1951

COMMISSIONER OF INCOME-TAX BOMBAY v. MESSRS. AGARWAL AND CO.

Chagla C. J.

accrued on December 31. In order that it should accrue, they had already worked for 11 months and they transferred the right and the obligation of managing agents to the assignees for the remaining period of one month. Therefore, the consideration of Rs. 57,80,000 paid to Agarwal & Co. obviously and clearly included the right to receive this commission when it was ascertained and when it accrued at the end of the calendar year. Therefore, this is a clear case of the assignment by E. D. Sassoon & Co. Ltd. of part of the income which they had already earned by working as managing agents for 11 months. When the income did accrue and was paid to Agarwal & Co. the question then fell to be determined as to how the income should be apportioned between the two managing agents: one who had worked for 11 months and the other who had worked for 1 month. But, in my opinion it is wholly erroneous to say that the income was brought about or was earned only by Agarwal & Co., and that E. D. Sassoon & Co. Ltd. had nothing whatever to do with the production of that income.

We would, therefore, answer the question submitted to us in both the questions raised in the two references, which are identical, in the affirmative.

In Reference No. 24, the Commissioner to pay the costs; and in Reference No. 27, the assessee to pay the costs.

Attorneys for Commissioner: *N. K. Petigara.*

Attorneys for respondent: *Rustomji & Ginwala.*

Answers accordingly.

A. J. P.

ORIGINAL CIVIL

Before Mr. Justice Tendolkar.

A. v. B.[*]

1952 *March 5*

Hindu law—Marriage, whether also a civil contract—Wife impotent at the time of marriage and at the date of the husband's suit for nullity of marriage—Whether husband entitled to decree for nullity of marriage—Bombay Hindu Divorce Act (XXII of 1947).

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[*] O. C. J. Suit No. 981 of 1951.

A suit was filed by a Hindu husband against his wife for a declaration that their marriage which had taken place on May 12, 1950, according to Hindu Vedic rites, was null and void on the ground that the wife was physically incapable of consummating the marriage and was, therefore, impotent both at the date of the marriage and the suit. On the question whether under Hindu law the husband was entitled to a decree for nullity of marriage:—

(*i*) *Held,* that although under Hindu law marriage is a sacrament, it is also a contract;

(*ii*) *Held,* that even if marriage is a sacrament (sanskara) only, an impotent person, being incapable according to the Smriti texts, of performing a samskara, the fact that a marriage is a sacrament cannot stand in the way of a declaration that the attempted marriage is a nullity; and that apart from texts directly prohibiting the performance of marriage ceremonies by impotent persons, any marriage under any system of law postulates that the spouses who go through the ceremony of marriage have the physical capacity to get married. In order that two persons should be capable of getting married they must have even according to Hindu texts the physical capacity at least to cohabit, if not to procreate children.

(*iii*) *Held,* that the doctrine of *factum valet* cannot be invoked to validate a marriage which is null and void on account of incapacity of a spouse.

(*iv*) *Held,* therefore, that the marriage of an impotent, whether a male or female, is absolutely null and void under the Hindu law.

(*v*) that even if the husband was not entitled to such a declaration, he could be granted a decree for divorce under the Bombay Hindu Divorce Act, 1947.

Ratan Moni Devi v. *Nagendra Narain Singh,*[1] *Purshotamdas Tribhovandas* v. *Purshotamdas Mangaldas,*[2] and *Muthusami Mudaliar* v. *Masilamani,*[3] relied upon.

Amirthammal v. *Vallimayil Ammal,*[4] and *Bhagwati Saran Singh* v. *Parmeshwari Nandan Singh,*[5] dissented from.

Mauji Lal v. *Chandabati Kumari,*[5] and *Anjona Dasi* v. *Pralhad Chandra Ghose,*[7] referred to.

Suit for declaration by the husband that his marriage with the defendant was null and void, and in the alternative for a decree for divorce.

The parties, who belonged to the Cutchi Lohana Community of Bombay, were married on May 12, 1950 according to the Hindu Vedic rites. The plaintiff was 22 years of age and the defendant 16 at the time of the marriage.

(1) (1945) 1 Cal. 407.
(2) (1896) 21 Bom. 23.
(3) (1909) 33 Mad. 342.
(4) [1942] Mad. 807, F. B.
(5) [1942] All. 518.
(6) (1911) L. R. 38 I. A. 122.
(7) (1870) 6 Beng. L. R. 243.

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On October 17, 1951, the plaintiff filed a suit for a declaration that the marriage was null and void, or in the alternative for a decree for divorce under the Bombay Hindu Divorce Act, 1947.

The suit was heard.

J. H. Dave, with *Sir Jamshedji Kanga* and *M. P. Laud*, for the plaintiff.

N. A. Mody, with *M. H. Shah*, for the defendant.

TENDOLKAR J. This is a suit filed by a Hindu husband against his wife for a declaration that their marriage is null and void, or in the alternative for a decree for divorce under the Bombay Hindu Divorce Act, 1947. The parties were married on May 12, 1950, at Bombay according to Hindu Vedic rites. At the date of the marriage, the defendant was sixteen years of age having been born on August 16, 1934. The plaintiff alleges that the defendant did not have at the time of marriage either a vagina or uterus and she still has neither the vagina nor uterus, or to use medical expressions, she has had no development of vaginal cervix, uterine or the genital tract and the internal organs, and, therefore, she is impotent and incapable of having sexual intercourse with any male. The plaintiff also alleges in the plaint that the parents of the defendant practised fraud and deception upon him, as they did not disclose these physical defects of the defendant, which they should have known, as the defendant had no menstruation periods prior to marriage and does not have them still. The defendant by her written statement admits that she had no vagina at the time of marriage and has not got one even now; but she says that she has been advised that a vagina can be created by a surgical operation. As regards the uterus, it is her case that she has an underdeveloped uterus. She admits that she was at the time of marriage and still is incapable of having sexual intercourse and is unable to consummate the marriage.

2. At the hearing, the allegations of fraud and deception were unreservedly withdrawn; and the defendant, whilst maintaining that her alleged impotence was not permanent and was curable, did not lead any evidence to show that a vagina can be created by a surgical operation. The result, therefore, is that I have to deal with this case on the footing that the defendant has not and never had a vagina, and is, therefore, and has always been incapable of consummating the marriage, or having sexual intercourse with her husband. On these

facts there can be little doubt that she must be considered to have been impotent at the time of marriage and she still continues to be impotent.

3. If marriage amongst Hindus was a contract, there can be little doubt that on these facts the plaintiff would have been entitled to a decree for nullity of marriage; but it is urged on behalf of the defendant that a Hindu marriage is a sacrament संस्कार and not a contract and there can, therefore, be no decree for nullity.

4. On behalf of the plaintiff reliance is placed on a decision of their Lordships of the Privy Council for the proposition that a Hindu marriage may be declared to be null and void. The case relied upon is *Mouji Lal* v. *Chandrabati Kumari.*[1] In that case, on an application for letters of administration it became necessary to consider whether unsoundness of mind rendered the marriage of an individual invalid. The Calcutta High Court held that the alleged unsoundness of mind was not of such a character as would render the marriage invalid, and Pargiter J. stated:

> "...Upon this finding, it is not necessary for me to consider the elaborate arguments which have been addressed to us by both parties whether a marriage contracted by a really insane person, is or is not invalid according to Hindu law."

When the matter went to the Privy Council their Lordships of the Privy Council agreed with the Calcutta High Court that the objection to a marriage on the ground of mental incapacity must depend on a question of degree and that in that case the evidence of mental infirmity was wholly insufficient to establish such a degree of that defect as to rebut the extremely strong presumption in favour of the validity of the marriage. It may be urged that if nullity of marriage was not known to Hindu law, their Lordships would not have proceeded to consider what was the degree of mental incapacity in the individual; but nonetheless, it is quite apparent that their Lordships did not apply their mind to the question as to whether there would have been a nullity of marriage if the person was wholly insane, but only held that even if the person was of unsound mind, the unsoundness was not of such a character as would in any event render the marriage null

[1] (1911) L. R. 38 I. A. 122, s. c. 13 Bom. L. R. 534, s. c. 38 Cal. 700, 708.

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and void. I am not, therefore, prepared to read this judgment of their Lordships of the Privy Council as an authority for the proposition that there can be nullity of marriage under Hindu law.

5. Turning next to the authorities in India, a Full Bench of the Madras High Court has in *Amirthammal* v. *Vallimayil Ammal*[1] held that a congenital idiot can be lawfully married; and a Division Bench of the Allahabad High Court has in *Bhagwati Saran Singh* v. *Parmeshwari Nandan Singh*[2] held that the marriage of a lunatic if duly solemnized is not invalid. On the other hand, in *Ratan Moni Debi* v. *Nagendra Narain Singh*[3] the Calcutta High Court has held that a wife whose husband was impotent at the time of marriage and continues to be so is entitled to a decree of nullity of marriage under Hindu law. Having regard to this conflict of authorities between the different High Courts, it becomes necessary for me to consider afresh whether there can be a decree of nullity of marriage under Hindu law in the case with which I am concerned, viz. the case of a wife being impotent at the time of marriage and continuing to be so thereafter.

6. Now, both the Madras and the Allahabad High Courts in coming to the conclusion that they did relied upon a passage in Mayne's Hindu Law (5th edn.) which is in the following terms (p. 109, s. 90):

> "As the great and primary object of marriage is the procurement of male issue, physical capacity is an essential requisite, so long as mere selection of a bridegroom is concerned; but a marriage with an impotent male is not an absolute nullity as it is by English law."

This was the opinion of John D. Mayne. In the tenth edition of the same book which was edited by S. Srinivas Iyengar a different view was taken, and in s. 105 at p. 150 it is stated that—

> "The marriage of a lunatic, an idiot or an impotent person is invalid under the Hindu law."

In the subsequent edition, viz. the eleventh edition by N. Chandrashekhara Aiyer, s. 105 repeats the observations of Mayne in the earlier editions quoted above and then proceeds to observe (p. 143):

> "...It has now been held by the High Courts of Madras and Allahabad, in decisions of questionable correctness, that under the Hindu law, an idiot, a lunatic or an impotent person can be lawfully married."

(1) [1942] Mad. 807, F. B.
(2) [1942] All. 518.
(3) [1945] 1 Cal. 407.

Both the Madras and the Allahabad High Courts rejected the expression of opinion in the tenth edition of Mayne and accepted the opinion in the earlier edition of Mayne, with the result that it becomes necessary to consider whether the opinion of John D. Mayne was justified by the texts on which he relied. In a foot-note Mayne relies upon Manu, IX-203 and Narda XII-8 to 19, and I will proceed to consider how far these texts support the view of Mayne.

7. Manu IX-203 states,

यद्यर्थिता तु दारैःस्यात्
क्लीबादीनां कथँचन ।
तेषामुत्पन्नतन्तूनां
अपत्यं दायमर्हति ॥

The translation of this verse in the Sacred Books of the East, Vol. XXV, by Buhler is (p. 373):

> "If the eunuch and rest (klibadi) should somehow or other desire to take wives, the offspring of such among them as have children is worthy of a share."

Now, the word "kleebadi" refers to a category of people already enumerated in the previous verse 201 which is translated in the Sacred Books of the East, Vol. XXV, at (p. 372):

> "Eunuchs and outcaste, (persons) born blind or deaf, the insane, idiots and the dumb, as well as those deficient in any organ (of action or sensation), receive no share."

But there is no agreement amongst the commentators of Manu as to the true translation of क्लीबादि. The word is a बहुव्रीहि समास There are two kinds of this Samas. One is अतद्गुणसंविज्ञानो बहुव्रीहिः and the other is तद्गुणसंविज्ञानो बहुव्रीहि: The translation which I have quoted treats this word as being a तद्गुण बहुव्रीहि: and that is the opinion of some of the commentators. But others take a different view. Sarvadnya Narayan says: क्लीबादीनामित्यतद्गुणसंविज्ञानो बहुव्रीहिः। and Laxmidhar in Kalpataru also says the same thing. Ghose in his Hindu Law, 1st edn., Vol. II, p. 487, translates this passage as follows:—

> "...'Those beginning with the eunuch' is a word in the Atadguna Bahuvrihi Samasa form and thus means 'all the rest excepting the eunuch'".

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Vivad Ratnakar also says: क्लीबादीनामित्यतद्गुणसंविज्ञानो बहुव्रीहि,: क्लीबस्य अपत्योत्पादनायोग्यत्वात् which is translated by Ghose as follows:

"...The words 'eunuch and the rest' is a compound formed in the way of Atadguna Bahuvrihi samasa and thus means all the rest except the eunuch, because the eunuch is incapable of raising issue." (Ghose's Hindu law, 1st edn., Vol. II, p. 562).

Vivad Ratnakar then proceeds to quote the author of Prakash as saying that the word is तद्गुण बहुव्रीहि: but refers to curable impotency. The wellknown commentator Medhatithi restricts the word "kliba" to a variety of impotent persons known as वातरेता: (whose semen is as thin as air) and who may have a desire for co-habitation. In the alternative Medhatithi says that the word refers to people who are not impotent at the time of marriage but subsequently become such. Aparārka says: क्लीबस्यापत्यं चिकित्सादिवशाद्भवति which is translated by Ghose as "Children are born to impotent persons by means of medical treatment" from which it follows that Aparārka restricts the word to cases of curable impotency. Kulluka emphasizes the word कथंचन (somehow). He says that the word कथंचन suggests that an impotent person should not marry, but if he does, he may have a "kshetraja" son.

8. It is thus apparent that there is no unanimity even amongst the commentators as to whether "klibadi" is to be interpreted as अतद्गुण or तद्गुणबहुव्रीहि and that the commentators who incline to the view that it should be interpreted as तद्गुणबहुव्रीहि attempt to escape the consequences of such interpretation by restricting the word either to curable impotence or to persons who were not impotent at the time of marriage but subsequently became impotent. However, it is really not very material to consider which of these two interpretations is the correct one, because even if these texts of Manu do not apply, there is a similar text of Yajnavalkya which would come into effect. Yajnavalkya II-140-141 are as follows:

क्लीबोऽथ पतितस्तज्जः पङ्गुरुन्मत्तको जडः ।
अन्धोऽचिकित्स्यरोगाद्या भर्तव्याः स्युर्निरंशकाः ॥ १४० ॥
औरसाः क्षेत्रजास्त्वेषां निर्दोषा भागहारिणः ।
सुताश्चैषां प्रभर्तव्या यावद्वै भर्तृसात्कृताः ॥ १४१ ॥

Gharpure translates these verses as follows:—

"An impotent person, an outcaste, and his issue, one lame, a mad man, an idiot, a blind man, and a person affected with an incurable disease and (like) others, must be maintained; excluding them from any share.

> The aurasa and kshetraja sons, however, of these, if free from defects, are entitled to allotments." (Yajnavalkya Smriti, 1st ed., Verses, 140 and 141, pp. 265, 268).

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This, therefore, is a clear text for the proposition that the क्षेत्रज son of an impotent person is entitled to a share on partition Now, a woman is the field (क्षेत्र), the person appointed *to* produce offspring is the one who sows the seed (बीजिन्), or one who is appointed (नियोगिन्) and the child born of such a union is a क्षेत्रज son, i.e. born out of the field. The possibility of a क्षेत्रज son existed when the practice of "*niyoga*" was permissible whereby some other person could be appointed to beget a child out of another person's wife. There is a great divergence of views as to the origin and scope of the practice of "*niyoga*" and also as to whether Manu sanctions or forbids it, but it is unnecessary to consider it because there is unanimity of opinion that "*niyoga*" is forbidden in the "Kaliyuga" in which we at present live. Sarasvativilas (Ghose, Vol. II, p. 1023) points out that Yajnavalkya II-141 is applicable only to "dwaparyuga," because the practice of having a "kshetraja" son is forbidden in the Kaliyuga:—

> यत्तु याज्ञवल्क्येनोक्तम्। "औरसाः क्षेत्रजास्त्वेषां निर्दोषा भागहारिणः" इति तद्द्वापरादि युगविषयमिति मन्तव्यं कलौ क्षेत्रजपुत्रनिषेधात्।

It may be translated as follows:—

> "As to what Yajnavalkya says: 'but their sons legitimate and Kshetraja are entitled to shares if free from similar defects', that was applicable in the Dwapara Yuga as the Kshetraja son is prohibited in the Kali Yuga" (Principles of Hindu law by Ghose, 1st edn., Vol. II, p 1002, No. 157.).

Smritichandrika II, (Mysore Government Oriental Library Series, Bibliotheca Sanskrita, No. 48, 1916 edition) at p. 634 repeats verbatim the above quoted words of Sarasvativilas. It must be remembered that the verses of both Manu and Yajnavalkya are not in the chapter relating to marriage but are in the one relating to partition; and as there is no possibility of an impotent getting a son in the Kaliyuga, which is the present age, as the practice of "*niyoga*" is forbidden, there can be no question of the son of an impotent getting a share on partition. If, therefore, Yajnavalkya II-141 does not apply in Kaliyuga, equally so Manu IX-203 cannot apply in Kaliyuga.

9. There is one further point in this connection which is of importance. In the case before me, even assuming that these verses have an application in the present age when they refer to the son of an impotent person, there is a possibility of

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such a son in a case where the husband is impotent, because he may have a *kshetraja* son; but there can be no son to an impotent female in any event, and, therefore, there can be no question of these verses being requisitioned for the purpose of showing that since the child of an impotent female is recognised as a sharer the marriage of an impotent female must be deemed to be recognised. In any event, as I will point out later, there are texts which directly deal with the question as to whether the marriage of an impotent person is null and void, and it would, therefore, be improper to conclude from the fact that the son of a particular union is to be given a share on partition that the union itself is a valid marriage. The offspring of an illegitimate union may also be provided a share by any system of law, but that would not render such a union a valid marriage.

10. Turning next to the verses of Narada, Chapter XII, 8 to 19, on which also Mayne relies, when one looks at these verses it is extremely difficult to see how a lawyer of the eminence of Mayne could conceivably have read these verses as supporting the proposition that the marriage of an impotent is valid. In the Sacred Books of the East, Vol. XXXIII, Chap. XII, Jolly translates verse 8 as follows (p. 166):

> "The man must undergo an examination with regard to his virile; when the fact of his virile has been placed beyond doubt, he shall obtain the maiden, (but not otherwise)."

Verses 9 and 10 describe the characteristics by which an impotent person can be detected. Verse 11 says that there are fourteen species of impotent men including both the curable and incurable. Then Narada lays down rules as to these different species of impotent men. Verses 18 and 19 are as follows:—

अन्यस्यां यो मनुष्यः स्यादमनुष्यः स्वयोषिति ।
लभेत सान्यं भर्तारमेतत्कार्यं प्रजापतेः ।। १८ ।।
अपत्यार्थं स्त्रियः सृष्टाः स्त्रीक्षेत्रं बीजिनो नराः ।
क्षेत्रं बीजवते देयं नाबीजी क्षेत्रमर्हति ।। १९ ।।

Jolly translates them as follows:—

> "If a man is potent with another woman but impotent with his own wife, his wife shall take another husband. This is a law promulgated by the Creator of the world.
>
> Women have been created for the sake of propagation, the wife being the field and the husband the giver of the seed. The field must be given

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to him who has seed. He who has no seed is unworthy to possess the field." (Sacred Books of the East, Vol. XXXIII, Chap. XII, Verses 18 and 19, at p. 169).

These two verses far from lending support to the proposition that the marriage of an impotent person is valid appear directly to lay down that the marriage is not valid. The result, therefore, is that neither Manu IX-203 nor Narada XII-8 to 19 on which Mayne relies for his opinion in the fifth edition support that opinion.

11. Having thus destroyed the basis of the opinion, I will next proceed to consider the texts that directly bear on the marriage of impotent persons. There are first the texts which lay down who should get married. Yajnavalkya I-52 says:

अविप्लुतब्रह्मचर्यो लक्षण्यां स्त्रियमुद्वहेत् ।
अनन्यपूर्विकां कान्तामसपिण्डां यवीयसीम् ॥

Gharpure translates this verse as follows:

"One who has not swerved from the vow of celibacy may take to wife a woman possessing (good) qualifications, (viz.) one who has not belonged to any other, who is lovely, who is not a sapinda, and who is younger (than himself)".

Commenting on this verse Mitakshara says:

स्त्रियं नपुंसकत्वनिवृत्तये स्त्रीत्वेन परीक्षिताम् ।

which may be translated as, "a 'stri' examined as to her maidenhood to obviate the possibility of her being sexless." Now, Mitakshara is a high authority and the definition of "stri" given by it lays down an essential requirements as to what a स्त्री should be. On behalf of the defendant reliance is placed on the statement in Shabdendushekhar to the following effect: स्तनकेशवती स्त्री स्यात् (A स्त्री has hair and breasts). That quite obviously, is not a definition of what a "stri" is but it only gives some of the outward characteristics of a woman, for the purpose of identifying her sex.

12. Then, with regard to the husband, Narada XII-8, which I have already quoted earlier, shows that the husband has to be examined as to his virile, while Yajanvalkya prescribes that the wife has to be examined to find that she is potent. The result is that both the husband and the wife, according to the texts, have to be examined in order to make sure that they are potent.

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13. We next have Vishnu quoted in Viramitrodaya, Sanskar Prakash, (Chowkhamba Sanskrit Series, 1913 edn., p. 551):

कुब्जवामनजात्यन्धक्लीबपङ्गुवार्तरोगिणाम् ।
व्रतचर्या भवेत्तेषा यावज्ज वमनंशतः ॥

The agreed translation of this verse is:

"The crooked, the dwarf, the blind by birth, the impotent, the lame and other diseased persons, as they are not entitled to a share on partition they should remain celibate for the whole of their life".

Viramitrodaya also quotes Sangrahakar (p. 551):—

पङ्ग्वादीनामनंशत्वादसामर्थ्याच्च शास्त्रतः ।
नियतं नैष्ठिकत्वं स्यात्कर्मस्वनधिकारतः ॥

The agreed translation of this verse is:

"As the lame and others including impotent persons get no share on partition and as they are also incapable and are not entitled to have sanskars, lifelong celibacy is enjoined on them by the shastras."

Now, it must be remembered that Viramitrodaya is a high authority in the Mitakshara school and was recognised as such by their Lordships of the Privy Council. See *Vedachela Mudaliar* v. *Subramania Mudliar*.(1)

14. We next have Narada XII-19 which I have quoted earlier. That verse emphasizes the fact that the wife is the field and the husband the giver of the seed. It also says that the field should be given to the person who has the seed and that the person who has no seed does not deserve the field. It would follow therefrom that if there is no field there can be no question of marriage, because according to this verse of Narada women are created for the purpose of procreation, and if they cannot procreate, they cannot be wives.

15. We next have Manu VIII-226:—

पाणिग्रहणिका मन्त्रा कन्यास्वेव प्रतिष्ठिताः ।
नाकन्यासु क्वचिन्नृणां लुप्तधर्मक्रियाहि ताः ॥

The agreed translation of this is:

"Nuptial texts are meant only for "kanyas" and not for those who are not kanyas (अकन्या) because they are excluded from religious ceremonies."

Medhatithi in his commentary explains what is "luptakriya."

लुप्तक्रियाः—यासाँ धर्मेऽग्निहोत्रादावपत्योत्पादनविधौ चाधिकारो नास्त्यतस्ता न विवाह्याः ।

(1) (1921) L. R. 48 I. A. 349, 361, s. c. 24 Bom. L. R. 649.

An agreed translation of which is:

"Those who are not entitled to help in the performance of agnihotra and other rites or in the begetting of children are not fit to be married."

and further says,

न कस्यांचिद्वेदशाखायां मनुष्याणामकन्याविषयो विवाहः श्रुतः ।

"In no vedic texts is marriage with "akanya" found to be mentioned." Sarvadnya Narayan says, नाकन्यासु क्लीबेषु. It may be translated as, "Akanya means an impotent woman." Viramitrodaya in Sanskar Prakash after citing Manu says:

इत्यक्षतयोनीनामेव कन्याशब्दाभिधेयानां मंत्रसंस्कारमाह ।

An agreed translation of which is:

"Mantras for the sacrament can only apply to kanyas, by which is meant girls who are virgo intacta (whose yoni (योनि) is uncut)." Kulluka in his commentary points out that marriage with a virgo intacta is धर्म्य (religious) but marriage with a girl who is not a virgo intacta is not forbidden although it may be अधर्म्य (not approved by religion). But the emphasis of Viramitrodaya obviously is not on whether the "yoni" (genital organ) is cut as on the fact that the woman must possess a "yoni", whether cut or uncut, and if she does not possess one, she cannot be considered to be a "kanya" and cannot be married.

16. We next have the following passage in the Smritimuktafala which quotes Chandrika:—

मत्तोन्मत्तजडक्लीबपतितानां द्विजन्मनाम् ।
नोद्वाहो नैव संस्कारो नाशौचं नोदकक्रिया ॥
रंभाविवाहः कर्तव्यस्तदलाभेऽर्कशाखया ।
विवाहं मनुजाः कुर्युरित्येतन्मनुरब्रवीत् ॥

An agreed translation of which is:

"Such of the twiceborn persons as are intoxicated, insane, idiot, impotent or fallen; for them there is no marriage, no sanskara, no impurity, no libations; they may be married to a plantain tree or in its absence to the branch of a sun plant. This is what Manu has said."

17. Then again in Grihya and Dharma Sutras it is prescribed that the wife should be a "Nagnika" नग्निका . See Vaik. VI-12; Hir. I-19-2; Gobhila III 4-6; Manawa I-7-8; Vashishtha Dharma Sutra XVII-17; Gautama Dharma Sutra XVIII-23.

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18. In his commentary on the Hir. 1-19 Matridatta says:—

वस्त्रविक्षेपणार्हा न ग्नका मैथुनार्हेत्यर्थः ।

"Nagnika is a girl fit to throw away her clothes, meaning thereby that she is fit for co-habitation." The Grihya and Dharma Sutras were written probably in the period 600-300 B.C. The word "*nagnika*" was differently interpreted when child marriages came into vogue in later periods; but there is no doubt that at the time of the Grihya and Dharma Sutras grown up girls were married and indeed the Grihya Sutras provide for a rite of co-habitation on the fourth day after marriage. (See Sacred Books of the East, Vol. XXX, p. 301, note (*t*), where all the references are collected.) Thus the requirement that the girl should be a "*nagnika*" also involves that she should be fit for co-habitation.

19. But it is urged that the Mimansa rule of interpretation is that if there is a known (दृष्ट)reason for a thing prohibited, the texts should be considered as only recommendatory, while if there is an unseen (अदृष्ट)reason for a thing prohibited the texts should be considered obligatory. It is urged that all the texts cited above are recommendatory only, because obviously the reason of it can be easily seen. That may have been so if the texts stood by themselves; but as I will proceed to point out there are numerous other texts which put it beyond doubt that these texts which I have already quoted must be treated as mandatory and not recommendatory, so far as marriage of an impotent person is concerned.

20. Turning now to such texts, we first have Narda XII-97:

नष्टे मृते प्रव्रजिते क्लीबे च पतिते पतौ।

पञ्चस्वापत्सु नारीणां पतिरन्यो विधीयते ॥

In the Sacred Books of the East, Vol. XXXIII, Ch. XII, this is translated as follows (p. 184):—

"When her husband is lost or dead, when he has become a religious ascetic, when he is impotent, and when he has been expelled from caste: these are the five cases of legal necessity, in which a woman may be justified in taking another husband."

It is apparent from this text that the first marriage is null and void; otherwise the woman could not marry a second husband, as polyandry was not allowed in Hindu law.

21. We next have Katyayana quoted in Viramitrodaya, Sanskar Prakash, p. 759:—

उन्मत्तः पतितः कुष्ठी तथा षण्ढः सगोत्रजः ।
चक्षुःश्रोत्रविहीनश्च तथापस्मारदूषितः ॥
वरदोषाः स्मृताह्येते कन्यादोषाः प्रकीर्तिताः ।
प्राक् पश्चाद्वा समुत्पन्ना दानं तत्र निवर्तयेत् ॥

The agreed translation of this is:—

"A lunatic, one guilty of grave sins, a leper, an impotent, a *sagotra,* one bereft of eye-sight and hearing, or epileptic: these defects are to be avoided both in the bride and the bridegroom, whether these defects arise prior or subsequent to the marriage, the gift of the daughter shall be nullified."

22. Smritichandrika, p. 221, quotes Katyayana, as saying:—

स तु यद्यन्यजातीयः पतितः क्लीब एव वा ।
विकर्मा वा सगोत्रो वा दासो दीर्घामयोऽपि वा ।
ऊढापि देया साऽन्यस्मै सप्रावरणभूषणा ।

The agreed translation of this verse is:

"If a bridegroom belongs to another caste, or has fallen, or is impotent, or guilty of foul acts, or belongs to the same *gotra,* is a slave, or suffers from a disease for a long time, the bride even though given away in marriage to him should be given in marriage to another with clothes and ornaments." This text again shows that the first marriage is null and void.

23. We next have Vasishtha quoted in Madana Parijata at p. 153:—

कुलशीलविहीनस्य षण्ढादिपतितस्यच ।
अपस्मारिविधर्मस्य रोगिणां वेशधारिणाम् ।
दत्तामपि हरेत्कन्यां स्वगोत्रोढां तथैव च ॥

The agreed translation is:

"If a girl is married to one who is of a bad family and bad character or who is impotent, or fallen or who is epileptic, or belongs to another religion, or who is diseased and pretends to be normal, or who is one belonging to the same *gotra,* such a girl should be taken back from the bridegroom."

24. Madana Parijata also quotes Katyayana:

वरदोषमनाख्याय पाणिं गृह्णाति यो नरः ।
याचनंच प्रकुर्वीत तद्दानं नाप्नुयात्तुसः ।
कन्यादोषेऽप्येवमेव दाता दण्ड्योवरस्तथा ॥

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which is translated by Gharpure as follows (p. 186):

"Where a man accepts a hand without disclosing defects in the bridegroom or makes a request he shall not obtain what is given. In regard to the girl also this is the rule. The giver shall be punished; also the bridegroom."

25. We next have Manu IX-73:—

यस्तुदोषवतीं कन्यामनाख्यायोपपादयेत् ।
तस्य तद्वितथं कुर्यात् कन्यादातुर्दुरात्मनः ।

It is translated in the Sacred Books of the East, Vol. XXV, as follows (p. 340):—

"If anybody gives away a maiden possessing blemishes without disclosing them, (the bridegroom) may annul that (contract) with the evil-minded giver."

26. We next have Kautilya, Chapter XV:—

विवाहानांतु त्रयाणां पूर्वेषां वर्णानां पाणिग्रहणात्सिद्धमुपावर्तनम् । शूद्राणां च प्रकर्मणः वृत्तपाणिग्रहणयोरपि दोषमौपशायिकं दृष्ट्वा सिद्धमुपावर्तनम् । न त्वेवाभिप्रजातयोः ।

The agreed translation of which is:

"In the case of marriages of the first three castes there can be an annulment up to the time that the marriage is completed (i.e. up to *Saptapadi*); in the case of shudras the annulment can be made even up to the time of consummation of marriage. In the case of all four castes nullity can be granted even after marriage if serious defects connected with bedworthiness (औपशायिका दोषाः) are noticed, but not if children are born of the union.

Now (औपशायिका दोषाः) are the defects with regard to bedworthiness and must of necessity include impotence, which makes cohabitation absolutely impossible as in the present case.

Lastly, we have the commentary of Viramitrodaya on Yajnavalkya I-66 in which Viramitrodaya quotes Narada:—

गूढयित्वात्मनो दोषान् विन्दन्नत्ययमर्हति ।
वरस्य दत्तनाशश्च भवेत् स्त्री च निवर्तते ॥

It is translated by Gharpure as follows (p. 186):—

"By concealing one's own defects he who secures (a bride), double shall be the punishment for such a bridegroom, the gift shall be rescinded, and the woman returned."

This verse of Narada is also quoted in Dipakalika of Shulapani who is accepted as a great authority in Bengal.

28. On a review of all these texts, it seems to be beyond doubt that the marriage of an impotent, whether a male or a female, is absolutely null and void under Hindu law.

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29. But it is urged that marriage under Hindu law is a sacrament only and not a contract; and, therefore, once the *saptapadi* has been performed the union cannot be dissolved. I will, therefore, proceed to consider how far this submission is wellfounded. Manu II-67 states:—

वैवाहिको विधिः स्त्रीणां संस्कारो वैदिकःस्मृतः ।

It is translated in the Sacred Books of the East, Vol. XXV, (p. 42), as "The nuptial ceremony is stated to be the Vedic Sacrament संस्कार for women." There is no doubt that marriage is a *sanskar* and indeed it is the only *sanskar* prescribed for women under Hindu law; but it does not follow therefrom that marriage is not also a contract. An essential part of the ceremony of marriage is कन्यादान (the gift of the bride). Under Hindu law there are six elements of a valid gift.
According to Apararka:

दाता प्रतिग्रहीता च श्रद्धादेवं च धर्मयुक्
देशकालौच दानानां अङ्गान्येतानि षड्विदुः ॥

The agreed translation of which is:—

"The giver, the acceptor, faith, presence of some divine element to give solemnity to the transaction, and the mention of time and place. These are six elements of a gift."

In the gift of a bride the bride's father is the giver (*data*) and the bridegroom is the acceptor (*pratigrahita*), faith is the desire for eternal brahmaloka, presence of divine elements is of the three witnesses, the deities, fire, and the officiating priest, and the time and place are mentioned in the *sankalpa* of the marriage. "Kanyadana" therefore fulfills all the six requirements of "gift" under Hindu law. Moreover, the formula of "Kanyadana" recites the *gotra* (गोत्रोच्चार) of three ancestors on both sides. Sanskar Kaustubha points out that this is a common conveyancing formula for all gifts under Hindu law.

30. Then again Manu V. 151 says: प्रदानं स्वाम्य कारणम् (The gift of the bride is the cause of the husband's dominion over her.) and in Chapter IX-88 after describing the qualities of a husband Manu prescribes that the bride should be given to him (तस्मैकन्यां दद्य which also shows that there is a gift of the bride.

31. It is clear from all these texts that marriage even under Hindu law is a gift and to that extent in any event it is a contract; and that gift can be rescinded as can be seen from the texts in relation to the nullity of marriage.

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32. Text writers, ancient and modern, appear also to have taken the view, generally speaking, that a Hindu marriage is not only a sacrament but is also a contract. In *Purshotamdas Tribhovandas* v. *Purshotamdas Mangaldas*,[1] Candy J. says: "Marriage of Hindu children is a contract made by their parents;" and the authority of West and Buhler is cited for this proposition, although I have been unable to lay my hands on this edition of West and Buhler. Mayne in his earlier editions says:

"Hindu marriage is the performance of religious duty, not a contract";

but this view was not shared by the learned author who edited the tenth edition, who says:

"...While marriage is according to Hindu law a sacrament, it is also a civil contract, which takes the form of a gift in the Brahma, a sale in the Asura, and an agreement in the Gandharva".

(See pp. 143-144).

In the eleventh edition which is edited by Chandrashekhar Iyer the same passage is repeated. It may be mentioned that in the Asura form of marriage the bride is given for consideration while in the Brahma form it is a voluntary gift; so that in the Asura form it may be taken to be a sale. Collister J. in his judgment in *Bhagwati Saran Singh* v. *Parmeshwari Nandan Singh*[2] quotes the following passage (p. 581):

"In Macnaghten's Hindu law, page 57, the learned author says: 'Marriage among the Hindus is not merely a civil contract, but a sacrament, forming the last of the ceremonies prescribed to the three regenerate classes and the only one for *sudras*.'

In Strange's Hindu law at page 44 there is the following passage: 'The essence of the rite (of marriage) consists in the consent of the parties...that is, of the man on the one hand, and, on the other, of the father or whoever else gives away the bride.'

In Vyavastha Chandrika, volume II, page 432 it is said 'Marriage amongst us Hindus, though essentially a religious sacrament (being the last of the initiatory rites prescribed for men of the regenerate classes, and the only one for women and sudras) partakes also of the nature of a civil contract."

33. Coming next to the decisions of the Indian Courts, in *Anjona Dasi* v. *Pralhad Chandra Ghose*,[3] which was a suit for a declaration of nullity of marriage, Glover J. held that the Court had no power to grant a decree for nullity while Mitter J. took a contrary view. The learned Judge observes that (p. 248):

[1] (1896) 21 Bom. 23, 30.
[2] [1942] All. 518.
[3] (1870) 6 Beng. L. R. 243.

"...The institution of marriage among the Hindus is not only a religious sacrament, but it is also a civil contract, and important civil rights arise from it quite independent of any right of property."

The case was then referred to a third Judge, Norman J., who agreed with Mitter J. In the course of his judgment the learned Judge observed (p. 253):

"Suits relating to marriage deal with that which, in the eyes of the law, must be treated as a civil contract, and with civil rights arising out of that contract."

34. We next have Sankaran Nair J. (as he then was) in *Muthusami Mudaliar* v. *Masilamani*[1] where he observes (p. 355):

"...A marriage whatever else it is, i. e., a sacrament, an institution, is undoubtedly a contract entered into for consideration with correlative rights and duties."

I am, therefore, of opinion that there is no warrant for the proposition that a Hindu marriage is a sacrament only. It is also a civil contract.

35. But assuming that a Hindu marriage is a sacrament only, i.e., a *"sanskara"*, there is authority for the proposition that an impotent person cannot perform the *"sanskara"*. Manu II-67 which I have already cited points out that this is a Vedic *sanskara*. In the performance of this *sanskara* it is essential to offer oblations to holy fire and some people do not have under the Hindu law the capacity to do so. Manu IV-205-6 is translated in the Sacred Books of the East, Vol. XXV, as follows (p. 161):—

"A Brahmana must never eat (a dinner given) at a sacrifice that is offered by one who is not a Srotriya, by one who sacrifices for a multitude of men, by a woman, or by a eunuch.

When these persons offer sacrificial viands in the fire, it is unlucky for holy (men) and it displeases the gods; let him therefore avoid it."

These verses show that an impotent person cannot offer oblations to fire as it displeases the deities. Katyayana in Shrauta Sutra I-4-5 says:

अङ्गहीनाश्रोत्रियषण्ढशूद्रवर्जम्।

which may be translated as

"Those who are deficient in limb or are not learned in vedas or are impotent or sudras are to be excluded from vedic rites."

Viramitrodaya in dealing with the Sanskara of Jata Karma observes:—

अनेन जातकर्मवदन्येऽपि संस्काराः क्लीबस्य नभवन्तीति गम्यते।

[1] (1909) 33 Mad. 342.

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which may be translated as "It appears from this that an impotent person cannot perform any sanskar as he cannot perform jatkarma." The commentary of Medhatithi on Manu VIII-226 which I have cited above also shows that impotent females (अकन्या) cannot perform the *sanskara.* If, therefore, an impotent according to these texts, is unable to perform a *sanskara,* the fact that a marriage is a *sanskara* cannot stand in the way of a declaration that the attempted marriage is a nullity.

36. But quite apart from direct texts prohibiting the performance of marriage ceremonies by impotent persons, it seems to me that even if a Hindu marriage was a mere sacrament, any marriage under any system of law postulates that the parties who go through the ceremony of marriage have the physical capacity to get married. To take only an extreme case, if a Hindu male draped in a saree or a frock got married to another male, no system of law can conceivably uphold such a marriage. Marriage postulates physical capacity in both the partners, for one of the essential purposes of marriage under any system of law is co-habitation. This is emphasized in the ceremonies of marriage under Hindu law. In the Ashvalayana Grihyasutra in the mantras immediately preceding "Laja Hom" the bridegroom says to the bride amongst other things प्रजा प्रजनयावहै i.e. "Let us beget children" and in the *saptapadi* the fifth step is for offspring, viz. प्रजाभ्यः पंचपदी

37. Manu IX-8 says:

जायायास्तद्धि जायात्वं यदस्यां जायते पुनः।

which is translated in the Sacred Books of the East, Vol. XXV (p. 329):

> "...for that is the wifehood of a wife (jaya) that he is born (jaya) again by her."

Manu IX-28 describes the purpose of marriage as:

अपत्यं धर्मकार्याणि शुश्रूषा रतिरुत्तमा।

which is translated as (p. 332):

> "Offspring, (the due performance of) religious rites, faithful service, and highest conjugal happiness..."

It is clear, therefore, that in order that two persons should be capable of getting married they must have the physical capacity at least to cohabit if not procreate children, and indeed in my opinion Manu VIII-226 which prescribes that an "akanya" cannot get married clearly lays down that an impotent female

cannot get married at all. This verse of Manu would be wide enough to include the illustration that I took of a male draped in female garb getting married to another male.

38. I will next deal very shortly with the decisions of the Indian High Courts to which I have made reference earlier. *Bhagwati Saran Singh* v. *Parmeshwari Nandan Singh*,[1] was a case of partition, and the validity of marriage with a lunatic husband had to be considered. The wife of this lunatic all throughout had been recognised as the legally wedded wife (see p. 591 of the judgment of Collister J.). At p. 590 Collister J. says:

"There is no actual prohibition of such a marriage in the ancient text-books, and, having regard to the various authorities which I have mentioned, I am of opinion that the marriage of a Hindu lunatic, though improper and immoral and discouraged by Hindu law, is not invalid if duly solemnized. Whatever injunction against such a marriage may be read into the ancient commentaries, it would appear to be of a directory rather than of a mandatory character."

With very great respect to the learned Judge, the learned Judge appears to me to have come to the conclusion that the texts were of a directory character because various texts which I have cited in my judgment were not brought to the notice of the learned Judge at all; and if they had been, I venture to think, with respect to the learned Judge, that he may have come to a contrary conclusion. The learned Judge appears also to have been impressed by the opinion expressed by Mayne in his earlier edition, although, as I have pointed out in my judgment, the authorities that Mayne cites for that opinion do not bear out that opinion.

39. Coming next to the case of *Amirthammal* v. *Vallimayil Ammal*[2] a Full Bench of the Madras High Court held that a congenital idiot has the status of a co-parcener notwithstanding the fact that he is excluded from enjoyment of a share. Leech C. J. deals with the marriage of a congenital idiot at pp. 825-827 of the report and the learned Judge accepts the view which was taken by Mayne in his earlier editions. Here again, with very great respect to the Full Bench, it is unfortunate that the texts that I have referred to were not cited before them. Somaiyya J. who also delivered a judgment only considered the question whether a disqualified person could be a co-parcener and not the question as to whether the marriage of a congenital idiot was null and void. With very great respect

(1) [1942] All. 518. (2) [1942] Mad. 807, F. B.

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to the Full Bench I am unable to agree with the decision in so far as it holds that a congenital idiot can be lawfully married. It may be that if he has children born of the marriage they may have a right on a partition, but that is wholly a different matter.

40. Since both these High Courts place great reliance on the opinion of Mayne in the earlier editions, it is pertinent to point out that John D. Mayne was himself conscious of the handicap from which he suffered. In the preface to his first edition he says:

"I cannot conclude without expressing my painful consciousness of the disadvantages under which I have laboured from my ignorance of Sanskrit."

Therefore, high as is the authority of John D. Mayne in Hindu law, his opinion sometimes suffers from the handicap that he did not have all the Sanskrit texts presented to him. Indeed many of the texts that I have cited have not been translated at all and are not available in any language other than Sanskrit.

41. The case of *Rattan Moni Debi* v. *Nagendra Narain Sing*[1] was decided by Edgeley J. who held that a wife whose husband was impotent was entitled to a decree for nullity of marriage. The learned Judge after quoting Manu IX-203 pointed out that the system of "*niyoga*" was absolute and that fact had therefore an important bearing on the question whether nullity should be granted, and indeed he granted nullity of marriage on that ground. While I respectfully agree with the decision, the decision would be reinforced by the various texts that I have cited in my judgment.

42. I have, therefore, come to the conclusion that since the defendant was at the time of her marriage, and still is, impotent and incapable of consummating the marriage, her marriage with the plaintiff was null and void.

43. However, it is urged that the doctrine of *factum valet* should be applied. Now, that doctrine provides that where there is a violation of any rules which regulate mere matters of form, if the act is performed, it shall be deemed to be valid. That doctrine concerns itself with rules which are of a recommendatory nature or directory in their character or are mere matter of form. It has no application in a case where, as in the present one, the parties to the marriage did not have the capacity to marry. That doctrine cannot be successfully invoked by the defendant.

(1) [1945] 1 Cal. 407.

44. I may add that if I had taken the view that the plaintiff was not entitled to a declaration of nullity, I would have had no hesitation in granting him a decree for divorce under the provisions of the Bombay Hindu Divorce Act, on the ground that the defendant was at the time of her marriage and still is impotent.

Defendant has not chosen to lead any evidence to show that her impotency is curable. This issue, therefore, does not arise.

The plaintiff will be entitled to a decree in terms of prayer (*a*). Plaintiff to pay the defendant's costs of the suit. Two counsel certified.

45. Before I part with this case I would like to record my deep appreciation of the very valuable assistance I have received in this case from counsel on both sides, and particularly from Mr. Dave, who has brought to bear upon this question his great erudition as a sanskrit scholar.

Attorneys for plaintiff: *Mulla & Mulla.*

Attorneys for defendant: *Shah & Co.*

Suit decreed.
K. B. S.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

ABDULLABHAI ABDUL KADER (APPLICANT) *v.* THE COMMISSIONER OF INCOME TAX, BOMBAY CITY (RESPONDENT).*

1952
Mar. 25

Indian Income Tax Act (XI of 1922), ss. 42 and 43—Non-resident having business connection in taxable territories in years of account—Assessee appointed agent of non-resident under s. 43 for years of account—Orders of such appointment passed after non-resident's death—Legality of such orders—Expression "business connection in taxable territories" in s. 42: meaning of—Whether connection must be permanent and exclusive—Connection must not be of casual character but must have some continuity in it.

A non-resident had business connection with the assessee in the taxable territories in the years of account and the assessee was appointed the agent of the non-resident for those years under s. 43 of the Indian Income-tax Act, 1922. But the orders appointing the assessee such agent were passed after the death of the non-resident. On the question whether the assessee could be so appointed agent of the non-resident after the latter's death,

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* Income-tax Reference No. 30 of 1949.