

(1875) 03 CAL CK 0001

Calcutta High Court

Case No: None

Narain Dhara

APPELLANT

Vs

Rakhal Gain, Guardian of
Jonardon

RESPONDENT

Date of Decision: March 6, 1875

Citation: (1876) ILR (Cal) 1

Hon'ble Judges: Mitter, J; Markby, J

Bench: Division Bench

Judgement

Mitter, J.

From the foregoing statement it is clear that the defendant put the legality of her marriage, and consequently the legitimacy of her son, upon a social custom obtaining among her caste people.

2. The contention raised in special appeal is that the decision of the lower Court, both on the question of the validity of the marriage and the heritable rights of an illegitimate son of a sudra, is erroneous in law; and I am of opinion that this contention is valid. After having expressed his opinion that an illegitimate son of a sudra under the Hindu law inherits his putative father's property, the District Judge, with reference to the question of marriage, says: "But more than this I am not at all sure that the son is illegitimate; the defendant lived as his wife with Radhoo for twenty years, and still asserts that she was married to him. The marriage therefore may, I think, be presumed, and the disproof of it lies upon the plaintiff. I cannot say that he has succeeded in disproving it."

3. In an ordinary case, where it is established that parties have lived together as husband and wife for a long length of time, it is consonant with natural justice to presume a valid marriage between them; and I am not aware of any peculiar provision in the Hindu law which is inconsistent with such a presumption as this. But in this case there is no room for it, for the parties are of different castes, and a valid marriage between them is impossible, unless sanctioned by any peculiar social

custom governing them; see Vyavastha Darpana, p. 1038, and Ward's Account of the Hindus, vol. i, p. 94. It is for this reason we find that the defendant, in her written statement, alleges that the marriage between her and the deceased Radhoo was valid by the usage obtaining amongst her caste people. Of this custom she has given no evidence, and it is possible that the attention of the parties was not called to this matter on account of the form in which the issue regarding the legitimacy of the defendant's son has been framed. But it is clear that, upon the materials upon the record, the lower Appellate Court, having regard to the particular facts of this case, was legally not warranted in making any presumption in favour of the validity of the alleged marriage between the defendant and the deceased Radhoo. Therefore the judgment of the District Judge upon this matter is erroneous in law.

4. The next question we have to consider in this case is whether or not an illegitimate son of a sudra can succeed to the property of his putative father. The lower Courts have relied upon a decision of the Judicial Committee of the Privy Council, quoted in Cowell's Lectures, 1870, page 171, in support of their view--*Inderan Valungypuly Taver v. Ramaswamy Pandia Talaver* 3 B.L.R. P.C. 1. It is a Madras case; and before discussing whether it is applicable or not, it will be better to examine the authorities of the Bengal school of the Hindu law bearing upon the question before us.

5. In the Dayabhaga, the leading authority of the Bengal school, the passage which is supposed" to favour the contention of the illegitimate son is to be found in v. 29 of Chap. ix. This chapter deals with the subject of the participation of sons by women of various tribes, and v. 2 clearly shows that they are not illegitimate sons, but legitimate issue of married weaves of various tribes, the shasters in ancient time legalising intermarriage. But in the present age, the provisions relating to intermarriage are not extant, but have become obsolete. Therefore it is questionable whether the provisions of that chapter are binding now; see note, page 14, Vyavastha Darpana. But passing over that objection, let us see how far the passage quoted supports the view of the law taken by the Courts below. The v. 29 as translated by Mr. Colebrooke, runs thus: "But the son of a sudra, by a female slave or other unmarried sudra woman, may share equally, with other sons, by a consent of the father. Thus Menu says--"A son, begotten by a man of the servile class on his female slave, or on the female slave of his slave, may take a share of the heritage, if permitted: thus is the law established." "The passage as translated certainly 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." There is a similar inaccuracy in v. 31, which should stand thus: "Having no other brother begotten on a married woman (he) may take the whole property: provided there be not a daughter's son. So Yajnavalkya ordains:

"One who has no brother may inherit the whole property for want of daughter's sons." But if there be daughter's son, he shall share equally with him ; for no special provision occurs: and it is fit that the allotment should be equal; since the one, though born of an unmarried woman, is son of the owner, and the other, though sprung from a married woman, is only his daughters' son."

6. These passages as corrected will appear to accord with the quotation from Menu in v. 29 of Chap ix, which has been cited as their authority; but as they stood before they would seem to go much further than the text of Menu warranted. Therefore, it is evident from these verses, if we read them correctly, that they do not lay down that all illegitimate sons of sudras inherit their father's property, but only a particular class,--viz., those begotten by a man of the servile class on his female slave or on the female slave of his slave." In Mitakshara, Chap, i, Section 12, there occur the following passages:

1. The author next delivers a special rule concerning the partition of a sudra's goods. 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 daughter's 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 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 sudra 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.

7. The same rule of law is to be found in the Dattaka Chandrika, Section 5 v. 30 and the third volume of Colebrooke's Digest, Bk. v., v. 174 (the aforesaid inaccuracy of translation as has been pointed out before also occurs in Bk. v., v. 174 of Colebrooke's Digest).

8. From all these texts of the Hindu law, it is evident that so far as the districts governed by the Bengal school of the Hindu law are concerned, the lower Courts are not correct in laying down broadly that all illegitimate sons of sudra succeed to the inheritance of their father. Sir W. Macnaghten also takes the same view of the law. In his treatise on Hindu law, vol. i, pi 18, he says: "Among the sons of the sudra tribe an illegitimate son by a slave girl-takes with his legitimate brothers a half share, and

where there are no sons (including son sons and grandsons) but only the son of a daughter, he is considered as a co-heir, and takes an equal share." In a note in page 15 of the second volume of the same work, he observes: "According to the Hindu law, the illegitimate son of a sudra man by a female slave, or a female slave of his slave, may inherit, but not the illegitimate child of any of the three superior classes. It appears in this case that the parties are sudras; but it is not distinctly stated whether the eldest brother died previously or subsequently to the death of any or all of his other three brothers, or whether the woman on whom the plaintiff was begotten by him was one of the fifteen descriptions of slaves, or was merely a concubine. If the woman were his slave, and the other three brothers died before the eldest, then the son begotten by him on the female slave would be entitled to the entire property. On the other hand, if one or more of the brothers died subsequently to the death of the eldest brother, the illegitimate son would be entitled to claim only such portion as belonged to his putative father, there being no law admitting the son of a sudra by a female slave to share the estate of the collaterals. If the woman were not his female slave, the son begotten on her by him would have no right to the inheritance, but only a claim to maintenance; and under no circumstances could the son of the sister begotten as above have any right to succeed to his mother's brothers."

9. From an examination of these authorities, it is clear that according to the doctrines of the Bengal school of the Hindu law, a certain description of illegitimate sons of a sudra by an unmarried sudra woman is entitled to inherit to their father's property in the absence of legitimate issue. It has never been contended, far from being established, in this case, that the minor son of Radhoo, whose right has been set up by the defendant in answer to the plaintiff's claim, falls within that class. Consequently that son is not entitled to inherit to Radhoo's property: and he being put out of the way, the plaintiff's, right is clearly established. Therefore, the decisions of the lower Courts are opposed to the provisions of the Hindu law.

10. We have next to determine whether the conclusion at which the courts below have arrived can be supported upon the authority of the decision of the Judicial Committee of the Privy Council quoted by them, *Inderan Valungypuly Taver v. Ramaswamy Pandia Talaver* 3 B.L.R. P.C. 1.

11. Two questions were at issue in that case, viz., 1st "whether there was a marriage in fact; and secondly, if there was a marriage in fact then whether there was a marriage in law." Upon the evidence, the first question was decided in the affirmative. "Then if there was a marriage in fact," their Lordships observe, "was there a marriage in law? When once you get to this, viz., that there was a marriage in fact, there would be a presumption in favour of there being a marriage in law."

12. Having made this presumption, their Lordships proceed to examine the grounds upon which it was contended that, notwithstanding that presumption, the marriage was invalid in law. The ground upon which this contention was founded was that the

father of the mother of the plaintiff in that case was illegitimate therefore the child of that father, being an outcaste, could not contract a valid marriage. After observing that there is no authority to support any such proposition as that which is contended for, they further observe: "Though their Lordships do not agree in everything that has been stated in the Court of Appeal, they are satisfied that in the sudra caste illegitimate children may inherit and have a right to maintenance."

13. They, therefore, clearly do not entirely endorse the view taken by the High Court of Madras in that case See 1 Mad. H.C. 478. Referring to that judgment, it appears that that Court held that the son of a sudra and of a woman between whom there has been no formal ceremony of marriage inherits his putative father's property. Their Lordships expressly say that they do not wholly concur with the Madras High Court in laying down this as a correct proposition of law; but they say that, in the sudra caste, illegitimate children may inherit and have a right to maintenance, or may inherit in certain cases and have a right to maintenance in all cases. Such a proposition as this is clearly consonant with the authorities we have been examining in this case: and the effect of that observation in that particular case before their Lordships was to show that the argument of the party contending against the validity of the marriage was based upon the assumption that an illegitimate child is necessarily an outcaste,--an assumption not true in all cases. It appears to me, therefore, that the decision quoted by the lower Courts, far from supporting their conclusion, goes in a great way to show that an illegitimate child does not necessarily in all cases possess heritable rights, even amongst the sudras.

14. For these reasons I think that the decision of the lower Courts upon the materials now upon the records cannot stand. But from the nature of the issues laid down in the Munsif's Court, it appears to me that the question of custom, which was distinctly raised in the defendant's written statement, and in fact upon which the defendant's case was solely made to rest, was wholly lost sight of in both the Courts below. It is possible, therefore, that in respect of this particular matter of the defendant's defence, she having been misled by the form of the issue, has been precluded from adducing any evidence in support of it. Upon this ground I am inclined to give her an opportunity of establishing her defence, if she can. I would therefore remand the case for the adjudication of this issue, viz., whether by any usage or custom prevailing amongst the caste people of the defendant there could be any valid marriage between her and Radhoo. Costs to follow the result.

Markby, J.

15. I entirely concur with my learned colleague in thinking that the lower Courts are wrong in laying down broadly and without restriction that the illegitimate sons of a sudra can succeed to the inheritance of their father. I concur with him in thinking that the illegitimate sons of a sudra can only succeed to their father's estate in certain cases; and that, in this case, if the son of Radhoo be illegitimate, he will not succeed.

16. The only doubt I have is as to the reasons given by my learned colleague for holding that the District Judge is wrong in presuming that there was in this case a valid marriage and that the son of Radhoo was therefore legitimate. I understand my learned colleague to consider that the presumption is excluded because the alleged wife is of a different caste from the husband, and that, unless sanctioned by custom, such a marriage "is not legally binding. Upon a question of this kind I should hesitate greatly before I differed from my learned colleague, it being a question with which he is peculiarly well qualified to deal. I only wish to point out that no legal authority is quoted for this position. In the ancient text-books no such authority could be found, because it is admitted (1) that in ancient times the sudras were but one general caste or class (2) that in ancient times the marriage of a man with a girl of different class or caste was not prohibited. Whether the comparatively modern prohibition against intermarriage of persons of a different class or caste extends in this part of India to the modern subdivisions of the sudra caste or class is a matter of very great importance. The restrictions thus imposed would be very numerous; and restrictions upon marriage, however convenient socially, assume quite a different aspect when recognised by the law. If the law does recognise them, of course they cannot be ignored: but if it does not, it would be wrong to impose them, and I feel great hesitation in saying for the first time that there is a legal bar to these marriages.

17. I do not, however, consider it necessary to express any difference of opinion upon this point, because I see no objection to the order of remand proposed by my learned colleague. If it appears upon the evidence taken that these two classes or castes may intermarry, the presumption from cohabitation may then be made as in other cases. If, on the other hand, it be found that they cannot, there will be no room for any such presumption.