

yet she may have civil rights. In criminal cases the presumption of innocence must be displaced by positive evidence. As the evidence in this case was not specific in the sense indicated above, I doubted at first if we should at all interfere in revision. After reading Mr. Justice Parker's judgment, I see no objection to directing a re-hearing of the appeal in order that the Judge may come to a distinct finding with regard to the intention, and then dispose of the case, and I concur in the order proposed by Mr. Justice Parker.

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.*

SIVASANGU AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

v.

MINAL (PLAINTIFF), RESPONDENT.\*

1888.  
April 12, 13.  
1889.  
January 29.

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*Hindu law—Inheritance—Rule of inheritance affected by manner of life—Maraver prostitutes—Act XXI of 1850.*

A married Maraver woman deserted her husband and lived in adultery with another man, to whom she bore four children. Of these children, the two daughters associated together leading the life of prostitutes, and the two sons separated themselves from their sisters and observed caste usage. The elder daughter died leaving property in land :

*Held*, that the sister succeeded to the deceased in preference to the brother.

SECOND APPEAL against the decree of S. Gopalachari, Subordinate Judge of Madura (East), in appeal suit No. 539 of 1886, reversing the decree of M. A. Tirumalachari, District Munsif of Dindigul, in original suit No. 596 of 1885.

Suit to redeem certain land mortgaged by one Kuppayi, deceased, to defendant No. 1. The plaintiff was the sister of the late Kuppayi, and claimed both under a will alleged to have been executed by the latter in her favor on 8th July 1881 and also as heir by Hindu law. Defendant No. 2, who was brought on to the record by an order of the District Munsif, denied the validity of the will and claimed to be a preferential heir to the deceased, being the son of her brother.

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\* Second Appeal No. 75 of 1887.

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The relationship of the parties as described above was admitted, and it was also admitted that the deceased Kuppayi, who was unmarried, acquired the property in suit from a man with whom she lived as a concubine.

Kuppayi, the plaintiff, Kandasami (since deceased), who was the father of defendant No. 2 and one Karuppannan, who was brought on to the record by the order of the High Court, were the children of a woman of the Maraver caste called Karuppayi by one Shanmuga Pillai, with whom she lived as a concubine after deserting her husband. The dates when these events took place did not appear from the record of the second appeal. The plaintiff was unmarried and had lived with various paramours. The further circumstances of the family appear sufficiently below.

There was no substantial dispute as to the mortgage sought to be redeemed, and the will set up in the plaint was not established to the satisfaction of either the Court of first instance or the Court of first appeal. The sole question in this case accordingly related to the law of inheritance applicable to the case.

The District Munsif dismissed the suit and the Subordinate Judge passed a decree in favor of the plaintiff for the reasons summarized in the following order of the High Court.

Defendant No. 2 preferred this second appeal.

*Bhashyam Ayyangar* and *Kaliyanaramayyar* for appellants.

*Subramanya Ayyar* for respondent.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the following order and judgment.

This second appeal came on for hearing on Thursday, the 12th April 1888, and on Friday, the 13th April 1888, when the Court made the following

ORDER.—The appellant is the brother's son and the respondent is the sister of one Arulayi *alias* Kuppayi. About seven or eight years before suit, Kuppayi mortgaged the land in dispute to the first defendant with possession. Kuppayi died in July 1881 leaving her surviving, besides the appellant and the respondent, a brother named Karuppannan, who is not a party to the present suit. Kuppayi and her survivors were the children and grandson of one Karuppayi, a woman of the Maraver caste. Karuppayi was originally a married woman, but she since left her husband and lived in concubinage with one Shanmuga Pillai. Kuppayi,

the deceased, the appellant's father Kandasami, and Karuppannan, her brother, were the offspring of the illicit union between Karuppayi and Shunmuga Pillai. Kuppai did not marry, but lived with several persons in concubinage, two of whom were the late Zamindar of Kannivadi and one Boomi Balayam Pillai. The Subordinate Judge was of opinion that she acquired the land in suit with monies which she earned by living in prostitution with the Zamindar of Kannivadi. The respondent brought the present suit against the first defendant alone to redeem the mortgage executed by her deceased sister. Though she alleged also that the property in dispute was acquired jointly by her and by her deceased sister, and that the latter left a will in her favor, she since abandoned those grounds of claim. The substantial question which was insisted on throughout was whether she was Kuppai's heir. Like Kuppai, she also never married, but lived in prostitution. It is alleged for her that she lived with her sister when the latter died, while her brother, Karuppannan, and nephew, the appellant, lived apart. It is admitted during the hearing of this second appeal that though the appellant's father was the son of a prostitute mother, the appellant himself was born to his father in wedlock. It does not appear from the record before us whether Karuppannan is married or not. The first defendant, the mortgagee, denied that the respondent-plaintiff was Kuppai's legal representative, and pleaded that the appellant was the person entitled to redeem alleging that he had in his possession other properties left by Kuppai and received the melvaram payable to Kuppai under the instrument of mortgage. Thereupon, the District Munsif made him a party (defendant) to the suit, and as the second defendant, he contended that being the brother's son of the deceased woman, he was a preferable heir. The District Munsif held that the rule of law applicable to this case was the Hindu law applicable to the fee of an unmarried sister, and that the deceased's brother Karuppannan was the lawful heir, and on this ground he dismissed the suit. The plaintiff appealed from that decision to the Subordinate Judge and made the appellant before us one of the respondents. The Subordinate Judge considered that a prostitute was neither a maiden nor a damsel within the meaning of the rule of Hindu law which applied to the descent of sister's fee, and he was of opinion that the rule of decision was the one laid down by the

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author of the Mitakshara in regard to the peculiar property of a woman who contracted a marriage in one of the disapproved forms. He considered that the sister might be preferred to her brother, but that the brother excluded the brother's son and accordingly passed a decree in favor of the respondent. From this decree, the mortgagee, the first defendant, has preferred no second appeal, but the second defendant, the brother's son of Kuppayi, the deceased, has preferred this appeal.

As Kuppayi, to whom the property in suit belonged is dead, the case before us is clearly one of vested inheritance and not of contingent reversion, in which there might be a doubt as to whether the brother or the brother's son would be the heir in existence when the reversion should fall in or become an estate vested in possession. The appellant's pleader does not attempt to controvert the position that one of the rules applicable to collateral succession in the case of ordinary Hindu property is that the nearer in degree excludes the more remote. Nor can there be any doubt as to the soundness of the rule, for, in the compact series of heirs indicated by the text of Yagnyavalkya, the author of the Mitakshara places the brother before the brother's son. As to the rule of law applicable in the case before us, both the Lower Courts are in error. A prostitute is certainly *not* a maiden within the meaning of the rule applicable to the sister's fee. Nor can property acquired by her with funds earned by prostitution be treated as sridhanam or property given to a woman who contracts an Asura marriage or a legal marriage though in one of the inferior forms prescribed by the law. A legal marriage and the character of the property as sridhanam are the prerequisites of the rule of succession mentioned by the Subordinate Judge.

The decision of the High Court in the Sivaganga case which was confirmed by Her Majesty in Council is clearly against the view that *all* property vested in a woman, however acquired, is her sridhanam governed by the special rules of succession prescribed by the Mitakshara in regard to woman's peculiar property. We are of opinion that the property left by Kuppayi must be treated as ordinary Hindu property, if the Hindu law regulated its devolution. The rule of law applicable to the children of a prostitute mother who have elected to retain Hindu usage is that of Hindu law as laid down in the decision of the Privy Council in *Myna*

*Boyye v. Ootaram*(1). We are, however, not inclined to apply this rule at once. Before coming to a decision it is desirable, first, to make the brother of Kuppayi a party defendant, and then to determine the question. It will also be necessary to ascertain whether, as suggested by the respondent's pleader, the respondent and Kuppayi lived together and continued to practise prostitution whilst their brother lived apart from them and resumed his *status* as a member of caste, electing to follow its approved usage and regarding his sisters as degraded, and if so, whether, according to the usage of the class to which the parties to this second appeal belong, there is any special rule of preference in favor of the sister in regard to succession to the property left by her prostitute sister.

It was held by the Sudder Dewanny Adalat in *Tara Munnée Dassea v. Motée Buneanee*(2) that under Hindu law prostitute daughters living with their prostitute mother succeeded to the mother's property in preference to a married daughter living with her husband. The *ratio decidendi* was that the legal relation of a married and respectable daughter to her mother ceased when the latter became an out-caste. The contention for the respondent is that directly the brothers of a prostitute marry and resume their caste usage separating from her, their legal relation to their prostitute sister ceases.

We shall, therefore, direct the Subordinate Judge to make Karuppunnan a party to the present suit, and after hearing his defence, to try whether the rule of succession applicable to ordinary Hindu property is applicable to the property left by Kuppayi; whether the respondent was an associate of her deceased sister in her degraded condition as a prostitute and lived with her at the time of the latter's death, and whether, Karuppunnan, their brother, and the appellant had separated from them resuming their caste usage; if so, whether, according to the usage of the class to which the parties belong or otherwise, there is a rule of preference in favor of the sister.

Another contention in this case was that the second appeal should be dismissed on the ground that the brother excluded the brother's son and that the appellant was not a necessary party to the present suit. If the Hindu law applicable to ordinary Hindu

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(1) 8 M.L.A., 400. (2) VII Sudder Dewanny Adalat, 273.

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property governed this case, the suit must be dismissed on the ground that neither the appellant nor the respondent was Kuppayi's heir. The fairer course would be to make the brother a party and to adjudicate on the claim once for all after hearing his defence instead of dismissing the appeal and thereby encouraging a multiplicity of suits.

The findings on the issues mentioned above will be returned within three months from the date of the receipt of this order, when ten days will be allowed for filing objections.

In compliance with the above order, the Subordinate Judge added as a party to the suit Karuppannan, the plaintiff's brother (who in his written statement denied the title of the plaintiff and set up a superior claim in himself as a preferential heir), and subsequently returned on the above issues as follows.

As to the first issue, whether the rule of succession applicable to ordinary Hindu property is applicable to the property left by Kuppayi, he said :—

“The line of heirs to the property of female depends upon (a) the source of the acquisition, (b) the *status* of the acquirer, viz., whether she is a maiden, a female under coverture, or a widow.

“The sources of acquisition may be classified under five heads :—(1) gifts by relatives or *stridhanam* in the technical sense (2) presents from strangers, (3) inheritance, (4) earnings by labor, skill or mechanical arts, (5) accumulations.

“The property in dispute in this case must, upon the evidence . . . be looked upon either as a present given by the Zamindar of Kannivadi when Kuppayi was in his keeping, or as a purchase made by her with such presents. It must, therefore, be treated as falling either under division (2) or division (4) above referred to.

“But Kuppayi was neither a maiden, nor a married woman nor a widow. And though as regards presents from strangers and earnings by labor, &c., Katyayana makes this provision, viz. : ‘The wealth which is earned by mechanical arts or which is received through affection from a stranger is subject to her husband's dominion,’ which would seem to cover only cases where the acquisition is made by a female under coverture, there is no provision at all in the text-books, so far as I can see, in regard to the descent of property acquired by a female through prostitution, except the following which is to be found in *Strange's*

Manual of Hindu Law, para. 363 :—‘ With prostitutes, the tie of kindred being broken, none of their relatives who remain undegraded in caste, whether offspring or other, inherit from them *Tara Munnee Dassea v. Motee Buneanee*(1). Their issue after their degradation succeed.’” This doctrine was accepted by the High Court in *Mayna Bai v. Uttaram*(2). The particulars and *ratio decidendi* of *Tara Munnee Dassea v. Motee Buneanee*, which was also approved of in *Mayna Bai v. Uttaram*, have been already given in the order of their Lordships in this suit remitting issues for trial. That decision contains the nucleus for the proposition formulated by Mr. Justice L. Strange.\*

For these reasons, it seems to me that the issue under consideration must be answered in the negative, and that, at all events, the succession here would, in the first instance, devolve not on the relatives that remain undegraded in caste, but on those who are Kuppayi’s heirs after the degradation or who are her associates in the degradation.

The Subordinate Judge further found with reference to the second and third issues, that (1) the plaintiff was an associate of her deceased sister in her degraded condition as a prostitute and lived with her at the time of the latter’s death; and that (2) the father of the second defendant and the second and third defendants had separated from the plaintiff and her sister, resuming their caste usage. On the fourth issue it was held that on the facts recorded under the first issue the plaintiff was the preferential heir.

This second appeal having come on for re-hearing the Court delivered the following

JUDGMENT.—We see no reason to suppose that the Subordinate Judge has come to a wrong conclusion on any of the issues referred to him for trial.

But it is argued that under the ordinary Hindu law the brother excludes the sister; that no exception can be validly made (under Act XXI of 1850) on the ground that the deceased was an out-caste.

Act XXI of 1850 was intended to apply to those who by change of religion or otherwise lose their caste, and to preserve to

(1) VII Sudder Dewanny Adalat, 273.

(2) 2 M.H.C.R., 202.

\* The Subordinate Judge also referred to II Macnaghtens’ Hindu Law, pp. 132, 133, 137.

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them any right of inheritance which they might otherwise forfeit under ancient Hindu law or the usage of the country. We are inclined to doubt whether the case before us is at all within the purview of the Act. Assuming that it is, as argued before us, the Act did not abrogate any rule of preference which might exist as between the sister of a prostitute associated with her in her degraded condition and her brother who remained in the caste, and treated her and the deceased as being out of caste.

The view taken by the Subordinate Judge that the sister is entitled to preference is supported by the principle laid down in the case mentioned,—*Tara Munnee Dassea v. Motee Buncanee*(1). There the competition was between a married daughter in caste and a prostitute daughter who lived with her prostitute mother when they were out of caste.

Following the opinion of the Pundit, the Sudder Dewanny Adalat held that the two prostitute daughters were alone entitled to inherit what the prostitute mother had left, and that the relation of the married and respectable daughter to the out-caste mother had been severed.

Although the case was decided prior to Act XXI of 1850, we observe that there is an analogy between the legal relation of two prostitute sisters living together in their degraded condition and that of two brothers living in coparcenary, while a third brother lives away from them without any community of interest.

We are referred to no authority in support of appellant's contention, and in principle the view taken by the Subordinate Judge appears to us to be sound. We therefore dismiss the second appeal and the second defendant will bear the plaintiff's cost therein. We make no order as to the costs of Karuppattan.

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(1) VII Sudder Dewanny Adalat, 273.