1869. *February* 15. *R. C. No.* 3 *of* 1869.

The question raised for determination was whether the petitioner, who was not a party to the registration of the bond sued on, could be allowed summarily to recover the amount thereof under the provisions of the said Section as the representative of the deceased obligee.

The District Munsif was of opinion that the petitioner was entitled to recover, but submitted the question for the decision of the High Court.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—We are of opinion that the petitioner was not entitled to proceed under Section 53 of the Registration Act. The decision of the Court in the case reported in 3, *Madras High Court Reports,* 199, is an authority for the construction that the summary remedy under that Section is made applicable only as between the immediate parties to the registered obligation, and we see nothing in the language of the Sections 53 to 55 to warrant a distinction in favor of the representative of an obligee.

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## Appellate Jurisdiction. (a)

*Special Appeal No.* 451 *of* 1868.

N. KRISHNAMMA ........................*Special Appellant.*

N. PAPA and 2 others ............ .....*Special Respondents.*

The words "the heirs of the preceding Kurnum" in Section 7 of Regulation XXIX of 1802 mean his next of kin according to the order of succession of several grades of legal heirs and not heirs in the order of succession to undivided divisible ancestral property.

A daughter's son is one of the nearer sapindas, and in the line of heirs before a brother's son according to Hindu Law.

*Semble,* an illegitimate son of a Sudra by his concubine is his heir in preference to a brother's son.

1869. *February* 15. *S. A. No.* 451 *of* 1868.

THIS was a special appeal against the decision of P. Srinivasa Rao, the Principal Sadr Amin of Vizagapatam, in Regular Appeals Nos. 102 and 117 of 1867, reversing the decree of the Court of the District Munsif of Vizagapatam in Original Suit No. 18 of 1864.

(a) Present: Scotland, C. J. and Innes, J.

1869. *February* 15. *S. A. No.* 451 *of* 1868.

This was a suit brought for the establishment of plaintiff's right to the office of kurnum of Kupparada and Butcherazpetta, under Regulation XXIX of 1802, and to recover lands attached thereto.

The defendants pleaded that the 2nd defendant was entitled to the office of kurnum, but that the lands did not belong thereto, they having been given by the 3rd defendant to the 2nd for temporary enjoyment, and were resumable at any moment.

The District Munsif of Vizagapatam made a decree declaring the 1st plaintiff's right as well to the kurnum's office as to the lands.

The 1st and 2nd defendants appealed to the Court of the Principal Sadr Amin of Vizagapatam who dismissed the suit.

The following is extracted from the Judgment of the Principal Sadr Amin :—

The only question to be determined is who is the next heir to Ramannah the late kurnum? Of the two claimants the 1st plaintiff's position, as the son of Ramannah's deceased brother, is acknowledged on all hands, and he will therefore succeed in the absence of an intermediate heir. Is there any such heir? Is the query upon the answer to which depends the whole case and this answer in its turn depends upon the question whether the son of Ramannah's concubine (2nd defendant) is his son in the eye of the law.

All the parties in the case are Hindus,—the plaintiff's vakil states that the family in question is of the cast called "Calinga." There is no evidence to prove this; but then the vakil admits that the said cast is something other than Brahmana, Khsatraya, and Vyseya. It is clear therefore that it must be "Sudra," for there are only four casts among the Hindus. "Menu" declares, Chapter X, Section 4, that, "the Sacredotal, the Military, and the Commercial, these three are twice born classes, the Sudra the fourth is of the once born class. There "is no fifth class." I therefore hold that Ramannah was a "Sudra."

Then as to the woman kept by Ramannah, the plaintiff's vakil argues that she was not of a class in which

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he could have married, she being a person of a class called " Reddiky" quite different from Ramannah's. But the vakil admits that the class of Reddiky is one of such divisions of the cast of Sudra. The law makes no distinction as to such sub-divisions, unless one of the parties were so degraded as to forbid all sorts of intercourse between them according to any approved custom or usage. But such is not the case here.

The law is clear on the subject. It is stated that " for a Sudra is ordained a wife of his own class and no other" (Menu, Chapter III, Section 13, and Chapter IX, Section 159), and there is no provision as to the sub-divisions whatever. The Madras High Court in Regular Appeal No. 45 of 1867 (M. H. C. R. Vol. I. 483) declared that " there being no proof of special custom or usage, the " marriage would be valid, even though the parties had been " of different sects or cast divisions of the fourth or Sudra " class," and again, the classes spoken of are the four classes recognized by Menu, and not the infinite sub-divisions of these classes introduced in the progress of time."

So then the woman was one whom Ramannah could have legally married. But he did not marry her. He kept her as a concubine and begot 2nd defendant by her. Is this illegitimate issue entitled to succeed as heir ? The law on the subject is embodied in the following passages :—

" Manu," Chapter IX, Section 179, " A son begotten by a man of the servile class on his female slave, or on the female slave of his male slave, may take a share of the heritage," &c., vide also rules to the same effect as contained in Matakshara, Chapter 1, Section 12, paras. 1 and 2, Dayabhaga, Chapter IX, verse 29, Dattaka Mimansa, Section 2, verse 26, Dattaka Chandrica, Section 5, verse 30 and Yagnavulkya as contained in Colebrooke's Hindu Law Book, V, Chapter III, verses 174 and 175.

So then the son of a Sudra by a female slave inherits. But who is a slave ? and whether a concubine can be classed as a slave ? are questions which next arise for my solution.

The law did at first recognise seven sorts of slaves according to Menu, but the number has been since increased to fifteen by "Narada" as follows.—(Colebrooke's Digest, Book III, Chapter I, Section 1, verse 29).

(1). One born of a female slave in the house of her, master; (2) one bought; (3) one received by donation; (4) one inherited from ancestors; (5) one maintained in a famine; (6) one pledged by former master; (7) one relieved from great debt; (8) one made captive in war; (9) a slave won in a stake; (10) one who has offered himself up in this form "I am thine"; (11) one apostate from religious mendacity; (12) a slave for a stipulated time; (13) one maintained in consideration of service; (14) a slave for the sake of his bride, and (15) one self-sold. These fifteen slaves may be male or female. Of these, the woman who consented to be kept by a man does, in my opinion, come under No. 10, *i. e.*, a slave who offers herself thus, "I am thine", and this is evident from the law classing together a female slave and an unmarried Sudra woman kept by a man thus:—

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| Yagnemulka Book V, Chapter III, Section 174, Commentary II, p. 321.<br>Colebrooke's Dig. Stokes' Ed. p. 298. | The son of a Sudra by a female slave or other Sudra woman not legally married, shall share, &c. |
| Dayabhagha, Chapter IX, verses 29—31. | Ditto. Ditto. |

Thus it is clear that no particular stress is laid on the term son of *slave* mentioned in the law. It must be taken to mean the son of a woman not legally married, *i. e.* all illegitimate issue. In fact one of the best English authorities on the Hindu Law, Mr. Colebrooke, states "that issue by a concubine is described in the law as a son by a female slave or by a Sudra woman. If the father be Sudra, he might have allotted a share to his illegitimate son," Sir T. Strange, (II, page 68). Sir T. Strange himself in his own words states (I, p. 68-69-132) "that an illegitimate son of a Sudra is entitled to inheritance, and that an illegitimate son is the offspring of a woman not legally married to the putative father." Mr. Elberling too states the same thing (Section 160.)

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Moreover, it must be observed that slavery has been, very fortunately, unknown in India from the time she came under the English rule, and an express enactment has been passed (Act V of 1843) declaring that no right arising out of an alleged property in the person in services of another as a slave shall be enforced by any Civil or Criminal Court or Magistrate, &c., &c. Consequently, if the rule, in Hindu Law, that the son of a slave shall inherit, meant, the son of a slave in the very literal and limited sense of the word slave, and never extended to females kept by men as their fixed concubines, the highest Judicial Courts in India would not have recognised the rights of illegitimate issue of a Sudra at all. This portion of the Hindu Law would have been set down as obsolete, and the civil rights of Sudras, like those of the three regenerate tribes, who have been confined to the issue of a man and his wedded wife, and none other. But such is not the case as I will presently prove.

In a case cited in Morley's Digest (Vol. I, p. 310), it was declared that, " among Sudras, illegitimate sons inherit to their putative father."

Another case in which a concubine's son was treated as a slave's son and held entitled to inheritance, is to be found among the notes of Sir Edward Hyde East's cases, No. XXXI in Morley's Digest II, p. 43.

The late Sadr Court of Madras recognised the right of an illegitimate son of a Sudra to inheritance in No. 652 of 1860.

The Madras High Court, in Special Appeal No. 45 of 1863, in which the contention was, that a certain party was the son of a Sudra by a concubine, declared on the authority of the Mitakshara, Chapter I, Section 12, and Sir Thomas Strange's Hindu Law, I, p. 132, that " the law has been and still is that the illegitimate children succeed their father by right of inheritance" (M. H. C. R. I, 482. Special Appeal No. 23.) Vide also High Court decision in 297 of 1864 (M. H. C. R. II 293.)

In support of the above, I may also cite the Privy Council Judgment in the case of *Chutary Run Merdun Syu* v. *Sabub Purlahad Syi* (Sutherland's Edition of 1867, p. 313.) With reference to that case the Honorable Mr.

Holloway observed (M. H. C. R. II 484) that " 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 Sudra, the son's right would have been unquestionable."

Under these circumstances, I come to the conclusion that the son of a Sudra by a kept woman, who is also of the Sudra cast, though of a different sub-division, is entitled to inheritance under the Hindu Law, and that therefore the 2nd defendant in this case is a legal heir to the late kurnum Ramannah.

But then the right of such an illegitimate son of a Sudra is not an unqualified one. The essence of the whole law on the subject is contained in the work of Sir T. Strange's Hindu Law, wherein the author says, " Among Sudras, illegitimate continue to participate with legitimate sons, if there be any. If there be none, nor daughters, nor daughter's sons, they are distinguishable in point of inheritance from legitimate sons." (Vol I, p. 132.)

In this case it is allowed that Ramannah has left a daughter and daughter's son, besides the illegitimate son the 2nd defendant. The subject of this suit being one of inheritance to the office of kurnum, the daughter's claim becomes lapsed owing to her incapacity to perform the same (Vide decision of the Sadr Udalut in Special Appeal Nos. 85 of 1844 and 45 of 1852). There remains therefore the daughter's son and illegitimate son (2nd defendant); the selection lies between them, and either of them would exclude the 1st plaintiff in toto. Consequently, without expressing any opinion for or against the absent party, *i. e.*, the said Ramannah's daughter's son, and confirming my observations to first plaintiff and 2nd defendant, I declare it, as my decided opinion, that the selection made by the Maharajah of Vizianagrum (3rd defendant) in favor of the 2nd defendant was the most legal and justifiable one and must be upheld.

Since thus the 1st plaintiff's heirship to succeed to the office of kurnum is negatived, his claim to lands, which he

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describes as belonging to that office, must be disallowed of course, and consequently it becomes unnecessary to enter into an investigation in this case as to whether the lands in question do really belong to the said kurnum's office, or are held by the 2nd defendant by a special temporary grant from the Maharajah of Vizianagrum.

Under all these circumstances, I reverse the decree appealed against, and dismiss the plaintiff's suit taxing him with his own and defendant's costs throughout.

*Sloan,* and *Kuppuramasamy Sastry,* for the special appellant, the first plaintiff.

*Scharlieb,* for the special respondent, the third defendant.

The Court delivered the following

JUDGMENT:—This is a suit to establish the right claimed by the plaintiff to an hereditary office of kurnum, and to recover the lands forming the mirasi maniem attached thereto. The 2nd defendant is the present holder of the office, having been appointed by the 3rd defendant under Regulation XXIX of 1802. Both the Lower Courts have found that the office is hereditary; and that the last rightful possessor, Ramanna, died undivided from his family; that he was the paternal uncle of the plaintiffs and the natural father of the 2nd defendant; and that he also left surviving him a legitimate daughter and her son, both of whom are still living. On these findings the original Court decreed that the 1st plaintiff was entitled to be appointed by the 3rd defendant to the office, and finding also that the lands claimed were appurtenant to and passed with the office, it decreed further the plaintiff's right to possession of the lands. But the Lower Appellate Court has reversed that decree and dismissed the suit without going into the question whether the lands are appurtenant to the office, on the ground that the 2nd defendant, the illegitimate son of Ramanna by the 1st defendant, his concubine, was his heir, and entitled to the office in preference to the plaintiff, Ramanna being a Sudra.

From that decision the 1st plaintiff has appealed, and the objection relied upon on his behalf is that the Hindu Law in regard to the rights of an illegitimate son of a

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Sudra to inherit is strictly limited to a son by a woman in one of the conditions of slavery defined by the law. This position has been met on the part of the respondents with the argument not only that the law has a general application to all illegitimate sons of Sudras, but that assuming the law to be so limited, and the 2nd defendant not eligible, the legitimate grandson of Ramanna through his daughter is a nearer heir than his nephew, the appellant, and of right therefore entitled preferably to the office under the Regulation, and we are of opinion that this contention is well founded and fatal to the claim in the suit.

We think that the words "the heirs of the preceding kurnum" in Section 7 of Regulation XXIX of 1802, mean his next of kin according to the order of succession of the several grades of legal heirs, and not, as has been argued on behalf of the appellant, heirs in the order of succession to undivided divisible ancestral property. Now a daughter's son is clearly one of the nearer sapindas and in the line of heirs before a brother's son, and consequently if the appellant's objection is valid, the 2nd defendant is the person whom the Section makes it obligatory on the 3rd defendant to appoint, except he be incapacitated for the duties of the office, and that must be established by proof before the Judge of the Zillah, which it is not pretended has been done. The plaintiff therefore has failed to show a right as heir rendering his appointment to the office obligatory on the 3rd defendant.

It becomes unnecessary to express a decision on the appellant's objection to the 2nd defendant's right to succeed, but we may observe that our present apprehension of the authorities leads us to think that the Lower Appellate Court has taken the sound view of the law.

The decree appealed from must be affirmed, and the appellant must pay the costs of the 1st and 2nd respondents.

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