

BOMBAY HIGH COURT

Chunilal Pranshankar

Vs

Surajram Haribhai

(Chandavarkar and Heaton, JJ.)

05.04.1909

JUDGMENT

Chandavarkar, .J.

1. The facts, upon which the questions of law in the two second appeals turn, are shortly these: The property in dispute originally belonged to one Dowlatrai Becharlal. He made a will on the 9th of October 1889, and died ten days later, leaving him surviving two daughters, Ladkore and Mani. Mani being a minor, the District Court of Ahmedabad appointed her maternal grandmother Raliata and her maternal uncle Chunilal guardians of her person, and the Nazir of the Court guardian of her property, under the Guardians and Wards Act. By the order of appointment the guardians of the person of the minor were enjoined not to give the girl in marriage without the Court's permission. Subsequently Chunilal applied to the Court for permission to brother the girl to one Harprasad. The permission was granted, but some disagreement having arisen between Chunilal and Harprasad's grandfather, the former applied to the Court for revocation of the order granting the permission. The Court declined to revoke the order; nevertheless Chunilal gave the girl in marriage to another boy. This was in violation of the Court's order. Some time after that, Mani lost her husband, and she herself died childless on the 22nd of November 1905.

2. The respondents Nos. 1 and 2 in Second Appeal No. 252 brought the suit claiming in their plaint the property in dispute, which Mani had left at her death, as reversionary heirs of her father Dowlatrai. They alleged that under Dowlatrai's will the property had come to Mani but with only a life-interest in it; and that on her death it descended to them as Dowlatrai's heirs.

3. At the trial of the suit the said respondents prayed for amendment of the plaint to the effect that Mani had taken an absolute estate in the property under her father's will and that on her death they were entitled to it as her heirs. The amendment was allowed and evidence led accordingly.

4. Both the Courts below have found upon the evidence that Chunilal gave the girl in marriage

by receiving money consideration for the gift. Upon that fact they have held that the marriage was in the Asura form. The result of that finding being that on Mani's death her stridhan, in default of her issue must go to her nearest relations on her father's, not her husband's side, the Courts have given the respondents a decree, holding that they are entitled to the property as Mani's heirs.

5. The first point of law urged in this Second Appeal (No. 252) from that decree is that the amendment of the plaint ought not to have been allowed, since it transformed the nature of the suit into one of a character inconsistent with that originally brought. At first the respondents claimed the property as Dowlatrai's heirs-; subsequently they abandoned that position and claimed as heirs to his daughter Mani. There is no inconsistency if we have regard to the substance of the claim. The respondents claimed the property on the strength of Dowlatrai's will. The Court was asked to construe it and to give the respondents a decree for the property. It was competent for them to abandon their first construction and substitute for it another as the basis of their title.

6. It is next contended that the finding of the Courts below that the marriage of Mani was in Asura form is erroneous in law, because there is no evidence that her maternal uncle, who gave her in marriage as her guardian, received money as consideration for it. The question is one of fact and its determination must depend on the evidence of surrounding circumstances and probabilities, if direct evidence of payment of money is not forthcoming.

7. Then it is urged that, assuming that money was received by Chunilal as consideration for the gift, of the girl in marriage, that fact will not give the marriage an Asura form under the Hindu law, if the marriage itself was solemnised according to the rites prescribed for the Brahma form; and that the Court must presume in the first instance in every case that the marriage was in the latter form.

8. The prima facie presumption, no doubt, is that every marriage under the Hindu law is according to the Brahma form; but it can be rebutted by evidence. And here, according to the findings of the Courts below, it has been rebutted.

9. Where the person who gives a girl in marriage receives money consideration for it, the substance of the transaction makes it, according to Hindu law, not a gift but a sale of the girl. The money received is what is called bride-price; and that is the essential element of the Asura form. The fact that the rites prescribed for the Brahma form are gone through cannot take it out of that category, if there was pecuniary benefit to the giver of the girl. The Hindu lawgivers one and all condemn such benefit and the Shastras, regarding it as an ineradicable sin, prescribe no penance for the sale of a bride, (see the Agni Puran cited in Shudra Kamalakar, page 108).

10. Whenever, therefore, it is proved, the Courts must hold the marriage to have been in the Asura form, however much it might be disguised by the adoption of the rites of the Brahma form. That adoption cannot take away the taint of the lower form.

11. Under the Hindu law, certain forms are common to both the Brahma and the Asura form of marriage. Unless those forms are gone through, the relation of husband and wife is not brought about in either case and there can be no marriage tie. Those forms consist in the invocation before the sacred fire and the seven steps (Saptapadi) taken before that fire by the bride-groom and the bride jointly. As said in the Madana Parijata, (page 157, Bibliotheca Indica Series), "it should not be doubted whether the relation of husband and wife is produced in the Asura and other forms of marriage by reason of the absence of the saptapadi or seven steps ceremony therein. Even in those forms of marriage the observance of that ceremony is prescribed by way of command after acceptance". Those steps taken, the marriage tie becomes indissoluble. (The Hindu Law of Marriage and Stridhan by Sir Gooroodas Banerji, 2nd Edition, page 89, Madhava-charya's Parashara Samhita, Bombay Oriental Series, Vol. I, part II, pages 88 and 89.)

12. But what distinguishes the one form from the other is that, in a Brahma marriage it is a gift of the girl pure and simple; in the Asura, it is the sale of the bride for pecuniary consideration. If the sale exists, its effects cannot be undone by the form of a gift being gone through.

13. It is contended by Mr. Gokuldas for the appellant that the true test of the Asura form of marriage is the taking of the bride-price by none but the father of the girl, or, in default of him, by any of her paternal kindred giving her in marriage. In support of this argument the following Smriti of Manu Sacred Books of the East Vol. XXV, Page 81, Section 31. is relied upon:

When the bride-groom receives a maiden after having given as much wealth as he can afford to the kinsmen and to the bride herself according to his own will, that is called the Asura rite.

14. The original in this text for kinsmen" is jnati, which, Mr. Gokuldas argues, means "paternal kindred." That no doubt is the meaning, according to certain scholiasts See the St. Peterburgh Sanskrit Dictionary under the word Jnati. So also in his gloss on the third verse of Yajnyavalkya in the Chapter on Impurity," where the word jnati occurs, Vijananeshwara in the Mitakshara Moghe's Third Edition, Page 274 explains the word as meaning samana gotraja sapindas and sam-anodakas.

15. But the question is whether this text of Manu uses the word jnati as exhaustive, confining the right to receive the bride-price to paternal relations in the absence of the father, or as illustrative, extending it to all who have the right to give the girl in marriage.

16. The answer to that question must depend upon whether the duty of giving a girl in marriage

devolves in the first instance upon her father, and in default of him, on any of her paternal relations only, or extends to all relations, paternal or maternal.

17. A text of Yajnyavalkya Mandlik's Hindu Law, Page 169, Sections 63 and 64 mentions the paternal relations as being charged with the duty. But Narada Sacred Books of the East, Vol. XXIII, Part 1, Page 169 and Vishnu. Sacred Books of the East, Vol. VII, Page 109 include the maternal relations also. The former specifically mentions the girl's maternal uncle. Nilakantha in his Sanskara Mayukha as. authorities both the text of Yajnyavalkya and of Narada. Madhava-charya in his Commentary on Parashara Samhita quotes as authority the text of Narada.

18. No doubt Vijnaneshwara in the Mitakshara quotes only Yajnyavalkya's text and makes no reference either to Narada's or Vishnu's. But no importance attaches to that circumstance. The Mitakshara purports to be a commentary on Yajnyavalkya and Vijnaneshwara * * Moghe's Edition (3rd) of the Mitak-share, page 3 himself enunciates the principle that, were all Smritis are of equal importance, and where there is conflict between two or more Smriti writers, we are free to choose any we like. Nilakantha in the Vyvahara Mayukha cites Yajnyavalkya's text that where there is a conflict between two or more Smritis, that one should be accepted which is conformable to equity Mandlik's Hindu Law, page 5, lines 17 to 20.

19. The rule of the Hindu Shastras that a girl must be given in marriage as far as possible and that she Cannot give herself unless there is no relation to give her, is founded upon the theory that women have no independence. Her father, or, in his absence any relation who, as guardian standing in the father's place, has supported and protected her during her virginhood, is charged with the duty. This is pointed out in the ' Mitakshara Page 265 of the same.-* * *, where it is said: "The gift is enjoined only in the case of a virgin who has been protected by her father and others." The word "others" being construed as ejusdevi generis with the word ' father'-a construction of which several illustrations are to be found in the writings of the Nibandhakaras or commentators on Hindu law-the passage means that where there is no father, the duty of giving a girl in marriage devolves on a relation of hers who stands in his place as her legal guardian and has as such protected her.

20. If, then, the Smritis of Narada and of Vishnu are as authoritative as the Smriti of Yajnyavalkya, the maternal relations of a girl are among the kindred whose duty it is to give her in marriage. And the text of Manu, on which Mr. Gokuldas strongly relies, must be construed as being descriptive, not enumerative, according to the

canon

of interpretation in Hindu law, known as nyaya samyatwa or samana nyutwa, that a rule, which in terms applies to one individual who is a member of a class composed of many. persons, all possessing the same property or attribute, must be held to apply not only that individual but also

to all the other members of the same class in matters relating to that property, because all of them stand in respect of it on-the same footing (10) * * * .

21. An instance of the application of this rule of interpretation is to be found in the portions of the Mitakshara and of the Vyavahara Mayukha which deal with partition. There Vijnaneshawara and Nilakantha respectively refer to a text of Manu, which says that if at a partition in a joint family, consisting of two or more brothers, the elder or eldest deceive the younger brother or brothers by concealing any part of the joint wealth, he (the elder or eldest) shall be punished by the king, and deprived of his share. Vijnaneshawara explains that though Manu mentions only the elder brother, the text applies to the younger equally, if the latter be guilty of similar fraud, Nilakantha too says the same.

22. If, then, the maternal relations of a girl, are like the paternal relations in the category of those charged with the duty of giving her in marriage, what Manu says in the text relied upon by Mr. Gokuldas about the paternal relations must apply to the maternal relations also on the rule of interpretation just mentioned. The receipt of bride-price is, no doubt, condemned by Manu as a sin : but he does not prescribe it as unlawful. He allows a marriage in which such receipt enters as consideration for the sale of the girl; and it is difficult to understand why the marriage should be Asura if the girl happens to be given by one of her paternal relations; by receiving a gratuity and why it should cease to be in that form merely because the party giving her and receiving the gratuity happens to be one of her maternal relations.

23. In the present case Chunilal (defendant No. 2), who gave Mani in marriage, was her maternal uncle and a maternal uncle is mentioned among the guardians competent to give a girl in marriage. Besides, by reason of that relationship he was at the time of the marriage the legal guardian of her person duly appointed by a Court of law. He supplied to her the place of her father. It is true that his power to give her in marriage was subject to the condition of the Court's consent; and he infringed it. But the circumstance cannot affect the question as to the form of marriage, if he was, according to law, her relation and guardian, and as such was competent to receive bride-price and give the marriage the Asura form.

24. We are not to be understood as deciding that the conclusion above stated would apply to the marriage of a girl who has been sold in marriage by a person who was neither her paternal nor maternal relation. According to the Shastras, the giving of a girl in marriage is a pious act, and even a person who is in no way related to her may so give her, if she has no relations, or if, there being relations, they are unwilling to discharge that duty. In Madan Ratna Skandha quoted in the Nirnaya Sindhu, (page 245, Jnana Sagar Edition) it is said that it is 'proper (for a man) to give in marriage according to the (prescribed) religious rites the unmarried daughter of another person, even if she is not of the same gotra as himself, after making her his own (daughter) and by

(presenting) her (with ornaments) of gold." Such a case, when it arises, will have to be determined on its own merits.

25. Lastly, it remains to notice Mr. Gokuldas's argument that Mani's marriage should not be held to have been in the Asura form, because there is no evidence and no finding that Mani received any money for herself as bride from the bride-groom before marriage, whereas the text of Manu, which defines that form, requires that payment of money as consideration for the gift of the girl in marriage shall be not only to her relations (Jnati) giving her but it must be also to the girl. But, as Nilkantha points out in his Sanskara Mayukha * * * * Samskara Mayukha: Amarapur-Kar's Edition p. 45 on the authority of another text of Manu, the taint of the Asura form lies in the gratuity paid to the giver of the bride for his benefit, not anything paid to her; and it is the taint which determines the form.

26. On these grounds the decree of the Court below must be confirmed with costs.