Appellate Jurisdiction.(a)

Special Appeal No. 145 *of* 1875.

VENCATACHELLA CHETTY....(*Plaintiff*)*Special Appellant.*
PARVATHAM and another....(*Defendants*)*Special Respondents.*

Illegitimate sons are excluded by the Hindu Law from inheriting when the intercourse between their parents was in violation of, or forbidden by, law.

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THIS was a Special Appeal against the decree of Mr. J. H. Nelson, the District Judge of North Tanjore, in Regular Appeal No. 96 of 1874 confirming the decree of the Court of the District Munsif of Tranquebar in Original Suit No. 354 of 1873.

Plaintiff, as the illegitimate son of Narrainsawmy Chetty, sued *in forma pauperis*, to recover for his share certain property, &c. from 1st defendant, daughter of the said Narrainsawmy Chetty. Second defendant, another illegitimate son of the said Narrainsawmy Chetty, was made a party to the suit.

The plaintiff alleged that, at the death of the aforesaid Narrainsawmy Chetty, 1st defendant applied to the Civil Court of Tranquebar, under Act X of 1841, and obtained from plaintiff possession of the property specified in the schedule; that plaintiff instituted Original Suit No. 30 of 1865, on the file of the Tranquebar Principal Sadr Amin's Court for the recovery of the said property and obtained a decree, which, however, was reversed in Regular Appeal No. 265 of 1866. The Civil Judge, who disposed of the appeal, being of a opinion that plaintiff and 2nd defendant were the sons of the said Narrainsawmy Chetty's concubine. The special appeal preferred by the plaintiff against this decree was dismissed. The plaintiff submitted that even as the son of a concubine, he is entitled to a fourth share.

The 1st defendant pleaded that the previous case barred the plaintiff's present claim; that plaintiff is not entitled to any share as he was the offspring of adulterous intercourse. She further contended that plaintiff should

(a) Present :—Sir W. Morgan, C.J., Innes and Kindersley, J.J.

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bear his share in certain debts legally due by her; that the claim for the moveable property is barred; and that no produce has been raised from the lands claimed.

The following, among other issues, were recorded :—

Whether or not the legal proceedings taken by plaintiff in the former suit, are a bar to this suit. If a bar, how ?

Whether plaintiff is the fruit of an adulterous connexion, or whether he is the son of a concubine legally recognized and as such entitled to the share he claims ?

Whether 1st defendant has any debts such as to compel plaintiff legally to contribute his quota in them ?

Whether the claim for the moveable property is barred or not ?

Was any produce raised from the land, and if so, what is the quantity ?

The District Munsiff of Tranquebar held that the plaintiff's present suit was not barred by the proceedings in the previous suit, and that plaintiff was the fruit of an adulterous connexion. Upon this second point he observed :—

"Plaintiff's vakil argued that even if plaintiff was looked upon as the fruit of an adulterous connection, there was nothing in the Hindu Law against his obtaining a share in the property of Narrainsawmy Chetty, but expressed his inability to quote cases in support of the position. The authority in point chiefly relied on by the defence, is the judgment of the Madras High Court in *Parisi Nayudu* v. *Bangaru Nayudu*(1). The conclusion which their Lordships have logically drawn in that judgment is, that to entitle the illegitimate sons of a Sudra by a Sudra woman to inherit a share in the family property, the intercourse between the parents must have been a continuous one, and the woman must have been an unmarried woman. Therefore the illegitimate son of a Sudra by a Sudra woman living with him in adultery is not entitled to a share in the family property. I think this is a clear law on the point and ought to be followed. The vakil for the plaintiff argued that the conclusion of their

(1) 4 Madras H. C. Rep., p. 204.

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Lordships was not supported by authorities and that the phrase "other unmarried Sudra woman" found in para. 2 of page 215 of Volume IV, was not found in the text in Mitákshárá, in page 426 of Mr. Stokes' edition. He further argued that among the fifteen classes of slaves, there is a slave for the sake of one's bride, and, if she says to the man that "I am thine," the issues begotten on her by the man are entitled to share in the property. The phrase is not, as the vakil contends, unsupported. It is to be found in Chapter IX verse 29 of the Dáya Bhága, Mr. Stokes' edition, page 298, *vide* also Elberling on Inheritance Section 160, page 71. Though Dáya Bhága is an authority in the Bengal Presidency I don't think we can entirely reject it. The vakil has blended two slaves into one. Among the fifteen classes of slaves enumerated in page 137 of Mr. Stokes' Hindu Law, a slave who offers himself and says "I am thine," is different from the slave for a bride. Therefore, I do not see anything in the argument. The other authorities quoted by plaintiff's vakil are the judgments in *Pandaiyá Télaver* v. *Puli Télaver* (1) *Yettapa Naikar* v. *Venkatasubha Yettia*; (2) *Krishnamma* v. *Papa*,(3) of Norton's Leading Cases on Hindu law, p. 499, *Murdun Syn* v. *Purhulad Syn*(4) and Colebrooke's Digest, Volume II, p. 171. All these authorities do not at all support the contention. But the first six verses in page 171 of Colebrook's Digest fully satisfy me that the issue of a woman living in adultery is not entitled to a share, and that the Hindu Law sets its face against adultery. For these reasons I am of opinion on the 2nd issue, that plaintiff is not one of the kinds of illegitimate sons recognized by the Hindu Law, and that he is not entitled to the share he claims."

On appeal from this decision the District Judge of North Tanjore sent down the following issue for decision.

"Is it or is it not customary in the caste to which the deceased Narrainsawmy Chetty belonged for an illegitimate

(1) 1 Madras H. C. Rep., p. 478, affirmed on appeal, 13 Moore's I. A., p. 1418, s. c, 3 B. L. R., (P. C.) p. 1.

(2) 2 Ibid., p. 293, on appeal, 12 Moore's I. A., p. 203.

(3) 4 Ibid., p. 234.

(4) 7 Moore's I. A., p. 18, at p. 49

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son, begotten by one on the body of the wife of another, in any circumstances to succeed to any part of the estate left by his father? If so, in what circumstances and to what share should such son succeed?"

The Lower Court decided this issue against the plaintiff and that decision was affirmed on appeal by the District Judge. The plaintiff then appealed to the High Court on the following grounds.

I. That the Lower Appellate Court gave judgment on the strength of an unrecognized custom, and not on the broad principles of Hindu Law applicable to the case.

II. Exhibit H is more than 30 years old and from proper custody, and therefore requires no proof.

III. Both the Lower Courts failed to assign due weight to the presumption in plaintiff's favor arising from the fact of plaintiff's mother having lived with his father for more than 40 years.

IV. The dictum that the son of an adulterous connexion cannot inherit, is against the weight of the authorities on Hindu Law.

Ramachendrier, for *Jaga Row Pillay*, for the pauper special appellant, plaintiff.

In Hindu law an illegitimate son is not *quasi nullius filius* but has substantial rights. *Pandaiyá Telaver* v. *Puli Télaver*,(1) *Yettapa Naikár* v. *Vencatasubha Yettia*, (2) 1 Sir T. Strange's H. L., pp. 68, 132. All children born out of wedlock are illegitimate according to Hindu law, and their rights are secured. *Parisi Nayudu* v. *Bangaru Nayudu*, (3) is against me, but I submit that the judgment does not contain a correct statement of the law, and, as the

(1) 1 Madras H. C. Rep., p. 478 affirmed on appeal 13 Moore's I. A., p. 141, s.c., 3 B.L. R. (P. C.), p. 1.

(2) 2 Ibid., p. 293, on appeal, 12 Moore's I. A., p. 203.

(3) 4 Ibid., p. 204.

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decision upon this point was not necessary for the case, it is a mere *obiter dictum*.

Mitákshárá, ch. 12, sloka 1 contains a special law on behalf of Sudras. In the original the word translated "slave" is "Dasi." According to the judicial interpretation of the word "Dasi" given in *Yettapa Naikár* v. *Venkatasubha Yettia*, (1) it includes any Sudra woman kept in concubinage. The word is further explained in *Krishnamma* v. *Papa* (2). As to the term "slave" and those included thereunder, see the Dáya-kráma-Sángraha, ch. 12, s. 2, Stokes's "Hindu Law Books," p. 522.

The marriage tie is so loose that any wife may leave her husband when she pleases. Vyavahára Mayúkha, ch. 19, sloka 11 appears to give the power I contend for.

[INNES, J.—I do not see how that bears upon the present case.]

It shows the looseness of the marriage tie. Dattáka Mímánsá, s. 2, sloka 26, Stokes's "Hindu Law Books," p. 551 explains, ch. 1, s. 12 of the Mitákshárá. And s. 4, sloka 75 of the Dattáka Mímansa explains the words "slave's son" (Dása-putra). The question is—would the previous marriage of the mother bar her son's succession to the property of his father? In former ages Brahmins did not legislate for Sudras. For Sudras there are no "munthrums," no peculiar marriage ceremonies, no ceremony for divorce. The woman may be superseded at her husband's pleasure, and she may leave her husband when she pleases.

Mr. Miller and *Rama Row*, for the 1st special respondent, 1st defendant.

There is a distinct finding that there was no condonation on the part of the husband; the plaintiff is therefore the

(1) 2 Madras H. C. Rep., p. 293, on appeal, 12 Moore's I. A., p. 203.
(2) 4 Ibid., p. 234.

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offspring of an adulterous connexion. The question is whether, among Sudras, children of such connexions inherit. According to Menu, ch. 9, sloka 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, *if permitted:* thus is the law established."(*a*) The rights of such a son are laid down in Mitákshárá, ch. 1, s. 12. With regard to the special rules as to the partition of a Sudra's goods, see Stokes's "Hindu Law Books," p. 425. Yájnaválkya's text cited in the Dáya-kráma-Sángraha, ch. 6 slokas 32-33, refers to "the son of a Sudra by a female slave *or other unmarried Sudra woman*" according to slokas 29 to 31 of chapter 9 of the Dáya Bhága, Stokes's "Hindu Law Books," p. 298.

If the woman was not a "female slave," the son would only have a right to maintenance. II Colebrooke's Digest, pages 325, 326. Burnell's Dáya Bhága, p. 24, s. 32, Macnaghten's Hindu Law, Vol. I, p. 18 and Vol. II, pp. 15 and 16 (note).

This son could not perform important ceremonies. There are many authorities to show he should not be admitted to society, but he may perform some unimportant ceremonies on account of the maintenance to which we admit he is entitled. Elberling, p. 71 § 160. West and Bühler, p. 56, question 12, where "Dasi" is explained. See also p. 63.

Menu recognizes only seven sorts of slaves. Menu, ch. 8, sloka 415. This number is increased by Nárádá to fifteen, II Colebrooke's Digest, [3rd Edn.] p. 14; see also explanation at page 16 and p. 170—text of Hárita.

(*a*) In *Narain Dhara* v. *Rakhal Gain*, 1 Indian L. R., (Calcutta), p. 1, Mitter, J., observed upon this passage (p. 5). "The passage as translated warrants the conclusion that an illegitimate son of a Sudra by a slave or other unmarried Sudra woman takes the inheritance of the father; but referring to the original text, I find that there is a slight inaccuracy of translation in the first part of the verse in question, the passage, if correctly rendered, would run thus:—'But the son of a Sudra by an unmarried female slave, &c., may share equally with other sons, by consent of the father, &c.'"

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In *Yettapa Naikár* v. *Venkatasubha Yettia*,(1) the text quoted from Macnaghten was approved of as also in *Murdun Syn* v. *Purhulad Syn*(2) *Parisi Nayudu* v. *Bangaru Nayudu*(3). As to what sons are now recognized, see 1 Sir T. Strange's H. L., p. 63. Burnell's Translation of the Dáya Bhága, para. 32 shows that this large number of sons is not now recognized. Mitákshárá, Stokes's "Hindu Law Books," p. 410.

The question of a twice married woman's son succeeding does not arise in the present case. His is one of the classes now obsolete.

The term "female slave" must be confined to an "unmarried woman."

A woman living in adultery is a concubine and entitled to maintenance West and Bühler, p. 59, and her daughter also. Ibid., p. 60.

If deceased was a Sudra, his son on a twice married woman is entitled to half the share of a legitimate son, Sutherland's Translation of Dattaka Mímánsá, Section 4, sloka 58, (note). Stokes's "Hindu Law Books," p. 583 explains the term "twice married woman."

A woman who leaves her husband and lives with another man does not lose her spiritual connexion with her husband, only her temporal, and, on her death, the husband would go through the purifying ceremonies. Menu, ch. 9, sloka 59, describes who are the eleven fictitious sons, as also does sloka 170. 2 Colebrooke's Digest, p. 330, shows that such sons were not unknown in former times.

Right to inherit depends on efficacy to perform funeral rights, 2 Colebrooke's Digest, p. 371. At p. 375 of that work a son raised by appointment and a son raised on the sly are distinguished, and at p. 375, it is said that the son

(1) 2 Madras H. C. Rep., 293, on appeal, 12 Moore's I. A., p. 203.
(2) 7 Moore's I. A., p. 18.
(3) 4 Madras H. C. Rep., p. 204.

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of a concealed birth, becomes the son of the husband, the reason for which rule is given at p. 381. The only exception in the text-books is where the adultery is between high and low castes. Adultery is not immoral according to Hindu Law if between the same castes. The punishment awarded is very slight, and the offence is placed in the same degree as crimes in the third degree. See Menu, ch. XI, ss. 60-67. *Mayna Bái* v. *Uttáram.* (1) In that case if the father had been a Hindu the judgment would have been that the children were entitled to inherit their father's property notwithstanding the fact that they were the offspring of adulterous intercourse.

Ramachendrier in reply.

The Court delivered the following

JUDGMENT :—The plaintiff sought to participate in the estate of Narrainsawmy Chetty, his father. There was another son and a daughter. It appeared that, while these latter were the children of Narrainsawmy's lawful wife, plaintiff was the offspring of an adulterous connection of plaintiff's father with Venkata Ammal, the wife of one Nainam.

The District Munsif was of opinion that, by the Hindu Law, the plaintiff was not entitled to share in the inheritance. The District Judge, on the appeal made by plaintiff, entertaining doubts as to the application of the Hindu Law to people of the class to which the parties belong directed an issue to ascertain whether in such circumstances plaintiff was, by any custom of their caste, entitled to inherit to his father.

The Munsif returned a finding in the negative, and the District Judge concurring dismissed the appeal.

The only question, which, in the argument in the special appeal, we were asked to consider, is the right of plaintiff to inherit under the Hindu Law.

The decisions of this Court have gone the length of declaring the illegitimate son of a Sudra woman, where intercourse between the parents was of a continuous character, entitled to inherit but have disallowed the claim of a son by

(1) 2 Madras H. C. Rep., p. 196, at pp. 199 and 203.

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an incestuous intercourse, *Parisi Nayudu* v. *Bangaru Nayudu*(1). The intercourse in the present case was continuous, but in the former cases the precise question in this case was not before the Court for consideration, viz., whether the son by adulterous intercourse with the wife of another can share in the heritage of his father.

The law, as set forth in verse 170, Chapter IX of Menu, and in verse 14, Chapter V of the Smrutichándrika (Kristnasawmy Aiyer's Translation) seems to show that plaintiff cannot inherit to the husband of his mother. This incapacity may at first appear calculated to add strength to the arguments in favor of his inheriting to the person, to whose adulterous intercourse with his mother he owes his birth. But these arguments are such as must at once be rejected and cannot derive support from the presumption that incapacity in respect of the one source of inheritance implies capacity in respect of the only other source.

We were first asked to regard plaintiff as the son of what is called in the treatises a twice married woman, the rights of such a son to inherit being (it was said) recognized by the law. Granting that plaintiff's mother would answer one of the definitions of a twice married woman, that appear in the treatises, it is yet evident from the texts quoted to us [among which may be noticed the Dáya Bhága (Dr. Burnell's Translation) p. 24, verse 32] that this social relation has long become obsolete. Then it was urged that the intercourse of the woman with plaintiff's father was perfectly free on her part, and was not without the assent of the husband, and was, therefore, on the footing of a mere concubinage untinged with adultery; but the assertion that the adultery was condoned was negatived by the finding of the District Munsif from which the District Judge has not dissented, and even, if it had been connived at or condoned, it does not appear that the Hindu Law would have regarded the marriage tie as dissevered, or the connection as other than adulterous. Verse 15, Section VIII of the Dattaka Mímánsá, which quotes a text of Prajapati, seems to show that an adulteress is still regarded up to her death as a member of the family of

(1) 4 Madras H. C Rep., 204.

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the husband. The case of *Parisi Nayudu* v. *Bangaru Nayudu* (1) was disposed of mainly on the ground that sons by an intercourse prohibited by the law were not recognized by the Hindu Law as entitled to inherit and this conclusion was founded partly upon the words "or other unmarried Sudra woman" occurring in Chapter IX of the Dáya Bhága, verse 29. It seems not very clear that the words mean *absolutely* unmarried. It is at least doubtful whether they are not limited to the meaning of a woman not married to the person, whose son claims to inherit or share.

But, however this may be, there can be no question of the strong terms of condemnation in which the Hindu Law denounces adultery.

We find nothing therefore in the circumstances of the case to lead us to adopt a different ground of decision from that upon which the judgment in *Parisi Nayudu* v. *Bangaru Nayudu*(1) mainly preceded, viz., that illegitimate sons are excluded from the privilege of inheriting when the intercourse between their parents was in violation of, or forbidden by law.

It may be that plaintiff would be entitled to maintenance from the estate of his father, though not to a share in the estate, but we must dismiss this special appeal with costs.

Appeal dismissed with costs.

(1) 4 Madras H. C. Rep., 204.

NOTE.—According to the Bengal school of the Hindu law, only the illegitimate sons of a Sudra by an unmarried female slave, or a female slave of his slave, are entitled to inherit the father's property in the absence of legitimate issue. *Narain Dhara* v. *Rakhal Gain*, 1 Indian L. R., (Calcutta), p. 1.