

(1945) 07 BOM CK 0020
In the Bombay High Court

Madhavrao Raghavendra and Others

APPELLANT

Vs

Raghavendrarao and Others

RESPONDENT

Date of Decision : 31-07-1945

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9

Citation : AIR 1946 Bom 377

Hon'ble Judges : Kania, Acting C.J.

Bench : Division Bench

Judgement

Kania, Ag. C.J.

1. This is an appeal from the judgment of the Joint Civil Judge (Senior Division) at Poona in civil Suit No. 224 of 1931. "When this suit was filed, plain, tiffs 1, 2 and 3 were minors. They are sons of defendant 1 by his predeceased wife. The suit was filed by the plaintiffs" next friend the g?andfather, who is a Jahagirdar and a First Class Sardar in the Deccan Defendant 1 lost his first wife in about 1927. Defendant 2, who is stated to be of Bharadwaja gotra, was taken in adoption by one Kale, who was of a different gotra, on 11th July 1929. On 12th July 1929, defendant 1 married defendant 2 according to Hindu rites. The next friend of the minor plaintiffs, who was aware of the intended marriage, had taken part in various ceremonies prior to the marriage. A couple of days before the marriage he received a letter from the Shankaracharya of Sankeshwar Pith, expressing the opinion that the intended marriage of defendants 1 and 2 would be against Hindu religion. The plaintiffs" next friend, thereupon, refrained from attending the marriage. Other persons attended the marriage. It was performed by the priest of the family. That was followed by a feast of about 200 or 300 people, when all friends and relations attended as usual. After the marriage was celebrated, defendants 1 and 2 and the minor plaintiffs lived with, the next friend of the plaintiffs for several months. In 1931, the next friend filed this suit in the name of the three minor sons of defendant 1. The first prayer is that the marriage of defendants 1 and 2 be declared null and void. The second prayer is

that as the marriage of defendants 1 and 2 was not permitted by law, and, as the upanayan (thread) ceremony of the plaintiffs was to be shortly performed, defendant 2 should be restrained from taking part in that ceremony. It was also claimed that defendant 1 may be restrained from performing the ceremony without undergoing the prayaschit prescribed by the shastras. Defendants 1 and 2 filed one written statement. In para. 5 they contended that the marriage of defendant 1 with defendant 2 was legal, according to the custom and practice prevailing in the community of the Deccani Brahmins in this Presidency. The allegation that asagotra marriage is null and void under Hindu law was not admitted. Various other minor contentions were raised in the pleadings, with which we are not now concerned. Defendants 3 to 6 are the sons of defendant 2 by defendant 1, born since the suit was filed. Since the thread ceremony of the plaintiffs has been performed, we are now concerned only with the first prayer. Before the trial Court several witnesses were examined on the question of custom. They also deposed to the meaning of the authoritative texts. It is clear that their interpretation of the texts cannot help the Court, as the Court has to look to the interpretation put on the texts by recognized commentators only. The learned trial Judge came to the conclusion that a marriage between sagotras was prohibited according to the Hindu Smriti writers and recognized commentators. He, however, held that the defendants had established the custom pleaded by them and therefore to that extent the law was modified. The suit was therefore dismissed. From that judgment, this appeal has been preferred. When the matter came before this Court, at first, only plaintiff 2, who had by then attained majority appeared as the appellant. In the course of discussion it was stated that all the plaintiffs were living with the defendants. At a later stage, plaintiffs 1 and 3 appeared through another advocate to support the appeal. It may be mentioned that all the three plaintiffs have now attained majority. It is not denied that they live with the defendants. It appears, therefore, clear that although they have attained majority, the appeal is still prosecuted under the directions, or, according to the wishes of the paternal grandfather, who was the original next friend of the plaintiffs.

2. On behalf of the appellant, it was contended that the evidence led before the trial Court on the question of custom was not sufficient. It was argued that the instances were few and the details of each instance were not sufficiently full to make it a perfect instance. The learned advocate for the appellant did not address us at length on the question of interpretation of the original texts as the finding of the trial Court was in favour of the appellant. At a later stage, in reply, he however addressed us on that part of the dispute between the parties.

3. Mr. Kane relied on three cases in support of his contention that the evidence of custom should be clear and unambiguous, and the custom should be ancient. In *Bhagvandas Tejmal v. Rajmal* ('73) 10 Bom. H.C.R. 241 the question was in respect of an adoption in the Jain community. In the course of the judgment it was pointed out that evidence of custom has to be scrutinized with care because it can be conveniently asserted by the party who wants to rely on the same. The

observations of the Judicial Committee in *Ramalakshmi Ammal v. Sivanantha Perumal* ("70-72) 14 M.I.A. 570 were relied upon. The observations are as follows (p. 585):

Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular Districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

Those observations are clearly binding on us. It should be noted that the Court was dealing with a custom modifying the law of succession. In that case the Court held that the custom was not proved, because there were only three instances, two of which were only four years old, and one 20 years old, but of which the details were not perfect. Mr. Kane further relied on *Basava v. Lingangauda* ("95) 19 Bom. 428 in support of the same proposition. That was a case of an only son's adoption. The Court up-held the adoption. In that case evidence of 29 instances was led and was spread over a period of 60 to 70 years. Ranade J. in an elaborate judgment, examined each of the instances in detail and came to the conclusion that the custom propounded was established by the evidence on record. The next in order of date is *Chandika Bakhsh v. Mnna kuar* ("02) 24 All. 273 where it was alleged that there was a family custom that on the extinction of the line of one of several brothers, the descendants of all the other brothers took equally, without reference to their nearness to the common ancestor. An examination of the judgment shows that evidence of only four instances was led in that case. In delivering judgment Lord Macnaghten observed as follows (p. 75):

The result is that in support of the alleged custom four instances at most can be adduced, and those of a comparatively modern date, and that there is no other evidence.

The Court considered that in that state of affairs the custom was not proved.

4. On behalf of the respondents, reliance was placed on several later decisions. It seems that without derogating from the general principle laid down by the Privy Council in *Ramalakshmi Ammal v. Sivanantha Perumal* ("70-72) 14 M.I.A. 570 the tendency has been not to strictly construe the word "antiquity" as was contended to mean by the appellant. Proceeding to consider the decisions in their order of date, the next is *Chiman Lal v. Hari Chand* ("13) 40 Cal. 879 . In that case also the Court had to consider the question of adoption amongst Jains. After dealing with the evidence on record and bearing in mind that the parties had lived together after the adoption for several years, it was observed that instances 20 or so years old raised a presumption of antiquity, and although the evidence

of instances was comparatively meagre, the Court gave the declaration of validity, but limited it to the parties to the suit, so that the question may be further considered if necessary, if fuller evidence was available in later litigation. In *Parshottam Ganpat v. Venichand Ganpat* ('21) 8 AIR 1921 Bom. 147 the question of adoption amongst Jains residing in the Belgaum District came to be considered. Evidence of instances was led. Some instances were of adoptions after the controversy arose. It was argued that these later instances should not be considered at all that argument was disposed of by Sir Norman Macleod C.J. in these terms (p 759):

These remarks would appear to me most pertinent, but from the later cases which have come before the Courts on which it was sought to establish a custom, it seems to be no longer considered that the evidence of modern instances, which alone can be proved by oral evidence, cannot establish the custom, unless the Court is satisfied by the evidence of texts or experts that those instances have occurred in pursuance of a recognized custom, in order to link the present with the past.

It was observed that it was open to the plaintiffs to call the evidence of Pandits and elders of the Jain community, to show that the validity of an orphan adoption was not recognized by them. It was a significant fact that the evidence which they did call to negative the custom was, as pointed out by the learned Assistant Judge, not entitled to any credence whatever. Fawcett J. in the same case, pointed out that in Halsbury's Laws of England, vol. X, Article 442, p. 234, it was stated that as a general rule proof of the existence of the custom, as far back as living witnesses can remember, was treated, in the absence of any sufficient rebutting evidence as proving the existence of the custom from time immemorial, and that evidence of the existence of the alleged custom for a period of 20 years may be sufficient to warrant a Court in finding as a fact the existence of the custom from time immemorial. He relied on several text books and on a passage from the judgment in *Ambalika Dasi v. Arpana Dasi* ('19) 6 AIR 1919 Cal. 681 . The Calcutta High Court had held that a usage for 20 years may raise a presumption, in the absence of direct evidence of a usage, of its existence beyond the period of legal memory.

5. In AIR 1925 267 (Privy Council) which was decided in 1925, the Judicial Committee of the Privy Council had occasion to consider the question of custom in respect of inheritance in a tribe. Their Lordships observed that the custom could properly be proved by general evidence given by members of the family or tribe without proof of special instances. In the course of the judgment it was stated as follows (p. 388):

As regards the custom in respect of which the two Courts in India have differed, their Lordships think the Subordinate Judge was in error in putting aside the large body of evidence on the plaintiff's side merely on the ground that specific instances had not been proved. They are of opinion that the learned Judges of the High Court are right in holding that a custom of the kind alleged in this case

may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognisant of its existence and its exercise without controversy.

There is a large body of oral evidence establishing the custom, wholly unrebutted by the defendants, who have relied exclusively on the district *riwaj-i-am*. The judges of the High Court have commented on these documents, and their Lordships see no reason to differ from them.

That case lays down a further land-mark in the consideration of evidence led on custom. It recognizes that general opinion of members of the community or elders, who are likely to know the existence of the custom, is entitled to great weight even though they may not be able to give specific instances. It further decides that when there is clear evidence of such general statements, which is all one-sided, it is open to the Court to rely on that and give a decision upholding the custom.

6. Next ill order of date is the decision in *S.K. Wodeyar v. Ganapati* ("35) 22 AIR 1935 Bom. 371 where Rangnekar J. was dealing with the question of a custom of entry into a temple. Following the observations in AIR 1925 267 (Privy Council) quoted above, the Court upheld the custom in the absence of specific instances. In the course of his judgment the learned Judge stated as follows (p. 588):

In my opinion, it is open to a Court to hold a custom to be proved, even if there are no instances, if there is sufficient evidence on which the Court can rely and say that that evidence proves that a particular usage has been so long known and so well known in a particular district as to have been tacitly acknowledged as the law governing that particular district.

7. In considering the evidence of witnesses it was observed as follows (p. 590):

it is clear that in all such questions as to proof of custom one material consideration for the Courts would be whether the witnesses are men who are likely to know the custom in dispute and we have special means of acquiring knowledge about it and whether they speak of their own personal knowledge in their lifetime, and if they do that, it is open to them to refer to information which they may have received from their elders or ancestors and which may be strictly speaking hearsay.

In the same volume another decision of the Privy Council, in AIR 1935 132 (Privy Council) is re-ported. The relevant point decided was that a customary law, if found to exist in 1880 and 1910, must be taken to have the ordinary attribute of a custom that it is ancient, and that, unless the contrary is proved, it must be assumed to have existed prior to 1858. Those observations support the view that recent instances if they could be linked up reasonably with past, could be used to support the argument that the custom was ancient.

8. The question came to be considered again by the Privy Council in AIR 1939 22 (Privy Council) . The custom in question was to exclude a daughter from

inheritance in respect of an estate governed by male primogeniture. Their Lordships reiterated that in proving a custom it was not necessary to adduce proof of actual instances of the custom taking effect. Sir George Lowndes, in delivering the judgment, observed as follows (p. 705):

The opinions of responsible members of the family as to the existence of such a custom, and the grounds of their opinion, though generally in the nature of family tradition, are clearly admissible and their unanimity in the present case is remarkable.

In AIR 1941 21 (Privy Council) the Judicial Committee had occasion again to consider the question of antiquity in respect of custom. It was observed that the English rule that a "custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" does not apply to conditions in India. A custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district the force of law. It must be ancient, but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district. In that case the Court had before it instances which ranged over a period of nearly 80 years. These were held to be sufficient to establish the custom as binding on the parties. *Suganchand Bhikamchand v. Mangibai Gulabchand* ("42) 29 AIR 1942 Bom. 185 is the latest decision to which our attention has been drawn. After considering the evidence on record, Broomfield J. observed as follows (p. 363):

Witnesses have been examined on both sides who have made general assertions that the custom in Marwar and among the Jains in thana is as alleged by the plaintiff or as alleged by the defendant respectively. In the evidence of this group of witnesses no particular instances have been referred to at all. Nor is any reference made to judicial decisions that fact does not make the evidence inadmissible.

After quoting the passage from AIR 1925 267 (Privy Council) (quoted above), the learned Judge observed as follows (p. 368):

There is no doubt that if the evidence is all one way, or if there is a strong preponderance of evidence in favour of a particular custom, the Court cannot ignore it, although I witnesses do not cite specific cases in support of their statements.

It must be recognized that when general opinion is conflicting, it has of course little value, but when that evidence is all one-sided, the Courts have accepted the evidence and acted on the same.

9. I have summarized above the relevant passages from the judgments of the different cases cited to us. They disclose, in my opinion, a clear manner of proof of custom. While the rule laid down by the Privy Council in *Ramalakshmi Ammal v. Sivanantha Perumal* ("70-72) 14 M.I.A. 570 still holds good, it is recognized that the meaning given to the word "ancient" in English law is not applicable to custom here. It is also recognized that the necessary proof in each case will depend on the nature of the custom alleged and the want of instances or paucity thereof does not prevent the Court from upholding the custom, if there is a general consensus of opinion of persons who are likely to know of its existence, particularly when the evidence is all in one direction. Moreover unlike cases of succession, the custom being permissive, the test of invariability will not apply.

10. Having regard to these observations we have to approach the evidence on record. Custom is a recognized source of Hindu law. I do not propose to deal in detail with the evidence, as my learned brother is going to do so. It is sufficient for me to say that the evidence in this case is all one-sided and is given by independent, orthodox and respectable members of the community, priest and an author. Their veracity is not challenged. The opinion is expressed by persons who are all likely to know of its existence. In addition to general opinion they have given instances also. The oldest is over 100 years old. It is true that an instance is not found at regular interval, but the instances, deposed to by witnesses with sufficient particulars, are of marriages, which took place, after passing through a form of adoption, 20,30 or 60 years ago. In addition, there are instances of 1922, 1927,1928 and 1929. The evidence shows several instances of such marriages after the suit was filed. In my opinion, these instances, under the circumstances of the case, are stronger proof of the ancient nature of this custom. The question before the parties is about their status. If the custom is held not proved, or not in existence, the relationships between the man and woman will not be of husband and wife. They will be living an immoral life. Knowing the danger of such a position being established, if a dispute arose, the parties have confidently passed through the ceremony of adoption and celebrated the marriage even after the existence of such custom was disputed in the present suit, In my opinion, that shows the strong mental conviction of the community that such a custom exists. The evidence shows that in the later years, members of respectable families have been married on the footing that such a custom exists. The parties are recognized by the community as husband and wife and they have social relations with the rest of the community on the footing of their marriage being legal. In the present case the erstwhile next friend of the minors himself made the betrothal of defendants 1 and 2. When the Shankaraeharya expressed his opinion a doubt was raised in his mind; but it was not sufficiently strong to make him stop the marriage. His conduct shows that out of respect for the Shankaracharya he refrained from attending the marriage; but he took no other objection to the same effectively. After the marriage was celebrated, the parties lived with him peacefully for several months. The suit was filed about two years after the marriage. All this, in my opinion, shows that the

custom was recognized to exist, even by the next friend of the minors. Defendant 1 is still the president of the Rigvedi Deshastha Brahmin conference and defendant 2 is the president of the female branch of it. This shows that in spite of the unfortunate intervention of the Shankaracharya the community as such has recognized them as husband and wife and that is done in spite of the dispute raised by the next friend of the minors. I, therefore, agree with the trial Court that the custom is established and the general law, which is held to be against the marriage amongst sagotras, to that extent is departed from. On the question of interpretation of the ancient texts, the Court is bound by the judgment of the Privy Council in AIR 1935 57 (Privy Council) . In that case at page 143 their Lordships approved of the observation in Collector of Madura v. Moottoo Ramalinga Sathupathy ("68) 12 M.I.A. 397. It is the duty of a Judge

not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage.

Their Lordships observed that the Mitakshara subordinates in more than one place the language of texts to custom and approved usage and it was, therefore, clear that in the event of a conflict between the ancient text writers and the commentators, the opinion of the latter must be accepted. With all respect, I think that the observations, as worded, do not carry out the intention with which they were expressed. The Board considered that the ancient text writers had laid down a certain rule of law and the commentator in his commentary had recognized the growth of custom in the intermediate period and, therefore, the views of the commentator were more liberal. To give effect to this more liberal view, their Lordships stated that in the event of a conflict between the ancient text writers and the commentators, where they were not reconcilable, the opinion of the latter must be accepted. The question, however, may have to be seriously considered when the opinion of the commentator does not enlarge, but restricts the meaning of the original text.

In the present case the learned trial Judge, in the course of his judgment, has relied upon Manu Smriti chap. III, Verses 5, 8 and 9 which are as follows: (Verse 5)

She who is not a sapinda of the mother and she who is not a sagotra of the father is recommended to the twice-born for being selected for wife.

He should not marry girls of black complexion, she should not have additional limbs, she should be healthy, should not be hairy, should not be without hair, should not be talkative and should not be brown.

She should not have the name of a river and not of tree or mountain and she should not bear a furious name.

He has also relied on Vajnavalkya Smriti chap. III, verses 82, 58 and 54, which

are as follows.

He with the celibacy not broken should marry a girl of good signs, not belonging to others, beautiful, not of a sapinda relationship and younger than himself.

She should be healthy, should have brothers should not have the same gotra and pravara and should be five degrees removed from the mothers and seven degrees from the father.

A maiden should be taken from a highly respectable family of persons well-versed in the Vedas, and inheriting the virtue of ten generations, prosperous; not even from such a family if there be any hereditary disease.

I find that in the judgment of the trial Court the texts are not considered in their order, but the texts of the two law givers are taken together and their combined effect is considered.

11. Proceeding on the footing that in the Bombay Presidency we are bound by Yajnyavalkya Smriti and the commentary of "Vijnanesvara thereon, the argument urged by the respondents is that the various qualities of a prospective bride described in verses 52 to 54 can, in no event, be considered the irreducible minimum qualifications. They are recognized as qualities which would be preferable to have in a prospective bride. Proceeding with that line of reasoning, it is contended that just as a healthy girl and a girl with brothers is stated to be an eligible bride, the statement that she should not be of the same gotra and arsha should be considered recommendatory. It was argued that in the last line of verse 53, the limitation of five degrees on the mother's side and seven degrees on the father's side would be redundant if full effect and meaning is given to the prohibition not to marry a girl of the same gotra and arsha. It is further pointed out that verses 52, 53 and 54 are all to be read together. It is not disputed that except the restrictions that they should not be of the same gotra and arsha and should not be related within five degrees on the mother's side and seven degrees on the father's side, all the rest are only qualities for which a girl may be preferred, but are not enjoined as necessary qualities in a would-be bride. It was argued that it is against the ordinary rule of construction therefore to accept certain portions of one verse as mandatory, and the rest as only recommendatory. It was pointed out that while the Privy Council in AIR 1935 57 (Privy Council) had expressed the views mentioned above, in the case of adoption of an only son and eldest son, it considered the texts of Mitakshara recommendatory, although the appropriate translation was "should be" in connection with both of them. The Decision of the Privy Council in *Sri Balusu Gurulingaswami v. Sri Balusu Ramakshamma* ('99) 22 Mad. 398 and the passages on pages 415-416 and 428-429 show the great hesitation and diffidence with which their Lordships approached the question of interpretation of ancient texts when the commentators differed in their opinion. The commentary of Vijnanesvara (Mitakshara) on the texts of Yajnyavalkya in that case was in these terms:

Paragraph 11. So an only son must not be given (nor accepted). For Vasistha ordains "Let no man give or accept an only son.

Paragraph 12. Nor, though a numerous progeny exist, should an eldest son be given, for he chiefly fulfils the office of a son, as is shown by the following text:.

In spite of the use of the words "must" and "should" in Mitakshara, in view of the conflict of interpretation by the different commentators and High Courts of the original texts, their Lordships held that it was a recommendatory and not a mandatory text. Similarly, in respect of the different kinds of stridhan, their Lordships have not accepted the commentary of Vijnanesvara fully, that is clear from *Bhugwandeem Doobey v. Myns Baee* ('67) 11 M.I.A. 487 and *Debee Mangal Prasad v. Mahadeo Singh* ('12) 34 All. 234. In the present case, in view of our conclusion on the question of custom, it is not necessary to decide the larger question. If the matter were to be decided there appears considerable force in the contention that Mitakshara's commentary on Yajnyavalkya, chap. 10, verse 53, in respect of the girl not being of the same gotra and pravara is open to considerable comment.

The text runs as follows:

In the case of marriage with girls who are sapinda, saman gotra or saman "pravara, the condition of wifedom does not come into being but in case of girls who are afflicted with diseases, etc., the condition of wifedom does come into being but there is a conflict in regard to worldly considerations only.

12. It is questioned on what basis a distinction is sought to be made in respect of the two qualifications mentioned in the first line of verse 53 of Yajnyavalkya. One ground suggested by Mr. Kane was that when there was a visible explanation for prescribing certain qualities, the text would be recommendatory; but if human mind cannot think of an explanation, the same should be considered as prescribed owing to some super, human reason, and, therefore, the text would be mandatory. It is pointed out that this line of reasoning overlooks the conditions under which the texts came to be written. It is recognized that in ancient times, each of the rishis formed, as it were his own feudatory realm and was supreme within his boundaries. Persons living in his ashram or attached thereto as relations, were prohibited from looking upon members of the other sex with an eye to matrimony. To prevent such a contingency, these texts are clearly explicable. If this is considered a rational explanation for the command stated to be contained in the second part of the first line of verse 53, of Yajnyavalkya, there appears no reason to treat it differently from the first part, namely, that the girl should be free from disease and should have a brother. The explanation for not applying these texts rigidly to Kshatriyas and Vaishyas is far from satisfactory. As already stated, the point does not require to be elaborately considered in this case, but as arguments were addressed to us at some length, I have thought fit to summarize them, so that those who may be in charge of legislation at the appropriate time may seek further elucidation of the ancient

text and commentaries. In my view, the judgment of the trial Court is correct. The appeal fails and is dismissed. The appellant to pay the costs of respondents 1 to 6.

Gajendragadkar, J.

13. Sadashivrao Madhavrao Purandare is a Jahagirdar and a First Class Sardar in the Deccan; his only son Raghavendra has three sons by his first wife who died about 1927. In 1929 Raghavendra married Sonubai Mudholkar. The present suit has been filed on 29th January 1931, by the three minor sons of Raghavendra, by their next friend their paternal grandfathar Sadashivrao Purandare, against their father Raghavendra, defendant 1, and his second wife Sonubai, defendant 2, In their plaint, as originally framed, the plaintiffs claimed two reliefs:

(1) that it may be declared that the so-called "marriage between defendants 1 and 2 is null and void and that it confers no rights whatever on defendant 2 as a lawfully wedded wife of defendant 1 and stepmother of the plaintiffs; (2) "Defendant 1 may be restrained by an injunction from performing the thread ceremonies of plaintiffs 1 and 2, unless and until he has discontinued cohabitation with defendant 2 and made her live separate from him and has farther undergone the prayaschitta prescribed by the shastras, and defendant 2 be restrained by an injunction from participating in any such thread ceremonies of the plaintiffs, as the lawfully wedded wife of defendant 1 and stepmother of the plaintiffs.

14. At an early stage of the suit it was found that the thread ceremony of the plaintiffs had already taken place and the injunction claimed with regard to it had become superfluous. Besides, it was also held that the question of defendant 1's competence to perform the plaintiffs' thread ceremony was a question of a purely religious nature and was outside the jurisdiction of civil Courts u/s 9, Civil P.C., and so the second prayer made by them in the plaint could not be entertained. Against this finding no complaint has been made. The Court, therefore has now to consider only the first prayer and the allegations made in support of it. In support their first prayer, the plaintiffs alleged that

they, their next friend and defendant 1 are Rigvedi Deshasth Brahmins belonging to the Bharadwaja gotra. Defendant 2 is also a Rigvedi Deshasth Brahmin lady belonging to the same gotra. According to Hindu law, as recognized and administered by the Civil Courts in British India, and also according to the Hindu religious text books, a marriage between persons belonging to the same gotra is absolutely null and void,

They further alleged that

If the validity of this so called marriage is left unchallenged by the plaintiffs, it may cause them very serious injury.

15. This claim of the plaintiffs was resisted by defendants 1 and 2 by their written statement, Ex. 186. The defendants contended that

The allegation made in para. 1 that the marriage of defendant 1 with defendant 2 is illegal is denied. It is submitted that the marriage is legal as the gotra of the bride was altered by an adoption of the bride according to the custom and practice prevailing in the community of the Deccani Brahmins in this Presidency. Further that the plaintiff 8 allegation that a sagotra marriage is null and void under Hindu law is not admitted. The text prohibiting such marriage is merely recommendatory and does not make the marriage null and void.

There were some other allegations made in the plaint and the written statement with which it is not necessary to deal. On these pleadings the learned trial Judge framed these issues:

(5) Whether defendants proved that the bride's gotra was altered by her adoption before marriage,

(5A-12) Whether defendants proved that the rule against sagotra, marriage was merely recommendatory?

(5B) Domain tiffs prove that defendants 1 and 2 were of the same gotra before marriage?

(6) Whether defendants proved that a marriage between sagotra bride and bridegroom was not absolutely void under the Hindu law but was in accordance with custom prevalent in the community to which parties belonged?

The learned trial Judge found that the gotra of defendants 1 and 2 was the same, namely Bharadwaja. He held that under Hindu law a daughter could not be validly adopted, and, in support of that conclusion, he relied upon a decision of this Court in *Gangabai v. Anant* ("89) 13 Bom. 690 . He further held that even if a daughter were adopted for the purpose of marriage, she had to observe the gotra of her natural family, as well as that of her adoptive family, and in support of this conclusion the learned trial Judge relied upon a decision of this Court in *Basappa v. Gurulingawa* ("33) AIR 1933 Bom. 137 . The learned trial Judge also held that on the texts, as interpreted by Mitakshara, marriage between persons of the same gotra was invalid and in support of this conclusion he relied upon a decision of this Court in *Ramchandra v. Gopal* ("08) 32 Bom. 619. Lastly, on the question of the custom set up by the defendants, the learned trial Judge found in their favour. He came to the conclusion that the custom pleaded had been proved by satisfactory evidence, and since the said custom was obviously not opposed to public policy and was not immoral, it can be judicially recognized and enforced. On that view of the matter, the learned trial Judge dismissed the plaintiffs' suit.

16. Unfortunately, this litigation had a prolonged and somewhat chequered career. Meanwhile, four sons have been born to Raghavendra by his second wife and they have been impleaded to this suit as defendants 8 to 6. The plaintiffs, who were minors when the proceedings were pending in the Court below, have now become major and appear on the record as such. Plaintiff 2 alone has preferred the present appeal, and plain, tiffs 1 and 8 have been joined as

respondents 7 and 8. It was during the pendency of the hearing of this appeal before us that plaintiffs 1 and 8 (respondents 7 and 8) have appeared by an advocate and have supported the appellant's contentions.

17. For the appellant Mr. Kane has urged that the finding of the learned trial Judge on the question of the custom set up by defendants 1 and 2 is wrong. His main argument has been that the evidence adduced by defendants 1 and 2 in support of the said custom is insufficient in law to justify the finding recorded by the learned trial Judge. Mr. Kane has supported the judgment of the trial Judge in regard to his finding as to the invalidity of the marriage under the strict provisions of Hindu law. This part of the judgment has been challenged by Mr. Jahagirdar for respondents 1 and 2. So, two main points arise for decision in this appeal: (1) Is the marriage between defendants 1 and 2 invalid under Hindu law on the ground that defendants 1 and 2 belonged to the same gotra before their marriage? If yes, (2) Is it shown that by a custom applicable to the Deccani Brahmins to which community the parties in suit belong, such marriages are recognized as valid? It may be mentioned that the question of custom was more exhaustively argued before us and it is that question which I propose to discuss first.

18. Now, it well known that under Hindu law custom is one of the three sources of law. Where there is a conflict between the custom and the text of the Smriti, custom overrides the text. As observed by the Privy Council in *Collector of Madura v. Moottoo Ramalinga Sathupathy* 12 M.I.A. 397 "under the Hindu system of law, clear proof of usage will outweigh the written text of the law. "A custom like the present must be proved to be ancient, certain and reasonable, and being in derogation of the general rules of law, it must be established by clear and unambiguous evidence. When a party sets up a custom, it is obvious that the onus to prove that custom is on him. Putting the onus of proving this custom upon defendants 1 and 2 in this case, the question to decide is what is the mode by which this custom can be permitted to be proved. Mr. Kane contends that while proving such a custom, it is necessary that it must be established by satisfactory evidence of instances where this custom was observed and the instances cited in support of this custom must be shown to be ancient and certain. The argument is that in a case of this kind it is not open to a party to ask the Court to hold a particular custom as proved unless in support of that custom the party has been able to adduce evidence of a large number of instances showing that the custom really prevailed from ancient times. In support of this contention, Mr. Kane relied upon a decision of this Court in *Bhagvandas Tejmal v. Rajmal* ("73) 10 Bom. H.C.R. 241 . The passage on which Mr. Kane relies appears at page 260 where this Court respectfully accepted the principles laid down by their Lordships of the Privy Council in *Ramalakshmi Ammal v. Sivanantha Perumal* ("70-72) 14 M.I.A. 570. This is what the Privy Council had stated (p. 585):

Their Lordships are fully sensible of the importance and justice of giving effect to

long established usages existing in particular Districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

It may be pointed out that in regard to a custom like the present it is difficult to expect evidence of invariability. The custom in terms purports to be permissive. It is not the case of defendants 1 and 2 that amongst the members of the community to which they belong, marriages between persons of the same gotra take place invariably. The test of invariability can be legitimately applied in the case of customs like primogeniture. But, in the case of permissive customs the test of invariability cannot be rigidly applied. Mr. Kane also relied on a decision in *Rama Nand v. Surgiani* ("94) 16 All. 221. In that case the Court was dealing with a custom as regards the stepmother's right to succeed to her step-son. It was held there that (p. 223):

A custom where it is disputed and where it goes to limit or vary well-known rules of law must be clearly proved by evidence? Evidence which is consistent with there being a custom as with there being no custom at all is not evidence of a custom modifying or varying the general law.

In this case the learned Subordinate Judge

Had apparently raised a case on his own motion for the defendant which was not suggested by the defendant in her written statement, and which, could not have been omitted from her written statement if she had been relying on a custom so much at variance with the ordinary rule of Hindu law.

In fact, in this case it was found that there was no evidence of custom in the strict sense to be considered. To the same effect is a decision of the Madras High Court in *Vannia Kone v. Vannichi Ammal* ("28) 15 AIR 1928 Mad. 299 at p. 13. It was held that:

In order to give effect to a custom which is set up and which is at variance with ordinary Hindu law, it should be ancient, invariable, continuous, notorious, not expressly forbidden by the legislature and not opposed to morality or public policy, and as regards instances in support of the custom they should be established by clear and unambiguous evidence and must be conclusive.

Under the custom with which the Court was dealing in that case, it was alleged that the widows of a deceased last owner dying with, out issue were excluded from inheriting to his estate, but that his nearest dayadhis inherited his estate to the exclusion of his widows. On evidence it was found that the custom pleaded had not been satisfactorily proved, and that even if it existed in old days, it had ceased to be uniform and invariable by reason of inroads made in it from time to

time. The Court took the view that since the custom was obviously opposed to the present rules of equity and justice, it was too late in the day to revive it. In this connection Mr. Kane referred to a decision of this Court in *Basava v. Lingangauda* (95) 19 Bom. 428. It was held in this case that according to the custom of the Lingayats in the districts of Dharwar and Bijapur the adoption of an only son is valid. In his judgment Ranade J. has elaborately considered all the instances cited in support of the custom and concluded (p. 452):

That the custom of giving an only son in adoption has been satisfactorily proved in nineteen Lingayat instances, three Reddi, and three Dhangar cases, making in all twenty-five instances in favour of the alleged custom, while it has not been satisfactorily established in ten Lingayat, one Reddi, and one Shepherd case, making in all twelve cases.

Ranade J. further held that he was satisfied (p. 459):

That the evidence of the twenty-five proved instances in this case is sufficient to show that the custom of the adoption of an only son is an immemorial, invariable and recognized custom among the Lingayats in the southern districts of this Presidency.

It was also pointed out that (p. 459):

Not a single case was shown on defendants' behalf where an adoption of an only son by the Lingayats of these parts was disowned or repudiated by the people, or by their rulers, Native and British.

Mr. Kane contends that this decision emphasizes the fact that any particular custom pleaded by a party must be proved by citing several instances in support of it. Lastly, Mr. Kane relied upon a decision of the Privy Council in *Chandika Bakhsh v. Mnna kuar* (02) 24 All. 273. The family custom there pleaded was that on the extinction of the line of one of several brothers the descendants of all the other brothers take equally without reference to their nearness to the common ancestor. It was held that the said custom had not been proved. The judgment of Lord Macnaghten shows that though 18 instances had been cited, only four instances had been proved and the evidence with regard to those four instances was held to be slender and not enough to support the finding in favour of the custom pleaded. There was no evidence of a general character adduced in this case to show the belief of the community in the matter of the custom in question. Mr. Kane contend that the evidence produced in this case by defendants 1 and 2 in support of the custom pleaded by them must be appreciated in the light of the principles laid down in these cases.

19. On the other hand, Mr. Jahagirdar for defendants 1 and 2 has argued that there have been many subsequent decisions as a result of which the rule as to proof of custom has been considerably modified and relaxed. It would, therefore, be convenient at this stage to refer to these decisions in their chronological order.

20. In *Chiman Lal v. Hari Chand* ("13) 40 Cal. 879 while dealing with the

adoption of a married orphan amongst Agarwal Banias of Zira in the Punjab, the Privy Council held that the evidence produced in support of the custom pleaded was sufficient to hold (p. 160):

That the Agarwal Banias of Zira do not in matters of adoption follow the general rules of Hindu law and that by the custom applicable to them an unequivocal declaration of adoption followed by subsequent treatment of the person as an adopted son is sufficient to constitute a valid adoption.

Their Lordships, however, held that since the evidence was of a limited nature, the decision should be confined to the parties to the suit and to the appeal before them and those claiming through or under them. The evidence about the observance of the custom pleaded in this case covered a period of about 20 years before the suit. In *Parshottam Ganpat v. Venichand Ganpat* ("21) AIR 1921 Bom. 147 while dealing with the Custom amongst the Jains by which it was alleged that an orphan could be validly given in adoption, it was held that the evidence adduced in that case in support of that custom was sufficient as between the parties and those claiming under them. With regard to the argument advanced before this Court in that case that the instances cited in support of the custom were not sufficiently ancient, it was pointed out:

That it is not surprising that the only evidence in support of the custom adduced in the present case consists of instances that have occurred within the present generation.

In this connection Fawcett J. referred to the decision in *Bhagvandas Tejmal v. Rajmal* ("73) 10 Bom. H.C.R. 241 on which stress was laid on behalf of the appellants and pointed out that the test of invariability could have no application to the custom with which he was dealing. Fawcett J. took the view that the evidence of the existence of the alleged custom for a period of 20 years may be sufficient to warrant a Court in finding as a fact the existence of the custom from time immemorial. Fawcett J. says (p. 767):

A similar rule was applied to Hindu usages by Grey C.J. in a judgment delivered so long ago as 1831, a quotation from which is given in Roy's Customs and Customary Law in British India at pages 27 and 28, and which is referred to in AIR 1925 267 (Privy Council) [According to the said rule enunciated by Grey C.J.] ? a usage for twenty years may raise a presumption, in the absence of direct evidence of a usage, existing beyond the period of legal memory?.

In this case, this Court applied this rule in appreciating the evidence adduced by the parties in support of the custom pleaded. In AIR 1925 267 (Privy Council) the Privy Council were dealing with a dispute as to inheritance from a member of an agricultural tribe in the Punjab, called the Khattars. The plaintiff had there admitted that under the custom of the tribe a sister or daughter was excluded in favour of collaterals in respect of ancestral property, but she denied that the custom was extended to self, acquired property. Both Courts in India found that part of the property claimed was self, acquired property. The Subordinate Judge

dismissed the suit on the ground that the plaintiff "had failed for absence of specific instances to establish satisfactorily the custom under which she claimed her brother's inheritance." The High Court of Lahore allowed the plaintiff's appeal holding that the custom pleaded had been proved. Dealing with this question, their Lordships held that (p. 383):

The Subordinate Judge was in error in putting aside the large body of evidence on the plaintiff's side merely on the ground that specific instances had not been proved. They are of opinion that the learned Judges of the High Court are right in holding that a custom of the kind alleged in this case may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognisant of its existence and its exercise without controversy.

Thus, this decision lays down that in dealing with the question of custom, Courts should not treat the proof of specific instances as the only method in which the custom could be established. If there is general evidence as to the existence of the custom given by members of the family or the community, it would be open to the Courts to rely upon that evidence and to hold the particular custom as proved. In *S.K. Wodeyar v. Ganapati* ("35) 22 AIR 1935 Bom. 371 Rangnekar J. adopted the principles laid down in the decision of the Privy Council to which I have just referred and held that (p. 588):

That it is open to a Court to hold a custom to be proved, even if there are no instances, if there is sufficient evidence on which the Court can rely and say that that evidence proves that a particular usage has been so long known and so well known in a particular district as to have been tacitly acknowledged as the law governing that particular district.

In AIR 1935 132 (Privy Council) their Lordships of the Privy Council held that (p. 818):

Customary law, if found to exist in 1880 and 1910, must be taken to have the ordinary attribute to a custom that it is ancient, and that, unless the contrary is proved, it must be assumed to have existed prior to 1858.

In AIR 1939 22 (Privy Council) the Privy Council were dealing with the existence of a custom according to which it was alleged a daughter was excluded from inheritance. While dealing with that custom their Lordships observed the (p. 705):

The opinions of responsible members of the family as to the existence of such a custom, and the grounds of their opinion, though generally in the nature of family tradition, are clearly admissible: see *Gururudhwaja Prashad Singh v. Sagarandhwaja Parshad Singh* ("01) 23 All. 37 .

In this case their Lordships held that it was unnecessary to examine the evidence as to the instances cited in the case since (p. 704):

It is well established that proof of actual instances of such a custom taking effect is not necessary: see AIR 1925 267 (Privy Council) and other cases.

This decision, therefore, shows that while dealing with the general evidence in support of any alleged custom opinion of responsible members of the community is admissible; and if that evidence is not contradicted by any evidence to the contrary and is not otherwise shown to be unreliable, it should not be disregarded. In AIR 1941 21 (Privy Council) the Privy Council were dealing with a customary law applicable to the Mahomedan Tulla clan resident in the Shahpur district in the Punjab, under which it was alleged that collaterals of the tenth degree of a deceased landowner do not take precedence over his married daughters in succession to his non-ancestral estate. It was held, while dealing with that custom, that the English rule that

a custom, in order that it may be legal and binding, must have been "used so long that the memory of man runneth not to the contrary," does not apply to conditions in India. A custom must be ancient but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district.

It may be mentioned that the instances cited in this case commenced from 1905-06 and ranged over a period of thirty years. I have already said that the test of invariability which may be applied to a custom in regard to succession is hardly applicable to a permissive custom like the one with which we are dealing in this case. In *Suganchand Bhikamchand v. Mangibai Gulabchand* ("42) AIR 1942 Bom. 185 this Court was dealing with the question of a custom amongst the Jains under which the widow of a coparcener in a joint family is competent to adopt a son without the authority of her husband and without the consent of his coparceners. Broomfield J. observed that (p. 368):

If the evidence is all one way, or if there is a strong preponderance of evidence in favour of a particular custom, the Courts cannot ignore it although the witnesses do not cite specific cases in support of their statements.

On these authorities, then, it seems to be fairly well established that if in a particular case the party pleading a custom has produced general evidence of a respectable and reliable character showing that the particular custom prevails amongst the community to which the witnesses belong, and that the observance of the custom is well known for a fairly long period of time, that evidence can be accepted in support of the custom pleaded. The decisions also seem to lay down that if instances are cited covering a period of nearly 80 years, it would not be unreasonable to presume that the evidence of those instances shows that the custom had been in existence even before the period covered by those instances. It is in the light of these principles that the evidence of custom led in this case must now be examined.

21. Before dealing with the evidence, it is necessary to point out that defendant 1 is himself a graduate and defendant 2 has passed the first M.A. of the Nagpur University, Both the parties are highly educated and come from very respectable families. They swear that when they thought of their marriage, they consulted the leading members of the community, some lawyers and their own relations. It is their case that they were told that under the custom prevailing amongst the community, it was open to them to marry if defendant 2 was taken in adoption by a person of a different gotra. It is obvious that they accepted the advice given to them by their relations and friends and believed bona fide that under the custom of the community to which they belonged, if before their marriage defendant 2 went in adoption, their marriage would be perfectly valid.

22. In support of the custom pleaded by them, defendants 1 and 2 have produced before the Court the evidence of five witnesses, who speak about the prevalence of this custom amongst the community to which they belong. It may be mentioned at this stage that Mr. Kane, who appears for the appellant, did not suggest that any of the witnesses who have come before the Court are actuated by improper motives. It is admitted that all of them are men of status and occupy respectable positions in society. The evidence which they are giving is the result of their own honest beliefs and convictions. They are thoroughly independent witnesses, and it is not suggested that they have any interest in either of the parties to the suit. Some of them are friends of the family of longstanding. These witnesses have come to the Court and have sworn to the fact that to their knowledge and belief the custom pleaded by the defendants prevails amongst the Deccani Brahmins from ancient times. (After examining instances cited in the case, the judgment went on :) These are the instances relied upon by the defendants in support of their plea that there prevails in the community to which they belong a custom by which a marriage can be validly performed between persons belonging to the same gotra, if, before the celebration of the marriage the daughter was given in adoption to a person of a different gotra. Subsequent to the marriage which gives rise to this suit, there is evidence to show that six or seven marriages of the same type have taken place in this community.

23. The learned trial Judge took the view that the defendants were not entitled to rely upon these instances because these marriages had taken place subsequent to the marriage in question. I am unable to agree. It seems to me that while dealing with a growing custom like the present it would be unreasonable to exclude from consideration instances in support of that custom merely on the ground that those instances took place pending the suit. It is not denied that these subsequent marriages have in fact taken place between persons of the same gotra and that in each one of them the difficulty arising from the same gotra was overcome by giving the girl in adoption before the marriage. Presumably, the parties to these marriages knew about this case where the question of validity of such marriages had been raised. Even so, their belief in the existence of the custom was apparently so strong that they did

not feel any difficulty in following the custom. In that view, these instances lend very strong support to the plea made by the defendants. While dealing with this question it may also be: pointed out that the priest who officiated at the marriage of the defendants has given evidence and he says that he was asked to do so by the next friend of the plaintiffs. It is well known that the outlook of the priestly class in such matters is always very orthodox. The conduct of the priest in officiating at the marriage of defendant 1 and defendant 2 therefore suggests that he did not think that there was anything objectionable or wrong in that marriage. Thus, in addition to the general evidence to which I have already referred, the defendants have led evidence about several specific instances of marriages which supports the custom which they have pleaded.

24. In the case of most of these instances, the only criticism made is that better evidence should have been called to prove those instances. The cross-examination of the witnesses, however, shows that the fact of marriage in each case was not seriously disputed. The remarkable feature about all these instances is that in each case the girl was given in adoption before she was married. It has not been suggested that there were any protests against these marriages in the community to which the parties belonged or that when they were performed, members of the community did not attend or otherwise expressed their disapproval. Considering the evidence as a whole, I am satisfied that the learned trial Judge was right in holding that the custom pleaded by defendants 1 and 2 had been proved. Besides, there are other circumstances in this case which support the same conclusion. The marriage between defendant 1 and defendant 2 was not performed hastily, impulsively or secretly. Before it was settled both the parties consulted their relations and their friends. They also consulted some lawyers. It appears in evidence that the next friend of the plaintiffs himself suggested the girl should be given in adoption before the marriage was celebrated. Accordingly, defendant 2 was given in adoption on nth July 1929, and the marriage was celebrated on 12th July 1929, about 4.80 P.M. Evidence clearly shows that at the celebration of this marriage and at the performance of the adoption which preceded it, members of the community attended. Evidence also shows that when after the celebration of this marriage a feast was arranged, it was attended by several members of the community. After the marriage was performed, the next friend of the plaintiffs and his wife stayed with the defendants at least for four months, if not longer. Besides, even after this marriage, defendant 1 continues to be one of the leaders of the community in social and educational matters. There is an institution of Deshastha Brahmins for education purposes which was opened about 16 years back. Defendant 1 has been the president of that institution for the last 16 years. In 1985 there was a gathering of all the Purandare families at Saswad. Of that meeting the next friend of the plaintiffs was the president and defendant 1 was the vice-president. Defendant 2 was the president of the female section in that meeting. Defendant defendants 1 and 2 have taken part in the conferences of the community held subsequent to the their marriage.

25. As I have already mentioned, the priest of the family officiated at the marriage, and though the next friend of the plaintiffs sought to suggest that as a result of this conduct they were excommunicated, it has been shown satisfactorily by the evidence on behalf of the defendants that they were never excommunicated. In this connection the conduct of the next friend of the plaintiffs is also significant. It appears in evidence that he attended the adoption of defendant 2 on 11th July and in fact made some customary presents to the girl in token of the settlement of marriage. It also appears in evidence that some of the ceremonies which preceded the actual celebration of marriage were attended to by the next friend or his wife, He allowed the wada of the family to be used for the purpose of this marriage. He sent his wife along with Chimnrao to issue personal invitations for the marriage of his son. He sent the family priest to officiate at the marriage and what is more important, he bore all the expenses of this marriage himself. In fact, in his cross-examination he has admitted "that as Shankaracharya told that the marriage was against religion I opposed this marriage." It would, therefore, be perfectly legitimate to assume that but for the unfortunate intervention of Shankaracharya, the belief of the next friend of the plaintiffs was in consonance with the plea taken up by the defendants in this case, namely, that a marriage between sagotras would be valid according to custom if the girl was given in adoption to a person of different gotra before the marriage is performed.

26. It appears that about 11th July 1929, Shankaracharya was camping near Poona. On some representations made to him, he was pleased to issue an adnyapatra addressed to defendant 1, as well as to the next friend of the plaintiffs. In this adnyapatra (Ex. 29 c) he said:

I am purposely writing this letter. As the sagotra marriage is prohibited by religious scriptures, it is undesirable to do it. Therefore if you intend to perform it on any account whatever, the above difficulty (bar) will not be removed. It is absolutely undesirable that such a calamity should befall in your family.

27. As the next friend of the plaintiffs has himself admitted, it is because of this letter that he decided to oppose the marriage of defendant 1 and 2. That being so, on the question of custom and his belief about it, the Court is entitled to consider the conduct of the next friend of the plaintiffs before he received the said letter that conduct, as I have already indicated, considerably supports the plea set up by defendants 1 and 2. Thus the conduct of the parties as evidenced by these circumstances lends support to the conclusion of the learned trial Judge that the custom pleaded has been proved. It may be mentioned that while dealing with this question, the learned trial Judge has said:

All this must be due to the simple fact that the Deshastha Brahmin community does recognise such a custom and it is prevalent in this community since a long time.

Reading the judgment as a whole, it seems to me that the learned trial Judge

has referred to the Deshastha Brahmin community through oversight and that he really intended to refer to the Deccani Brahmin community instead. The custom pleaded was one applicable to all Deccani Brahmins, and the issue referred to the community to which the parties belonged, meaning the genereal community of the Deccani Brahmins. The evidence both general and as to specific instances refers to the three major sub-communities amongst the Brahmins namely: Konkanastha, Deshastha and Karhada. that being so, the finding of the learned trial Judge, in substance, was that the custom pleaded with regard to the whole of the Deccani Brahmin community had been proved. On a consideration of the evidence in this case, I feel satisfied that this finding is correct and must be accepted. In this view of the matter, it may not, strictly, be necessary to consider whether, apart from custom, marriages between sagotra persons are valid under Hindu law. However, since this question has been argued before us, I think it is necessary for me to deal with it.

28. The learned trial Judge held that under the provisions of Hindu law, the marriage between defendant 1 and defendant 2 must be held to be invalid because the gotra of defendant 1 was the same as that of defendant 2 in her father's family. In support of his conclusion the learned trial Judge has referred to the commentary of Mitakshara relevant on the point and has relied upon a decision of this Court in *Ramchandra v. Gopal* ('08) 32 Born. 619 Shortly stated the argument is that under Hindu law no valid marriage can be contracted if the gotra and pravara of the bride and the bridegroom are the same. Before dealing with the texts bearing on this question it would be necessary to consider briefly the history of the origin and development of gotra and pravara in ancient Hindu literature. Max Muller, in his "History of Ancient Sanskrit Literature," observes (p. 199):

Gotra or Kula means a family, and the number of families that had a right to figure in the Brahmanic Peerage of India was very considerable. The Brahmans were proud of their ansestors, and preserved their memory with the most scrupulous care, as may be seen by the numerous treatises on the subject which are preserved to the present day.

He further says (p. 199):

The names of the gotras were liable to confusion, particularly in later times, when their number had become very considerable. But the respect which the Brahmans, from the very earliest time paid to their ancestors, and the strictness with which they prohibited marriages between members of the same family, lead us to suppose that the genealogical lists, such as we find in the Brahmanas in the Sutras, in the Mahabharata, in the Puranas, and even at the present day, present in their general outlines a correct account of the priestly families of India. All Brahmanic families who keep the sacred fires are supposed to descend from the Seven Bishis. These are: Bhrigu, Angiras, Visvamitra Vasishtha, Kasyapa, Atri, Agasti. The real ancestors, however, are eight in number: Jamadagni, Gautama and Bharadvaja, Visvamitra, Vasishtha, Kasyapa, Atri, Agastya. The eight gotras,

which descend from these Bishis, are again subdivided into 49 gotras, and these 49 branch off into a still larger number of families. The names gotras, vansa, varga, "paksha, and gana are all used in the same sense, to express the largenas well as the smaller families descended from the eight Bishis." (p. 199).

Then he points out (p. 200)

that each of the 49 gotra claims one, or two, three or five ancestors, and the names of these ancestors constitute the distinctive character of each gotra.

Finally he concludes thus (p. 204):

It is clear from this that the science of genealogy being so intimately connected with the social and ecclesiastical system of the Brahmans, must have been studied with great care in India, and that the genealogical lists which have been preserved to us in ancient works represent something real and historical.

Mr. C.V. Vaidya, in his "History of Medieval Hindu India," vol. II, pp. 56-57, deal with this subject thus:

According to the latest view the gotra Rishi is a son or rather a descendant of one of the Seven Rishis with the addition of the eighth Agastya who is outside the well known Seven Rishis of Baudhayana. According to Baudhayana's dictum the original Indo-Aryan families were considered to be eight, viz., 1. Visvamitra, 2. Jamadagni, 3. Bharadvaja, 4. Gautama, 5. Atri, 6. Vasishtha, 7. Kasyapa, and 8. Agastya. But an important Sloka in the Mahabharata takes us still further back, and states that originally there were four gotras only,

Mula-gotrani chatvari samutpannani Bharata Angirah Kasyapaschaiva Vasistho Bhrigurevacha.

Santi. p. 296.

These ancient four gotras, Angiras, Kasyapa, Vasishtha and Bhriгу are supported by the Pradarvhayayas also in several Sutras which always begin with Bhriгу Pravara. Now this shows that, when the first or Solar Race Indo-Aryan invaders came to India, there were four family stocks, 1. Bhriгу, 2. Angiras, 3. Kasyapa, and 4. Vasishtha. They were the patriarchs?so to say the mind-born sons of the Creator and they were progenitors of all the three Aryan classes. They in fact were not Brahmin Rishis but Aryan-Rishis.

Now Bhriгу's name does not appear in the Saptarshis; but that of his descendant Jamadagni does. So also Angiras is substituted by his two grandsons, Bharadvaja and Gautama. Therefore, in order to constitute the later eight stocks, we have to add Atri, Visvamitra and Agastya. It is clear that Atri stock represents the second horde of Aryan invaders, i.e. the Lunar Race Aryans, as the moon is looked upon as the son of Atri and Lunar Race Aryans have generally the Atri gotra. Agastya is entirely a new addition; but it took place in Vedic times; for Agastya is a Vedic Rishi, while Visvamitra, an Indo-Aryan Kshatriya, became a Brahmin and a Pravara Rishi, by his austerities. Vivsamitra was, therefore, a

Solar Race Kshatriya stock, which became priest by his intelligence and his religious merits.

29. Thus, it would appear that both Max Muller and Mr. Vaidya believe that the gotra and pravara system shows a regular and trustworthy descent. On the other hand, in the chapter on "Gotra" in his thesis on "Hindu Exogamy" Mr. Karandikar points out that in the Rigveda, the word gotra occurs about six times; but nowhere does it mean a family or a family name. In four places it means either a cloud, or a mountain, while, in two other places, it means a herd. Both interprets the word as cow's stall, while Geldner thinks that gotra means a herd. This word gotra in the Rigvedic times was slowly gathering around it the idea of a group. According to Mr. Karandikar

That gotras and pravaras are not very ancient may be seen from the fact that in the very comprehensive rituals of the Vedic sacrifices very little importance is attached to gotras and pravaras (p. 61).

Mr. Karandikar has examined this question in great detail and his conclusions can thus be summarized. In early Vedic times sept exogamy must have been absent, though marriage was generally contracted outside the family. In the days of the Samhitas other than the Rigveda and the Brahmana works, gotras had made their appearance and the Brahmin community was being organized on the basis of pravaras. The rule of sept exogamy, as given in Manu-Smriti, is rather loose and no penalty is provided for the breach of that rule. In Manu's rule of exogamy, pravara is not mentioned, nor is it implied, although commentators on Manu-Smriti, who came several hundred years after Manu, have interpreted the word sagotra as sapravara. It was during the Sutra period that the scope of the rule was extended and gone penances were prescribed for, the sin of sagotra marriage. Baudhayana in his Dharma-Sutra declares that a sagotra wife should be abandoned as far as sexual life is concerned, but should be protected like mother. When sagotra marriage results in an issue, the issue would belong to Kasyapa gotra and the father would be purified by a Krichchhra penance of three months. The views of Gautama on this subject were extremely strong. However, during the Sutra period, the prohibition against sagotra marriage on the whole was rather half-hearted. It was at the beginning of the Christian era that sept exogamy grew more and more rigid. Medhatithi, the first great commentator on Manu, deals with the subject at great length, while Mitakshara adopts the same rigid view about sagotra marriages and holds that those marriages are absolutely void.

30. In his "History of Dharmasastra", vol. II, Part 1 (1941), while dealing with the subject of marriage in chap. 9, Mr. Kane has considered the history and growth of gotra and pravara exhaustively. In despair he points out that:

The mass of material on gotra and pravara in the sutras, the puranas and digests is so vast and so full of contradictions that it is almost an impossible task to reduce it to order and coherence.

(P 483).

According to Mr. Kane, the general conception about gotra is that it denotes all persons who trace in an unbroken male line from a common ancestor. The conception of pravara is closely interwoven with that of gotra from very ancient times. The word pravara literally means "choosing" or "invoking." As agni was invoked to carry the offerings of a sacrificer to the gods by taking the names of the illustrious rsis (his remote ancestors) who in former times had invoked agni, the word pravara came to denote one or more illustrious rsis, ancestors of a sacrificer. The words arseya and arsa are the synonyms of pravara. The word pravara is not to be found in the Rigveda, though its synonyms arsa and arseya occur in a few places. Mr. Kane states the connection of gotra and pravara thus:

Gotra is the latest ancestor or one of the latest ancestors of a person by whose name his family has been known for generations; while pravara is constituted by the sage or sages who lived in the remotest past, who were most illustrious and who are generally the ancestors of the gotra sages or in some cases the remotest ancestor alone.

(P. 497).

31. According to the commentators, however, the word "gotra" has a peculiar technical meaning. The relevant discussion in Medhatithi's commentary on Manu has been thus aptly summarised by Mr. Kane:

"just as, though all persons are men, some are called brahmanas, so among brahmans certain persons are known by immemorial usage (or convention) as belonging to certain gotras like Vasistha and the sutra-karas lay down that a certain gotra has certain pravaras; so the word gotra is applied to Vasistha and other sages by rudhi (by convention or long-standing usage). It cannot be supposed that a person called Parasara was born at a certain time and then his descendants came to be called Parasaras. In that case the Veda would not be anadi (beginningless), as it is supposed to be, since it mentions Parasara, Vasistha, etc. So gotra is anadi like the brahmana caste and the Veda. The word is also secondarily used to denote a person, who is very illustrious on account of his learning, wealth, valour or generosity, who thereby gives a name to his descendants and then becomes the founder of the family. This is laukika gotra. But this is not the meaning of gotras which brahmanas have. The secondary meaning may apply to the word gotra when used in the case of Ksatriyas. (pp. 485-486).

32. At present the number of gotras is literally legion; while majority of these gotras have three pravara sages, a few have one, two or five. According to the commentators, the Ksatriyas and the vaisyas have no gotras and pravaras of their own and they have, for the purposes of their marriage, to adopt the gotras and pravaras of their purohitas. Mr. Kane justly quarrels with this doctrine of the nibandha writers and says: "This is carrying the doctrine of atidesa (extension) too far or with a vengeance." Mr. Kane also points out that as a fact it is wrong to

assume that ksatriyas have no gotra or pravara of their own.

33. It will thus be seen that scholars of ancient Sanskrit literature have expressed somewhat conflicting opinions as to origin and development of gotra and pravara. I think it is impossible to accept the suggestion that in reference to the Brahman families of today their gotras and pravaras represent anything like an unbroken line of descent from the common ancestors indicated by the names of their respective gotras and pravaras. Besides if this fanciful theory is accepted, its logical extension may well lead us to the conclusion that in the last analysis all Hindus are descended from their mythological ancestor Manu himself and in that sense all of them belong to the same pravara. It seems pravara and gotra had a purely ritualistic origin and in ancient times when several rites and sacrifices were frequently performed, pravara and gotra had some significance. In course of time, the performance of these rituals gradually decreased, until eventually it ceased altogether. During this period, the genesis and real significance of pravara and gotra was mis-appreciated. In the writings of subsequent authors these words came to be invested with a mystical and metaphysical importance; apparently, prohibitions against marriage of sagotra and sapravara persons were vehemently discussed and rigidly sought to be enforced about this time. I will now proceed to consider the texts of Manu and Yajnyavalkya bearing on this question to see whether under those texts marriages between sagotra persons should be treated as absolutely void. The material verses in Manu-Smriti bearing on this subject are:

Chapter III, verse 5:

She who is not a sapinda of the mother and she who is not a sagotra of the father is recommended to the twice-born for being selected for wife.

Chapter III, verse 8:

He should not marry a girl of black complexion; she should not have additional limbs; she should be healthy, should not be hairy, should not be without hair, should not be talkative and should not be brown.

Chapter III, verse 9:

She should not have the name of a river and not of tree or mountain and she should not bear a furious name.

Yajnyavalkya in his Smriti deals with this topic thus:

Chapter III, verse 52:

He with the celibacy not broken should marry a girl of good signs, not belonging to others, beautiful, not of a sapinda relationship and younger than himself.

Chapter III, verse 53:

She should be healthy, should have brothers, should not have the same gotra and pravara and should be five degrees removed from the mother and seven

degrees from the father.

Chapter III, verse 54:

A maiden should be taken from a highly respectable family of persons well-versed in the Vedas, and inheriting the virtue of ten generations, prosperous; but not even from such a family if there be any hereditary disease.

On these texts the question to be decided is whether the requirement that the girl should belong to a different gotra as laid down by Manu, or that she should have a different gotra and different pravara as laid down by Yajnyavalkya is obligatory. It is admitted that most of the attributes mentioned by Manu and Yajnyavalkya with regard to the boy, as well as the girl, are recommendatory. The only provision which is admitted to be obligatory is the requirement that the girl should be five degrees removed from the mother and seven degrees from the father. Mr. Jahagirdar contends that if the verses from Manu and Yajnavalkya are read as a whole, it should not be difficult for the Court to hold that the requirements as to gotra and pravara mentioned therein are recommendatory, rather than mandatory. I think there is considerable force in Mr. Jahagirdar's contention. Mr. Kane, however, argues that while interpreting these verses, it is necessary to adopt the rule of construction laid down by Jaimini in his *Purva Mimamsa*,

that if there is a seen (*drsta*) or easily perceptible reason for a rule stated in the sacred texts, it is only recommendatory and the breach of such a rule does not nullify the principal act. But if there is an unseen (*adrsta*) reason for a rule and there is a breach of such rule, the principal act itself is rendered invalid and nugatory thereby. (Kane's History of Dharmasastra, Vol. II, Part I. p. 437.)

Speaking for myself I feel no hesitation in rejecting this argument. As Mayne, in his "Hindu Law and Usage" points out, "some of the Mimamsa rules of interpretation are of very doubtful utility in the present day administration of Hindu Law." The rule of *adrsta* on which Mr. Kane relies is, I think, obviously one of such rules. The next contention urged by Mr. Kane is that whatever may be the view which the Court may take about the interpretation of the texts of Manu and Yajnyavalkya, the Court is bound to accept the interpretation which Mitakshara has put on the text of Yajnyavalkya, Mitakshara, while commenting on verse 53, Chap, in reads thus:

In the case of marriage with girls who are sapinda, samangotra or samanpravara, the condition of wifhood does not come into being, but in case of girls who are afflicted with diseases, etc., the condition of wifhood does come into being but there is a conflict in regard to worldly consideration only.

It is quite clear that according to Vijnanesvara, a marriage between persons of the same gotra is absolutely void, since in such a case, according to him, the condition of wifhood does not come into being. Vijnanesvara's interpretation is based on the mimamsa rule of interpretation to which I have referred above.

That rule is both artificial and irrational; and as I have already indicated I would certainly not be prepared to adopt It as a safe guide in interpreting Sanskrit texts for the purpose of administering Hindu law. Besides, the said interpretation is open to other serious objections in so far as it deals with the question of ksatriyas and vaisyas. Vijnanesvara says that since ksatriyas and vaisyas have no gotra of their own, for the purposes of marriage they should adopt the gotra of their priests. Now, the assumption made by Vijnanesvara that ksatriyas have no gotras of their own is historically inaccurate: and the solution offered by him in regard to marriages amongst the ksatriyas and vaisyas is clearly meaningless and unsatisfactory. The difficulties in applying this prohibition to the ksatriyas and vaisyas are obvious. In several cases, many ksatriya families which may not be related even remotely to each other may have the same priest, while near relations may engage different priests. Besides, the literal requirements of the prohibition can be easily met by the parties changing their priest just at the time of the marriage.

34. Further, amongst all the regenerate classes the more serious prohibition based upon sapinda or consanguinity has, even according to Mitakshara, been relaxed according to usage. Marriages between first cousins, such as that of a man with a daughter of his mother's brother or of his father's sister, are referred to with approval on the ground that they are supported by custom. It seems very unreasonable that relaxation should be permitted in regard to the requirement of sapinda, while the rule as to gotra and pravara should be rigidly enforced. It may be conceded that on the whole,

Vijnaneswar was a farseeing jurist and statesman, and by his commentary on YajnyaValkya, he practically freed Hindu law from its religious fetters, and "made it readily acceptable to all communities in all parts of India, establishing it on new foundations." Mayne's Hindu Law and Usage, 10th Edn., (p. 47.)

Unfortunately, however, while dealing with the provisions of Hindu Law of marriage, he was not able to rise above the conventional beliefs of his age.

35. The question then is whether the Court is bound to accept the interpretation put by Vijnanesvara on the verses of Yajnyavalkya in question. Mr. Jahagirdar for the defendants contends that though the opinions expressed by Vijnanesvara in his commentary are entitled to great weight, they are in no sense binding upon the Court. He argued that, on some questions the Privy Council had refused to accept the interpretation put by Mitakshara upon the texts and in that connection he referred to a decision in *Sri Balusu Gurulingaswami v. Sri Balusu Ramakshamma* ("99) 22 Mad. 398. The question which the Privy Council had to decide in that case was whether the adoption of an only son was valid under Hindu law that question had given rise to a conflict of judicial decisions in India and the views expressed by the different commentators on that point could not easily be reconciled. Adoption of an only sort prima facie appeared to be discountenanced if not actually prohibited, by the text of Yajnyavalkya as interpreted by Mitakshara. Their Lordships dealt with the several decisions of the

Indian Courts on that point and the opinions expressed by the different commentators, and they concluded thus, (pp. 428-29):

But what says authority? Private commentators; are at variance with one another; judicial tribunals are at variance with one another; and it has come to this, that in one of the five great divisions of India the practice is established as a legal custom, and of the four High Courts which preside over the other four great divisions, two adopt one of the constructions and two the other. So far as more-official authority goes there is as much in favour; of the law of free choice as of the law of restriction. The final judicial authority rests with the Queen, in Council. In advising Her Majesty their Lordships have to weigh the several judicial utterances. Upon their own examination of the smritis their Lordships find them by no means equally balanced; between the two constructions but with a decided, preponderance in favour of that which treats the disputed injunctions as only monitory and as leaving; individual freedom of choice. They find themselves, able to say with as much confidence as is consistent with the consciousness that able and learned men think otherwise, that the High Courts of Allahabad and Madras have rightly interpreted the, law and rightly decided the cases under appeal.

While dealing with the works of commentators on Hindu Law, their Lordships said:

They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity" of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers accustomed to treat as law what they find in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu Society, and impart to it an inflexible rigidity, never contemplated by the original law, givers,

This decision shows that in the matter with which the Privy Council were dealing, the commentators took different views and those views gave rise to conflicting judicial decisions while on the point with which we are dealing all the commentators take the same view. Besides, the text of Mitakshara came in for discussion in that case only incidentally.

36. Mr. Jahagirdar also referred to the decision of the Privy Council in *Debee Mangal Prasad v. Mahadeo Singh* ("12) 34 All. 234 where somewhat contrary to the views of Mitakshara, the Privy Council have held that a share obtained by a widow on partition of the joint family property is not her stridhan even under the Mitakshara law.

37. On the contrary it has been repeatedly pointed out by the Privy Council that while deciding questions of Hindu law, in regard to parties governed by the Mitakshara school, the views expressed by Vijnanesvara are of paramount importance. In *Collector of Madura v. Moottoo Ramalinga Sathupathy* ("68) 12 M.I.A. 397 the Privy Council declared that it is the duty of a Judge (p. 436):

not so much to inquire whether a disputed doctrine is fairly deducible from, the earliest authorities, as to ascertain whether it has been received by the particular School which governs the district with which he has to deal, and has there been sanctioned by usage.

The same view was expressed by the Privy Council in AIR 1935 57 (Privy Council) . In that case, dealing with the question of succession, the Privy Council held that:

According to the Mitakshara School of Hindu law samanodakas including only those agnates who are within the eighth to the fourteenth degree of descent from (and including) the common ancestor: in the absence of an agnate within the fourteenth degree the estate devolves upon the deceased's bandbus.

Dealing with the commentary of Vijñanesvara on the material text of Yajñavalkya, Sir Shadi Lal pointed out that (p. 143):

Vijñaneswara, when writing his commentary Mitakshara on the Smṛiti of Yajñavalkya, probably found that a usage had grown up restricting the samanodaka relationship to the fourteenth degree. He accordingly refrained from endorsing the all embracing rule of Yajñavalkya, and while mentioning it in the verse dealing with the subject, he gave prominence to the restricted scope of the word, and supported it by citing Vṛihad Manu. It must be remembered that the commentators, while professing to interpret the law as laid down in the Smṛitis; introduced changes in order to bring it into harmony with the usage followed by the people governed by the law; and that it is the opinion of the commentators which prevails in the provinces where their authority is recognized.

Sir Shadi Lal also cited with approval the passage from the decision in Collector of Madura v. Moottoo Ramalinga Sathupathy ('68) 12 M.I.A. 397 to which I have just referred and thus concluded (p. 143):

Indeed, the Mitakshara "subordinates in more than one place the language of texts to custom and approved usage": Bhyah Ram Singh v. Bhyah Ugur Singh ('70) 13 M.I.A. 373 at p. 390. It is, therefore, clear that in the event of a conflict between the ancient text writers and the commentators, the opinion of the latter must be accepted." It is true that while dealing with questions like this, Courts have to construe the texts of Hindu law in the light of the explanations given by recognized commentators, But it must always be remembered that since the said commentaries were written, several centuries have passed by and during this long period the Hindu mode of life has not remained still or static. Notions of good social behaviour and the general ideology of the Hindu society have been changing; with the growth of modern sciences and as a result of the impact of new ideas based on a strictly rational outlook of life, Hindu customs and usages have changed. The custom as to marriages between persons of the same gotra which I have held proved in this case is an eloquent instance in point. Between the letter of the law and sadachar good conduct, according to the consciousness of the community there is obviously great variance. It follows, therefore, that the

prohibitions which have been so emphatically enunciated by the Nibandha writers in this connection have not, for a considerable time past, conformed to the usage and custom recognized by the community. In such a case it is obviously the duty of the Legislature to intervene and to amend the material provisions of Hindu law so as to make them consistent with the custom and usage prevailing in society and thus help to place the Hindu law of marriage on a more rational basis.

38. While dealing with this question, the learned trial Judge has relied upon the decision of the Court in *Ramchandra v. Gopal* ("08) 32 Born. 619 and Mr. Kane has argued that the Court is bound by that decision. The parties to that suit were Chitpavan Brahmins of the thana District. The validity of the adoption was impugned on the ground that there could be no legal marriage between the adoptive father and the natural mother of the adopted son in her maiden stage. The adopting father and the natural mother belonged to different gotras, but two out of the three pravaras were common to both. It was argued that under Hindu law, no marriage could have validly taken place between the adoptive father and the natural mother of the adopted boy since two of their pravaras were the same. This objection was considered by this Court and it was held that "the validity or invalidity of the marriage tie in cases of this kind must be determined under the original text Yajnavalkya as authoritatively interpreted by Vijnyanesvara in the Mitakshara." It was also held that on the interpretation of Mitakshara no valid marriage could have taken place between the adopting father and the natural mother of the adopted boy. Notwithstanding these findings the Court was not prepared to accept the position, "that the invalidity of such a connection is necessarily a ground for holding the plaintiff's adoption to be invalid." Chaubal J. who delivered the judgment of the Court, considered "the texts on which the argument as to the invalidity of the adoption was based and came to the conclusion that the restrictions sought to be imposed from the gloss of Nanda Pandita on the text "Putrachhayavaham" were only recommendatory, and that the gloss only contemplates the specific cases of Viruddha Sambandha mentioned therein. On that view, the adoption was held to be valid. That being the decision in the case, strictly speaking, the finding that if the adoptive father and the natural mother of the adopted boy had married, the marriage would have been invalid, could be regarded as obiter. It was not a decision that the marriage was invalid. In fact, the point about the invalidity of the marriage arose only incidentally. However, the judgment of Chaubal J. shows that he recorded that finding with some reluctance; because in connection with that finding he took the precaution of making an important addition, an observation, Chaubal J. said (p. 628):

I can conceive that deviations from any prescribed rule may obtain in practice and that the frequency of such deviations in any particular community may in course of time have established a recognized and binding usage or custom: and where such is established it would no doubt be the duty of our Courts to give effect to it, if otherwise legal and valid.

Indeed the facts in this case show that Chaubal J.'s anticipation that deviations from the prescribed rule on the ground of custom may be set up has come out true. On the whole I am not prepared to accept the argument that we are bound by the views expressed in *Ramchandra v. Gopal* ('08) 32 Born. 619 as to the invalidity of marriage between persons of the same gotra.

39. However, as I have already pointed out, the Privy Council have consistently taken the view that under the Mitakshara School of Hindu law the gloss of Vijnanesvara must be accepted as authoritative and binding. That being so, there is no alternative but to hold that marriages between sagotra persons like defendants 1 and 2 are invalid under Hindu law. This finding, however, does not affect the decision in the case, since I have already held that the custom under which such marriages are permitted and on which the defendants had relied has been proved.

40. The result is that the appeal fails and is dismissed. The appellant to pay the costs of respondents 1 to 6.