

(1925) 11 BOM CK 0056**Bombay High Court****Case No:** Second Appeal No. 299 of 1925

Vithabai Janu Kharat

APPELLANT

Vs

Pandu Janu Kharat

RESPONDENT

Date of Decision: Nov. 17, 1925**Citation:** (1926) 28 BOMLR 595**Hon'ble Judges:** Norman Macleod, J; Coyajee, J**Bench:** Division Bench**Final Decision:** Allowed**Judgement**

Norman Macleod Kt., C.J.

The plaintiff sued for a declaration that the property in suit belonged to him and defendant jointly, and to have possession of a half of it by partition. The plaintiff was the son of one Janu by a concubine Ganga. Ganga admittedly lived with Janu as his mistress ever since she was fifteen years of age until his death, and had three children by him. But, unfortunately for the plaintiff. Ganga had a husband Mahadu. The defendant complained that the connection between Janu and Ganga was adulterous, and unless it can be proved that Mahadu had divorced Ganga, the plaintiff cannot succeed, The trial Judge was of opinion that the consent on the part of a husband to his wife living with another man would be sufficient to remove the bar of adultery, He says :-

Mahadu did not dispute the connection between Ganga and Janu, though they all lived in the same village, and Ganga was living with Janu for about twenty years since about five years before plaintiff's birth. Such an intercourse imports consent on the part of Mahadu. Defendant relays on ILR 2 Bom. 140 to show that a son by adulterous or unlawful intercourse cannot inherit, and on 2 B. H. C. R. 117 to show adulterous connection. In the last-mentioned case, there was no consent on the part of "the first husband. It will, thus, be seen that the plaintiff is entitled to be held as a dosiputra of Janu Kharat.

2. In appeal, the Judge, dealing with the evidence of Tanubai, sister of Janu, said :-

I accept this story, and conclude that Mahadu gave his active consent to Ganga staying with Janu permanently. Quite possibly there was an informal divorce as well, but about this there is no direct proof. On the fact) found I agree with the learned Subordinate Judge that the plaintiff is Janu's dasiputra.

3. Now, Tanubai must have known whether or not Mahadu had divorced Ganga. All that appears from her evidence is that Mahadu was a complacent husband, who was provided by Janu with another wife. Thereupon, he troubled himself no longer with the defection of Ganga, But it seems to me that it would be going too far towards conniving at adultery for the Court to hold on those facts that; it was bound to infer that Mahadu had divorced Ganga. I think all that the evidence can be considered to prove is that; Mahadu was indifferent to Ganga living with Janu, and from that fact we cannot infer, that Mahadu divorced her. The result must be that the plaintiff was a son of Janu by adulterous intercourse and cannot, therefore, enjoy the full rights of a dasiputra according to the Hindu law. If he were a dasiputra, then he could rely upon the decision of the Privy Council in *Ramulammal v. Visyanatha-swami Naicker* (1922) 25 Bom. L.R. 577 : 18 Bom. L.R. 70 that an illegitimate son of a Sudra inherits one-half of the share to which he would have been entitled had he been legitimate, Consequently, seeking partition against a legally married widow he takes the inheritance in equal shares with her. There is a reference in their lordships' judgment to a decision of this Court in *Gangabai Peerappa v. Bandu*. ILR (1915)40 Bom. 369 It is represented as a decision to the effect that in a competition between the widow and an illegitimate son, the son took only one-third share; but in that case the competition was between an illegitimate son and a legitimate daughter; and the principle on which the case was decided really is the same as the principle on which their lordships decided the case which I am dealing with. The various texts relating to the rights of illegitimate sons amongst Sudras are considered in the judgment, and there can be no difference on that question between the law observed in Madras and the law observed in this Presidency.

4. On our finding that the plaintiff was not a dasiputra, the appeal must succeed. The plaintiff's suit for partition fails. He is entitled, however, to maintenance, We direct the lower Court to enter upon an inquiry as to what maintenance the plaintiff is entitled to. The costs to come out of the estate.

Coyajee J.

5. For the reasons given in the judgment now pronounced by the learned Chief Justice, I am of opinion that the plaintiff has failed to prove that he is the dasiputra of Janu. It is, therefore, unnecessary to consider the extent of the share in Janu's estate to which he would have been entitled had he established the status which he claims for himself.