1916.

MARSHAL & Co. v. NAGINCHAND FULCHAND.

The amount deposited by the defendants in Court, viz., Rs. 4,001, the defendants to have liberty to withdraw.

Solicitors for the plaintiff: Messrs. *Little & Co.*

Solicitor for the defendant: Mr. *M. B. Chothia.*

G. G. N.

ORIGINAL CIVIL.

Before Mr. Justice Kemp.

ABDUL RAZAK ABDUL GAFOOR (PLAINTIFF) *v.* MAHOMED HUSSEIN DALVI (DEFENDANT).*

1916. *October* 10.

Contract—The Indian Contract Act (IX of 1872), sections 65, 73—Breach of promise to marry, parties being Konkani Mahomedans—Suit for damages for breach of promise to marry as under English law not maintainable under Mahomedan law.

Under Mahomedan law in a suit for breach of promise to marry the plaintiff cannot recover the damages peculiar to an action for breach of promise under the English law.

The action under the English law though based upon the hypothesis of a broken contract is attended with some of the special consequences of a personal wrong and damages may be given of a vindictive and uncertain kind not merely to repay the plaintiff for temporal loss but to punish the defendant in an exemplary manner. This anomaly should not be introduced in the case of Mahomedans whose views of the relationship of the married parties to one another are so different to those of persons governed by the English law.

SUIT for damages for breach of promise to marry.

Abdul Razak bin Abdul Gafoor the plaintiff and Mahomed Hussein the defendant were Konkani Mahomedans of Bombay residing at Mahim.

In July 1915, the defendant agreed to give his daughter Mariambai a minor in marriage to the

* O. C. J. Suit No. 415 of 1916.

1916.

ABDUL RAZAK v. MAHOMED HUSSEIN.

plaintiff. Pursuant to the said agreement the defendant's daughter was betrothed to the plaintiff on the 10th of July 1915. On the occasion of the betrothal ceremonies the plaintiff presented to the bride several gold and silver ornaments, and further presents of rich embroidered garments were made by the plaintiff to the bride from time to time.

The plaintiff alleged that prior to the betrothal it was agreed that the plaintiff should settle certain immoveable property for the benefit of the bride upon certain trusts and that a final deed of settlement should be executed on the date of the marriage. The draft agreement in respect of the intended settlement was rejected by the defendant who stated that he understood the arrangement to be that the plaintiff should execute a deed of gift of the said property in favour of the bride, and not a deed of settlement.

Subsequently it was arranged that the plaintiff should pass a promissory note to the defendant for Rs. 2,700 as security for purchase of a house by the plaintiff within six months from the date of the marriage in the name of the bride. The plaintiff accordingly executed the required promissory note on 1st of September 1915.

On the 14th of September 1915, the defendant through his attorney wrote to the plaintiff stating that the betrothal had been cancelled and asking for the return of a ring which he had presented to the plaintiff and offering to return the ornaments and clothes presented by the plaintiff to the bride. The plaintiff attributed this conduct of the defendant to his refusal to supply the defendant with money to pay off the creditors.

The plaintiff thereupon filed the present suit to recover (1) Rs. 2,000 by way of damages for breach of the contract of marriage, (2) ornaments and clothes

presented to the bride and (3) Rs. 675 being the expenses incurred in anticipation of the marriage with the defendant's daughter.

The defendant contended that in any event the suit was not maintainable under Mahomedan law by which the parties were governed.

Mulla, with *Kanga*, for the plaintiff.

Captain, with *Davar*, for the defendant.

KEMP, J.—This is a suit by the plaintiff for damages for breach by the defendant of his contract to give his daughter in marriage to the plaintiff, for the return of certain ornaments and clothes presented by the plaintiff to the defendant's daughter in anticipation of the proposed marriage, and for expenses incurred in connection with the agreement for the marriage.

The parties admit that a betrothal ceremony took place in July 1915 but they are at variance on the terms arranged between them before the ceremony. Plaintiff says that he undertook to settle certain immoveable property for the benefit of the girl upon certain trusts and to execute a formal deed of settlement on the date of the marriage, whilst defendant's version of the arrangement is that plaintiff was to make an absolute gift of his Mahim property to the girl. Plaintiff also states that on disputes arising in consequence an arrangement was arrived at subsequent to the betrothal ceremony by which the plaintiff executed a promissory note for Rs. 2,700 in favour of a third party who was attempting to bring about a settlement on the understanding that the note should be returned to him on his purchasing within six months from the date of the marriage immoveable property in the name of the defendant's daughter. The defendant replies that he did not agree to this proposal.

1916.

ABDUL RAZAK v. MAHOMED HUSSEIN.

The first issue raised is: Whether a suit for breach of promise of marriage will lie under Mahomedan law? If by this it is meant that in a suit for breach by the father of the girl of his promise to give the girl in marriage the plaintiff cannot recover the damages peculiar to an action for breach of promise of marriage under the English law I entirely agree with the proposition. The contract in respect of which by the English law a plaintiff may recover such damages for breach of a promise to marry is one which, in my opinion, arises from personal status. No authority from the Mahomedan law has been cited to me to justify the allowance of such damages in cases where the parties are Mahomedans. In an action for breach of promise of marriage in English law no attempt at fixing any measure of damages can be made. Such actions stand on a par with actions for libel as to the range of topics in which counsel are allowed to indulge: Mayne on Damages, Sixth Edition, p. 502. As was stated by Bowen L. J. in *Finlay* v. *Chirney*[1], "the action [for breach of promise of marriage is one] which is based on the hypothesis of a broken contract, yet is attended with some of the special consequences of a personal wrong, and in which damages may be given of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss but to punish the defendant in an exemplary manner." I see no reason to introduce this anomaly to Mahomedans whose views of the relationship of the married parties to one another and of the negotiations for bringing about a marriage are so different to those of persons governed by the English law.

When, however, I say that the principle on which damages which are allowed by the English law as peculiar to the breach of a contract to marry should not

(1) (1888) 20 Q. B. D. 494 at p. 504.

be applied to the case of the breach of a promise for valuable consideration made by the father of a Mahomedan girl to give her in marriage I am not to be taken as saying that the ordinary results which flow under section 73 of the Indian Contract Act from the breach of a contract should not follow in this case as well as in the case of any other contract. Under that section the promisee is, on breach by the promisor of his contract, entitled to receive from him compensation for any loss or damage caused to the promisee by such breach or which the parties knew when they made the contract to be likely to result from the breach of it. Moreover, under section 65 of the Indian Contract Act the promisee is entitled to the return of his consideration or compensation in respect of it as on a failure of consideration. These are principles which are applicable to every contract and have nothing to do with personal status.

Indeed the right to the return of money, ornaments, clothes, &c., on a failure to perform the marriage is one which is recognized by Mahomedan law (Macnaghten's Principles and Precedents of Mahomedan law, Chap. VI, p. 250). Nor do I see why as the ornaments and clothes in this case were sent to the defendant's house he is not the proper party to be sued for their return. No point, however, has been made by the defendant of this.

Only so far, therefore, as the plaintiff in this case claims a lump sum of Rs. 2,000 as damages for breach by the defendant of his contract with the plaintiff do I hold that he is not entitled to succeed. The suit must proceed with regard to the other reliefs prayed for.

[The hearing of the suit was then proceeded with and the suit was dismissed with costs on the 12th of November 1916.]

1916.

ABDUL RAZAK *v.* MAHOMED HUSSEIN.

Solicitors for the plaintiff: Messrs. *Little & Co.*

Solicitors for the defendant: Messrs. *Captain & Vaidya.*

Suit dismissed.

G. G. N.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1918. *January* 21.

CHUNILAL HARILAL AND OTHERS (HEIRS OF ORIGINAL DEFENDANTS), APPELLANTS *v.* BAI MANI (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sections 2 (11), 53—Legal representative—Surviving co-parceners in a joint Hindu family are not legal representatives of deceased co-parceners—Decree for injunction—Decree cannot be enforced against co-parceners who were not parties to the suit.

The plaintiff obtained a decree for injunction against two defendants, who were members of a joint Hindu family, with three other co-parceners. After the death of both defendants, the plaintiff sought to execute the decree against the three surviving co-parceners:—

Held, dismissing the application, that the surviving co-parceners were not bound by the decree for on no construction of the term "legal representative" could members of a joint Hindu family be brought within its definition as contained in section 2 (11) of the Civil Procedure Code of 1908.

PER BEAMAN, J.:—"Section 53 (of the Civil Procedure Code) has been enacted, in my opinion, expressly to enforce one recognised rule of the Hindu law, namely, that members of a joint Hindu family may not escape the payment out of the joint family property of any debt incurred and decreed against their father before his death provided that such debt is not tainted by immorality....The object of the section is limitative and is intended to give effect to a well-known rule of the Hindu law referable to a religious rather than legal sanction which might otherwise have been rendered nugatory by the definition of 'legal representative.'"

* Second Appeal No. 73 of 1917.