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education of the children is in this case the Court of the Divisional Judge and not the High Court, and we do not think that having regard to the nature of the jurisdiction we can hold that the Court of the Divisional Judge is a subordinate Court in the sense in which that expression is used in section 24 (1) (*a*) of the Civil Procedure Code so as to enable us to transfer this proceeding, of which notice has been served upon the respondent, to the Divisional Court for disposal. It is an unfortunate case, but we must be particular in the exercise of the very special jurisdiction given to us under the Indian Divorce Act, and the only course now open to us is to return the petition for presentation to the proper Court.

Application returned.

J. G. R.

APPELLATE CIVIL.

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

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August 10.

RANGAPPA BIN NINGAPPA IMMADI AND OTHERS (ORIGINAL DEFENDANTS) APPELLANTS *v.* VENKANBHAT BIN LINGANBHAT JOSHI AND ANOTHER (ORIGINAL PLAINTIFFS) RESPONDENTS.*

Vatandar Joshi—Right to officiate at marriages—Yajman—Ceremony in Pancha-Kalas Lingayet form—Claim for fees in respect of part of the ceremonial in Hindu form—Ceremony cannot be split up.

The question raised in this appeal was whether the ceremonials observed by Lingayets in marriages are to be regarded as a whole in deciding whether or not the village Gramopadhya is entitled to perform the ceremony or whether the ceremony can be split up into parts, and if it is found that some part of the ceremonial is similar to the Brahmin ritual the Gramopadhya can insist upon payment of fees in respect of such part of the ceremonial as may have been performed by another.

Held, that if the ceremony performed was not a Hindu marriage ceremony as a whole the Joshi or Gramopadhya had no right to demand the fees.

* Second Appeal No. 216 of 1914.

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SECOND appeal against the decision of E. H. Leggatt, District Judge, Dharwar, reversing the decree passed by V. V. Wagh, Subordinate Judge at Dharwar.

Plaintiffs as the hereditary Watandar Joshis of Annigeri and eight other villages sued to recover rupees 5 annas 10, the amount of the fees, payable at two marriages celebrated in defendant 1's house and to obtain an injunction restraining the defendants from inviting persons other than the plaintiffs to officiate at marriages and from paying to such persons the fees due to the plaintiffs. They alleged that it was their right to (*a*) write *Nandi*, (*b*) throw rice, (*c*) tie the Kankan, (*d*) fasten the Mangalsutra and otherwise officiate at the marriages that took place among the Kurba caste to which defendant No. 1 belonged.

Defendant No. 1 answered that the marriages in his house were not performed by writing *Nandi* as stated by plaintiffs; that they were performed by installing *Pancha-kalas*; that his caste people were amenable to the jurisdiction of the Lingayet religion and not to that of the plaintiffs' caste; that the defendant's family had never had their marriages performed by the plaintiffs; and that they were not entitled to receive fees.

The Subordinate Judge rejected the plaintiffs' claim holding that the marriages were not performed according to Hindu ritual as observed by the Joshi but in *Pancha-kalas* Lingayat form. He observed that in determining the liability the ceremony must be taken as a whole in particular form and it would not be right from the common circumstance of fastening of Mangalsutra or the wrist thread or the throwing of rice on the bridal pair, to say that the ceremony was in Hindu form and that the Watandar Joshi was entitled to his fees.

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The District Judge, on appeal, reversed the decision holding that the plaintiffs were entitled to perform the ceremonies of (*a*) throwing rice, (*b*) tying Kankandhara, (*c*) tying Mangalsutra and that for the last two acts they were entitled to fees.

The defendants appealed to the High Court from this decision.

Nilkant Atmaram for the appellants:—The Lingayets are not Brahminical Hindus and therefore they are not bound to employ Brahmin priest for their marriage ceremonies. In this particular case the District Judge found that all the ceremonies of the Brahmanic marriage ritual were not performed. The ceremonies at marriages must be treated as a whole and cannot be split up: *Waman Jagannath Joshi* v. *Balaji Kusaji Patil* [1].

S. V. Palekar for the respondents:—We contend that it would be wrong to say that Lingayets are non-Hindus and that their obligation to choose their priests, for marriage purposes, from among the Vatandar Joshis of the village to which they belong, is no greater than that of convert Christians or Mahomedans. The Lingayets are Hindus and, as a matter of fact, they call themselves Veershaivas: see Bombay Gazetteer, Vol. XXII, p. 102. Once it is conceded that they are Hindus the ruling in *Raja Valad Shivapa* v. *Krishnabhat* [2] applies. Therefore, when the defendant asserts that the plaintiffs, who are admittedly the Vatandar Joshis of the Hallikeri village to which the defendants belong, are not entitled to officiate at the marriage ceremonies of all the Hindus in that village and receive the fees, the burden lies upon him of proving the statement. He has done nothing to discharge that burden.

[1] (1889) 14 Bom. 167. [2] (1879) 3 Bom. 232.

On the contrary, the plaintiffs have affirmatively proved that they are entitled to officiate at the houses of all the members of the community to which the defendant belongs.

Defendant has no doubt engaged another priest to perform the marriage ceremony. Even then he is liable to pay to the plaintiffs the fees which would be properly payable to them, if they, the plaintiffs, had been employed to perform the ceremony: *Dinanath Abaji* v. *Sadashiv Hari Madhave*[1]. The lower appellate Court, whose finding of fact is binding in second appeal, has found that only three of the component ceremonies were, as a matter of fact, performed. Even in that case the plaintiffs are entitled to their fees due in respect of those particular component ceremonies. This is the real principle underlying the case of *Waman Jagannath Joshi* v. *Balaji Kusaji Patil*[2].

SCOTT, C. J.:—The contest in this case resolves itself into this, whether the ceremonials observed by Lingayets in marriages are to be regarded as a whole in deciding whether or not the village Gramopadhya is entitled to perform the ceremony, or whether the ceremony can be split up into parts, and if it is found that some part of the ceremonial is similar to that according to the Brahmin ritual the Gramopadhya can insist upon payment of fees in respect of such part of the ceremonial as may have been performed by another. The point is stated exceedingly well by the learned Subordinate Judge, Mr. Wagh. He says:—

"It is urged that some of the ceremonials such as the fastening of the Mangalsutra and the Kankandhara are common to the Hindu form and the Pancha-Kalas form, and that therefore the fastening of the Mangalsutra and the Kankandhara in the Pancha-Kalas form of marriage, entitles the plaintiffs to the fee appropriate to the Hindu form. If the ceremonials of the Brahmins

(1) (1878) 3 Bom. 9. (2) (1889) 14 Bom. 167 at p. 170.

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the Jains and the Lingayets are compared it would be found that they agree in some points and are divergent in others. Yet they have their characteristic basic differences arising out of the faith on which they are founded. It would not be right, therefore, from the commou circumstance of the fastening of the Mangalsutra or of the wrist thread or the throwing of rice on the bridal pair, to say that the ceremony is Hindu in form and that the Watandar Joshi is entitled to his fee. We have to take the marriage ceremony as a whole and determine whether it is in the Hindu form or in the Pancha-Kalas Lingayet form. If it is the former the Joshi is entitled to his fees, and if it is the latter, he is not."

The contrary view is stated by the District Judge who after consideration of the cases cited to him, namely, *Raja valad Shivapa* v. *Krishnabhat* [1], *Waman Jagannath Joshi* v. *Balaji Kusaji Patil* [2], and *Krishnumbhut* v. *Anunt Gungadhurbhut* [3], says :—

"I am therefore of opinion that the Court must consider the particular ceremonies performed rather than the marriage as a whole, and that even if some ceremonies, whether optional or obligatory, were performed which plaintiff himself could not perform, and for which he can therefore claim no fees, the fact does not debar him from claiming fees on account of other ceremonies which were actually performed and which plaintiff could perform, and is entitled to perform, in the ordinary course in the case of marriages in the caste of defendant No. 1. The addition of some ceremonies which plaintiff could not perform and the omission of others, which would necessarily have been performed had plaintiff officiated, does not affect his right to recover his proper fees, if any, on account of such ceremonies as were performed."

We are of opinion that the view taken by the District Judge is based upon a misapprehension of what was decided by this Court in *Waman Jagannath Joshi* v. *Balaji Kusaji Patil* [2]. The judgment of the Subordinate Judge, with appellate powers, reversing that of the Subordinate Judge was there under appeal to the High Court. The appellate Court's opinion was that "the plaintiffs were only entitled to recover in case a marriage was performed in any of the modes known to

[1] (1878) 3 Bom. 232. [2] (1889) 14 Bom. 167.
[3] (1857) 4 Morris 111.

the Hindu law, or in the mode described by Mr. Mandlik with respect to castes other than the Brahmin caste, and that the marriages in dispute being not performed in any such way, they were not such marriages as they were entitled to recover fees for in virtue of any right acquired by grant or prescription." The High Court said: "We agree with the lower appellate Court that, under such circumstances as he thinks existed here, there would have been no intrusion on the plaintiffs' privileges which would give them a right to recover their fees from the Yajman as laid down in the decisions of this Presidency.... But no issue was expressly raised as to the manner in which the marriages in question were performed; and although in the course of the hearing some evidence was given on the subject, neither party, we think, clearly understood what was the real issue between them on that part of the case." Therefore the issue was sent down to the District Court: "What ceremonies were performed on the occasions of the marriages, or either of them, and by whom?" We have referred to the record in that case, and we find that the learned District Judge after stating what ceremonies were, on the evidence taken on remand, performed, stated his opinion that "the ceremonial enumerated by the late V. N. Mandlik in his Hindu law as observed by lower castes, was not followed on these occasions." That was a confirmation of the inference drawn by the lower appellate Court whose judgment was under appeal to the High Court, and upon that finding the Court confirmed the decree of the First Class Subordinate Judge, with appellate powers, with costs. We take that as an authority for the opinion of the Subordinate Judge that if the ceremony performed is not a Hindu marriage ceremony as a whole the Joshi or Gramopadhya has no right to demand the fees.

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We reverse the decision of the lower appellate Court and restore that of the Subordinate Judge with costs throughout upon the plaintiffs. The cross objections are dismissed with costs.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

1915.

August 17.

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

RAMCHANDRA DINKAR PRABHU MIRASI, AND OTHERS (HEIRS OF ORIGINAL DEFENDANTS NOS.10—12) APPELLANTS *v.* KRISHNAJI SAKHARAM PRABHU MIRASI, AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1 TO 9, 13 TO 25 AND 29) RESPONDENTS.*

Decree—Execution of decree—Partition effected by Collector—Partition not in accordance with the direction of the decree—Wrongful distribution of shares—Mistake—Collector's power to re-open partition—Court's duty to rectify mistake of its agent.

One Atmaram Bhagwant, a member of a Mirasi family, brought a suit for partition of his 1/36th share in three villages. In November 1888 a decree was passed directing that the half share of the Desai family in each of the three villages should first be separated and the remaining share divided between the members of the Mirasi family in accordance with the decree Atmaram applied for execution of the decree in Darkhast No. 127 of 1893 but before partition was made on this application defendant No. 8 filed Darkhast No. 404 of 1894 for his share. These Darkhasts were disposed of in 1898 when defendant No. 8's share was separated and given into his possession. The appellants (defendants Nos. 10—12) then applied for separate possession of their share in 1900, but when the surveyor prepared a list of lands remaining over after the first partition as the share of the appellants, the latter found that the Khasgi land in one of the villages remaining for their share was less than what they were entitled to and that the plots below and adjoining their houses had been allotted to the share of defendant No. 8. They then applied to the Collector to re-open partition. The Collector declined to do this and referred the matter to the Court on the ground that the appellants refused to take possession of their shares. The appellants,

* Second Appeal No. 590 of 1912.