Privy Council Appeal No. 71 *of* 1928.

P. M. A. M. Vellaiyappa Chetty and others - - - *Appellants*

v.

Natarajan and another - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JULY, 1931.

Present at the Hearing:

LORD TOMLIN.
LORD MACMILLAN.
SIR DINSHAH MULLA.

[*Delivered by* SIR DINSHAH MULLA.]

This appeal arises out of a suit instituted in the High Court of Madras by the illegitimate sons and an illegitimate daughter of P. M. A. Muthiah Chetty, a Sudra by caste, by a continuous concubine, for past and future maintenance against their father. Muthiah Chetty owned no separate property, but he was joint with his uncles and uncles' sons, and the joint family possessed considerable properties. The plaintiffs claimed that the maintenance should be charged on the joint family properties. The suit was filed on the 18th September, 1919. Muthiah Chetty died on the 21st April 1921, and after his death the plaint was amended, and the uncles and uncles' sons were brought on the record as defendants Nos. 2 to 5 as his surviving coparceners and legal representatives.

The learned Judge who tried the case awarded maintenance to each son at the rate of Rs. 100 per month from the date of the institution of the suit for life, and to the daughter at the rate of Rs. 50 per month until she attained the age of 18 years, and the maintenance was made a charge on certain joint family property.

On appeal the High Court confirmed the decree so far as it related to the sons' claim for maintenance, but reversed it as regards the daughter's claim on the ground that an illegitimate daughter was not entitled to maintenance out of joint family property. From that decree of the High Court defendants Nos. 2 to 5 have brought the present appeal.

Three questions were raised at the hearing of this appeal, viz. :—

(1) Whether the illegitimate son of a Sudra by a continuous concubine is entitled, after the father's death, to maintenance out of properties held by the father jointly with his collaterals as members of an undivided Hindu family, where the father has left no separate property and no legitimate son ;

(2) whether, if so, he is entitled to maintenance for his life or during minority only ;

(3) whether he is entitled to arrears of maintenance accrued due in his father's lifetime.

These questions were also raised before the High Court and the High Court answered them in favour of the sons. It was conceded on behalf of the appellants that there have been cases in India in direct support of the judgment of the High Court, but it was argued that those decisions were not founded on any text of the Hindu law, and that unless there was a text to support it the sons' claim should be disallowed.

The rights of illegitimate sons are considered in the Mitakshara, Chapter I, section 12. The section is headed " Rights of a son by a female slave, in the case of a Cúdra's estate," and consists of three verses which are as follows :—

" 1. The author next delivers a special rule concerning the partition of a Cúdra's goods. ' Even a son begotten by a Cúdra on a female slave may take a share by the father's choice. But, if the father be dead, the brethren should make him partaker of the moiety of a share : and one, who has no brothers, may inherit the whole property, in default of daughter's sons.'

" 2. The son, begotten by a Cúdra on a female slave, obtains a share by the father's choice, or at his pleasure. But, after [the demise of] the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share : that is, let them give him half [as much as is the amount of one brother's] allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife, nor sons of daughters. But, if there be such, the son of the female slave participates for half a share only.

" 3. From the mention of a Cúdra in this place [it follows that] the son begotten by a man of a regenerate tribe on a female slave does not obtain a share even by the father's choice, nor the whole estate after his demise. But, if he be docile, he receives a simple maintenance."—(Stokes Hindu Law Books, p. 426.)

It has been held in India that the text of Yajnavalkya, cited in verse 1 and the commentary on the text refer to the estate of a separated householder. The view so taken has not been

contested before their Lordships. See *Ranoji* v. *Kandoji* (1885), 8 Mad. 557, at p. 561 ; *Perrathi* v. *Thirumalai* (1887). 10 Mad. 224. at p. 343 ; *Ramalinga Muppan* v. *Pavadai Goundan* (1902), 25 Mad. 515. at pp. 522, 523 ; *Gopalasami Chetti* v. *Arunachellam Chetti* (1904). 27 Mad. 32, at p. 36.

It is to be observed that verses 1 and 2, which relate to a Sudra son. make no mention of maintenance where the father has left no property to which the son can succeed.

The father having died undivided in the present case, and the text being silent as to maintenance, the case stands outside the text. But this. in their Lordships' opinion, is not sufficient to cause the rejection of the plaintiffs' claim if it can be sustained on some principle recognized by the Hindu law. The High Court have held that there is such a principle, that principle being that where under the Hindu law a person is excluded from inheritance to property or from a share on partition of joint family property, he is entitled to maintenance out of that property, and that the present case is such a case. The matter was thus summed up by Krishnan J. in his judgment :—

> "The text does not expressly deal with maintenance of Sudras it is true, but the authorities are quite clear that when the illegitimate son cannot ask for a share he is entitled to get maintenance from his putative father's joint family estate even in the hands of his coparceners."

Their Lordships will, therefore, proceed to examine the authorities.

The first case in order of date is *Ranoji* v. *Kandoji* (1885), 8 Mad. 557. In that case the High Court of Madras held that an illegitimate son does not become a coparcener by birth, that he cannot, therefore, demand a partition against his father's brother's sons of property held by the father in coparcenery with them, and that he is entitled to maintenance only. Muttusami Ayyar J. said :—

> "The illegitimate son, it will be observed, does not become a coparcener. He is ordinarily entitled only to maintenance and in the case of Sudras this right to maintenance is in certain cases to be satisfied by the allocation not of a share, but of a portion of the estate equal to half a share."

It appears from the judgment that in the view of the learned Judge the share of inheritance provided for the illegitimate son was not in recognition of his status as a son or an heir, but that it was merely in lieu of maintenance, the maintenance being represented by the specified share of inheritance.

The next case is *Ananthaya* v. *Vishnu* (1894), 17 Mad. 160. The suit was by an adult illegitimate son of a Brahman against the legitimate son of his father for maintenance out of joint family property which had passed to the legitimate son by survivorship. As the plaintiff's father belonged to a twice-born class, his case came within the terms of verse 3, and he could claim maintenance only, but two questions were raised on both of which the verse was silent, namely, whether the plaintiff, being an adult, was

entitled to maintenance, and, if so, whether maintenance could be made a charge on the joint family property. Both these questions were answered in the affirmative. On the first question Muttusami Ayyar J. said that the maintenance provided for in verse 3 was in lieu of inheritance as in the case of females of the family and disqualified heirs, and that it should, therefore, be awarded for life. On the second question the learned Judge said :—

> " As the maintenance awarded is the result of exclusion from inheritance, and as the Hindu theory is that family property constitutes assets from which charges in the nature of maintenance, &c., are to be made, the maintenance decreed to an illegitimate son may be secured on the family property as in the case of a female member, by being declared to be a charge."

Pausing here, and reading this and the preceding case together, it would appear that in the opinion of the learned Judges the share allotted to the illegitimate son of a Sudra was in lieu of maintenance, and that the maintenance provided for the illegitimate son of one who belonged to a regenerate class was in lieu of inheritance.

After these cases in date comes *Gopalasami Chetti* v. *Arunachellam Chetti* (1904), 27 Mad. 32. The suit was by an illegitimate son for his share in his father's estate, or, in the alternative, for maintenance against the father's adopted son and his brother's son with both of whom the father was joint at his death. The claim for a share was disallowed, but maintenance was decreed out of the joint family property. Arrears of maintenance for nine years prior to the suit were also allowed, being presumably arrears accrued due during the father's lifetime. It would appear from the judgment that the son's right of maintenance was not even contested, and that the only questions argued were as to the scale of maintenance and the arrears of maintenance.

The last case on the subject cited to their Lordships was *Panchepayesa Odayar* v. *Kanaka Ammal* (1917), 33 Mad. L.J. 455. In that case a Sudra died leaving a concubine and an illegitimate son by her. The suit was for maintenance by the concubine and the son against the undivided brother of the deceased out of the joint family property in his hands. The Subordinate Judge awarded maintenance to the son until majority and to the mother for life. An appeal was taken to the High Court, and, as appears from the judgment, the only question argued was whether a concubine was entitled to maintenance out of joint family property, and the judgment of the Subordinate Judge was confirmed. The son's right to maintenance was not called in question. There was no appeal in this case by the son from that part of the decree which limited his maintenance until majority.

It appears from the above cases that where the father dies undivided and leaves no separate property, the illegitimate son of a Sudra is entitled to maintenance out of the joint property in the hands of the surviving members of the family to which the father belonged. The ground of the decisions would seem to

be that the share of inheritance which in the case of a separated householder is allowed to the illegitimate son is in lieu of maintenance, and that where the father has left no property to which the son could succeed, he is entitled to maintenance out of joint family property because of his exclusion from a share on a partition of that property.

That maintenance in the case of the twice-born classes is in lieu of inheritance is apparent from the terms of verse 3, but there is a divergence of opinion as to whether the share of inheritance allotted to a Sudra son is merely in lieu of maintenance, or whether it is in recognition of his status as a son and a member of the family. The latter view was taken in some cases where the question, though not one of maintenance, involved a consideration of the status of an illegitimate son, and it seems to have been influenced to a large extent by the position in the Mitakshara of section 12, which deals with the rights of illegitimate sons.

The arrangement of the Mitakshara is this : Chapter I deals with partition of unobstructed heritage. It consists of twelve sections. After expounding the law of partition in general in the earlier sections the author enumerates in section 11 twelve classes of sons common to all the four castes, including the legitimate and adopted sons. Then comes section 12, which deals with the rights of illegitimate sons. This is followed by Chapter II. That chapter relates to obstructed heritage, and prescribes the order of succession *on failure of sons*. Verse 1 of section 1 of that chapter is as follows :—

> " 1. That sons, principal and secondary, take the heritage, has been shown. The order of succession among all [tribes and classes] *on failure of them*, is next declared."

Verse 2 is as follows :—

> " 2. The wife and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow student ; on failure of the first among these the next in order is indeed heir to the estate of one who departed for heaven *leaving no male issue*. This rule extends to all [persons and] classes."

Such being the arrangement of the chapters, the question arises whether any inference can be drawn from the place of section 12 as to the status of an illegitimate son, and if so, what ?

The first case on the subject is *Sadu* v. *Baiza* (1880), 4 Bom. 37. The question there was whether, where a Sudra left two sons, one illegitimate and the other legitimate, and the legitimate son died before partition of the estate with the illegitimate son and without leaving male issue, the illegitimate son was entitled to the whole estate by right of survivorship, or whether the share of the legitimate son passed to his own heirs. The High Court at Bombay held that the two sons succeeded to the property as members of a joint family and that the illegitimate son was entitled to the whole estate by survivorship. It was argued in that case that the illegitimate son could not be a coparcener

with the legitimate son, first, because of the inequality of shares, and, secondly, because he was not even an heir as he was not mentioned in the list of heirs in Chapter II, section 1, verse 2. As to the first argument, Westropp C.J. said that inequality of shares did not prevent coparcenery as under the ancient Hindu law the elder son was entitled to a larger share, and his younger brothers nevertheless were his coparceners. As to the second argument the learned Chief Justice said :—

> " It has, to a certain extent, been already noticed in *Rahi* v. *Govinda* [1 Bom. 104], though not as clearly expressed as it might be, that the place in which the author of the Mitakshara has in his work dealt with illegitimate sons is important. He does so before he treats of obstructed heritage, *i.e.*, of the rights of succession after the failure of sons, principal and secondary, and he has treated the *dasiputra* as amongst those in the case of Shudras."

In the same case Nanabhai Haridas J., after indicating the important points of difference between the position of the legitimate and that of the illegitimate son, observed as follows :—

> " While admitting, therefore, that the position of a *dasiputra* in a Shudra family does differ in important particulars from that of an *aurasputra*, I am not prepared to allow that the former is not a member of the family at all, or that he is not a coparcener, and not, therefore, entitled to succeed with right of survivorship. His legal status as a son is unquestionably recognized."

The learned judge refrained from expressing any opinion as to whether an illegitimate son is entitled to inherit from his father's legitimate son or from his collaterals, saying that the question did not arise for decision.

The *ratio decidendi* of the above case is that an illegitimate son in a Sudra family has the status of a son, and that he is a member of the family, though with limited rights as compared with a legitimate son.

Then came the Madras case of *Ranoji* v. *Kandoji*, to which reference has already been made. In that case Muttusami Ayyar J. said :—" No inference can be drawn from the place in which the author of the Mitakshara deals with the rights of an illegitimate son. The passage is introduced as a special rule." It was in this case that the learned Judge laid down that the share of inheritance given to a Sudra son was in lieu of maintenance, a view which he repeated in *Parvathi* v. *Thirumalai* (1887), 10 Mad. 334, at p. 345.

This was followed by a Calcutta case, *Jogendro Bhuputi* v. *Nittyanund Man Singh* (1885), 11 Cal. 703. The facts of that case were very similar to the Bombay case, and the point for decision was the same. The learned judges of the High Court, Garth C.J. and Beverley J., after consulting Mitter J., followed the Bombay decision. In the opinion of the learned Judges inequality of shares in the case of an illegitimate son did not prevent coparcenery any more than in the case of an adopted son. " This

case of an adopted son," they said, " appears to us very analogous to that of an illegitimate son. In both cases there is the same sort of imperfect brotherhood to the legitimate son, and in both the superior position of the legitimate son is recognized by his receiving a larger share upon partition."

The Calcutta case was taken on appeal to this Board and the judgment of the High Court was confirmed (see L.R. 17 I.A. 128). Their Lordships held that the illegitimate son could not enforce a partition during his father's lifetime, as he could take a share only by " the father's choice," and that he did not acquire at his birth any right to share in the estate in the same way as a legitimate son would do, but that on the father's death he succeeded to the father's estate as a coparcener with the legitimate son, and on the death of the legitimate son before partition, he became entitled to the whole estate by survivorship. Their Lordships examined at some length the judgments of Westropp C.J., and Nanabhai Haridas J., in *Sadu* v. *Baiza*, and observed as follows :—

> " Therefore, their Lordships have before them the well-considered judgment of the High Court of Bombay upon this question, as well as that of the High Court of Calcutta, and it appears to them that the learned Judges of those Courts put a right construction upon the law as stated in the Mitakshara."

The Madras case of *Ranoji* v. *Kandoji* was also cited to their Lordships, but no reference was made to it in the judgment

This decision was the first authoritative recognition of the status of the illegitimate son of a Sudra as a son and a member of the family, and it seems to have considerably influenced the course of decisions in India. In *Ramalinga Muppan* v. *Pavadai Goundan, supra*, a Madras case, Bhashyam Ayyangar J. expressed the opinion that the illegitimate son of a Sudra was in a position more analogous to that of a legitimate son than to that of other relations whose right of inheritance was liable to obstruction. In a later Madras case, *Subramania Ayyar* v. *Rathnavelu Chetty* (1918), 41 Mad. 44, Kumaraswami Sastriyar J. observed that so far as the Smriti writers were concerned, the position of the illegitimate son was by no means inferior to that of an adopted son, and he expressed his dissent from the view taken by Muttusami Ayyar J. in *Ranoji* v. *Kandoji* that the share of inheritance given to the illegitimate son was merely in lieu of maintenance. The learned Judge said :—

> " With all respect, an examination of the Smritis shows that there is nothing in them to support the view as to the share being given in lieu of maintenance or to suggest that at some period the illegitimate son's rights were enlarged, he being given a share in lieu of maintenance. An examination of the development of Hindu law as to the various forms of marriages and the twelve classes of sons shows that greater importance was being gradually attached to marriage and legitimacy, and that even in the time of Manu and Yajnavalkya distinctions based on these considerations were drawn between the various classes of sons. It is hardly likely that if the Sudra illegitimate son was not in the pale of heirs at any anterior period he would have been given the extensive rights conferred in lieu of a bare right of maintenance."

On a consideration of the texts and the cases on the subject their Lordships are of opinion that the illegitimate son of a Sudra by a continuous concubine has the status of a son, and that he is a member of the family ; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son ; that where the father has left no separate property and no legitimate son, but was joint with his collaterals, as in the present case, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but he is entitled as a member of the family to maintenance out of that property ; that his position in this respect is analogous to that of widows and disqualified heirs to whom the law allows maintenance because of their exclusion from inheritance and from a share on partition, and that the Court may, as in their case, award not only future but also past maintenance, so far as it is not barred by the law of limitation, and may direct the same to be secured by a charge on the joint family property. Their Lordships express no opinion as to whether the illegitimate son would have any rights of maintenance out of the joint family property if the father left separate property or if such property was not sufficient for his maintenance.

For the reasons stated above, their Lordships agree with the conclusion reached by the High Court. The decree, however, cannot stand in its present form. Though the judgment of the learned trial Judge says that " the maintenance will be a charge upon the property (242, Police Commissioner's Road)," the decree, as passed by him and confirmed by the High Court, provides for the payment of maintenance and costs out of " the assets of P. M. A. Muthia Chetty, the first defendant herein since deceased," and similar words are also used in the decree of the High Court which directs payment of the costs of the appeal. It is obvious that the undivided interest of a coparcener does not, after his death, constitute his assets, and their Lordships think that the decree of the High Court should be amended (*a*) by adding after the words " in favour of first and second plaintiffs " the words " with this alteration that the words ' the immovable properties mentioned in the schedule hereto ' shall be substituted for the words ' the assets of P. M. A. Muthia Chetty the first defendant herein since deceased ' " in clause 1 of the decree of the first Court, and for similar words also in clauses 4 and 6 thereof, and (*b*) by substituting in the decree of the High Court the words " the immovable properties mentioned in the schedule hereto " for the words " the assets of P. M. A. Muthiah Chetty, the deceased first defendant, come to their hands as his undivided coparceners and legal representatives."

In the result, their Lordships are of opinion that this appeal fails, and that the decree of the High Court should be confirmed with the amendments indicated above, and their Lordships will humbly advise His Majesty accordingly. The appellants must pay the respondents' costs of this appeal.

In the Privy Council.

P. M. A. M. VELLAIYAPPA CHETTY AND OTHERS

v.

NATARAJAN AND ANOTHER.

DELIVERED BY SIR DINSHAH MULLA.

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