

BOMBAY HIGH COURT

Tukaram Krishna Patil

Vs

Dinkar Bisbat Mahadu

(Patkar and Broomfield, JJ.)

11.09.1930

JUDGMENT

Patkar J.

1. This was a suit brought by the plaintiffs Shankar and Dinkar for possession of certain property on the ground that they were the dasiputras of one Mahadu Daryaji Patil who died in February 1924. Defendant No. 1 the brother of Mahadu contended that the plaintiffs were not the dasiputras of the deceased Mahadu, and that Mahadu and defendant No. 1 were Kshatriyas and not Shudras.

2. Both the lower Courts came to the conclusion that Mahadu and defendant No. 1 were Shudras, that Shankar was born in November, 1918, that Radha's husband died on 6th August, 1918, and that, therefore Shankar was not the illegitimate son of Mahadu, but Dinkar, who was born on 10th March, 1922, was the illegitimate son of Mahadu and was entitled to succeed to the property of Mahadu.

3. In second appeal it is urged that the finding of both the Courts that Mahadu and defendant No. 1 were Shudras should not be accepted on the ground that the decision in *Maharaja of Kolhapur v. Sundaram Ayyar* was not followed by this Court in *Sabrao Hambirrao v. Radha Hambirrao*¹ and that both the Courts have not applied the test of the consciousness of the community in order to determine the varna of Mahadu. The learned Subordinate Judge applied the principle of the consciousness of the community as the test of varna and having regard to the defendant's admission before the Revenue Officers that he was a Shudras and to the fact that Mahadu's family was not one of the 96 families, came to the conclusion that they were not Kshatriyas but was Shudras. That finding was accepted by the lower Appellate Court. The finding, therefore, on this point is based on the evidence in the case, and is on a question of fact which it is difficult to interfere in second appeal.

4. It is next urged that the connexion of Radha with Mahadu was in its inception adulterous, and

therefore Radha could not be said to be a dasi of Mahadu, and Dinkar was not entitled to succeed as the illegitimate son of Mahadu.

5. In *Rahi v. Govind*² it was held that in the Presidency of Bombay the illegitimate offspring of a kept woman or a continuous concubine amongst Shudras are on the same level as to inheritance as the issue of a female slave by shudra, and at page 113 it was observed that the condition, that the Shudra woman should never have been married to any man, has in practice, been discarded in the Presidency of Bombay.

6. In *Sadu v. Baisa*³ it was held following *Rahi v. Govind*⁴ that in the Bombay Presidency, among Shudras the illegitimate offspring of a kept woman or continuous concubine are on the same level as to inheritance as the dasiputra or son of female slave by a Shudra.

7. In *Rajani Nath Das v. Nitai Chandra Dey*⁵ it was held that an illegitimate son of a Shudra was entitled as a dasiputra to a share of the inheritance, provided that his mother was in the continuous and exclusive keeping of his father, and he was not the fruit of an adulterous or an incestuous intercourse.

8. In *Gangabai Peerappa v. Bandu*⁶ it was held that among Shudras an illegitimate son of a concubine stands on the same level as to inheritance as the dasiputra. In that case the woman was a widow and lived with her paramour till his death, and it was observed at page 371 Page of 39 M.--[Ed.] that the condition that the Shudra woman of whom the illegitimate son is born, should never have been married to any man has been discarded in the Presidency of Bombay, and that among Shudras the illegitimate sons of a kept woman or concubine are on the same level as to inheritance as the dasiputra or the son of a female slave by a Shudra.

9. In *Soundararajan v. Arunachalam Chetty*⁷ It was held by the Full Bench of the Madras High Court that the illegitimate son of a Shudra by a dancing woman who was by profession a prostitute before she came into his keeping but who was kept by him in continuous and exclusive concubinage thereafter was entitled to get his appropriate share in the joint family property after his father's death, provided the connexion between his father and mother was not incestuous or adulterous, At page 150 Page of 40 B.--[Ed.] it was observed that the limitation as to her being an exclusive and continuous concubine is not to be found in the texts and appears to have been imposed by the Courts as necessary to secure due evidence of the paternity, just as the further restriction that the connexion must not have been incestuous or adulterous was imposed on general grounds of morality. It was held in *Subramania Ayyar v. Rath-avelu Chetty*⁸ that it was not necessary that the woman should be an unmarried woman.

10. It would therefore, follow from the decided cases that it is not necessary that the woman

should be an unmarried woman. She may be a widow according to the decision in *Gangabai Peerappa v. Bandu*⁹ or a common prostitute according to the decision of the Madras High Court in *Soundararajan v. Arunachalam Chetty*¹⁰

11. Golapchandra Sarkar Basin in his Hindu Law, 6th Edition, at page 299, is of opinion that the various decisions on the right to maintenance of a concubine from the estate of her deceased paramour, and their son's claim to a share therein, contemplate cases in which the concubine lived as a member of the family and that such a concubine is called *avaruddha stri*. This opinion coincides with the view of Shah, J., in *Bai Monghibai v. Bai Nagubai*¹¹ But their Lordships of the Privy Council in *Bai Nagubai v. Bai Monghibai*¹² have expressed the view that as slavery is abolished, common residence is not now necessary, whatever may have been the case when the concubine was a slave of the household, and that a concubine is entitled to maintenance out of the estate of her deceased paramour provided that the concubinage be permanent until the death of the paramour and sexual fidelity to him be preserved although the concubine be not kept in the family house of the deceased.

12. It would, therefore, follow that the woman must be in the sole keeping of her paramour and the connexion must last till the death of the paramour and the sexual fidelity to him is preserved. There is no limitation of time fixed by any of the decided cases or by the texts as to the duration of such connexion. In the Privy Council decision the period was five years, whereas in the Madras Full Bench case of *Soundararajan v. Arunachalam Chetty*¹³ the period of three years elapsed from the inception of the connexion to the birth of the illegitimate son. It would, therefore, be sufficient if the concubine was in the sole keeping of the deceased and the connexion lasted till the death of the paramour, and the illegitimate son was not fruit of adulterous connexion.

13. In the present case, even though the connexion was in its inception adulterous, it ceased to be adulterous after the death of Radha's husband on 6th August, 1918, and the plaintiff was born, four years after Radha became a widow and the connexion ceased to be illegal or forbidden by law. Though Radha's connexion with Mahadu was immoral, it ceased to be illegal or forbidden by law after Govind's death, and being of the same caste as Mahadu, it was open to her to remarry him after her husband's death. The decisions have not gone so far as to lay down that the connexion from the very inception should be free from the taint of adultery or illegality. The only condition is that the illegitimate son should not be the fruit of adulterous intercourse. I think, therefore, that Radha comes within the category of a *dasi* or continuous concubine according to the decided cases, and that the plaintiff Dinkar is *dasiputra* or the illegitimate son of Mahadu and entitled to succeed.

14. I think, therefore, that the view taken by both the Courts is correct, and this appeal must be

dismissed with costs.

15. Broomfield, J.--I agree with my learned brother that this appeal fails.

16. Of the points raised by Mr. Thakor on behalf of the appellant only one can be regarded as a point of law. He has contended that the plaintiff-respondent has not the legal status of a dasiputra because his mother Radha had only lived with his father Mahadu for five or six years (seven or eight years according to the trial Judge) and because their association was in its inception adulterous, Radha's husband Govind being still alive with Mahadu. The interesting argument in which Mr. Thakor has developed this point seems only to have disguised the fact that there is no real substance in either of the reasons that have been put forward. There is no authority for the proposition that a man and a woman must have lived together for any particular term of years in order that the woman may be entitled to the privileges of a dasi or avaruddha stri or the offspring of their intercourse to the privileges of a dasiputra. One must be able to say of the woman that she was a permanent or continuing concubine, that she consorted exclusively with the one man during the period of her association with him and that she was openly and avowedly his mistress and dependant. That was laid down by Shah, J., in *Bai Monghibai v. Bai Nagubai* 69 Ind. Cas. 291 : A.I.R. 1923 Bom, 130 : 47 B. 401 : 24 Bom. L.R. 1009(SUPRA), and to that extent the judgment of Shah.J., was unaffected by the decision of the Privy Council in appeal in the same case, *Bai Nagubai v. Bai Monghibai* 96 Ind. Cas. 20 : A.I.R. 1926 P.C. 73 : 53 I.A. 153 : 50 B. 604 : 24 A.L.J. 729 : (1926) M.W.N. 514 : 4 C.W.N. 599 : 44 C.L.J. 53 : 24 L.W. 309 : 28 Bom. L.R. 1143(Supra). To satisfy those conditions it is no doubt necessary that the association must be have lasted from some considerable time. Provided the conditions are satisfied, it seems to me it is neither necessary nor possible to be more precise as regards the duration of time. The Privy Council decision in *Bai Nagubai v. Bai Monghibai* 96 Ind. Cas. 20 : A.I.R. 1926 P.C. 73 : 53 I.A. 153 : 50 B. 604 : 24 A.L.J. 729 : (1926) M.W.N. 514 : 4 C.W.N. 599 : 44 C.L.J. 53 : 24 L.W. 309 : 28 Bom. L.R. 1143(supra) implies that a period of five years is sufficient, and in *Soundararajan v. Arunachalam Chetty* 33 Ind. Cas. 858 : 39 M. 136 : 39 M.L.J. 793 : 2 L.W. 1247 : 18 M.L.T. 552 : (1916) 1 M.W.N. 31 (F.B.)(Supra), a person was held to be entitled to the status of a dasiputra who was born only three years after his mother began to live with his father.

17. As regards the argument based on the fact that Radha's husband was still alive with Mahadu. I am unable to see that that makes any material difference. Mr. Thakor says that it is a matter of first impression, and we have not been referred to any reported case in which the facts were precisely the same. But, in my opinion, the authorities are wide enough to cover the present case. It is perfectly well-settled that no person who is himself the offspring of an adulterous intercourse can claim a share as dasiputra; but that is not the position in this case. The plaintiff's mother had been a widow for four years when the plaintiff was born, and I can see no essential difference

between the facts of this case and the facts in *Gangabai Peerappa v. Bandu* 32 Ind. Cas. 986: 40 B. 369 : 18 Bom. L.R. 70(*supra*), As my learned brother has pointed out, it was held as long ago as *Rahi v. Govind* 1 B. 97, that it is no longer a necessary condition that the woman should not have been married to another man. In this case it appears that Radha had never lived with Govind who is said to have been a leper. Before she came to live with Mahadu, she had been the mistress of another man, Vithu, but that, fact is immaterial. In *Soundararajan v. Arunachalam Chetty* 33 Ind. Cas. 858 : 39 M. 136 : 39 M.L.J. 793 : 2 L.W. 1247 : 18 M.L.T. 552 : (1916) 1 M.W.N. 31 (F.B.)(*Supra*) the woman held to be entitled as a *dasi* had been previously a professional prostitute. The fact seems to be that, provided the conditions mentioned above are fulfilled, the antecedents of the woman do not count.

18. An illegitimate son can only be entitled to a share in his father's property if the parties are Shudras. In this case the parties are Marathas. The question was raised at the trial whether the family in question is of the Kshatriya, or Shudra caste. Both the lower Courts have held that the parties are not Kshatriyas but Shudras. On the face of it that appears to be obviously a question of fact. Mr. Thakor, relying on some remarks of Madgavkar, J., in *Subrao Hambirrao v. Radha Hambirrao* 113 Ind. Cas. 497 : A.I.R. 1928 Bom. 295 : 52 B. 497 : 30 Bom. L.R. 692(*Supra*) has argued that, in order to decide whether a particular Maratha family belongs to the Kshatriya caste or the Shudra caste, caste consciousness or the consciousness of the community is an important factor, that caste consciousness may be proved by the evidence of the members of the community, that the lower Courts have ignored the evidence of certain members of the community who were examined, and that this amounts to a mistake of law which enables the whole question to be re opened even in second appeal. The evidence, however, of these Maratha witnesses has not been ignored by the lower Courts. What the learned Assistant Judge says is that their evidence is interested. That does not seem to be an unreasonable description of the evidence of witnesses who are claiming a higher status not only for the defendant but for themselves. There is nothing in the judgment in *Subrao Hambirrao v. Radha Hambirrao* 113 Ind. Cas. 497 : A.I.R. 1928 Bom. 295 : 52 B. 497 : 30 Bom. L.R. 692(*Supra*) which makes it incumbent on the Court to attach importance to interested evidence. Further the lower Courts have given other reasons for not relying on the evidence of these Maratha witnesses. It seems to me to be purely a question of appreciation of evidence and not a matter of Law at all. But, as my learned brother has pointed out, if the argument based on caste consciousness has to be considered, it would appear to tell rather against the defendant than in his favour seeing that in the heirship inquiry by the revenue authorities he himself admitted that he was of shudra caste.

Cases Referred.

113 Ind. Cas. 497 : A.I.R. 1928 Bom. 295 : 52 B. 497 : 30 Bom. L.R. 692
21 B. 97

34B 37 F.B.)

4 1 B.97

563 Ind. Cas. 50 : A.I.R. 1921 Cal. 820 : 48 C. 643 : 32 C.L.J. 433 : 25 C.W.N. 453 : (F.B)

632 Ind. Cas. 986: 40 B. 369 : 18 Bom. L.R. 70

733 Ind. Cas. 858 : 39 M. 136 : 39 M.L.J. 793 : 2 L.W. 1247 : 18 M.L.T. 552 : (1916) 1 M.W.N. 31 (F.B.)

842 Ind. Cas. 556 : 41 M. 44 : 22 M.L.J. 94 : 6 L.W. 149 : 33 M.L.J. 224 : (1917) M.W.N. 688 (F.B.)

932 Ind. Cas. 986: 40 B. 369 : 18 Bom. L.R. 70

1033 Ind. Cas. 858 : 39 M. 136 : 39 M.L.J. 793 : 2 L.W. 1247 : 18 M.L.T. 552 : (1916) 1 M.W.N. 31 (F.B)

1169 Ind. Cas. 291 : A.I.R. 1923 Bom, 130 : 47 B. 401 : 24 Bom. L.R. 1009

1296 Ind. Cas. 20 : A.I.R. 1926 P.C. 73 : 53 I.A. 153 : 50 B. 604 : 24 A.L.J. 729 : (1926) M.W.N. 514 : 4 C.W.N. 599 :

44 C.L.J. 53 : 24 L.W. 309 : 28 Bom. L.R. 1143

1333 Ind. Cas. 858 : 39 M. 136 : 39 M.L.J. 793 : 2 L.W. 1247 : 18 M.L.T. 552 : (1916) 1 M.W.N. 31 (F.B.)