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For these reasons the decree appealed from must be reversed and the point on which the District Court has decided the appeal being substantially of a preliminary character, the case must be remanded to that Court for disposal according to law. Costs of this second appeal must be paid by the respondents. Other costs to abide the result.

Decree reversed.

R. R.

APPELLATE CIVIL.

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

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March 23.

GULABCHAND PARAMCHAND (ORIGINAL DEFENDANT 1), APPELLANT, *v.* FULBAI KOM HARICHAND RAMCHAND AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT 5), RESPONDENTS.*

Indian Contract Act (IX of 1872), sections 2 (g) (h), 20-35, 65—Indian Trusts Act (II of 1882), section 84—Agreement to pay a certain sum in consideration for a promise to marry—Part payment—Failure of the agreement—Suit to recover part payment—Agreement by way of marriage brokerage—Agreement—Contract—Difference between the two.

By an agreement made between the parties the plaintiff promised to pay the sum of Rs. 1,800 to the defendant as consideration for the latter's promise to marry his niece to the plaintiff's son. But before the marriage could take place the plaintiff's son died of plague. Under the agreement, however, the plaintiff had before her son's death paid to the defendant the sum of Rs. 750. Subsequently the plaintiff having brought a suit to recover that sum, the defendant contended that the agreement being by way of marriage brokerage was void as opposed to public policy and, therefore, under section 65 of the Indian Contract Act (IX of 1872) no sum paid under it could be recovered.

Held, that having regard to the character of the agreement between the parties the plaintiff was entitled to recover the sum from the defendant.

Section 65 of the Indian Contract Act (IX of 1872) provides for the restitution of any advantage received under a contract or agreement. The section preserves the distinction between agreement and contract which is maintained throughout the Act. The section speaks generally of an agreement discovered to be void without any express reference to the cause or origin of the void character, so that an agreement which is void by reason of a principle of law would not on that account fall outside the scope of the section.

* Second Appeal No. 258 of 1908.

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SECOND APPEAL from the decision of R. D. Nagarkar, First Class Subordinate Judge of Poona, with Appellate Powers, confirming the decree of Dahyabhai R. Dalal, acting Subordinate Judge of Bárámati.

The plaintiff sued to recover from the defendants Rs. 965-13-0 under the following circumstances:—The plaintiff had a son named Ramchand and defendant 1 had a niece named Mainabai, who was the daughter of defendant 1's brother Motichand, deceased, and his widow Gangabai, defendant 5, and sister of Devchand, defendant 4. Defendants 2 and 3 were the brothers of defendant 1. Defendant 1 being the manager of the joint family of which all the defendants were members agreed to give his niece the said Mainabai, a minor, in marriage to plaintiff's son Ramchand and the plaintiff consented to give to defendant 1 Rs. 1,800 as *Daffa*[1] money. Out of the said sum the plaintiff paid to defendant 1 Rs. 500 and Rs. 250 on the 6th and 12th October 1902, who passed to the plaintiff receipts for the same. On the 20th October 1902, the plaintiff paid Rs. 150 to one Fulchand Tarachand on behalf of defendant 1. Thus the plaintiff paid to defendant 1 Rs. 900 in all and the balance of Rs. 900 was to be paid at the time of the marriage. But the marriage did not take place as the plaintiff's son Ramchand died of plague on or about the 25th October 1904. Thus the performance of the marriage having become impossible the plaintiff asked defendant 1 for the return of Rs. 900 and as he refused to do so, the plaintiff brought the present suit for the recovery of the amount with interest thereon, namely, Rs. 65-13-0.

Defendants contended *inter alia* that defendant 1 was not the manager of the family but as he was the eldest member he was merely called at the negotiations of the betrothal according to the custom of their caste; that only Rs. 750 were paid to defendant 1 who gave the said amount to Mainabai's brother and mother and passed receipts to the plaintiff in his name, because he was the eldest member but he had not derived any benefit

(1) *Daffa* money means a reward given to the person standing in *loco parentis* to the girl for settlement of the marriage and is undistinguishable in principle from marriage brokerage.

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from the amount and was not liable for it; that the payment of the *Daffa* money being against public policy the plaintiff could not recover it; that there was no agreement to return the amount and the suit was not maintainable as the plaintiff did not celebrate the marriage during Ramchand's life-time; and that the marriage could not be solemnized because Ramchand had said he would not do it and so the defendants were not liable for the return of the amount.

The Subordinate Judge found that defendant 1 was liable for plaintiff's claim; that the plaintiff paid Rs. 750 to defendant 1 for himself and for the joint benefit of all the defendants; that the plaintiff had a right to claim back the amount from the defendants, and that the claim was opposed to public policy. He, therefore, passed a decree for the plaintiff for Rs. 750. His reasons were as follows:—

Defendant No. 1 agreed to give his niece in marriage to plaintiff's son in consideration of her giving Rs. 1,800 to him as *Daffa*. That this sum was to be paid to the bride's guardian in consideration of his giving his ward in marriage is quite clear. *Daffa* means the money taken by persons in *loco parentis* to the girl for giving her away in marriage. The plaintiffs' as well as the defendants' witnesses all agree in saying so. That this money was to be paid to the person entitled to give away the girl in marriage and not to the bride or to the couple is evident from the document of betrothal (Exhibit 41) not mentioning the stipulation about the sum of Rs. 1,800. In the document of betrothal no reference is made to this sum because it goes to the person who, if not satisfied, would break off the match, and who would not like that such a monetary payment to him should appear in this document which will be read by many members of his caste. The reason is that acceptance of such a reward is looked down upon with contempt by the community. It is forbidden by Hindu Law and it is nothing but the selling price of the girl. The view that this was given by way of reward to obtain the guardian's assent to the marriage and not by way of a provision for or gift to the bride receives support from the plaintiff's statement in her deposition (Exhibit 62) that "defendant No. 1 said that he was the person entitled to give away the girl in marriage and therefore the money was given to him. I do not know who was to get the money, but I gave it to Gulabchand (defendant No. 1)." If the money was to go to the bride the plaintiff would have stated that the bride was to get the money instead of saying that she did not know who (*i. e.*, which of the defendants) was to get the money. No attempt or suggestion has been made by the plaintiff to show that this was a gift intended for the bride. Though men know that it is disgraceful to accept money for giving away their girls in

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marriage they do not know that such acceptance is regarded by law as unlawful and it is on this account, that witnesses or parties interested in concealing the true nature of this monetary payment have not made any attempt to do it. Now turning to the question whether such an agreement which entitles a guardian to be paid money in consideration of his giving his girl in marriage is legal or unlawful as being against public policy, it is obvious that such an agreement is derogatory to the happiness and welfare of the child as it acts as an incentive to the guardian to have regard to considerations other than the child's happiness in marrying her into another's family. The child is given away to the highest bidder without having the least regard for her welfare. She is actually sold to the highest bidder without caring to know whether the child's life is likely to be miserable or not. Hindu Law forbids and treats with contempt such contracts. The law is quite settled on this point, it regards such agreements as against public policy, *vide* I. L. R. 22 Bom. 658.

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Now I turn to the important issue whether plaintiff has a right to claim back the amount. The defendants attempt to take advantage of the unlawfulness of the agreement by way of a defence to the plaintiff's claim. It is to be observed that in the present case the marriage being not solemnized the illegal purpose has not been carried out. Not only that, but the defendants assert that the boy Ramchand refused to carry it out and they have tried to substantiate their statement by proving a letter written by the boy to the defendant No. 1 (Exhibit 66). Had the illegal purpose been carried out, the money paid could not have been recovered back; nor could an action by the defendants have lain to recover the amount promised to them in consideration of their giving their girl in marriage. Thus the present case is quite distinguishable from cases where the illegal purpose has been carried out. It may also be observed that the plaintiff would not have been willing to make such a payment if the defendants had offered to give their ward in marriage to her son without demanding such money. But the greedy guardians who want to make the marriage of their ward a source of gain to themselves would not give her to the plaintiff's son unless she promises to pay.

The payment takes place under circumstances practically amounting to coercion and the plaintiff has no alternative but to submit to the terms dictated by them. The Calcutta High Court has in *Ram Chand Sen* v. *Audaito Sen*, (I. L. R. 10 Cal., 1054) allowed such a claim, and Tyabji, J., has while referring to the Calcutta case at page 665 of I. L. R., 22 Bom. expressed his opinion that payment of money made to a father can be recovered if already paid when the marriage is not performed. In this case also it is manifest justice that defendants should not be allowed to retain the money, the justice of the claim being entirely with the plaintiff.

On appeal by defendant 1 and cross-appeal by the plaintiff the decree was confirmed. The following is an extract from the appellate Court's judgment:—

On 5th October 1902 (Exhibit 41), there was executed by the defendant No. 1 a document of betrothal, under which it was agreed that the niece of defendant No. 1, who is also the daughter of the defendant No. 5, should be given in marriage to the plaintiff's son, since deceased. The plaintiff agreed to pay the defendant No. 1 Rs. 1,800 besides as *Daffa*. This is practically a reward given to the person standing in *loco parentis* to the girl for settlement of the marriage and is undistinguishable in principle from marriage brokerage. The *Daffa* amount is not mentioned in the document of betrothal. The lower Court came to the conclusion that the agreement to pay *Daffa* was opposed to public policy. This finding was not challenged by the appellant's pleader in either appeal; but the case was argued on other points without disputing this finding. I agree with the lower Court on the evidence that the agreement in the present case is opposed to public policy.

The next question is whether the plaintiff is entitled to recover such *Daffa* money as she might be proved to have paid to the defendant No. 1 on the ground that the illegal purpose of the agreement was not carried out owing to the death of the boy the bridegroom elect, before the celebration of the marriage. I think the lower Court correctly decided the point in the affirmative following the Calcutta ruling *Ram Chand Sen* v. *Audaito Sen*(1) of which Tyabji, J., has expressed his approval at p. 665 *et sequens* in I. L. R., 22 Bombay. In the Calcutta case the guardian of the girl had married her to another boy in breach of the agreement with the plaintiff thereby committing a sort of fraud on the plaintiff. This feature is absent in the present case; but still the principle of the ruling applies and the equity is in the plaintiff's favour as remarked by the lower Court.

Defendant 1 preferred a second appeal and the plaintiff presented cross-objections.

D. A. Khare for the appellant (defendant 1):—We contend that the agreement between the parties was in the nature of a marriage brokerage and was therefore void as opposed to public policy. The plaintiff, therefore, cannot recover the sum paid under such an agreement: see section 65 of the Indian Contract Act. That section provides for the restitution of any advantage received under a contract or agreement in two cases only. The first case is where "an agreement is discovered to be void," and the other "where a contract becomes void." In the present case the contract was void from the beginning. Therefore, the case does not fall under the section which applies to agreements

(1) (1884) 10 Cal. 1054.

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which are not void at the outset on account of some illegality known to the parties. We rely on *Dayabhai* v. *Lakhmichand*[1].

M. V. Bhat for the respondent (plaintiff) was not called upon.

BATCHELOR, J.:—By an agreement made between the parties to this suit the plaintiff promised to pay the sum of Rs. 1,800 to the first defendant as consideration for the first defendant's promise to marry his niece to the plaintiff's son. But before the marriage could take place the plaintiff's son died of plague. Under the agreement, however, the plaintiff had, before her son's death, paid to the first defendant a sum which the lower Courts have ascertained to be Rs. 750. The question is whether, having regard to the character of the agreement between the parties, the plaintiff is entitled to recover this sum from the first defendant. Both the Courts below have decreed the claim, and the first defendant now appeals from that decree.

The only ground upon which the decree is attacked has reference to the character of the agreement between the parties. It is contended that that agreement, being an agreement by way of marriage-brokerage, is void as opposed to public policy, and therefore, under section 65 of the Contract Act, no sum paid under it can be recovered.

In *Dholidas* v. *Fulchand*[2] it was held by a Division Bench of this Court that such an agreement as that now in question is void as opposed to public policy under section 23 of the Contract Act, and this decision is binding upon us. That being so, it is urged by the Honourable Mr. Khare that the only principle of law on which in India money paid under a void agreement can be recovered is contained in section 65 of the Contract Act; and that the language of this section shuts out such a claim as this.

The section provides for the restitution of any advantage received under a contract or agreement in two cases, of which the first is the case where "an agreement is discovered to be void." It is urged that the agreement before us was never discovered to be void, but was void *ab initio*. That, however,

(1) (1885) 9 Bom. 358. (2) (1897) 22 Bom. 658.

is we think, precisely the case contemplated by the section, where the word "agreement," used in sharp antithesis to the word "contract" in the second branch of the sentence, clearly denotes an agreement which, being void *ab initio*, never reached the stage of contract. In this respect section 65 merely preserves the distinction between agreement and contract which is maintained throughout the Act—e.g., sections 10, and 20 to 30—in compliance with the interpretation clauses (g) and (h) of section 2. It will be observed, moreover, that the section speaks generally of an agreement discovered to be void without express reference to the cause or origin of the void character, so that such an agreement as this, void by reason of a principle of law, would not on that account fall outside the scope of the section. It is true also that there seems the less justification for any attempt to circumscribe the wide language of the Act seeing that the section purports on its face to substitute one broad, general principal for the numerous and somewhat technical rules, with their qualifications, which obtain in English Law on the subject. So far, then, the matter seems to be free from complexity.

But, apart from the observations in *Dayabhai* v. *Lakhmichand*[1] which scarcely seem to have been necessary to the decision arrived at, the use of the word "discovered" introduces certain difficulties in the application of the section to an agreement which is void under section 23 by reason of an unlawful consideration or object; and we are therefore of opinion that this appeal should be decided on a somewhat different ground.

It will be observed that what section 65 provides for is a suit to recover any advantage received by the defendant under the agreement or to obtain compensation therefor. But what the plaintiff in this suit seeks is the recovery of a definite sum of money paid to the defendant. In the recent case of *P. R. and Co.* v. *Bhagvandas*[2] we have held that a suit for a debt or liquidated money demand can still be maintained, as it could formerly have been maintained under the *indebitatus* counts, and we think that the present suit should be regarded as a suit for money had and received. Such suits were held to lie wherever the defend-

(1) (1885) 9 Bom. 358. (2) (1909) 11 Bom. L. R. 335.

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ant was "obliged by the ties of natural justice and equity to refund the money": per Lord Mansfield in *Moses* v. *Macferlan*(1). The rule was, no doubt, subsequently restricted in its operation, but in such a case as this, where no material part of the illegal purpose has been carried into effect, the payment has always been held to be recoverable; See *Kearley* v. *Thomson*(2), *Herman* v. *Jeuchner*(3), *Wilson* v. *Strugnell*(4) and *Taylor* v. *Bowers*(5).

The principle of law applied in this view of the case is recognised and illustrated in section 84 of the Trusts Act, and has been adopted by the Courts in India in numerous cases. Reference may, for instance, be made to *Mulji Thakersey* v. *Gomti*(6), where not only the ornaments and clothes, but also the Rs. 700 *upariyaman* paid to the father of the intended bride were held to be recoverable; and to *Dholidas'* case(7), where Tyabji, J., expressed the opinion that payments under such an agreement as this may be recoverd if the marriage has not taken place. This was also the view followed by a Division Bench in Calcutta in *Jogeswar Chakrabatti* v. *Panch Kauri Chakrabatti*(8), which was approved in *Ram Chand Sen* v. *Audaito Sen*(9), where Garth, C. J., says that in such a case "it is manifest justice that the defendants should not be allowed to retain the money." We concur in this opinion and on the above grounds we affirm the decree of the lower appellate Court and dismiss this appeal with costs. The cross-objections are also dismissed with costs.

Decree affirmed.

G. B. R.

(1) (1760) 2 Burr. 1005 at p. 1012.
(2) (1890) 24 Q. B. D. 742.
(3) (1885) 15 Q. B. D. 561.
(4) (1881) 7 Q. B. D. 548.
(5) (1875) 1 Q. B. D. 291.
(6) (1887) 11 Bom. 412.
(7) (1897) 22 Bom. 658.
(8) (1870) 5 Ben. L. R. 395.
(9) (1884) 10 Cal. 1054.