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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.

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ORIGINAL CIVIL.

*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.

pay the plaintiff Rs. 5,000, the said sum to be due on the marriage of the defendant's youngest brother (Lakhia) with a girl of the Lovana caste. The plaintiff stated that the defendant's said brother Lakhia did marry a girl of the Lovana caste on the 26th May, 1890, and that he (the plaintiff) had then demanded payment from the defendant of the balance of the Rs. 5,000 due under the agreement, a portion of the amount having been already paid, but the defendant had not paid the same.

It appeared from the evidence that, subsequently to the date of the above agreement, disputes had arisen in the caste. A suit was brought in the High Court the result of which was that in 1869 the plaintiff was removed from the position of *setia* of the caste. The plaint was filed in July, 1882. Shortly afterwards the defendant Jagjivan died, but the suit was continued against his representatives. At the hearing the *setia* then in the office, who had succeeded the plaintiff in [133] that position, gave evidence, and stated that he and some of the leaders of the caste to whom he had spoken on the subject, disapproved of the plaintiff's conduct in bringing the present suit.

The material portions of the agreement sued on were as follows :—

“To Sha (Thakar) Pitamber Ratansi. Written by Jagjivan, the son of Lovani (female) Bai Velu. To wit:—I, in the month of *Fagan* of *Samvat* 1918 (March, 1862), made an agreement with you as follows:—Including my next younger brother Moti and his next younger brother Lakhia we (are) three brothers and one sister named Devbai, who is a widow: with them and with me you are to get caste-intercourse established. And you are to get me married. And when I shall get my two brothers married therein you are to render as much assistance as may be required of you. For that I will pay you Rs. 5,000, namely, five thousand, including the undermentioned expenses. Therefore I this day make and deliver this writing as follows:—These rupees five thousand I and my heirs and representatives will truly pay to you and your heirs and representatives. In the month of *Fagan* of *Samvat* 1918 (March, 1862), I made the said agreement with you. Thereafter you in the month of *Chaitar* of *Samvat* 1918 (April, 1862,) you who are the *setia* of your section, and the three *setias* of three other sections, named Sha (Thakar) Walji Madhavji and Sha (Thakar) Govind Bhanji and Sha (Thakar) Nanji Kalanji, you, having agreed to pay to these three persons the moneys in respect of (their respective) vessel accounts, and having kept them near (*i.e.*, in their presence), admitted me or us into caste in my books (*i.e.*, you made an entry to that effect in my book). For that you received from me Rs. 851 as a fine for the caste. And (you) wrote (in the caste book) the particulars in regard thereto; and (you) wrote therein that we should act according to the custom of the caste; and you wrote that we were to remain in your section ..... From that day our caste-intercourse commenced with your four sections. But there are five other sections in our caste. The caste-people and the *setias* thereof did not attend; with them our caste-intercourse did not commence..... And as to the other five sections which exist in our caste, Bai Velu was formerly married to a caste-man in one of those (sections) whose house was left (by her). He has a few relations, among whom there are two *setias* also. Should they or any caste-man instigate (any people) in the caste and cause them to raise an objection with reference to Sha Hansraj, with whom our caste intercourse continues, you are always hereafter to use shifts in regard thereto as you have hitherto done. And unless some moneys for making (purchasing) vessels be fixed and paid to the people of all those five sections, their caste-intercourse cannot be established with us. Therefore some castemen regard us out of caste, in consequence of which I cannot get married..... Further, you are to get me married, within one year (that is) twelve months from this day. Thereafter I may get my second brother Moti married in that same year. And I have a third brother Lakhia. I may get him married in that same year; therein you are to render as much assistance as may be required, or you are also to get Moti married within a year. And I have a third brother Lakhia; I may get him married when I may find it convenient. Therein you are to render as much assistance as I may require. And you are to get me married and I am to get [134] my two brothers married with your requisite assistance (*i.e.*, we three brothers, if we, are to be got married with three girls of my caste-men. If you fix any sums of money and cause them to be paid to the fathers of such three girls I will pay the same out of the aforesaid sum fixed to be paid to you. And as to the sundry expenses which may be incurred for performing the marriages of us three brothers and as to the expenses which may be incurred in giving the (marriage) feasts, I will pay the same (out of my pocket). And so soon as my last brother Lakhia or the last (surviving) brother shall have been got married (as to the payment of) your aforesaid rupees five thousand:—851 which you have received as a fine for the caste and any moneys which may be paid to you for the expenses of any *ujarni* (dinners) which may perhaps be required to be given hereafter, and any moneys which you have caused to be paid by us to the fathers-in-law of us, three brothers, for getting us three brothers married, all these being deducted, as

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to the net balance which may be found payable to you by me I will truly pay the same to you by instalments of Rs. 100, namely, one hundred rupees, each (to be paid every month). And should I not pay you any such instalment of one hundred rupees, and should two instalments for two months, be completed, then I will truly pay at once in full the whole residue of the money which may be due to you.....When I shall pay such money to you, you are to get made as many copper and brass vessels as may suffice for preparing the food for feasting all the nine sections of the caste and such iron (utensils) as may suffice for stirring up and serving the said food. But should the money thus to be paid by me prove short of the cost thereof, then you are to get made a smaller number of vessels in proportion to the amount of the money that may be paid by me. And as to such copper and brass vessels which you may thus get made, you are to get the words 'Presented to Sha Ratansi Madhavji's section by Bai Velu's sons' inscribed on such vessels, and you are to keep the same. And when any caste-man belonging to any of the nine sections of our caste may ask for them for using them in preparing food, you are to lend them to him. And on the dinner being over you are to take them back and keep them. When any caste man may ask for such vessels for preparing food, you are to make no objection in regard thereto."

*Jardane and Russell*, for the defendant.—We deny that the plaintiff fulfilled his part or performed any services under the agreement. The admission to the caste and the marriage of the defendant's brothers were effected independently of the plaintiff. The plaintiff earned nothing under the agreement. He had, in fact, wholly lost his influence with the caste. Further we say the action is not maintainable. This is a secret agreement made by a person in a fiduciary position for his own benefit, or that of his own section of the caste (Indian Contract Act, s. 23). The agreement is also opposed to public policy as an agreement to procure marriage.

*Kirkpatrick and Dhairyawan*, for the plaintiff.—Three facts are proved: 1st, that the defendant and his brothers were out-casted; 2nd, that the agreement was made with the plaintiff to procure their re-admission; 3rd, that the plaintiff did procure their re-admission. We submit that the agreement can be enforced. The fact that the plaintiff was to endeavour to get the defendant and his brothers married, [135] does not make the agreement illegal. The basis of marriage and all the usages connected with it in India are wholly different from those in England. The "public policy" to which the English cases refer, is the public policy which aims at maintaining the English social system. The social system of India is not the same, and the decisions do not, therefore, apply. English public policy is not necessarily public policy everywhere. The English doctrine as to marriage brokerage would be altogether out of place in India—*Juggessur Chuckerbutty v. Panchcowrie Chuckerbutty* (1); *Bolton v. Madden* (2).

## JUDGMENT.

SCOTT J.—This is a suit of a very unusual character. It is brought for the recovery of the balance of the sum of Rs. 5,000 which the plaintiff alleges to be due under an agreement made on the 3rd October, 1864, between him and the representatives of one Jagjivan Hansraj. Jagjivan was the eldest of three brothers whose mother had been put out of her caste, the Lovana caste, for misconduct. The re-admission of the sons, together with their marriage to girls of the caste, was the subject-matter of the agreement. At the date of the agreement and down to 1869 the plaintiff was head of one of the sections and manager of the whole caste. Previously to this agreement of 1864, on which the present suit is brought, there had been an earlier oral agreement of which an abstract is found signed by the parties in the plaintiff's books, dated the 12th April, 1862. This first agreement was made between Jagjivan, his father and his brothers, and not only the plaintiff on the other side but also the heads of three other sections of the caste. The dispute is expressly described as "a caste dispute," and the family is to be re-admitted on their giving a feast and making a present of caste vessels.

This earlier agreement is recited in the main agreement, which, however, is made with the plaintiff alone. But it is made with him in his capacity as *setia*, or head of his section of the caste, and also expressly in his capacity as a manager of the whole caste property, whilst the money to be paid for re-admission is to be expressly applied for the purchase of vessels for the use of the caste. "Unless," says the agreement, "some moneys for making vessels be fixed and paid to the people of all those five sections, their caste-intercourse cannot be established."

This agreement, so far as it concerns re-admission into caste, is quite within the law. I find in Steele's Law of Caste, p. 149: "The caste may re-admit into caste privileges the children of excluded persons on the petition and an investigation into their case;" and p. 148, "Re-admission into caste generally depends more on the ability of

(1) 14 W.R. 154.

(2) L.R. 9 Q.B. 55.

the party to pay fine or provide an expiatory entertainment than the enormity of the offence." But I have searched in vain in Steele, Colebrooke, West and Bühler, Mayne, Macnaughten, Strange, and Stokes' translations of Hindu law books for any recognition of, or even reference to, a system of what is called, in English legal phraseology, "marriage brocage."

It appears, from the recital of the second agreement, that the family had only obtained, up to that date, re-admission into four sections of the caste, and that the other five sections still refused them equality in caste privileges. The second [136] agreement was, therefore, made. By it Jagjivan bound himself to pay Rs 5,000 after deduction of (1) Rs. 851 already advanced by Jagjivan under the first agreement; (2) the expenses of caste dinners which might have to be given; (3) money paid to fathers-in-law for the marriage of the three brothers to their daughters. The balance found due is to be paid to the plaintiff, who is to purchase with it caste utensils to be held by his own section, but for the use of the whole caste. After carefully considering all the evidence I am of opinion that the plaintiff did successfully exert himself to obtain the re-admission of Hansraj and his brothers into the caste. It was sufficiently proved, also, that the plaintiff was the go-between who brought about the marriages of two of the brothers with girls of the caste. Both facts are established even by the evidence for the defence.

The questions really in doubt are, first, whether the action is maintainable in law, and, secondly, whether the defendants have not already paid the sum claimed by the disbursements indicated by the agreement.

Before I discuss the points raised in argument I will consider one which was not raised at the hearing at all. This agreement was made secretly by the head of a caste. To reveal it, he said, would spoil the whole transaction. Yet the contract was made in his capacity as manager, and the compensation for his services was expressly to be devoted to caste purposes. The agreement was in greater part carried out in 1865. The promised "moneys for making caste vessels" would be completely due as soon as the third brother was married. But this third marriage was delayed. It did not take place for fourteen years. Meanwhile the plaintiff fell into disfavour with his caste-brothers, suspicion was thrown upon his management, and in 1869 he was ejected from the post by the High Court. Could he, after that dismissal, bring a suit on an agreement made with him *nominatim* (see the recital) as holder of the office of manager, without the concurrence of his successor? The agreement was made with him in his representative, not his private, capacity. The benefit accrued, not to him, but to the caste. It was for the caste to say whether they wished to enforce its terms. The plaintiff is no longer their spokesman. Before he had performed the agreement in its entirety he had lost his position as their representative. His successor alone could express their wishes. That successor appeared and told the Court that those of the leaders of caste with whom he had spoken, disapproved, as he did himself, of this suit. Under these circumstances I do not think the suit maintainable.

But I do not base my decision on this point alone. There is another objection to the suit and one of more importance from a public point of view.

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); Story's Equity Jurisprudence, plac. 260-261. 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 argument 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 [137] 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 d'être* 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 brocage" 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

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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.

It is not necessary for me to decide the other legal questions which were raised at the hearing, nor is it necessary for me to go into the facts. My judgment is for the defendants, with costs, although it may be useful to add that the evidence clearly shows that the amount claimed, Rs. 3,149 of the claim, even if legal, ought to be reduced by at least Rs. 2,200.

13 B. 137.

## ORIGINAL CIVIL.

Before Mr. Justice Scott.

KARMALI RAHIMBHOY AND OTHERS (*Plaintiffs*) v. RAHIMBHOY  
HABIBHOY AND OTHERS (*Defendants*). \* [27th July, 1888.]

*Minor—Suit on behalf of minor—Compromise without sanction of Court—Right of minor on attaining majority to impeach decree—Practice—Procedure.*

One Rahimbhoy Dharamsey as father and guardian of the present plaintiffs (K., I., and M.) filed this suit in 1870 to recover from the defendants, as executors of Khan Mahomed Habibbhooy, the arrears of a monthly allowance which they claimed under his will. By a decretal order, dated 6th November, 1871, the suit was referred to the Commissioner to take accounts of the administration of the estate by the defendants. Accounts were duly brought in by the defendants, and objections and surcharges to these accounts were filed on behalf of the plaintiffs in June, 1874. In November, 1875, Rahimbhoy Dharamsey died, and in April, 1876, his mother Kajbai, (grandmother of the infants), was appointed guardian *ad litem* of his infant children (the plaintiffs). The Commissioner made his report in March, 1884, which was confirmed by the Court in 1885. The two elder children [138] (K. and I.) attained their majority and made no objection to the report, but M., the third plaintiff and the youngest of the three brothers, on attaining his majority in December, 1887, at once instituted proceedings, and obtained a rule calling on the defendants to show cause why the proceedings in the suit subsequent to August 1876, should not be set aside, and why he should not be at liberty to proceed with the accounts filed in the office of the Commissioner. He alleged that the inquiry before the Commissioner had not been conducted in the interest of the infants, but had been improperly compromised by withdrawing objections which had been lodged to the accounts brought in by the defendants, and that this compromise had not been sanctioned by the Court.

*Held*, that there had been, in effect, a waiver of the infants' claim under an agreement of withdrawal between the parties; and that for such waiver and withdrawal the Court's sanction on behalf of the infants was necessary; and that as such sanction had not been obtained, the plaintiff would be entitled to impeach the decree and re-open the accounts if he had proceeded in the proper manner by an application for review or by an original suit, but that the present procedure was wrong, and that the rule must be discharged.

[R., 20 A. 370 (374); 23 B. 620 (622); 36 B. 77=13 Bom. L.R. 573=11 Ind. Cas. 568; 29 C. 735 (737); 27 M. 377=14 M.L.J. 159; 3 C.L.J. 119 (125); 10 C.L.J. 420=13 C.W.N. 1197 (1210); 16 Ind. Cas. 543; 6 O.O. 175 (182); 37 P.R. 1903.]

RULE taken out by the third plaintiff (Mirali Rahimbhoy) calling on the defendants to show cause why the proceedings in this suit subsequent to August, 1876, should not be set aside, and why the said plaintiff Mirali Rahimbhoy should not be at liberty to proceed with the accounts filed in the office of the Commissioner for taking Accounts, &c.

This suit was originally filed by one Rahimbhoy Dharamsey as father and guardian of the plaintiffs now on the record, *viz.*, Karmali, Ibrahim,

\* Suit No. 370 of 1870.