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Prasanna S,

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No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

Phone : +91 94896 71437 - info@iledu.in / Chairman@iledu.in



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SAPINDA AND DEGREES OF PROHIBITED RELATIONSHIP- AN ANALYSIS

Authors: Muskaan Dalal, Student of Bennett
University, Times of India Group

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ABSTRACT

Prior to the enactment of the Hindu Marriage Act in 1955, marriages in India were based on various shrutis, smritis and shastras and there was no uniform set of rules. Many times, the marriages also involved incest. This is against the principles of morality and is also not good for the overall health of the population as it would narrow the human gene pool. Sapinda and degrees of prohibited are the essentials to Hindu marriage under the Hindu Marriage Act, 1955. The persons marrying each other must not be sapindas of each other and should not be within the scope of degrees of prohibited relationship defined under the Act. However, there is an exception to the rule which relates to the custom or usage which permits anything of this sort. Sapinda has been defined under Section 3(f) of the Hindu Marriage Act, 1955, it states that if two people are related to each other through common ancestors, with extends to three generations of the mother's side and five generations of the father's side. Degrees of prohibited relationship have been defined under Section 3(g) of the act. This section states certain relations in which marriage cannot take place like descendants. So, according to the Hindu Law, marriage cannot take place among the people who are pindas to each other or who come under the prohibited relationships under the act. These topics are analyzed in detail along with relevant case laws. This paper discusses the meaning of Sapinda and degrees of prohibited relationship in detail while

analyzing their scope under the essentials of the Hindu marriage under Hindu Law. The paper discusses the provisions relating to these two concepts as well as who comes under these relationships. In this regard, the concept of full blood, half blood and uterine blood have also been discussed. The paper also contrasts the current provisions in the Hindu Marriage Act with the provisions in the ancient law as inscribed in the Mitakshara and Dayabhaga schools of law.

SAPINDA AND DEGREES OF PROHIBITED RELATIONSHIP

I. Introduction

Hindu Law has evolved since the enactment of the Hindu Marriage Act in 1955. Before the said enactment, traditional law derived from various smritis, shrutis and shastras was followed all over India by the Hindus. Different traditions and practices were followed by the people. The marriage took place according to different rituals and concepts as there was no uniform set of rules for the same. No strict conditions were present and many times marriage took place among the family members and involved incest. Now, this is not something which is beneficial for the human population as it can pose many medical health issues. The human gene can also be narrowed if people start breeding among family members as they have the same genes. In addition, incestuous relations are against morality and public order and hence the Hindu marriage legislation aimed at bringing a uniform set of rules and conditions for Hindus residing in the country. In accordance to this, Section 5 of the Hindu Marriage Act, 1955 states certain conditions that need to be fulfilled for a marriage under this act to be valid in the eyes of law. This involves basically five conditions that are monogamy (no living spouse at the time

of marriage i.e., unmarried, divorcee, widow/widower), sanity, age of majority (18yrs- women, 21yrs- men), the parties should not be within the degrees of prohibited relationship and should not be *sapindas* of each other. If any of the above condition is missing, then the marriage will not be a valid marriage. This paper discusses the last two conditions of a valid marriage i.e., *sapinda* and degrees of prohibited relationship in detail.

II. *Sapinda* Relationship

Section 3(f)(i) of the Hindu Marriage Act defines *sapinda* relationship with reference to a relationship that extends to the third generation from the mother's side in the line of ascent and the fifth generation from the father's side in the line of ascent. This definition is inclusive of the third and fifth generation respectively. Marriage between such relations cannot take place. The *Dharmashastra*, which are important ancient Hindu texts in the form of smritis also state that marriage under such type of relationships is a 'sin' of the highest order i.e., *Mahapataka*⁵²⁸. The word '*sapinda*' literally mean one's body. There are two theories relating to the *sapinda* relationship- one by *Jimutavahana* and the other by *Vijaneshwara*. These are based on the ancient Hindu commentaries *Dayabhaga* and *Mitakshara*.

The *Jimutavahana* theory was also called the oblation theory and it was based on the '*pinda*' which is offered to the departed ancestors, those who offered *pindadan* to a common ancestor were *sapindas* of each other. In contrast, the *Vijaneshwara* theory was based on the particles of the same body. Those who shared the same particles in their bodies were called *sapindas* of

each other. These theories will be discussed in the later part of the paper. The Hindu Marriage Act incorporates the *Vijaneshwara* theory with certain modifications with respect to the number of generations involved. The *Jimutavahana* theory was not included in the codified law. The particles of the same body theory was considered to be a more simpler concept to interpret than the oblation theory. Two people who have a common ancestor within five generations from the father's side and three generations from the mother's side cannot marry each other. However, the exception to this rule of *sapinda* is that if there is a custom which prevails that allows the marriage between the *sapindas*, then that custom will override the effect of the provisions of the Hindu Marriage Act, 1955. However, the custom should have been prevailing for a really long time, should be unambiguous and clear as held in the case of **Harihar Prasad and Ors. v. Balmiki Prasad and Ors.**⁵²⁹ It was stated in this case that the evidence that is being given in the court for the validity of any such custom should be unambiguous and clear and only then will the court give the custom a legal recognition. Also, the custom should not be opposed to public policy as stated in the case of **Savitri Devi v. Manorama Bai**⁵³⁰ that it is important for the custom to be certain, ancient, reasonable and should not be opposed to public policy. Antiquity and certainty are of importance while judging the validity of such customs.

III. Who Comes Under *Sapinda* Relationship?

Under the act, the persons who have a common lineal ascendant or if one is a lineal ascendant of the other in relation to five generations from the father's side

⁵²⁸ Dr. Paras Diwan, Modern Hindu Law, 16th ed. 2005, p.94

⁵²⁹ 1975 AIR 733, 1975 SCR (2) 932

⁵³⁰ 1998 (1) MPLJ 254, AIR 1998 MP 114

and three generations from the mother's side are said to be *sapindas* of each other. When the generations are counted, the person who is to be considered is called the first generation and then the above generations are seen as second, third, etc. If the two people marrying have the relationship beyond the *sapinda* definition i.e., sixth generation and above from the father's side and fourth generation and above from the mother's side, then they are not *sapindas* of each other and are eligible to be married to each other. When they have a common ancestor also, both of them need to be *sapindas* of that common ancestor, then only they will be *sapindas* of each other, if one of them is not a *sapinda* of the common ancestor, then they are not *sapindas* of each other. If the two people are related to each other within the meaning of *sapinda* relationship, they are *sapindas* of each other and cannot marry under the Hindu Marriage Act. So, this is an essential condition for a Hindu marriage to be a valid marriage.

IV. Degrees of Prohibited Relationship

Section 3(g) defines the degrees of prohibited relationships and states certain relations in which the marriage cannot be solemnized. Section 5 (iv) of the act establishes a condition of the Hindu marriage that the parties marrying each other should not come within the ambit of prohibited degrees. This condition was made basically to prevent the marriages among family members. These sorts of marriages are against the public order and morality as they involve incest. The overall health of the population will also suffer if such marriages are given a legal validity. Thus, the law has prohibited marriages among certain people and relations and the same cannot be solemnized. However, if there is a valid custom that

allows any such marriage to take place, then that custom will be given importance and the marriage under that particular custom will be considered valid. In the case of **Venkata v. Subhadra**⁵³¹, it was stated that a marriage between a niece and maternal uncle is valid as there was a valid custom to this extent. So, the court recognized the marriage as a valid marriage even though the marriage between this relation has been specifically mentioned as a prohibited marriage under Section 3(g)(iv). Thus, custom is an exception to the rule of *sapinda* and prohibited degrees of relationship. Then again, the marriages between the children of brother and sister are common in South India but they fall under the prohibited degrees. However, they will be valid as it is a custom of that place. Thus, custom is given importance while deciding such cases. However, the custom should be very old and should be followed for a really long time. This was held in the case of **Shakuntala Devi vs Amar Nath**⁵³². The court stated that marriage can take place within prohibited degrees only and only if it is proved by the parties that there exists a custom to that regard and this custom should be existing beyond human memory that is being followed for a long period of time. In the case of **K. Kamakshi v. K. Mani**⁵³³, it was held that the number of instances and time period that is required to show the existence of a certain custom will depend on the facts of a particular case as the situation is different in each case. All said and done, these essential conditions are made to ensure morality and public policy and so a custom cannot override that. If a custom is

⁵³¹ I.L.R. Madras 548

⁵³² AIR 1982 P H 221

⁵³³ Letters Patent Appeal No. 93 of 1969, (Madras HC), (Decided on April 22, 1970)

proved to exist and the court feels that it is against public policy, then it can take measures in that respect and regard the marriage as void. This was seen in the case of **Baluswami Reddiar v/s. Balakrishna Reddiar**⁵³⁴ wherein the court regarded the marriage between grandfather and granddaughter void on the ground of immorality even when a custom was proven to exist. In Haryana, Karewa marriages were common in which a person marries his brother's widow. The case of **Jag Nahar Singh v. Sadhuram**⁵³⁵ made such marriages void in the eyes of law as they are opposed to public policy.

V. Who Comes Under the Degrees of Prohibited Relationships?

Section 3(g) of the Hindu Marriage Act defines the degrees of prohibited relationship. This section lists certain relations among which the marriage cannot take place like brother, sister, grandparents, grandchildren, parents, etc. The prohibited degrees also involve the wife of brother, the wife of the father's and mother's brother respectively. The grandmother's and grandfather's siblings and their respective spouses, brother and sister, aunt and nephew, uncle and niece, children of brother and sister also come within the ambit of prohibited relationships. Two people cannot marry if one of them is a lineal ascendant of the other. Lineal ascendant implies a straight line of relationship upwards like son, father, grandfather, etc. The spouses of the lineal ascendants and descendants are also included under the prohibited degrees. So, a person cannot marry his brother's wife. However, there is an exception to this rule which relates to the custom or usage. If there is a valid custom which states that a

particular type of marriage has been taking place as a custom for a very long time, then it can be accepted as a valid marriage.

VI. Concept of Full Blood, Half Blood and Uterine Blood

Section 3 (c) of the Hindu Marriage Act, 1955 discussed the concept of full blood and half blood. Two persons are related to each other by full blood when descended by a common ancestor by the same wife which means they have the same parents i.e.; their mother and father are the same. Two persons are related by half blood when descended by a common ancestor but by different wives so they have the same father but the mother is different for both of them.

Section 3 (d) defines uterine blood. Two people are connected to each other by uterine blood when they are not descended by a common ancestor but they have a common ancestress which implies that they have the same mother but their father is different.

To understand the concept, we can consider an example, A (father) and B (mother) are married and they have a son E and a daughter F. B had an affair before marriage with C and they had a son G. A was previously married to D and they had a daughter H. In this example, E and F are related by full blood as they have the same parents. E and F are related to G by uterine blood as they have the same mother but the father is different. E and F are related to H by half blood as they have the same father but different mothers. G and H do not have the same mother or father so they do not fall in either of the category.

When degrees of prohibited relationships are considered, they also include the relationships by full blood, half blood and uterine blood. The persons who are connected by uterine blood or half blood cannot marry each

⁵³⁴ AIR 1957 Mad 97

⁵³⁵ AIR 1934 Lah 283

other. Only full blood relationship is not important. Even illegitimate relations are considered for this. In the above example, G is an illegitimate son of B, so he will also fall in the category of prohibited relationships for F. E cannot marry H as they are connected by half blood. Suppose, A and B adopt a male child M. M cannot marry F and H even if he is an adopted child and not connected by either full, half or uterine blood as relationship by adoption also forms a part of prohibited relationships under the Act. The inclusion of the relationships by full blood, half blood, uterine blood, legitimate and illegitimate blood relationship and adoption has been given in the explanation to Section 3 (f) and (g). Therefore, these relationships will also be included while evaluating *sapinda* and prohibited degrees of relationships.

In the case of **Smt Mausmi Sharma v. Himanshu Sharma**⁵³⁶, it was contended by the parties that they are not related to each other by blood or by uterine blood however, it was held that the marriage is void and they fall within prohibited degrees as the husband's father and wife's mother were brother and sister and the marriage cannot take place. The marriage was solemnized under Special Marriage Act, 1954 and was void according to Section 24 read with Section 4 and Section 2 (b) of the above Act.

VII. Ancient Hindu Law Relating to *Sapinda* and Prohibited Degrees

Sapinda and prohibited degrees also formed an important part of the ancient Hindu law that prevailed in India. There are two Hindu schools of law—*Mitakshara* and *Dayabhaga*. The *Mitakshara* is written by *Vijaneshwara* and it is a commentary on the *Yajna*

Valakya Smriti while *Dayabhaga* is a commentary written by *Jimutavahana*. Both the schools play a great role in interpreting the Hindu laws.

The concept of *sapinda* also forms a part of both the commentaries and has evolved since. As discussed earlier, both the schools of law had different theories on the *sapinda* relationship. The law that governs the Hindus today as per the Hindu Marriage Act is derived from the *Mitakshara's Vijaneshwara* theory.

The *Vijaneshwara* theory revolves around the particles of the same body. According to this theory, the relationships that the people in a family have basically makes them to have the same particles in their bodies. For example, a son will have the same particles as his father, his father will also have the same particles as his father and thus the son and the grandfather will also have the same particles. This can include the mother also; the son will have the particles of the mother and this will extend to the mother's family also. The blood relations were given importance under the *Mitakshara* law and it was governed by the principle of propinquity. This relation extends to seven generations from the father's side and five generations from the mother's side. Therefore, the seven generations from the father's side and five generations from the mother's side, including the subject from whom the generation is counted are *sapindas* of each other and marriage among *sapindas* is prohibited and cannot take place.

According to the *Jimutavahana* theory, *pinda* is an offering made to the departed ancestors and those who offered the *pindadan* to the same common ancestor were *sapindas* of each other. The heirship was seen from the point of view of spiritual efficacy and

⁵³⁶ First Appeal No. 101 of 2016, (Allahabad HC), (Decided on October 10, 2017)

so whoever performed these rituals inherited the property of the ancestor. This *pindadan* extends to seven generations which includes three ascendants and three descendants and the person himself/herself. This was based on the notion of oblation. Oblation literally means an offering to the god. Those who offered the *pinda* to a common ancestor were *sapindas* of each other and hence marital relationships among them were prohibited and cannot be solemnized. However, the present law revolves around the *Vijaneshwara* theory of the particles of the same body. The difference is that the number of generations have been relaxed. Earlier, seven and five generations from the father and the mother's side respectively were counted but now this has been reduced to five and three generations respectively. A proper codified law was required to this extent as there were different beliefs and practices throughout India and different notions were accepted in accordance with different theories. The uniform act will help to establish a set of rules for this important concept and thus *sapinda* and prohibited degrees were defined in the modern law and were also included as the essential elements of a valid Hindu marriage.

VIII. Implications of Marrying Within *Sapindas* and Prohibited Degrees of Relationship

The marriage of people who are *sapindas* of each other and who come within the prohibited degrees is prohibited by law. The Hindu Marriage Act of 1955 expressly prohibits such marriages. Thus, there are also provisions to ensure that the rules are followed.

Section 11 of the Act makes such marriages void in the eyes of law. Thus,

any person who marries with these prohibited degrees will not be a part of a valid Hindu marriage. Section 11 is prospective in nature and thus the 1955 law will not affect the marriages that had already taken place before the enactment of the act and they will be considered as valid marriage only but the marriages that take place after the enactment will be void ab initio. When a marriage is void, the wife cannot claim maintenance as the marriage never really took place in the eyes of law. So, when marriage took place in the prohibited degrees and later divorce was filed, the wife will have no right of maintenance as marriage did not happen at the very first place as it was void. However, in the case of **Kamani Devi v. Kameshwar Singh**⁵³⁷, the court held that the obligation to pay maintenance to the wife will prevail even if the marriage had taken place within prohibited degrees of relationship as in this case, the parties were married according to the *Gandharva* form of marriage and the court discussed about such form of marriage in detail while explaining the obligation to pay maintenance to the wife in such cases as the *Gandharva* form is a valid form of marriage according to the law. But this case took place in 1946 which is before the enactment of the Hindu Marriage Act. Section 11 of the act renders such marriages void ab initio.

The Hindu Marriage Act also specifies the punishment for marrying within *sapindas* and prohibited degrees of marriage. Section 18 (b) of the act prescribes the punishment for marrying in contravention to this rule. Any person who marries under this will face a punishment of simple imprisonment extending to one month or with a fine of Rs. 1,000 or both. This has been done so

⁵³⁷ AIR 1946 Pat 316

that people actually ensure the following of the rules given under Hindu law. Again, if they can prove that there exists a valid custom, then the marriage will be valid and will not involve punishment.

IX. Conclusion

The marriage is a union of two people and thus it is important that it fulfills certain conditions. Hindu law prescribes the essential elements of a valid Hindu marriage. Not being *sapindas* of each other and not being within the prohibited degrees of relationship are two of such important elements for a marriage to be a valid marriage. Article 25 of the Indian Constitution gives the people of India the right to the propagation of religion however this is subjected to public order, morality and health. *Sapinda* and prohibited degrees are a part of the Hindu codified law in accordance with the conditions of Article 25 i.e., to ensure public order, morality and health. Public order and morality are ensured if people do not marry their *sapindas* and within close family relations. If this is not done, then it will amount to immorality which will ultimately be against public order. Health of the people is also maintained by following this rule as discussed earlier, if people marry within their own family, then the human gene pool will be narrowed and the biological factors of genetic variation and natural selection will not be ensured. This will lead to serious medical concerns among the people as hereditary diseases will be common. Hence, the law was required in order to maintain the sanctity of Article 25 and also to ensure a uniform set of rules. There were a lot of theories prevailing for the rule of *sapinda* and different places had different practices and traditions relating to marriage. Thus, to bring an element of uniformity, the law has been codified and *sapindas* and prohibited degrees of relationship have

been defined under the Hindu Marriage Act. However, the customs are also given importance and if a valid custom is recognized by the law in accordance with Section 3 (a) of the act, then the marriage will not be regarded as a void marriage.

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