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follow on the adoption (*Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*(1)).

The authority to adopt being in writing and not contained in a will, its registration is compulsory and unless registered it is inoperative to confer such authority (sections 17 and 49, Indian Registration Act III of 1877). We may add that there is no evidence except exhibit I to prove that authority was given assuming that such evidence could be adduced, an assumption that is not free from doubt, the question depending on whether the word "grant" in section 91 of the Indian Evidence Act means a grant of property only or refers to other grants also. There being, therefore, no evidence that any authority to adopt was given, the adoption if it took place was invalid.

We therefore dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. February 19, 20. March 12, 13, 20.

GOPALASAMI CHETTI (PLAINTIFF), APPELLANT,

v.

ARUNACHELAM CHETTI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Illegitimate son—Right to maintenance—Evidence Act—I of 1872, s. 112—Presumption as to paternity applicable only to offspring of married couple.

In a suit by an illegitimate son of a deceased Chetti again son and brother of his late father for a share in his father's e alternative, for maintenance:

Held, that the claim for a share must fail as it was not sl deceased had left any separate or self-acquired property. The deceased (consisting of his father and two sons, of whom one was was not shown to have had any ancestral property, but it had acqui by trade in which the father and the two sons were jointly engaged. no indication of an intention to the contrary, it must be presumed tl erty thus acquired was held by the members of the family as joi

(1) 10 Moo., I.A., 279 at p. 312.

* Appeal No. 136 of 1901 presented against the decree of T. V. Subordinate Judge of Madura (East), in Original Suit No. 67 of 1899.

with the incident of the right of survivorship. Inasmuch as the plaintiff's father had predeceased his father and brother, plaintiff could claim no share as against his grandfather and uncle; and, as he was illegitimate, he could not 'represent' his father in the undivided family.

Ramalinga Muppan v. *Paradai Goundan*, (I.L.R., 25 Mad., 519), referred to.

The fact that in the present case there was a son in existence beside the illegitimate son made no difference, in principle, between this case and the cases already decided.

Held also, that plaintiff was entitled to maintenance. An illegitimate member of a family, who is not entitled to inherit, can be allowed only a compassionate rate of maintenance and cannot claim maintenance on the same principles and on the same scale as disqualified heirs and females who have become members of the family by marriage. But regard should be had to the interest which the deceased father of the illegitimate son had in the joint family property and the position of his mother's family.

Arrears of maintenance awarded for a period of nine years prior to the suit.

The presumption as to paternity in section 112 of the Indian Evidence Act only arises in connection with the offspring of a married couple. A person claiming as an illegitimate son must establish his alleged paternity in the same manner as any other disputed question of relationship is established.

SUIT for a share in the estate of plaintiff's father, or, in the alternative, for maintenance. Plaintiff claimed as the illegitimate son of one Chidambaram Chetti deceased, the first defendant being the adopted son and second defendant being the brother's son of the deceased. The facts are fully set out in the judgment. The Subordinate Judge dismissed the suit.

Plaintiff preferred this appeal.

V. C. Desikachariar for appellant.

V. Krishnaswamy Ayyar, *P. R. Sundara Ayyar* and *K. N. Ayya* for respondents.

JUDGMENT.—The plaintiff, claiming as the illegitimate son of one Chidambaram Chetti deceased, has brought the suit for his share in his father's estate or in the alternative for maintenance, against the first defendant, the adopted son, and the second defendant, the brother's son, of Chidambaram Chetti. The defendants denied *inter alia* that the plaintiff was the illegitimate son of Chidambaram Chetti and contended that, even if the plaintiff were his illegitimate son, he could not inherit to his father as his mother was a married woman; that Chidambaram Chetti left no separate or self-acquired property, and that, even if the said Chidambaram Chetti was entitled to a share in the property acquired in trade by his father and brother—on the footing that it was joint family property—such share on his death in 1888 passed by survivorship to his

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father and brother; and that the plaintiff cannot therefore claim any share in such property.

The Subordinate Judge found that the plaintiff's mother was not a married woman, that she was continuously kept by Chidambaram Chetti as a concubine, and that the plaintiff was his illegitimate son by such connection, but dismissed the plaintiff's suit on the ground that the plaintiff was estopped from maintaining it by reason of an arrangement made by Chidambaram Chetti in his lifetime, in accordance with which the plaintiff's mother, subsequent to Chidambaram Chetti's death, relinquished all her claims on receipt of a sum of Rs. 2,200 from the second defendant's father. It is impossible to uphold the decision of the Subordinate Judge on this point. A reference to paragraph 2 of the first defendant's written statement in which the said arrangement is alluded to and to exhibit II—the receipt given by the plaintiff's mother for the said amount—clearly shows that no arrangement or settlement was made as regards the plaintiff's right to a share as to maintenance, that the plaintiff's mother gave an acquittance only in respect of her own claims referred to in exhibit II, and that the transaction was not one in which she professed to act as the plaintiff's guardian during his minority or to affect any right or claim which he might have.

The respondents' pleader sought to support the decree appealed against by impugning the finding of the Subordinate Judge as to the plaintiff's status as the illegitimate son of Chidambaram Chetti and by contending that Chidambaram Chetti having died undivided from his father and brother, the plaintiff cannot claim any share in the joint property of such family notwithstanding the existence of the first defendant, the adopted son of Chidambaram Chetti.

We agree with the Subordinate Judge that the marriage of the plaintiff's mother with one Kuppusami has not been proved, and that the plaintiff is Chidambaram Chetti's illegitimate son entitled to rights of inheritance in respect of his father's estate, if any. The onus of establishing that he is the son of Chidambaram Chetti, is clearly on the plaintiff and he cannot by simply proving that his mother was the Chetti's concubine shift the onus on to the other side to disprove his paternity. The legal presumption as to paternity raised by section 112 of the Indian Evidence Act is applicable only to the offspring of a married couple. A person claiming as an illegitimate son must establish his alleged paternity

like any other disputed question of relationship and can, of course, rely upon statements of deceased persons under section 32, clause 5, for opinion expressed by conduct under section 50 of the Evidence Act and also upon such presumptions of *fact* as may be warranted by the evidence.

[Their Lordships then dealt fully with the evidence on which they found that plaintiff was the illegitimate son of the late Chidambaram Chetti, and continued.]

The plaintiff would therefore certainly be entitled to a share in the estate of Chidambaram Chetti, had the latter left any separate or self-acquired property as alleged in the plaint. This, however, the plaintiff has entirely failed to establish. The family consisted of Arunachelam Chetti and his two sons Chidambaram Chetti and (his brother) Muthuraman Chetti (father of the second defendant). The family is not shown to have had any ancestral property, but it acquired property by trade in which the father and the two sons were jointly engaged. There being no indication of an intention to the contrary it must be presumed that the property thus acquired was held by the members of the family as joint property with the incident of the right of survivorship. Chidambaram Chetti having predeceased his father and brother, it has now been clearly established by decisions (*Krishnayyan* v. *Muttusami*(1), *Ranoji* v. *Kandoji*(2) and *Parvathi* v. *Thirumalai*(3)) that the plaintiff can claim no share as against his grandfather and uncle, and being illegitimate he cannot 'represent' his father in the undivided family. As stated in the judgment of this Court in *Ramalinga Muppan* v. *Pavadai Goundan*(4) "the effect of these decisions is that it is only when the father dies a separated householder that an illegitimate son is entitled to inherit to his separate estate," but that when the father dies an 'Avibhakta' (undivided from his lineal ancestors, brothers or other collaterals) he can claim no share in the joint family property. It is true that in none of the reported cases on the point did there exist, as in the present case, along with the illegitimate son, a legitimate son, by birth or adoption —of the deceased 'Avibhakta' or undivided father. But that circumstance cannot make any difference in principle inasmuch as the special rule of inheritance in favour of the illegitimate son of

(1) I.L.R., 7 Mad., 407.
(2) I.L.R., 8 Mad., 557.
(3) I.L.R., 10 Mad., 334.
(4) I.L.R., 25 Mad., 519 at p. 522.

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a Sudra, along with his legitimate brothers, provides that, in the absence of legitimate brothers, the illegitimate son may inherit the whole property in default of daughter's sons of the deceased. This clearly shows that the Sudra father therein contemplated is one that was divided from his ancestors and collaterals (see 'West and Buhler,' 3rd edition, volume I, page 72). But if he was not so divided the text cannot apply, though he may have left legitimate sons along with the illegitimate son. The only point decided in *Ramalinga Muppan* v. *Pavadai Goundan*(1) is that, if the illegitimate son of a separated Sudra predeceases his father, leaving him surviving his (the illegitimate son's) legitimate son and then the father dies, the illegitimate son's legitimate son will 'represent' his father and inherit the whole estate of his grandfather in preference to the divided brothers of the grandfather; and this does not in any way militate against the above principle.

It was also suggested and argued that though Chidambaram Chetti predeceased his father Arunachelam Chetti, the latter, being himself a separated householder and the *pater familias* of the joint family, could allot a share, by his choice to the plaintiff and that therefore on his death without making such allotment, the first and second defendants as the legitimate grandsons of Arunachelam Chetti should make the plaintiff 'partaker' of the moiety of a share. However plausible this argument may be, it is impossible to maintain this position both because the word 'father' in the text cannot grammatically include 'grandfather' and because the context relating to daughter's son shows that it cannot apply to the grandfather.

The plaintiff's claim, therefore, for a share in the joint family property entirely fails.

As regards his alternative claim for maintenance, the issues proceed on the footing that the plaintiff is entitled to maintenance unless such claim be barred by section 43, Civil Procedure Code, or the plaintiff be estopped from maintaining the suit (*vide* issues Nos. 6, 7, 8 and 16); and the only questions for decision are, what rate of maintenance should be decreed and whether past maintenance should also be awarded. In determining the rate of maintenance, an illegitimate member of a family who is not entitled to inherit can be allowed only a compassionate rate of maintenance and he

(1) I.L.R., 25 Mad., 519 at p. 522.

cannot claim maintenance on the same principles and on the same scale as disqualified heirs and females who have become members of the family by marriage. In fixing, however, the compassionate rate of maintenance for the plaintiff, regard, no doubt, should be had to the interest of his deceased father in the joint family property and the position of his mother's family. We think that Rs. 25 per mensem during his life (from date of suit) will be a fair amount to be awarded under the circumstances and there is no reason to disallow to the plaintiff arrears of maintenance at the same rate for the period of nine years prior to the suit, as claimed by him (*Raja Varlagadda Mallikarjuna Prasada Nayadu* v. *Raja Varlagadda Durga Prasada Nayadu*(1)).

The plaintiff having succeeded only in part and the defendants having unsuccessfully impugned plaintiff's status as the illegitimate son of Chidambaram Chetti, each party will bear his own costs throughout.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice.

AMIRTHAM (PETITIONER), PETITIONER,

v.

ALWAR MANIKKAM AND OTHERS (COUNTER-PETITIONERS), RESPONDENTS.*

1903. January 20, 21.

Civil Procedure Code—Act XIV of 1882, *ss.* 407, 408, 409—*Suit in* formâ pauperis.

Sub-section (*c*) of section 407 of the Code of Civil Procedure does not refer solely to a question of jurisdiction. Under it, an applicant must make out that he has a good subsisting *primâ facie* cause of action capable of enforcement. *Kamrakh Nath* v. *Sundar Nath*, (I.L.R., 20 All., 299), followed.

Section 409, which provides that "the Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence the applicant is or is not subject to any of the prohibitions specified in section 407," enables the parties to argue the question if they so desire, but does not preclude the Court, if no argument is offered, from considering that question.

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(1) I.L.R., 24 Mad., 147 at p. 154.

* Civil Revision Petition No. 259 of 1902, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of S. Raghava Ayyangar, District Munsif of Srivilliputtur, in Miscellaneous Petition No. 313 of 1902, dated 8th April 1902.