

(1912) 08 MAD CK 0046
In the Madras High Court

D. Srinivasa Iyengar

APPELLANT

Vs

Thiruvengadathaiyengar by Guardian Krishnasamy Iyengar
and Srirangammal by Guardian Rukmani Ammal

RESPONDENT

Date of Decision : 30-08-1912

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33

Citation : (1913) 25 MLJ 452

Hon'ble Judges : Sundara Aiyar, J; Sadasiva Aiyar, J

Bench : Full Bench

Judgement

Sundara Aiyar, J.—The suit in this case is one for partition by a Hindu minor. The 1st defendant is the plaintiff's stepbrother. The 5th

defendant is the plaintiff's mother and 1st defendant's stepmother. The 6th defendant is the plaintiffs elder-sister. The 5th and 6th defendants were

made parties on the ground that provision should be made for the maintenance of the former and for the maintenance and marriage and other

expenses of the latter.

2. The first question raised in second appeal is whether the plaintiff is entitled to a share of the amount recovered from a Life Insurance Company

on a policy of insurance taken out by Doraisami Aiyengar the father of the plaintiff and the 1st defendant. The policy states that it was taken for the

benefit of Dorasami's wife and two sons of whom the wife and one of the sons died, and the 1st defendant alone was left; but both the Courts

have found that the premia for the policy were paid out of funds belonging to the whole family. This finding has been attacked in second appeal; but

we are unable to interfere with it. It was argued that the finding of the Lower Appellate Court was based in part on the supposition that Doraisami

Aiyangar was the managing member of the family and that this was not the fact. But no objection was taken to the finding on this ground in the

Memorandum of Second Appeal: nor does Doraisami Aiyangar's management seem to have been denied in the Lower Appellate Court. The

plaintiff was therefore rightly held entitled to a share of the insurance money.

3. The next question is whether the decree in plaintiff's favour for mesne profits for 2 years before the suit is right. It was alleged by the plaintiff that

he and his mother were turned out of the family house and have to live elsewhere. The Subordinate Judge has found that the plaintiff has failed to

prove that they were turned out of the house; but he allowed mesne profits, because he held that a minor plaintiff is entitled to recover mesne

profits in a suit for partition. I am of opinion that there is no foundation for this view. The case relied on by the Subordinate Judge Krishna v.

Subbanna ILR (1884) M. 564, does not support it. In that case it was observed If an adult member is not excluded, but chooses to live apart from

the manager, then as he did not choose to enforce partition, it may be very reasonable that, apart from the consideration of fraud or

misappropriation by the manager, the principle above stated should be applied to him." [That is, the principle that the manager is not bound to

account for past transactions or past income). " But the principle cannot apply to the case of an infant member, who has been excluded by the

manager from the family house and from enjoyment of the property. The infant is, by reason of infancy, incompetent to authorize the act of the

manager or, at, all events, cannot be legally bound by any authorization in fact given during his infancy. Moreover, the infant being excluded, cannot

be assumed in point of law or fact to have known of any act of the manager," The observations relate primarily to a suit for account including an

account of past profits. An infant who has been excluded from commensality was held entitled to an account of past profits during the period of his

exclusion. They do not support the view that the mere fact that the infant was living separately when it was not due to any fault on the part of the

manager would entitle him to recover a share of the profits. The manager of a Hindu family is entitled to spend the income for the benefit of all the

members of the family. It is unnecessary to consider whether a member living separately could make a claim for the expenses of his maintenance;

for that is not the question raised for decision before us. The manager after making all proper expenditure is expected to add any surplus that may be left to the family funds. No member is entitled to claim a share of past profits on the ground of his separate residence. If he is excluded by the act of the manager, he has, no doubt, been held then entitled to call upon the manager to account for the profits received during the time of his exclusion. The manager would then be entitled to credit for all proper expenditure including any investments made in which of course the excluded member would be entitled to share. With respect to any profits for which the manager is unable to account, the excluded member would be entitled to his share of them. There is no reason why the same principle should not apply to a minor coparcener. No authority has been cited in support of the application of a different principle. The question here is not one of the right to an account. No doubt one reason for refusing an account to an adult coparcener suing for partition has been stated to be that "every adult member of an undivided joint family living in commensality with the Karta, must be taken, as between himself and the Karta, to be a participator in, and authorizer of, all that is from time to time done in the management of the joint property to this extent, namely, that he cannot without further cause call the Karta to account for it". Abhaichandra Roy Ghowdhry v. Pyari Mohan Guho (1870) 5 B.L.R. 347. This reason would not of course be applicable to the case of a minor member. But the point has no bearing in deciding whether a minor is entitled to claim mesne profits. The claim for mesne profits must therefore be disallowed. The Subordinate Judge's decree awarding 611/2 on this account must be set aside.

4. The next question is whether the expenses of the plaintiff's Upanayanam and marriage and the 6th defendant's marriage were rightly provided for in the decree for partition. Jairam v. Nathu ILR (1906) B. 54 and Mahadeva Pandia v. Rama Narayana Pandya (1902) 13 M.L.J. 75 are clearly in support of the plaintiff's case. Two contentions have been raised in this Court:

- (1) that such provision can be made only out of the separate or self-acquired property of the father of the parties, and cannot be made out of the ancestral property of the father derived from his father, and
- (2) that the plaintiff is entitled to have a provision made only for his

Upanayanam and not for his marriage the latter not being a necessary Samskara according to Hindu Law.

5. The first contention is entirely without foundation. Mr. P.E. Ganapathy Aiyar, the learned vakil for the plaintiff who has argued the question very fully relies on certain passages in the Mitakshara. Yagnavalkya's text Chapter 2 verse 124 does not expressly refer to the ceremonies to be

performed for the brothers the text being to the effect that ""Uninitiated sisters should have their ceremonies performed by those brothers who have

already been initiated giving them a quarter of one's own share."" But the text has been interpreted by commentators as including the ceremonies of

brothers too. The Mitakshara in Chapter 1 Section 7 verse 3 expressly provides.

6. ""If any of the brethren be uninitiated when the father dies who is competent to complete their initiation.? Uninitiated brothers should be initiated

by those, for whom the ceremonies have been already completed."" Verse 4 lays down "" By the brethren who make a partition after the decease of

their father, the uninitiated brothers should be initiated at the charge of the whole estate."" Reliance is placed on Chapter 1 Vers 14. These verses

deal with the power of the father to make gifts to one or another of the sons. The power to make gifts is now regarded as confined to the separate

or self-acquired property of the father. The contention is that these verses show that Section 3 verse 1 dealing with partition after the father's

decease -""Let sons divide equally both the effects and the debts, after [the demise of] their two parents,"" relates only to the self-acquired property

of the father. To a question put to the appellant's vakil from the Bench which text, then, provides for the division of the father's ancestral property?

his answer was that Section 5 verse 1 does so. ""But among grand-sons by different fathers the allotment of shares is according to the fathers."" But

this verse is intended merely to show that where the brothers have an unequal number of sons, the grandsons take per stirpes and not per capita.

Section 1 of Chapter 1 was referred to as showing that the father and his sons have equal rights in the property descending from the grand-father.

But this does not help the contention that Section 5 verse 1 of Chapter I and Section 3 taken together show that the provision in Section 7 for the

Samskaras of the uninitiated brothers and sisters is intended to be made only out of the self acquired property of the father.

7. Reference is also made to the Smrithi Chandrika Chapter 4 verses 36 and 37. verse 36 cites a text of Vishnu which runs thus:- "" The Text of

Vishnu that " the initiations of unmarried daughters are to be defrayed in proportion to his own wealth" is applicable either to a case where no

partition of heritage takes place from there being an only son, or to a case where brothers live in union."" Verse 37 is in these terms :-""Hence

Vyasa, brothers whose investiture and other ceremonies have not been performed are to be initiated in due time from the paternal wealth alone by

brothers whose sacraments have already been completed. Unmarried sisters are also to be initiated by their elder brothers according to law."" The

word " alone " is the translation of the Sanskrit word " Eva," the meaning being that the paternal wealth must be used for the purpose indicated.

The use of the word " paternal" is relied on as showing that only the father's own wealth was intended. But this contention cannot be upheld. The

language is comprehensive and would take in all ancestral property. The same observation applies to similar texts of Brihaspathi and Narada in

verses 38 to 41. There is nothing to show that the author of the Smrithi Chandrika understood the expression " paternal wealth " as meaning the

self-acquired property of the father. The texts cited from the Madhaviya pages 17 and 18 of Burnell's edition, the Viramitrodaya p. 81 of Sitarama

Sastri's " Hindu Law Books " and the Vivada Chintamani p. 49 of the same book do not carry the case any further. I must hold that the plaintiff is

entitled to have funds set apart for his ceremonies out of the ancestral property which descended to plaintiff and the first defendant from Doraisami

Iyengar.

8. The second contention is that the ceremonies for which the plaintiff is entitled to have provision made do not include his marriage. It is argued

that marriage is not a necessary ceremony in the case of a Brahmin male and the case of Govindarajulu Narasimham v. Devara Bhotla

Venkatanarasayya ILR (1903) M. 206. is relied on. That case decided that a debt borrowed for the expenses of the marriage of a coparcener

could not be enforced against the other co-parceners. That position has been considerably shaken by the observations contained in Kameswara

Sastri v. Veeracharlu ILR (1910) M. 422 The learned Chief Justice who was a party to the judgment in the earlier case was subsequently

prepared to reconsider his view. The question has been elaborately considered by Krishnaswami Aiyar J. in *Kameswara Sastri v. Veeracharlu* ILR

(1910) M. 422. and by Chandavarhar, J. in *Sundarabai v. Shivnarayana* ILR (1907) B. 81. I have nothing to add to the reasons given by these

learned Judges for holding that marriage is a proper ceremony for a Brahmin and an obligatory ceremony for all with extremely few exceptions.

See also West and Buhler page 781; Strange's Hindu Law vol. 2 pages 286, 288 Sircar's Hindu Law (3rd edition) page 245 Section 292. But I

do not think that it is necessary to rest the decision in this case on the ground that marriage is absolutely obligatory. There are no doubt texts in

favour of the position that the initiatory ceremonies in the case of the three higher castes end with the Upanayanam, See Smrithi Chandrika chapter

4 verse 42 which is supported by the author of the Vivadachintamani. See Seetarama Sastri's edition page 40. The Smrithi Chandrika text has

been explained by Chandavarkar, J. in *Sundarabai v. Shivnarayana* ILR (1907) B. 81. It was decided very recently in *Gopalakrishnamaraju*

by his mother *Bangaraya Vs. Venkatanarasa Raju and Others*, . by a Full Bench of this court after the arguments in this case were heard that

marriage is considered an obligatory ceremony for Hindus except in the case of one who is prepared to live the life of a perpetual Brahmachari or

of a Sanyasi and that a debt borrowed for the marriage of one of the coparceners is binding on all. This judgment in my opinion practically

concludes the point raised in this case. The first defendant has no right to compel the plaintiff to abjure marriage and to become either a Naishtika

Brahmachari or a Sanyasi. The plaintiff has the right to become a grahastha and to live the life which is ordained for Brahmins in general; marriage is

an indispensable ceremony (avasyam kartavyam) for all except the most spiritually advanced persons The family property should provide the

means for such an initiatory ceremony. There can, at any rate, be no doubt that marriage is regarded as a most proper ceremony for every Hindu.

This is sufficient to justify the plaintiff's claim for a provision for his marriage. The first defendant has been married at the expense of the family.

There is no reason for treating the brothers differently. Modern custom is undoubtedly in favour of allowing the provision. In deciding what

ceremonies are regarded as proper and necessary regard should be had in my opinion to the sentiments of the community especially when there is

a difference of opinion amongst text writers. I am also prepared to hold that a brother who has had his own marriage performed at the family

expense is not entitled to object to a similar provision being made for the other brothers. The Subordinate Judge's view therefore must be upheld

with respect to the allotment both for the plaintiff's Upanayanam and for his marriage. In the result the appeal must be allowed in so far as the

award of mesne profits is concerned and dismissed in other respect.

9. Memorandum of Objections :-The first respondent has put in a Memorandum of Objections objecting to the Lower Court's refusal to make a

provision for-the maintenance of the 5th defendant, the plaintiff's mother. A preliminary objection was raised by Mr. Ganapathy Aiyar to the

memorandum on the ground that the 5th defendant who appealed against the decree of the District Munsif disallowing a provision for her

maintenance has not herself appealed to this Court against the disallowance and that it was not competent to the plaintiff to do so. The ground on

which the Subordinate judge refused to make an allotment for the 5th defendant's maintenance was that her maintenance should come out of the

plaintiff's own half share of the property and cannot be enforced against the first defendant's half share. The first respondent (i. e., the plaintiff) is

therefore affected by the judgment and is interested in disputing its correctness. The 5th defendant is a party to the Second Appeal. This Court has

power under Order XLI, Rule 33 of the CPC to pass such decree as it thinks proper dealing with the rights of all the parties before it. The

preliminary objection must be disallowed.

10. On the merits the Memorandum is entitled to succeed. The question was decided so long ago as 1870 in the Zamindar of Oread v. Meenakshi

Animal (1870) 5. M.H.G.R. 377 by Holloway and Innes JJ. The Smrithi Chandrika supports her claim. See Chapter 4 verse 14. ""The word

mother includes a step mother."" In verse 7 a text of Vyasa is quoted ""Even childless wives of the father are pronounced equal shares and so also

are all the paternal grand-mothers : they are declared equal to mothers."" See Kumaravelu v. Virana Goundan ILR (1879) 5 M. 29. The basis of

the mother's right is as pointed out by the author is the interest that she has by reason of her relationship to her husband. This reason is equally

applicable to the step-mother. Mr. Ganapathi Aiyar's argument that the question

was not really considered in the *Zemindar of Orcad v. Meenakshi*

Amtal (1870) 5 M.H.G.R. 377. cannot be accepted. The same view was apparently taken in *Subbarayalu Ghetty v. Kamala Valli Thayaramma*

ILR (1911) M. 147. though the decision itself proceeded on another ground. The case relied on by the Subordinate Judge *Hemangini Dasi v.*

Kedarnath Kundu Chowiry ILR (1889) C. 758, was based upon the express provisions of the *Dayabhaga* according to which the step mother's

right is only against the share of her sons.

11. To Subordinate Judge, must be requested to return a finding on the 7th issue. He will also find whether the 5th defendant is in possession of

any family jewels as distinguished from her own *Stri-dhanam* jewels and if so what is their value. One month will be allowed for the findings and

seven days for objections.

Sadasiva Aiyar, J.

12. I have had the advantage of perusing the judgment of my learned brother in this case. I agree with him in all the conclusions formulated in that

judgment except on one point which however is not unimportant I am therefore obliged to write the following separate judgment and I shall notice in

it only two points of Hindu Law, one point on which I regret I have to differ from and the other point on which I agree with my learned brother.

13. The distinction between the ancestral and the self-acquired property of a father was not known to the ancient Hindu Law. The expression "

paternal estate " when used in Hindu Law-books does not mean the father's self-acquisition alone but merely means the estate which the son can

inherit or obtain through his relation as such son to his father. In *Gudimetla Venkatarazu Vs. Bollozu Kotayya*, . I have attempted to show that

according to the *Shastras*, sons had no right in the property which belonged to their father till both their father and mother were dead. *Sankha* and

Likhita state (see *Jagannatha* page 199) that even properties acquired by the sons themselves independently of their father cannot be partitioned

among them while the father lives since the sons are not their own masters in respect of any wealth so long as their father lives. *Harita Smriti* also

says the same. *Manu* says that three persons including a son can have no wealth of their own so long as their superior is alive. Of course we cannot

now wholly go back to the ancient Law of the *Shastras* and we have to accept the

Mitakshara which, relying mainly on a supposed text of

Gautama, gives to the sons by their mere birth, rights in the (self-acquired and ancestral) properties of the father. This supposed text of Gautama is

not found in Gautama's institutes-now and is opposed to the undoubtedly genuine text of Gautama that property is acquired only in five modes viz.,

inheritance, purchase, partition, seizure, or finding. Even if it is genuine, it can only mean that "birth" gives the son an inchoate and contingent right

to inherit to his father or mother on their death and not a right in presenti in their property as soon as he is conceived. The text of Yagnavalkya in

respect of ancestral Immovable property not being at the disposal of the father must be interpreted in the light of the moral obligation of a Grihasta

to provide for the support of his wife and children because not only those already born but even those thereafter to be born to him require

maintenance and support according to Vyasa's text. There are passages in the Smritis to show that to pass the ownership in Immovable property,

the consent of even neighbours and the whole of his village is requisite, the unrestricted private ownership and right of alienation in landed property

having been greatly discouraged in some portions of the long past period of Hindu civilisation. In fact, the Mitakshara (Chapter I Section I slokas

24 to 27 clearly says that the father is not master of the Immovable property acquired even by himself. The text of Yagnavalkya about the

ownership of father and son being equal in wealth received from the grand-father was merely intended as a moral injunction prohibiting the unequal

division of the grandfather's wealth between the father and sons. In fact, this text has been rightly interpreted as giving only a figurative ownership

to the sons in order that the father might fulfil his moral obligation of not making an unequal division of such property between himself and his sons.

It was not at all intended to give a legal right of present ownership in ancestral property to the son. Some other commentators explain the text by

saying that it was intended that where the father died leaving a son and grand-sons by a deceased son, the grand-sons by the deceased son should

obtain a share equally with their uncle. In other words, it was intended that the surviving son alone as the nearest sapinda, should not take the

whole of the estate to the exclusion of the grand-sons by the deceased son. It was therefore stated that the right of inheritance after the grand-

father's death is the same in the case of the son and the grand-son (by a pre-deceased son). The son is never considered in the ancient text-books as the true owner of any property so long as his father or mother is alive. See Jagannatha's Digest page 283. Yagnavalkya says that among those whose fathers are deceased the allotments of shares is according to the fathers. Katyayana similarly says "should a brother die before partition, his share shall be allotted to his son provided he has received no fortune from his grand-father. The son's son shall receive his father's share from his uncle's son." As I have said already it may be that to avoid the consequences of the logical effect of the dictum that the estate belongs to the nearest sapinda that the Smriti texts make the son, the grand-son and the great grand-son of the deceased owner to equally partake (per stirpes in the case of the grand-son and the great grand-son) the estate of the deceased owner instead of the son alone taking the whole as such nearest sapinda. But if a great great-grandson is left, he cannot claim to inherit any share of his great great- grandfather's property directly from the deceased owner. The Mitakshara's having laid down the principle of present right by birth instead of a mere figurative right has led to a very large amount of anomalies in the Hindu Law. To adapt the language of Beaman, J in a recent Bombay Case (that learned Judge was referring to the Mahomedan law). "There seems now little hope of expecting from the vast entanglements of the Mitakshara Hindu Law, anything like consistent principles, or intelligible classifications, and every single rule seems to be open to innumerable exceptions many of which appear to conflict in principle with the main rule." This modern main rule as to right by birth was in hopeless conflict with the son's undoubted legal liability under the ancient Hindu Law to pay his father's debts and hence the Privy Council have been obliged to virtually destroy this rule by allowing the validity of alienations effected to discharge the father's debts provided they are not illegal or immoral. This alleged right by birth is also ignored when the father was given the right to alienate his self-acquisitions, even if they were immovables. This same right by birth has led to the so-called right of survivorship unknown to the ancient Hindu Law, It has also virtually killed the numerous texts which show that the great-great-grand-son has no right to inherit directly the property of his great-great-grandfather, if the great-great-grandfather at his death left nearer descendants. The clear texts

(see Manu slokas 186 and 187 of Chapter 9 and the text of Katyayana) which deny the right of the great-great-grandson to inherit could not be

explained away except by much involved ingenuity. Such misapplied ingenuity has been abundantly shown by the commentators who wrote

Viramitrodaya, the Smritichandrika, the Madhavya, the Vivada Chintamani, and the Vivada Ratnakara. These unsatisfactory commentaries, the

Courts have been obliged to accept as making the rule as to the non-existence of succession and inheritance beyond the third descending line,

inapplicable to the cases governed by the Mitakshara Law. (See the elaborate judgment of my learned brother Sundara Aiyar, J. in Sir Abhinava

Purna Priya Vedaji Bhaskar Thirumal Rao Saheb. Vs. Arni Rangadani Rao Saheb, . For myself, I am unable to interpret the texts of Manu and

Katyayana as intended only to apply to cases where the property to be inherited was the acquisition of the great-great-grandfather because the

Mitakshara. confers right by birth even in self acquisitions to the sons and through them, of course, to the grandsons and great-grandsons. I am

clearly of opinion that the Mitakshara principle of right by birth utterly destroys the rule laid down in the texts of Katyayana and Manu that the

great-great-grandson has no claim to inherit directly his great-grandfather's property.

14. When, therefore, the Hindu Law books treat of partition of the paternal estate-I would put it rather as the parental estate- they did not mean to

confine themselves to the partition of the father's self-acquired estate because according to the ancient law, both his self acquisition and his

ancestral estate are his own and are parental estate so far as the sons are concerned. As my learned brother has pointed out, there are no separate

chapters in the Smritis or even in the commentaries treating of the partition of self-acquired estate apart from the ancestral estate of the father. The

only difference made is between partition during the father's lifetime and partition after the father's death. Mr. Ganapathi Iyer has attempted to

confine the texts of Yagnavalkya and other Smriti writers (Vishnu, Vyasa, Brihaspati and Narada) which required initiated brothers to set apart

from the paternal property the expenses of the initiation of uninitiated brothers and sisters before dividing the paternal property, to the father's self-

acquired properties and this attempt to restrict these texts to the self-acquired property of the father has, in my opinion, wholly failed. In fact,

Narada says that if no wealth of the father exists, the ceremonies of uninitiated brothers must, without fail, be defrayed by the brothers already

initiated contributing funds out of their own private wealth. Thus when the initiated brothers are bound even in the absence of any property inherited

by themselves to spend money for the Samskaras of their uninitiated brothers, it is impossible to hold that they are not bound to meet those

expenses out of the property which they inherit from their father as ancestral estate.

15. We now come to the question as to what are the Samskaras of uninitiated brethren, the expenses of which have to be first set, apart from the

inheritance before it is divided among all the sons. (Formerly, sisters also had shares in the inheritance along with their brothers and the texts about

expenses of initiation refer to both uninitiated brothers and sisters). Brihaspati's text clearly points to the Samskaras in question, viz., those which

the brothers initiated by their father had to perform for their brothers and sisters whose initiation had been left incomplete by the father at his death,

such initiations which are morally obligatory on the father being rounded up by the Upanayana ceremony. His text is as follows :- ""For younger

brothers, whose thread investiture etc., ceremonies have not been performed, their elder brothers shall perform them out, of the collected wealth of

their father."" If the expenses of the marriage Samskara were also intended to be set apart before partition, that Samskara would have been

mentioned in preference to the thread investiture ceremony. The word ""Dvijati Samskara"" as used in the Shrimad Bhagavatam and other sacred

books, is intended to apply only to that important Samskara which initiates the Hindu into his caste viz., the Upanayanam ceremony. It is well

known that females also, according to the Shastras, had the Upanayana Samskara performed in former ages, just like males though now the

Vivaha Samskara has become practically the only Samskara for females. But even now, at the time of the Vivaha Samskara, most of the previous

Samskaras are rapidly gone through for females. The Smirthi Chandrika is clearly of opinion that the ceremonies contemplated by Narada's text

commence with Jatakarma and end in Upanayana. Now the Samskaras are variously numbered from 8 to 48 and even more (see also

Jagannatha's introduction page XXX). The Savitri or the ceremony of investiture is the 7th when numbered from Jatakarma according to the

Samskara Ratnamala and the 8th or 10th when numbered from Garbhadanam according to other works. Marriage or Vivaham comes as the 14th

or 16th ceremony. That the marriage of males is not considered an indispensable Samskara is clear to me after a perusal of several of the ancient

Shastric books. The late Dewan Bahadur Ragunatha Rao a very learned, accurate, and unprejudiced Sanskrit scholar, has in my opinion,

conclusively shown in his works that marriage both for males and females is optional and not obligatory. The late Mr. Justice Krishnaswami Aiyar

while inclined to attach great importance to the Vivaha ceremony see Kameswara Sastri v. Veeracharu ILR (1909) M. 422. admits that the Jabala

Upanished, Manu, Yagnavalkya, and Mitakshara lay down that a Hindu can go straight from the Brahmacharya stage after Upanayana to the

Sanyasashrama stage without having been a Grihastha and having had the Vivaha Samskara if he has conquered his animal passions during the

Brahmacharya stage. (Yad Shareva Viramet Tad Shareva Pravrajat). See also Mitakshara, Prayaschitta Kandam on Yati Dharma. We have the

well-known text of the Bhagavatham that animal sacrifices, intoxicating liquor sacrifices, and marriage are not obligatory Samskaras but are

intended only for those who have not conquered their desires for flesh, spirituous liquors and sexual gratification.

Loke Vyavayamishamadhya Seva Nitiyastu Jantoh nahi tatra chodana Vyavasthitis thesu vivaha Yagna sura Grahair Asunivrvrithi rishta.

[Bhagharatham Ekadesa Skandham 5th Adhyaya 11th Stanza Ed.].

16. The texts which praise the Grihasthasramam as supreme are only what are known as Arthavada and laudatory texts intended to encourage the

married house-holder to perform his duty of maintaining the other three Ashramas and were clearly not intended to really lay down that the

Grahasthashrama is superior to the other Ashramas. In fact, in the Bhagavatham and other religious works and also in the Smirthis, the married

stage is in several places despised as the Jaghanyasrama and it is clearly laid down that apart from the exceptional cases of Gnana Sanyasjs like

Janaka, a man who dies as an ordinary Grahasthashramee will be merely moving round and round in the three lower worlds, whereas the Naishtika

Bramacharya the vanaprastha and the Sanyasi alone can go to the higher four worlds after passing to which there is no further involuntary return to

the rounds of births in the three lower worlds. Marriage is only a Vikalpavidhi and it is not a Nitya or Apurvavidhi. It is either a Niyama Vidhi or is

only a Parisankhya Vidhi. Even Chandavarkar, J. in Sundarabai v. Shivnarayana ILR (1908) B. 81. does not state that marriage is always

obligatory but only that it might "" become obligatory"" in the cases and for the reasons he has set forth (page 93, 1st line). As regards the texts

quoted by Krishnaswami Iyer, J. which ordain that a man should discharge his three (or five) debts and that he should pro-create sons by marriage

to discharge one of those debts, viz., the debt due to his Pitris, there are numerous passages in the Shastras to show that when real Vairagya is

obtained and real undivided devotion to the Supreme Lord, the debts to Devas, Rishis, Bhootas, Aptas (fellowmen) and Pitris all become

nonexistent and completely discharged and that on the very day such Vairagya and devotion are obtained that very day you should give up the

wordly life. The learned Judge himself does not state that marriage is a compulsory samskara even for the man who is not fit to pass at once to the

vanaprastha stage but that is practically compulsory; Kameswara Sastri v. Veeracharlu ILR (1909) M. 422. The Bhagavatham says.

Devarshir Bhootapta Nrinam Pitrinam na Kinkaro Nayamrineecha Rajan Sarvatmana Yassaranam Saranyam Gato Mukundam parihritya Kartam

Bhaghavatham Ekadesa Skandbam 5th Adhyaya 40th Stanza, Ed.

17. Now according do the texts (see especially Narada quoted in the Smrithi Chandrika, page 59 of Mr. Krishnaswami Iyer's translation) which

require the initiated brothers to perform the ceremonies of their uninitiated brethren, it is clear that it is only those ceremonies which the deceased

father was expected and bound to perform for his sons, if he was alive that the initiated brothers had to perform in the place of their father for their

uninitiated brothers. ""What is left of the father's property after the father's obligations have been discharged, let the brothers divide."" Now what

are those ceremonies: Manu says ""Let the father himself perform the 8 ceremonies which perfect the second birth of a twice-born man like the

ceremony on conception"". Thus, it is clear that the father is under an obligation to perform only up to the Upanayana ceremony, the Samskaras to

be performed for his son. Vivaha is a ceremony which is performed after a man attains his majority and depends on his own will and option. It is,

therefore, perfectly clear to me that the marriage Samskara is not one of the Samskaras which the initiated brothers have to perform for their

uninitiated brothers and the expenses of the future marriage ceremony of the uninitiated brother is therefore not intended by the texts to be

deducted out of the patrimony before it is divided. I am glad to have for the above view, the support of that very learned Judge, the late Mr.

Justice Krishnaswami Aiyar, who has said in *Kameswara Sastri v. Veeracharlul* "" there is also another reason for separating marriage from the

Samskaras that precede it, for, as pointed out at page 300 of the Digest, it is not a Samskara which a father does for the sons as he does in the

case of the preceding Samskaras but one in which the son himself participates as the active agent."" The learned Judge further on says "" The

marriage of an unmarried brother is certainly not a duty cast on the married brothers where there is no patrimony"". The texts of Narada make the

initiated brothers perform the Samskaras of uninitiated brothers even out of the own acquisition if there is no patrimony and as the Samskaras so

made obligatory on the initiated brothers are the same whether there is patrimony or not, if such Samskara cannot include the marriage Samskara

in the one case, they cannot include it in the other case also. In the case of uninitiated sisters, as the marriage ceremony has now taken the place of

their Upanayana, the marriage expenses must be met or set apart, but in the case of uninitiated brothers, I think we must stop at the Upanayana

ceremony as even the Smriti Chandrika does not venture to go beyond the expenses of the Upanayana ceremony as obligatory on the patrimony.

If we go as far as the optional sacrament of marriage, why should we not go to the 30 and odd sacraments which follow the marriage sacraments

and where are we to stop ? In these days when it is deemed essential to postpone the marriage of boys till their education is completed, I am not

prepared to allow any monies for the future marriage of a minor boy to be set apart several years before the marriage is likely to take place. The

making of such of provision will be the holding out of a temptation to the boy and his widowed mother to hasten the marriage before he completes

his education and such early marriages are utterly opposed to the shastras. The question decided in *Kameswara Sastri v. Veeracharlul* ILR (1909)

M. 422. was that the expenses of the marriage of a male Hindu are expenses incurred on account of the ""family necessity"" because they are,

reasonable and proper expenses. That question is quite a different question from that which we are now considering, viz., whether the expenses of such marriage ought to be set apart at a division among the brothers as the expenses of an obligatory Samskara, under the texts of Narada and other sages. The expressions "" family necessity"" and ""family benefit"" have always been liberally construed to include the expenses for purposes usually and reasonably incurred according to the status of the particular family and that question was recently decided in S.A. 1703 of 1909

Gopalakrishnamaraju by his mother Bangaraya Vs. Venkatanarasa Raju and Others, by a Full Bench of which I was a member but the present question as to the expenses of what Samskaras have to be set apart at partition has no connection with the question decided by the Full Bench, the decision of the Full Bench merely affirming that where the marriage had taken place and where therefore, the Vivaham sacrament of male was found to have been obligatory owing to the unfitness of that male member for the life of a Naishtika Brahma-charya or of a Sanyasin, the reasonable expenses which had been incurred for his marriage were proper family expenses which would support the alienation of family property made for meeting such expenses. I wish to add that in these times when the giving of a Varasulkam is so rampant, it is very problematical that any expenses need at all be incurred for a boy's marriage when he comes of marriageable age and on that ground also I should hold that the allowance of Rs. 150 to the minor plaintiff for his marriage expenses is based on a remote speculative necessity. In this case, the plaintiff is only a boy 5 years old and to speculate about his marriage and his marriage expenses now seems to me to be a great deal premature. In the result, I would modify the lower Court's decree by deleting the provision made in it to the extent of Rs. 150 for the plaintiff's marriage, plaintiff being a child five years old, his marriage, if it takes place at all in future, having to be postponed till he is 24 according to the shastras, it being problematical whether his marriage instead of entailing expense may not even be a source of pecuniary profit to him when it occurs and the Hindu law contemplating the expenses up to Upanayanam alone being set apart at the time of division for the benefit of uninitiated brothers. In other respects I agree with the judgment of my learned brother and I agree in the order proposed by my learned brother to be passed in this casa as regards the question of 5th

defendant's maintenance.

Sundara Aiyar, J.

18. As my learned brother does not agree with my view on the question of the plaintiff's right to have provision made to defray the expenses of his

marriage, we refer u/s 98 of the CPC for the decision of a third Judge the question whether, when one only of two coparceners in a Hindu family

has been married at the family expense the other coparcener, a minor, is entitled at a partition of the family property to have provision made for his

marriage out of it.