they could make out their own invoices to send to the defendants. The plaintiffs were not obliged to mention the invoices they received from England since the invoices were not necessary either for proving the plaintiffs' case or for assisting the defendants in their defence. The present application is obviously made for the purpose of delaying the plaintiffs' suit.

The summons will be discharged with costs.

Counsel certified.

Attorneys for plaintiffs: Messrs. *Little & Co.*

Attorneys for defendants: Messrs. *Thakordas & Co.*

Summons discharged.

G. G. N.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

BAI GULAB (PLAINTIFF-APPELLANT) *v.* JIWANLAL HARILAL (DEFENDANT-RESPONDENT)*.

1921. *October* 13.

Hindu law—Marriage—Anuloma *marriage, whether valid—Marriage between a Vaishya male and the illegitimate daughter of a Vaishya born of a Sudra woman—Validity of the marriage.*

According to Hindu law as administered in the Bombay Presidency, the marriage between a Vaishya male and the illegitimate daughter born of a Vaishya father and a Sudra mother is valid.

Validity of *anuloma* marriages discussed and texts of Hindu law cited.

Brindavana v. *Radhamani*[1], referred to.

Bai Kashi v. *Jamnadas*[2], considered.

APPEAL from the judgment of Kajiji J.

* O. C. J. Appeal No. 27 of 1921: Suit No. 1924 of 1920.

(1) (1888) 12 Mad. 72. (2) (1912) 14 Bom. L. R. 547.

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The plaintiff, Bai Gulab, was an illegitimate daughter of one Jagjiwandas Kashidas, a Vaishya of the Modh Bania caste. The mother of the plaintiff was Durgabai, a Sudra woman of the Maratha caste in the keeping of Jagjiwandas Kashidas. The birth certificate from the Municipal Register described the plaintiff as a Bania, and this was presumably at the instance of her father Jagjiwandas.

The plaintiff lost her mother two or three months after her birth, and the putative father brought her up in his own house along with his two legitimate children, a son and a daughter. She used to wear Bania dress and was recognised as a Bania girl by the people belonging to the caste of Jagjiwan.

On 18th December 1919, the plaintiff was married to the defendant Jiwanlal Harilal. The marriage was arranged by one Nandubai with the knowledge and acquiescence of Jagjiwandas and his daughter Dhangavri. The Gour of the caste performed the marriage, and all marriage ceremonies required for the performance of a valid marriage amongst Banias had taken place. At the marriage feast the plaintiff, dressed as a Bania bride, dined with several Bania females.

Differences having arisen between the plaintiff and the defendant subsequent to the marriage, the plaintiff, on 28th July 1920, filed the suit against the defendant for a declaration that the marriage between her and the defendant was null and void and inoperative according to Hindu law and usage.

The plaintiff also alleged that the marriage was the result of fraud on the part of the defendant and was a sham transaction, the plaintiff being told by the defendant that she was to remain in the defendant's house as his mistress and not his rightful wife. The plaintiff claimed Rs. 10,000 as damages for having suffered in

body, mind and reputation owing to the fraudulent conduct of the defendant in going through the marriage ceremony and his subsequent conduct towards her.

The defendant, in his written statement, contended that the marriage was valid under Hindu law and repudiated the allegation as to fraud and damages and counter-claimed that he was entitled to restitution of conjugal rights.

The trial Judge, Kajiji J., held that the plaintiff was recognised as a Bania girl by the people of the caste at the time of her marriage and that the marriage was accordingly valid under Hindu law. The counter-claim was decreed.

The plaintiff appealed.

Munshi, with *M. V. Desai*, for the appellant.

Jinnah and *Taraporevala*, for the respondent.

SHAH, J.:—This is an appeal from the judgment of Mr. Justice Kajiji in a suit filed by one Bai Nandubai as the next friend of the minor Bai Gulab for a declaration that the marriage of the minor with the defendant was null and void and for certain other reliefs.

The defendant is a Visa Modh Bania of Ahmedabad living in Bombay. The next friend of the minor is a Lohana by caste and the minor, whose caste is a point in dispute between the parties, lived under the care of Bai Nandubai at the time of the marriage.

The plaintiff filed the suit alleging that the marriage between the minor and the defendant was the result of fraud, that the minor girl was a Sudra and that the marriage was invalid. A sum of Rs. 10,000 was claimed as damages.

The defendant pleaded that the girl was the daughter of a Bania named Jagjivandas, that the marriage was

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properly and openly performed as a marriage would be performed among Banias according to Hindu rites, that the girl was in fact a Bania girl and not a "Sudra." He repudiated the allegations as to fraud and damages and made a counter-claim for the restitution of conjugal rights as the husband of the minor girl.

Several issues were raised, but at the hearing, issues Nos. 4 and 7 relating to the fraudulent character of the marriage ceremony and the claim for damages were abandoned.

It was admitted before the trial Court that the marriage ceremony was performed and that consummation had taken place. It was also admitted that the minor girl was born of the connection between Jagjivandas and one Durgabai, a Maratha woman, and that Durgabai was not married to Jagjivandas.

On a consideration of the evidence the learned trial Judge held that the girl was a "Sudra" but was accepted as a Bania girl at the time of the marriage as she lived with Jagjivandas, who looked after her practically as his daughter until she went to live with Dhangavri, the legitimate daughter of Jagjivandas who put her in charge of Nandubai. The learned Judge found that the marriage was valid as she was practically recognised as a Bania girl at the time. Certain other improper suggestions made by the plaintiff in the course of the hearing were found on the evidence to be unfounded and accordingly a decree was passed disallowing the plaintiff's claim and allowing the defendant's counter-claim.

In the appeal before us it is urged that the marriage is invalid as the girl is in fact a Sudra girl; that the circumstance that the girl was recognised as a Bania girl by the caste people cannot make the marriage

valid, if it be otherwise invalid, and that according to the Hindu law a marriage between a Vaishya male and a Sudra female is invalid.

As regards the caste of the girl, on the facts admitted in these proceedings, it is clear that her mother was a Maratha woman and her father is a Visa Modh Bania. It appears from the evidence that she was brought up by the father as a Bania girl. In the Birth Register the caste is described as Wani and the names of the parents are mentioned. It appears from Gulab's evidence that her mother died when she was about two years old, and apparently she lived as a Bania girl with her father. A few months before the marriage in question, which took place in December 1919, the girl was sent away to Dhangavri, the daughter of Jagjivandas. Then Nandubai, who was a neighbour of Dhangavri, came to have charge of the girl, and the marriage in question was arranged apparently by Nandubai with the defendant. Though there is no evidence on the point, under the circumstances it is not unlikely that at least in the beginning Nandubai was acting with the knowledge and acquiescence of Dhangavri—and perhaps of the father of the girl—and it is also not unlikely under the circumstances that the parties concerned might have been aware of the parentage of the girl. However that may be, apparently the marriage was brought about on the footing that she was a Bania girl. As a fact, however, her parentage is known now, and the question arises whether she was a Sudra or occupied any better status. The lower Court has recorded the finding that she was a Sudra, but has found that her caste is a matter of doubt according to law and that, as she was treated as a Bania girl, for the purpose of the marriage she must be treated as a Bania girl. It is also urged on behalf of the defendant-respondent that, according to Hindu

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law, as stated in *Brindavana* v. *Radhamani*[1], the caste of the girl would be higher than that of the mother and lower than that of the father, and reliance is placed upon Manu, Chapter X, Verse 41 and Yajnavalkya, Verses 91, 92, 95, and 96 of the Yajnavalkya Smriti, Acharadhyaya with Vijnaneshwara's commentary thereon as supporting the view that the girl in the present case cannot be treated as a Sudra. Apart from the decision in *Brindavana* v. *Radhamani*[1], the difficulty in the way of accepting this argument is that where the *anulomajas* are referred to they are referred to as born of the wedded wife of a lower class: and where the *pratilomajas* are described there is no reference to the lawful wedlock. We are not concerned here with the *pratilomajas* but in the case of *anulomajas* Yajnavalkya and Vijnaneshvara refer to those born of a wife though she may be of a different class. The word used is *vinnâ* (विन्ना) which indicates a married state and not any irregular connection. It is true no doubt that in *Brindavana's case*[1] the learned Judges held that a son born of a Kshatriya male and Sudra female though not married was higher in caste than a Sudra. In fact they applied the principle applicable to the *anulomajas* to the case of an illegitimate son. They observe at p. 85 of the report as follows:—

> "Though the illegitimate children of members of the regenerate classes are excluded from inheritance by the author of the Mitakshara, they are substantially recognised by him as members of their fathers' families for purposes of maintenance, and the absence of legal marriage is, in our judgment, no bar to the determination of their caste with reference to the law applied to the *anulomajas*, the point in analogy being the conventional notion in regard to the superior efficacy of the seed".

If the learned Judges in Madras were prepared to go so far on the strength of these texts I am unable to discover any serious difficulty in applying the same

[1] (1888) 12 Mad. 72.

rule in this Presidency. Of course, if this rule be applied Bai Gulab would not be a Sudra. In view of the difficulty of applying these texts in their entirety on account of the mixed marriages being very uncommon, the absence of any precedent in this Presidency on this point and the special features of the caste system on this side of India, I prefer to leave this question open, and to deal with the case on the footing that the girl is a "Sudra."

The fact that the caste people of her father, who is a Visa Modh Bania of Surat, raised no objection to her father treating her as a Bania girl before the marriage, and that the marriage was celebrated as though she were a Bania girl without any objection on the part of the caste at Ahmedabad, to which the defendant belongs, does not appear to my mind to afford a sufficiently firm basis for the view that the marriage is valid, even though otherwise it may not be valid. It is urged for the defendant that as the caste people of the defendant have raised no objection to the marriage and are not shown to be likely to do so, the marriage must be accepted as valid. No doubt where there is any plea of special custom or usage, the attitude of the caste people would be very relevant as bearing on the existence of such a custom. But it is very doubtful to my mind whether the validity of a marriage can be determined solely with reference to the position which the caste people may take up with regard to it. Their power to deal with the matter socially whenever they find any departure from the usual practice of marriage within their own circle, is undefined and practically unlimited. But this Court has not recognised the power of the caste to decide questions as to the legal validity of a particular marriage. That must be decided ultimately with reference to the provisions of law, subject of course to the proof of any special

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usage having the force of law. For instance in *Reg.* v. *Karsan Goja*[1] and *Reg.* v. *Sambhu Raghu*[2] the Court refused to recognise the interference of the caste as having any effect on the question whether the particular marriage was void or not. These rulings have no direct application here, but the principle underlying them is capable of application to this case; and even apart from these decisions on principle the position is clear to my mind.

The question, therefore, that arises for decision is whether, according to the Hindu law the marriage between a Vaishya (in this case a Visa Modha Bania of Ahmedabad) and the illegitimate daughter of a Vaishya (in this case a Visa Modh Bania) born of a "Sudra" (in this case a Maratha woman) is valid. It is valid if according to law the marriage between a Vaishya and Sudra is not prohibited by law. If it is prohibited, it would be invalid. The *pratiloma* marriages have been held to be invalid in this Presidency. In *Lakshmi* v. *Kaliansing*[3] a marriage between a Brahmin girl and a Rajput male was set aside. In *Bai Kashi* v. *Jamnadas*[4] it was held that a Brahmin woman cannot contract a valid marriage with a "Sudra." Mr. Justice Chandavarkar has discussed the various texts bearing on this question and the judgment is very helpful in deciding the question now under consideration. Both these were decisions relating to *pratiloma* marriages. But there is no decision of this Court, so far as I am aware, and none has been cited to show that *anuloma* marriages also are invalid.

It is clear that where there is a marriage in fact, there is a presumption in favour of there being a marriage in law: *Inderun Valungypooly Tavér*

(1) (1864) 2 Bom. H. C. 117, at p. 124.
(2) (1876) 1 Bom. 347.
(3) (1900) 2 Bom. L. R. 128.
(4) (1912) 14 Bom. L. R. 547.

v. *Ramasawmy Pandia Talaver*[1]. The argument on behalf of the appellant has been that mixed caste marriages even of *anuloma* nature are not only obsolete but are prohibited by the Hindu law. This is a point of great importance and it is desirable to deal with it in some detail. It is important to remember at the outset that what is out of practice or obsolete is not necessarily prohibited, and the argument is based upon the assumption that what is obsolete is prohibited by law. The importance of the difference between the two positions will be clear when I refer to the texts bearing on this point.

In the first place, we have the texts of Manu (Chap. III, Verses 12 and 13) which point out that while for the first marriage of twice-born men (wives) of the same class are recommended, the *anuloma* marriages are permissible: see Sacred Books of the East, Vol. XXV, pp. 77 and 78. The following Verses Nos. 14 and 19 express disapproval of marriages of higher classes with Sudra women. But where first there is a provision for such marriages and next any strong disapproval thereof is expressed, the fair meaning is that such marriages are disapproved but option is given and they are not prohibited. That is the meaning which a commentator like Medhatithi has put upon them; and Kulluka Bhatta has interpreted them to mean that the prohibition is to be understood as limited to *pratiloma* marriages and not to be extended to *anuloma* marriages. Mr. Justice Chandavarkar has referred to these views in *Bai Kashi's case*[2] at pp. 551, 552 of the report, and it is clear that so far as Manu is concerned no prohibition of *anuloma* marriages can be inferred.

I shall now refer to the verses in the Yajnavalkya Smriti and Vijnaneshvara's commentary thereon

(1) (1869) 13 Moo. I. A. 141. (2) (1912) 14 Bom. L. R. 547.

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bearing on the point, as the position is very clearly stated there. In the third Chapter of Acharadhyaya which relates to "marriages" Yajnavalkya first lays down rules as to the selection of the bride and of the bridegroom, some of which are mandatory and others clearly recommendatory only. It is not necessary to refer to them in detail. Thereafter he proceeds to lay down the rules as to intercaste-marriages in Verses 56 and 57. It will be convenient to quote here the translation of these Verses as well as of Vijnaneshvara's commentary thereon given in the Translation of Acharadhyaya by Srisachandra Vidyarnava (published by the Panini Office, Bhuvaneshwari Ashrama, Allahabad, in 1918) at pp. 120, 121, 122, 128 and 129 :—

"Marriages are of three kinds, as they are either for the sake of enjoyment, or for the sake of a son, or for the sake of Dharma (religion). Among these, the marriage for the sake of a son is of two kinds, necessary (Nitya) and optional (Kamya). In the necessary (Nitya) marriage for the sake of a son from the text 'the bridegroom must be of the same class and learned,' it is shown that the wife of the same class is the principal.

Now the author mentions an optional rule with regard to Kamya marriages. (In Kamya marriages, a man may marry a girl of the same caste, as in the Nitya marriage, or of lower caste). This is on the strength of the maxim that an option may be allowed in the cases of the Kamya in relation to a Nitya form of any ceremony".

YAJNAVALKYA.

LVI.—Though it has been said that a twice-born may take a wife from a Sudra family, yet that is not my opinion, because out of her, he is born himself.—56.

Though it has been said :—"but for those who through desire proceed (to marry again) the following females (chosen) according to the (direct) order (of the castes), are most approved" (Manu III, 12). After having premised this (another sage, Vishnu, XXIV 1 to 5) says :—"(1) Now a Brahmin may take four wives in the direct order of the (four) castes, (2) a Kshatriya three, (3) a Vaishya two, and thereby (though these authors, Manu and Vishnu, would allow to the twice-born men, marriages with Sudra women, yet, "it is not my," Yajnavalkya's, "opinion." "Because he," the twice-born, "is

born himself therein." As says a Shruti (Aitareya Brahmana VII, 13, 10 or 7) :—"His wife is only then a real wife (jaya from jan to be born) when he is born (jáyaté) in her again." Hereby assigning the reason "that out of her he is born himself," the author prohibits a marriage with a Sudra woman for one who is desirous of begetting a Naityaka (necessary) son. But in the case of not being able to produce a Naityaka son, in producing an optional son, for a Brahmana, a Kshatriya, and Vaishya woman, and for a Kshatriya, a Vaishya woman, are allowed.

* * * * *

Now the author describes the order in which such inter-marriage may take place for him who is still desirous of sexual gratifications, though he has got a son, or has lost his wife and is not entitled to enter another order (asrama), but is anxious to remain in the order of the house-holder.

YAJNAVALKYA.

LVII.—Three, according to the order of the caste, so also two, and one for a Brahmana, a Kshatria and Vaishya respectively, (may be the wives). To a person born as a Sudra, a girl of her own caste is his wife.—57.

According to the order of the classes, for the Brahmana three, for the Kshatriya two wives, and for the Vaishya one wife are ordained. A Sudra can have only one wife born in the same class.

It is an established rule that a wife of the same class has precedence over all other wives. In the absence of her that precedes, she that follows takes precedence (as the principal wife) in the due order (of classes). This is also the order in the injunction of begetting a son either as a substitute for a necessary (Nitya) son, or an optional (Kamya) son.

As to the son of a Sudra woman being counted among sons and being described in the Chapter on Partition, e.g., where the author after enumerating the son begotten by a Brahmana upon his Kshatriya wife, is Murddhávasikta, &c., ends with "this rule refers to wives regularly married," (Verses 90 and 91), that refers to the son of a person desirous of sexual enjoyment or who is simply desirous of remaining in the Asrama (order of house-holder) and does not refer to twice-born in legitimate wedlock.

* * * *

The author now describes the special ceremonies to be observed in marrying girls of the same or of different classes.

YAJNAVALKYA.

LXII.—In marrying a girl of the same class the hand should be taken, the Kshatria girl should take hold of an arrow, the Vaishya should hold a goad, in the marriage with one of higher class.—62.

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In marrying a girl of one's own class, the hand should be taken, according to the rules of one's own Grihya Sutra. A Kshatriya girl should hold an arrow, a Vaishya girl should hold a goad in her marriage with persons of higher classes. A Sudra girl should take hold of the end of the skirt. As it has been said by Manu (III. 44) :—

"A Sudra girl marrying one of higher class should take hold of the hem of the (bridegroom's garment)."

Taking the verses of Yajnavalkya without the commentary it is clear that in the opinion of Yajnavalkya a twice-born person should not take a wife from a Sudra family but if at all a person is inclined to depart from that rule, he can do so on the lines indicated in Verse No. 57. Far from their being a prohibition there is a provision for what Yajnavalkya is not in favour of. Here Yajnavalkya has adopted a style of expression which, to my mind, is clearly indicative of disapproval on his part of such marriages but of readiness to recognise departures from approved lines within the limits indicated in the next verse. Vijnaneshvara makes this clear in his commentary. The word *nishedha* (meaning prohibition) used by him in the commentary in Verse No. 56 must be read subject to the limitation which he points out in that very sentence and also subject to what he clearly lays down in his commentary on Verse No. 57. This meaning is clear from the phraseology adopted by Yajnavalkya and Vijnaneshvara in Verse No. 92 in the next chapter in the same Adhyaya. While speaking of *anulomajas* both Yajnavalkya and Vijnaneshvara use the word *vinnâ* (married woman) which indicates the recognition by them of valid marriages among those classes in their order. No such word is used in Verses Nos. 93 and 94 relating to *pratilomajas*. Yajnavalkya expressly states in Verse No. 95 that all *pratilomajas* are bad (*asanta*) and *anulomajas* are good (*santa*).

Further, while speaking of the shares of sons belonging to different classes in Chapter I, section 8 (in the

chapter on Dayavibhaga in the Mitakshara), there is provision made for sons born of *anuloma* marriages, but there is no provision for *pratilomajas* (see Stokes' Hindu Law Books, p. 402, Mitakshara, Chap. I, section 1, paras. 4 to 6). That indicates the validity of and not prohibition against *anuloma* marriages. I refer to these provisions only for the purpose of the present point and not as necessarily governing the rights of such sons at present.

Lastly, in the Prayaschitta Adhyaya, Vijnaneshvara has made the meaning clear once more in his commentary on Verse No. 22 of that Adhyaya. I do not consider it necessary to quote the translation here: but the relevant passages may be found in the second paragraph of clause 109 and clause 111 at p. 49(1) of the translation of the Prayaschitta Adhyaya published by the Panini Office, Bhuvaneshvari Ashrama (Allahabad) in 1913.

Thus Yajnavalkya and Vijnaneshvara, whose opinions are binding upon us, do not lay down any *prohibition* as distinguished from disapproval of *anuloma* marriages.

(1) The passages run as follows :—

109 (2) But (with regard to men) of inferior Varnas when the Sapindas of (their) superior castes are born or dead, the purification is with the expiry (of the period of impurity) of those (superior castes). But it has been thus stated by BAUDHAYANA (that it lasts for) ten days irrespective (of castes): "Whoever of Kshatriya, Vaisya, or Sudra castes are (Sapinda) relatives of a Brahmana, (in case) of impurity (resulting from) their (birth or death) purification of a Brahmana is declared to be with ten days." Of these alternatives the settlement (of application) is (that they) refer to the times of difficulty or not difficulty.

111. But in the case of those born of (mixed unions in) contrary gradation there is no impurity whatever, for, says the text of a Smriti: "Those born (of prohibited unions) in the reverse order (of castes) are out of the (pale) of Dharma." Only in the case of a death or birth (among them there is of course) a process of purification for the removal of taint as in the (case of) discharging urine and fæces :—EDITOR.

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The next authority that we have to consider is Nilkantha's opinion as expressed in his Mayukhas. In his Vyavahara Mayukha he refers to the division of property among sons of wives of different classes and has incidentally referred to *anuloma* and *pratiloma* marriages (see Mandlik's Hindu Law, pp. 46 and 47). No doubt there the author does not deal with the question of marriage. He deals with it in his Saunskara Mayukh in the Chapter relating to marriages under the heading of *vivah krama* (order of marriages). The passage may be found at p. 98 of the edition published by the Gujarati Press. The Verse No. 57 from Yajnavalkya is quoted and explained as referring to marriages other than a marriage with the woman of the same class; and the passage taken as a whole clearly shows that Nilakantha practically accepts the view as propounded in the Mitakshara that *anuloma* marriages are permissible. The passage concludes with a reference to Yajnavalkya's Verse No. 62 and a part of Manu's verse (III, 44) which is also quoted by Vijnaneshvara in his commentary on Verse No. 62. The translation of this part of the Mitakshara is already quoted above.

Nilkantha's view appears to be further clear from his treatment of the subject of *anulomajas* and *pratilomajas* in the Saunskara Mayukha at pp. 120-121 of the same edition(1).

(1) The passage in original runs as follow :—

ब्राह्मणस्य चतस्रो भार्या क्षत्रियस्य तिस्रो वैश्यस्य द्वे शूद्रस्यैकेति स्थितम्। तत्र समानजातिभ्यां पितृभ्यां जातानामपत्यानां समानजातित्वं मातापित्रोर्वैजात्याज्जात्यन्तरं च भवतीति स्पष्टम्। लोके ता जातीराह याज्ञवल्क्यः—

सवर्णेभ्यः सवर्णासु जायन्ते हि सजातयः।
अनिन्द्येषु विवाहेषु पुत्राः सन्तानवर्द्धनाः॥
विप्रान्मूर्द्धावसिक्तो हि क्षत्रियायां विशः स्त्रियाम्।
अम्बष्ठः शूद्राजातो निषादः पारशवोऽपि वा॥

It would thus appear that Manu and Yajnavalkya, Vijnaneshvara and Nilkantha are agreed that the *anuloma* marriages are not prohibited. This reading of the Mitakshara and the Saunskara Mayukha conflicts with certain observations of Chandavarkar J. in *Bai Kashi's case*[1], in which he refers to Vijnaneshvara as prohibiting such marriages. It must be remembered that the learned Judge had to deal with a *pratiloma* marriage and his observations were mainly directed to such marriages. He has fully realised the difference between the two kinds of marriages and has refrained from expressing any definite opinion as to *anuloma* marriages, as would appear from his observations at p. 553 of the report in *Bai Kashi's case*[1].

Thus the argument for the appellant derives no support from the two principal Smritis nor from the Mitakshara and the Saunskara Mayukha. How is then the prohibition to be inferred contrary to these opinions? The only ground suggested is that such marriages are obsolete and must be taken to be

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एकस्यैव नामद्वयम्।

वैश्या शूद्र्योस्तु राजन्यान्माहिष्र्योग्रौ सुतौ स्मृतौ।
वैश्यात्तु करणः शूद्र्यां विन्नास्वेष विधिः स्मृतः॥

प्रतिलोमजा अप्युक्तास्तेनैव—

ब्राह्मण्यां क्षत्रियात्सूतो वैश्याद्वैदेहकस्तथा।
शूद्राज्जातस्तु चाण्डालः सर्वधर्मबहिष्कृतः॥
क्षत्रिया मागधं वैश्याच्छूद्रात्क्षत्तारमेव च।
शूद्रादायोगवं वैश्याज्जनयामास वै सुतम्॥
माहिष्येण करण्यां तु रथकारः प्रजायते।
असत्सन्तस्तु विज्ञेयाः प्रतिलोमानुलोमजाः॥ इति॥

प्रतिलोमा अन्तो ऽनुलोमाः प्रान्त इत्यर्थः। एतेषां सङ्कीर्णसङ्कर भेदादिक्रमनुपयोगाद्विस्तृतिभयाच्च नोक्तम्। —EDITOR.

[1] (1912) 14 Bom. L. R. 547.

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prohibited by usage. I am unable to accept the view that because such marriages are obsolete they are illegal or prohibited by law. The prohibition must be found in the law books or in the usage having the force of law. Such usage must be proved like any other fact. It may be that the fact of their being obsolete may render the proof of such usage easy. But in the present case not only is there no proof of such usage, but the evidence, such as it is, goes to show that such marriages are not treated as illegal or void by the castes concerned. It seems to me that far too much weight is sought to be placed upon the circumstance that the *anuloma* marriages are more or less obsolete. The opinions of Manu and Yajnavalkya and Vijnaneshvara and Nilkantha, if I may say so, are fairly reflected in the general attitude of the castes in these matters. They approve of marriages within their respective circles, and generally speaking disapprove of marriages outside their circles. They do not, however, necessarily refuse to recognise the marriages outside their circles but extend the same toleration socially to those who depart from the usual rule as the Smriti writers and the commentators have extended legally to *anuloma* marriages. The readiness on their part to recognise socially what is legally not prohibited depends necessarily upon the circumstances of each case as it arises including the nature of the departure from the usual rule and the attitude of the parties concerned. But the attitude of the castes, which is stated in different modern books as prohibiting inter-caste marriages altogether, is generally indicative of nothing more than the disapproval of such marriages according to the rules of practice of each different caste. It does not afford a sufficient justification for treating as illegal what has not been prohibited but in terms contemplated and allowed by law.

I have discussed the question specially with reference to the principal authorities of Hindu law accepted in this Presidency and to the decisions of this Court. I have considered the decisions of other High Courts; but as a matter of law I have not been able to find any basis therein for inferring any legal prohibition of such marriages, and, so far as they are based on usage, I do not think that they could be applied in their entirety to this Presidency. I have not, therefore, referred to them specifically. I may add that I do not see anything in these judgments which necessarily conflicts with my view. No other legal objection to the marriage is suggested. I am, therefore, of opinion that the marriage in question is valid.

I would affirm the decree appealed from and dismiss the appeal with costs. The costs to be payable by the next friend.

MACLEOD, C. J.:—I agree.

Solicitors for the appellants: Messrs. *Mantri & Co.*

Solicitors for the respondents: Messrs. *Ardeshir, Hormasji & Dinshaw.*

Appeal dismissed.

G. G. N.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice.

JAIRAM JADOWJI (APPLICANT) *v.* NOWROJI JAMSHEDJI PLUMBER (OPPONENT)*.

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Civil Procedure Code (Act V of 1908), Order XXI, Rules 97, 99—Execution of decree for possession of immoveable property—Obstruction by a sub-tenant—Whether a sub-tenant is a person claiming to be in possession "on his own account"—Landlord and tenant.

* O. C. J. Suit No. 381 of 1920.