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assigned amounts to nothing more than an inability to pay, but that is no sufficient reason why execution should not at once proceed. It is denied that the plaintiffs were willing to allow the defendants to pay the debt by instalments, but at any rate any offer made was not accepted, and there is no reason why the claim should not be decreed. The decree should be modified and the claim decreed, with costs and interest at 6 per cent. from date of the institution of the suit, by sale of the property hypothecated, and this appeal decreed with costs.

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January 23.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

SARASUTI (DEFENDANT) v. MANNU (PLAINTIFF).\*

*Declaratory Decree—Hindu Law—Inheritance—Sudra—Illegitimate Son.*

In a suit merely for a declaration of right in respect of certain property, the lower appellate Court, considering that the suit was really one for the possession of such property, allowed the plaintiff to make up the full amount of court-fees required for a suit for possession. The plaint in the suit was not amended, and the lower appellate Court eventually gave the plaintiff a declaratory decree. *Held*, on second appeal by the defendant, who objected that a suit merely for a declaratory decree could not be maintained, that such objection ought not to be allowed under the circumstances.

The illegitimate offspring of a kept woman or continuous concubine amongst Sudras are on the same level as to inheritance as the issue of a female slave by a Sudra. Under the Mitakshara law the son of a female slave by a Sudra takes the whole of his father's estate, if there be no sons by a wedded wife, or daughters by such a wife, or sons of such daughters. If there be any such heirs the son of a female slave will participate to the extent of half a share only. *Held*, therefore that M, the illegitimate son of an *ahir* by a continuous concubine of the same caste, took his father's estate in preference to the daughter of a legitimate son of his father who died in the father's lifetime.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Lala Lalta Prasad, for the appellant.

Mr. Conlan and Babu Barodha Prasad, for the respondent.

\* Second Appeal, No. 833 of 1878, from a decree of W. Young, Esq., Official Judge of Mainpuri, dated the 29th June, 1878, reversing a decree of Maulvi of Mainpuri, dated the 22nd February,

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The judgment of the High Court was delivered by

OLDFIELD, J.—The plaintiff, who is an *ahir*, brought this suit for a declaration of his right as heir to all the property left by his father, Baldeo Prasad. The Court of first instance found the plaintiff to be an illegitimate son of Baldeo Prasad, and therefore not entitled to inherit. The appeal came before the Judge, Mr. Tyrrell, and, on an objection as to the insufficiency of the stamp, he permitted the plaintiff to make up the full amount of fees required for a suit for possession of the property, which the Judge considered was the real object of the suit. He also found plaintiff to be the illegitimate son of Baldeo Prasad by a woman of the *ahir* class, and he remanded the suit for a finding as to the custom prevailing in respect to the right of inheritance of such a son. The appeal was finally disposed of by Mr. Young, before whom the finding on the issue remitted came, which was to the effect that the issue of a concubine of the same caste inherits property equally with the children of the lawful wife. Mr. Young has held on the precepts of Hindu law, and without allowing distinctions with reference to the kind or degree of illegitimacy, that the illegitimate offspring of a Sudra by a woman of the same caste will have a right of inheritance in default of legitimate male issue, and he has given a decree declaring the plaintiff to have established his right in the property in suit.

The first plea in appeal takes the objection that a suit for a declaration of right cannot be maintained. We consider the plea cannot now be allowed under the circumstances. There is no doubt that the claim is one for a declaration of a right only, and that the plea has never been amended, and the decree passed is only for a declaration of a right, but the plaintiff has paid full institution fees, and we are not disposed to throw out the suit at this stage.

The next plea is to the effect that it is only the son born of a female slave as distinct from a concubine who can inherit the property of a Sudra. We consider that the plaintiff's right of inheritance is one which should be determined by Hindu law, and the law of succession applicable is stated in Mitakshara, ch. i, s. xii, vv. 1 and 2, and is to the effect that the son begotten on a

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female slave takes the whole estate, if there be no sons of a wedded wife or daughters of such a wife or sons of daughters; but if there be any of the above-named heirs the son of a female slave will participate for half a share only,—*Rahi v. Govind* (1); and *Chuoturya Runmudun Syn v. Sahib Purhlad Syn* (2), and *Inderan Valungy-puly Taver v. Ramaswamy Pandia Talavar* (3) may be referred to for authority that illegitimate sons of Sudras inherit as heirs; and there is authority for holding that there is no such distinction as is contended for between a son born of a slave and of a concubine. The question will be found very fully discussed in the decision of the Bombay High Court above cited, which held that the illegitimate offspring of a kept woman or continuous concubine (and that is what the plaintiff before us is found to be) amongst Sudras are on the same level as to inheritance as the issue of a female slave by a Sudra, and this view accords with the opinion expressed in a decision of the Madras High Court (4), and is in accordance with Strange's Hindu Law, 4th ed., p. 69; West and Bühler, 2nd ed., p. 110; and Colebrooke's Dayabhaga, ch. ix, vv. 29, 30, 31, and Digest, Bk. v, ch. iii, v. clxxiv. It is opposed to a decision of the Calcutta High Court (5) and to a note to be found in Macnaughten's Hindu Law, vol. ii, p. 15. The former is a case decided by the law of the Bengal school, and the decision proceeds very much on rejecting the hitherto accepted translation by Colebrooke of passages in the Dayabhaga, and the opinion expressed in Macnaughten's Hindu Law does not seem to accord with what was held in a case reported at p. 256 of the same volume.

The plaintiff is heir in preference to the defendant, who is the daughter of a legitimate son of Baldeo Prasad, who died in his father's lifetime, and it is not urged that there are any nearer heirs living. The other pleas in appeal have no weight. We dismiss the appeal with costs (6).

*Appeal dismissed.*

(1) I. L. R., 1 Bom. 97.

(2) 7 Moore's Ind. App. 18.

(3) 3 B. L. R., P. C. 1.

(4) *Pindaiya Telaver v. Puli Telaver*,  
1 Mad. II. C. R. 478.

(5) *Narain Dhara v. Rukhal Gain*,  
3, L. R., 1 Calc. 1.

(6) The plaintiff in this case was presumably not the offspring of an incestuous or adulterous intercourse. Such offspring it has been held cannot inherit—see *Datti Parisi Nayudu v. Datti Bangaru Nayudu*, 4 Mad. II. C. R., 204.