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a Court would be justified in refraining from exercising its powers summarily. But the fact that it does possess such powers to distribute the amount to the successful party cannot be disputed having regard to the terms of the deposit and the provisions of O. XLV, r. 7, of the Civil Procedure Code. If authority were needed, I would refer to *Bikramkishore Manikya* v. *Ali Ahmad*.[1] There the High Court ordered the amount deposited as security to be paid to the respondent's solicitors in England in satisfaction of their bill of costs taxed before the Privy Council.

We, therefore, allow this petition and direct the payment of the costs from the deposit with the Registrar in terms of the prayer in the petition with costs which shall be paid by opponents Nos. 1 and 2. Opponent No. 3 will bear his own costs.

Petition allowed.

Y. V. D.

[1] (1930) 58 Cal. 1034.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, Mr. Justice Rampekar and Mr. Justice Wadia.

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SAHEBGOUDA ADOPTIVE FATHER NINGAPPA PATIL (ORIGINAL DEFENDANT), APPELLANT *v.* SHIDDANGOUDA NINGAPPA PATIL AND ANOTHER, BOTH MINORS BY THEIR GUARDIAN NATURAL MOTHER GIRIABAI NOW NINGAPPA PATIL (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu law—Patilki Watan—Succession to impartible property—Adopted son—After-born legitimate son—Who has preferential claim to succeed.

Where there is a dispute as to succession to an impartible property in which the rival claimants are an adopted son and the after-born legitimate son, the succession devolves on the after-born legitimate son in preference to the adopted son.

Ramasami Kamaya Naik v. *Sundaralingasami Kumaya Naik*,[1] relied on.

Pratapsing Shivsing v. *Agarsingji Raisingji*[2] and *Gangadhar Bagla* v. *Hira Lal Bogla*,[3] referred to.

*First Appeal No. 12 of 1937.

[1] (1894) 17 Mad. 422. [2] (1918) L. R. 46 I. A. 97, s. c. 43 Bom. 778.
[3] (1916) 43 Cal. 944.

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SAHEBGOUDA v. SHIDDANGOUDA

FIRST APPEAL against the decision of S. T. Ranade, First Class Subordinate Judge at Bijapur.

The suit related to the rights of an adopted son and after-born natural son with regard to impartible property.

The facts material for the purposes of this report are stated in the judgment.

K. G. Datar and *N. S. Anikhindi*, for the appellant.

G. R. Madbhavi and *K. R. Bengeri*, for the respondents.

BEAUMONT C. J. This appeal raises a very interesting question of Hindu law as regards the rights of an adopted son and after-born natural sons with regard to impartible property.

One Ningappa Bandeppa Patil adopted the defendant Sahebgouda as his son in 1920. A registered adoption deed was passed, and as Ningappa was a Watandar Patil, the adoption was duly reported to the revenue authorities as required by s. 34 of the Bombay Hereditary Offices Act. After the defendant's adoption, two sons, Shiddangauda and Basappa, were born to Ningappa. They are the plaintiffs in the suit. Ningappa died in April, 1931. The property which he left behind him consisted of some lands, houses and moveable property at Algur and an eight-anna share in the Patilki Watan. On his death the name of the adopted son was entered in the Watan register in spite of the protests of Girjabai, the mother of the minor plaintiffs. Then the plaintiffs through their guardian brought a suit for a declaration that they were the sole heirs to the property of their deceased father or, in the alternative, if the defendant was held to be an adopted son, that they were entitled to eight-ninths and the defendant to one-ninth of the moveable and immoveable property and that, plaintiff No. 1 was exclusively entitled to the eight-anna share in the Patilki Watan. At the trial the plaintiffs admitted the defendant's adoption and the defendant admitted that the plaintiffs were the legitimate sons of Ningappa. The learned Judge decreed the suit in favour of the plaintiffs holding that they

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were entitled to eight-ninths of the property, and that the natural sons being a superior class of heirs, plaintiff No. 1 was exclusively entitled to the Patilki Watan according to the rule of lineal primogeniture prescribed by s. 36 of the Bombay Hereditary Offices Act. Against that decree the defendant has appealed.

The finding of the learned Judge that the defendant is entitled to only one-ninth share in the partible property both moveable and immoveable is not challenged before us. That finding is based on the text of Vasishtha that "when a son has been adopted, if a legitimate son is afterwards born, the son given shares a fourth part." The text is capable of different interpretations, but in *Giriapa* v. *Ningapa*[1] it was held by Sargent C. J. and Telang J., upon a review of all the authorities, that in Western India both in the districts governed by the Mitakshara and those specially under the authority of the Vyavahara Mayukha, the right of the adopted son, where there is one legitimate son born after the adoption, extends only to a fifth share of the father's estate on the principle that the adopted son takes a fourth of the legitimate son's share.

The point which has been argued before us, and which is the only point in the appeal, is about the right to succeed to the impartible property, the eight-anna share in the Patilki Watan. Section 36 of the Bombay Hereditary Offices Act provides that when any representative Watandar dies it shall be the duty of the Collector to register the name of the person appearing to be the nearest heir of such Watandar as representative Watandar in place of the deceased Watandar, and that in determining who is the nearest heir for the purpose of the section the rule of lineal primogeniture shall be presumed to prevail in the Watan family. The question is whether the defendant or plaintiff No. 1 is the nearest heir according to the rule of lineal primogeniture. Our attention has not been drawn to any decided case in

[1] (1892) 17 Bom. 100.

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which the question has been considered. On behalf of the appellant stress is laid on the well established principle that the rights of an adopted son, unless curtailed by express texts, are in every respect the same as those of a natural born son (*Pratapsing Shivsing* v. *Agarsingji Raisingji*[1]). The text of Vasishtha to which reference has been made contains however an express curtailment of the rights of an adopted son where there is an after-born natural son. In *Gangadhar Bogla* v. *Hira Lal Bogla*,[2] where the contest was between an adopted son and an after-born natural son as regards the Stridhan of their step-mother, Mookerjee J. in discussing this text of Vasishtha observed that it referred only to the estate of the adoptive father and that it should be strictly construed and should not be extended to cases not comprised within its letter and beyond its true spirit. In the case before us the dispute however does relate to the estate of the adoptive father. If the share in the Patilki Watan had been partible, defendant would have got a one-ninth share. The question is whether by reason of its being impartible the defendant is entitled to take the whole of it to the exclusion of plaintiff No. 1. Can it be said that the adopted son and an after-born natural son rank as equal heirs to the estate of the adoptive father? There is no text directly dealing with the rights of an adopted son and an after-born natural son to impartible property. Our attention has been drawn to a decision of the Madras High Court in *Ramasami Kamaya Naik* v. *Sundaralingasami Kamaya Naik*,[3] in which the question has been discussed. The case related to succession to impartible property and was between sons born of mothers of the same caste but of different classes therein, and it was held that the right of a junior son by a first married wife, if she be of higher class, is superior to that of an elder son of a wife of a lower class. After observing that the view taken was in accordance with the analogies of general Hindu law as applied to partible

[1] (1918) L. R. 46 I. A. 97, s. c. 43 Bom. 778. [2] (1916) 43 Cal. 944.
[3] (1894) 17 Mad. 422.

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property the learned Judges proceeded to consider what rule was suggested by analogy first to the existing Hindu law of inheritance and next to the Hindu law as it existed in early times when primogeniture conferred by the general law certain special rights and privileges. They considered the cases in which the rival claimants were a legitimate junior son and an illegitimate senior son or an after-born son and an adopted son. Dealing with the latter case they said (p. 434) :—

"Turning to the case of a disputed succession to an impartible estate in which the rival claimants are an adopted son and the after-born legitimate son, it is stated in Dattaka Chandrika, s. V, 32, that among Sudras, they take equal shares in partible property. But the succession to impartible property, nevertheless, devolves on the after-born son in preference to the adopted son, the reason being that the adopted son is a substitute for the *aurasa* son, and that, when the latter comes into existence, he excludes the substitute.

This is the second exception to the general rule under which of two sons who may be entitled to share alike in partible property, one is the principal or primary and the other as a mere substitute is a secondary son, and as such, excluded by the other, though his junior in years, from succession to impartible property. The succession of a legitimate son to an impartible estate in preference to an illegitimate son, and of an after-born son in preference to an adopted son does not rest on mere inference. In Dattaka Chandrika, s. V, 26, a Vedic text is referred to as ordaining that kings shall not appoint to the empire any of the twelve descriptions of sons, which included also the adopted son and the son of a female slave, when a legitimate son existed."

This case went up in appeal to the Privy Council but the decision of Their Lordships affirming that of the High Court was based upon the concurrent findings of the High Court and the trial Court that there was a valid custom prevailing among the Kumbla Zamindars whereby the son of a senior wife has a prior right of succession to a son by a junior wife although the latter may be the elder son. The view of the Madras High Court in *Ramasami's* case[1] has been referred to by Mayne, Hindu Law, 10th Edn., p. 262. Gour in his Hindu Code, 4th Edn., s. 63, (p. 259), says with regard to the limitation of the rights of an adopted son in favour of an after-born natural son " Except in the case of a Shudra, the rights of an adopted son are, on the birth of an *auras* son, limited as follows :—He loses all rights to the

[1] (1894) 17 Mad. 422.

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performance of religious ceremonies; he is not entitled to succeed to an impartible estate in preference to the *auras* son; his right of inheritance, in other cases, is reduced to a fourth share of the natural son". The same view has been expressed in West and Buhler's Digest of Hindu Law, 4th Edn., p. 1045. Ghose in his "Law of Impartible Property" (Tagore Law Lecture, 1904), p. 188, says :—

"It is also a rule of Hindu law and the rule has been affirmed by a decision in Madras that the adopted son, [though he can succeed like an *aurasa* son] cannot succeed to an impartible estate when there is an [after-born] *Aurasa* son [or any direct male descendant]."

The Madras decision referred to is that in *Ramasami's* case.[1] Steele in his "Law and Customs of Hindu Castes within the Dekhun Provinces, subject to the Presidency of Bombay" says (p. 186) that in the case of a son being born after one has been adopted the natural born son would be entitled to the honour of primogeniture (Burepuna) and precedence (Man-Pan), the adopted son being considered as a younger brother.

The principle underlying the text of Vasishtha which gives the adopted son only one-fourth share of the *aurasa* son implies that the adopted son, who is treated only as a substitute for an *aurasa* son, becomes on the birth of an *aurasa* son an inferior class of heir and must as such give place to the natural son where succession to impartible property is involved. The view taken by us is supported by the Madras decision to which reference has been made, by the opinions of several authorities on Hindu law, and by the custom prevailing in this Presidency. The learned Subordinate Judge has in our opinion rightly held that plaintiff No. 1 is exclusively entitled to the eight-anna share in the Patilki Watan.

The appeal is dismissed with costs.

Decree confirmed.

J. G. R.

[1] (1894) 17 Mad. 422.