner Dulari has this year pledged with him the gold ornaments of the value of about Rs. 275 which he produced, on which he advanced Rs. 260 to petitioner. I do not believe her denial of these facts. Without taking the other evidence which Mr. Davar, for the respondent, was willing to give, I find that Dulari is not a pauper, and I refuse her leave to sue as such.

Mr. Davar has also argued that the application should be rejected under s. 407, cl. (c), of the Code of Civil Procedure, on the ground that petitioner's allegations do not show a [128] right to sue. He relies on the passage in the judgment of a Full Bench in *Chatterpal Singh v. Raja Ram*(1), which is as follows:—"We cannot read these words of s. 407 as binding the Court's discretion to merely ascertaining whether 'the right to sue' arose within its jurisdiction, but they have in our opinion a more extended meaning, namely, that an applicant must make out that he has a good subsisting cause of action, capable of enforcement in Court, and calling for an answer, and not barred by the law of limitation or any other law."

I have frequently followed this ruling in hearing pauper petitions, where the facts were clear and the law evident; where, therefore, no injustice was likely to occur from disposing of the case in the inquiry

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under Chap. 26 of the Code. The Court is bound to exercise a measure of caution, because the pauper is often without the advantage of the aid of counsel, and it is evident that the summary mode of inquiry may in cases of any complexity lead to important facts not being elicited or explained. This practice of the Court has probably existed before I took my seat on this Bench, as it has been acquiesced in by every counsel of experience. In some matters, as noticed by Couch, C. J., in *Imperial Banking and Trading Company v. Pranjivandas* (1) there is no duty on the Court to raise an issue; in others injustice would arise if the Judge decided disputed matters of law or fact without fuller inquiry.

The question raised by Mr. Davar's argument is whether a positive rule of law precludes the petitioner from claiming the relief on the facts alleged by her, which are the following:—In her plaint she states that she brought up one Laxmi, an orphan girl of a different caste, from infancy until her eleventh year at considerable expense, and that "in January last, arrangements had been made with a respectable gentleman to get the said girl married on payment to your petitioner of Rs. 2,500 in consideration of the expenses incurred by your petitioner in maintaining the said girl and supplying her with all necessaries. That the respondent had also agreed with your petitioner to pay her Rs. 2,000 if the petitioner gave the said girl in marriage to the said respondent, [129] who is also a Bhatia by caste." She then alleges that the respondent induced the girl to leave her, though he has not married her, and that "in consequence of this illegal conduct of the said respondent your petitioner has suffered loss of Rs. 2,500 which she would have received in consideration of her defraying maintenance and clothing charges of the said girl with the intended husband." Her prayer is that the respondent may be ordered to pay her Rs. 2,500 as damages for inducing the girl to leave the house for immoral purposes without performing the necessary marriage. Petitioner does not allege that the respondent has put her to any expense.

At her examination she said: "I claim to recover Rs. 2,500 from respondent, because he agreed to pay that for the girl, whom I had brought up from infancy, only for my giving her in marriage. He has taken her away without giving me money." When I asked her what she had lost, petitioner replied that she had spent Rs. 10,000 in bringing up the girl. She demands Rs. 2,500 as a reward for giving her in marriage.

I may here observe that the claim is not one for damages for loss of service in consequences of seduction or abduction, and I need not consider the question on which the learned Judges differed in *Ram Lal v. Tula Ram* (2), whether a suit of that nature would lie.

The bargain alleged I take to be one for payment of money to a guardian in consideration of giving a girl in marriage. In *Ram Chand Sen v. Audaito Sen* (3), Garth, C. J., said he was disposed to hold that such contracts are so far void as to be incapable of being enforced by the rules of equity and good conscience, and inclined to the English rule, which makes marriage brokerage contracts illegal. Beverley, J., expressed a different opinion. At the first hearing I drew Mr. Davar's attention to this case, and he has since brought to notice the judgment of my brother Scott, J., in *Pitamber Ratansi v. Jagjivan Hansraj* (4) delivered on the 24th March, 1884, which

(1) 2 B. C. H. R. 258 (266).

(3) 10 C. 1054.

(2) 4 A. 97.

(4) See *infra*, 13 B. 131.

deals fully with the point, and ought, therefore, in the extreme paucity of decisions, to have [130] been reported. The following passage shows the view that Scott, J., took of a transaction very like that on which petitioner bases her claim :—“ 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* (1). 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. It was contended that such an agreement did not apply in India. The *asura* form of marriage, which is legal among the lower castes, is, no doubt, nothing more than the purchase of a wife from her father by the husband. As long as the custom of infant marriages is maintained, mutual affection and choice cannot be the basis of marriage. But I do not think it follows that the English rule can have no *raison detre* in India. Although custom and local law in this country may be defective in the matter of marriage, that is no good reason why an additional evil should be engrafted upon them. I had no proof given me that ‘marriage brokerage’ is an established usage in India. I can find no recognition of it in the reports. I think it is immoral and against public policy even in the present state of matrimonial relations in India. Marriage brokers should not be given a legal *status* such as would enable them to enforce their contracts by law. The tendency of such a decision would be to still further degrade the position of women and to perpetuate the inequality of their relations with the other sex. In my opinion the contract is void, under s. 23 of the Contract Act, and to this I would add, as an additional authority, the following passage from Narada :—‘And let the king who desires prosperity repress sinful proceedings which are unauthorized by moral law,’ and the Hindu commentator quoted by Colebrooke defines ‘sinful proceedings’ as ‘acts not productive of good.’ See Colebrooke’s Digest, *sloka* 27, Vol. II, p. 301.”

Mr. Davar relies on the above decision as authority for treating the present claim as based on an agreement opposed to public [131] policy, and thus void under s. 23 of the Indian Contract Act. I am of opinion that the present case cannot be distinguished in principle, and I concur in the reasoning of the above passage, and think that I ought to follow it in this matter, it being a clear decision of this point, and hold that the petitioner’s allegations do not show a right to sue.

The considerations on which the case of the *Duke of Hamilton v. Lord Mohun* (2) was decided by Lord Chancellor Cowper appear to me peculiarly applicable in the present matter between guardian and ward, *viz.*, “ that the case of a mother or guardian insisting upon gain for consenting to a marriage, must be a much more frequent mischief, and in all probability oftener happen, than an agreement of this nature with a third person ; that it was most natural in this case to treat with the guardian ; and to tolerate such an agreement, would be paving a way to guardians to sell infants under their wardship.” The rule and the reason for it are stated in similar terms in Fonblanque’s *Treatise of Equity*, Vol. I, p. 260, (5th ed.). “ So wherever a mother or father, or guardian, insist upon a private gain, or security for it, and obtains it of the intended husband, it shall be set aside ; for the power of a parent or

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265.(1) 3 P. Will. 76 ; *Story’s Equity Jurisprudence*, plac. 260-261.

(2) 1 P. Will. 118, 120.

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guardian ought not to be made use of to such purposes. You shall not have my daughter, unless you do so and so, is to sell children and matches"; see also *Osborne v. Williams* (1) and the cases collected under *Scott v. Tyler* in White and Tudor's Leading Cases in Equity, Vol. II, p. 120.

I refuse the petitioner leave to sue as a pauper, and order her to pay the costs.

13 B. 131-N = 13 Ind. Jur. 267-N.

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Before Mr. Justice Scott.

PITAMBER RATANSI (*Plaintiff*) v. JAGJIVAN HANSRAJ (*Defendant*).
[14th and 17th March, 1884.]

Caste—Re-admission to caste—Contract to procure admission to caste—Contract made by head of a caste in representative capacity not enforceable by him after he has ceased to hold office—Marriage—Agreement to procure marriage in consideration of a money payment—Marriage brokerage—Illegal agreement—Public policy.

[132] The defendant was the eldest of three brothers whose mother on her marriage had been put out of the Lovana caste for having married a man belonging to a different caste. The defendant was anxious that he and his brothers should be re-admitted to the caste; and in 1864 he entered into an agreement with the plaintiff, who was at that time one of the *setias* of the caste, whereby the latter agreed to procure the admission of the defendant and his brothers and get them married to girls belonging to the caste. In consideration for these services the defendant was to pay the plaintiff the sum of Rs. 5,000 which sum was to become due on the marriage of the defendant's youngest brother to a girl of the caste, and to be expended in purchasing caste utensils, which were to be kept for the use of the caste. The plaintiff alleged that part of this money had been already paid to him, and that on the marriage of the defendant's youngest brother in 1880 he had demanded payment of the balance (*viz* Rs. 3,149) which the defendant had not paid. He now sued to recover this balance. One of the witnesses at the hearing was the *setia* of the caste who had succeeded the plaintiff in that position. He stated that he and other leaders of the caste to whom he had spoken, disapproved of this suit.

Held, that the suit was not maintainable. The agreement was made with the plaintiff as one of the heads of the caste. It was made with him in his representative, not in his personal, capacity, and the benefit of the agreement accrued, not to him, but to the caste. It was, therefore, for the caste to say whether they wished to enforce the agreement. The plaintiff, however, had lost his position as one of the heads of the caste in 1869, and was no longer the spokesman or the representative of the caste. His successor had told the Court that the leaders of the caste disapproved, as he did himself, of this suit. Under these circumstances the suit was not maintainable.

Held, also, that the contract sued on, in so far as it promised a money payment for the negotiation of a marriage by a third party, was immoral and contrary to public policy.

[F., 13 B. 126; Appl., 17 M. 9 = 3 M.L.J. 132; R., 22 B. 658 (661); 1 C.L.J. 261.]

SUIT to recover Rs. 3,149, the balance of a sum of Rs. 5,000 due under an agreement dated 3rd October, 1864.

The plaintiff alleged that he was one of the heads or *setias* of a section of the Lovana caste; that the defendant's mother, (Bai Velu), had originally been a member of this caste, but on her marriage with the defendant's father, who belonged to another caste, she had been out-casted; that the defendant was anxious that he and his younger brothers should be admitted into the caste, and had induced the plaintiff to use his influence as *setia* for that purpose. On the 3rd October, 1864, an agreement, in writing, had been made between them, whereby it was arranged that the plaintiff should procure the admission of the defendant and his brothers into the caste and assist in getting them married to members of the caste, and that the defendant should

* Suit No. 267 of 1882.

(1) 18 Ves. Jun. 379.