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(1931) 04 AHC CK 0025

Allahabad High Court

Case No: None

Ram Harakh	APPELLANT
Vs	
Jagar Nath and Others	RESPONDENT

Date of Decision: April 8, 1931

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 552
- Guardians and Wards Act, 1890 - Section 48

Citation: AIR 1932 All 5 : (1931) ILR (All) 815

Hon'ble Judges: Sen, J

Bench: Division Bench

Final Decision: Disposed Of

Judgement

Sen, J.

This is an appeal by the plaintiff and is directed against the appellate judgment of Mr. Rup Kiahan Aga, Sessions and Subordinate Judge of Allahabad, who reversed the decision of Mr. Shri Gopal Singh in a suit for a declaration that Mt. Gomti, defendant 3 was the wadded wife of the plaintiff and also for a decree granting restitution of conjugal rights. The suit was instituted on 15th September 1927 in the Court of the Munsif, East Allahabad.

2. The parties to the action are Sarju Pari Brahmins and thus belong to the twice-born caste.

3. The defendants to the suit are Jagarnath, uncle of Mt. Gomti, Mt. Kailasfey, the mother and Mt. Gomti herself who was under the guardianship of Jagarnath at the data of the suit.

4. Jagarnath and Baijnath were brothers. It is not clear from the pleadings or the evidence on the record whether these two were members of a joint Hindu family. Baijnath died about the year 1921 leaving a widow, Mt, Kailashy, and two minor

daughters Mt. Gomti and Mt. Phul Kali. Mt. Kailashy is alleged to have given Mt, Gomti in marriage to Ram Harakh, plaintiff in February 1926. After the marriage Jagarnath applied in the Court of the District Judge that he should be appointed guardian of Mt. Gomti. In his petition the factum of the alleged marriage was carefully concealed from the District Judge. No notice of his application was given to Ram Harakh, plaintiff. A certificate of guardianship was granted to Jagarnath in due course. Armed with this certificate, he applied to the District Magistrate u/s 552, Criminal P.C. for the recovery of possession of the minor. The application was granted. Mt. Gomti was removed from the custody of the plaintiff and was handed over to Jagarnath. These are the facts which led to the institution of the suit.

5. The suit was contested by Jagarnath. He denied the marriage and contended that Mt. Kailashy had become unchaste and had given birth to an illegitimate son, two years after the death of her husband.

6. It may be noticed that Jagarnath did not expressly plead in the alternative that even on the assumption that the marriage had been solemnized between Earn Harakh and Mt. Gomti, there was no valid marriage inasmuch as it had taken place without the consent of Jagarnath who, as her paternal uncle was the only person who, in the circumstances of the case, was competent to give consent in the matter.

7. The Court of first instance held that the question of Mt. Kailashy''s moral character was irrelevant. It however held on the evidence that the imputation of unchastity to Mt. Kailashy was false and "unfounded. The lower appellate Court has not differed from the trial Court on this point. We may state at once that we have examined the record for ourselves and that we are in agreement with the finding of the trial Court that the story of Mt. Kailashy''s unchastity is not only irrelevant but is a baseless falsehood. We are further of opinion, that Mt. Kailashy did not give birth to an illegitimate son about two years before this action. It is proved from the evidence that she gave birth to a posthumous son just a few months after the death of her husband. It is not improbable that these falsehoods have been deliberately imported into the case with the object of depriving Mt. Kailashy of her right of maintenance and the posthumous son of his right of inheritance in the property in the possession of Jagarnath, In view of the prevailing notions, it appears to us extremely improbable that the plaintiff would claim as his wife the daughter of a woman who not only was guilty of misbehaviour, but had as the result of her liaison, given birth to an illegitimate child. The Court of first instance has written a careful and well-balanced judgment. Its findings of fact and of law may be briefly indicated:
(1) That Mt. Kailashy gave her daughter Mt. Gomti in marriage to Ram Harakh; (2) that the marriage was solemnized with the due performance of the rights enjoyed by Shastras; (3) That, for purposes of marriage, the paternal uncle, and not the mother, is the proper guardian; (4) that the relevant texts relating to the consent of the father or of the other male kindred in the absence of the father impose a moral obligation and do not confer a legal right; (5) that these texts are merely directory

and not mandatory; (6) that the marriage having been duly solemnized according to the rituals prescribed by the Shastras was not liable to be set aside at the instance of the paternal uncle upon the mere ground that he was not a consenting party to the marriage:

If a marriage is duly solemnized without the consent of even the father, the doctrine of "factum valet quod fieri non debet" will render the marriage perfectly valid.

8. The trial Court cited the decision in Khusal Ghand v. Bai Mani [1887] 11 Bom 247 in support of its view.

9. The trial Court gave the plaintiff a declaratory decree but dismissed the claim regarding the restitution of conjugal rights upon the ground that the girl was immature, her age being only nine years.

10. The plaintiff submitted to the decree. The defendant appealed to the lower appellate Court. As we have already noticed, the last mentioned tribunal has reversed the decision of the trial Court, The judgment appears to us unsatisfactory and in certain respects incomprehensible.

11. We find it extremely difficult to follow the reasonings of the learned Judge in the following passage:

The contention in appeal is that defendant 3 the girl in the case being a minor and the defendant-appellant having been appointed her guardian under the Guardians and Wards Act after the alleged marriage, the civil Court had no jurisdiction to make a declaration and that the decree of the lower Court has been passed in the teeth of the prohibition contained in Section 48, Guardians and Wards Act. The respondent meets this contention by pointing out that he was not made a party to the proceeding for appointment of guardian. I am not concerned with the question whether the plaintiff-respondent was or was not made a party to the proceeding of appointment of guardian. Section 48 expressly says" an order made Under this Act shall be final," and "shall not be liable to be contested by a suit or otherwise." To allow therefore the suit to be maintained upon any ground practically amounts to giving an opportunity to the plaintiff-respondent to contest the appointment order by means of a civil suit. The cause of action for the suit is expressly stated in the plaint to be the fact that the appellant got himself appointed guardian without disclosing the fact that defendant 3 had been married to the plaintiff-respondent and thereafter by means of a proceeding u/s 552, Criminal P.C. he recovered the person of the minor from the custody of the respondent.

12. The whole of this passage is manifestly founded upon a misreading and mis-appreciation of the object and scope of Section 48, Guardians and Wards Act. There is nothing in that Act to prevent the plaintiff from maintaining a suit in the civil Court for a, declaration that the minor ward is his lawfully wedded wife. There is nothing in the texture of that Act to justify the hypothesis that the marriage of a

Hindu girl by her natural guardian without the approbation or consent of the certificated guardian is null and void. The cause of action for the suit is the factum of marriage. The cause of action alleged against the guardian was that he was improperly retaining the custody of his lawfully wedded wife who from the date of the marriage had passed into the lawful guardianship of her husband. Here the plaintiff was perhaps. over-stating his case, but the Court of first instance having dismissed the plaintiff''s suit for restitution of conjugal rights and the plaintiff having submitted to that decree, the question as to whether the plaintiff could recover his wife from the custody of the certificated guardian was no longer relevant and indeed did not arise before the lower appellate Court.

13. The lower appellate Court recorded no finding upon the material issue relating to the factum of marriage. The finding of the first Court has been referred to in its judgment in the following sentences.

The finding of the Court below is that the mother of defendant 3 secretly and surreptitiously married her daughter to the plaintiff-respondent because she was afraid that the defendant-appellant was opposed to the marriage on the ground of the'' ineligibility of the plaintiff-respondent on the ground of disparity or age.

14. The trial Court had said:

It appears that Mt. Kailashy got defendant 3 married to the plaintiff in haste and rather secretly.

15. The girl was produced before the Munsif and she appeared to be about 9 or 10 years of age. The plaintiff was described by the trial Court to be about 25 years old or more. The trial Court nowhere said that the reason why Mt. Kailashy married her daughter to the plaintiff secretly and surreptitiously was because of her apprehension that the defendant was opposed to the marriage on the ground of disparity of age.

16. The lower appellate Court refused to uphold the marriage by the application of the doctrine of factum valet. Its reasons are that to do so would be to give

a dangerous extension to the doctrine of factum valet, and it would practically defeat the rule of Hindu law and in such case a paternal relation has the right to give the minor in marriage, because the mother or other relation who has no such right may always ignore the rule by secretly giving the child in marriage and then justifying the marriage by doctrine of factum valet. The safeguard provided by the Hindu law in the interest of the minor with regard to the right to give them (sic) in marriage would thus be practically turned into a dead letter. Moreover I do not consider that the doctrine of factum valet should be applied to every case where the Court is faced with an accomplished fact, and that the Court should have no discretion to refuse to apply that doctrine where under the circumstances of the case the application of that doctrine may seem to be fraught with prejudicial

consequences to a minor as an this case. The respondent is a well built person of about 30 years of age and his marriage to a girl of 9 years is highly undesirable, apart from any other objection which defendant-appellant may hive to the marriage, and in view of this circumstance I think that the Court should be reluctant and should have the power to refuse in the exorcise of its discretion, the application of doctrine of factum valet for upholding the marriage.

17. We entirely repudiate the correctness of the doctrines propounded above. Where marriage is an accomplished fact though solemnized without the consent of the paternal uncle, the application of the doctrine of factum valet is an absolute and not a discretionary rule of law. The view of the lower appellate Court is not supported by any Shastric text and is not countenanced by any authority. Indeed the Court below makes no attempt to support its conclusion by reference to either the one or the other. Its judgment proceeds upon an assumption that the Shastric texts relating to the preferential right in the matter of giving consent in marriage are imperative and not admonitory. We are not aware of any texts of Hindu law which go to the length of laying down that the marriage of a girl, solemnized by the natural guardian, without the consent of the person who has the preferential right to give his Consent is absolutely null and void.

18. We shall refer to some of the texts from the authoritative Smritis. The principal text-is that of Yajnavalkaya, verses 63 and 64:

A father, paternal grandfather, brother, Sakulya, the mother likewise are the givers of a girl in marriage. The right to do so devolves on them successively, so that on the failure of the first, the next in order is entitled to perform the ceremony, if of sound mind.

19. Vishnu in Ch. 34, verses 38 and 39 provides:

The father, the paternal grandfather, the brothers, the kinsmen, the maternal grandfather and the mother are the persona by whom a damsel may be given in marriage.

10. Narada in Ch. 12 verses 20 to 21 recites:

The father himself shall give a damsel in marriage or with his consent, the brother, the maternal grandfather and maternal uncle and his agnates etc.

11. It would thus appear that Narada and Vishnu''s texts are similar to Yajnavalkaya''s texts, the noticeable difference being that Narada gives precedence to the maternal grandfather and the maternal uncle before the sakulyas and the mother. Vishnu also places the maternal grandfather before the mother. The peculiar language of the text is indicative of the fact that the persons mentioned therein are under an obligation to perform the marriage and cannot claim it as a right conferred on them. It is manifestly so, because each of these persons cannot be legally compelled to give the girl in marriage and cannot be cast in damages for

his failure to do so. The text of Yajnavalkaya which we have quoted above is followed by the verse:

If they do not give (her in marriage), they become guilty of destroying an embryo at every menstruation of the damsel.

12. It may be stated with confidence as a general, though not a universal, rule that where a spiritual penalty has been provided for in the Smritis for the violation of a Shastrio duty, the injunction is not one of an imperative character so as to be legally binding upon the conscience.

13. The authors of the Smritis are silent on the right to the guardianship of the person of the minor. Their texts generally relate to the property possessed by the minor. The texts that we have quoted above provide as to the consent of the guardian being necessary in the matter of the disposal of a girl by marriage. The texts cannot be construed as amounting to a recognition of a legal, right. Even assuming that it is a right this is not predicative of the existence of a right to either select the husband or to give the daughter away in marriage to the exclusion of the natural guardian. We cannot shut our eyes to the fact that as a matter of established practice in the case of a separated Hindu, the mother is the custodian and guardian of her minor girl after the death of the father and that the paternal kindred are consulted by her in matters of marriage and other cognate matters only by way of courtesy, and that as a matter of practice, the male agnates do not controvert the mother''s authority. This is what it should be because the paternal kindred could not be expected to have the interest of the minor so much at heart as the mother of the minor.

14. We would once more repeat that there is no express authority in the Smriti texts that the consent of the parents and guardians of the girl is an essential condition for the validity of the marriage and that the absence of such consent makes the marriage null and void. It is true that in the matter of consent, the mother has been given a subordinate place; but this is a vestige of the archaic law in which the female in a Hindu family was always given a position of subordination and dependence. The consent however of the father or of the male agnate or the male cognate was not an essential part of the marriage ceremony. The ceremony consists in the recital of mantras, the panigrahana, the kanyadan and the saptapadi round the nuptial fire. Of these, the saptapadi or the circumambulation round the sacrificial altar is the most essential, the performance of which completes the marriage.

15. The consent therefore of the father or of the other male relations enumerated in the texts is something of the nature and the character of a benediction and is not an integral part of the ceremony constituting the marriage. The ceremony again is founded not upon contract but upon sacrament or samskara. The religious efficacy of this ceremony is independent of the father''s consent.

16. In construing the Smriti texts, one is apt to confound a rule of a commendatory character with a rule which is positive and imperative. The Hindu sages knew and emphasized upon the difference between the two. The technical term vidhi or vidhivakya connotes a rule of positive law and is distinguishable from niyama, which though a rule of conduct, is not necessarily and in all cases binding upon the conscience. Vijnaneshwara in his famous commentary significantly points out that a precept which, upon a proper classification of the text belongs to the realm of ecclesiastical law, has not in the Vyavahara law, the same authority as a vidhivakya and cannot be treated there as a positive rule of law. In the way however in which these rules are mixed up together in the text-books, a person is apt to confound one for the other. The Judicial Committee sounded a note of warning:

All these old text-books and commentaries are apt to mingle religious and moral considerations not being positive laws, with rules intended for positive laws.

17. In the preface of his valuable work on Hindu Law, Sir William Macnaghten says:

It by no means follows that because an act has been prohibited it should therefore be considered as illegal. The distinction between the vinculum juris and the vinculum pudoris is not always discernible : Balwant Singh v. Kishori [1898] 20 All 267.

18. In Sri Balusu v. Sri Balusu [1899] 22 Md 398(at p. 139 of 29 I.A.) their Lordships of the Privy Council are reported to have observed as follows:

No system of law makes the province of legal obligation co-extensive with that of'' religious or moral obligation. A man may, in his conduct or in the disposition of his property, disregard the plainest dictates of duty. He may prefer an unworthy stranger to those who have the strongest natural claims upon him. He may be ungrateful, selfish, cruel, treacherous to those who have confided in him and whose affection for him has ruined them. And yet he may be within his legal rights. The Hindu sages doubtless saw this distinction as clearly as we do, and the precepts they have given for the guidance of life must be construed with reference to it. If a transaction is declared to be null and void in law, whether on a religious ground or another, it is so, and if its nullity is a necessary implication from a condemnation of it, the law must be so declared. But the mere fact that a transaction is condemned in books like the Smiritis does not necessarily prove it to be void. It raises the question what kind of condemnation is meant.

19. We have already pointed out that the giving away of a girl in marriage by the natural guardian without the consent of the father or the other male agnate concerned has nowhere been condemned in the Smriti texts and it has nowhere been enunciated that such a marriage is without legal efficacy.

20. According to the text of Narada, marriage is irrevocable:

Once is a partition ordained, once is a girl given in marriage, and once does a man say. I give.

Amongst people belonging to a twice born caste, there cannot be a remarriage of girls either upon widowhood or otherwise.

21. If the marriage be annulled one of the parties affected by it cannot be restored to the status quo ante. Whether the marriage has been consummated or not, the girl can no longer be regarded as a marriageable virgin according to the prevailing notions of the Hindu community. This should be a good reason, for up holding a marriage upon the ground of factum valet.

22. The maxim factum valet quod fieri non debet litarally means "what should not be done, yet being done, shall be valid." the nearest approach is to be found in the Dayabhaga which lays down that " a fact cannot be altered by a hundred texts." This principle however is not to be restricted to the Dayabhaga system of law and is to be found and is ifrequently applied in the Mitakshara system and has bean recognized by the Privy Council as such in a number of cases which need not be referred to. The principle of factum valet is applicable within certain well-recognizad limits, and generally speaking, it is applicable to cases where a legal precept has been reduced by independent reasoning to a mere moral suggestion. As has been pointed out in Go pal Narain v. Hanmant Ganesh [1878] 3 Bom 273:

When the defect is one which can be described of the nature of non potuit rather than of non dubuit, then the maxim does not apply.

23. Mr. Gulab Shastry formulates the rule of factum valet in the following terms:

An act or transaction done by a man in the exercise of a right or power, natural or recognized by law, cannot be undone or invalidate by reason of there being texts in the Shastras prohibiting such act or transaction.

24. In Lakshmappa v. Ramava [1875] 12 BHC 364 which was an adoption case, Sir Michael Westropp pointed out the limits within which the doctrine was applicable:

To us it appears that its application must be limited to cases in which there is neither want of the authority to give or accept, nor imperative interdiction of adoption. In cases in which Shastra is merely directory, or only points out particular parsons as more eligible for adoption than others the maxim may be usefully and properly applied, if the precept or recommended preference be disregarded.

25. The principle enunciated herein was quoted with approval by Mahmood, J., in Ganga Sahai v. Lehhraj Singh [1887] 9 All 253 at p. 295. In this case, Mahmood, J., was of opinion that the application of the maxim in this country did not rest upon any rule of Hindu law or of Mahomedan law, but rested upon principles of justibe, equity and good conscience. While agreeing with him that the maxim is not to be applied to cases beyond the limits within which its application is recognized in civil

law, we have some difficulty in endorsing that the maxim is to be treated as no more than an equitable principle quite apart from the Hindu law. As however nothing turns upon this aspect of the case, we need not pursue this matter any further.

26. Mr. Shastry, who appeared for the contesting defendant, pleaded that the doctrine of factum valet could not be invoked or applied until it was established, as a fact, that the mother of the minor girl was driven by force of necessity to perform her marriage by an improper refusal of the consent on the part of the male agnates or kindred or their unwillingness to perform the marriage after the girl had attained her marriageable age. He further contended that for the application of the doctrine, it was necessary to establish that the girl had been given in marriage to a suitable person and that there was no fraud or force. He next contended that in the present case no marriage had taken place in fact or in law and that his plea to that effect had not been considered by the lower appellate Court.

27. We have a number of judicial decisions in which it has been held that where a Hindu marriage has been brought about by fraud or force, it is open to a Court of justice to declare such marriage null and void. The principle upon which these judgments proceed has been enunciated to be that what the public law stigmatizes as a crime cannot be accepted as the source of a legal relation, The cases in which the principle has been expressly or impliedly formulated are Brindaban Chandra Kurmohar v. Chundra Kurmohar [1886] 12 Cal. 140, Gazi v. Sukru [1897] 19 All 515, Mulchand Kuber v. Bhudia [1898] 22 Bom 812 and Kasturi v. Cheronji Lal [1913] 35 All 265. In the present case, it has not been pleaded by the defendant that the marriage was vitiated for having been performed by force or fraud. The defendant did not raise this plea in his written statement. No issues on the point was framed. There was no evidence given on that point nor a finding arrived at by either of the Courts below. The point therefore does not arise. Mr. Shastry however contends that the trial Court having held that the marriage was performed secretly and in haste, this must be treated as a finding that the marriage was brought about by force or fraud. Secrecy and haste may, when coupled with certain other facts be a badge of fraud, but by themselves they do not constitute fraud. In a country, in the sacred texts of which marriage by capture was recognized at one stage of the evolution of national life to be a valid form of marriage it may be open to question whether force by itself vitiates marriage. It may further be doubted whether a marriage begun by force, but solemnized by the performance of the Shastric rituals including saptapadi could be avoided in a Court of law. It may be conceded that a contract obtained by coercion, duress or fraud is voidable at the instance of the party aggrieved. But the transaction of a marriage in a Hindu family belonging to the twice born caste is not a contract but is the result of a sacrament, marriage being one of the 16 samskaras provided for in the Smritis. We do not think it necessary however to go into this question. In view of the pleadings in the case, we have to accept the position that the marriage in the present case was not tainted either by force or fraud.

28. The learned Sessions and Subordinate Judge did not try the issue as to whether the marriage had actually taken place. We did not think it necessary to remit the issue to him for trial. We examined the evidence for ourselves and we have Hot the slightest doubt in our mind that the finding of the Court of first instance in affirmation of the marriage is correct. Five witnesses were examined on behalf of the plaintiff including Ram Harakh. Lachhmi Narain is the family purohit of Ram Harakh. He deposes that all the rites of the Hindu Shashtras were performed. He was not cross-examined en the point. The saptapadi, which in popular dialect is described as the bhanwar or phera ceremony, was also performed. No reason has been assigned and we can see none why the plaintiff''s witnesses should not be believed. The defendant was examined as a witness and produced three more witnesses; not one of them was present in the village when and where the marriage is said to have taken place. The defendant did not produce the girl in the Court of the Munsif on the date of the final hearing. He was ordered to produce the girl on 21st February 1928. The girl was produced on 1st March 1928. She was examined by the Munsif and she denied that she was married to the plaintiff. She was evidently tutored to say so.. The Munsif found that there were godha marks on her hands and on the other parts of her body. Now it is a fact well known in this part of the United Provinces that no tatoo marks are ever allowed to be placed upon the body of a virgin girl. The presence of tattoo marks-was a circumstance which strongly corroborated the statements of the plaintiff and his witnesses that the marriage of the girl had been performed. We have-not the slightest doubt that Mt. Gomti was married to the plaintiff, we find accordingly.

29. It has been next argued that the marriage of the plaintiff with Mt, Gomti was. not a suitable one and for that reason the marriage should be declared null and'' void. Thia plea has found favour with the Court below and considerable emphasis hag been laid upon the fact that the plaintiff is a man of about 30 years and that Mt Gomti is about nine years'' old. We do not know what evidence there is on the record about the age of the plaintiff. In the plaint, the age of the plaintiff has nowhere been mentioned. Nor has it been mentioned in the written statement. The plaintiff was examined in Court on 21st February 1928 and appears to have given out his age as 25. The lower appellate Court had a look are him and guessed that his age was about 30. We have no tangible evidence on the record about the age of the plaintiff. The lower appellate Court finds that he is a well-built person. It is in evidence that he is possessed of some property. There is nothing in the Hindu Shastras. to suggest that the marriage of a person of the plaintiff''s age with a girl of eight or nine years is opposed to the notions of propriety as entertained by the Rishis. It must be noted that the marriageable^ age under the Hindu law is eight years. The Shastras provide that if the guardian does not marry her within three years of her attaining the marriageable age, the girl is free to choose a husband for herself. These texts may militate against advanced ideas, which some of us have imbibed from the West, but we cannot ignore the prevailing notion amongst the

Hindus that the gift of a girl of eight years in marriage is considered to be highly meritorious and the giver earns the piety of guardian. We cannot also ignore the fact that only in recent years when the Sarda Bill was sought to be introduced very many Hindus resented it most strongly. We are not aware of any text of Hindu law or of any authoritative decision on the point that the marriage of a Brahmin girl of nine years to a young man of between 25 and 30 must be held as null and void simply upon the ground of disparity of age. We are clearly of opinion that where the marriage has been celebrated in due form, according to the customary rituals, the same cannot be annulled upon the ground that the mother performing the marriage had not obtained the consent of the male agnates or other male kindred of the minor girl who under the Hindu texts had the preferential right to give their consent. We are therefore of opinion that for the application of the doctrine of factum valet it was not necessary to establish that before the marriage, the male kindred has either improperly refused their consent to the marriage or were not willing to perform the marriage or that the girl had been given in marriage to a suitable person. The term "suitable,'' is after all a comparative term.

30. In order to attract the application of the doctrine of factum valet, the essential conditions which must be present in the case are:

(1) That the marriage was performed between two people belonging to the same caste or to certain recognized subdivisions of the said caste;

(2) that these two people did not stand to each other as relations within the prohibited degree; and

(3) that the marriage was performed with the essential ceremonies including the final ceremony of the saptapadi. We refrain from making any pronouncement whether marriage may be challenged on the ground of fraud or force, the point not arising in the case.

Where these conditions are fulfilled, the marriage is not liable to avoidance upon the ground that the consent of the father, the paternal uncle, or any other preferential male relation had not been obtained prior to its celebration. The consent of such relations is no part of the marriage ritual.

31. We have examined most of the judicial decisions dealing with the question in issue and we are of opinion that the weight of authority against Mr. Shastry''a contention is overwhelming.

32. The earliest case is that of Bai Rulyat v. Jeychand Kewul [1840-48] Bellassis'' Report 43. Here, the mother gave the daughter in marriage without the consent of the father. The question as to its legality was referred to the Shastris of Surat and to those that were attached to the Sadar Adalat. Upon their exposition of the law, the Court held that where the marriage had been duly solemnized, it could not be annulled. The facts of the case in Modhoosoodun Muherjee v. Jadub Ghunder

Banerjee [1865] 3 W.R. 194, were somewhat peculiar, the plaintiff being a Koolin Brahmin whose occupation in life was to marry numerous wives and to live upon his income of marriage. One of his wives had contracted the marriage of his daughter with an inferior Brahmin without his consent. It was held that a Koolin Brahmin was not such a natural guardian of his daughter as the mother and that the want of a guardian''s consent would not invalidate a marriage otherwise legally contracted and performed with all the necessary ceremonies. It may be noted that the judgment of the Court was based upon the Vyavasta of the Pandit that the marriage; under such circumstances was indissoluable. In Brindabun Chandra Kurmokar v. Ghundra Kurmokar [1886] 12 Cal 140, Norris and Ghose, JJ. held that the want of consent by the lawful guardian did not necessarily invalidate the marriage:

There can be no doubt that the uncle of the girl had a right in preference to the mother, under the Hindu law, to give the girl away in marriage, but the mother, the natural guardian, having given her away, and the marriage, having not been procured by fraud or force, the doctrine of factum valet would apply, provided of course the marriage was performed with all the necessary ceremonies....

33. We are in complete accord with this view and this fully meets the contention raised by Mr. Shastry. In Khushal Chand Lalahand v. Bai Mani [1887] 11 Bom 247, the Smriti texts and the judicial decisions were examined by Sargent, C.J. The suit which gave rise to this appeal was instituted by the plaintiff-appellant against his wife Bai Mani to recover possession of his minor'' daughters, Jadav and Manki. On 23rd October 1883, plaintiff applied for an injunction restraining Bai Mani from giving Jadav in marriage to one Shiv Lal. Injunction was issued but the marriage was nevertheless celebrated on 15th November 1883. The plaintiff then amended his plaint and sued for a declaration that the marriage should be declared null and void. This prayer was refused. The marriage was supported on the principle of factum valet. There being no express authority in the Hindu law text making the consent of the parents and guardians of a girl a condition precedent to the validity of a marriage, his Lordship observed:

But if, upon the true construction of the texts, the giving the girl in marriage is not a right, but a duty to be discharged for the spiritual benefit of the girl, it would be impossible, we think, bearing in mind the extreme importance which the Hindu law attaches to the marriage of females, to hold, in the absence of distinct words in invalidating the marriage, that the consent of the particular person upon whom the duty devolves of giving the girl in marriage, as provided by the texts, is of the essence of the marriage, and if it be not, then the principle of factum valet is applicable, and it is scarcely necessary to say that the propriety of its application, in the case of marriage where the consequences of a declaration of invalidity would, if not expressly by law, at any rate, by the social custom of Hindus, be so serious to the woman, is. far stronger than in the case of any other change of legal status.

34. The matter has been discussed elaborately by Muttusami Ayyar and Shephard, JJ. in Venkatacharyulu v. Bangacharytdti [1890] 14 Mad 316. Here, the mother gave her daughter in marriage to the plaintiff without the consent of the father who subsequently repudiated the marriage. The mother had falsely informed the officiating priest that the father was a consenting party. In spite of this fact, the Court held that the plaintiff was entitled to a declaration that the marriage was valid and to an injunction restraining the parents from remarrying the girl to anyone else. Their Lordships observed (at p."323 of 14 Mad.):

It has however been held by this Court that when an adoption cannot be upheld owing to a legal defect, the adopted boy does not fulfil his status as son in his natural family, and in the same way it might be held that when a marriage rite is set aside on the ground that it is forbidden by the very law which prescribes the rite, the girl''s prior legal status remains without taint, the rite being denied and not inefficacious on that ground. But the religious theory mentioned above and the social difficulty which may arise from the marriage being set aside is a legitimate ground for recognizing the doctrine of factum valet except in cases of clear fraud and force when the religious-ceremony may be presumed to be denied by fraud upon its policy.

35. It may be conceded that where the marriage is between persons standing to each other in the prohibited degree of relationship, there can be no marriage at all. Similarly, where the essential religious ceremonies have not been performed there can be no marriage, but the validity of the marriage cannot be affected by the mere non-giving of the consent. In Ghazi v. Sakru [1897] 19 All 515 the plaintiff brought a suit against his father-in-law for recovery of his wife and for an injunction restraining her father from offering obstruction to her living with him, The marriage was celebrated by the mother without the consent of the father. The father had ceased to support his wife and daughter for a number of years. The Court held that the mother was the legal guardian of the daughter though the father was a preferential guardian and where the girl had been given away in marriage by the mother, and all necessary rites had been duly performed, there was a valid marriage and that in the absence of force or fraud, such marriage could not be disregarded by reason of the father of the girl not consenting to it. If the father of the girl cannot dispute the validity of the marriage, a fortiori the paternal uncle of the girl cannot be allowed to do so. In Bai Dewali v. Moti Karson [1893] 22 Bom 509, the facts were briefly these : Bai Dewali was the mother of a minor girl named Rakhi aged 8 or 9 years. Bai Dewali was the certificated guardian of Rakhi. Moti Karson was the paternal uncle of the girl and he sought to take the girl from the mother with a view to getting, her married. On 2nd January 1898 the District Judge of Ahmedabad passed an order declaring that Moti Karson had a right to dispose of the girl in marriage in preference to the mother. The Court directed the mother to deliver up the daughter to Moti Karson. In defiance of this order, Bai Dewali married Rakhi to one Gobind on 9th of January 1896. It was held by Parsons and Ranade, JJ., that the

marriage must be upheld by the application of the principle of factum valet and that neither the disobedience of the Court''s order nor the disregard of the preferable case of the male relations would invalidate the marriage. The same view was reiterated and emphasized by the same learned Judges in Mulchand Kuber v. Bhudia [1898] 22 Bom 812. Upon a review of the authorities, their Lordships came to the conclusion that the Hindu texts, qua, the eligibility of persons who could claim the right of giving the girl in marriage were directory and not mandatory. In Surjyamoni Dasi v. Kali Kanta Das [1900] 28 Cal 37, while dealing with the question as to whether there was a legal marriage between the plaintiff and defendant 1, Ameer Ali and Baratt, JJ., ruled that if such a marriage had been actually and properly celebrated, it would be legal and binding, although it had bean performed-without the consent of the uncles, supposing that their consent ought to have been previously obtained. In Bai Bamkishore v. Jamnadas Mulchand [1912] 37 Bom 18, Chandavarkar, Ag. C.J. and Batchelor, J., refer to a text in Dharma Sindhu which provides that where the mother has to give her daughter in marriage, she herself must perform the ceremony of nandi shradda and that all other ceremonies she must get performed by a Brahmin. The learned Judges proceed:

The text of Yajnayavalkya does not say that the mother is to have no voice at all and may be altogether set at naught where there are male paternal relations of the girl, competent to give her in marriage. Had that been the intention of the Hindu law, there would have been express texts to that effect. We cannot infer such intention by mere implication, because that would lead to very undesirable results, especially in the present state of Hindu society.

36. We may be permitted to point out that the above view is perhaps not fully reconcilable with a dictum of this Court in re Kasturi v. Panna Lal [1916] 38 All 520, which was decided by Piggofct and Lindsay, JJ. The question of the validity of the marriage was not directly and substantially in issue. Their Lordships accepted. the statement of law contained in Kasturi v. Chiranji Lal [1913] 35 All 265.

37. Against this catena of decisions, the only case which has been cited to us on behalf of the respondent is a decision of the Chief Court of the Punjab in re Dyal v. Narain Das [1884] 64 PLR 1884. It has been assumed in this case that the relevant texts of Hindu law relating to the matter in issue are mandatory and not admonitory. The texts themselves have not been examined. The rules regulating the mandatory character or otherwise of such texts have not been referred to. The rulings of the Indian Courts which have a bearing upon the point have also not been considered. The Court upheld the decision of the lower, appellate Court that where the marriage had been celebrated by the mother in opposition to the authority of the father, who was a leper and without his consent and where it was found as a fact that the marriage was unnecessary and unsuitable, the marriage was void. The aforesaid ruling has not been followed in a later decision of the said Court in Mt. Indi v. Ghania [1919] 53 IC 783, and it was held that a Hindu mother could effect a

valid marriage for her daughter even in the presence of the paternal grandfather. Upon principle and in view of the authorities we are of opinion that the decree of the lower appellate Court cannot be sustained. We hold therefore that the marriage of the plaintiff with Mt. Gomti was a valid marriage and was not liable to avoidance.

38. Plaintiff''s suit for restitution of conjugal rights was dismissed by the trial Court. Plaintiff preferred no appeal to the lower appellate Court against this, part of the decree. In his appeal to this Court he has asked fore decree for restitution of conjugal rights. We are of opinion that we ought not to entertain this plea. The dismissal of the plaintiff''s suit for restitution of conjugal rights will not prevent him from bringing a fresh suit claiming for the same relief at the proper time when the girl has attained her puberty and is in a position to be sensible of her marital responsibilites.

39. We do not approve that the girl should remain in the custody of the defendant-respondent. He appears to us to be a thoroughly unscrupulous person. He preferred very serious and most unfounded charges against his sister-in-law. He-must be held responsible for the falsehood uttered by the girl before the Munsif that there was no marriage. If she is allowed to remain in the custody of the defendant, it is not improbable that he would try to prejudice her mind in various ways against her husband and her mother. We are of opinion that the District Judge might be moved, either by the mother or by the husband, if they so desire, to terminate the guardianship of Jagarnath and to place the girl under the guardianship of Mt. Kailashy or such person who may be properly entrusted with the protection of the girl till the time that she grows up to puberty.

40. We allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs.