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as at a Court sale been bought by the judgment-creditor without ve of the Court can sue within twelve years to set aside the sale and recover possession. It shows that when after the death of a judgment-debtor his property is sold without notice to the heirs, those heirs can sue within twelve years to recover it. But the reasoning cannot be applied by analogy to the present case. There the auction-purchaser was not a party to the suit. Here it is only on the ground of his being a party that the sale can be avoided. The case, therefore, clearly falls under section 244, and no separate suit will lie. Section 294 provides expressly a remedy by application. See *Chintamanrav* v. *Vithabai*[1].

We, therefore, dismiss Appeal No. 944 of 1895 with costs on the appellant.

Issue sent down in Appeal No. 892.
Appeal No. 944 dismissed.

(1) I. L. R., 11 Bom., 588.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Hosking.

FAKIRGAUDA (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANGI (ORIGINAL DEFENDANT), RESPONDENT.*

1896. *July* 7.

Hindu law—Marriage—Lingáyets—Marriage between members of different sects of Lingáyets—Burden of proof of invalidity of marriage—Evidence.

According to the Lingáyet religion, as well as according to Hindu law, marriages between members of different sects of the Lingáyets are not illegal, and where it is alleged that such a marriage is invalid, the *onus* lies upon the persons making such allegation, of proving that such marriage is prohibited by immemorial custom.

SECOND appeal from the decision of T. Hamilton, District Judge of Dhárwár, confirming the decree of Ráo Bahádur Gangadhar V. Limaye, First Class Subordinate Judge.

The plaintiff sued to obtain possession of his wife, the defendant. The parties were Lingáyets and resided in Dhárwár.

The defendant contended that she and the plaintiff belonged to different sects of the Lingáyet caste and that there could be no lawful marriage between them.

* Second Appeal, No. 854 of 1895.

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The Subordinate Judge found that the defendant was not the lawfully married wife of the plaintiff, the parties belonging to different sects of the Lingáyet caste, and there being no evidence of any custom sanctioning such marriages. He also held that the claim was time-barred under articles 34 and 35, Schedule II of the Limitation Act (XV of 1877).

On appeal by the plaintiff the Judge summarily dismissed it, under section 551 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff preferred a second appeal.

Dhondu P. Kirloskar, for the appellant (plaintiff):—The parties are Lingáyets who have been held to be Sudras—*Gopal* v. *Hanmant*[1]; *Basava* v. *Lingangarda*[2]. Marriages between different sections of the Sudra class are not invalid—*Inderun* v. *Ramasawmy*[3]; *Pandaiya Telaver* v. *Puli Telaver*[4]. In the present case the parties, no doubt, belong to different sects. The evidence shows that the plaintiff is a member of the Adilanjigar sect and the defendant a member of the Panchamsali sect. But the circumstance that they belong to different sects is not by itself sufficient to invalidate a marriage if it has taken place. The marriage having taken place, every presumption must be drawn in its favour, unless and until it is clearly shown that marriages among members of different sects are strictly prohibited. If the conscience of the caste does not revolt against such a marriage, it must be upheld—*Patel Vandravan Jekison* v. *Patel Manilal Chunilal*[5].

Among Hindus marriage is a *sanskar* and if it once takes place, the doctrine of *factum valet* applies and nothing can undo it. Defendant admits the fact of marriage. She must, therefore, prove that it is invalid.

Daji A. Khare, for the respondent (defendant):—Both the lower Judges have found, on the evidence, that marriages cannot take place among members of the different sub-divisions of the Lingáyet caste. That being so, the marriage alleged by the plaintiff is invalid—*Narain Dhara* v. *Rakhal Gain*[6].

(1) I. L. R., 3 Bom., 273.
(2) I. L. R., 19 Bom., 428 at p. 457.
(3) 13 Moore's I. App., 141.
(4) 1 Mad. H. C. Rep., 476.
(5) I. L. R., 16 Bom., 470.
(6) I. L. R., 1 Calc., 1.

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Dhondu P. Kirloskar, in reply:—The decision relied on is not applicable, because in that case the parties belonged to different castes and not to two sub-sections of the same caste.

HOSKING, J.:—This action was instituted by Fakirgauda to obtain possession of his wife Gangi. The parties reside in the Dhárwár District, and are Lingáyets. The lower Courts have both found that the parties are members of different sects of Lingáyets, but neither Court has given in its judgment the names of the sects. From the evidence there can be no doubt that they found plaintiff to be a member of the Adibanjigar sect, and defendant to be a member of the Panchamsali sect.

The Subordinate Judge framed, as the only issue on the merits of the case, the question whether defendant is the lawfully married wife of plaintiff. He held that, in the absence of evidence of custom sanctioning a marriage between persons of different castes of the Lingáyets, such a marriage must be held to be invalid. The District Judge, who has dealt with the case rather summarily under section 551 of the Civil Procedure Code, also appears to have placed on plaintiff the *onus* of proving that the marriage was valid.

It has been contended in this Court that the fact of marriage having been admitted, it must be presumed to be valid, and that it was for defendant to prove that the marriage was invalid. We are of opinion that both these contentions are correct.

The status of Lingáyets as Sudras was determined by the judgment of this Court in *Gopal* v. *Hanmant*[1]. In *Upoma Kuchain* v. *Bholaram Dhubi*[2] the Calcutta High Court, after reviewing previous decisions on the question whether marriages between persons in different sections or sub-sections of the Sudra caste are valid[3], d that there is nothing in Hindu law prohibiting such marri-s. In *Basava* v. *Lingangauda*[4] Mr. Justice Ranade says: The ngáyets are admittedly a heretical sect, and are not subject to religious laws.....The liberty of widow re-mar-

(1) I. L. R., 3 Bom., 273. (2) I. L. R., 15 Cal., 708.

(3) *n Dhara* v. *Rakhal Gain*, I. L. R., 1 Cal., 1; *Inderun* v. *Ramasawmy*, . A., 141; *Ramanuni Ammal* v. *Kulanthai Natchiar*, 14 Moore's I. A.,

(4) I. L. R., 19 Bom. at p. 457.

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riage, and even of wife re-marriage, has been allowed to this Lingáyet community." The only authorities we have been able to consult as to the religion of the Lingáyets are Steele on Hindu Castes and Campbell's Gazetteer of the Dhárwár District. The former work throws no light on the point at issue in this suit. Mr. Campbell says that according to the Lingáyets the practice of wearing the *ling* was introduced by Basav (A.D. 1100-1160), who reformed the Lingáyet religion. Mr. Campbell lays down among the leading doctrines and rules of Basav's faith that as all *ling* wearers are equal, the Lingáyet woman is as high as the Lingáyet man, and that, therefore, she should not marry till she comes of age, and should have a voice in choosing her husband, and that as all *ling* wearers are equal, all caste distinctions cease. Mr. Campbell says that many of these rules are not observed, and he states that in Kolhápur neither eating together nor intermarriage is allowed among the different classes of Lingáyets. A Jangam, that is, a Lingáyet priest, may in Dhárwár marry the daughter of a pure Lingáyet, a Shilvant or a Banjig. The customs of the Lingáyets apparently vary in different districts.

Upon this authority we hold that according to the Lingáyet religion, as well as according to Hindu law, marriages between members of different sects of the Lingáyets are not illegal, and where it is alleged that such a marriage is invalid, the *onus* lies upon the persons making such allegation, of proving that such marriage is prohibited by immemorial custom.

The way in which plaintiff put forward his case, attempting, unsuccessfully, to prove that he and defendant are both Panchamsalis, weakens his contention that intermarriages are not prohibited, and one of his own witnesses, Lingangauda (Exhibit 31), has directly asserted that marriages do not and cannot take p[lace] between Panchamsalis and Adilbanjigars, but the cross-examination of defendant's witnesses shows that the present content[ion] was raised in the Court of first instance, and plaintiff is entit[led] to have the case tried on a proper issue, if the suit is n[ot] by limitation. The District Court has recorded no f[inding] that point. Should it be necessary to decide the issue [of] hibition by custom, the question being one of great i[mportance] to the Lingáyet community in the Dhárwár District, [it]

desirable that there should be a thorough enquiry and that persons of standing in the community should be examined. We reverse the decree of the lower appellate Court and remand the case for a fresh decision. Costs to follow final decision.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Hosking.

ABAJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* BALA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1896. *July 8.*

Act (X of 1873), Sec. 9—Offer by one party to be bound by oath of other if taken in a certain form—Acceptance of the offer—Subsequent retractation of the offer—Administering of the oath discretionary with the Court.

The plaintiff offered, under section 9 of the Indian Oaths Act (X of 1873), to be bound by the oath or affirmation of the defendant in a prescribed form upon a certain point. The defendant accepted the offer and took the oath.

Held, that the plaintiff could not retract his offer to be bound by the oath.

SECOND appeal from the decision of S. Tagore, District Judge of Sátára, confirming the decree of Ráo Sáheb K. H. Kirkire, Subordinate Judge of Khatáv.

The plaintiff claimed as the adopted son of one Gopal (deceased) to recover certain property which he alleged was in the hands of his adoptive mother (defendant No. 2), who in collusion with her son-in-law (defendant No. 1) had wrongfully taken possession of it.

The defendants denied the plaintiff's adoption.

At the hearing the plaintiff offered, under section 9 of the Indian Oaths Act (X of 1873), to be bound by the oath of the second defendant upon the point of his adoption if she took it before a certain idol in a certain form. She agreed to do so and the Court appointed a commissioner to administer the oath.

The plaintiff subsequently retracted his offer and applied that the case might be disposed of by the Court on its merits. The Judge, however, rejected his application, and the commissioner administered the oath to the second defendant as proposed originally by the plaintiff.

*Second Appeal, No. 891 of 1895.