(1868) 12 CAL CK 0018

Calcutta High Court

Case No: None

Mutuswamy Jagavera Yettappa Naiken		APPELLANT
	Vs	
Venkataswara Yettappa		RESPONDENT

Date of Decision: Dec. 23, 1868

Judgement

1. The Suit out of which this appeal has arisen was brought by the respondent claiming to be an illegitimate son of a former zemindar of Yettiapooram against the appellant, the present zemindar, for maintenance out of the income of the zamindari. The suit was brought in the Court of the Principal Sudder Ameen of Tinnevelly, although that Court has no jurisdiction where the matter in dispute is of a value exceeding Rs. 10,000. The appellant, however, did not plead to the jurisdiction; and the parties proceeded to try the right in that Court, treating the suit as one for the sum of Rs. 8,400, the amount claimed for one year''s maintenance. The consequences of this procedure were that an appeal lay from the Court of the Principal Sudder Ameen to the Zilla Judge; that the judgment of the latter upon any issue of fact was final, in India, and could only be brought before the High Court at Madras, by special appeal, on some alleged error upon a point of law or procedure.

2. The issues in the cause were, first, whether the plaintiff''s mother was in the exclusive and permanent keeping of the former zemindar of Yettiapooram as his mistress; and, secondly, whether or not the plaintiff was the illegitimate issue of the said zemindar by that woman, and, as such, entitled to maintenance.

3. The Principal Sudder Ameen held that the plaintiff (the respondent) had failed to prove his title, and dismissed the suit with costs. The Civil Judge, on appeal, by his decree of the 31st of March 1864, determined both the above issues in the respondent''s favour, declared him entitled to maintenance at the rate of Rs. 2,500 per annum, and decreed that this amount should be paid annually by the appellant "from the villages forming the private property of the present zemindar''s (the appellant''s) family." This decree was brought by special appeal upon grounds, some

of which will be hereafter considered before the High Court of Madras, which, on the 3rd of January 1865, dismissed that appeal; and on the 27th of March in the same year, rejected an application for review of judgment with costs. The appellant having obtained Her Majesty''s special leave to appeal, has brought this appeal against the decree of the High Court and that of the Zilla Court of Tinnevelly; and all questions in the cause, whether of fact or of law, are, of course, open to him upon it.

4. Their Lordships, at the close of the argument for the appellant, intimated that, in their opinion, the second issue had been properly found in favour of the respondent. They will now state their reasons for coming to that conclusion, and, in so doing, will briefly recapitulate the facts of the case.

5. The appellant''s father, the then zemindar of Yettiapooram, died in 1840, leaving three sons, viz., Kumara, the alleged father of the respondent, Venkataswara, and the appellant. The zamindari, which is impartible, descended, in the first instance, to Kumara alone; and he shortly afterwards, but certainly before the 25th of December 1840, brought into his zenana as his concubine, Avadai Jangram, the mother of the respondent. She was the daughter of a Dasi or Nach girl, attached to a Pagoda, which seems to be one of the appurtenances of the zamindari; and if she had not then begun to follow, would, no doubt, but for her introduction into the zemindar''s zenana, have followed her mother''s profession with its ordinary incident, prostitution. On the 25th of December 1840, the zemindar executed in her favour an instrument, which will be afterwards considered. He built her a house within the precincts of his palace, and up to the time of his death, which took place in May 1853, she continued to be his favourite mistress. So far the parties were agreed; but whilst the respondent contends that he is the son of the zemindar by Avadai, and born after her introduction into the zenana, the appellant insists that at that time, and when her connection with the zemindar began, she had for some years been a public dancing girl attached to the Pagoda, and that she brought with her into the palace the respondent, who was then at least twelve months'' old, and her child by an uncertain father.

6. On the death of Kumara, his next brother, Venkataswara, succeeded to the zamindari. He lost little time in turning out Avadai and her son; for in November 1854 we find that the latter had brought a criminal charge in the Magistrate''s Court against the zemindar and his retainers for an alleged forcible entry, and the abstraction of jewels of considerable value. This charge ended in the razinama, or instrument of compromise, and the Magistrate''s order thereon, both bearing date the 6th of November 1854. In this razinama, the respondent is described as the son of the late zemindar of Yettiapooram, and in the body of the instrument Venkataswara is spoken of as "the paternal junior uncle of the complainant;" and in the Magistrate''s order the fact of the complainant being "the natural son of the first defendant''s elder brother" is expressly assigned as a reason for admitting the compromise.

7. Three years after this, and in November 1857, the respondent commenced a suit for the recovery of the property which was the subject of the Porappu grant of the 25th December 1840, from which, with his mother, he had been ejected by Venkataswara. In his plaint he described himself as the son of Kumara, the late zemindar of Yettiapooram. The answer of the zemindar impeached the validity of the grant by his predecessor of a village forming part of the zamindari. The reply of the respondent, on this point, was in effect that his mother being of parallel grade with the wife of his father, the zemindar, he as the illegitimate son of a Sudra by a Sudra woman was in the class capable of inheriting the zamindari, and therefore that the grant was good. In his rejoinder, Venkataswara said, that "the mere allegation that the second plaintiff was of parallel grade with the wife was sufficient to show that she was not a legal wife, but a woman as represented in the answer; and that no one would think the plaintiffs were heirs to the zamindari." But he did not then controvert the respondent''s title by a direct denial that he was the son of Kumara, the course which, though the fact was not necessarily in issue in that suit, we should have expected the zemindar to take, had the case touching the respondent''s birth, which is now set up by the appellant, been that which was then received by the family. The earliest assertion of that case of which there is any evidence, is to be found in the answer made in this suit by Venkataswara, some time in or about the year 1859, to the ground of appeal filed by the respondent on his appeal to the Zilla Court against the decree of the Principal Sudder Ameen dismissing the claim to this village. In one paragraph of that answer, it is stated that "the records show that the first plaintiff was born before the second plaintiff was kept by the late zemindar, and the statement that they are blood relations is incorrect." In these proceedings, therefore, their Lordships find strong grounds for coming to the conclusion that the respondent, for several years after the death of Kumara, continued to be reputed and admitted to be the natural son of that zemindar.

8. The decision of the suit for the village which, in the Zilla Court, as well as in that of the Principal Sudder Ameen, and on a special appeal to the Sudder Diwani Adalat, was adverse to the respondent, did not touch the question of his birth. It proceeded entirely on the ground that the grant having been made without the previous consent of Government, and not having been registered in the Collector''s Office, was not valid as against the successor to the zamindari.

9. The final decision of the last-mentioned suit was in September 1860, and the present suit was brought in September 1863, against the appellant, who, on the death of his brother during the interval, had succeeded to the zamindari. The oral evidence upon the issue whether the respondent was the illegitimate son of Kumara was certainly not very strong on either side. But if the case of the appellant were true, we should have expected that he, a powerful zemindar, in possession of the estate, with all the family records, and influencing the family dependents, would have been able to produce better evidence in support of his case than that which he

has produced. The testimony of the Brahmins and women attached to the Pagoda seems to their Lordships to be especially unworthy of credit. It has been argued that the non-mention of the respondent in the Porappu grant of the 25th of December 1840, affords an inference that he was not the son of the zemindar, nor, at that time, so recognized by him. This may be true if it be assumed that the child was then in existence; whilst, on the other hand, the mere fact that the respondent is not mentioned in the deed, taken by itself, might afford an inference in support of the theory, that he was not then born. But if it be assumed that he was, as the appellant alleges, then in existence, and known not to be the child of the zemindar, it is highly improbable that the deed should have provided for her male issue generally without at least postponing the respondent to any male issue to be thereafter born to the zemindar. And, again, if the deed were, as it has been argued, to have been a gift to the woman in the nature of a settlement made upon taking her from the Pagoda into the exclusive keeping of the zemindar, there was no absolute necessity for the mention of her son, if then in existence, whether he was or was not then the son of the zemindar. Upon the whole case their Lordships think that the evidence for the respondent confirmed as it was by the razinama and other evidence of recognition by the family after the death of Kumara, outweighed that on the appellant''s side, and justified the finding of the Zilla Judge of the second issue in his favour. They are satisfied that Kumara in his life-time recognized the appellant as his son; and they see no sufficient grounds for doubting that the appellant was in fact his natural son. They would have felt greater difficulty in coming, upon the evidence before them, to a conclusion upon the question whether the appellant was born after or before the introduction of his mother into the zenana. The admission, in his reply, as to his mother''s age, is of more weight than any of the evidence to the contrary, and that is consistent with the theory of his birth, at least a year before she became an inmate of the zemindar''s zenana; and the receipts for rent in his name, which are dated as early as February 1841, also tend to support that theory. It appears, however, to their Lordships, that if it be established that the appellant was the natural son of this Hindu father, and recognized by him as such, it is not essential to his title to maintenance that he should be shown to have been born in the house of his father, or of a concubine possessing a peculiar status therein. They concur in the judgment of the High Court upon this point, against which little, if anything, has been urged at the Bar.

10. Their Lordships further think that, subject to the observations hereafter to he made, the amount of maintenance awarded by the Zilla Judge is reasonable. And this being so, they would have recommended Her Majesty to dismiss the appeal, and confirm the decree below simpliciter, but for the point which remains to be considered.

11. The decree of the Zilla Court directed that the amount awarded as maintenance be paid annually to the plaintiff (the present respondent) by the defendant (the present appellant) from the villages forming the private property of the present

zemindar''s (the appellant''s) family. The first ground of appeal insisted upon by the Counsel for the appellant, on the special appeal to the High Court of Madras, is stated to have been "that there was no appearance of any other property than that of the zamindari, and the fastening of a life-rent on that was illegal."

12. The High Court has sought to dispose of this objection by saying, "the fact that the judgment of the Civil Judge indicates the possession of private property by the zemindar in possession, who has inherited the whole property of the plaintiff''s father, renders this objection, even if tenable, wholly inapplicable." And it proceeds to remark that the question, whether maintenance in such a case could be charged on a zamindari, was still an open one.

13. The objection involved two distinct propositions, viz.:--1st, that there was no proof of property other than the zamindari; and, 2ndly, that the maintenance could not be charged on the zamindari. And the High Court has avoided the decision of the latter question by assuming that there was a conclusive finding on the other. It may have thought that it was bound to make that assumption by the rule which excludes questions of fact from the province of a special appeal. Their Lordships, however, are disposed to think that the question, which is more pointedly raised by the first of the points stated in the application for a review, at page 35 of the Appendix, was one which, on the strictest construction of that rule, the High Court was competent to entertain on a special appeal. But be that as it may, their Lordships, who are not subject to the rule, are bound to see whether that part of the decree of the Zilla Judge, which directed the payment of the maintenance from the villages forming the private property of the zemindar, was warranted by the pleadings and evidence before him. They are of opinion that it was not. The plaint sought for payment of maintenance "out of the income of the zamindari." There is no trace in the printed record of any evidence of the existence of property other than the zamindari, or of the nature of such property, supposing that any does exist. It is obvious that the nature, as well as the existence, of any such property is a material question. The respondent may have a right to be maintained out of private property which descended from his father to the present zemindar, yet he may have none to be maintained out of private property which the zemindar has acquired in any other way.

14. If the decree be erroneous, as it stands, there remains the question whether it ought not to be simply varied, by directing payment of the maintenance out of the income of the zamindari. But the High Court has failed to determine the question whether the zamindari is so chargeable; and the parties have declined, in the present state of the record, to argue that question before their Lordships. In this state of things their Lordships however unwilling to prolong this litigation, can but remit the cause to India, with a declaration of the respondent''s status as an illegitimate son of the zemindar Kumara, and of his consequent right to maintenance. It will be for the High Court to determine whether the decree should

be varied by directing the maintenance to be paid out of the income of the zamindari, or whether it shall direct any further enquiry in order to ascertain whether there is any other property upon which it can be charged. If that Court shall find that it can be properly charged on the income of the zamindari, their Lordships are of opinion that the amount awarded by the Zilla Judge, having regard to the respondent''s status, is reasonable and ought to be decreed. But if it cannot be so charged, then, in the absence of information as to the other property on which it may be chargeable, their Lordships cannot pronounce an opinion as to the reasonableness of its amount, and they must leave that question also to be determined by the High Court on further enquiry. They trust, however, that the respondent''s title to maintenance being now conclusively ascertained, the parties will be wise enough to settle the questions that remain open by private arrangements and without further litigation. The order which their Lordships will humbly recommend Her Majesty to make is, to reverse the decree of the Zilla Court of the 31st March 1864, and the decree of the High Court of the 31st March 1865, and in lieu thereof to declare that the respondent is the illegitimate son of the former zemindar, Kumara Naiken, and as such is entitled to maintenance: and to remit the cause to the High Court of Madras, in order that such Court may determine whether, regard being had to the above declaration, the respondent is entitled to receive maintenance out of the income of the zamindari (in which case such maintenance is to be decreed at the rate of 2,500 rupees per annum); and if not so entitled, whether he is entitled, as against the appellant, to any, and what amount of maintenance, and if so, out of what property and fund, and that for the purposes aforesaid the said High Court shall be at liberty to make and direct any further inquiry that to them may seem just. Their Lordships will give no costs of this appeal.