APPELLATE JURISDICTION (*a*)

Regular Appeal No. 70 *of* 1864.

SIVANANANJA PERUMÁL SETHURÁYAR .....*Appellant.*

MUTTU RÁMALINGA SETHURÁYAR and others ..... } *Respondents.*

Regular Appeal No. 80 *of* 1864.

ATHILAKSHMI AMMÁL .....*Appellant.*

SIVANANANJA PERUMÁL SETHURÁYAR.....*Respondent.*

As regards the rights of sons by different wives to inherit whether in co-parcenery, or as the sole heir (except perhaps the son of the first wife), the priority in point of time of their mothers' marriages has never been regarded when the wives were equal in caste and rank, and the rule of primogeniture was and is the same in the case of sons by several wives of equal caste and rank as in the case of sons by one wife.

A deed of gift of land forming a part of a Zamindári executed by the Zamindár in favour of his daughter 5 years subsequent to her marriage, is not valid.

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THESE were a regular appeals against the decree of the Civil Court of Tinnevelly, in Original Suit No. 15 of 1863.

The facts are sufficiently set forth in the following

JUDGMENT :—This is a suit brought to recover the Zamindári of Urkádu and to make void an alienation of a portion of the partible family property, made by the plaintiff's father (the Zamindár last in the possession) to his daughter the 6th defendant upon her marriage, by way of dowry, the same having been made without the consent of the plaintiff and others. The plaintiff also seeks a division of all the partible real and personal estate left by his father the late Zamindár, and the delivery over of his $\frac{1}{5}$ th share therein. The grounds of the plaintiff's claim, as alleged in the plaint, are :—That his father married three wives, by the first of whom he had no male issue ; that the plaintiff is his first born son by the 2nd wife, and sole heir to the Zamindári in preference to the 1st defendant, the eldest son of the 3rd wife the 4th defendant.

In the written statement put in by the 4th defendant as mother and guardian, she asserts that her marriage took

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place before the marriage of the plaintiff's mother, and that being the senior wife her eldest son, the 1st defendant, is the sole heir entitled to succeed according to the long established usage regulating the succession to Zamindáries in that part of the country. She further states that there was no delay on her part in regard to the division of the estates which were divisible, and that the only delay was on the part of the plaintiff and his brother, the 5th defendant.

The 6th defendant, in her written statement, relies upon the validity of her right to the property given to her as dowry under an instrument executed on the 13th September 1860. She alleges enjoyment of it ever since, and that it was a less amount of dowry than her position and the late Zamindár's fortune entitled her to, and that the assent of the plaintiff to the gift was not necessary.

The Civil Court finds that the marriage of the 4th defendant to the late Zamindár was celebrated before his marriage to the plaintiff's mother, and being of opinion that, in point of law, the right of succession passed to the eldest son of the 2nd wife in preference to the first born of all the sons by the 3rd wife, has decreed against the plaintiff's claim as heir to the Zamindári. But as to the other property in suit, the Court has decreed to the plaintiff his $\frac{1}{5}$ th share upon a division, holding the alienation by gift to the 6th defendant to be invalid as against the plaintiff.

The plaintiff and the 6th defendant have appealed against this decree. The plaintiff's grounds of objection relied upon at the hearing, are substantially—that the evidence wholly failed to support the special custom put forward by the 4th defendant, and that by the general Hindu law the right of primogeniture is not governed, in the case of sons by several wives, by priority of marriage amongst the wives ; but if priority of marriage does govern, then that the evidence proved that his mother's marriage took place before the marriage of the 4th defendant. The 6th defendant's grounds of objection are ; that the alienation being a gift to her upon marriage for maintenance was valid and binding, but that at all events her father might alienate to the extent of his own share in the property without the consent of his sons.

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Both appeals have been heard together, and, as in the Lower Court, we have, with the consent of the parties, taken all the evidence in Suit No. 3 of 1861 as admissible evidence for our consideration. To dispose of the plaintiff's appeal first :—There is no doubt that the plaintiff is the first born son of the late Zamindár, and there is no dispute as to the relationship in which the parties stand to each other and to the Zamindár, except in regard to the priority in point of time of the marriage of the plaintiff's mother, and that issue it will only be necessary to allude to after we have expressed the decision at which we have arrived upon the two main questions in the case.

First then, has it been shown that by established custom, where there are several wives and the first wife has no male issue, the right of succession passes to the eldest sons of the other wives according to the priority of their mother's marriages, and not to the first born of all the sons? It is not pretended that such a custom has at any time received judicial sanction, and what the law requires before an alleged custom can receive the recognition of the Court and so acquire legal force is, satisfactory proof of usage so long and invariably acted upon in practice as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class, or district of country ; and the course of practice, upon which the custom rests, must not be left in doubt but be proved with certainty. Applying that rule of law here, we are of opinion that the evidence wholly fails to support the custom set up.

[The Court then, having analysed the evidence of this custom, proceeded as follows.]

We are thus brought to consider the second question, whether by Hindu law, independently of particular custom, the plaintiff is rightful heir to the Zamindári, and in determining it we are relieved from considering any qualification that the law may attach to the difference of caste amongst the wives, as in this case there is no difference of caste. Heirship by right of primogeniture rests upon an exceptional rule of the general law of inheritance, applicable to

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Zamindáries and other estates which are considered in the nature of Principalities and impartible. As respects all other property, except under certain strictly limited grants from the Government and in the case of some offices, the law at the present day does not recognize a right by succession in one of several sons or one of the other male members of an undivided family to the exclusion of the others, beyond the preferential claim of the eldest to manage the property. Now, no work of authority which at the present day is governed by the rule of primogeniture, was cited at the bar, nor have we found any bearing materially upon the present question. We must therefore decide it upon principle and by analogy to the existing general law of inheritance, and upon what we find laid down in early times, when primogeniture by the general law conferred some special proprietary rights and privileges which no longer exist.

Upon general principle, where the wives are, as in this case, of the same caste and rank, there is no sound ground of distinction on which the birth-right of the first born of all the sons can be denied. Whether the plaintiff's mother was second of third wife of the late Zamindár, she was equally with the 4th defendant his lawful wife, and by the birth of the plaintiff his father first acquired all the benefits, temporal and spiritual, which are ascribed to the birth of a son and the performance by him of the appointed exequial rights. (*Manu IX*, 106, 107 ; *Col. Dig. V. I.* 10). Then applying the general law of succession which governs partible property, it favors strongly the plaintiff's right. All legitimate sons of the same rank are upon an equality, though the offspring of several wives and though the number of sons by each differs. The sons severally take *per capita*, and their rights in the distribution of property are not affected in any way by the order of their mothers' marriages (1 *Stra. H. L.* 205). Seniority too by birth, independently of the order of marriages, gives the preferable claim to the management of the joint property. In the case of a plurality of wives of unobjectionable caste, priority of marriage seems to be regarded by the law only for the

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purpose of regulating the order of precedence amongst the wives themselves and the right of each to succeed as heir to the husband in default of sons.

But the plaintiff's right derives still further support from the texts of *Manu* to which we were referred in the course of the argument. Although the passages relate directly to rights and privileges of the first-born upon partition, which are no longer admitted, still they are not the less of force here and in other cases, to which at the present day the rule of primogeniture applies; so far as they show to which of the sons of several wives rights of primogeniture passed. In *Manu*, Cap. IX, after treating of the then privileged position of the first-born son and his rights upon partition, it is observed in Section 122, with reference to the birth of a son by a first married wife after the birth of a son by a subsequently married wife of a lower class, "it may be a doubt in that case how the division shall be made." But in the next section it is declared that the son of the first married wife is entitled to the preference, and after him "those who were born first but are inferior on account of their mothers who were married last." Then in Section 125 it is laid down that, "as between sons born of wives equal in their class *and* without *any other* distinction, there can be no seniority in right of the mother, but the seniority ordained by law is according to the birth." The effect of these sections, we think, clearly is (at least as between the sons of wives of equal caste other than the wife first married) that the first-born of all the sons possessed the right of primogeniture, and this view is in accordance with the other texts, and the commentary in 2 Col. Dig. Book 5, Chap. 1, to which reference was also made in the argument. Upon the whole it appears to us that, as regards the rights of sons by different wives to inherit, whether in co-parcenery, or as sole heir (except perhaps the son of the first wife), the priority in point of time of their mothers' marriages has never been regarded when the wives were equal in caste and rank, and that the rule of primogeniture was and is the same in the case of sons by several wives of equal caste and rank as in the case of sons by one wife. For these reasons, we are of opinion that by the general law

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of inheritance the plaintiff is heir to the Zamindáry by right of primogeniture.

It has been unnecessary to decide whether a distinction exists in favor of the younger son of a *first* wife, as the former Pandits of this Court appear to have thought; and we desire to be understood as not expressing any opinion upon the point one way or the other. Our decision also leaves untouched the question, how far a difference of caste between the wives and the husband would affect the right of the first-born son; but we may refer to some observations upon this subject to be found in the Judgment of the Chief Justice in the recent case of *Pandaiya Telavar* v. *Puli Telavar*, (I. M. H. C. Reps. 483).

Our decision being in favour of the plaintiff's right by birth upon the general law, it is not necessary to decide the singular question raised,—whether the late Zamindár's marriage with the plaintiff's mother was celebrated before or after his marriage with the 4th defendant, it being the case of both parties that the marriages took place at different times of the same day. But we think it proper to observe that the Court at present sees no sufficient grounds for saying that the right conclusion has not been arrived at by the Lower Court.

The remaining question is that raised in the appeal of the 6th defendant, namely, her right to all or a portion of the land in her possession under the deed of gift (marked VI) from her father the late Zamindár. For the proper determination of this question it became necessary to send two issues to the Lower Court:—first, whether the property transferred to the 6th defendant by the said deed was part of the Zamindáry; secondly, whether such deed was executed at the time of the 6th defendant's marriage, and if not, when. On the first issue the Civil Court finds that 5 kottas, 5 markals and 1 measure were, and 9 kottas, 17 markals and $4\frac{1}{8}$ measures were not part of the Zamindáry. On the 2nd issue the finding is that the deed was not executed at the time of the 6th defendant's marriage, which took place on the 3rd May 1855, five years before the date of the deed.

No exception has been taken to the correctness of these findings on the evidence, nor has it been contended

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that the appellant can upon them be held to possess a valid right under the deed to more than the quantity of land which is found not to be part of the Zamindáry. But the appellant represents that she is prepared with witnesses to show that the deed was executed in pursuance of an oral agreement to transfer all the lands as a dowry, entered into by the late Zamindár at the date of her marriage, and the Court is asked by another issue to afford her an opportunity for the examination of those witnesses. We think that such a proceeding would result only in a number of presons being obtained to give false and utterly worthless evidence, and ought not to be allowed. The plaintiff therefore is, in our judgment, entitled to recover the portion of the Zamindáry found to be in the appellant's (6th defendant's) possession, but the appellant has a valid title to the portion of partible land transferred by the deed marked VI, the only objection suggested on behalf of the respondent, as to its being more than would have been the proper share of the appellant's father on a division, not having been persisted in.

The decree of the Court will be (reversing so much of the Lower Court's decree as relates to the Zamindáry property) that the plaintiff is entitled to possession of the Zamindáry including the portion found to be in the 6th defendant's possession, and the property appurtenant thereto ; and (modifying the rest of the Lower Court's decree) that the plaintiff is entitled to $\frac{1}{5}$th share upon division of the partible family property, except the 9 kottas, 17 markals and $4\frac{1}{8}$th measures of land to which the 6th defendant is entitled under the deed marked VI, and also to recover from the 6th defendant the mesne profits of the 5 kottas, 5 merkals, and 6 measures, of the Zamindáry land awarded to him by this decree, accrued since the death of the last Zamindár.

The costs of the appellant in the appeal by the plaintiff must be borne by the 4th respondent, and in the appeal by the 6th defendant each party will bear his and her own costs.
