

APPELLATE CIVIL.

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

MAHANTAWA KOM IRAPPA (ORIGINAL DEFENDANT 4), APPELLANT, v.
GANGAWA KOM MALAPPA AND OTHERS (ORIGINAL PLAINTIFF AND
DEFENDANTS 1 AND 3), RESPONDENTS.*

1909.

July 15.

Hindu Law—Panchals—Kurbars—Sub-divisions of Shudra tribe—Inter-marriage valid—Custom as to illegality—Burden of proof.

A marriage between a man of the Panchal caste and a woman of the Kurbar caste is valid. The Panchals and the Kurbars are sub-divisions of the Shudra tribe.

The onus lies upon the party alleging an illegality by reason of immemorial custom to prove such prohibiting custom.

Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver (1) and *Fakirgauda v. Gangi* (2), followed.

SECOND APPEAL from the decision of T. D. Fry, District Judge of Dhárwár, confirming the decree of V. V. Kalyanpurkar, Subordinate Judge of Haveri.

The plaintiff sued to recover from the defendants the property in suit alleging that the property belonged to her deceased father Udcha, that it was in the possession of her step-mother Savakka, and that Savakka having remarried the inheritance devolved on the plaintiff. Savakka was joined in the suit as defendant 3 and defendants 1, 2 and 4 were alienees from Savakka.

Defendants 1, 2 and 4 set up their title as vendees from Savakka.

Defendant 3 did not put in appearance.

The Subordinate Judge, V. V. Kalyanpurkar, found that the re-marriage of defendant 3 was proved, but he found in the negative as to the necessity for the alienations by her. He, therefore, allowed the plaintiff's claim.

On appeal by defendant 4 the District Judge found that, though the re-marriage of defendant 3 was proved, still the question as to validity of the re-marriage should have been

* Second Appeal No. 785 of 1909.

(1) (1869) 13 Moo. I. A. 141.

(2) (1896) 22 Bom. 277.

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raised and considered by the Subordinate Judge inasmuch as defendant 3's husband, Basappa, belonged to the Panchal (artificer) caste and defendant 3 belonged to the Kurbar (shepherd) caste, both castes being sub-divisions of the Shudra tribe. The case was therefore remanded for a finding upon the issue, "Was Savakka's re-marriage with Basappa a valid marriage?"

On the said issue the finding of the Subordinate Judge, V. G. Kaduskar, was in the negative.

The respondents, that is, the plaintiff and defendants 1 and 3, raised objections to the finding.

The District Judge, however, found in appeal that Savakka's re-marriage was valid and that the alienations by her were not binding on the plaintiff. He, therefore, confirmed the decree. With respect to the validity of the re-marriage the Judge made the following observations:—

In disposing, after remand, of the second issue, Mr. Kaduskar has found himself unable to accept the ruling in *Upoma Kuchain v. Bholaram Dhubi* (15 Cal. 708). I take it however that Mr. Kaduskar's attention was not drawn to the fact that the judgment to which he takes exception was quoted with approval by the Bombay High Court in *Fakirgowda v. Gangi* (22 Bom. 277) and that both these decisions are founded on the judgment of the Privy Council in *Inderun v. Ramasawmy* (Moore, Vol. XIII, p. 141).

The concluding words of the judgment of the Privy Council may be quoted. Those words are: "On the whole seeing that those parties are both of the Sudra caste and that the utmost that has been alleged really is, that the Lomindar was one part of the Sudra caste, and the lady to whom he was married was of another part, or of a sub-caste, their Lordships hold the marriage to have been valid; to hold the contrary would in fact be introducing a new rule, and a rule which ought not to be countenanced."

I follow these rulings as a matter of course * * *

All that the Courts decide is that two Sudras of different parts of the caste can contract a marriage which the Courts will regard as valid in law. Whether the members of the different divisions will regard such marriages with disapproval and will take action accordingly is a question into which the Courts have not entered and are not likely to enter.

In the case now before me the parties to the marriage were admittedly Sudras—a Kurbar and a Panchal. Under the rulings quoted the marriage which, as I have held, was contracted between them was valid unless it is

proved that the marriage was prohibited by immemorial custom (see the Bombay ruling cited above).

The evidence in this case certainly does not establish any prohibition by immemorial custom and it seems impossible to attach much importance to the necessity for what has been referred to as "conversion". On that point I am impressed with Mr. Kalyanpurkar's remark: "I feel tolerably sure that considering the superiority of the Panchal caste (*i. e.*, Basappa's caste) over the Kurbar (*i. e.*, Savakka's caste) there can be no objection to the validity of such a marriage."

This would be in accordance with the old rule cited by Mayne on page 106 of his 7th edition. "Originally marriages between men of one class and women of a lower were recognized."

The further treatment in this work of such marriages as obsolete cannot be accepted here in view of the remark on that point in 15 Cal. 711. I hold that the marriage was valid.

Defendant 4 preferred a second appeal.

M. B. Chaulal (Government Pleader) and *G. S. Mulgaumkar* appeared for the appellant (defendant 4) :—The sole question is about the validity of Savakka's marriage with Basappa. They belong to entirely different castes. Under this circumstance it cannot be said that Savakka has gone into another family by her re-marriage and thus lost all her interest in her deceased husband's property. Basappa's caste is Panchal, while Savakka's is Kurbar. The validity of the marriage must depend upon the custom of the caste with regard to such marriage. Panchal is a caste akin to Brahmin: (Steele on Hindu Customs, pp. 352 and 356). A Panchal like a Brahmin has to perform Thread Ceremony (investiture of sacred thread). In other respects their rights are taken from the Kamlakar Sutra or the Sacred Ordinances of the Shudra caste. It is the custom of the caste that can validate such a marriage. The lower Court has relied upon the decision of the Privy Council in *Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver*⁽¹⁾. We submit that that case is distinguishable. There the marriage was between a Shudra male and an illegitimate female. An illegitimate person, whether a male or female, has no caste at all and such a marriage does not come within the pale of Hindu Law. We rely upon

(1) (1869) 13 Mco. I. A. 141.

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the remarks on p. 71 of Tagore Law Lectures, Hindu Marriage and Stridhan. The ruling in *Fakirgauda v. Gangi*⁽¹⁾ lays down that the marriage between members of two sub-divisions of the Lingait caste is not invalid. But in the present case the very fact that Basappa and Savakka are excommunicated shows that the custom of the caste does not recognize such a marriage. The decision in *Upoma Kuchain v. Bholaram Dhubi*⁽²⁾ is against our contention. That case originated in Assam and perhaps the sub-divisions there were in the same caste.

G. S. Mulgaumkar:—We further rely upon *Narain Dhara v. Rakhal Gain*⁽³⁾ and *Lakshmi v. Kabiansing*⁽⁴⁾.

[BATCHELOR, J.:—In the last case the marriage was between a Brahmin girl and a Rajput husband. They were not members of the same class or tribe.]

N. A. Shiveshvarkar appeared for respondent 1 (plaintiff):—The texts in support of a marriage like the one involved in the present case are Manu, Ch. III, cl. 12 *et seq*; Mitakshara, Ch. I, sec. 2, cl. 2 and note; Strange's Hindu Law, Vol. 1, p. 41, relying upon 3 Colebrook's Digest, 329: see also Golap Chandra Sarkar's Treatise on Hindu Law (3rd Edn.), pp. 102, 104. Originally a marriage between a man of a superior caste and a woman of an inferior caste was permitted. It is only the later commentators that introduced the prohibition against inter-marriages. But the prohibition applies only to the three regenerate classes and not to the Shudra class. In *Narain Dhara v. Rakhal Gain*⁽³⁾ the question as to the validity or otherwise of the marriage was not decided. There the question was whether from the fact that a man of the Kaivartta (fisherman) caste and a woman of the Tanti (weaver) caste lived as husband and wife for a period of twenty years, marriage in fact could be presumed to have taken place between them, and it was held that it could not be presumed inasmuch as the basis for such presumption was wanting in the case, the parties being members of two sub-divisions of the Shudra tribe between whom there was in practice no inter-marriage. That ruling does not lay

(1) (1896) 22 Bom. 277.

(2) (1888) 15 Cal. 768

(3) (1875) 1 Cal. 1.

(4) (1900) 2 Bom. L. R. 128.

down that an inter-marriage between such sub-divisions is legally invalid.

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SCOTT, C. J. :—The question which has been argued before us on behalf of the appellant is, whether a marriage between a man of the Panchal caste and a woman of the Kurbar caste is valid. The Panchals and the Kurbars are sub-divisions of the Shudra tribe.

It has been held by the Judicial Committee in *Inderun Valungyooly Taver v. Ramaswamy Pandia Talaver*⁽¹⁾ that when the factum of a marriage is proved the presumption is that it is valid in law and in that case there was nothing illegal in the inter-marriage of members of different sub-divisions of a Shudra tribe. The onus would, therefore, appear to lie upon the party alleging an illegality by reason of immemorial custom to prove such prohibiting custom. That was the view taken by this Court in the case of *Fakirganda v. Gangi*⁽²⁾.

The learned District Judge in the case now before us has correctly applied the law as to onus. He says "the evidence in this case certainly does not establish any prohibition of immemorial custom." We must therefore hold that the marriage of Savakka with Basappa was a valid marriage and the appellant's case for that reason must fail.

We dismiss the appeal with costs.

Appeal dismissed.

G. B. R.

(1) (1869) 13 Moo. I. A. 141.

(2) (1896) 22 Bom. 277.