
(1941) 02 MAD CK 0011
In the Madras High Court

Swayampakula Subbaramayya and Others APPELLANT
Vs
Swayampakula Venkatasubbamma and Others RESPONDENT

Date of Decision : 05-02-1941

Acts Referred:

Citation : AIR 1941 Mad 513 : (1942) ILR (Mad) 989 : (1941) 53 LW 693 :
(1941) 1 MLJ 724

Hon'ble Judges : Somayya, J;Pandrang Row, J

Bench : Full Bench

Judgement

Pandrang Row, J.—My learned brother has prepared a judgment dealing with both the points that arise in this appeal, namely, the question

of fact whether there was a form of marriage gone through by the first respondent with the deceased Janakiramamoorthy and the question of law

whether such a marriage is valid according to Hindu law. I have had an opportunity of seeing that judgment and it would have been unnecessary for

me to deliver a separate judgment of my own but for the fact that, on the question of the factum of the marriage, I find myself unable to agree with

the conclusion arrived at by my learned brother. I am of opinion that no sufficient reason has been shown for disturbing the finding of the trial Judge

on this point.

* * * *

2. [Then his Lordship discussed the evidence and concluded that there was an actual marriage.]

3. On the other point, however, I find myself in full agreement with my learned brother, and, as the subject will be dealt with very fully by him in his

judgment, it seems hardly necessary for me to say more than a few words on

that part of the case. The question also has been discussed at considerable length and in an exhaustive manner by the learned author of Mayne's Hindu Law, 10th edition, paras 123 to 127. What has been said by the learned author in his book and what will be said by my learned brother in his judgment which is about to be delivered more or less exhaust everything useful that can be said on the topic and I need only add a few general words of mine own. There is no doubt, in my opinion, that though anuloma marriages were recognised by several of the Smriti writers, at the same time and almost in the same breath they were condemned. This recognition cum condemnation by the Smriti writers ripened later on into a definite prohibition by the time of the Puranas, for we find that in the Puranic period such marriages were regarded as improper and invalid, the reason given for this change by the commentators being that such marriages were regarded as not permissible during the Kali age. This sort of change in the law unconsciously brought about by the general acceptance of the views of the text writers and the Puranas by the community is not uncommon. There are other subjects in which the old Hindu law has been similarly modified or has become obsolete. Whether the word used is ananushteeyam or varjyam it is very clear that, after the Puranic period and certainly after the well known commentators wrote their commentaries, marriages of this kind, especially marriages between a Brahmin and a Sudra girl, were universally regarded as not permissible under the law during the Kali age. After all, much importance cannot be attached to what is contained in the texts of the Smritis or what the commentators have said, in the absence of the real sanction behind what the Smritis and the commentators have written, namely, the sanction of long usage and acceptance by the community, which alone gives the contents of these Smritis and the commentaries their real force as law. My learned brother has been able to find some corroboration of the actual usage in the Hindu community from the accounts of travellers from the seventh century A. D. onwards. There has been, as pointed out by him, an invariable usage not to permit marriages between a Brahmin and a Sudra girl for at least a thousand years past and this in my opinion affords very strong corroboration of the view which one arrives at independently that marriages of this kind, though permitted in very ancient times, had ceased to be

regarded as permissible under the later Hindu law. Indeed the final conclusion expressed by Mr. Srinivasa Aiyangar in his book Mayne's Hindu

Law, 10th edition in paragraph 127 appears to me to be quite correct, namely:

Whatever may be the correct interpretation of the Mitakshara on the point, marriages between members of different castes have been prohibited

and discontinued by the usage of the community for such a length of time that the only legal course is to treat them as invalid except where there is

a custom or enactment to the contrary.

4. There is no such custom or enactment pleaded in this case.

5. The result is that the appeal must be allowed and the decree of the Court below set aside and the suit dismissed. Plaintiffs 1 and 3 will be at

liberty to claim maintenance on the footing of a permanently kept concubine and an illegitimate son respectively in a separate suit, if so advised. We

do not think it necessary or desirable that we should deal with this aspect of the case for it was made clear in the Court below by the first plaintiff in

her evidence that she did not want any relief except on the footing that she was the lawfully wedded wife of Janakiramamoorthy and there is no

reason why any other claim should be considered in this appeal.

6. The appellants will have their costs of the appeal in this Court, and the costs in the lower Court will be borne by the parties themselves.

Somayya, J.

7. This is an appeal preferred by the defendants against the decree of the District Court of Nellore in O.S. No. 22 of 1936 which was a suit

brought by three plaintiffs for recovery of maintenance from the estate of one Swayampakula Janakiramamoorthy who died on the 17th of June,

1935.

8. Defendants 1 to 3 are the sons of Janakiramamoorthy and the fourth defendant is his wife. They are all Brahmins to which caste

Janakiramamoorthy belonged. Plaintiffs claim that the first plaintiff who is a Kapu or Sudra was married to Janakiramamoorthy and that plaintiffs 2

and 3 are the daughter and son born of Janakiramamoorthy by the first plaintiff.

9. The defendants who are the Brahmin wife and the sons by the Brahmin wife deny that the first plaintiff was ever married to Janakiramamoorthy

and state that the marriage even if true is invalid under the Hindu law. Two

questions arise (1) whether there was in fact a marriage between the first plaintiff and the late Janakiramamoorthy and (2) whether the marriage, even if true, is valid under the Hindu law. Both these questions were answered in the affirmative by the lower Court and the plaintiffs were granted maintenance at the rate of Rs. 20 per month. The defendants appeal against the said decree and repeat the objections that the marriage was not true in fact and that even if it was a fact, it is invalid in law.

10. The defendants raised another contention in the lower Court and urged that Janakiramamoorthy had nothing to do with the first plaintiff, that first plaintiff was not living with Janakiramamoorthy as man and wife, and that plaintiffs 2 and 3 are not his children.

11. The plaintiffs adduced a large volume of evidence to show that Janakiramamoorthy was visiting the first plaintiff, that he was on terms of intimacy with her, that he took a house for her and maintained her, that plaintiffs 2 and 3 were his children born to the first plaintiff and that he

acknowledged them to be his children on several occasions. Relying upon this evidence the Court below held that it is proved beyond doubt that

the first plaintiff was living with Janakiramamoorthy as man and wife and that plaintiffs 2 and 3 are his children born of her. In view of the fact that

this finding is not now attacked, the only questions that arise for decision are the question of fact whether there was a marriage and the question of

law whether the marriage between a Brahmin and a Sudra woman is valid under the Hindu law.

12. The evidence of the factum of marriage lies within a small compass.

13. (After discussing the oral and documentary evidence in the case, his Lordship proceeded):

14. I hold that there was no marriage between the first plaintiff and the late Janakiramamoorthy.

15. Assuming that there was a marriage between Janakiramamoorthy and the first plaintiff, the question is whether it is valid under the Hindu law.

The first plaintiff is a Sudra and Janakiramamoorthy was a Brahmin. The marriage was thus between a Brahmin and a Sudra woman and is known

in Hindu law as "anuloma marriage". The appellants contend that marriages between members of different castes as opposed to members of

different sub-castes are invalid. On the other hand, the respondents urge that whereas a marriage between a woman of a higher caste and a man of a lower caste or a pratiloma marriage as it is called may be invalid, a marriage between a man of a superior caste and a woman of an inferior caste is not invalid and point out that an anuloma marriage has been recognised by all ancient Smriti writers, that their works contain rules for the performance of such a marriage and provide for a share to be given to the sons of such a marriage. The learned Advocate-General who appeared for the appellants did not urge that anuloma marriages were not recognised by the ancient Smriti writers. His whole argument is that even the Smriti writers without any exception condemned such marriages though they recognised the existence of such marriages in their times, that by the time of the Puranas these marriages were prohibited as unsuited for the Kali age and that the Nibhandhakaras or commentators prohibit these marriages altogether as unsuited for this age. He urges that several centuries ago this form of marriage became obsolete and that therefore, if performed at the present day, such a marriage is illegal.

16. We therefore start with this that all the Smriti writers recognised this form of marriage as a lawful marriage. That they condemned it at the same time is clear; and we may in this connection refer to the texts of two of the Smriti writers. Manu, Chapter III, verses 12 and 13 recognise that a Brahmin may take a Sudra wife. Then verse 14 says:

In no history or chronicles can be found that, even in the time of distress, a Brahmana or a Kshatriya has (lawfully) married a Sudra wife.

17. Verse 16 says:

He, who marries a Sudra woman, becomes degraded.... By visiting a Sudra wife for the purpose of begetting offspring on her, a twice-born one becomes degraded.

18. Verse 17 says:

By lying with a Sudra woman in his bed, a Brahmana falls into degraded existence; by begetting a child on her he stands divested of his Brahmanism.

Yajnavalkya, Chapter I, sloka 56 says:

There is a saying that twice-born ones can get their wives from among the

Sudras. I do not approve of it. For the atman (Self) itself is born there, that is, in the wife as a son.

19. Both Manu and Yajnavalkya, while recognising the existence of anuloma marriages and providing for the rights of the Sudra wife and her offspring, have expressed their strong disapproval of such marriages and Yajnavalkya personally prohibits them altogether.

20. Then we come to the Nibandhakaras or commentators. The commentators take the Smriti of Manu, Yajnavalkya or Parasara as their text and

comment upon it and incidentally refer to the other Smriti writers and sages and sometimes they give their own opinion. Medhathithi and Kulluka

are well known commentators on Manu. The Mitakshara is the principal commentary on Yajnavalkya Smriti and Viswarupa and Apararka have

also written commentaries on the Yajnavalkya Smriti. Parasara Madhaviyam is a commentary on Parasara Smriti. Dayabhaga is an independent

work by Jimutavahana. As is well known, the Dayabhaga prevails in Bengal and the contiguous places and the Mitakshara in the rest of India.

There are also commentaries on Mitakshara and Dayabhaga which are also of very high value and of recognised authority yielding only to the

Mitakshara or the Dayabhaga when there is a conflict. On points on which Mitakshara or Dayabhaga is silent, these commentaries prevail. We

have Sri Krishna Tarkalankara who is the author of Dayakramasangraha, a commentary on Dayabhaga. Balambhatti and Subodhini are

commentaries on Mitakshara. In addition to these, we have two works which are regarded in Southern India as of very high authority. These are

Parasara Madhaviya which is a commentary on Parasara Smriti and Smriti Chandrika which is an independent work and not a mere commentary.

21. We have the Mayukha of Nilakanta whose authority prevails in the island of Bombay, Gujarat and in North Konkan.

22. Some of these commentaries expressly prohibit anuloma marriages as unsuitable for Kali age. They refer to this or that Purana as the authority.

Some of them even refuse to discuss those portions of the Smritis regulating the rights of the issue of anuloma marriages on the ground that such

marriages being prohibited for this age, a discussion of the rights of the children would be a mere waste of time. The Smriti Chandrika, which in this

part of the country is regarded only as next to the Mitakshara, says in Chapter X,

verse 7:

Even a son of the body does not become a legitimate son when he is born of a wife of an unequal class, the marriage of a woman of an unequal

class being in itself prohibited in the Kali age. Accordingly Dharmajnya: "The marriage of girls of an unequal class by twice-born men". Add to

these, is prohibited by the great in the Kali age, in view to maintain virtue. We have not therefore detailed the laws relating to partition of property

among sons of unequal classes, secondary sons (an adopted son excepted), appointed daughters and the sons of such daughters, as it would tend

in vain to swell the work; such a partition being in the present age obsolete.

23. This is the translation given by Mr. T. Krishnaswami Aiyar in his translation of Smriti Chandrika published in the year 1867. On reference to

the original the Sanskrit expression corresponding to the word "obsolete" is "ananushtiya". It is urged by Mr. Rajamannar for the respondents that

the expression "Samprathi ananushtiyamanathwat" has not been correctly translated by Mr. Krishnaswami Aiyar and that the correct translation is

not that it is now obsolete but it ought not to be observed or practised in these days. I do not think it matters much whether we take the one or the

other translation. There is a distinct prohibition against such a marriage and there is also the fact that the author even refuses to discuss the rights of

inheritance of the children on the ground that it is a waste of time. It will be observed that he treats the sons born of marriages of persons belonging

to different castes, secondary sons except the adopted son, and appointed daughters and their sons, all on the same footing and declines to discuss

their rights as being a waste of time. It is undoubted that the system of appointed daughters and appointed daughters sons and secondary sons

(except adopted son) has long become obsolete. In 20 CWN 702 (Privy Council) the Judicial Committee laid down at page 287:

It was endeavoured to establish that proposition by reference to the place which was assigned by Manu and other early authorities to the twelve

then possible sons of a Hindu. As to this contention, it is sufficient to say that whatever may have been the position and rights between themselves

of such twelve sons in very remote times, all of these twelve sons, except the legitimately born and adopted, are long since obsolete. A discussion

as to their rights and interests, even if they could now be ascertained, would be

beside the point....Hindu law and customs have not stood still, and what we are concerned with is the position at the present time of an adopted son in a Hindu family.

24. As regards the position of an appointed daughter and an appointed daughter's son it is enough to refer to the decision of this Court in Sri

Rajah Venkata Narasimha Appa Row Bahadur Vs. Shree Rajah Suranani Venkata Purshottama Jaghandadha Gopal Row Bahadur and Others, .

25. The translation by Krishnaswami Aiyar of the word as "obsolete" correctly describes the situation as regards secondary sons other than

adopted son and the appointed daughter's son. The author treats these two and the case of the sons of anuloma marriages on the same footing. If

these institutions were still in observance, the author would not have dismissed them in this summary fashion. We think that Krishnaswami Aiyar's

rendering brings out the real meaning of the author.

26. Parasara Madhaviyam is a work of a very great scholar known as Vidyardnya, who was a Prime Minister of the Kings of the Vijayanagar

Dynasty. He is said to have flourished, as is pointed out in Mayne's Hindu Law, tenth edition, pages 50 and 51, in the fourteenth century. Being a

great scholar and also the Prime Minister of the great Vijayanagar kingdom, his opinion is entitled to very great weight. In volume 1, part 2, pages

97 and 98 (Parasara Dharma Samita, edited by Pandit Vaman Sastri Islampurkar, printed in 1893, Bombay Sanskrit series, 48), he says.

Distinguishing the different ages, the law is clearly established by a Smriti, which referring to the marriage of persons of any of the twice-born

castes with persons of the other castes, declares that the learned say that these practices must not be followed in the age of Kali.

27. Apararka is one of the principal commentators on Yagnavalkya. His authority has been acknowledged by the Privy Council in 20 CWN 1

(Privy Council) In commenting on slokas 128 to 132 of Yajnavalkya he points out that in the Kali age the son of a Sudra wife is not in vogue. To

understand his statement we must refer to the definition of "" aurasa"" as given by Yajnavalkya in verse 128 where he says: (sic)

28. Commenting on this definition, Apararka says this:

(Anandasrama Edition 1904, Part ,II, page 734).

29. As translated in, (Journal portion) 21 M.L.J. 254 :

He who is born of the dharmapatni (wife) is known as the aurasa son. She with whom he observes his religious duties is the dharmapatni. Though

even the term patni (by itself) indicates companionship in religious duties, yet by the use of the term dharma here patni means only wife. By the term

dharmapatni the Sudra wife is excluded because of the absence of her companionship in religious duties.

30. Vasishta says:

A Sudra wife is only for conjugal felicity and not for religious duties.

31. Verse 132 of Yajnavalkya runs thus:

Of these, the one succeeding, in default of all preceding, gives the pinda and takes the wealth.

32. In commenting on this, Apararka says:

(Anandasrama Edition 1904, Part II, page 739).

33. It is correctly translated in, (Journal portion) 21 M.L.J. at 305 thus:

Of the sons mentioned, aurasa etc., primary as well as secondary, in default of the preceding i.e., preceding son, the succeeding that is, the

succeeding son, is authorised to give (sraddha) pinda and to take the wealth. Of the substitutes of a son, only the adopted son is accepted in

Kaliyuga. Therefore only, it is mentioned by Saunaka when dealing with things not in vogue in the Kaliyuga:

The acceptance of all others except the aurasa (son) and the adopted (son) in the place of son is mentioned among things not in vogue.

34. The term ""aurasa son"" or ""Dharmapatnija"" as defined by Yajnavalkya is rendered by Mitakshara in Chapter I, Section 11, placitum 2 thus:

The issue of the breast...uras is a legitimate son -aurasa. He is one born of a legal wife. A woman of equal caste, espoused in lawful wedlock, is a

legal wife -Dharmapatni : and a son begotten on her, is a true and legitimate son and is chief in rank."" (See Setlur's Book, Part I, page 30).

35. Viswarupa who is an earlier commentator than Vignaneswara also gives the same meaning to the terms ""aurasa son"" and ""Dharmapatni"":

Lawfully wedded wife--a wife of equal caste....; the aurasa is the son begotten by him on her.

(Seetharama Sastri's translation of Viswarupa, 1900 Edition, page 8).

36. Thus an ""aurasa son"" as defined by Yajnavalkya, means according to

Vignaneswara, Apararka and Viswarupa the son born to a wife of an equal class. According to Saunaka's text set put in Apararka's commentary, all other sons excepting a son by a wife of an equal class and an adopted son are not in vogue. The sons by wives of unequal classes were not in vogue even in Saunaka's time or at any, rate by the time of Apararka, who adopts Saunaka's text.

37. Nilakanta, the author of Vyavahara Mayukha, seems to me to say that the son by a wife of an unequal class is prohibited in Kali age.

38. In Chapter IV, Section 4, Nilakanta deals with the mode of partition. He sets out in placitum 41 the texts of Yajnavalkya relating to 12 kinds of sons including aurasa or Dharmapathnijas already referred to by me in dealing with Apararka's view.

39. Then we have the following: placitum 42:

The aurasa, or the legitimate son born of a lawfully married wife of equal class, is the principal son.

40. Then in placita 43, 44 and 45, Nilakanta sets out the secondary sons dealt with by Yajnavalkya's text and concludes in placitum 46 thus:

All the secondary sons mentioned here, except dattaka or the adopted son, are forbidden (recognition) in the Kali age""; because we read in the prohibitions (in the Kali age). ""There is no acceptance as sons, of others than the dattaka (adopted) and an aurasa or legitimate sons.

41. This translation is from Mandlik's ""Vyavahara Mayukha and Yajnavalkya Smriti"" (1880 edition Part II, pages 49-50). The texts above set out are in the same book (Part I, pages 38-39).

42. We start in verse 42, with the definition of an "aurasa" as "a son of a wife of an equal class". Excepting the adopted son (dattaka) and the aurasa (as defined in placitum 42), there is no acceptance of other kinds of sons and they are an forbidden recognition in the Kali age. So, the son by a wife of an unequal class is forbidden, not to be recognised and there is no acceptance of him as a son.

43. We must read placitum 46 along with placitum 42 and then we get the opinion of Nilakanta.

44. Subodhini, a commentary on Mitakshara also lays down the rules just as Apararka and Nilakanta do as pointed out above. He, like them, takes the enumeration of 12 kinds of sons, gives the definition of an " aurasa" as

a son born of a wife of an equal class, then sets out the rights of the secondary sons and winds up by saying:

(Setlur's Mitakshara with commentaries thereon in Sanskrit (1912), Edition, page 710).

45. The above passage may be translated as follows:

All this pertains to another age (Yuga); but in Kali (age), only "aurasa" and "dattaka" sons (are recognised); also putrika (appointed daughter) by

reason of equality of status with an aurasa. Because it is said in a Smriti:

There is no acceptance as sons of others than the adopted son (dattaka) and an aurasa or legitimate son.

46. Add to this:

That the learned say that these practices must not be followed in the age of Kali.

47. Even the practices of the virtuous are seen to be the same in the Kali age.

48. Sastachara or "practices of the virtuous" is a recognised source of Hindu law.

49. In Dayakrama Sangraha of Sri Krishna Tarkalankara, a leading commentary on Dayabagha, we find in Chap. 1, Section 2, placitum 7:

In the present age, a widow is exclusively of the same class with her late husband, since marriage with a woman of unequal class is prohibited

during the Kali, or iron age.

(Setlur's Hindu Law Books, Part II, page 111).

50. Kamalakara in Nirnayasindhu under the heading or "'Prohibitions in the Kali age'", says:

The marriage of a dwija (twice-born) with a maiden of a dissimilar class is prohibited in the Kali age.'" (Nirnayasindhu, Nirnayasagara Edition

1901, page 275; see also Mandlik's Vyavahara Mayukha, Part II, page 218 footnote).

51. Mr. Rajamannar drew our attention to Mr. Setlur's Hindu Law Books, Part I, page 24, where Vijnaneswara is said to refer to anuloma

marriages as actually occurring during his time. In Chapter. I, Section 8, placitum 2, it is set out thus:

Under the sanction of the law, instances do occur of a Brahmana having four wives; a Kshatriya, three; and a Vysia, two; but a Sudra, one. In such

cases, the sons of a Brahmana born to him by women of the several castes shall have four shares, three, two or one in the order of these castes.

52. On a reference to the original, this translation appears to be clearly incorrect. The words, "instances do occur" do not correctly translate the

Sanskrit expression "darsitah" : This passage of Mitakshara occurs while commenting upon Yajnavalkya's text II, 125. Mr. Setlur seems to have

taken this translation from Mr. Colebrooke. It is necessary to set out that passage to understand the author.

(Setlur's edition, page 667).

53. No doubt Vignaneswara took the text of Yajnavalkya II, 125, and wrote his commentary, that it was pointed out, that is, by the author

Yajnavalkya that four wives for Brahmins etc., were pointed out, but that does not mean that at the time when Vijnaneswara was writing the

Mitakshara he chronicles an existing fact. Several other commentaries like the Mitakshara take the above and other texts of Yajnavalkya and

expound the meaning. All these commentators also set out those portions of Yajnavalkya relating to the Niyoga practice, that of subsidiary sons

other than the adopted son, and that of an appointed daughter's son and give their commentary, but that does not mean merely because the

commentator for the sake of completeness of the work wrote an elaborate commentary on these portions of Yajnavalkya or the other Smritis that

at the time when they were writing the commentaries, these practices were still in vogue. Even by the time of Manu, the Niyoga practice had

become obsolete. He says so in fact and yet he mentions the practice of Niyoga and the rules relating to it. (Manu IX, 64, 66-68).

54. What is more important and more relevant to my mind is the fact that one at least of the commentators refuses even to discuss the rights of the

issue of such marriages on the ground that it will be a sheer waste of time. That could only be on the footing that it is not necessary to devote any

time to a discussion of the rights of these persons because these institutions are no longer in vogue and it is not necessary to prescribe for the state

of society as it was when he was writing the commentary. That is why the discussion in Smriti Chandrika seems to be of very great importance in

finding out whether really this system of anuloma marriages had not become obsolete by the time he was writing. There can be only one answer. It

seems to me clear therefore that by the time of the Nibandhakaras which began by about the tenth century A.D., if not earlier, this practice of

anuloma marriages had become obsolete.

55. Now coming to the text writers after the advent of the British rule- there are several treatises of various English and Indian writers of eminence.

All these without an exception state that this practice of anuloma marriage has become obsolete. In the sixth, seventh, eighth and ninth editions of

Mayne which alone are available to us this subject is dealt with in paragraph 89. The sixth edition is of the year 1900 and in all the editions it is

pointed out that such marriages had become obsolete. In the tenth edition it is pointed out in paragraph 124 that the rules in ancient law books

regarding marriages between persons of different castes have long ago become obsolete. Sir Thomas Strange in his Hindu Law published in 1825

discusses it at pages 39 and 40. He winds up by saying:

But it is unnecessary to dwell upon these distinctions, the practice of such inter-marriages being Considered to have been prohibited from the

commencement of the present (the Kali) age; since when equality of tribe has been ever, as it continues to be in the strictest sense, essential to legal

marriage, though not to the legitimacy of the issue; inasmuch as, should one so prohibited take place, the issue would notwithstanding be legitimate.

56. It is not now contended before us that if the marriage is invalid the issue can be legitimate. The above passage from Strange written in 1825

shows that he understood that it was unnecessary even to dwell upon those distinctions as the system of marriages of persons belonging to different

castes was considered to have been prohibited from the commencement of the Kali age and that equality of tribe was in the strictest sense essential

to a legal marriage. Sir Gurudoss Banerjee in his work on Marriage and Stridhanam and J.C. Ghosh all say that such marriages had become

obsolete from the commencement of the Kali age. (Banerjee, 5th Edition 76-82. Ghosh's Hindu Law, Volume I, 809-810). Mandlik also is of the

same opinion (See his edition of Vyavahara Mayukha, Part II, page 218, footnote). Dr. Jolly also takes the same view (Hindu Law--Tagore Law

Lectures, 1883, pages. 179-181).

57. Shamcharan Sircar who was one of the Tagore Law Lecturers, says in his Vyavastha Darpana the second edition of which was published in

1867, on page 656, Vyavastha, 399:

The marriage with a girl of a different caste is prohibited in the present (Kali) age.

58. And he relies on passages from the Vrihat Naradiya Purana and Aditya Purana.

59. Again, in the Chapter treating of the castes of the Hindus, he says on page 1038, Vyavastha, 674:

Each of the castes or classes above mentioned is at present a separate or distinct tribe. Inter-marriages, between any two of these castes or classes, being abrogated or not being in practice, it must be concluded that the marriage between any two of them, if contracted, is null and void, and the issue of such marriage not entitled to inheritance, the same being considered as unlawfully born.

60. The writer says the same thing in his Vyavastha Chandrika Volume II, page 454, para 693 (1880 edition).

61. Of these, Vyavastha Darpana relates to the law as current in Bengal and the Vyavastha Chandrika relates to the law as current in all the provinces of India, except Bengal proper. Thus, the institution of anuloma marriage is prohibited by the Nibandhakaras or commentators and also by the modern text writers as unsuited for this Kali age. As stated in Mayne's Hindu Law, tenth edition on page 178:

When Hindu writers say that certain practices have become prohibited in the Kali age, they do not merely mean that the ancient practices are now prohibited and are therefore no longer law. The prohibition was due to a new consciousness and wide disapproval, to a new usage, discontinuing or abrogating the old usage.

62. Coming to the decisions, the question directly arose for decision before the Allahabad High Court in Padam Kumari v. Suraj Kumari I.L.R.

(1906) All. 458. There, the marriage was between a Brahmin male and Kshatriya female. There is no discussion in the judgment. Burkitt, J., says:

Now whatever may have been the case in ancient times, as shown in old text books, I have no hesitation in saying that at the present day marriage between a Brahmin and a Chhatti is not a lawful marriage in these provinces and that the issue of such a marriage is not legitimate.

63. Aikman, J., says:

Whatever may have been the case in ancient times, and whatever may be the law in other parts of India, I think there can be no doubt that in these

Provinces there cannot in the present day be a lawful marriage between a

Brahmin and a member of a different caste.

64. The question came up before the Bombay High Court in *Bai Kashi Vs. Jamnadas Mansukh Raichand*, , a case of a pratiloma marriage, that is,

a marriage of a woman of a higher caste with a man of a lower caste. Mr. Justice Chandavarkar, while pointing out that a pratiloma marriage was

expressly prohibited even by the old Smriti writers, says that an anuloma marriage would in the present day be invalid. The learned Judge begins

the discussion by referring to anuloma marriages. After referring to various portions of Manu and other text writers, he points out that

Yajnavalkya's own opinion was against such marriages. Then, he refers to the comment of Vignaneswara that the text of Yajnavalkya was a

prohibition of the marriage of a woman of the Sudra caste with a man of the twice-born class. He then refers to Nilakanta's Mayukha which is a

leading authority in the Bombay Presidency. He says:

From this gloss of the Mitakshara, from which Nilakanta, the author of the Vyavahara Mayukha, expresses nowhere any dissent, it is reasonable to

infer that, according to the leading authorities on Hindu Law as recognised in this Presidency, a Shudra wife is not permitted to a Brahmin, a

Kshatriya, or a Vaishya. If that is so, it is a necessary corollary from it that the marriage of a Brahmin woman with a Shudra is also prohibited. This

inference is supported by a text cited by Madhavacharya in his commentary on the Parashara Smriti, which is regarded by Hindus as an authority

of special force in these times called Kaliyug. In that commentary, after quoting the conflicting texts on the question of marriage between persons of

different castes, Madhavacharya concludes as follows:

Distinguishing the different ages, the law is clearly established by a Smriti, which, deferring to the marriage of persons of any of the twice-born

castes with persons of other castes declares: "the learned say that these practices must not be followed in the age of Kali".

65. Mr. Justice Chandavarkar, after pointing out that if in the case of anuloma marriages, the marriage is invalid, it is an a fortiori case in the case of

a pratiloma marriage, then goes on to say that in the case of pratiloma marriage it is not a case of a mere inference and that there are several texts

prohibiting pratiloma marriage. His view therefore is that an anuloma marriage, is not valid, though the point did not directly arise before him for

decision.

66. The validity of an anuloma marriage directly arose in *Bai Gulab v. Jiwanlal Harilal* I.L.R.(1921) 46 Bom. 871. Mr. Justice Shah delivering the

leading judgment, held that such a marriage is valid; and Mr. Justice Venkatasubba Rao sitting as a single Judge followed this decision in *Ratansi D.*

Morarji Vs. The Administrator-General, . In a later decision of, the Bombay High Court in *Natha Nathuram v. Mehta Chotalal* I.L.R.(1930) 55

Bom. 1 the decision in 46 Bombay was not challenged and the validity of an anuloma marriage was upheld. There is, however, a discussion by Mr.

Justice Patkar and he follows in the main the reasoning of Mr. Justice Shah in the earlier case. It is therefore necessary to consider the reasoning in

the 46 Bombay case. The question divides itself into two parts : (1) Has it become obsolete? and (2) if so, whether it could be revived?

67. Mr. Justice Shah refers to Manu and Yajnavalkya and points out, quite rightly in our opinion, that Manu recognises the existence of such

marriages in his time and the validity thereof. After referring to Manu, Yajnavalkya and Vignaneswara he says at page 883:

Thus Yajnavalkya and Vignaneswara, whose opinions are binding upon us, do not lay down any prohibition as distinguished from disapproval of

anuloma marriages.

68. Then, he takes up Nilakanta's opinion as expressed in his *Mayukha* and points out that Nilakanta practically accepts the view as propounded

in the *Mitakshara*. He winds up the discussion of the texts on page 885 by saying:

It would thus appear that Manu and Yajnavalkya, Vignaneswara and Nilakanta are agreed that the anuloma marriages are not prohibited.

69. Then, after referring to Mr. Justice Chandavarkar's reading of *Mayukha*, he expresses his dissent from that view and says:

Thus the argument for the appellant derives no support from the two principal Smritis nor from the *Mitakshara* and the *Samskara Mayukha*. How

is then the prohibition to be inferred contrary to these opinions? The only ground suggested is that such marriages are obsolete and must be taken

to be prohibited by usage. I am unable to accept the view that because such marriages are obsolete they are illegal or prohibited by law. The

prohibition must be found in the law books or in the usage having the force of law. Such usage must be proved like any other fact. It may be that

the fact of their being obsolete may render the proof of such" usage easy...ramayya ...The opinions of Manu and Yajnavalkya and Vignaneswara and Nilakanta, if I may say so are fairly reflected in the general attitude of the castes in these matters. They approve of marriages within their respective circles, and generally speaking, disapprove of marriages outside their circles. They do not, however, necessarily refuse to recognise the marriages outside their circles but extend the same toleration socially to those who depart from the usual rule as the Smriti writers and the commentators have extended legally to anuloma marriages.... But the attitude of the castes, which is stated in different modern books as prohibiting inter-caste marriages altogether, is generally indicative of nothing more than the disapproval of such marriages according to the rules of practice of each different caste. It does not afford a sufficient justification for treating as illegal what has not been prohibited but in terms contemplated and allowed by law.

70. Shah, J., does not, it is clear, refer to any other ancient text writer except Manu, Yajnavalkya, Vignaneswara and Nilakanta. There are a number of commentators who expressly prohibit these marriages and, as I pointed out, at least one of them goes so far as to refuse to waste any time on the discussion of the rights of the children of such marriages. Even the prohibition contained in Parasara Madhaviya, a work of great authority, being the work of a great scholar and statesman, which is fully set out by Chandavarkar, J., in Bai Kashi Vs. Jamnadas Mansukh Raichand, is not even referred to by Shah, J. The whole of his judgment is that there is no prohibition in the law books. He says that the prohibition must be found in the law books or in the usage having the force of law. Evidently, if his attention had been drawn to the fact that the prohibition is found in the law books, his view might have been otherwise. Having regard to what we have set out above, we think it is not correct to say that there is no prohibition in the law books. That this institution was obsolete is recognised by Shah, J., when he says at page 886:

It seems to me that far too much weight is sought to be placed upon the circumstance that the anuloma marriages are more or less obsolete.

71. His entire reasoning is contained in this, that in his opinion in addition to being obsolete, there must be a prohibition contained in the law books

or in a usage having the force of law. Such a prohibition is contained in the commentaries above referred to even if such a prohibition is necessary.

72. As observed already, it is conceded that Manu, at any rate while disapproving of such marriages, recognised the existence of these marriages

and made rules for the performance of the marriages and the like. Yajnavalkya in unmistakeable terms says that his own opinion is against the

validity of such a marriage. Then, no doubt, he gives what, according to him, was the share of the son of a Sudra wife; but, that, personally he

prohibits them, can admit of no doubt. Mitakshara simply comments on the various portions of Yajnavalkya and it has not given any independent

opinion of its own. And Mayukha as shown already is against the validity of such marriages on the ground of its being obsolete. The passages from

Nilakanta set out above were evidently not brought to the notice of Chandavarkar, J., and Shah, J. Therefore, Chandavarkar, J., is, we think,

though not on the ground mentioned by him, quite justified in saying that Nilakanta's opinion is also against the validity of such a marriage.

73. Coming to the judgment of Mr. Justice Venkatasubba Rao in *Ratansi D. Morarji Vs. The Administrator-General*, we must point out that after

referring to *Bai Gulab v. Jiwanlal Harilal* I.L.R.(1921) 46 Bom. 871 he says that even Chandavarkar, J., in *Bai Kashi Vs. Jamnadas Mansukh*

Raichand, , took the view that anuloma marriages are valid. This, we point out with great respect, is erroneous. Venkatasubba Rao, J., says at

page 173;

Chandavarkar, J., in *Bai Kashi Vs. Jamnadas Mansukh Raichand*, , after an examination of the Smritis and the commentaries, also arrives at the

conclusion that anuloma marriages are valid.

74. Then, he says that he was prepared to follow the decision in 46 Bombay and 14 Bombay Law Reporter and to decide that an anuloma

marriage was valid. There is no independent discussion of his own. His judgment is therefore vitiated by his misunderstanding of what

Chandavarkar, J., decided in 14 Bombay Law Reporter.

75. Then coming to the decision in *Natha Nathuram v. Mehta Chotalal* I.L.R. (1930) 55 Bom. 1 Shingne, J., points out at page 17:

The correctness of the decision in *Bai Gulab's* case I.L.R.(1921) 46 Bom. 871 was not challenged on behalf of the plaintiff.

76. Therefore, Shingne, J., did not think it necessary to go into the various texts of Hindu Law on the point and stated that his learned brother had

considered them. Patkar, J., who delivered the leading judgment does not add materially to the discussion of Shah, J., in *Bai Gulab v. Jiwanlal*

Hiralal I.L.R.(1921) 46 Bom. 871. Like Shah, J., he refers to Manu and Yajnavalkya. Then, his attention was drawn to the opinion expressed in

Mayne's Hindu Law, 9th Edition, pages 108 and 785:

That marriages between persons of different castes are obsolete, and a son born of such marriage would be illegitimate.

77. Dealing with it he says at page 9:

Shah, J., in *Bai Gulab's* case I.L.R.(1921) 46 Bom. 871 was unable to accept the view that because such marriages are obsolete, they are illegal

or prohibited by law, and held that the prohibition must be found in the law books, or in the usage having the force of law, and such usage must be

proved like any other fact.

78. Then, he wound up this part of the judgment by referring ,to Shah, J.'s opinion, that the attitude of the castes which is stated in different

modern books as prohibiting inter-caste marriages altogether, is generally indicative of nothing more than the disapproval of such marriages

according to the rules of practice of different castes and that it does not afford a sufficient justification for treating as illegal what was not prohibited

but in terms contemplated and allowed by law. We have sufficiently dealt with the opinion of Shah, J. It therefore appears that the view of Shah, J.,

is vitiated by his omission to refer to those commentators who expressly prohibit these marriages and who even refuse to discuss the rights of the

issue of such marriages and also by what we consider is an erroneous view of the law when he says that when an institution is shown to be

obsolete, the party must also go further and show that there is an express prohibition against such an institution in some law* books or that it was

prohibited by usage having the force of law. It may be difficult to arrive at the conclusion that a particular institution like an anuloma marriage or the

practice of Niyoga or that of an appointed daughter's son is obsolete. But once you come to the conclusion that they are obsolete, it is difficult to

postulate a further condition that the act questioned should, in addition to being proved to be obsolete, also be shown to have been expressly

prohibited in the law books or that it is contrary to a usage having the force of law.

79. In systems of jurisprudence where there is a law-making body such as a Parliament, there is no such thing as a law becoming obsolete.

However long it may be before it is put into force or enforced, once a law is enacted, it is always a law and it continues to be the law until it is

repealed by a later statute. But so far as Hindu law is concerned, it was never the subject of any legislative enactment. It is the growth of several

ages and the Smriti writers and the commentators prescribe what, according to the needs of the society as it existed in their times, was necessary

for regulating the relations between the various members of that society. As is clear from the various differences between the Dayabagha and the

Mitakshara school, the Hindu Law did not stand still but was moulded to the needs of the particular age and was developed from time to time. As

pointed out by the Judicial Committee in the 40 Bombay case already referred to, Hindu law did not stand still. The further growth of the Hindu

law was arrested by the advent of the British rule and now further changes have to be made by the Legislature. In fact, the Legislature has enacted

Act III of 1872 and amended it in 1923 to suit the requirements of the changed conditions. If further changes are felt necessary, we can only look

to the Legislature.

80. In addition to the commentators to whose opinions I have just referred, we have the writings of certain travellers who visited India some

centuries back. They have noted what they observed to be the customs and practices of the country. We shall refer to them only for the purpose of

showing that during the time when they visited India the system of anuloma marriage was not in vogue or rather that marriages within the caste were

very strictly observed. Reference to these writings is necessitated by a vehement argument put forward on behalf of the respondents that the

practice of anuloma marriage has not in fact become obsolete. It is urged by Mr. Rajamannar that marriages between the members of different

castes are unusual and would occur only once in a way. He also says that all the cases which occur do not come to Court and that from the mere

fact that we have not very many instances where the question has been dealt with by Courts of law, it ought not to be taken that the institution itself

became obsolete. He says that there is no evidence in this case to show that it was obsolete. It is with a view to meet this argument that we think it

necessary to refer to the writings of some of these travellers.

81. Yuan Chwang came from China and visited India in the early part of the 7th century (629-645 A. D.). A work of his travels has been edited

by Mr. J. W. Rhys Davids and Dr. Bushell and published by the Royal Asiatic Society. On page 168 of this book the following account is given:

These four castes form classes of various degrees of ceremonial purity. The members of a caste marry within the caste, the great and the obscure

keeping apart.

82. The Editor referring to the original wording in Chinese says:

What our author states seems to be clear and simple. Marriages take place within a caste and a Vaisya man, for example, may marry any Vaisya

maid. And he will marry no other.... But though a man might espouse any maid of his caste, the rich and the great married among themselves, and

the poor and the obscure kept to themselves in their marriages." ("On Yuan Chwang's Travels in India 629-645, A. D." by Thomas Watters,

1904, Edition, pages 168-169.)

83. Then we have a chronicle of what Alberuni, a traveller from Persia observed during his visit between 997 and 1030 A.D. Dr. Edward C.

Sachau has published an English translation of this traveller's book. Of Alberuni, Romesh Chundar Dutt in his work on "A History of Civilization in

Ancient India", Volume II, page 318 says.;

But it is always a gain to see ourselves as others see us, and we propose in the present chapter to draw a similar sketch of Hindu civilization at the

commencement of the Modern age, from materials supplied to us by a cultured and large-hearted foreigner, Alberuni, who wrote in the eleventh

century.

84. In Dr. Sachau's edition of Alberuni, we find in Chapter LXIX the following passage in Volume II, page 156:

In our time, however, the Brahmans, although it is allowed to them, never marry any woman except one of their own caste.

85. R.C. Dutt referring to this passage of Alberuni says on page 323:

Every man of a particular caste could, under the ancient law marry a woman of

his own caste, or one of the castes below his. But this practice had fallen into disuse; caste had become more rigid, and in our time, however, the Brahmans, although it is allowed to them, never marry any woman except one of their own caste". (Chapter LXIX).

86. Sir Thomas Roe in his Journal ""Voyage into the East Indies"", says:

This people marry into, and consequently still keep in their own tribes,. sects, occupations and professions; for instance, all Brahmins (which are their priests, the sons of all which are priests, likewise) are married to Brahmins' daughters."" (The Travels of Sig. Pietro, printed in 1665 (Madras University Library), page 434).

87. Francois Bernier in his ""Travels in the Moghul Empire,"" translated and published by Archibald Constable and re-edited by Vincent Smith says on page 325:

These books enjoin that the people shall be divided, as in fact they are most effectually, into four tribes, (Tribus); first, the tribe of Brahmans, or interpreters of the law; secondly, the tribe of Quetterys or warriors; thirdly , the tribe of Bescue, or merchants and tradesmen, commonly called Banyanes; and fourthly, the tribe of Seydra or artisans and labourers. These different tribes are not permitted to intermarry, that is to say, a Brahman is forbidden to marry a Quettery and the same injunction holds good in regard to the other tribes.

88. That is what Bernier observed in his travels between. 1656-1668 A. D.

89. Steele in his "Law and Custom of Hindoo castes within the Dekhun Provinces subject to the Presidency of Bombay", dealing with marriages in

Chapter III which is headed ""Existing Customs--Marriage"", says, ""the parties must be of the same caste"". (Page 163 of the edition of 1868). Steele published his first edition in 1826. I hold therefore that an anuloma marriage is invalid.

90. I agree that the question of maintenance on the footing that there was no marriage between the first plaintiff and Janakiramamoorthy cannot be gone into in this suit and that the appeal should be allowed with costs in this Court.