

## PRIVY COUNCIL

Kamulammal, (Since deceased) now represented by Kattari Nagaya Kamarajendra  
Ramasami Pandiya Naicker

Vs.

T. B. K. Visvanathaswami Naicker, since deceased

P. C. A. Appeal No. 45 of 1919

(Lords Buckmaster CJ. Phillimore, Lord Salvesen, J. Sir Lawrence Jenkins and Mr.  
Ameer Ali.JJ.)

20.12.1922

### JUDGMENT

#### **Sir Lawrence JenkinsJ.**

1. This is an appeal from a decree dated the 26th October 1915, of the High Court of Judicature at Madras, which varied a decree dated the 14th October, 1905, of the Court of the Subordinate Judge of Madura.
2. The case started as far back as the 25th April, 1902, and is one of much detail in which numerous issues have been raised; but the points now in contest have been reduced to two, and it will only be necessary to set forth so much of the complicated story as relates to them.
3. In December, 1888, KamarajaPandiyaNaicker, the Zamindar of Bodinaickenur, a Sudra by caste, died, and there survived him (among others) his illegitimate son the original plaintiff in the suit, his wife the original 1st defendant, his daughter the second defendant, and certain col lateral agnates who are parties to the suit. He left no legitimate male issue. The appellant set up a paper-writing as her husband's last will. Both Courts have held it not proved. Though this finding has been questioned in the appellant's case, its propriety is, in their Lordships' opinion, concluded by the concurrent findings of the Courts in India. and so the only point left for decision is whether the plaintiff as the sole illegitimate son of the late Zamindar, was entitled as against the appellant, the lawfully-married widow, to a one-third or a one-half share in the personal or self-acquired properties of the Zamindar.

4. The Subordinate Judge decreed only one third in his favour; the High Court held him entitled to one-half. From this decision the widow has appealed. Both the widow and the illegitimate son have died during the litigation, and representatives have been substituted in their place. The rights of the illegitimate son of a Sudra in the Madras Presidency rest principally on a text of Yajnavalkya as explained and developed in the Mitakshara and other authoritative commentaries.

5. In the concluding section of Chapter I of the Mitakshara the right of a son by a female slave in the case of a Sudra's estate are considered. It is conceded that the plaintiff comes within the scope of the section. In paragraph I the text of Yajnavalkya is quoted, and in the second paragraph it is interpreted. According to Colebrook's translation, they run as follows:-

"1. The author next delivers a special rule concerning the partition, of a Sudra's wealth. Even a son begotten by a Sudra 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 daughters' sons."

"2. The son begotten by a Sudra 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 brethren 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 a 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.'

6. The words enclosed in brackets are a gloss by Balambhatta or Subodhini.

7. Here the contest is between the illegitimate son and the widow, and though the widow is not named in the text it is well settled that as a preferential heir to the daughter's son she is included among those who share with the illegitimate son, and it would serve no useful purpose to speculate why she was not mentioned in the text. But the measure of the respective shares still has to be determined. The text and the commentary speak of the illegitimate son being made partaker of a moiety of a share or participating for half a share, but there is no explicit statement as to the unit in which he is to take his half-share. There are two possible views - either that he is to take one-half of the other participant's share, or one-half of what the illegitimate son would have taken, had he been legitimate.

8. Mr. J. R. Gharpure, an able Sanskritist and a vakil of the Bombay High Court, in his recent translation of the Mitakshara, renders the text of Yajnavalkya as providing that the brothers should make the illegitimate son "a half sharer"; and his translation of Vijnaneswara's commentary on this text is "these brothers should make that son of the female slave a half-sharer, i. e., they should give him a half from their own allotment." He appends a foot note in which he says this is made clearer by Balambhatta and Subodhini, and gives what purports to be a quotation from Balambhatta and Subodhini in these words. "From the entire estate a half of what would be regarded as his share, i. e., one-half of the amount allotted to a legitimate issue." Their Lordships have unfortunately had no opportunity of examining these authorities. This rendering "half-sharer," which is not without significance, is also to be found in RaoSahebMandlik's translation of Yajnavalkya's text.

9. In the SarasvatiVilasa this text is cited, and the comment on its is in these terms. "The meaning is that even when there is a daughter's son, the son of the female slave takes only a half" (paragraph 396).

10. The Dattaka-Chandrika, Ch. V, 31, deals with the text as follows, " Therefore if any even in the series of heirs down to the daughter's son, exist, the son by a female slave does not take the whole estate, but only shares equally with such heir." Though the Dayabbaga is not a governing authority in Madras it is worthy of notice that in commenting on this text, JimutaVahana lays down that if there be daughter's son, the illegitimate son shall share equally with him, adding the explanation that as no special provision occurs it is fit that the allotment should be equal (Ch. IX, 31).

11. The Daya-Krama-Sangraha, another Bengal authority, is to the same effect (VI, 1-35). In Colebrook's Digest the rule is further elaborated, and it is there said that "after the death of the father, if no such will had been declared, the brethren born of a wife legally married shall allot him half a share - that is, half of such share as would have been assigned had his mother been legally married. Consequently a son by a female slave not superior in class to her Sudra master shall obtain the moiety of a full share."

12. These last cited commentaries, while not of governing authority in Madras, at any rate show the sense in which the text has been understood elsewhere.

13. Though in Ch. I, Section XII, of the Mitakshara there is no explanation of how the half share is to be computed, still in another part of the treatise there are directions which indicate the method of computation approved by its author in the ascertainment of fractional shares. Thus in Ch. I, Section VII, paragraph 5, it is provided that "sisters

should be disposed of in marriage, giving them as an allotment the fourth part of a brother's own share." In paragraph 6 it is said that the meaning is that the girl shall be allowed to participate for a quarter of such a share as would be assignable to a brother of the same rank with herself. This is worked out in paragraph 7 as follows:-

"For example, if a person had only a Brahman wife and leaves one son and one daughter, the whole paternal estate should be divided into two parts and one such part be sub-divided into four; and the quarter being given to the girl, the remainder shall be taken by the son. Or, if there be two sons and one daughter, the whole of the father's estate should be divided into three parts; and one such part be sub-divided into four and the quarter having been given to the girl, the remainder shall be shared by the sons. But if there be one son and two daughters the father's property should be divided into thirds, and two shares, be severally sub-divided into quarters; then, having given two quarter shares to the girls, the son shall take the whole of the residue. It must be similarly understood in any case of an equal or unequal number of brothers and sisters alike in rank."

14. In the second volume of Norton's Leading Cases p. 499, reference is made to a case of *Annasamy Moodelly v. Tandavaraya, Madras S. R.*<sup>1</sup> for and the ruling is stated in these terms, "Where a plaintiff (illegitimate) and defendant (legitimate) were two brothers, the property was divided one-quarter to the plaintiff, three-quarters to the defendant." This would be in conformity with the rule of division that would give an illegitimate son one-half of the share to which he would have been entitled had he been legitimate.

15. Reference, however, has been made to *Gangabai v. Bandu*,<sup>2</sup> where it was decided by the Bombay High Court that in a competition between the widow and an illegitimate son, the son took only one-third. But from the judgment delivered, it is apparent that this conclusion was not in accordance with the view that the learned judges took of the text and the commentaries, but was founded on what they understood to be the case law of the Bombay Presidency.

16. If the true method of computation be to allot to the illegitimate son one-half of what he would have taken had he been legitimate, then where the competition is between the illegitimate son and the widow the allotment of the respective shares presents no difficulty. Such a son if born of a lawfully-wedded wife would have taken the whole; by reason of his illegitimacy this would be reduced to one half; and so he and the lawfully-married widow would take in equal shares.

17. In Madras this result, according to the judgment of the High Court now under appeal, has the support of the case-law of that Presidency, and it was definitely stated in the course of the present argument, without being controverted, that as between an illegitimate son and a law fully-wedded widow there has been no departure in Madras from the rule of equal shares.

18. The learned Judges of the High Court after a reference to the decisions, say, "In this state of things we are not prepared to depart from the course of decisions in this Court, which hold that the plaintiff is entitled to share equally with the widow." This, in their Lordships' opinion, was the right conclusion at which to arrive, and they will accordingly humbly advise His Majesty that this appeal be dismissed with costs. There will be only one set of costs.

Appeal dismissed.

1. 1860, p. 11,
2. 40 Bom. 369,