[TESTAMENTARY AND INTESTATE JURISDICTION.]

Before Mr. Justice Green.

IN THE GOODS OF NATHIBA'I.

1876.
September 21.

JAIKISONDA'S GOPALDA'S, APPLICANT;
HARKISONDA'S HULLOCHANDA'S AND MATHURADA'S PURSHOTAMDA'S, CAVEATORS.

Hindu Law—Marriage—Asura form—Nagar Vissá Vania caste—Palu—Inheritance—Practice—Costs.

The Hindu Law, at least as evidenced by usage, though it permits the Asura form of marriage among the mercantile and servile classes, does not prohibit to those classes the more approved forms of marriage.

The form of marriage in use among the Nágar Vissá section of the Vania caste corresponds to one or other of the approved forms, and not to the Asura, and the giving of *palu* does not constitute a purchasing of the bride.

Property inherited from her deceased husband by a childless widow, among the Nágar Vissá Vanias, at her death, intestate, devolves on the relations in blood, on the mother's side, of the husband, in preference to the heirs and next of kin of the widow.

An applicant for letters of administration to the estate of a widow, having concealed the existence and claims, of which he was aware, of the relatives of the deceased husband of the widow, on the application being dismissed, was ordered to pay the costs of the application and of the caveats entered by some of the relatives of the deceased husband.

NATHIBA'I, the widow of Bhoga Pitámber, a member of the Nágar Vissá section of the Vania caste, died intestate and without issue on 19th February 1876, leaving property within the local jurisdiction of the High Court of Bombay. The applicant, as the nearest relation in blood to Nathibái, applied for letters of administration to her estate and effects, but was opposed by the caveators, a first cousin, and a first cousin once removed on the mother's side, of Nathibái's deceased husband, Bhoga Pitamber, on the ground that the property left by Nathibái was part of the estate of her deceased husband inherited by her at his death, which at her death ought to go to his heirs and next of kin, and not to her's. To this the applicant replied that the property left by Nathibái was her separate property; and also that she had been married to Bhoga Pitámber according to the Asura form of marriage, the only form used amongst the Nágar Vissá Vanias, and therefore the property, even if inherited by her from her husband,

1876.

JAIKISONDA'S GOPALDA'S v. HARKISONDA'S HULLOCHANDA'S AND ANOTHER.

would at her death go to her heirs and next of kin and not to her husband's. The applicant, though aware of their existence and their claims, had not brought to the notice of the Court, in his affidavit, the fact that there were relations in blood (the caveators and others) of Bhoga Pitamber, the husband of the intestate Nathibái.

The principal question in the case was, whether the form of marriage in use amongst the Nágar Vissá Vanias corresponded to the Asura, or to one of the forms of marriage approved by the Hindu Law, and depended for its solution on the evidence of the ceremonies observed amongst the Nágar Vissá Vanias prior to, and at the time of, the celebration of the marriage.

Marriott, Advocate General (Acting), and *Kasinath Trimbak Telang*, for the applicant, cited *Vijiarangam* v. *Lakshuman*,(1) and Stokes H. L. Books, p. 101.

Farran, for the caveators, cited *Mussumat Thakoor Deyhee* v. *Rai Baluk Rám*,(2) and *Bhugwandeen Doobey* v. *Myna Báee*.(3)

GREEN, J.:—This is an application by one Jaikisondás Gopaldás for a grant of letters of administration to himself of the goods, chattels, rights, and credits of the above-named Nathibái, who died, on the 19th February 1876 in Bombay, intestate, a widow and without issue, and leaving property within the Presidency of Bombay and within the local jurisdiction of this Court.

To this application a *caveat* has been entered by the above-named Harkisondás Hullochandás and Mathuradás Purshotamdás. One Motilal Damodhar (though not having himself entered a *caveat*), has filed an affidavit in support of the *caveat* so as aforesaid entered. One Ganpatlal, the son of one Dulabdás, has presented a petition and appeared at the second day's hearing, the object of the petition being to bring to the attention of the Court that he and his said father object to the application being granted. The question for decision is, whether the applicant, as nearest in blood to the deceased Nathibái, is entitled to her property, and to have administration of her estate granted to him, as against the relations in blood to the deceased husband of Nathibái, Bhoga Pitámber. The applicant

(1) 8 Bom. H. C. Rep. 244; see page 254, O. C. J.

(2) 11 Moore I. A. 139; see page 175.

(3) 11 Moore I. A. 487; see page 512.

is a nephew of Nathibái, being the son, and, so far as appears, the only son, of one Gopaldás Candás, the brother of Nathibái.

According to the affidavit of the applicant, Pitámber (the father of Bhoga Pitámber) died about seventy years ago, leaving an only son the said Bhoga, "and no brother or other male member of his family."

Bhoga Pitámber died in Bombay in the month of Margsar Shud, Samvat year 1928 (*i.e.* between 13th December and 26th December 1871). The applicant's affidavit is wholly silent as to the existence of any blood relations of Bhoga Pitámber through his mother Jamnabái.

These blood relations of Bhoga Pitámber, through his mother Jamnábái, as appearing by the affidavit of the caveators and the said Motilal Damodhar, are as follows:—

The maternal grand-father of Bhoga Pitámber was one Candás. He appears to have left three sons, viz., Iswardás Candás, Hullochandás Candás, and Damodhardás Candás, and two daughters, namely, Casibái and the said Jamnábái. Iswardás Candás left two sons, Narrotumdás and Purshotamdás. Narrotumdás Iswardás left a son, Gordhandás Narrotumdás, and Purshotamdás Iswardás left a son, the caveator, Mathuradás Purshotamdás. Hullochandás Candás left two sons, Lackmidás and Harkisondás, the latter being the caveator first above-named. Lackmidas Hullochandas left five sons, Achratlal, Muggonlal, Pohonchabái, Lalbái, and Nánábái, who are not in any way party to these proceedings. Damodhardás Candás left a son, Dulabdás, who in the petition of his son (the said Ganpatlal) is stated to be living at Cambay, and to be of the age of seventy years. Casibái, one of the two daughters of Candás, was the mother of the above-named deponent Motilal Damodhar. The other daughter of the same Candás was the said Jamnabái, the mother of Bhoga Pitámber. The application of Jaikisondás Gopaldás is thus, it will be seen, opposed by the *caveat* of a first cousin of Bhoga Pitámber through the mother of the latter, namely, Harkisondás Hullochandás, and of a first cousin once removed of the said Bhoga Pitámber, also through the mother of the latter, namely, Mathuradás Purshotamdás, and these two *caveats* are supported by the affidavit of Motilal Damodhar (also a first cousin of Bhoga Pitámber through the mother of the latter), and by Ganpatlal Dulabdás

1876.

JAIKISONDA'S GOPALDA'S v. HARKISONDA'S HULLOCHANDA'S AND ANOTHER.

(a first cousin once removed). As to the property left by Nathibái, it consisted, according to the affidavit of the applicant, of cash, ornaments, jewels, and furniture of the value of Rs. 3,500, and outstanding claims amounting to Rs. 2,000. According to the caveators' affidavit, Bhoga Pitámber (who in his lifetime was in the service of a Khoja as Metha), left property at his death, consisting of moveables of the value of about Rs. 10,000, and a house at Cambay of the value of upwards of Rs. 1,000, and his widow Nathibái, upon his death, possessed herself of the moveable property left by him in Bombay and spent about Rs. 4,000 in funeral and charitable ceremonies performed on and after his death. The same affidavit also states that the moveable property left by Nathibái was a portion of the property left by her deceased husband, and which came to her hands at his death, and that she did not leave any peculiar separate or self-acquired property. It does not seem to be disputed between the applicant and the caveators that the moveable property, of which Nathibái died possessed, had, in fact, come to her from her husband, whether, as the applicant says, partly by inheritance, and partly by a sort of gift by the husband in contemplation of death, or, as the caveators say, wholly by title of inheritance. It is not necessary to consider whether Nathibái had the right to expend so large a portion, as she seems to have done, of the property coming to her from her husband; the question here is only as to the rights of the parties in respect of what has remained. Nor is it necessary to discuss the question whether property coming to a widow by inheritance from her husband is or is not in the strict sense of the word *stridhan*. It appears to be quite settled (see *Mussumat Thakoor Deyhee* v. *Rai Baluk Rám*,(1) *Bhugwandeen Doobey* v. *Myna Báee*,(2) and *Vijiarangam* v. *Lakshuman*(3)) that property derived by a childless widow by gift or inheritance from her husband passes, or at any rate so much of it as remains, passes, on her death, to the heirs of her husband, and not to her own blood, except in the case of a widow who had been married to her deceased husband in some other than one of the four approved or more reputable forms of marriage. The parties in the present case belong to that section of the Vania caste called Nágar Vissá Vanias, and are reputed to belong to

(1) 11 Moore, Ind. Ap. 139. (2) 11 Moore, Ind. Ap. 487.
(3) 8 Bom. H. C. Rep. 244, O. C. J.

the Vaisá or third of the original four great sub-divisions of the Hindu race. The applicant in his original affidavit says nothing about the form of marriage by which Nathibái was united to Bhoga Pitámber. The caveators, in their affidavit, however, allege that "according to the immemorial and universal custom of the Nágar Vissá Vania caste, all the property left by a childless widow, and acquired by her from her husband and from any relation of her husband, or from any or either of them, belongs at her death to the heirs and next of kin, according to Hindu Law, of her deceased husband." The applicant's affidavit in reply alleges that Bhoga Pitámber before his death made a gift of all his property to his wife, the said Nathibái, and that the property left by the said Nathibái consists of her separate property, and, further, that amongst the members of the Nágar Vissá Vania caste one form of marriage only prevails; that according to the best of the deponent's knowledge, information, and belief, that form of marriage is the *Asura* form, and that according to that form Nathibái was married to Bhoga Pitámber.

The essential characteristic of the *Asúra* form of marriage appears to be the giving of money or presents by the bridegroom or his family to the father or parental kinsmen of the bride, or, in fact, a sale of the girl by her father or other relation having the disposal of her in marriage in consideration of money or money's worth paid to them by the intended husband or his family. In Manu it is described thus: "When the bridegroom having given "as much wealth as he can afford to the father and parental kins-"men and to the damsel herself takes her voluntarily as his bride, "that marriage is called *Asura*," and by Yajnavalkya, "an *Asura* "marriage is contracted by receiving property from the bride-"groom." In Steele's Summary, p. 31, under the title "Marriage" "*Usoor* (or Asura) is where the girl is taken in exchange for wealth "and married. This species is peculiar to the Vaisá and Sudra "castes. The sale of a girl in marriage is forbidden."

In the four approved or more reputable forms of marriage, no such presents are made, and in the castes observing those forms anything of the nature of a present to the girl's relatives appears to be carefully avoided as something disgraceful. The old Hindu Law books no doubt speak of the *Asura* form of marriage as being

1876.

JAIKISONDA'S GOPALDA'S v. HARKISONDA'S HULLOCHANDA'S AND ANOTHER.

permitted to the mercantile and servile classes (*i.e.*, the Vaisás and Sudras) and as not being permitted to the two higher classes. But I do not find anything in the texts cited to show that the *Asura* form is obligatory on the mercantile and servile classes, or that the four more approved forms are not permissible to them, as well as to the two higher classes. As the *Asura* form is said to be permitted or peculiar to the mercantile and servile class, so the *Rákshasa* is permitted or peculiar to the warrior class. But this does not mean that it is obligatory on them, but only allowable. If at least the only form in which a warrior could get a lawful wife was the *Rákshasa*, which Manu describes thus: "The seizure of a maiden by force from her house, while she "weeps and calls for assistance, after her kinsmen and friends "have been slain in battle, or wounded, and their houses broken "open," it would of itself account for the supposed extinction of this class without the alleged victories of Pursharám.

It must, it appears to me, in the absence of reliable evidence as to the form in fact observed in each particular case, be a matter of inquiry what is the form in actual use among the caste, or section of a caste, to which the parties, the form of whose marriage is in question, belong, bearing in mind also the strong tendency generally observable among the lower castes and sections of castes, to attempt to adopt, so far as possible, the religious and social forms and usages of castes and sections of castes considered higher. In the present case the evidence, on the part of the applicant, that, on the occasion of Nathibai's marriage, her mother (for, according to their evidence, her father was then dead) received a present of Rs. 1,000 from Bhoga Pitámber, cannot, in my opinion, be relied upon. The witness who states this circumstance is Goverdundás Narrotumdás (maternal uncle of the applicant, and a different person, apparently, from the abovementioned Gordhandás or Goverdhandás Narrotumdás, the grandson of Iswardás Candás). He says that he learnt the fact from Bhoga Pitámber himself. But the same witness states that except this instance he cannot mention any other cases of presents made to the father, and that such payments are made privately, and he would not hear of them. He says further that to receive such presents is considered disgraceful. Now this of itself makes it rather unlikely that Bhoga Pitámber should have told the

witness that such a present was made on the occasion of his own marriage with Nathibái. The same witness stated also that when he had his own daughters married, he did not receive anything, except *palu*, and, in fact, he has no instances to give of any usage in this caste for anything to be given by the intended husband, except what is called *palu* and ornaments according to custom. He produced a written contract, entered into some 10 or 12 years ago, on the occasion of the marriage of a daughter of his sister's husband Gopaldás. The document is addressed to one Shah Dayabhái Rámáchandra, the brother ofthe then intended husband, and signed by Gopaldás Candás, the father of the intended wife. It provides as follows:—"The betrothal of my daughter Behen "Kasi to your brother Shah Parmanand has been agreed to, as for "her *palu* Rs. 701, and a *vák* (armlet) worth Rs. 100, and a nose-"ring worth Rs. 100, altogether Rs. 901. As to *Ritbhát*, the *Rit* "(*i.e.*, customary presents, &c.,) of (*i.e.*, according to the custom "of) Nágar Vissa Khambati is truly to be given and taken. As "to the *Pehrawani* (presents of clothes, &c.) to the bridegroom, I "am truly to give a pair of cocoanuts."

But this usage of giving or agreeing to give *palu* to the bride herself (which is nothing else than a kind of rudimentary marriage settlement) is quite a different thing in idea and incidents from the giving of presents to the bride's relations who have the disposal of her in marriage. We find in fact the distinction between the two classes of cases clearly drawn by Manu himself. Though he lays it down (Section 24) "the ceremonies of *Asuras* "must never be performed," and (Section 51) "let no father who "knows the law receive a gratuity, however small, for giving his "daughter in marriage, since the man who through avarice takes a "gratuity for that purpose is a seller of his offspring," yet we find in Section 54: "When money or goods are given to damsels, "whose kinsmen receive them not for their own use, it is no sale; "it is merely a token of courtesy and affection to the brides." What Manu here describes, is a practice to which the giving of *palu* seems to me exactly to correspond.

The next witness Vithaldás Sobherám (who appears to be a leading member of the Nágar Vissá Vania caste) was called on behalf of the applicant, I suppose for the reason that on a

1876.

JAIKISONDA'S GOPALDA'S v. HARKISONDA'S HULLOCHANDA'S AND ANOTHER.

former occasion he had stated on affidavit that the form of marriage in use in the caste is the *Asura*, for the greater part of his evidence is decidedly unfavourable to the applicant's case. This witness says that he stated in the affidavit in question that the form of marriage was *Asura*, as it is what he understood by *Asura*; but that since he made his affidavit he came to know that different forms of marriage are practised in his caste. In fact, this witness seemed really to know little or nothing as to the essential nature of the different forms of marriage, though he may be a useful witness as to the actual usages of his caste. He says that it is the invariable practice of their caste to give *palu*, but does not know of anything else but *palu* being given; that if he had a daughter he would consider it very disgraceful to receive anything for her marriage, and that the caste would not tolerate such a thing. He says further that it is the custom of the caste that when presents are made to the bride from the father of the bridegroom, and the bride dies without issue, the presents are returned to the quarter from which they came; but that when the bride has presents from her own father, the latter gets them after her death. This was the whole of the evidence (except the bare statement in the affidavit of the applicant himself, a young man of apparently 20 or 22 years old, and very unlikely to be an authority on the subject of the usages of his caste) given on the part of the applicant to show that the marriage of Nathibái with Bhoga Pitambar was in the *Asura* form. On the part of the caveators we have the evidence of Harivalabdás Caliandás (a leading man, though his modesty would not allow him to admit this, of the Nágar Vissá Vania caste) and of Manishanker Madhaorám (an Owdich Brahmin of Surat, who says he has been in the habit for five years past of officiating as priest at the marriages of the caste in question, having before that period done so in other sections of the Vania caste). The first-named witness speaks to the custom prevailing in his caste, that on the occasion of a marriage the bride receives from the bridegroom or his father or relatives *palu*, and that this *palu* is generally deposited with some third person, and is intended as a provision for the maintenance of the wife in case of her husband's death. He states further that this custom is not peculiar to the Nágar Vissá sections of the Vania caste, but that other sections of same

caste have it, and some sections of the Brahmins, as the Motála, Owrishtr, and Tolakiya Brahmins, and that, apart from the *palu*, the father of the bride does not receive anything for himself from the part of the bridegroom, and that, in fact, "in our caste we never sell our daughters." In answer to a question by the Court, the witness said: "If the bride had a mother "and no father, there would be the same objection to the mother "taking a present." Indeed, so scrupulous do they seem to be to avoid any appearance of such a thing that, as the same witness says, "from the betrothal and before the marriage the father of the "bride would not even take food or water at the house of the "bridegroom." He says further: "According to the customs of "our caste, the presents given to the bride by the bridegroom on "a marriage, go back to *his* relations if she dies a widow and "without issue," and that he could give five, seven, or ten instances within his own knowledge of this custom being observed. The Brahman Manishanker states that the marriages among the Nágar Vissá Vania caste, of which he professes to have five years' experience, are not in the *Asura* form, for the reason that in the *Sankalpa*, or formula which he repeats during the ceremony, the words *Brahma Prájápatya* (which are the names of two of the approved forms) occur, and that the form used is, in fact, a kind of mixture of these two forms, namely, the *Bráhmá* and *Prájápatya*. He says further that among the Brahmans, so far as he knows, in all cases, *palus* or presents to the bride are given by the bridegroom or his father, Rs. 300 at least, it may be more, and that in marriages among the Brahmans generally *palus* are given. He says, however, that he is acquainted chiefly with Guzerathi Brahmans, and does not know if, among the Brahmans of the Dekhan, *palus* are given. Now, whether or not it be the fact that Guzerathi or Owdich Brahmans are less highly regarded than Brahmans of the Dekhan, (a suggestion, however, which this witness by no means appreciated favourably,) yet it appears to me quite out of the question that any usage should prevail among any section of Brahmans which would impress upon their marriages the character of one of the forms not approved for the twice born.

With regard to the form called *Brahma*, we find in Manu, Chapter III., Section 27: "The gift of a daughter clothed only with a

1876.

JAIKISONDA'S GOPALDA'S v. HARKINSONDA'S HULLOCHANDA'S AND ANOTHER.

"single robe to a man learned in the *Vedas*, whom her father "voluntarily and respectfully receives, is the nuptial rite called "*Bráhmá*." Steele in his summary, under the title "Marriage," describes the *Bráhmá* form or kind of marriage in these words: "Where the charges are incurred solely by the girl's father." As to the other form, the name of which, *Prajápatya*, is mentioned by the Brahman Manishankar, we find in Manu: "The "nuptial rite called *Prajápatya* is when the father gives away his "daughter with due honour, saying distinctly, 'may both of you "perform together your civil and religious duties.'" All that Steele says about the form called *Prajápatya* is that it is the form "where the girl is given with the view of obtaining offspring," which, as a definition, is by no means satisfactory, as I should suppose that girls are given in marriage with *that* view, not merely in the form called *Prajápatya*, and among the twice born in India, but in all forms, and all the world over.

On the evidence, the conclusion at which I have arrived is, that, among the Nágar Vissá section of the Vania caste, the form of marriage in use corresponds to one or other of the approved forms, and not to the incidents of that called *Asura*; and that the property left by Nathibái, being, as it appears, composed of the residue of what came to her by inheritance from her deceased husband, must devolve on *his* relatives in blood, and not on her's.

With regard to the case set up by the applicant in his affidavit in reply, that Bhoga Pitámber in his lifetime, and shortly before his death, had given his property to his wife, the only evidence produced on the applicant's part is that of one Mahomed Hajee Ali, timber merchant and contractor. [The learned Judge discussed the evidence as to the gift, and continued]:—In any event, the evidence would not show a gift by Bhoga Pitámber to his wife of his whole property, or of any thing more than the balance remaining to his credit with Mahomed Hajee Ali; and even as to that I am of opinion that the evidence does not show more than this, that Bhoga Pitámber took his wife to his debtor to tell him that on his own death the amount due was to be paid to his widow as his representative, as she, in fact, would be, there being no issue.

In the above circumstances the application must be dismissed, and with costs. Had the applicant been unaware of the existence or claims of the caveators and other relations of the husband, or had he brought their existence to the attention of the Court when making his application, it might have been a case for not ordering the applicant to pay the caveators' costs. But he was quite aware of their existence and claims, as they were set up directly after Nathibái's death, and it is the duty of all applicants for administration to bring to the attention of the Court the existence of persons who have any fair ground of adverse claim or opposition to such application.

Application dismissed with costs.

[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Knt., Chief Justice and Mr. Justice Nánábhái Haridás. October 2.

BA'BAN MAYACHA AND OTHERS (PLAINTIFFS, APPELLANTS) *v.*
NA'GU SHRAVUCHA AND OTHERS (DEFENDANTS, RESPONDENTS.)*

Jurisdiction—Res judicata—Cause of action—Right of fishing in the sea.

The District Court may, when the defendants reside within its local jurisdiction, try a suit for damages for and restrain by injunction an alleged illegal disturbance of the plaintiff's right to fish and use fishing stakes and nets fixed in the sea below low-water-mark and within three miles of it.

The dismissal, on the ground of want of jurisdiction, by the Civil Court of a suit to eject the defendants from the fishing ground of the plaintiffs, situate below low-water-mark, does not operate as a bar to a subsequent suit by the plaintiffs to recover damages from the defendants for fixing their fishing stakes and nets too near to those of the plaintiffs.

Rights of the Crown and of the public in the waters and the subjacent soil of the sea discussed.

The right of the public to fish in the sea, whether it and its subjacent soil be or be not vested in the Crown, is common, and is not the subject of property.

That right may, in certain portions of the sea, be regulated by local custom.

Members of the public, exercising the common right to fish in the sea, are bound to exercise that right in a fair and reasonable manner, and not so as to impede others from doing the same; and conduct which prevents another from a fair exercise of his equal right, if special injury thereby results to him, is actionable.

* Regular Appeal No. 62 of 1873.