APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

KHUSHA'LCHA'ND LÁLCHAND, (ORIGINAL PLAINTIFF), APPELLANT, *v.* BA'I MA'NI, (ORIGINAL DEFENDANT), RESPONDENT.*

1886. *September* 15, 16, 20; *December* 2.

Hindu law—Marriage of a girl without her father's consent—Husband and wife—Suit by the father to declare such marriage void—Factum valet.

The plaintiff, a Hindu father, sued for a declaration that the marriage of his daughter, which had been celebrated by his wife without his consent, was null and void. It appeared that the plaintiff had for about eight years voluntarily given up residence with his wife and daughters, and that he had several times been requested by his wife to get their daughter, aged eleven years, married, but had neglected to do so. The plaintiff's wife, accordingly, having procured a suitable husband for their daughter, informed the plaintiff of the intended marriage; but the plaintiff instead of approving the course taken by his wife, filed a suit, and obtained an injunction restraining his wife from celebrating the marriage. The marriage nevertheless was solemnized with due ceremonies. The Court of first instance declared the marriage void. The defendant appealed, and the lower Appellate Court reversed the lower Court's decree. On appeal by the plaintiff to the High Court,

Held, confirming the decree of the lower Appellate Court, that the marriage should be supported, under the circumstances of the case, on the principle of *factum valet*, there being no express authority, in the Hindu law texts, making the consent of the parents and guardians of a girl a condition precedent to the validity of a marriage. The plaintiff having been informed of his wife's intention to marry their daughter, made no *bonâ-fide* attempt to marry her, and, after entirely foregoing his claim to all control over his daughter for many years, merely attempted to assert his right without any regard to her interests, and with the sole object of annoying the mother, from whom he had been long separated with his own consent.

Quære, whether Civil Courts would set aside a marriage if a clear case was established of fraud, by both the parties intermarrying, on the rights of the father as guardian of his daughter for the purposes of marriage.

SECOND appeal from the decision of S. Hammick, District Judge of Surat.

Suit by a Hindu father to have the marriage of his daughter which had been performed without his consent, declared null and void.

This suit was originally filed by the plaintiff against his wife to recover possession of his two minor daughters, Jádav and Mánki, praying, at the same time, for an *interim* injunction

* Second Appeal, No. 96 of 1886.

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restraining his wife from giving Jádav in marriage to one Shivlál. The injunction was duly granted, but the marriage nevertheless was celebrated. The plaintiff accordingly amended his plaint by inserting a prayer that the marriage should be declared null and void. The plaintiff was a Jain, and belonged to the Ládvá Shrimáli Shrávak caste. The defendant, Bái Máni, alleged, among other things, that the plaintiff had ill-treated her and turned her out of his house eight years before the suit; that their daughter, Jádav, having arrived at a marriageable age, the plaintiff was requested to get her betrothed and married, but that he had failed to do so, and had asked her (the defendant) to get the daughter married herself, and that she, accordingly, betrothed Jádav to Shivlál, a respectable man, and had invited the plaintiff to be present on the occasion, but he having declined to do so, she got the marriage celebrated.

The First Class Subordinate Judge of Surat, who tried the suit, allowed the plaintiff's claim by decreeing the custody of Jádav to the plaintiff, and declaring the marriage null and void.

The defendant appealed to the District Judge of Surat, who reversed the decree of the Court of first instance. The following is an extract from his judgment :—

"* * * * It is admitted on all sides that the consent of the father of the bride is a necessary condition of a valid marriage among Hindus. But what is meant by a necessary condition ? It may well mean nothing more than that a bride must not—ought not—to be married without her father's consent. It does not follow that, if she is married without that consent, the marriage is void. Marriage is more than a civil contract ; it is, among Hindus, an act of religion, and it has not, in my opinion, been shown that the religious efficacy of the ceremony depends on the father's consent. But supposing the father's consent to be necessary in the sense that a marriage would, in default of it, be void, I am inclined to the opinion that in this case the father by surrendering the care and maintenance of the girl from her infancy to her mother must, in equity, be held to have surrendered the right to give her in marriage as well, and that he had put it out of his power to assert his authority over her at the last moment. The case of *Bái Ruliyat* (1 Bellasis' Report, 1840-48, p. 43,) is *in point*, although in that case it was proved that the father had deliberately abandoned the daughter, while here he only neglected his duties as a parent. Again, granting the father's right to bestow his daughter in marriage, it is equally his duty to get her married. But we find that Jádav had arrived at the full age when marriage is deemed incumbent, and yet the father had done nothing towards fulfilling that duty ; and if it is the father's duty to get his daughter married, then the

present attempt to annul the marriage must be a violation of his duty and abhorrent to the spirit of Hindu law.

But other considerations lead me to the conclusion that this marriage must be upheld. During the whole course of this case I do not find that any instance has been cited of a marriage once performed according to Hindu rites and ceremonies being annulled, because the father has not given his consent. I think that the Court should hesitate before taking the unprecedented course of declaring such a marriage void. Again, this is not a case in which the Court can by a simple decree restore the persons affected by it to the position in which they stood before the marriage. Supposing that the Court is able to declare the marriage null and void, still no power on earth is able to restore the innocent girl Jádav to the position of a marriageable virgin. It has been asserted that the father would even now be able to find another husband for her; but I believe that no one who knows the Hindu ideas on the subject would rely on such an assertion for an instant. Supposing that Khushál's prayer were to be granted, what, it may be asked, would be the effect on the future life of the girl? It is not too much to say that her happiness would be irretrievably ruined. She would lose the respectable position of a married woman, and would be reduced to the life of an ascetic or something worse. If ever there was a case when the maxim of *factum valet* ought to prevail, this certainly is one * * * * . On the above grounds, I find that the marriage must be upheld, though celebrated without the father's consent. As regards the prohibitory order of the Civil Court, no authority, either of statute law or of decided cases, has been adduced to show that a marriage is void, because performed in spite of the prohibition of a Civil Court."

From this decision the plaintiff preferred an appeal to the High Court.

K. T. Telang (*Shántárám Náráyan* with him) for the appellant:—The main question in the present case is how far a marriage performed, without the consent of the girl's father, is valid. The marriage of Jádav has taken place not only against the will of her father, but also in defiance of the injunction of the Court. The father is primarily entitled to the custody of his children—Mayne's Hindu Law, para. 80. The Hindu law gives a list of persons who can give away a girl in marriage, and among the enumerated persons the father comes first and the mother last of all. The mother's right to give her daughter in marriage arises only in default of the better qualified persons: see *Nundlál* v. *Tápeedás*[1]; West and Bühler's Hindu Law, (3rd ed.), p. 874, note(*f*). The consent of the father, who was alive, was, therefore, necessary to validate the marriage.

(1) 1 Borr., 16.

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Ganpat Sadáshiv Ráv (with *Gokuldás Kahándás*) for the respondent:—Under the Hindu law, marriage is not a contract. It is a *samskára* and one of the sixteen ceremonies, and is intended for the purification of the soul. Giving a girl in marriage is rather a duty imposed upon the persons enumerated under the Hindu law, than a right. Marriage is a purely religious act. Being a religious act, marriage does not require, as an essential, the consent of the parties to marriage, or that of their parents or guardians—Mayne's Hindu Law, para. 84. If consent was the essence of marriage, the marriage of lunatics would be invalid under the Hindu law, but it is not so. A marriage actually performed, though without the consent of the person whose consent ought to have been previously obtained, is valid—Strange's Hindu Law, Vol. I, p. 34; West and Bühler, (3rd ed.), 873, footnote (*f*); Steele's Hindu Law and Custom, p. 2 (new ed.); Maine's Institutes, Ch. II, pl. 67. Marriage is an indissoluble act. The marriageable age of a girl is fixed at six or eight years of age, at which age the girl not being able to choose for herself, the duty falls on the father primarily. The texts of Nárada cast the duty on the father and others qualified to give a girl in marriage. Here the father had abandoned his wife and children, and notwithstanding that he had been requested to obtain a husband for his daughter, had failed to do so. A father not getting his daughter married, who has reached her marriageable age, is reprehensible: see Manu, Ch. IX, sec. 4, pls. 90 and 91. The case of *Nundlál* v. *Túpeedás*[1], cited for the appellant has no application, as it holds only that a marriage contract is not binding without the consent of the father. If the father neglects his duty, the girl can herself choose a husband. The reason why the mother comes last on the list, is her dependent position. The Madras High Court has taken this view: *Namasevayam Pillay* v. *Annammai Ummal*[2]. A marriage duly celebrated cannot be annulled—*Modhoosoodhun Mookerji* v. *Jadub Chunder*[3]; *Brindabun Chandra* v. *Chundra Kurmokar*[4]; Steele's Hindu Law and Custom, p. 30 (new ed.); Nirnayasindhu, Ch. VIII, pl. 227; Colebrooke's Digest, Bk. IV, Ch. IV, sec. 3, and pls. 149 and 175; Tágore Law Lectures by Bánnerjee,

(1) 1 Borr., 16.
(2) 4 Mad. H. C. Rep., 341.
(3) 3 Calc. W. R., Civ. Rul., 194.
(4) I. L. R., 12 Calc., 140.

p. 53; Mandlik's Vyaváhar Mayukha, p. 409; Norton's Leading Cases, Vol. I, p. 1.

Shántárám Náráyan in reply:—In order to constitute a marriage according to one of the approved forms, there must be the giving of the girl, which is the first and the indispensable act, and essential to a valid marriage. The right of other persons to give a girl in marriage arises when the father is dead. Marriage and adoption require giving and receiving. Marriage is both a contract and a sacrament. It is true that there is no consent on the part of the parties, but there is the preliminary *válkdán* or giving of word, which constitutes a contract. *Slokas* 11 of Chapter III of Manu are devoted to private morals, and the prohibited degrees are therein given. *Sloka* 20 of the chapter gives the forms of marriage. Four of these forms show that giving and receiving are matters of necessity. The marriage of Jádav in the present case was by one of the approved forms, she having been married by the Brahma form, which, like the Daiva form, makes the giving of the girl a necessity. The Asura form requires the taking something from the bridegroom and giving away the daughter. Brahma and Asura are the only two forms approved and in use. The persons to give the girl are certain specified persons: see Manu, Ch. 8, 203, 204 and 205. Eight years is not the time at which a girl should be married. The word "marriageable" in the *sloka* is to be interpreted as referring to the time when the girl has attained puberty, and three years more are given from that time. Jolly's translation of Nárada, of which secs. 20 and 21, (*vide* pp. 82 and 83), contains a list of persons who can give a girl in marriage. Section 22 says if none of these are available, she herself is to do it. This is important to show that the period of marriage is maturity. Eight years is the suggestion of the commentators as the age of betrothal. These authorities go to prove that it is the father who must first give his daughter in marriage, and if he should fail, then she may do it herself only on arriving at the age of puberty. Choosing a husband for herself will amount to a *gándharva* marriage, which does not obtain now. Here the age of Jádav was ten or eleven, and she was not fit to give herself in marriage. In defiance of the Court's

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injunction the marriage has taken place. The father did not neglect his duty, for he had looked for a husband for his daughter, and while he was alive the mother could not exercise the power without his consent. The Nirnayasindhu, the Dharmasindhu, the Achar Chapter of the Mitákshara, and also the Sanskár Kaustubha support the father's authority to give his daughter in marriage. Here the girl has not given herself away as a matter of fact, and in so far the marriage has taken place without the father's consent it must be declared a nullity.

SARGENT, C. J.:—This appeal raises a question of some importance to the Hindu community. The plaintiff instituted this suit against his wife, Bái Máni, to recover possession of his minor daughters, Jádav and Mánki, and on the 23rd October, 1883, applied to the Court for an injunction restraining the defendant from giving Jádav in marriage to one Shivlál. The Court ordered the injunction to issue, but the marriage was nevertheless celebrated by the mother on the 15th November, 1883. The plaint was then amended by adding a prayer that the marriage so celebrated should be declared null and void, on the ground that Jádav had been given in marriage by her mother without the consent of her father, the plaintiff. The Subordinate Judge held that this circumstance, which he found proved, rendered the marriage null and void. The District Judge, on the contrary, held, that, under the circumstances, the father had forfeited his right to give his daughter in marriage; but that, in any case, the marriage having been celebrated, could not be annulled.

The parties are Jains by religion of the Ládvá Shrimáli Shrávak caste, and it was not disputed that the proper form of marriage, according to the usage of the caste, is the Brahma form, which consists in the solemn gift of the bride by one of her relations to the selected bridegroom with the proper religious ceremonies; nor was it contended that the Hindu law of marriage—which, as Dr. Bánnerjee observes in his Tágore Lectures, p. 259, "does not differ among Jains from the ordinary Hindu law except in minor details"—was not applicable in the present case, owing to any particular custom or usage of the caste. Marriage, according to the Hindu law books, is a strictly religious institution, the only *samskára* or sacrament which can be

performed for a woman, and by long established custom the religious rites, which constitute the celebration of marriage, are deemed to be compl ted by the *saptapadi* or walking of the seven steps by the bride and bridegroom.

As the marriage of girls before arriving at puberty was strictly enjoined by the Smriti writers, it became necessary that some member of the family should be appointed to discharge the duty of betrothing the girl at the proper age and giving her away on the celebration of marriage; and we find, accordingly, in Yájnavalkya, Vishnu, and Nárada, rules on the subject of guardianship over a maiden for the purpose of marriage, which, it is admitted, are the foundation of the modern law. These rules agree in assigning to the father the first place, and to the mother a place after all the male relations in the paternal line; and, indeed, in the two latter authorities after those also in the maternal line. These rules have been construed by the late Supreme Court, the Sadar Adálat, and the present High Courts in several cases to be found in the reports, and have also been enforced, according to such construction, before the actual marriage had taken place, and where the question between the parties was solely as to who was entitled to betroth the girl. We may refer to *Ex parte Junkypersaud Agurwallah* [1]; *Nundlál* v. *Tápeedás*[2]; *Namasevayam Pillay* v. *Annammai Ummal*[3]. But the actual question, which now presents itself for decision, has, so far as we are aware, only come before the Civil Courts on two occasions, and was then decided in the negative. In *Bái Rulyat* v. *Jeychund Kewul*[4], where the marriage had been solemnized by the mother without the consent of the father, the question as to the legality of the marriage was referred to the Shástris of Surat as well as to those of the Sadar Adálat, and upon their exposition of the law the Court held that the marriage having been duly solemnized, could not be annulled. And, again, in *Modhoosoodun Mookerji* v. *Jadub Chunder*[5], the Court held that the marriage could not be dissolved in the special circumstances of the case, but also expressed the opinion that in no case could it be annulled, having

(1) Boulnois' Rep., Vol. 2, p. 114.
(2) 1 Borr., 16.
(3) 4 Mad. H. C. Rep., 339.
(4) Bellassis' Rep., 1840-48, p. 43.
(5) 3 Calc. W. R., Civ. Rul., 194.

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been duly celebrated; and such is stated to be the law in Mayne's Hindu Law, para. 81, and also in Dr. Bánnerjee's Tágore Lectures on Marriage, although the latter writer suggests that although the want of the guardian's consent would not necessarily invalidate marriage otherwise legally valid, the guardian might, for any sufficient reason affecting the propriety of such marriage, obtain a declaration that it is void. Lastly, it is so stated in Steele on the Law and Custom of Hindu Castes, p. 30, upon the authority of an answer of the Poona College, that a marriage concluded without consent of parents is not void, if the prescribed ceremonies are performed, for the correctness of which reference is made to the Nirnayasindhu, a work which, as the learned authors of West and Bühler say, is "highly esteemed in Western India, especially among the Maráthás, in deciding questions about religious ceremonies and rites." Such is the state of the authorities.

If we turn to the texts themselves, which provide for the succession of persons upon whom the right devolves of marrying the maiden, we find that they are directory rather than mandatory in their tone, and contain no expression from which the invalidity of the marriage can be inferred as the consequence of a departure from the letter of their provisions. In the text of Yájnavalkya, which is to be found in 2 Strange's Hindu Law, p. 28, the relations are enunciated "as the proper persons to give away a damsel, the latter respectively on failure of the preceding." In Colebrooke's Digest, Bk. V, Ch. 2, sec. 135, the same text is given in the following terms: "In the disposal of a girl, the father, paternal grandfather, brother and kinsmen and the natural mother shall be consulted in the order herein specified. On the death of the first, the right of giving away the damsel devolves on each of the others successively." In the texts of Vishnu and Nárada, the persons mentioned are declared "to be entitled, in order of succession, to perform the ceremony." It is true that, as Dr. Bánnerjee says at p. 45 of his Tágore Lectures, the bride may, owing to her tender years at which she is married, be regarded by Hindu law more as the subject of the gift than as a party to the transaction; but it is plain, from the strong disapproval by the Smriti writers of the Asura form of marriage in which the daughter is sold for a price to the bridegroom, that whatever may have been the view

of marriage in the earliest times before Brahminical influences had fully asserted their supremacy, the present theory of marriage, according to the Brahma form at any rate, repudiates all idea of property by the relations in the damsel, and assumes that they act as her guardians in the discharge of the sacred duty of marrying her, before she arrives at puberty, to one who satisfies the conditions mentioned in the sacred texts. The decision in *Namasevayam Pillay* v. *Annammai Ummal*(1) illustrates this view. There the Court allowed the mother to have a voice in the betrothment of her daughter notwithstanding the claim asserted by the brother of her deceased husband to the exclusive right to give the girl in marriage. They say, referring to the passage in the Digest, that "the text does not necessarily import the absolute exclusive right which the plaintiff seeks to have declared, *viz.*, the right to betroth his brother's daughter to any person whom he may hereafter choose without reference to her mother, and even against her feelings and wishes." Similarly, the Courts have held that the father might lose his right of betrothing his daughter by his own conduct, or be deemed to have abandoned it, as was decided in *Modhoosoodhun Mookerjee* v. *Jadub Chunder*(2) and *The King* v. *Kistnamah Náick*(3).

But if, upon the true construction of the texts, the giving the girl in marriage is not a right, but a duty to be discharged for the spiritual benefit of the girl, it would be impossible, we think, bearing in mind the extreme importance which the Hindu law attaches to the marriage of females, to hold, in the absence of distinct words invalidating the marriage, that the consent of the particular person upon whom the duty devolves of giving the girl in marriage, as provided by the texts, is of the essence of the marriage, and if it be not, then the principle of "*factum valet*" is applicable, and it is scarcely necessary to say that the propriety of its application, in the case of marriage where the consequences of a declaration of invalidity would, if not expressly by law, at any rate by the social custom of Hindus, be so serious to the woman, is far stronger than in the

(1) 4 Mad. H. C. Rep., 339. (2) 3 Calc. W. R., Civ. Rul., 194.
(3) 1 Norton's Leading Cases on Hindu Law, p. 1.

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case of any other change of legal *status*. The consent of parents and guardians as a condition precedent of the validity of marriage before the parties have arrived at a certain age is required by the law of most European countries. But the intention has been always expressed in the clearest language so as to admit of no doubt. The invalidity of the marriage of a male under twenty-five without consent of parents, is, by French law, provided for by express words declaring that such a male is "incapable of marrying" without consent: see Code Napoleon. And, again, Lord Hardwicke's Act in England, which was passed in a great measure to prevent the marriage of minors without the consent of parents or guardians, declares that the marriage of persons wilfully intermarried without the license from a person having authority to grant the same, (the grant of which is forbidden to minors without such consent of parents and guardians), is null and void. No such language, (as we have already pointed out), is to be found in the Hindu texts, and without it both authority and reason require that the marriage should be supported on the principle of *factum valet*. Whether the Civil Court would set aside a marriage, if a clear case was established of fraud, by both the parties intermarrying, on the rights of the father as guardian of his daughter for the purposes of marriage, it is not necessary to express an opinion, as the evidence in the present case can leave no doubt, as, indeed, has been found by the District Judge, that the husband, after being informed of his wife's intention to marry their daughter, made no *bonâ-fide* attempt to marry her; and after entirely foregoing his claim to all control over his daughter for many years, merely attempted to assert his right without any regard to her interests, and with the sole object of spiting the mother, from whom he had been long separated with his own consent. We must, therefore, confirm the decree with costs.

Decree confirmed.