PRIVY COUNCIL

GOPI KRISHNA KASAUDHAN *v.* MUSAMMAT JAGGO AND ANOTHER

*J. C.** 1936 *April*, 28

[On appeal from the High Court at Allahabad]

Hindu law—Marriage—Mitakshara school—Vaishyas—Abandonment of wife—Right of abandoned wife to re-marry—Custom—Marriage in sagai *form—Intermarriage in sub-castes—Validity of marriage of Kasaudhan with Agrahri woman.*

The Shastras do not contain any injunction forbidding marriage between persons belonging to different sub-divisions of the same *Varna* nor is there any general principle which can be invoked in support of such prohibition. A marriage between a Kasaudhan and an Agrahri woman is, therefore, not invalid merely because they belong to different sub-castes.

Where it has been established that by custom the abandonment of a wife by her husband dissolves the marriage tie, the woman abandoned may, during the life of the husband who has abandoned her, contract a valid marriage with another in the *sagai* form.

Inderun Valungypooly Taver v. *Ramasawmy Pandia Talaver* (1), and *Ramamani Ammal* v. *Kulanthai Natchear* (2), referred to.

APPEAL (No. 34 of 1934) from a judgment of the High Court (February 3, 1933) varying, but not on the question here, a decree of the Additional Subordinate Judge of Gorakhpur (December 23, 1929).

Musammat Jaggo, by birth an Agrahri, was married when young to one Baijnath, an Agrahri. On his death, she married in the *sagai* form Baijnath's younger brother Sheonath. Sheonath abandoned her and she then, again in the *sagai* form, contracted a marriage with one Nikku Lal, a Kasaudhan, by whom she had a son Kishan. The plaintiff appellant was admittedly a legitimate son of Nikku Lal and he claimed the entire estate of his deceased father, Nikku Lal, alleging that Musammat Jaggo was a mistress and not the lawful wife of Nikku Lal and that her son Kishan was illegitimate. It was

*Present: Lord BLANESBURGH, Sir SHADI LAL and Sir GEORGE RANKIN.

(1) (1869) 13 Moo. I.A., 141. (2) (1871) 14 Moo. I.A., 346.

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admitted that both Agrahris and Kasaudhans were Vaishyas.

The Subordinate Judge held that there was no instance of a marriage between members of the sub-castes in question, that intermarriage between sub-castes of a primary caste was not prohibited and that the plaintiff, on whom the onus lay, had failed to prove any custom prohibiting marriage between members of the two sub-castes in question, that the Hindu law permitted the re-marriage of an abandoned wife, that a marriage in *sagai* form had been contracted between Musammat Jaggo and Nikku Lal, that this marriage was valid and their son Kishan was legitimate.

These findings were confirmed by the High Court.

1936. *January* 16, 17, 20, 23. *Parikh,* for the appellant: There is no instance of a marriage between these sub-castes. Custom is not proved and the question becomes one of Hindu law.

[SIR SHADI LAL: The onus is on the person who says two persons cannot marry to prove a prohibition by statute, custom or personal law.]

There are concurrent findings of the fact that a marriage in *sagai* form was celebrated. The question is whether that was a lawful marriage. There is no divorce in Hindu law. Abandonment would not allow a woman of a twice-born caste to re-marry while her husband was alive. The case is different among Sudras. The *sagai* marriage is limited to the levirate. Reference was made to "Tribes and Castes of the North-Western Provinces and Oudh" by Crooke, Volume III, page 165 and Volume I, page 33, and to *Ramamani Ammal* v. *Kulanthai Natchear* (1). Customs of one caste or sub-caste cannot be applied to another. Disabilities must be determined with reference to a particular caste. Customs must be construed strictly: *Hurpurshad* v. *Sheo Dyal* (2). The rule in Ghose's Hindu Law (3rd edition), page 837, refers to Sudras. Reference was made

(1) (1871) 14 Moo. I.A., 346. (2) (1876) 3 I.A., 259(285).

to *Sri Ram* v. *Inchi* (1), *Bhola Umar* v. *Kausilla* (2), Mayne's Hindu Law, paragraph 94, and *Natha Nathuram* v. *Mehta Chotalal* (3). Generally castes and sub-castes are endogamous. There is no case in which a marriage of members of two separate castes, either among Sudras or twice-born, has been held valid. The dicta in *Pandaiya Telaver* v. *Puli Telaver* (4) at page 483 of the report is obiter: *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (5) at pages 157-159.

The respondents were not represented.

The judgment of the Judicial Committee was delivered by Sir SHADI LAL:

This appeal raises a question which has an important bearing upon the law of marriage governing the Hindu community. It arises out of a dispute relating to the estate of one Nikku Lal, who died in July, 1923. Nikku Lal was a member of the Vaishya caste of Gorakhpur in the United Provinces of India, and followed the Mitakshara school of the Hindu law.

The plaintiff Gopi Krishna, who is the appellant before their Lordships, is admittedly Nikku Lal's legitimate son; and his right to a moiety of the estate is no longer in dispute. He, however, claims the entire estate on the ground that the defendant, Sri Kishan, is not a legitimate son of Nikku Lal, and, therefore, has no interest in the property left by him.

That Sri Kishan was born of a woman called Jaggo is not disputed, but the question is whether she was, at that time, a lawfully wedded wife of Nikku Lal. It appears that she was originally married to one Baijnath, while she was a minor; and that, after his death, she married his younger brother Sheonath. The second marriage, however, did not prove to be a happy one, as Sheonath had another wife who naturally disliked the advent of a rival. There were consequently quarrels

(1) (1913) 11 A.L.J., 711.
(2) (1932) I.L.R., 55 All., 24.
(3) (1930) I.L.R., 55 Bom., 1.
(4) (1863) 1 Mad. H.C.R., 478(483).
(5) (1869) 13 Moo. I.A., 141 (157—9).

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between the two wives, and the husband, in order to put an end to the trouble, abandoned the second wife.

Thus deserted, Jaggo entered into a matrimonial alliance with Nikku Lal by performing the ceremony of *sagai*. Now *sagai* is an informal ceremony of marriage, and the courts below have concurred in holding, not only that she performed the ceremony of *sagai* with Nikku Lal, but also that it is recognized as a valid ceremony in the case of a re-marriage. This decision is not challenged before their Lordships, but it is urged that the lady could not contract a valid marriage during the continuance of her marriage with Sheonath. It is obvious that she could not marry Nikku Lal if she was still Sheonath's wife. The defendants, however, invoke a custom which recognizes and sanctions the re-marriage of a woman who has been abandoned by her husband. The learned Judges of the High Court have, upon an examination of the evidence, endorsed the conclusion of the trial Judge that Jaggo had been deserted by Sheonath before she married Nikku Lal, and that, by a custom applicable to the parties, such abandonment or desertion of the wife by her husband dissolves the marriage tie and sets her free to contract another marriage. Their Lordships see no reason for departing from the general rule of practice that they will not make a fresh examination of facts for the purpose of disturbing concurrent findings recorded by two courts in India.

Then, if the existence of Sheonath did not invalidate the marriage of Jaggo with Nikku Lal, was it invalid on any other ground? It is contended on behalf of the appellant that, as the parties to the marriage belonged to two different sub-castes of Vaishyas, the man being a Kasaudhan and the woman an Agrahari, they could not, under the Hindu law, enter into a lawful marriage with each other. Their Lordships are not aware of any rule of Hindu law, and certainly none has been cited, which would prevent a marriage between persons belonging to two different divisions of the same caste. Indeed,

there are several decided cases which have upheld such marriages. It is sufficient to refer, in this connection, to two judgments of the Board, *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (1) and *Ramamani Ammal* v. *Kulanthai Natchear* (2).

It is true that both these cases, as well as the judgments of the High Courts which are founded upon them, relate to the Sudra caste; and the argument advanced by the learned counsel for the appellant is that they cannot establish the validity of a marriage between persons belonging to two sub-castes of a twice-born class such as the Vaishyas. There can, however, be no doubt that the texts of the Hindu law do not enunciate any rule prohibiting the union in marriage of persons belonging to different divisions of the same caste, and not a single case has been quoted in which such a marriage has been declared to be invalid.

Their Lordships do not think that the matter requires any elaborate discussion. Put briefly, the position is this. The Shastras dealing with the Hindu law of marriage do not contain any injunction forbidding marriages between persons belonging to different divisions of the same *Varna;* and neither any decided case nor any general principle can be invoked which would warrant such a prohibition. Then, what is it upon which the appellant, on whom the onus rests, can sustain the invalidity of the marriage? It is said that marriages between members of different sub-castes of the same caste do not ordinarily take place, but this does not imply that such a marriage is interdicted and would, if performed, be declared to be invalid. Indeed, there is, at present, a tendency to ignore such distinctions, if they ever existed. There exists no doubt a disinclination to marry outside the sub-caste, inspired probably by a social prejudice; but it cannot be seriously maintained that there is any custom which has acquired the force of law. It is, however, unnecessary to pursue the subject, as in the courts below

(1) (1869) 13 Moo I.A., 141. (2) (1871) 14 Moo. I.A., 346.

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no such custom was set up or proved as would render the marriage invalid.

For these reasons their Lordships hold the marriage to be valid, and they will humbly advise His Majesty that the judgment and the decree pronounced by the High Court should be affirmed and this appeal be dismissed. There will be no order as to costs, as the respondents are not represented before them.

Solicitors for the appellant: *Hy. S. L. Polak & Co.*

The respondents were not represented.

REVISIONAL CRIMINAL

Before Mr. Justice Ganga Nath

1935
September, 6

EMPEROR *v.* MUNSHI RAM AND ANOTHER*

Child Marriage Restraint Act (XIX of 1929), sections 5, 6—What section applicable to the parents performing or conducting child marriage—Question of validity or of consummation of the marriage does not arise.

A marriage between a girl of over 14 years of age and a boy of less than 18 years of age was performed and conducted by their respective fathers. Upon their prosecution under sections 5 and 6 of the Child Marriage Restraint Act, pleas were taken that there was no valid marriage at all as the parties belonged to the same *gotra*, that *gauna* ceremony had not been performed yet, and that the girl not being a "child" as defined in the Act, her father could not be convicted under the Act. *Held*—

(1) That the marriage ceremony having been performed, no question of the validity or the invalidity of the marriage, or of the consummation or absence of consummation thereof, could arise under the Child Marriage Restraint Act; such questions were beyond the scope of that Act.

(2) Section 5 of the Act deals with the persons who perform, conduct or direct any child marriage, and the convictions of the two fathers under that section was valid inasmuch as in the case of Hindu marriages the fathers do perform, conduct and direct the marriage ceremonies. The section is wide enough to cover the cases of the father of the bridegroom and that of the

*Criminal Revision No. 712 of 1935, from an order of I. B. Mundle, Sessions Judge of Saharanpur, dated the 13th of July, 1935.