APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Sankaran-Nair.

1909. March 30, 31. April 1, 7, 21.

S. AUTHIKESAVULU CHETTY (PLAINTIFF), APPELLANT,

v.

S. RAMANUJAM CHETTY AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Succession, woman's estate—Form of marriage, proof of—Brahma and Asura marriages, essentials of.

A married woman of the Kavarai caste (Sudra) having died issueless, the question arose between the husband and the parents of the deceased as to who was entitled to succeed to her property. The evidence showed that at the marriage of the deceased woman, the Vivaha homam and the saptha-pathi were not performed and it was argued for the parents, that in the absence of these ceremonies the marriage was not in the Brahma but the Asura form, and that the parents and not the husband were entitled to succeed to the property. The evidence also showed that in that community it was not customary to perform these ceremonies. It was also proved that the jewels given to the bride were given as presents to her, and not as bride-price, and that the father when giving his daughter decked with jewels, pronounced the sloka, appropriate to the Brahma and Daive forms of marriage:

Held, that, according to Hindu Law, it must be presumed in the absence of evidence to the contrary that a marriage was in the Brahma form. Such a presumption cannot be made when it is shown that a certain community have till recently been following the Asura form of marriage, though in this case the Court will not presume that the marriage was in the 'Asura form.

The 'Asura' form of marriage is not approved even for the 'Sudra classes.

The distinctive mark of the Asura form is the payment of money for the bride, as the absence of such payment is of the approved forms.

The offerings and ceremonies necessary to constitute a valid marriage are the same in the Brahma and the three other approved forms and in the Asura form:

Held further, the non-performance of the *homam* and *sapthapathi* may thus be relied upon to show there was no valid marriage where they form, with or without others, a criterion of the intention to enter into the contract of marriage, but if cannot be relied upon to prove that the marriage was in any particular form.

The customary payment of a trifling sum of moneyknown as Payidimudupu cannot be regarded as bride-price:

Held, on the facts stated above, that this was a Brahma marriage and therefore that the husband was the heir of his wife.

* Original Side Appeal No. 34 of 1908.

ORIGINAL SIDE Appeal from the judgment of Boddam, J., dated the 13th day of February 1908, in Civil Suit No. 177 of 1906.

K. Narayana Rao and *P. Doraiswami Ayyangar* for appellant.

P. R. Sundara Ayyar for first respondent.

L. A. Govindaraghava Ayyar and *C. P. Ramaswami Ayyar* for respondents.

JUDGMENT.—The suit is brought by the plaintiff, appellant, to recover the stridhanam properties left by his wife who died without any issue. They are alleged to have been given to her at the time of marriage before the nuptial fire and during the bridal procession. The plaintiff claims to be the heir as the marriage was in the 'Brahma' form. The first defendant the father, and the second defendant the mother of the deceased, contend that the marriage was in the 'Asura' form and that, therefore, they are the heirs. Besides denying the right of the plaintiff to recover any properties in their possession they advance a counterclaim to recover some jewels of the deceased in the possession of the plaintiff The learned Judge has held that the 'marriage' was in the 'Asura' form and dismissed the suit. This is an appeal from that decision. It is not disputed that if the marriage was in the 'Brahma' form, the plaintiff is the heir, and if it is in the 'Asura' form one of the defendants, and not the plaintiff, would be entitled to the stridhanam left by the deceased.

The important question, therefore, for consideration is whether the plaintiff was married to his deceased wife in the 'Brahma' form. The parties are at issue and the evidence is conflicting as to the ceremonies performed at the plaintiff's marriage.

It is admitted that on 25th August 1904 took place what appears to be the ceremony of betrothal or *vagdanam* called by the witnesses Payidimudupu. On that day some married woman of the caste to which the parties belonged proceeded from the bridegroom's house to the house of the bride carrying certain presents consisting of cocoanuts, betel and nut, garlands, black-beads, saffron, red powder, etc., in a tray. There were also a pagoda and a fanam in it. The arrangement as to expenses and gifts was formally entered into and announced. According to the plaintiff's evidence his father said he was going to give a hundred pagoda worth of jewels, that is, Rs. 350, and the father of the bride, the first defendant, said he was going to give jewels of the value of not less than Rs. 5,000, and he was going to give jewels to the bridegroom also.

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According to the Purohit, defence first witness, the bridegroom's people promised Rs. 300 worth of property and the bride's people promised Rs. 5,000 worth of property. After this the bride's party said, according to the Purohit, we give the girl to you and the bridegroom's people said we take her. Then after certain ceremonies, the black-beads were tied round the bride's neck and all the articles in the tray with the exception of the pagoda and fanam were tied in the girl's waist. As to what was done with the pagoda and the fanam there is direct conflict of evidence. According to the plaintiff's evidence this pagoda and fanam were tied in a piece of cloth smeared over with saffron and with the cocoanut was placed in the waist-cloth of the bride. Some witnesses say it was so tied in the name of Venkateswar, the God of the Tirupati temple, and the pagoda and the fanam were according to custom afterwards sent to the temple. Other witnesses say that nobody cares what becomes of it after it is given to the bride. This is intended to rebut the defence evidence that this is the purchase money, in consideration of which the marriage took place. According to the defendants the pagoda and the fanam were given to the bride's mother, the second defendant. The purohit swears he took them out of the tray and delivered them to the mother himself. According to him "ancients say this money was given as cooly to the mother for suckling." The defendants rely upon this to show that this is really the consideration money paid by the bridegroom for the purchase of the bride, or at any rate, it represents what of old was really the purchase money, and that the marriage must therefore be held to be in the 'Asura' form.

Then, on the 28th August, the marriage ceremonies customary among the class to which the parties belong were performed. As the fact of marriage and its validity in law are admitted, it is not necessary to describe them. There was the gift of the bride decked with jewels admittedly worth more than Rs. 5,000 by the defendants to the plaintiff bridegroom and there was also Panigrahanam. But according to the Purohit and the other defence witnesses, there was no Vivaha homam, and no Saptapathi. It is not contended that the absence of these ceremonies invalidates the marriage, as it is conceded that these are not customary ceremonies among the community to which the parties belong and that they are not therefore performed. But it is contended that,

according to Hindu Law, they are essential in the case of 'Brahma' marriage. According to the plaintiff's evidence homam was performed, but it appears to have been Navagraha homam and not Vivaha homam. We have not been referred to any evidence to show that Sapthapathi formed a part of the marriage ceremony, and we must therefore accept he evidence of the Purohit who is also corroborated by other witnesses that it is not customary among this community to perform Vivaha homam or Sapthapathi and they were not performed in this case. The plaintiff also swears that at the time of the marriage his father told the first defendant that only such of the jewels as the latter intended as a gift to the bride should be on her person and that the rest should be removed to which he replied "not once but thrice" that all the jewels that were then on the person of the bride which are worth much more than Rs. 5,000 except the head ornaments were intended to be given as presents. This is denied by the defendants ; and though the plaintiff is supported by some witnesses, we are not prepared to accept their testimony which has not been believed by the learned Judge.

On behalf of the appellant, plaintiff, it is contended that there is a presumption that a Hindu marriage is not in the Asura form but Brahma, that the evidence in this case shows that there was no 'bride-price' paid ; but that the father gave his daughter to the bridegroom decked with jewels and that the sloka recited at the ceremony also shows that it was a Brahma marriage. On the the other hand, Mr. Sundara Ayyar contends that the Brahma marriage is primarily intended for Brahmans, though, no doubt, the other castes including the Sudras may have adopted it in some instances ; that the Balijas or Kaverais, the castes to which the parties belong, perform their marriages in the Asura form ; that the admitted fact that they still retain the ceremony of a gift of a pagoda and a fanam shows that the Asura form has not been discarded by them ; and that the omission of Vivaha homam and Sapthapathi shows that even if the marriage is not Asura, it cannot be Brahma.

There is no doubt that, according to Hindu Law, the presumption is in favour of Brahma marriage. The Asura marriage is not approved and is considered a base form of marriage. Though it is allowed in the case of Sudras, Manu says it ought not to be practised even by them. (Manu III, 51 and IX, 98.) The

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Courts have accordingly held that, in the absence of any proof to the contrary, the marriage must be presumed to be in one of the approved forms (see *Gojabai* v. *Shrimant Shahaji Rao Maaloji Raje Bhosle*(1), *Jagannath Prasad Gupta* v. *Kunjit Singh*(2), *Thayammal* v. *Annamalai Mudali*(3)); and as the other approved forms are unusual, and it is not stated that the marriage is in one of those forms, the presumption is that the marriage is in the Brahma form. But it is clear that the Asura form till recently, at any rate, was very common in Southern India (see I 'Strange's Hindu Law,' page 43), and Leon Sorg states that the marriage by purchase is the common form among the Tamils and when money is paid to the father of the bride the formula is repeated, "The money is for you, the girl is for me." He also states that the Kaverais, to which caste the parties belong, marry according to the Asura form.

This undoubtedly shows that the presumption of Hindu Law must be applied only with some caution to marriages among these castes. It is not contended that these castes, even if Sudras which is not admitted are not entitled to marry in the Brahma form. The words in Manu's text "to a man learned in the Veda" (Manu III, 27), a qualification which, however, is not found in Yagnavalkya, shows no doubt that the marriage was originally intended according to Manu for the Brahmans or the twice-born classes. But the other classes must have adopted it in the days of the commentators, as we find Kullaka Bhatta, Sarvagna Narayana Raghavananda and also others explain this to mean a person who follows the "achara," that is the usage of his class. It cannot be denied that any class or person may marry in the Brahma form; and we cannot ignore the tendency shown by the lower castes to imitate the higher castes in their ceremonies and other observances. When therefore it is shown that a certain community have been following till recently the Asura form of marriage, it may be that the Court may not be justified in drawing any presumption that they have abandoned that form; but we can neither draw any presumption, for these reasons, that the marriage is in the 'Asura form.' The case therefore has to be decided upon the evidence

(1) (1893) I L.R., 17 Bom., p. 114 at page 117.
(2) (1898) I.L.R., 25 Calc., p 354 at page 365.
(3) (1896) I.L.R., 19 Mad., 35.

given by the parties without the aid of any presumption in favour of either side.

The distinctive mark of the Asura marriage is the payment of money for the bride. It is certain that the payment of a pagoda and 2½ annas was not intended as any consideration in this case where the bride's father spent thousands of rupees himself and gave presents of considerable value to the bride and the bridegroom. The payment was not made to the father the owner, in the eye of the Hindu Law, of his daughter, for transferring his rights over her but it was made to the mother. The caste tradition according to the Purohit and the defence evidence is, that this amount, fixed by the caste, is paid as 'Palu Kuli', milk cooly; this does not support the theory that it is bride-price. It looks more like a compliment paid to the mother. Even where the father receives from the bridegroom, a cow and a bull and two pairs, it is treated as a marriage—Arsha—in an approved form, as it is not given as the price of the bride.

It will be observed the son of a wife wedded in the first three forms of marriage, the Brahma, Daiva and Prajapatya, liberates from sin, ten, seven and six ancestors and decendants respectively. The son of a wife married according to arsha rites liberates only three. It is a distinctive mark of these three forms of marriage that nothing is received by the bride's father; and according to Hindu Law, the Brahma form is honourably distinguished as the bride's father gives her decked her with jewels or honouring her by presents of jewels. According to some of the commentators of Manu, the father gives presents of jewels also to the bridegroom. In this case it is in fact admitted and clearly proved by the evidence on both sides that this was done. The Purohit also proves that at the time of the Panigrahanam he recited the sloka which implies that the desire to attain heaven prompted the gift of the virgin with wealth and decked with jewels कन्यां कनकसंपन्नां सर्वाभरणभूषितां दास्यामि विष्णवे तुभ्यं ब्रह्मलोकजिगीषया, This is peculiarly appropriate to the Brahma and Daiva forms of marriage. It is repugnant to an Asura marriage which is condemned and not carried out to attain heaven, and where the father does not give wealth or jewels but the bridegroom pays the 'bride-price.'

The next contention is that even if it is not proved to be Asura,' the marriage cannot be held to be Brahma on account of

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the omission of Vivaha homam, the nuptial fire and the Sapthapathi. As already stated it is not contended that this omission renders the marriage invalid in law. It is admitted that the formalities and ceremonies customary in the community to constitute the relation of husband and wife have been complied with, and that they constitute a valid marriage, and the same evidence that proves that the ceremonies aforesaid were not performed also proves that so far as this caste is concerned they are unnecessary to indicate the intention of the parties to enter into a valid contract of marriage. Mr. Mayne is of opinion that we have now only Brahma and Asura forms of marriage though he notices a few instances of Gandharva marriage also. Mr. Justice Bannerjee observes in his book on "Marriage and Stridhan" "Of the four approved forms of marriage, the Brahma is the only one that now prevails, and all persons, even Sudras, are at the present day held competent to marry in that from. Of the four base forms, the Asura is the one that is now prevalent, and is, in fact, the most common form of marriage, and Gandarbha marriages also sometimes take place." The marriage in this case is of course not in the Gandharva form and if it is not in the Asura form, if these learned authors are right, it must be a Brahma marriage. Such is also the view of the learned Judges in *Sivarama Casia Pillai* v. *Bagavan Pillay*(1).

Assuming, however, that there are various forms of marriage now prevalent, does the omission of the Vivaha homam and the Sapthapathi show that the marriage in question cannot be in the Brahma or any other approved form. Mr. Sundara Aiyar contends that it is not necessary for him to show that the marriage was in the Asura or in an unapproved form; there may exist others besides the eight forms.

The Hindu Law books, Smritis, describe the eight forms of marriage among Hindus: and the rules of succession are based upon these eight forms of marriage only. The rule of inheritance is based upon the following test of Yagnavalkya :—

"The property of a childless woman married in one of the four forms denominated Brahma, etc., goes to her husband ; but if she leave progeny, it will go to her (daughter's) daughters ; and in other forms of marriage (as the Asura, etc.,) it goes to her father

(1) (1859) Mad. Sud Rep., 44.

(and mother on failure of her own issue)." The other forms of marriage as the Asura are evidently the four unapproved forms described in the earlier part of the Smriti.

Vignaneswara in the Mitakshara enumerates them in this commentary on this sloka—

"Of a woman dying without issue, as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma, Daiva, Arsha, Prajapatya, the property as before described belongs, in the first place, to her husband On failure of him it goes to his nearest Sapindas. But in the other forms of marriage, called Asura, Gandharva, Rakshasa and Paisacha the property of a childless woman goes to her parents". Mitakshara, Chap. II, section XIII.

Thus for purposes of succession to stridhanam property, the Hindu Law recognises only these eight forms of marriage, and when a valid marriage has been proved to have been contracted according to the customary rites, then to decide the question of inheritance we have to determine to which of these eight classes it belongs Can it then be said that there are any ceremonies that are characteristic of the Brahma or approved form as distinguished from the Asura form, so that their presence or absence as a customary formality or ceremony would indicate the class to which it belongs ?

Commentators are divided as to the necessity of the prescribed offerings and wedding ceremonies in the case of Gandharva, Rakshasa and Paisacha marriages, sacred books of the East, Vol. 25 p. 81, footnote to sloka 32. Therefore, apparently they entertain no doubt that there is no difference in the ceremonies as to the other marriages. We have already held that among those classes who recognise *homam* as essential to a valid marriage, its performance is necessary to constitute the relation of husband and wife : even in Gandharva marriage, Sapthapathi follows homam. This also assumes that among the five forms including Brahma and Asura, all the ceremonies have to be performed (*Brindavani* v. *Radhamani*(1)). Mr. Justice Bannerjee in his work "Hindu Law of Marriage and Stridhan," p. 95, states, clearly, "At the present day, whether marriage is celebrated strictly according to the Brahma form, or whether a nuptial gratuity is taken by the

(1) (1889) I.L.R., 12 Mad., 72.

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birde's family, the same rites are observed in all cases" or in other words, there are no distinctive ceremonies to distinguish the Brahma from the Asura form. The non-performance of the Homam and the Sapthapathi may thus be relied upon to show there was no valid marriage where they form, with or without others, the criterion of the intention to enter into the contract of marriage, but it cannot be relied upon to prove that the marriage was in any particular form.

Our conclusion is strongly supported by the judgment of the Bombay High Court in *Moosa Haji Joonas* v. *Haji Abdul Rahim*(2) where it was held that a marriage according to Muhammadan rites was an approved form of marriage under Hindu Law. It was found to be the highest form of union known to Cutchee Memmous who follow the Hindu Law and was free from all that was reprehensible. It was held that it was the quality and not the form of marriage that decides the course of devolution.

We are therefore of opinion that the plaintiff is the heir of his deceased wife.

The next question is what is the value of the property left by the deceased. According to the plaintiff all the jewels which were worn by the deceased on the day of her marriage were her property given to her by the first defendant and their value is given by the plaintiff and his paternal uncle, the second witness. The latter estimates it at about Rs. 15,000. The other witnesses do not give their value. The first defendant admits possession of jewels of the value of Rs. 5,428-9-0, and states, in his evidence, that the other jewels worn by the deceased were either family jewels or borrowed for the occasion. It is not uncommon to borrow jewels to be worn by the bride at the marriage and the first defendant's evidence is supported by the fact that at the Vagdonom ceremony according to the first defendant he promised to give jewels for Rs. 5,000 only and the plaintiff's paternal uncle is only able to say that the first defendant promised to give not less than Rs. 5,000. This renders incredible the plaintiff's evidence that he presented jewels worth nearly Rs. 15,000. We accordingly accept the first defendant's evidence on this point.

We disallow the plaintiff's claim to the gold chain claimed as he has failed to prove that he gave it to the first defendant for repair.

(1) (1906) I.L.R., 30 Bom., 197. (2) (1906) I.L.R., 30 Bom., 197.

As to the defendants' counter-claim, they are not entitled to recover as the heirs of their daughter as the marriage was in the Brahma form, and as to their allegation that they only gave some of the properties for the marriage ceremony and the others were intended to be taken back, it is not explained why they were not taken back before. Any property therefore allowed to remain with the plaintiff must be presumed to have been given to him. We accordingly disallow the counter-claim.

We set aside the decree of the learned Judge and give the plaintiff a decree for the recovery from the defendants of the jewels in schedule V of the first defendant's written statement or their value Rs. 5,428-9-0, with costs in both Courts on the above value of the jewels decreed.

The counter-claim is dismissed with costs in both Courts.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sankaran-Nair.

JANAKISETTY SOORYUDU *alias* SOORAYYA (PLAINTIFF), APPELLANT,

v.

MIRIYALA HANUMAYYA (DEFENDANT), RESPONDENT.*

1908. November 20. December 3. 1909. July 20.

Hindu Law—Stridhanam—Property inherited by maiden daughter, nature of interest taken in—Daughter takes only limited estate.

Inherited property is not *stridhanam*, and the case of a maiden daughter succeeding to the *stridhanam* property of her mother is no exception to this general rule. The maiden daughter so succeeding takes only a limited estate.

The inclusion by Vignaneswara of inherited property in the definition of stridhanam is not in accordance with other authorities and ought not to be accepted as law.

Virasangappa Shetti v. *Rudrappa Shetti*, [(1896) I.L.R., 19 Mad., 110], followed.

Venkatarama Krishna Rau v. *Bhujanga Rau*, [(1896) I.L.R., 19 Mad., 107], not followed.

Narasayya v. *Venkayya*, [(1893) 2 M.L.J., 149], not followed.

SECOND APPEAL against the decree of S. P. Rice, District Judge of Guntur, in Appeal Suit No. 56 of 1905, presented against the

* Second Appeal No. 369 of 1906.