Gopi Tihadi Vs. Gokhei Panda and anr.

LegalCrystal Citation : legalcrystal.com/524372

Court : Orissa

Decided On : Aug-04-1953

Reported in : AIR1954Ori17

Judge : Panigrahi, C.J. and ;Mohanty, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 100 and 107; Contract Act, 1872 - Sections 23 and 65; Hindu Law; Evidence Act, 1872 - Sections 101 to 103

Appeal No. : Second Appeal No. 177 of 1948

Appellant : Gopi Tihadi

Respondent : Gokhei Panda and anr.

Advocate for Def. : B. Mohapatra, Adv.

Advocate for Pet/Ap. : M.S. Rao, Adv.

Disposition : Appeal allowed

Judgement :

Panigrahi C.J.

1. This appeal arises out of a simple suit for recovery of a sum of money but raises an interesting question of law.

2. The plaintiff was on the look out for a bride for his brother, Manu Tihadi, and defendant 2 who is distantly related to him, brought forward a proposal for getting the daughter of defendant 1 married to the plaintiff's brother. On 6-3-44 both the defendants approached the plaintiff who accepted the proposal and it was settled that the plaintiff should pay Rs. 650/-to defendant 1 for the marriage expenses in consideration of defendant 1's giving his daughter in marriage to plaintiff's brother. The Maha-prasad Nirbandha or betrothal took place at the village temple on 11-5-44 and the plaintiff paid the stipulated sum of Rs. 650/- to defendant 1,

It was agreed that on the next day defendant 1 would send his daughter to the plaintiff's house for the marriage ceremony. The plaintiff also sent a 'palki' the next day for bringing the bride. Defendant 1, however, refused to send his daughter and demanded Rs. 800/- as there were better offers. The contract was terminated and the defendant promised to return the sum of Rs. 650/- taken from the plaintiff four days later. When the demand was made again on 16-3-44, the defendant refused to pay back the money taken by him. The plaintiff filed a criminal case under Section 420, I.

P. C., but it was thrown out as being of a civil nature. The plaintiff, therefore, brought this suit for the recovery of Rs. 650/-advanced by him together with Rs. 72/- as compensation and damages for the loss and expenses incurred by him.

3. Defendant 1 denied the betrothal as well as the advance of money and pleaded that the suit was a sequel to previous enmity. His further plea was that the plaintiff was not entitled to enforce the contract and recover the advance made as the alleged contract was illegal. Defendant 2 has remained ex parte throughout.

4. The learned Munsif held that the plaintiff's case, had been amply proved by the evidence of his witnesses P. Ws. 2 to 8. He also held that the money has been paid as 'kanya suna' or bride-price and not for meeting the marriage expenses. He further held that the money had been advanced as consideration for obtaining the consent of defendant 1 to give his daughter in marriage to the plaintiff's brother. He overruled the contention of the defendant that the agreement with the plaintiff was illegal on the ground of its being opposed to public policy. He accordingly gave a decree to the plaintiff for Rs. 650/-, the amount actually advanced by him but disallowed his claim to recover the damages and compensation.

5. On appeal by the contesting defendant, the learned District Judge set aside both the finding of the trial court and held that the contract put forward by the plaintiff was unenforceable, as it was immoral since it amounted to the sale of a bride for a price and that it was not for the welfare of the bride. He also disbelieved the story of payment of Rs. 650/- on the ground that P.Ws. 2 and 7 were not mentioned as witnesses by the plaintiff in the complaint which he had filed in the criminal court prior to the filing of the present civil suit. He disbelieved P.W. 3 for the reason that he was an ex-tenant of the defendant. In the result, the appeal filed by defendant 1 was allowed and the plaintiff's suit was dismissed. It is against this reversing judgment of the learned District Judge that the plaintiff has come up in appeal.

6. Mr. M.S. Rao, appearing for the appellant, contends that the lower appellate court has not attached due importance to the findings of the trial court and has itself gone wrong in its appreciation of the evidence. He further contends that the lower appellate court has fallen into an error in holding that the suit was to enforce an agreement to contract a marriage with defendant 1's daughter while, in fact, the suit was one merely for the recovery of money received by the defendant for a purpose which did not materialise.

7. On behalf of the respondent it is submitted that the contract is both opposed to public policy and to good morals and the plaintiff should, therefore, be non-suited.

8. We were referred to the oral evidence of the witnesses who were disbelieved by the lower appellate court. I have myself gone through the entire evidence on the record. (After discussing the evidence of plaintiff's witnesses His Lordship proceeded:) I am unable to see any reason why all these witnesses should come and depose against the defendant.

The view taken by the learned munsif who examined these witnesses and saw them is more in accord with the probabilities and is entitled to respect. I do not mean to suggest that in all cases the view of the trial court should be regarded, as infallible. But if the evidence, taken as a whole supports the view taken by the trial court, the appellate court should not, except for very compelling reasons, set aside that finding

even if it takes a different view of the evidence. The reason is that the judge of first instance has the advantage of seeing the witnesses and observing the manner in which they give their evidence, which is not revealed by the written record of that evidence. On going through the evidence myself I am satisfied that the view taken by the trial court approximates nearer the truth, and I do not see adequate justification for disturbing its finding. The lower appellate court has fallen into an error of record and its estimate of the oral evidence appears to have been largely coloured by the view it took of the nature of the contract which it discusses in the earlier part of its judgment. I would, therefore, in agreement with the trial court hold that the defendant gave his word of assurance -- the certa verba -- called the Nirbandha and received money consideration from the plaintiff.

9. The plaintiff's claim is resisted mainly on the ground that the contract is opposed to public policy as such transactions, if upheld by courts, would, lead to sale of girls for a price; and secondly on the ground that it is opposed to good morals as it is clear that there was a disparity in age between the bride and the bridegroom. A number of decisions were cited before us in support of the respondent's contention that a marriage brokerage contract is illegal. The appellant's counsel also has cited several cases in support of his contention that the contract in question is not a brokerage contract and is not illegal on either ground.

10. The consideration or object of an agreement is lawful unless it is expressly forbidden by law, or the Court regards it as immoral or opposed to public policy. Under the English law of contract, a contract whereby a marriage is brought about in consideration of money payment is held to be illegal as marriage should be free union of the couple. But even in England money paid under such a contract is recoverable by the party paying it, before the execution of the contract. In India, marriage is not the subject-matter of a contract It is brought about by the parents of the parties. It is a sacrament and is a necessary 'Sanskara'. Without a son, the Sradhdha cannot be performed and pinda offered to the males, and to have sons marriage is both a duty and a necessity. Manu, describing the status of a woman says in Chapter 9:

'Her father protects her in childhood; her husband protects her in youth; and her sons protect her in old age. A woman is never fit for independence.'

Again.

'Reprehensible is the father who gives not his daughter in marriage at the proper time.'

The father is, therefore, under a duty to give his daughter in marriage at the proper time. The question of consent on the part of the girl does not arise having regard to the customs prevailing in this country and marriages are invariably brought about by the father, or other male relations of the girl. The custom of receiving money consideration by the father of the bride or the bridegroom, either at the time of betrothal or at the time of marriage, is well-established throughout India. In one case it is called 'sulka', in the other, it is called dowry. The money paid by the groom to the father of the bride intended as a dower is knownas 'kanya sulka' while the consideration paid by the father of the bride either in the form of jewellery or cash, is designated as dowry.

The money paid to the father of the bride was originally intended to be retained by

the bride as her separate property, but it would appear that in course of time the father of the bride received the amount, freely used either a part or the whole of it, either for the marriage ceremony or for his own purposes. Dr. Banerjee quotes a passage from Sir Henry Mayne's Remarks on Stridhan at page 398 of his Tagore Law Lectures on Marriage and Stridhan:

'Among the Aryan communities as a whole, we find the earliest traces of the separate property of women in the widely diffused ancient institution known as 'bride price.' Part of this price which was paid by the bride-groom either at the wedding or,, on the day after it, went to the bride's father as compensation for the patriarchal or family authority which was transferred to her husband but another part went to the bride herself, and was generally enjoyed by her separately, and kept apart from her husband's property..... The custom of paying a bride price hadits origin in its, being regarded as compensation to the bride's father for transfer of his patriarchal authority to the husband, and this custom is not peculiar to the Hindus alone.'

Later, the Romans adopted this custom and matured and improved it. Originally, there were only two forms of marriage, Brahma and Sulka, mentioned in the Griha Sutra.

One was priestly, the other contractual. Originally Sulka implied and latterly meant a tax or a fee, which was a fixed amount. Kaikeyi's Sulka, at the time of her marriage with Dasaratha was that her son was to succeed to the throne. It was originally nominal and symbolical. The sale of a girl is certainly prohibited but the receipt of a sulka had been long established even before Manu's Code. It is referred as the 'price of a bride' and forms no part of the Vedic ritual. Where the parent took a large amount from the bridegroom, the marriage was called 'Asura or Manusha' meaning popular or human. This is of course condemned by Manu' as it amounts to sale of a bride but a marriage performed in this form is not declared illegal. It is followed by Vedic rites and Manu allows inheritance to the son born out of an Asuric marriage. Yagnayavalkya also does not make the Asura marriage illegal. The old law, therefore, has survived to the present day. In his Tagore Law lectures Jayaswal makes the following interesting observations on the present position of Asura marriage:

'Asura marriage has continued to this day and the people do not think for a moment that they are doing anything blameworthy. No one can say that the provision of Manu is against it, as a Vidhi, when he himself recognised it later and in inheritance. The later Codes, the Mitakshara, and all later authorities tacitly accept it as legal. Under such conditions it would be wrong to look at the Asura marriage from the point of view of the English law and apply the principles of marriage brokerage to it. Unless by legislation the Asura marriage is declared illegal, the courts ought to uphold transactions connected with it. The Hindu law does not abolish it. The disabilities it places on the nuptial rights are sufficiently penal, and no other penalty, without express legislation, would be fair.'

Manu's injunction against the receipt of bride-price is as follows:

'No father who knows the law, must take even the smallest gratuity for his daughter, for a man who, through force, takes a gratuity is a seller of his offspring' -- Ch. III -- 51.'

This injunction is directory and is not to be understood as a Vidhi or mandatory

injunction. In the same Chapter, Section 31, the Asura form of marriage is described as follows:

'When the bridegroom receives a maiden after having given as much wealth as he can- afford to the kinsmen of the bride herself, according to his own will, that is called the Asura rite.'

In verse 54 he says:

'When the relatives do not appropriate (for their use) the gratuity given, it is not a sale: In that case the gift is only as token of respect and of kindness towards the maiden'.

It is clear, therefore, that while marriage in the Asura form is perfectly valid, the sale of the bride as such is prohibited. Moreover, there are Vedic passages in favour of the custom of purchasing a woman and the Smritis, therefore, find it all the more difficult in opposing this practice. The Manava Griha Sutra and the Kathakas contain the ceremonials for the purchase of women, known as 'Soulka Dharma'. Here it appears to be the usual form of marriage in which the father of the bride receives the price of the bride in gold. Like the Smritis the Maha Bharat condemns the purchase of women in principle, but allows it in practice -- See Jolly's Hindu Law and Custom -- p. 114.

In modern times the practice is so widely prevalent that the opposition of the Brahmins appears to have been only partially successful. It prevails in Bengal, though chiefly among the low castes. In Bombay presidency, however, it is very much jn vogue even among the higher castes. In Gujarat, the sale of girls is said to take place even now secretly, even among people who publicly denounce it, and in the City of Bombay often earnest money is paid by depositing valuable objects. (West and Buhler). Among the Sama Vedis a respectable and strictly religious sect of Brahmins in Thana, the father of the bride gets from Rs. 200/- to Rs. 1000/- as the price of bride -- Bombay Gazetteer. Also in the Madras Presidency the payment of price for brides is customary in various castes (Madras Census Reports -- 13 Madras 83.) The same is the case in the Punjab.

In Assam the marriages are effected almost only by purchase; it is common even among Brahmins. It is clear, however, that receipt of money by the father of a bride does not make it a sale if he does not appropriate it to himself and the validity of the marriage itself is not affected by the agreement to receive money from the bridegroom. Where money is received under a marriage contract entered into on behalf of minors, the Courts have generally awarded refund of the money received, or awarded damages for breach of contract though a suit for specific performance of contract is not entertained. Such contracts should be distinguished from a marriage brokerage contract as it is ordinarily understood. A marriage brokerage contract is a contract to remunerate a third person in consideration of his negotiating a marriage & as such is contrary to public policy and cannot be enforced. But there is no authority for saying that receipt of money by the parent of a bride in consideration of his giving his daughter in marriage amounts to sale per se -- or that it is otherwise opposed to public policy.

11. The expression 'public policy' has nowhere been denned & its meaning varies from judge tojudge and depends upon the facts and circumstances of each case. It has been said that public policy is always an unsafe and a treacherous ground for

legal decisions. As Sir George Jessel remarked in -- the Printing and Numerical Registering Co., Ltd. v. Sampson', (1875) 19 Eq. 462 (A).

'the paramount public policy to consider is that you are not lightly to interfere with freedom of contract. It must not be forgotten that you are not to extend arbitrarily those rules which say .that a given contract is void as being against public policy.'

A court cannot invent a new head of 'public policy'. A contract may be declared unlawful on the ground that it is contrary to public policy, because, it has been either enacted or assumed to be, by common law, unlawful and not because a Judge or a Court had a right to declare that it is, in his or their view, contrary to public policy. He must find, the facts and he must decide whether the facts so found do or do not come within the principles of public policy, recognised by the law, which the suggested contract is infringing or is supposed to infringe. What is contrary to public policy must be determined by well-established principles of law and not by the fine-spun speculations of social reformers or visionary theorists.

12. If, as I have endeavoured to show there has been an ancient custom in this country of receiving a bride price by the father of the girl in consideration of his giving his daughter in marriage, it cannot be said that it is not consonant with public policy or that it is opposed to the common weal. In the absence of any express statutory enactment abrogating such practices, Courts are not free to indulge in speculations as to whether such practices should be allowed to continue, merely on the ground of public policy. I am not, therefore, disposed to yield to arguments based on 'public policy'. If the defendant seeks to base his case on a contravention of public policy, it must be clear, unquestionable, and not clouded by doubt or speculation. It should not be resorted to when all other arguments fail.

13. The learned Munsif was of opinion that the agreement was not opposed to public policy, to which opinion the learned District Judge gives his silent approval, but he denounced the contract as immoral as there was a great disparity in age between the bridegroom and the bride. I am not convinced by this reasoning of the District Judge. Such marriages are not rare and are to be found all over the world and at all times. Even Manu says (Ch. 9 Verse 94.):

'A person aged thirty may marry a maiden pleasing to his heart who is aged twelve; or a person aged twenty-four, a maiden aged eight.'

Mere disparity in age does not offend good morals even according to the sages. A contract is said to be immoral if it is such as to shock one's sense of decency and good taste, such as a contract to let out a girl for prostitution or concubinage, or to get a murder committed. The purpose should be one which is bound to meet with universal disapproval. But the point which appears to have been missed by the lower appellate court is, assuming that the contract was opposed to public morals, is the plaintiff debarred from recovering the amount which he had advanced under an illegal contract which never matured? We have to start with the presumption that every marriage is in the Brahma form, and the onus is upon him who seeks to prove that it is in the Asura form. The defendant has failed to prove that the money was paid as a bride-price.

The evidence on the side of the plaintiff consistently is that it was paid to defendant 1 to meet the marriage expenses. I am unable to see anything in this transaction which

is opposed to pulic morals. The plaintiff was in the position of the oppressed party and the defendant in that of the oppressor. There is an inequality of situation between the parties and the delictum is not par. It is only in cases where the two parties are equally at fault that the Court refuses to lend its aid to one who founds his cause of action upon an immoral or illegal contract 'ex dolo malo non oritur actio'. But courts of equity have not always followed this stringent common law rule and have given relief to the oppressed party. The rigours of Manu's injunction were considerably softened by later commentators and the receipt of bride price is recognised by Yagnyavalkya as a well-recognised custom for the Mitakshara says (Ch II, 21-28).

'Whatever has been expended on account of espousals by the intended bridegroom or by his father or guardian for the gratification of his own or of the damsel's relations, must be repaid in full, with interest by the 'affaincer' to the bridegroom.'

The ancient texts of Manu are mixture of morality, religion and law. It does not follow that because an act has been prohibited by Manu it should therefore be considered illegal. Manu says, in Ch. 3 (8) that one should not marry a maiden with reddish hair, nor one who has a redundant member, nor one who is sickly nor one either with no hair or too much, nor one who is garrulous or has red eyes. Yet no one would seriously contend that the marriage of a garrulous woman is invalid. As Sir William Macnaughten observes in his valuable book on Hindu Law.

'the distinction between the vinculum juris and the vinculum pudoris is not always discernible.'

A parent, in disregard of his filial duty may violate the plainest dictates of religion, he may prefer an unworthy man as a suitable bridegroom for his daughter, and yet he may be within his legal rights. The mere fact that the receipt of money in consideration of marriage is discouraged in the Smritis does not necessarily make it immoral or illegal at the present day. More than one text cited from the Smritis has been interpreted by the courts of law as merely directory and not as mandatory. The rule of interpretation in such cases is that a precept supported by the assignment of reasons is to be taken as a recommendation only. If the rule is not couched in unambiguous terms of absolute command, its appeal is to the moral sense rather than to our duty of implicit obedience. As their Lordships of the Privy Council observed in -- 'Sri Balusu Gurulingaswamy v. Sri Balusuwamy Ramalakshmamma', 26 IA 113 (PC) (B): Where a practice has grown up, without being followed by hatred or social penalties, the decision should be in favour of that which does not annul transactions acceptable to multitudes of families and which allows individual freedom of choice. We have therefore to rely upon judicial decisions to see how such transactions have been interpreted rather than be guided by obsolete texts which reflect the temper and mood of a by-gone age.

14. The earliest case brought to our notice is -- 'Jogeswar v. Panch Kauri', 14 WR 154 (C). In that case the plaintiff sued the defendant for recovery of a sum of money paid to him in consideration of a promise made by the defendant that the latter would give the plaintiff his sister in marriage. The contract was broken and the girlwas married to another. The referring judge doubted whether the English law on the subject can be considered applicable to this country and observed:

'It appears to be a common practice not only to remunerate makers or ghataks for their services, but also for the husband to pay a certain sum called 'pan' to the

relatives of the wife, previous to the marriage'.

The Court decided that action for recovery of the money paid to the defendant would lie.

In -- 'Ramchand Sen v. Andaito Sen', 10 Cal 1054 (D) the defendant, in consideration of Rs. 100/-promised to give his minor daughter in marriage to the plaintiff. The defendant failed to fulfil his part of the contract, and the plaintiff brought a suit to recover money paid as consideration for the promise. It was held that such a suit would lie: and Beverley J., said:

'There is nothing immoral in the contract so far as I can see. No doubt the purchase or hire of a minor girl for purposes of prostitution or concubinage is immoral, but where a legal marriage is in contemplation, payment of money as consideration is in accordance with the customs of the country and is therefore in my opinion not opposed to public policy.'

In -- 'Bakshi Das v. Naidu Das', 1 Cal LJ 261 (E) Mookerji J. had occasion to refer to several reported cases and laid down certain principles which should govern the decision of such cases. In that case two brothers agreed to give their sister in marriage to the plaintiff upon his agreeing to pay them Rs. 190/- as pan money out of which Rs. 135/- was paid in cash and the balance was to be paid on the day of marriage. The defendants broke the contract and the plaintiff brought a suit for recovery of the money paid by him and damages for expenses incurred. The lower courts gave a decree to the plaintiff.

Mookerji J. affirming the judgment of the trial court held, in second appeal, that an agreement to pay money to the parents or guardians of the bride or bridegroom in consideration of their consenting to the betrothal, is not necessarily immoral or opposed to public policy, and that it will be enforced and damages also will be awarded for breach of it. The onus of proving that the agreement was opposed to public policy is upon the party who alleges it to be so.

In a later case reported in -- 'Anadi Ram v. Goza Kachori', A. I. Rule 1918 Cal 457 (F) the Court went further and their Lordships observed, that a contract for service, though incapable of being specifically enforced as being opposed to public policy the plaintiff may be entitled to restitution to the whole or some part of the money advanced by him on the equitable principles embodied in Sections 38 and 41, Specific Relief Act. The principle underlying these decisions, as far as I can understand, is that the plaintiff in suing to recover money advanced by him is not carrying out an illegal contract but is seeking to put everyone as far as possible, in the same position as they were in, before that transaction was determined upon. It is the defendant who is relying on the supposed immorality of the contract, and despite his endeavour to uphold morals, the Court will not permit him to take advantage of his own immoral act.

Learned counsel for the respondent drew our attention to a case reported in -- 'Nathu Khan v. Sewak Koeri', 15 Cal WN 408 (G). In that case the plaintiff sued for recovery of Rs. 800/- being the consideration money stated in a certain kebala by which he had sold certain property to the de-fendant. The defence set up was that the consideration stated in the kebala was fictitious and the real consideration was for payment to the defendant for his services in inducing his employer over whom he had influence, to

sell some villages to the plaintiff. The Court held that the parties were in 'pari delicto' and no relief could be granted. It will be noticed that this was a case of an executed contract and the suit was for relief after the contract had been executed. The decision of that case turned on the interpretation of the words 'declared to be void' in Section 65 of the contract Act, and has no application to a case like the one before us.

15. The view of the Calcutta High Court as indicated in the cases cited above has been consistently followed by the High Court of Patna, and I shall now briefly refer to a few of the reported decisions of that Court.

In -- 'Raghubar Das v. Nataber Singh', A. I. Rule 1919 Pat 316 (H) Dawson-Miller, C. J. said, 'referring to the Calcutta decisions: 'I think it is now too late to question the validityand propriety of those rulings'. His Lordship, however, held that if the contract involves anything in the nature of criminality or is one of moral turpitude, such as the Courts on that ground would refuse to enforce, then, not only will the Court refuse to enforce the contract, but it will not assist either party to recover back anything paid under the contract. Even if such a contract remains only executory, the Courts of this country will not assist a party to recover back his money paid under the contract. With great respect to the learned Chief Justice, I am not prepared to go so far at present. Where the contract remains executory, the Courts would allow either party to rescind it and be placed in the same position as if there was no contract at all.

In that case the plaintiff brought a suit seeking to recover Rs. 5000/- paid to the defendant in consideration of an agreement by the defendant, who was the spiritual guru of the Rani Saheba of Kaur, to bring about an adoption by the lady, of one of the plaintiff's sons. His Lordship expressed himself very strongly on the nature of this species of contracts and said:

'Speaking for myself, it seems to me that this is just one of that class of cases which the Court will refuse to have anything to do with at all, because it is, in my view, a grossly immoral act, to endeavour to bribe a priest to use his spiritual influence with his chela in the interest of the person bribing him'.

Roe, J., relying on the decision in -- 'Hermann v. Charlesworth', (1905) 2 KB 123 (I) (to which I shall advert later), held that money paid as consideration for bringing about a marriage may be recovered but this is subject to the rule of 'ex turpi causa'. This case is an instance of a contract tainted with gross immorality, and, in the circumstances of that case the plaintiff was rightly non-suited. The suit was for damages for breach of one 06 the conditions of the contract, and not for recovery of money on the ground that the contract was illegal or contrary to public policy 'ab initio'.

In -- 'Ramsumran Prasad v. Gobind Das', AIR 1926 Pat 582 (J) Jwala Prasad J. held that if the marriage is solemnised, no suit will lie to recover back the gift actually made, whether to the bridegroom, or the bride or the father of the bridegroom. Referring to the conduct of the donor of the gift in that case, His Lordship said:

'After having attained the object and having fulfilled the promise, I do not think that she canavail herself of the provisions of Section 23 and recover back the property in question. Far less could the plaintiffs who had succeeded as reversioners of her husband, recover it back on that ground.'

In -- 'Mt. sonphula v. Gansuri', A. I. Rule 1937 Pat 330 (K) where A advanced a certain

amount to B in consideration of his arranging the marriage of A's brother with the niece of B, it was held that the arrangement between A and B was neither immoral nor criminal, and A was entitled therefore to get a refund of the money advanced. In that case there was a great disparity between the ages of the plaintiff's brother and the girl, but it was observed that such marriages do take place with the approval of those who are interested in the welfare of the girls. In a later case, -- 'Dharanidhar v. Kanhji', AIR 1949 Pat 250 CD, the Court held that such a contract of marriage is not per se illegal or immoral, though one of the learned Judges struck a note of dissent. But the plaintiff was granted a decree on the ground that the contract had not been carried out.

16. Strong reliance was placed on the Full Bench decision of the Madras High Court reported in -- 'Kalavagunta Venkata v. Kalavagunta Lakshmi Narayan', 32 Mad 185 (M). That case is clearly distinguishable. The only point decided in that case was that if the money had been paid and the marriage solemnised, it cannot be recovered back, nor can a suit lie to enforce an agreement to pay money to the father of the bride.

On the other hand, in a, later case of the sams High Court, -- 'Srinivasa Iyer v. Sesha Iyer', AIR 1918 Mad 444 (N) where the plaintiff paid the defendant Rs. 400/- as remuneration to bring about a marriage and the contract failed, the plaintiff was granted a decree for recovery of the amount advanced by him on the ground that the effect of such a course was to put everybody in the same situation as they were, before it was determined upon. The plea that the agreement was unlawful was not put forward by the plaintiff, but by the defendant. The defendant could not complain of plaintiff's default, relying on the illegality of the contract, though, if the unlawful agreement or a part of it had been performed, such a plea would be available to him.

Schwabe C. J. held, on a review of the authorities in -- 'Kandaswami v. Kannaiah Naidu', AIR 1924 Mad 692 (O) that the plaintiff was entitled to recover money actually thrown away and also to claim damages to credit and reputation suffered by reason of the refusal of the defendant. That was an action for damages for breach of promise of marriage brought out by the brother of the proposed bridegroom against the father of the proposed bride.

17. The Bombay High Court also has taken the same view in a number of decisions.

The earliest case was -- 'Umedkika v. Nagindas', 7 Bom HCR 122 (P). Westropp C. J. held in that case that the plaintiff who had advanced money under an illegal agreement is entitled to recover it besides damages to his credit and reputation by reason of the defendant's refusal to fulfil the agreement.

In -- 'Mulji Thackersay v. Gomti', 11 Bom 412 (Q) a sum of Rs. 700/- paid to the father of the intended bride, ss also ornaments & clothes were held to be recoverable.

In -- 'Dholidas Ishvar v. Pulchand Chhagan', 22 Bom 658 (R) Tyabji J. held that payments under such agreements as these may be recovered if the marriage had not taken place.In -- 'Gulab Chand v. Fulbai Harichand', 33 Bom 411 (S), the plaintiff had promised to pay Rs. 18007-to the defendant and had actually made a payment of Rs. 750/- when the marriage contract was terminated. Their Lordships held that the transaction between the parties had not proceeded beyond the stage of agreement and that a suit would lie as the defendant was obliged by ties of natural justice and

equity to refund the money when no material part of the illegal purpose had been carried into effect.

In a later case, -- 'Balubhai v. Nanalal', AIR 1920 Bom 225 (T), where the defendants contended that the retraction of the proposal was inevitable on account of the ill-health of the bridegroom, the Court held that though the defendants could not be fined if there was good cause for retraction, yet they were liable to pay the expenses incurred by the bridegroom or his father during the betrothal.

18. The Allahabad and Lahore High Courts also have adopted the view taken by the Calcutta High Court.

In -- 'Bhagirathi v. Jokhu Ram', 32 All 575 (U), it was held that an alienation of family property for raising sulka or bride-price was held to be binding on the sons of the alienor; see also --'Bhan Singh v. Kaka Singh', AIR 1933 Lah 849 (2) (V); and -- 'Chhanga Mal v. Sheo Prasad', AIR 1920 All 167 (W).

19. There is thus a catena of decisions in support of the appellant's contention and I have not been referred to any authority where such an action is held to be not maintainable.

20. It has also been held that the mere fact that a present of money called 'pahni' is given, does not make the marriage an asura marriage. See -- 'Jai Kissondas Gopaldas v. Harikishondas', 2 Bom 9 (X). This practice is not confined to the lower classes, but even among Guzerati Brahmins presents of money are made to the parents of the bride. But however reprehensible may be the practice, the marriage is valid and there is nothing in the transaction which can be said to be contrary to public policy or the law of the land.

21. Even in England it has been held that money paid under such an agreement is recoverable when the contract fails. In -- '(1905) 2 K.B. 123 (I)', there was a contract by a lady (who was desirous of getting married) with the defendant (who was a marriage advertising agent) for paying him a reward if the defendant undertook to assist her in getting married by means of introductions to gentlemen. The plaintiff terminated the contract and sued for recovery of the amount advanced by her. It was found that the defendant had taken certain steps and incurred some expenses towards carrying out his part of the agreement. Nevertheless, the Court held that money paid under such a contract had not been fully executed.

22. To sum up, the following principles may be taken as well established:

(i) A marriage is presumed to be in the Brahma form until the contrary is proved; and the party alleging it to be in the Asura form has to prove that there was a sale of the bride.

(ii) Even if a bride-price is paid, the marriage itself does not become invalid.

(iii) The injunctions of the Smritis against the acceptance of a bride-price are only directory, and an infringement of the texts does not render the marriage invalid.

(iv) The custom of receiving bride-price has been so well-established throughout the country that itis too late in tile day to invalidate marriage on the ground of public

policy, nor can such marriage contracts be held to be immoral or illegal in the absence of a statutory enactment expressly prohibiting the custom.

(v) If a marriage has been solemnised the Courts will not help a suitor to recover back the money paid by him under such a contract, but if the agreement remains executory the Court will direct the recovery of the amount paid as bride price, though no suit for specific performance of the contract will be entertained.

23. Having these principles in mind, I have arrived at the conclusion that the suit by the plaintiff is maintainable and that he is entitled to our judgment. I would, therefore, set aside the judgment under appeal, restore that of the trial court and decree the plaintiff's suit as directed by the learned munsif. The plaintiff will also have his costs of this litigation throughout.

Mohanty J.

24. I agree.