APPELLATE JURISDICTION (*a*)

Regular Appeal No. 45 *of* 1863 (*b*)

PANDAIYÁ TELAVER and another.....*Appellants.*

PULI TELAVER and others.....*Respondents.*

The Hindu law independently of special usage or custom does not make illegitimacy an absolute disqualification for caste so as to affect in the relations of life not only the bastard, but also his legitimate children.

A Hindu of caste governed by the cástras may contract a valid marriage with the daughter of a bastard.

Semble a Cudra need not marry a wife of the same sect or caste with himself.

The Hindu, unlike the English, law recognizes a bastard's relation to his father and family.

By birth and without any form of legitimation bastards of the three twice-born classes are now recognized as members of their father's family and have a right to maintenance.

In the case of Cudras the law has been and still is that bastards succeed their father by right of inheritance.

The presumption of legitimacy where there has been opportunity for sexual intercourse is not irrebuttable.

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THIS was a Regular Appeal from the decree of J.H. Goldie, the Civil Judge of Tinnevelly, in Original Suit No. 6 of 1859.

This suit was brought to recover possession of the zemindàri estate of Telavenkottai from the original defendant, who claimed to be entitled to the estate as the undivided brother and heir of the late zamindár Indiran Rámasvámi Telaver. The zamindári is one which descends according to the rule of primogeniture, and the right of the plaintiffs to recover depended upon the proof and validity of the title of the first plaintiff, as the only legitimate son of the late zamindár by his second wife (the second plaintiff) ; his first wife having, as alleged by the plaintiffs, borne him no issue, and been put away for improper conduct, and having afterwards married a second husband by whom she had a son. The original defendant set up in answer that the family of the second plaintiff was of a low and inferior caste to that of his deceased

(*a*) Present : Scotland, C. J. and Holloway, J.

(*b*) The judgments in this appeal were not received by the Reporter until long after the reports of the other cases heard in August 1863 had been printed off.

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brother and that the females of it had been living in concubinage without lawful marriage; that the father of the second plaintiff was illegitimate and the second plaintiff consequently was of no caste, and that by Hindu law a marriage neither did nor could take place. But he admitted the marriage of his brother to the woman stated by the plaintiff to be his wife, and stated that she was divorced for want of chastity and bore no issue to his brother. By order of the lower court, the son of the first wife and his grand-mother as guardian (his mother being dead) were made supplemental defendants. Their answers contained a similar denial of the plaintiff's title and asserted that the imputations of frail conduct on the part of the first wife and that she was put away and married again, were false, and claimed that her son was entitled as heir.

The Civil Judge was of opinion that the families of the late zamindár and the second plaintiff were of the same caste, and that a marriage in fact according to Hindu usage had taken place with the second plaintiff: that she afterwards lived with the zamindár and was in all respects treated as his wife and that the first plaintiff was the issue of their union. But he decided, acting upon the authority of two opinions of the pandits of the late Sadr Court (*a*) that in law there was no valid marriage on the ground that, as the father of the second plaintiff was illegitimate, she was a person of no caste; and that by Hindu law it was not

(*a*) *Question submitted by the Civil Court of Tinnevelly to the Pandits of the Sadr Court.*

1*st Question.*—Does the Hindu Law prohibit the marriage of a Hindu with a woman of his own caste whose father was illegitimate, and is such marriage valid or invalid under the Hindu Law ?

2*nd Question.*—Is the marriage of Hindu of the Maravar (*b*) caste with a female of the Parivara caste legal under the Hindu Law ?

(Singed) J. H. GOLDIE, *Offg. Civil Judge.*

8th January 1861.

(True copy.)

J. D. GOLDINGHAM, *Acting Civil Judge.*

Answer of the Pandits of the Sadr Court.

The Hindu Law not only directs a man to espouse a wife of the same class with himself, but likewise forbids him to marry a female devoid of caste or race. The child, male or female, begotten by him of his lawfully wedded wife of the same class with himself, of course, belongs to the class of its parents. The son of a kept woman being one, not so begotten, cannot claim the class of his mother or father, and his daughter, destitute as she is of caste, cannot be considered by a Hindu as a " woman of his own caste." The marriage

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competent to the late zamindár, who was of a caste governed by the cástras, to contract a legal marriage with her. A decree accordingly, was given against the sight of the first plaintiff. Against this decree the plaintiff's appealed.

Sadagopacharlu (with him *Tirumalachariyar*) for the appellants, the plaintiffs.

of a Hindu of caste, with such woman seems from the above law to be forbidden ; and it is not, therefore, valid.

2. If the "Maravar caste" and "Parivara caste" be similar in their manners, the marriage of a Hindu of Maravar caste with a female of the Parivara caste would be valid, as being in accordance with the Hindu law. If they be dissimilar, and if the "Parivara caste" be inferior to the "Maravar caste," such marriage would not be valid under the Hindu law. If such marriage be however sanctioned by the custom of the said castes, then it would be good under such custom.

Authority.

Vaidyanátha Dikshitiyam : Manu.— "Let the twice-born man espouse a wife of the same class with himself, and endued with marks "of excellence." Vyása.—"A girl, destitute of relations, or caste, or "born on the day of Rohini," that is, when the moon is in the fourth of the lunar mansions, or devoid of race, must be rejected."

(Singed) APPANACASTRI, *Senior Pandit, S. C.*
(„) K. GOPALACASTRI, *Junior Pandit, S. C.*

19th January 1861.

Question submitted by the Civil Court of Tinnevelly to the Pandits of the Sadr Court.

The Pandits of the Sadr Court are requested to state, with reference to the reply given by them on nineteenth ultimo, in regard to the legality under the Hindu Law of a marriage contracted by a Hindu with a female of his own caste, whose father was illegitimate, whether Hindus of all castes are bound by the said law, and whether in particular it applies to a Hindu of the "Maravar caste." The question has been again put because the Pandits are stated in Strange's Manual of Hindu Law, page 10, to have declared on the 26th June 1854 that among the lower classes of Cudras, marriage with females who have lived in concubinage, is allowed. A copy of the question put to the Pandits on the point above referred to and the reply given by them is herewith forwarded.

(Singed) J. H. GOLDIE, *Offg. Civil Judge.*

5th February 1861.

(True copy.)
J. D. GOLDINGHAM, *Acting Civil Judge.*

Answer of the Pandits of the Sadr Court.

Our answer dated the 19th ultimo, was intended to show that the law therein set forth applies to Hindus of all classes, who are within the pale of caste. The said law therefore binds all the Hindus who conform to the Cástras, but not those of inferior caste, who depart from them.

The said law would likewise bind the Maravar caste, only if it be governed by the Cástras in all its acts, but not otherwise. It is for this reason that we have stated in our former answer that the marriage referred to in the question would be good under the custom of the said caste.

The answer of the 26th June 1854, referred to in Strange's *Manual of Hindu Law*, applies to Cudras of inferior caste, who depart from the precepts of the Hindu law.

(Singed) APPANACASTRI, *Senior Pandit, S. C.*
(„) K. GOPALACASTRI, *Junior Pandit, S. C.*

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Branson, for the first respondent, the defendant.

Ritchie, for the second and third respondents, the supplemental defendants.

The argument turned chiefly on the evidence as to the legitimacy of the first plaintiff.

The Court took time to consider and the Chief Justice delivered an elaborate judgment in which, after minutely analysing the evidence, his Lordship stated that the Court had come upon the first point to the conclusion that a marrage in fact did take place, and that the second plaintiff was not taken to live with the deceased as his concubine.

His Lordship then proceeded thus :

The next point is the objection raised to the validity of the marriage on the ground of caste. The case presented by the defendant is that the second plaintiff's father is shown to have been the son of the zamindár of Pambuli by a concubine of an inferior caste, and the second plaintiff therefore of no caste. The point might perhaps be disposed of on the ground of the insufficiency of the evidence to establish the alleged illegitimacy : but as the decree of the Civil Court rests upon the legal effect of the illegitimacy, we will, assuming it proved, express our opinion as to whether it was in Hindu law a disqualification invalidating the marriage.) What the Civil Court appears upon the authority of the pandit's opinions to have decided, and the defendant has contended is, that illegitimacy of the father placed him without the pale of the caste of his parents and consequenly his daughter (the second plaintiff) was destitute of caste ; and that a valid marriage could not take place between the late zamindár (he being of a caste that conformed to the cástras) and a woman of no caste.

In the view I take of the law it is unnecessary to make a distinction somewhat refined, and which would at all times be very difficult to ascertain, between a caste of Cudras conforming in all respects to the cástras, and one that did not so conform, as was pointed out with some effect to be the case with the caste of the late zamindár. There appears to be no satisfactory ground for the proposition that as respects either caste, the Hindu law, independently of special usage

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or custom, makes illegitimacy an absolute disqualification for caste, so as to affect in the relations of life not only the person who is illegitimate, but also his legitimate children. Nothing in the way of authority, except the detached passage referred to by the plandits has been adduced, and that passage standing alone cannot be accepted as an authority to that extent. It has been taken, we find, from amongst several other merely directory passages on the subject of personal appearance and from to be found in the work of Vaidyanátha on marriage, and does not appear to have any specific or particular application. I am, further, not aware that any authority can be found for the proposition ; and in principle and reason, looking to the rights of property possessed by illegitimate persons, the law would appear to be otherwise. The Hindu law does not, like the English law, consider an illegitimate person *quasi nullius filius*. It recognizes his relationship to his father and family and secures him substantial rights. Under the ancient law it seems that at one time in the case of the three superior or " regenerate tribes" sons not born in lawful marriage had rights of inheritance subsidiary to the " Aurasa," or son by a lawful wife, and could perform obsequies. *Manu* chap. 9, cl. 159, 160, 180 : *Mitakshara*, chap. 1, sec. 11 ; 2 *Strange's H. L.*, 194-211 ; and although this as a general law applicable to those tribes, has, in respect of inheritance, become obsolete ; yet it is clear law at the present day that by birth and without any form of legitimation, illegitimate children of those tribes are recognized as members of their father's family and have a right to maintenance. It is also equally clear that in the case of Cudras the law has been and still is that illegitimate children succeed their father by right of inheritance. *Mitakshara*, chap. 1, sec. 12: *Strange's H. L.*, i., 132. Whilst such is the law as to family status and rights of an illegitimate child, it would be anomalous and inconsistent that illegitimacy should be declared to be a taint and disqualification for the membership of caste in the individual and his children. Further, so to decide in this case, would in effect be giving to illegitimacy as a disqualification an operation which it would be contrary to the spirit, if not the letter, of legislative enactment (see Act No. XXI of 1850) to allow to degradation from caste. For these reasons I think that assuming the illegitimacy of her father, the second

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plaintiff was not placed in a different position as regards marriage, from that in which she would otherwise have stood; and apart from this question of illegitimacy, the evidence as already observed, shows that the parties were of different divisions of the same Maravar caste. I am consequently of opinion that the marriage was valid, and the first plaintiff therefore the legitimate son of the late zamindar.

It is not, however, to be understood that supposing the late zamindàr and the second plaintiff had been of different castes, the marriage would in my opinion have been invalid. The general law applicable to all the classes or tribes, does not seem opposed to marriage between individuals of different sects or divisions of the same class or tribe, and even as regards the marriage between individuals of a different class or tribe the law appears to be no more than directory. Although it recommends and inculcates a marriage with a woman of equal class as a preferable description, yet the marriage of a man with a woman of a lower class or tribe than himself, appears not to be an invalid marriage rendering the issue illegitimate. *Manu*, chap. 3, cl. 12, *et seq: Mitàksh.*, chap. 1, sec. 11, cl. 2 and note: 1 *Strange's H. L.*, p. 40. Accroding to this view of the law, there being no proof of special custom or usage, the marriage would be valid even though the parties had been of different sects or caste-divisions of the fourth or Cudra class.

Our opinion being in favour of the first plaintiff's legitimacy, it becomes necessary to determine whether the alleged heirship of the first supplemental defendant is well founded, for if so, he would be entitled to succeed, and the first plaintiff would fail in making out his title, and here the question of legitimacy depends upon paternity. [His Lordship here analysed the evidence on this point and continued thus:] The conclusion, then, to which I am brought is that the presumption arising from the fact of the first supplemental defendant's birth after his mother's marriage with the late zamindàr has been rebutted, and his legitimacy disproved.

It becomes unnecessary to say anything as to the right of the first plaintiff to succeed to the zamindàri though illegitimate. The point, however, is not one upon which any doubt would probably be found to exist. Upon the whole then, the appellant (the plaintiff) is entitled to judgment,

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and the decree of the Court, will be, reversing the decree of the Civil Court with the costs, that the first plaintiff is the legitimate son of the late zamindár and entitled to succeed to the possession of the zamindári.

HOLLOWAY, J. :—I have never entertained the least doubt that the argument for the invalidity of the marriage, drawn from the alleged illegitimacy of the woman's father, is altogether unsound.

That the son of a Cudra and of a woman, between whom there has been no formal ceremony of marriage, inherits to the Cudra, is clearly shown by the authorities quoted at page 49 of the seventh volume of Moore's Indian Appeals(*a*) ; and the decision of the Judicial Committee that the illegitimate son of a Kshatriya could not inherit went precisely upon the ground that the father was one of the twice-born tribes. The whole tenor of the judgment shews that if the father had been a Cudra, the son's right to inherit would have been unquestionable. It follows that the illegitimate son of a Cudra is not an out-caste.

Moreover, it is not invalid if it took place, because of the difference of class. The opinion of the pandits is, as usual, vague and unsatisfactory. As the twice-born man is instructed to marry a wife of the same class with himself, the reasonable inference is that upon one not twice-born, the precept is not binding.

Further, I am clearly of opinion that the classes spoken of are the four classes recognized by Manu, and not the infinite sub-divisions of these classes, introduced in the progress of time. I think, therefore, that being a Cudra, the woman was of the same class in the sense of the authority quoted.

The argument that, because the parties went through an unnecessary religious ceremony, a marriage which would, if the ceremony had been omitted, have been valid, has by it been rendered invalid, seems to me to have nothing in reason to support it.

That there was a ceremony which, if no disability existed, would have produced a valid marriage, the Civil Judge

(*a*) Sir Wm. Macnaghten's *Hindu Law*, I, p. 18, II, p. 15n. *Mitakshará*, ch. I, sec. 12: *Dáya Bhága*, p. 151 : *Dattaka Mimánsá*, sec. II, cl. 26: *Dattaka Chandriká*, sec. V, cl. 30 : 3 Coleb. Dig. CL. XXIV, p. 143. Strange's *Hindu Law*, i, 69-132' ; ii, 168: *Vencataram* v. *Vencata Lutchmee Ummall*, 2. Str. Notes of Cases, 305.

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seems to have believed. The oral evidence is supported by the treatment of the woman by the late zamindár, her lengthened residence with him and his own unquestionable declaration. The utter worthlessness of the evidence on the other side has been sufficiently shewn.

The only real difficulty in the case has arisen from the conflicting claim of the supplemental defendants ; one, the separated wife of the zamindár, and the other her son. The presumption of legitimacy, where there has been opportunity for sexual intercourse, was at one time pushed by the English Courts to, if not beyond, the verge of absurdity. The law as laid down in a case of the very highest authority(*a*) now is, that it is not an irrebuttable presumption of law ; but that it may, like other presumption, be rebutted either by direct evidence or by contrary presumptions. It was also held, following a dictum of Lord Eldon, that the conduct of the parties and their treatment of the child are admissible and most material evidence upon the question.

In this case, as in that, there is evidence on the whole satisfactory that the woman was cohabiting with another man, and there is evidence, which I believe to be true, that she was actually married to another man. Here also there, is the circumstance that the birth was not communicated to the person now asserted to be the father. Here, as there the rights to a valuable property were imperilled by the reticence ; and looking at the fanatical love of male offspring in a Hindu and particularly in a Hindu zamindár, it is certain, that how guilty soever the mother, he would have claimed the child. The mother, too, knowing the valuable property involved, would have taken care that her connexion and that of her son with it should not be severed. Prima facie there is of course no reason for crediting either set of witnesses ; but in this case the circumstances described render it proper to give credit to the allegations of those for the plaintiff. There is, therefore, in my opinion, satisfactory evidence of a perfectly legal marriage with the plaintiff's mother, that he was the fruit of the union, and that the supplemental defendant is not the zamindár's son. There must therefore, in my opinion, be a decree for the plaintiff with costs.

Appeal allowed.

(*a*) *Morris* v. *Davies*, 5 Cl. & Fin. 163, and see *R.* v. *Mansfield*, 1 Q. B. 444.