sion of the tarwad property. It is therefore governed by the principle laid down in *Ganapati* v. *Chathu*(1). The plaintiffs in the cases on which the Subordinate Judge relies sued as mere anandravans, the first defendant in each case being the karnavan.

The order of the Subordinate Judge must be set aside and he must be directed to entertain the plaint and deal with it in accordance with law. The respondents will pay appellant's costs. No order as to costs in civil revision petition No. 193 of 1890.

PRIVY COUNCIL.

GAJAPATHI RADHIKA (PLAINTIFF),

and

VASUDEVA SANTA SINGARO (DEFENDANT).

P.C.* 1892. May 12, 13, and 31.

[On appeal from the High Court at Madras.]

Appellant not allowed to raise in appeal a contention inconsistent with the case relied upon in the Courts below.

An appeal cannot be maintained upon a ground inconsistent with the case insisted on in the Courts below, notwithstanding that the new ground may be one that might have been brought forward, in the first instance, as an alternative.

In a suit between the widows of two brothers deceased, the plaintiff's title rested on this, that her and the defendant's late husbands, respectively, having been the sons of the same father, had, therefore, been sapindas to each other; so that the plaintiff as the widow of the one would be the heir of the other, expectant on the death of his widow. In this character she sued to have set aside an adoption made by the defendant. The Courts, however, found that the plaintiff's husband was an illegitimate son, and not a sapinda, and the suit was dismissed. The plaintiff, now appellant, on findings of fact that both the sons were illegitimate, urged that, though they could not inherit from their father, they yet could succeed to the estate of one another:

Held, that this contention was so inconsistent with the case made below that it was now inadmissible.

Sreemutty Dossee v. *Ranee Lalummonee*(2) referred to and followed.

Also, the opinion had been expressed by the Court below that, by the law prevailing in Madras, a widow is not in the line of succession to her husband's male collateral relations.

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(1) I.L.R., 12 Mad., 223. (2) 12 M.I.A., 470.

* *Present:* Lords WATSON, HOBHOUSE and MORRIS, Sir RICHARD COUCH, and Lord SHAND.

GAJAPATHI RADHIKA v. VASUDEVA SANTA SINGARO.

APPEAL from a decree (16th April 1888) of the High Court affirming a decree (16th August 1886) of the District Judge of Ganjam.

The subject of this appeal was the inheritance of one half of the Tekkali taluk in the Ganjam district, formerly held by Padmanabha Deo as zamindar, the common ancestor of all the parties to the suit. He was of the Kshatriya caste. He died in 1832, leaving two illegitimate sons, Krishna Chandra, deceased in 1854, and Gopinadha, deceased in 1856. The right to the estate was adjudicated on by this Committee in 1870 in *Sri Gajapathi Radhika Patta Maha Devi Garu* v. *Sri Gajapathi Nilamani Patta Maha Devi Garu*(1). Each of the above sons left an illegitimate son. Gopinadha's son was Hari Krishna, whose claim to share in the estate was disallowed in the above appeal. Krishna Chandra's son was Brindavana, who was plaintiff in a suit against the same defendants that were sued in this, and the suits were heard together in the Courts below (*Brindavana* v. *Radhamani*(2)); but he had no concern in the present appeal.

S. G. Radhika, plaintiff in this suit, and now appellant, was the wife of Gopinadha. The defendants were S. G. Radhamani, wife of the late Krishna Chandra, and Vasudeva Santa Singaro, now respondent, whose adoption the plaintiff sought to set aside. Radhamani died in January 1890 pending this appeal. The suit was brought as that of the widow of one brother suing to have set aside the adoption made by the widow of another brother, and was based on her presumptive title to succeed as reversionary heiress, as soon as the death of the widow, to whose husband the plaintiff's husband had been a sapinda, should occur.

The state of things at the institution of the appellant's suit, on the 13th October 1885, appears in the judgment of the High Court given below, in which also the suit of Brindavana, brought on the 22nd September 1885, (claiming as reversionary heir to Krishna Chandra's estate) is referred to as appeal No. 148 of 1886 (2). In that suit it was found that Krishna Chandra was of illegitimate birth and an ugra by caste, and in the present suit that Gopinadha was also illegitimate, the evidence filed in the one having been received in the other.

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(1) 13 M.I.A., 497. This was heard on an appeal from *Krishna Devi Garu* v. *Maha Devi Garu* (2 M.H.C.R., 369).

(2) I.L.R., 12 Mad., 72.

The proceedings in the Courts below are stated in their Lordships' judgment.

That part of the judgment of the High Court, COLLINS, C.J., and MUTTUSAMI AYYAR, J., which does not relate only to the inquiry as to the facts, was as follows :—

"That Padmanabha Deo was a Kshatriya is a fact admitted "on both sides. Upon his death each of his sons alleged that "the other was illegitimate, and a disagreement arose between "them. This difference continued for several years, until it was "terminated by a compromise, whereby each agreed to take a "moiety of his father's estate. On that footing, an agreement "was made in 1838 between Gopinadha Deo on the one part and "Nila Patta Maha Devi on the other, the guardian of Krishna "Chandra, who was then a minor under her protection. Krishna "Chandra since attained his majority and the agreement was "ratified and supplemented in 1844 by the two brothers. The "appellant and the first respondent are both Kshatriyas by birth, "and they married respectively Gopinadha and Krishna Chandra. "The latter died in 1854, and the former did not long survive "him. The widows of neither of the brothers had legitimate "sons; but both brothers left illegitimate sons by their concubines. "After the death of the brothers, there was a dispute in the family "as to the right of succession, and the present appellant was "placed in possession of the whole estate by the Revenue "authorities as the widow of the survivor of the two brothers. "This led to litigation in the family, which commenced in 1861 "and ended finally in 1877. The result was that the rights of "the brothers were adjusted in accordance with the agreements "between them of 1838 and 1844: and that the first respondent "and her co-widow got Krishna Chandra's moiety, and the "appellant was left in possession of her husband's moiety. In "the course of that litigation, the High Court came to the con-"clusion that Gopinadha was illegitimate, but its decision rested "upon the terms of the compromise evidenced by the agreements "of 1838 and 1844. The Privy Council, in deciding the case, "observed, in advertence to the compromise, that it proceeded "on the basis of legitimacy, and that it effected a division of the "estate in two equal shares between the brothers. The history "of this family, and of the various stages of the dispute between

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"the brothers, is fully set forth in the decision reported in 13 "Moore's Indian Appeals, 497.

"Soon after 1877, the first respondent succeeded to the entire "moiety of the estate, which belonged to her husband, owing to "the death of her co-widow. In September 1879, she adopted "the second respondent, her brother's son, with the consent of five "of Padmanabha's sapindas. The suit which has given rise to "this appeal was instituted by the appellant to set aside the "adoption and to establish her right as reversioner. She alleged "that her husband and Krishna Chandra were the legitimate sons "of Padmanabha, and that she was entitled to succeed to the first "respondent as her nearest gnati. The respondents denied that "Gopinadha was legitimate, and contended that the adoption of "the second respondent was valid. The parties proceeded to trial "on three issues, viz., (i) Was Gopinadha a sapinda of Krishna "Chandra? (ii) If so, is Radhika, as sapinda, entitled to succeed "to Krishna Chandra? (iii) Is the adoption valid? The District "Judge decided the first and second issues against the appellant "and dismissed the suit with costs. It is urged in appeal (i) that "the respondents are estopped from denying the legitimacy "of Gopinadha; (ii) that it is established by satisfactory evidence; "(iii) that the appellant is entitled to bring this suit to set aside "the adoption.

"The principal question of fact which we have to determine "in appeal is whether Gopinadha and Krishna Chandra were the "legitimate sons of Padmanabha. In appeal suit No. 148 of 1886 "we have come to the conclusion that, although a Gandharva "marriage was alleged in 1834 to have taken place between "Padma Mala and Padmanabha, and some doubt was then enter-"tained by the Revenue authorities as to Krishna Chandra's "illegitimacy, yet, it was not shown that any marriage took "place, and that even if a Gandharva marriage took place, it was "not a valid marriage. As regards Gopinadha the antecedent "facts of the case show that from 1834 he was regarded by Pad-"manabha's family and the Revenue authorities as illegitimate."

The Judges then went through the evidence, and stated that the appellant's pleader desired in the Court below that the evidence taken in No. 148 should be taken in this case. And they added:— "The conclusion to which we come is that

"Gopinadha was the illegitimate son of Padmanabha. It is "then said by the appellant's pleader that after the decision of "the Privy Council in 13 Moore's Indian Appeals, 497, the "respondents are estopped from denying Gopinadha's legitimacy, "and he relies on the observation made in that case that the "compromise evidenced by the agreements of 1838 and 1844 "proceeded on the basis of legitimacy. But the Judicial Com- "mittee observed that 'Whether both sons were legitimate, or only "one was legitimate, and to whichever of the two that status "might really attach, was a question no longer material to the "consideration in the rights devolving to persons taking under "that compromise or family settlement by which the status "assumed was to be taken as the real status of the family.' It "is clear that the observation was made with reference to persons "claiming under the compromise and rights founded upon it, while "the present claim is based on Hindu Law and depends on the "actual relationship between Gopinadha and Krishna Chandra as "sapindas. The assumed status was the real status only for the "purpose of carrying out the provisions of the compromise, and no "further, and the contention as to estoppel cannot be supported. "Even on the view that both Gopinadha and Krishna Chandra "were legitimate, the appellant must fail. According to the "Mitakshara Law as administered in this presidency, a brother's "widow is not in the line of heirs, and as to the contention that the "appellant is a Gotraja sapinda and therefore Krishna Chandra's "reversionary heir, it was already decided by the Full Bench of "this Court in *Mari* v. *Chinnammal*(1), that the wives of collateral "male relations who are Gotraja sapindas are not in the line of "heirs under the Mitakshara. It is also in evidence in the cognate "case that five persons authorized the adoption of the second by the "first respondent as the sapindas of Padmanabha, and though some "witnesses in this case say that they are so remote that no pollution "is observed with reference to them, their evidence is by no means "satisfactory. If there are, then, sapindas of Padmanabha, the "appellant cannot claim as a bandhu or a remote relation.

"We are, therefore, of opinion that this appeal cannot be sup- "ported, and dismiss it with costs."

On this appeal, Mr. *J. D. Mayne*, for the appellant, accepting

(1) I.L.R., 8 Mad., 126.

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the facts as found by the Courts below, relied upon them as supporting the argument that the brothers Gopinadha and Krishna Chandra being precluded by their illegitimacy from inheriting by descent, could, nevertheless, succeed to one another's estate. It was a just inference that they were on an equality, and it had been found in the case of their cousin Brindavana that a son born as they had been belonged to an intermediate caste, lower than that of their father, but higher than that of their mother. The caste assigned to the son of a Kshatriya by a Sudra woman was termed ugra as stated in the judgment in *Brindavana* v. *Radhamani*(1). The general principle of the law on this subject was that the illegitimate sons of the man of high caste took by succession collaterally to one another as brothers, though not inheriting from their father. The High Court had, by finding the facts, supplied the appellant with a title to succeed, as the only reversionary heir, through her late husband, to the deceased Krishna Chandra, although the High Court had not applied the law appropriate to the case. It was submitted that this should be done now. It could hardly be said that the question involved a contradiction of what had been raised below, for the contention had been that the plaintiff was in the line of heirs as the wife of a Gotraja sapinda, or at least as a bandhu of Krishna Chandra. It certainly would be nothing new that, although consistency with what had been raised by the pleadings and proceedings below must be observed, this Committee should act upon a view of the law not presented to the Courts in India. As to adherence to the facts put forward and the questions raised by the pleadings, and what was open in appeal, reference was made to *Bank of New South Wales* v. *O'Connor*(2), *Eshen Chunder Singh* v. *Shamachurn Bhutto*(3), and *Collector of Trichinopoly* v. *Lekkamani*(4).

Mr. *R. V. Doyne*, for the respondent, was not called upon.

Afterwards, on May 31st, their Lordships' judgment was delivered by Lord HOBHOUSE.

JUDGMENT.—The only question on which their Lordships have heard any argument is whether the appellant, who is the plaintiff in the suit, shall be permitted to open a case which she did not

(1) I.L.R., 12 Mad., 72.
(2) L.R., 14 Ap. Ca., 273.
(3) 11 M.I.A., 7.
(4) L.R., 1 I.A., 282.

bring before either the Court of First Instance or the Court of Appeal below. The material facts are as follows.

Padmanabha, talukdar of Tekkali, had two sons by different women. The plaintiff is the widow of one of them named Gopinadha. The first defendant, Radhamani, is the widow of Krishna the other son, and the second defendant is a boy whom Radhamani has purported to adopt. The plaintiff alleges that the adoption is invalid, and that, as the widow of Gopinadha, she is the heir of Krishna, subject to his widow's interest. She has brought this suit to set aside the adoption. It is plain therefore that she cannot obtain a decree unless, setting aside the adoption, she would stand next to Radhamani in the line of succession to Krishna.

For the defence it is alleged that Krishna and Gopinadha were not sapindas to one another. Krishna, as the defendant has pleaded, was the son of a Kshatriya woman married to Padmanabha, who was himself a Kshatriya, whereas Gopinadha was born to Padmanabha by a woman of some inferior caste.

On these pleadings issues were settled, the first being whether Gopinadha was a sapinda of Krishna. The District Judge found that Gopinadha was of illegitimate birth, and therefore was not a sapinda, and on that ground he dismissed the suit. He did not come to any finding on the other issues in the suit; but he intimated an opinion adverse to the plaintiff on the question whether she could claim to succeed to the collaterals of her husband.

The plaintiff appealed to the High Court, insisting on the legitimacy of her husband, but the High Court agreed with the District Judge on this point. They also expressed an opinion that, by the law prevalent in Madras, a widow is not in the line of succession to her husband's male collaterals. The appeal therefore was dismissed.

Connected with this suit, both in the original Court and in the High Court, was another suit to set aside the adoption, brought by one Brindavana, an illegitimate son of Krishna, claiming to be his heir according to the law applicable to the Sudra caste. The plaintiff was no party to this suit, but the defendants were the same as in her suit. The two were tried simultaneously, and the evidence in one was admitted in the other.

In Brindavana's suit the District Judge found that Krishna

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was not a Sudra, and that an illegitimate son could not succeed to him, and on appeal the High Court took the same view. That view, of course, was fatal to the suit, which was dismissed. The High Court also expressed an opinion that Krishna was an illegitimate son of Padmanabha, a point which does not appear to have been put directly in issue, but which was discussed as incidental to the question of caste, and was treated by the District Judge as of no moment and not requiring a decision. They further held that the adoption was lawful and valid.

As the plaintiff's case has been opened on this appeal, she now takes the ground that if, as has been conclusively decided, her husband was illegitimate, so also it has been held by the High Court that Krishna was illegitimate, and her Counsel contend that the two illegitimate sons, neither of whom could inherit from their father, can yet inherit from one another.

Their Lordships will assume for the present purpose that the plaintiff is entitled to avail herself of the finding of the High Court in Brindavana's suit to establish the illegitimacy of Krishna. And of the legal inference which is put forward, as they have not heard the argument for it, they will only say that it does not command assent at first sight. But they do not further examine it, because they think that the appeal cannot be maintained on a ground so inconsistent with all the previous proceedings in the case.

In both the Courts below, and indeed up to the moment when her case was lodged in this appeal, the plaintiff has been insisting on the legitimacy of her husband and his brother. It may be conceded that she might originally have framed her case in the alternative, so as to claim heirship if the disputed issue of legitimacy was decided against her. Then the case would have been tried with reference to that contention, and all facts ascertained, and researches into the law conducted accordingly. Possibly she might, on application to the High Court, have obtained some indulgence enabling her to amend the record and try the question. Mr. Mayne has urged that the question he submits is one of pure law, which he says this Committee may decide upon the facts found by the Courts below. No doubt there are cases in which the Court of Appeal will entertain questions of law not argued below, but which are raised by the facts stated in the pleadings. It is impossible to lay down any precise rule for

such cases. But Mr. Mayne could not, after time for search, find any case in which this Committee had allowed a plaintiff to rest his appeal upon a legal theory never presented to the Courts below, and rested on a state of facts inconsistent with the facts on which he had previously rested his case. In the judgment of this Committee in *Sreemutty Dossee* v. *Ranee Lalunmonee*(1) it is said :—"Their Lordships cannot but feel that it would be "most mischievous to permit parties, who had had their case upon "one view of it fairly tried, to come before this Board, and to "seek to have the appeal determined upon grounds which have "never been considered, or taken, or tried in the Court below. "It is obvious that if they wished to make the case which they "now make they would, by their answer, have put the case in "the alternative."

Indeed in cases of this kind, which may involve subtle and difficult questions of personal status, it is not easy to say what matters of fact would have to be ascertained for the proper decision of each proposition of law. One may be specified. There is no issue and no finding by either Court as to Gopinadha's caste. And yet it is impossible to suppose that the question whether two brothers can inherit from one another, because they are equal in point of illegitimacy, could be properly tried without knowing how they stand relatively in point of caste. It is indeed clear that to lay down a rule of inheritance between rival claimants without a trial of the case in view of that rule may involve serious risk of miscarriage.

But even viewing the question as one of abstract law, the rule now propounded is of a very peculiar kind, so unfamiliar as not to have occurred to the plaintiff's advisers in India, though they must have been quite awake to the possibility that both brothers might be found illegitimate. It is part of a law of inheritance confined to Hindus; perhaps, if we may judge by the utterances of the Courts below, confined to Madras, and certainly varying with the caste of the persons concerned. It is not right that Her Majesty in Council should be asked to decide such a point without any assistance from the Courts in India.

It is clear to their Lordships that this new contention cannot properly be heard by them on this appeal: and, considering the

(1) 12 M.I.A., 470.

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length of this litigation, and the fact that another appeal is awaiting the result of this one, it would be wrong to give the plaintiff any indulgence by way of amending the record.

They will humbly advise Her Majesty to dismiss the appeal, and the appellant must pay the costs.

Appeal dismissed.

Solicitor for the appellant—Mr. *R. T. Tasker*.

Solicitors for the respondent—Messrs. *Pemberton & Garth*.