

PETITIONER:
SHAKUNTALABAI & ANR.

Vs.

RESPONDENT:
L.V. KULKARNI & ANR.

DATE OF JUDGMENT 28/03/1989

BENCH:
SAIKIA, K.N. (J)
BENCH:
SAIKIA, K.N. (J)
OZA, G.L. (J)

CITATION:
1989 AIR 1359 1989 SCR (2) 70
1989 SCC (2) 526 JT 1989 (1) 607
1989 SCALE (1) 737

ACT:

Hindu Law--Udiki form of marriage prevalent among Li
n-
gayats--Ancient and unbroken custom of dissolution of ma
r-
riage-Whether prevalent--Proof of----Secti
on
57--Customs--Judicially recognised by Court--Passes in
to
law--Proof unnecessary. Serai Udiki marriage among Panch
a-
masal Lingayats--Custom--Proof of.

HEADNOTE:

This is defendants' appeal arising out of a suit for part
i-
tion.

One Mallappa Kulkarni had two sons: Veerappa and Gura
p-
pa. Verrappa is survived by his son Lingappa. Gurappa, w
ho
was in the service of Railways married Channavva (fir
st
wife) on 16.2.28 but since she remained issueless, he rema
r-
ried in 1955 Chinnavva (second wife). From this marriage t
wo
daughters were born viz. Shakuntlabai arid Annapoornav
a.
Consequent upon the death of his second wife Gurappa is sa
id
to have married Nilavva accroding to customary Udiki ma
r-
riage.

After retirement Gurappa settled permanently at Hub
li
where he had house, property etc. After the death of Gura
p-
pa, his first wife Channavva claimed 1/3rd share in t
he
property. Having failed to get the same, she sold her 1/3

rd share to Lingappa. Lingappa also could not procure the 1/3
rd share from defendants by mutual negotiation. Thereupon
he filed a suit for partition claiming his 1/3rd share in t
he immovable properties left by Gurappa. In the suit he i
m-pleaded Channavva (first wife) as Defendant No. 1 and t
he children from 2nd wife as Defendant Nos. 2 & 3 and Nilla
va was impleaded as Defendant No. 4, who was described
as having illegal connections with the deceased Gurappa.

The Additional Munsiff, Hubli who tried the suit pass
ed a preliminary decree for partition of 1/3rd share of Gura
p- pa's properties in the hands of the defendants 2 to 4
by metes and bounds. Defendants 2 to 4 contested that Defenda
nt No. 4 was lawfully married wife of Gurappa.

Defendants 2 to 4 appealed to the Civil Judge at Hub
li impleading the plaintiff and Defendant No. 1 as respodent
s.

The Civil Judge

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modified the decree and granted 1/6th share holding the 4
th defendant to be legally married wife of Gurappa. Bei
ng dissatisfied by the said order, the plaintiff as also D
e- fendants 2 & 3 filed appeals in the High Court. The Hi
gh Court by the impugned judgment allowed the plaintiff
's appeal and restored the decree of the trial Court for 1/3
rd share and dismissed the defendant's appeal. The High Cou
rt held that the 4th defendant was not legally married wife
of deceased Gurappa. Hence this appeal by Defendants 2 & 3
by special leave.

The question that was agitated before this Court wa
s: Whether proof of custom of Udiki marriage was adduced by t
he fourth defendant; and whether Udiki marriage itself impli
ed the dissolution of earlier marriage and if not, wheth
er separate custom of dissolution of the earlier marriage w
as pleaded and proved.

Allowing the appeal, this Court,

HELD: Custom must be proved and the burden of proof
is on the person who asserts it. A custom cannot be extended

logical process. Customs cannot be extended by analogy and it cannot be established by a priori method. [81B. E]

Nothing need be proved of which the Courts can take judicial notice. When a custom has been judicially recognised by the Court then it passes into the law of the land as proof of it becomes unnecessary under section 57(1) of the Evidence Act. [81 F]

From the evidence on record, appreciated in the light of the case law on the subject and the authoritative texts relating to the custom of dissolution and Udiki form of marriage prevalent among the Lingayats who are a religious sect following teachings of Basava, the Court entertains no doubt that there has been ancient and unbroken customs of dissolution of marriage and of Serai Udiki marriage among the Panchamasal Lingayats which was judicially noticed by the Courts, and that the marriage in the instant case, the fourth defendant with Gurulingappa was proved to have been customarily dissolved and that she was subsequently legally married with Gurappa in the valid customary form of Udiki marriage, whereafter, she lived with Gurappa as husband and wife until Gurappa died, and that, thereafter, she enjoyed the family pension by dint of her being nominated as wife of Gurappa to the knowledge of all concerned. She was accepted by the community as wife of Gurappa even after his death. There is, therefore, no scope for declaring the marriage illegal posthumously. [84F-H; 85A]

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Virasangappa v. Rudrappa & Anr., [1885] I.L.R 8 Madras 440; Pakhali Jina Magan v. Bai Jethi, I.L.R. 1941 Bom. 53; Sankarlingam v. Subban, [1894] 17 Madras 479; Shivalingi v. Chowdamma, A.I.R. 1956 Mys. 17; Rahi v. Govinda Val Teja, [1876-77] I.L.R. 1 Bom. 97; Edward v. Jenkins, [1891] Ch.D. 308; Mohammed Ibrahim v. Shaik Ibrahim, AIR 1952 P.C. 59; Ramalakshmi Ammal v. Sivanantha Perumal Sethuraya

14 M.I.A. 570; Raja Rajendra Narain v. Kumar Gangananda

JUDGMENT:

Ors., AIR 1925 PC 213; D.C. Bara Banki v. Receiver of t
Estate of Choudhry & Ors., AIR 1928 PC 202; Effuah Amiss
v. Effuah Krabah, AIR 1936 P.C. 147; Saraswati v. Jagada
bal, AIR 1953 SC 201 and Uzagar Singh v. Mst. Jeo, AIR 19
SC 1041, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3373
1979.

From the Judgment and Decree dated 24.1. 1979 of t
Karnataka High Court in Regular Second Appeal Nos. 522 a
591 of 1973.

R.B. Datar for the Appellants.
S.S. Javali and Ranjit Kumar for the Respondents.
The Judgment of the Court was delivered by
K.N. SAIKIA, J. This defendants' appeal by special lea
is from the judgment of the High Court of Karnataka dat
24.1. 1979 in regular Second Appeal Nos 522/1973 and
1/1973 which arose out of the following facts.

Mallappa Kulkarni had two sons Veerappa and Gurapp
Veerappa is survived by his son Lingappa. Gurappa, a railw
employee, married Channavva (first wife) on 16.2. 1928 b
finding her issueless and sending her to her parent's vi
lage, he married in 1935 his second wife Chinnavva who bo
him two daughters Shakuntalabai and Annapoornavva. Channav
(first wife) however used to pay occasional visits to Gura
pa. Chinnavva (second wife) died in 1943 whereafter Gurap
is said to have married Nilavva. Gurappa retired in 1961 a
settled permanently at Hubli constructing the suit house a
himself occupied a part and let out the other part on ren
After the death of Gurappa on 29.11.1976 his issueless fir
wife Channavva demanded 1/3 share in his moveable and i
moveable properties, but finding it difficult to acquire h
share sold her right to 1/3 share to

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Lingappa son of late Veerappa on 29.3. 1967 for Rs.5,00

The other heirs having rejected Lingappa's request for partition he instituted O.S. No. 387/1968 in the Court of Additional Munsif, Hubli impleading Channavva, Shakuntal bai, Annapoornavva and Nilavva (describing her as having illegal connection with deceased Gurappa) as first, second, third and fourth defendants, respectively, for partition of 1/3 share in the suit house and the moveable properties, and for possession thereof. The first defendant supported the case of the plaintiff; the other defendants contested the suit and averred that the fourth defendant was lawful married wife of Gurappa. On the pleadings the following issues, inter alia, were settled:

- "1. Whether the plaintiff proves the execution of the sale deed by defendant No. 1?
2. Whether the 1st defendant proves that she had valid title to the suit property and the alienation by her in favour of the plaintiff is valid and legal?
3. Whether the plaintiff has derived any valid title virtue of the sale deed in his favour?
4. Whether the defendant No. 4 proves that she is legal wedded wife of the deceased Gurappa?"

On 13.1.1971 the trial Court passed a preliminary decree for partition of 1/3 share of Gurappa's properties in the hands of defendants 2 to 4 by metes and bounds. The second, third and fourth defendants appealed to the Civil Judge Hubli impleading the plaintiff and the first defendant respondents in regular Appeal No. 31/1971 and the learned Civil Judge by his judgment dated 21.2. 1973 confirmed the decree only modifying it to the extent of 1/6 share instead of 1/3 share holding the fourth defendant to be legal married wife of Gurappa. The second, third and fourth defendants appealed therefrom in R.S.A. 591/1973 and the plaintiff appealed in R.S.A. 522/1973. The High Court by its impugned judgment dated 24.1. 1979 allowed the plaintiff's appeal R.S.A. No. 522 restoring the decree of the trial

Court for 1/3 share and dismissed R.S.A. 591/1973 holding that the fourth defendant was not legally married wife of Gurappa. Hence this appeal by defendants two and three.

Mr. R.B. Datar, the learned counsel for the appellant, stating that the case hinges on the question of validity of fourth defendant's

74 marriage, submits that the High Court while holding that the fourth defendant was not legally married wife of Gurappa overlooked vital evidence on record in proof of her customary Udiki marriage with Gurappa who himself declared her his wife wherefore she earned family pension after her husband's (Gurappa's) death. Mr. S.S. Javali the learned counsel for the respondents submits that there was no sufficient evidence to establish the custom of Udiki marriage and at any rate no custom to support the dissolution of marriage of the fourth defendant with her previous husband Gurulingappa was pleaded or proved. Mr. Datar replied that the custom of Udiki marriage itself implied the dissolution of the earlier marriage of the woman and there was sufficient evidence in support of the custom of dissolution of the previous marriage and thereafter the Udiki marriage of the fourth defendant with Gurappa.

The questions, therefore, are whether sufficient proof of custom of Udiki marriage was adduced by the fourth defendant; and whether Udiki marriage itself implied the dissolution of the earlier marriage, and if not, whether separate custom of dissolution of her earlier marriage was pleaded and proved. These were the questions in issue No.

4. From the records we find that the custom of Udiki marriage was pleaded by the fourth defendant, in her written statement, stating that after the death of Chinnavva (second wife) in the year 1943 Gurappa married her (fourth defendant) after she divorced her first husband Gurulingappa by mutual consent and the marriage was in Udiki form at Mir

in accordance with their caste custom and that thereafter she continued to live with Gurappa as his wife till his death in the year 1966. She further stated that there was a custom of Udiki form of marriage in Panchamsale sub-sect of Lingayat community to which she belonged and that there was a custom for dissolution of marriage in her sub-sect. She also described the formalities of Udiki form of marriage that a saree and a blouse were handed to her by the bridegroom Gurappa and the Mangalsutra was given by Gurappa after uttering Mantrums. The saree was worn by her and the Mangalsutra was tied round her neck. Considering the above in the context of issue No. 4 we entertain no doubt that the custom of Udiki marriage was pleaded. It also appears that the custom of dissolution of marriage prevalent amongst the caste was also compositely pleaded to the above extent. We have to see whether the above custom or customs were proved by evidence.

It would be logical first to take the question of custom of dissolution. In the written statement filed by the second defendant it was stated that after Chinnavva's death in 1943 Gurappa married the fourth defendant who divorced her first husband Gurulingappa by mutual consent. We have, therefore, to see whether the custom of Udiki marriage itself implied superior dissolution. The relevant texts and instances relied on may be referred to for this purpose.

In *Virasangappa v. Rudrappa & Anr.*, [1885] I.L.R. Madras 440 the questions were whether Kusava, daughter of Rudrava, who married Rudrappa was legitimate being born in lawful wedlock according to the custom of Lingayats and whether the said marriage was legalised by the custom which the parties belonged, it was found that Rudrava was 18 years earlier married to another person when she was 12 or

13 years old and out of Rudrava's next marriage with Rudra pa in Udiki form Kusava was born. The defendant contend that the second marriage of a wife forsaken by the first husband was allowed amongst the Lingayats; that such marriage was known as 'Serai Udiki' (giving a cloth) distinct from 'Lagna' or 'Dhara', the first marriage; and that Rudrappa married Rudrava in the Serai Udiki form; and that the plaintiff and all the members of the family and the caste recognised that marriage and Kusava was, therefore, legitimate and entitled to inherit. In that case evidence was produced to show that several marriages took place in Serail Udiki form which was accepted by the society and the children were considered legitimate. It was held that the parties were Sudras, and the Lingayat owed its origin to Vasava who held that caste distinctions were unworthy of acceptance and who repudiated Brahmanical observances. It was observed that the sect was particularly represented in Mysore, to a certain extent in Wynad, also in ceded districts in Coimbatore and the South Canara in Bombay Presidency and that instances had been before the Court in which the remarriage of widows amongst that sect had been supported. It was found that Rudrava was deserted by her husband who had never consummated his marriage and expressed himself ready to return and live with Rudrava only on the condition that certain property was secured to him by deed. When the request was not acceded to, he took no further interest in Rudrava and left her without information about him and did not prevent her from forming a new connection. It was also in evidence that Rudrava was treated as a lawfully wedded wife both by the appellant and by the other members of the family and there was proof to show that children of marriages contracted by wives deserted by their husbands were not regarded as inferior in any respect to the parties

to the suit and were received in the Maths of the sect a
nd initiated as the children born of a first
76 marriage. The court also observed that in matters of th
is kind heresay evidence like tradition may be received a
nd direct evidence of such marriages was not always possib
le and one of the ways in which they might be proved was fr
om the manner of their living and from the way in which th
ey were treated by the neighbouts. Kusava was accordingly he
ld legitimate.

at In Mayne's Treatise on Hindu Law and Usage 11th Edn.
page 175 it is said:

of "When we examine the usages of the aboriginal races, or
we those who have not come under Brahmanical influence,
by find a system prevailing exactly like that described
a Narada. Among the Jat population of the Punjab, not only
er widow, but a wife who has been deserted or put away by h
a husband, may marry again, and will have all the rights of
of lawful wife. The same rule exists among the Lingayats
fe South Kanara. In Western India, the second marriage of a wi
a- or widow (called Pat by the Maharattas, and Natra in Guj
in rat) is allowed among all the lower castes. The cases
g, which a wife may remarry are stated by Mr. Steele as bein
ly if the husband prove impotent, or the parties continual
by quarrel; if the marriage was irregularly concluded; if
t, mutual consent the husband breaks his wife's neck ornamen
if and gives her a chorchittee (writing of divorcement), or
ld he has been absent and unheard of for twelve years. Shou
er he afterwards return, she may live with either party at h
r- own option, the person deserted being reimbursed his ma
le riage expenses. A widow's pat is considered more honourab
th than a wife' but children by pat are equally legitimate wi
nd those by a first marriage. The right of divorce and seco
." marriage has been repeatedly affirmed by the Bombay Courts

In Encyclopaedia of Religion and Ethics edited by Jam Hastings Vol. 8 Page 69 we find that the Lingayats are a religious community in India, numbering nearly three millions at the census of 1911, of whom more than half are found in the southern districts of the Bombay Presidency. In the Bombay districts of Belgaum and Bijapur one-third of the population is Lingayat, and in the adjacent district of Dharwar they constitute nearly 50 per cent of the total. Beyond the limits of the Bombay Presidency, Lingayats are numerous in the Mysore and Hyderabad States. They also form an important element

in the population of the north-west corner of the Madras Presidency.

According to that Encyclopaedia the Lingayats are Dravidian, that is to say, they belong to a stock that was established in India before the arrival of the Aryans.

the Brahmanic triad--Brahma, Vishnu and Siva--they acknowledge only the god Siva, whose emblem, the linga, they bear on their persons. All wearers of the linga were proclaimed equal in the eyes of God. The traditional Lingayat teaching is Basava. The denial of the supremacy of the Brahman coupled with the assertion of the essential equality of all men, constituted a vital departure from the doctrines of orthodox Hinduism. Other important innovations were: the prohibition of child-marriage; the removal of all restriction on widows remarrying. The Lingayats according to the Encyclopaedia appear to consist of three groups or divisions (1) Panchamsalis with full astavarna rites (2) NonPanchamsalis with astavarna rites (3) Non-Panchamsalis without astavarana rites. The astavarna or eightfold sacrament is a principal Lingayat ceremony. While describing the Lingayats marriage ceremony it goes on to say that the tying of the tali is the binding portion of the ceremony. Before

he the tali is given to the bridegroom, it is passed round t
he assembly to be touched by all and blessed. As soon as t
he bridegroom ties it on the bride, all those present thr
ow over the pair a shower of rice. The bridegroom places so
me curemill seed and jagri, or unrefined sugar, on the bride
's head, and the bride does the same to the bridegroom.

ch The remarriage of widows was one of the points on whi
es Basava insisted, and was probably one of the biggest bon
ed of contention with the Brahmans. Widow remarriage is allow
to at the present day, but the authorities at Ujjini see fit
ed disregard it. They say that among jangams it is prohibit
he and that among the other classes of Lingayats it is t
ow growth of custom. It also says: "Among Lingayats wid
i- remarriage is common, and divorce is permissible. The ord
he nary law of Hindus is followed in regard to t
inheritance."

59 The Gazetteer of Bombay State, Dharwar District, 19
r- contains a description of Lingayats marriage and the ma
ot riage rules. At page 138 it says: "The Lingayats do n
s- allow the children of brothers to intermarry, nor may si
er ter's children. Marriage with a mother's sister's daught
r, is also prohibited. A man may marry his sister's daughte
is but if the sister be a younger sister such marriage
he looked on with disfavour. Widow marriage is allowed at t
i- present day, except amongst Jangamas. Divorce is permiss
ble. The chief feature of the

78
ra actual marriage ceremony is the tying on of the mangalsut
om (bride's luck neck-thread), is performed by the bridegro
he under the Jangama's discretion. The ceremony begins by t
it mathapad bowing to the mangalsutra, and proclaiming that
ys is about to be tied to the bride's neck. The bridegroom la
ys his right hand on the bride's fight hand, the mathapati la
he the lucky thread on the boy's hand. The teacher gives t
order to tye on the lucky thread and the bridegroom ties

it on the girl's neck."
ar In the Castes and Tribes of Southern India by Edg
is Thurston, first published in 1909 reprinted in 1975, it
on said that the marriage of widows was one of the points
l- which Basava insisted and that the practice is widely fo
t. lowed and that divorce is permitted on proof of misconduct.
by The husband can exercise his right to divorce his wife
fe proving before a Panchayat the alleged misconduct. The wi
en can only claim to divorce her husband when he has be
he outcasted. Wives who have been divorced cannot remarry. T
t. above answers are given on the authority of the Ujjini mut
r- It goes on to say: "There appears to be considerable dive
ly gence of opinion in other quarters. By some it is positive
m- asserted that divorce is not permitted under any circu
he stances; that the husband and wife may separate on t
nd ground of incompatibility of temper or for misconduct; a
to that in these circumstances the husband is at liberty
ce marry again, while the wife is not. Others say that divor
r- is permitted, and that both parties are at liberty to rema
is ry." In connection with the Lingayats of South Canara, it
of recorded, in the Indian Law Reports that "second marriage
r- a wife forsaken by the first husband is allowed. Such ma
n- riage is known as serai udiki (giving a cloth); as disti
guished from lagna or dhara, the first marriage."

we In Hindu Law by S.V. Gupte 3rd Edn. Vol. II, page 619
it read that divorce was not allowed by general Hindu law,
v- was in some cases permitted by customs. Such custom, howe
in er, prevailed only amongst the lower classes, especially
rt the Bombay Presidency. Customs to be recognised by the Cou
e, must be valid. Though Hindu law did not contemplate divorc
an still in those districts, where it was recognised as
am established custom, it had the force of law. In Sankarling
ld v. Subban, [1894] 17 Madras 479 divorce by consent was he

valid as a matter of custom of the Pakhali caste of Ahmedabad observing that there was nothing immoral in a custom by which divorce and remarriage were permitted by mutual agreement. There was no invalidity in a custom which married couple on account of disagreement between them by consent could divorce and were

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divorced by parties approaching the headman and other relations, paying certain amount and taking away tali or the sacred thread from round the wife's neck and giving it back to the husband. It was only when the divorce was enforced against the wishes of his wife that the custom permitting divorce would be illegal. In *Pakhali Jina Magan v. B Jethi*, I.L.R. 1941 Bom 535 it was held that a custom of divorce with mutual consent of husband and wife stated to exist among the Hindus of Pakhali caste of Ahmedabad was not repugnant to Hindu Law. When it was contended that the institution of divorce was itself opposed to the concept of Hindu law and that there was no decision of any Court in India which held a custom of divorce as valid as it was observed that would be going too far and that it was observed in Tagore Law Lectures, 1908, on Customs and Customary Law in British India, "divorce is not contemplated by the Hindu Law but it is not repugnant to its principles, and if there be a well established custom in its support, it may override the general provisions of that law." It was further observed that there had been many cases in our Courts arising out of divorce in the lower castes. In all those cases even where it was held that the divorce had not been properly granted, it had been taken for granted that the custom of divorce can validly exist in a particular community, especially if it is a sudra community, but that divorce granted cannot be forced by the caste against an Unwilling person.

In *Shivalingiah v. Chowdamma*, A.I.R. 1956 Mys 17 it has

been held that when a woman lives for a number of years in close association with a man and bears children who are acknowledged by the man as born to him, relations and persons of the village treat them as such, there is a presumption of legitimacy, as vice and immorality are not usual attributed to such association between a man and a woman.

In *Rahi v. Govinda Valad Teja*, [1876] 77 I.L.R 1 Bom 97 the legitimacy of 'Pat' or 'Pata' or 'Natra' marriages among the Marathas of Bombay Presidency was accepted. Relying on Hindu law of Strage and the statement of Mr. Steele who in his Law and Custom of Hindoo castes, which has been accepted as authority by the Courts, said that in that Presidency though forbidden in the present age (Kaliyug) to twiceborn caste it was not forbidden to sudras and that Manu appeared to have limited the prohibition to the twiceborn classes. This has been referred to by Sir Gooroodas Bannerjee in his Tagore Law Lectures on Hindu Law of Marriage and Stridhan, lecture VI. Devala expressly permitted re-marriage of a class. Narada also said: "Nashte mrite prabrajite klaibe cha patite patau; Pan-80 chaswapatsu narinang patih anyo bidhiate."

In cases of first husband having perished, or died naturally or gone abroad, or if he is impotent, or have lost his caste, in these five calamities a woman may take another husband.

In Kautilya's Arthashastra (See R Shamasastri, 2nd Ed. 189) which has been claimed to have been a work during the period 321-296 B.C., anterior, therefore, to Manu and Yajnavalkya, said: "If a husband either is of bad character, or is long gone abroad or has become a traitor to his kin, or is likely to endanger the life of his wife, or has fallen from his caste, or has lost virility, he may be abandoned by his wife." He further writes: "A woman hating her husband cannot dissolve her marriage with him against his will. N

can a man dissolve his marriage with his wife against his will. But from mutual enmity, divorce may be obtained (parasparam dveshanmokshah). If a man, apprehending danger from his wife, desires divorce (mokshamichchhet), he shall return to her whatever she was given (on the occasion of his marriage). If a woman, under the apprehension of danger from her husband, desires divorce, she shall forfeit her claim to her property; marriages contracted in accordance with the customs of the first four kinds of marriages cannot be dissolved." There is no doubt that the principle that once a marriage is a marriage is a subsequent development. Ancient Hindu Law also said: Tasmindesha ya acarah paramaryakramagatah; Varnanam santaralanam sa sadachara uchyate. Practice that obtains from generation to generation among the pure and mixed classes is called sadachara.

The next question is whether the custom of *Udiki marriage* would be a valid custom under law. In *Edward v. Jenkins*, [1896] 1 Ch.D. 308 the characteristics of a valid custom are stated. They are, that it must be of immemorial existence, it must be reasonable, it must be certain and must be continuous. Every custom must have to be in existence preceding memory of man and if the proof was carried back as far as living memory would go, it should be presumed that the right claimed had existed from time of legal memory. This was reiterated in *Mohammed Ibrahim v. Shaik Ibrahim*, AIR 1922 P.C. 59. In *Ramalakshmi Ammal v. Sivanant Perumal Sethurayar*, 14 M.I.A.

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570, it was held that it was the essence of special usage modifying the ordinary law, (in that case of succession) that they should be ancient and invariable; it is further essential that they should be established to be so, by clear and unambiguous evidence and that it is only by means of such findings that the Courts can be assured of their existence and that they possess the conditions of antiquity a

nd
to
of
continuity and certainty on which alone their legal title
recognition depends. Custom must be proved and the burden
proof is on the person who asserts it.

The Privy Council in *Raja Rajendra Narain v. Kum Gangananda & Ors.*, AIR 1925 PC 213, held that after the existence of a custom for some years has been proved by direct evidence, it can only, as a rule, be shown to be immemorial by hearsay evidence and it is for this reason that such an evidence is allowable as an explanation to the general rule. In *D.C. Bara Banki v. Receiver of the Estate of Choudhry & Ors.*, AIR 1928 PC 202, it has been held that a breach of a custom in a particular instance need not destroy it for all times. In *Effuah Amissah v. Effuah Krabah*, AIR 1936 P.C. 147, it was held that material customs must be proved in the first instance by calling witnesses acquainted with them until a particular custom has been proved by frequent proof the Court becomes so notorious that the Courts take judicial notice of it. A custom cannot be extended by logical process. In *Saraswati v. Jagadambal*, AIR 1953 SC 201, it has been held that oral evidence as to instances which cannot be proved by documentary evidence cannot be fairly relied upon to establish custom when no satisfactory explanation for withholding the best evidence is given. Custom cannot be extended by analogy and it cannot be established by a prior method. In *Uzagar Singh v. Mst. Jeo*, AIR 1959 SC 1041, laid down that the ordinary rule is that a custom, general or otherwise, has to be proved under Section 57 of the Evidence Act. However, nothing need be proved of which the Courts can take judicial notice. When a custom has been judicially recognised by the Court then it passes into the law of the land as proof of it becomes unnecessary under Section 57(1) of the Evidence Act. "In regard to marriage", says S Gooroodas Banerjee, "the ordinary Hindu Law does not, a

cannot, form the common rule for all sects alike."

Examining the written statements and the evidence adduced in this case we find that the fourth defendant Neela as DW-7 deposed: "Prior to my marriage with late Gurappa, was said that during my childhood I had married. The prior husband's name was one Gurulingappa. When I was aged about 16 or 17 years, my marriage with Gurulingappa was dissolved. The dissolution of the marriage took

⁸² place in the house of my elder brother Parappa Sallapur Hubli. In the presence of one N.M. Patil, S.R. Hiremath, then Chief Officer, my elder sister and her husband and mother's brother's son one Rachappa, my prior husband Gurulingappa, the dissolution took place. When I was aged about 23 or 24 years, my marriage with the late Gurappa took place at Miraj." The marriage which took place at Miraj was Udiki form. There was a custom of Udiki form of marriage Panchamasale subject of Lingayat community. I belong Panchamamasale subject. There is also a custom for dissolution of marriage in our section. The dissolution of marriage with Gurulingappa was effected by my declaration in the presence of elders, that I did not require Gurulingappa as my husband and by similar declaration by Gurulingappa that he did not require me as his wife. That declaration was followed by our mutual expression of liberty to marry another spouse. That was approved by the elders present then."

In cross-examination on behalf of the plaintiff she said: "Since my marriage with Gurulingappa had been performed when I was too young and since I did not desire to continue as his wife, a situation arose for the dissolution of the marriage. There was no other reason for the dissolution. About 13 years after my marriage with Gurulingappa, the marriage was dissolved." "I was not residing in my husband's house ever since my marriage with Gurulingappa but I w

as residing in my parent's house." She also deposed that to her knowledge her's was the only case where there was dissolution in their family from the time of their ancestors. Her mother was married in usual form and not in Udiki form. Nor her brothers or sisters got a dissolution of their marriages. She also did not know if there were instances of dissolution of marriages among the relations of Gurulingappa. She denied the suggestion that there was no dissolution of the marriage and that she continued to be the wife of Gurulingappa. DW-8 Parappa, elder brother of the fourth defendant testified about her re-marriage with Gurappa. According to him there was a custom in the Lingayat community for dissolution of the marriage and he could give certain instances of Udiki form of marriage in their family relations and friends. In his own family his elder sister's marriage was gone through in Udiki form. His wife's elder sister was also married in Udiki form. He did not give the names of the persons having entered into Udiki form of marriage at that time but said that there were thousands of instances. The dissolution of the marriage of fourth defendant took place in his Railway Quarters at Hubli. Outsiders, namely, Shri S.R. Hiremath, N.M. Patil were present. Among his relations, his elder sister, his cousin, Gurulingappa, his sister and the fourth defendant were present. He had written a letter to S.R. Hiremath requesting him to come over there. He requested the other persons also to come there. It was about 7.30 or 8.00 P.M. when the dissolution took place. The fourth defendant expressed that she had been married during her childhood and she was not going to continue with Shri Gurulingappa. Gurulingappa also expressed that in view of the big disparity in age between himself and the fourth defendant and in view of the fact that she had

expressed her intention for dissolution, he had no objection for dissolution. Thereafter, Hiremath, Patil and his relations also consented for the dissolution of the marriage. Parappa's mother removed the Tali from the neck of the fourth defendant and handed over the same to Gurulingappa. Gurulingappa, thereafter, went away telling that he was at liberty to marry again; and he later had married again. He clearly stated that as per the custom of the caste, there was nothing more to be done for the dissolution. This witness further deposed that in 1943, the Udiki marriage of the fourth defendant took place at Miraj. At the time of her marriage she was aged about 19 or 20 years. Parappa contacted Gurappa for the re-marriage. Gurappa brought his father with him and the re-marriage was fixed. He got his elder sister and his brother-in-law from Bijapur. His mother Rachappa and his wife were present at the time of re-marriage in addition to those who came from Bijapur. Gurappa and Jamakhandi were already there. A priest was officiating the re-marriage. The lady who had already undergone Udiki marriage was requested to present the clothes to the bridegroom and gold was brought by Gurappa and that was handed over to the priest who in turn gave it to the bride. Presentation of saris and blouses was made by Udiki form of marriage. Mangalsutra had been brought and it was given to the priest who enchanted some Mantram and, thereafter, it was given to Gurappa who in turn tied it round the neck of the fourth defendant. The above said function of tying Mangalsutra took place in God's room. Then the married couple offered their pranams to God. Thereafter, the priest tied the ends of the clothes of bride and bridegroom who thereafter prostrated before the elders to receive their blessings. It appears that this witness was thoroughly cross-examined but could not be dislodged.

DW-9 Gangadhara deposed that he knew as to Gurappa having been married in Udiki form and that the fourth defendant Neelava was his Udiki wife. He was present at the marriage. He gives vivid description of the ceremony including the persons who were present. He testified that the priest enchanted mantram and thereafter handed over the Guladali to Gurappa and, as directed by the priest to the Guladali around the neck of his wife, Gurappa tied the Guladali. Mr. Datar says Guladali meant Tali. The clothing was presented by each

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party to the other. As per the direction of the priest the bride made pranams to the elders present there. This witness too was thoroughly cross-examined but could not be shaken from his testimony.

DW-10 Neelakantappa Patil corroborated DWs.8 and 9 material particulars. DW-11 Rachappa testified to the dissolution of the fourth defendant's marriage with Gurulingappa in vivid details. DW-12 Gurulingappa himself testified that his marriage with the fourth defendant was dissolved, thus fully corroborating the other witnesses. He clearly deposes that the fourth defendant's mother removed the Tali from her neck and gave it to him and he took it, went home and subsequently married again.

Mr. Datar states on behalf of the second & third defendants that Neelava is dead and that while she was alive she was addressed as younger mother by the children. It is not denied that till her death she enjoyed the family pension as widow of Gurappa to the knowledge of the plaintiff. There is no evidence to show that she was not accepted as wife of Gurappa by the members of the community though in the plaintiff she was described as having had illegal connections with Gurappa.

The learned counsel for the respondents submits that all the witnesses were near relations and hence could not

believed. We do not agree. All elders were not relatives and their corroborated testimony could not be discarded. The second and third defendants in their written statements asserted that Neelava was legally married wife of Gurappa. The High Court ignored these vital pieces of evidence which the learned Civil Judge rightly considered.

From the above evidence on record, appreciated in the light of the case law on the subject and the authoritative texts as discussed above relating to the custom of dissolution and Udiki form of marriage prevalent among the Lingayats who are a religious sect following teachings of Basavanna, we entertain no doubt that there has been ancient and unbroken customs of dissolution of marriage and of serai Udi marriage among the Pnachamasale Lingayats which was already judicially noticed by the Courts, and that the marriage of the fourth defendant with Gurulingappa was proved to have been customarily dissolved and that she was subsequently legally married with Gurappa in the valid customary form of Udiki marriage, whereafter, she lived with Gurappa as husband and wife until Gurappa died, and that thereafter she enjoyed the family pension by dint of her being nominated as wife by Gurappa to the knowledge of all concerned. She was accepted by the community as wife of Gurappa even after his death. There is, therefore, no scope for declaring the marriage illegal posthumously.

The result is that this appeal is allowed, the judgment of the High Court is set aside and the judgment and decree of the Civil Judge are restored, without any order as to costs.
Y.L.

Appe

allowed.
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