APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

CHINNAMMAL AND ANOTHER (PLAINTIFFS NOS. 1 AND 2), APPELLANTS,

v.

VARADARAJULU AND ANOTHER (DEFENDANT AND PLAINTIFF NO. 3), RESPONDENTS.*

1891. April 9, May 5, December 4. 1892. January 5.

Hindu law—Law of inheritance—Custom—Illegitimate son of a Sudra—Specific Relief Act—Act I of 1877, *s.* 42—*Further relief.*

The widows of a shrotriemdar, who was a Sudra, brought a suit for a declaration of their title by inheritance to his lands against his illegitimate son, who had been registered as shrotriemdar in lieu of his deceased father, and to whom certain of the raiyats had attorned. The defendant claimed to be legitimate according to the customary law governing the family, although his parents might not have been married at the time of his birth, by reason of his parents having performed the ceremony of *pariyam* before his birth:

Held, (1) that the suit was not precluded by Specific Relief Act, s. 42, *proviso*;

(2) that the defendant was illegitimate and that the plaintiffs were accordingly entitled to one-half of the lands in question, and the defendant was entitled to the other half.

Observations on the allegation and proof of a custom in derogation of the general Hindu law of inheritance.

APPEAL against the decree of S. T. McCarthy, District Judge of Chingleput, in original suit No. 5 of 1889.

The plaintiffs sued for a declaration of their title to certain shrotriem lands in succession to Thanappa Naick, their late husband, who died in September 1885. They alleged that they were in enjoyment of the land, but that the defendant, claiming to be the son of the deceased shrotriemdar, had tried to collect rent from the raiyats in occupation.

The defendant pleaded that he was the legitimate son of the deceased, and the third issue was framed with reference to the plea as follows:—"Whether the defendant is the son and legal heir of the deceased Thanappa Naick?"

Evidence was given to show that the defendant's father and mother were not married at the time of his birth, whereupon the

* Appeal No. 119 of 1890.

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defendant set up a custom in support of his legitimacy, the nature of which is discussed in the judgment of the High Court. On this point the District Judge found that the defendant's parents were not married at the date of his birth, but had performed the ceremony of *pariyam*, and held that the defendant was legitimate under the customary law to which he was subject.

An issue was also raised as to whether the suit was bad by reason of the proviso of Specific Relief Act, s. 42, for want of a prayer for relief consequential on the declaration sought. On this issue the District Judge ruled in favour of the defendant, finding that "the defendant's name has been entered on the register in lieu of that of the deceased Thanappa Naick," and that "it was established that the defendant, through his lessee, is constructively in possession of the suit properties, and that the plaintiffs are not."

The District Judge accordingly passed a decree, dismissing the suit.

The plaintiffs preferred this appeal.

Mr. *Johnstone*, Mr. *Subramanyam* and *Ethiraja Mudaliar* for appellants.

Srirangachariar for respondents.

JUDGMENT.—We are unable to agree with the District Judge that the plaintiffs are precluded from obtaining a declaratory decree by the *proviso* to section 42 of the Specific Relief Act. The oral evidence as to possession of the disputed lands is, as the Judge admits, very conflicting, and the documents on which he relies in coming to the conclusion that possession is with the defendant are, in our opinion, worthless as evidence of possession. Exhibit V is a rent agreement in favor of the defendant, dated 11th January 1888, long after the dispute arose between the plaintiffs and the defendant. It is not proved that the executant of this rent agreement obtained possession of the house to which it relates. If he is the same person as the defendant's ninth witness, he was not asked about this, and he is the defendant's gumasta. And even if it were proved that the house in question is occupied by a tenant of the defendant, it is a small portion of the property in dispute, and against such a fact, if proved, would have to be set the admitted fact that the plaintiffs are in possession of the family house. Exhibit VI consists of a series of documents called irusalnamahs, purporting to show that kist for two shrotriem

villages forming part of the property in question was paid by the defendant, and sent to the treasury from the village munsif's office for faslis 1295 to 1298. That kist was so paid is of itself no evidence of possession. Admittedly the defendant was registered as the shrotriemdar by the Revenue authorities soon after the death of the late shrotriemdar Thanappa Naicker, but this would neither give him the legal title nor put him in possession of the lands. Kist would only be received by the Revenue authorities from the registered shrotriemdar, so that the payment of kist would not carry the matter any further than the registration of the shrotriem in the name of the defendant. Exhibit IX consists of 12 cultivation muchalkas by raiyats of one of the shrotriem villages in favor of the defendant's lessee Venkatachella Naicker. These again are executed in fasli 1297 or 1887-88 after the disputes between the plaintiffs and the defendant began. It would not be difficult for the defendant or his lessee to obtain such muchalkas from some of the raiyats. On the other hand, it is admitted that many raiyats of that same village did not give muchalkas to the defendant's lessee, and he filed suits to compel them to do so and obtained decrees (see copy judgment exhibit VIII). It is admitted that these decrees have not been executed, and the raiyats, who were the defendants therein, have not attorned to the defendant's lessee. The District Judge attaches great weight to the fact that the plaintiffs produce no documentary evidence in support of their assertions that possession of the disputed property is with them; but it must be remembered that they are women, and widows, and would, therefore, not be so able to obtain documentary evidence of the kind produced by the defendant. It appears to us that the conclusion to be drawn from all the evidence as to possession is that possession of the whole property in dispute is neither with one nor the other of the contending parties. As might be expected in the case of a dispute as to the title to lands, most of which are in the actual occupation of raiyats, some of the raiyats recognize one claimant as their landlord, and some the other. Such a case is eminently one in which a declaratory decree is desirable, to avoid multiplicity of suits and obtain a decision once and for all, which shall secure peaceful possession of the property. And we think there is nothing in the language of the proviso to section 42 of the Specific Relief Act to prevent the Court passing a declaratory decree in this case. It is only if "the

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plaintiff being able to seek further relief than a mere declaration of title, omit to do so," that the Court is precluded from making a declaration of title. And what further relief could the plaintiffs obtain in this suit? Not possession of the whole property in dispute, for admittedly the defendant is not in possession of the whole, and the raiyats, who do not recognize the defendant's title, would have to be made parties before possession of the lands in their occupation could be decreed to the plaintiff. And we can see no other prayer for relief which the plaintiffs could combine in this suit with the prayer for a declaration.

We must hold that a declaration of the plaintiffs' title can be made in this suit if their title is proved.

As to the plaintiffs' title, it is admitted that, as the widows of the late Thanappa Naicker they are entitled to succeed to his property, unless the defendant is the preferential heir. The defendant is said to be the son of Thanappa Naicker by one Tolasi, who is said to have been married to Thanappa Naicker long after the defendant's birth: some of the witnesses put it at more than fifteen years after. The defendant in his written statement merely claims to be the lawful son of Thanappa Naicker, and, as such, to be his legal heir and representative. Apparently, in the course of the case, he set up some peculiar custom of his caste or family by which he was entitled to be treated as his father's legitimate son, notwithstanding his having been born before the marriage of his mother, and the District Judge considers such custom proved, and finds that the defendant is the son and legal heir of Thanappa Naicker. It is not at all clear, however, what is the custom alleged or which the Judge considers proved, whether it is that the *pariyam* or betrothal ceremony is equivalent to marriage, and children born after that ceremony are legitimate, independently of any subsequent marriage, or whether a subsequent marriage is necessary to legitimatize children so born. Nor is it clear whether the custom found by the Judge is a custom of the defendant's caste or only of his particular family, and, if the former, what his caste is. The Judge calls it Paligar or Yanadi. Neither of these terms is generally known as descriptive of a caste. The defendant's evidence as to the custom consists of the depositions of his second, third, fourth, fifth and sixth witnesses. He himself, examined as his seventh witness, makes no definite statement as to the custom. His second, third and fourth witnesses seem to

consider betrothal as equivalent to marriage and lay no stress on subsequent marriage as legitimatizing the children, while the fifth and sixth seem to imply that a subsequent marriage is necessary. The only other evidence to prove the custom consists of depositions made by some of the plaintiff's witnesses in an inquiry before the Tahsildar of Trivellore (exhibits I, II, III, IV). These depositions are retracted by the plaintiffs' witnesses in this case, and are only admissible for the purpose of contradicting them. They are no evidence of the custom. This is, in our opinion, wholly insufficient evidence on which to find a peculiar custom of marriage or legitimacy prevailing in the defendant's caste or family. No judicial decisions recognizing the custom are proved. The only instances in which the custom is alleged to have been followed are in the defendant's own family. The custom is one contrary to the general law of marriage and inheritance prevailing amongst Hindus and requires strong evidence to support it. We notice also that the defendant's mother is said to have been of a different caste. That very loose notions of morality and of the sacredness of the marriage tie prevailed in the family to which the parties belong is probable enough, for Thanappa Naicker appears to have kept the defendant's mother and another woman in his house from the time they were girls and had children by them, and subsequently to have married them, having, in the meantime, married three other women. But something more than a prevailng low tone of morality in a family is required to establish a binding custom of legitimacy differing from the ordinary law.

It appears, however, from the evidence that sons born under circumstances somewhat similar to those of the defendant's birth have inherited property in the defendant's caste or family, and we think some further inquiry as to the existence of any peculiar custom in the caste or family ought to be made.

We shall direct the District Judge to return a revised finding on the third issue with reference to the above observations. He will require the defendant to put in a supplemental written statement, setting out precisely and accurately what is the custom he sets up, and will take such further evidence as the parties may adduce.

Finding is to be returned within two months from the date of the re-opening of the Court after recess, and seven days after

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posting of the finding in this Court will be allowed for filing objections.

[In compliance with the above order, the District Judge submitted a finding, from which the following passages are extracts :—

The issue on which I am required to submit a revised finding is—whether the defendant (Varatharajulu Naicken) is the son and legal heir of the deceased Thanappa Naicken.

That he is the son of Thanappa Naick I think there is no reason to doubt. The evidence of the witnesses examined in the case shows that he was born of Tolasiammal after she and her elder sister were taken to the house of Thanappa Naick. It is further proved that Tolasi bore to Thanappa Naick a daughter named Sithammal before the birth of this defendant. . . . .

Is he his legal heir ? This depends upon whether his mother was the legally married wife of Thanappa at the time of defendant's birth.

It is admitted on the side of the defendant that a marriage ceremony was gone through between Thanappa Naick and defendant's mother, Tolasi, some ten years after the defendant's birth. But it is contended that this ceremony was not necessary for the validation of the marriage, which had been completed by a ceremony called *pariyam* prior to Tolasi's coming to live in Thanappa's house. On the other hand the plaintiff's witnesses deny that there is any such ceremony as *pariyam*, and swear that there is no such custom as is alleged by defendant's witnesses of tying a second bottu—a thali.

In the supplemental written statement put in by the defendant, as required by the High Court's order, this second marriage is said to be 'like marriage among Brahmans at the sixtieth year,' and it is explained that it is only performed in the case of 'men of position, if they like, when the family is in good condition and there are children.'

Of the witnesses examined on behalf of the defendant only one, namely, the fourteenth witness, Sahadeva Naick, admits having tied a second bottu to his wife, and he says he did so 'because the first one was worn out' merely ! He adds that there is no ceremony on such occasions and no feeding of relatives. Whereas defendant's thirteenth witness says there is 'no difference between the ceremony of tying the second bottu and of the first *pariyam*,'

While defendant's eighteenth witness, Candaswami Naik, never heard of such a thing as tying second bottu. Defendant's fifteenth witness, Sendi Naick, says that, though he has not himself tied second bottu to his wife, he has an elder brother who did so. Defendant has not examined that elder brother, whereas Yegappa Naick (who seems to be the man) has been examined as plaintiff's fifteenth witness and denies having tied second bottu to his wife. . . . . .

The witnesses examined on behalf of plaintiffs swear that their marriage ceremony is similar to that of other Sudras, and that there is among them no such thing as *pariyam* marriage.

On a consideration of the whole evidence I am not satisfied that defendant's mother was at the time of his birth the legally married wife of Thanappa Naick. I consequently find on the issue that defendant Varatharajulu Naicken is not the legal heir of Thanappa Naick, unless it be as an illegitimate son, which is a question of law as to which I am not required to express any opinion.]

This appeal having come on for final hearing, the Court delivered judgment as follows:—

JUDGMENT.—The District Judge has found that the defendant is the son of the late Thanappa Naick, but that his mother was not the legally married wife of Thanappa Naick at the time of his birth. He also finds that the family is a Sudra family. No good reason has been shown by either side for doubting the correctness of these findings, which, we think, are supported by the evidence, and we accept the findings accordingly. The defendant then being found to be the illegitimate son of a Sudra, the question is to what decree (if any) are the plaintiffs entitled?

For the appellants (first and second plaintiffs) it is contended that they are entitled to a declaration that the whole property, or at least half, belongs to them. Respondent No. 1, on the other hand, contends that the plaintiffs having failed to prove the right they set up, viz., a right to the whole property, their suit should be dismissed.

The authorities as to the respective rights of a widow and an illegitimate son are somewhat conflicting, but the following appears to be the general result so far as they are agreed. If there be a widow and daughters or daughters' son and an illegitimate son, the latter takes half the estate, leaving the other half to be

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enjoyed as woman's estate by the widow and daughters or daughters' son in succession—Mayne's Hindu Law and Usage, 4th edition, § 507; *Ranoji* v. *Kandoji*(1), *Parvathi* v. *Thirumalai*(2), *Shesgiri* v. *Girewa*(3).

It is argued for appellants that the decision in *Parvathi* v. *Thirumalai*(2) is an authority for the proposition that the widow excludes the illegitimate son altogether, but we do not consider that such was the effect of that decision. That was a case of an impartible zamindari, and it was held that the illegitimate son of a Sudra zamindar did not exclude his father's coparcener or widow from succession. But the principle that the illegitimate son is co-heir with his father's widow, daughter or daughter's son was expressly affirmed (see page 343).

For the respondents a recent decision of the Privy Council—*Raja Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansingh*(4)—is quoted as deciding that the illegitimate son takes the whole as against the widow. When examined, however, this case does not support that proposition. In that case there had been a legitimate son who survived the father, and it was held in the case out of which the appeal arose—*Jogendro Bhuputi* v. *Nittyanund Mansingh*(5)—that the illegitimate son took as a coparcener with his legitimate brother, and, therefore, on the death of the legitimate son took the whole estate by survivorship, and this decision was affirmed by the Privy Council. There was no question there of the right of the widow of the father, but Mr. Mayne (4th edition, § 508), says that in such a case the illegitimate son would supersede the widow, and quotes the decision of the Calcutta High Court in this case in support of that view. This decision of the Calcutta Court was no doubt dissented from by this Court in *Parvathi* v. *Thirumalai*(2), and to that extent the authority of that Madras case is shaken by the Privy Council decision, but that does not affect the doctrine established by the Madras cases as to the right of the widow to at least half when the deceased has left no legitimate but only an illegitimate son.

The Madras decisions have made no distinction between the case of an illegitimate son by a slave girl and any other illegitimate son, provided the concubinage with the mother has been

(1) I.L.R., 8 Mad., 557. (2) I.L.R., 10 Mad., 334. (3) I.L.R., 14 Bom., 282.
(4) I.L.R., 17 I.A., 128; s.c. I.L.R., 18 Cal., 151. (5) I.L.R., 11 Cal., 702.

continuous—*Krishnayyan* v. *Muttusami* (1). The result is that the plaintiffs are entitled to half of the property of the late Thanappa Naick in the plaint schedules set forth, and the defendant as the illegitimate son of Thanappa Naick is entitled to the other half, and we reverse the decree of the Lower Court and make a declaration accordingly. We think the appellants should have their costs, original and appeal, as the defendant has failed in establishing the case which he set up, and which has been the principal subject of contention in this suit, viz., that he was the legitimate son of Thanappa Naick. Both memoranda of objections are dismissed without costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SECRETARY OF STATE FOR INDIA (DEFENDANT), APPELLANT,

v.

BAVOTTI HAJI (PLAINTIFF'S REPRESENTATIVE), RESPONDENT.*

1890. January 30. April 30. 1892. Feb. 16, 22.

Forest Act—Act V of 1882 (*Madras*), *s.* 6—*Burden of proof—Long possession—Presumption of title.*

Certain land was notified under Madras Forest Act, 1882, to be constituted a reserved forest. One, alleging that the jenm title had been in his family for six or seven centuries, claimed to be the owner of the land. His claim was contested by Government on the allegation that the land had belonged to another family and had been escheated. The claimant admitted that he had not been in possession for six years before the date of the notification, Government having objected to his interfering with the land. It was found that his family had been in possession for the previous sixty years at least, and that the alleged escheat was not proved:

Held, that the claim should be allowed.

Observations on the burden of proof and on the presumption of title arising on of possession

SECOND APPEAL against the decree of A. F. Cox, Acting District Judge of North Malabar, in appeal suit No. 374 of 1887, reversing the decision of A. Thompson, Forest Settlement officer, Kanot, in claim case No. 108 of 1885.

(1) I.L.R., 7 Mad., 407.

* Second Appeal No. 831 of 1888.