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sion, by notice to the tenant (No. 37), given to Bábáji as execution purchaser, by the Court, was not meant to deprive Vásudev's suit, in the event of its establishing his right, of any of its efficacy through a temporary defect of possession, while the rights of the parties had still to be brought to final adjudication. Although Vásudev's tenant received a notice not to pay rent to him, this constructive dispossession of Vásudev should not place him at any disadvantage when he had once established that it ought not to have occurred or ought to have been materially qualified. On the other hand, we think that the question of whether the debt, for which Náro's interest was sold, was one binding on the whole of the joint property, is one that we cannot at this stage entertain, as it was not raised in the Courts below.

We shall modify the decree of the District Court by declaring Vásudev entitled to joint possession along with Bábáji as tenant in common. The relative proportions of their interests, if a division in *specie* be desired, must be determined in a suit to ascertain Náro's share.

Each party to bear his own costs throughout.

Decree accordingly.

Note.—For the converse of this case see *Pándurang* v. *Bhaskar* (11 Bom. H. C. Rep. 72), which was a suit in ejectment by a purchaser at an execution sale against an undivided member of a mortgagor's family in possession of the mortgaged lands, and the cases referred to in the note at the end of that report.

[APPELLATE CIVIL JURISDICTION.]

RA'HI, WIFE OF TEJA' KURAD, AND OTHERS (DEFENDANTS AND APPELLANTS) v. GOVINDA' VALAD TEJA' (PLAINTIFF AND RESPONDENT.)

1875. September 7.

Hindu law—Effect of illegitimacy on the right of succession—Dásiputra—Pát marriage or remarriage amongst Sudras.

The general result of the authorities, both juridical and forensic, is that among the three regenerate classes of Hindus, (Brahmans, Kshatriyas, and Vaishyas,) illegitimate children are entitled to maintenance, but cannot inherit, unless there be local usage to the contrary; and that, among the Sudra class, illegitimate children, in certain cases at least, do inherit. The extent to which this right exists, considered, and the texts of Hindu law books bearing on the point referred to.

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According to Vijnyáneshvara, the author of the Mitákshara (Chap I., Section 12), the father of an illegitimate son by a *Dási* among Sudras may in his (the father's) life-time allot to such son a share equal to that of a legitimate son, and, if the father die without making such allotment, the illegitimate son by the *Dási* is entitled to half the share of a legitimate son, and, if there be no legitimate son and no legitimate daughter or son or such a daughter, the illegitimate son by the *Dási* takes the whole estate. If, however, there be a legitimate daughter or legitimate son of such a daughter, the illegitimate son would take only half the share of a legitimate son, and such daughter or daughter's son would take the residue of the property, subject to the charge of maintaining the widow of the deceased proprietor.

The *dictum* of Lord Cairns in *Sri Gajapathi Radhika* v. *Sri Gajapathi Nilamani* (13 Moore Ind. App. 497; S. C. 6 Beng. L. R. 202; 14 Calc. W. R. P. C. 33, reversing 2 Mad. H. C. Rep. 369),—"Supposing the sons, or either of them, to have been legitimate, the widow (of Padmanabha) could have been entitled to maintenance only. Had both the sons been illegitimate, their claim, unless some special custom governed the case, (which is not in proof,) would have been to maintenance only. In this last-named case the widow would have had the ordinary estate of a Hindu widow"—commented upon and explained.

The terms *Dási* and *Dásiputra*, as defined by various writers on Hindu law, discussed, and the rights by inheritance of a *Dásiputra* considered.

The condition that, in order to entitle the illegitimate offspring of a Sudra woman by a Sudra to inherit the property of the latter, or a share in it, she should, according to Jimuta Vahana and Nilkanthá, be an unmarried woman, has, in practice, been discarded in the Presidency of Bombay.

In this Presidency the illegitimate offspring of a kept woman, or continuous concubine, amongst Sudras, are on the same level as to inheritance as the issue of a female slave by a Sudra.

The custom of *Pát* marriage among the Maráthas, and *Nátrá* amongst the inhabitants of Guzerát, referred to, and the authorities bearing on the subject considered and discussed.

The sons of a *Punarbhu* (twice-married woman) by a duly-contracted *Pát* marriage, *i.e.*, in accordance with the custom of the caste, are legitimate and, as to the right of inheritance and extent of shares, rank on a par with the sons by *lágna* marriage.

G, a Sudra woman, was married to T (also a Sudra) by *Pát* marriage, without having received a *chhor chiti* (release) from her first husband, who was then living, or obtained any other sanction of her *Pát* with T :—

Held that the intercourse between G and T was adulterous, and that, therefore, the plaintiff, their son, being the result of such intercourse, was not entitled to take as *heir* even to the extent of half a share, and was not a *Dásiputra* within the scope of Yajnyávalkya's text, or recognized as such by other commentators. He was, however, held entitled to maintenance, as he had been recognized by T as his son.

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THIS was a special appeal from the decision of C. B. Izon, Acting Joint Judge at Tanna, reversing the decree of Váman Ganesh Bakhle, Subordinate Judge at Sinnar.

The facts of the case were as follows :—Tejá Kurad died in 1866, leaving, surviving him, the defendants (special appellants) Ráhi his widow, and Dhondi and Sakhu, his daughters. The fourth and fifth defendants, Mahádyá and Phulchand, were distant male relations of Tejá Kurad. The plaintiff Govindá claimed, as his son and heir by Gau, an alleged wife of Tejá by the *Pát* ceremony, to be entitled to certain lands. Tejá died without leaving any male issue other than Govindá. Previously to her connection with Tejá, Gau had been, by *lagna*, the wife of Bhágu, from whom she separated herself and went to live with Tejá for some time, during which Govind was born to her. Tejá believed Govindá to be, and treated him as, his son. The defendant Ráhi, Tejá's *lagna* wife, and the husband of Tejá's daughters (the second and third defendants) and defendant Mahádyá had also described and treated Govindá as the son of Tejá.

The Subordinate Judge found that Govindá was not the son of Tejá, either legitimate or illegitimate, and dismissed his suit with costs.

The Joint Judge (Mr. Izon) reversed the decree of the Subordinate Judge, and made a decree for the plaintiff with costs against the four first defendants. He found, as a fact, that there had been a ceremony of marriage solemnized between Tejá and Gau, but that it was invalid, inasmuch as Bhágu, the husband of Gau by *lagna*, was then living, and there was not any sufficient evidence that he had divorced her. He further found that Govindá was the illegitimate son of Tejá and, being a Sudra, was, in default of a legitimate son, his heir.

The case was argued before WESTROPP, C.J., and LARPENT, J., on the 5th July 1875.

Gokuldás (for *Dhirájlál Mathurádás*, Government Pleader) for the appellants.—Plaintiff's mother, Gau, had been lawfully married to Bhágu. There is nothing to show that Gau and her husband

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Bhágu had no access to each other, while Gau lived with Tejá as his wife by *Pát* marriage.

[WESTROPP, C.J.:—Do you wish to have an issue on that question ?]

Such issue is unnecessary, as it has been found by the lower Courts that Gau's marriage with Bhágu had not been dissolved at the time of her alleged *Pát* with Tejá. A woman who remarries in the life-time of her first husband cannot be regarded as the lawful wife of her second husband: *Khemkor* v. *Umiáshankar* (1). No custom can render such second marriage legal and valid: *Reg.* v. *Karsan Goja* (2). Tejá's intercourse with Gau, therefore, was adulterous. Plaintiff, consequently, as the result of such intercourse, could not be considered as an illegitimate son of Tejá, who would be entitled to inherit his (Tejá's) property under the Hindu law, in preference to Tejá's widow and daughters or their offspring. The expression "illegitimate sons" used by Strange, Macnaghten, and some other writers on Hindu law is rather misleading. The "illegitimate sons" who are entitled to inherit by Hindu law among the Sudras are sons of slaves (*Dásiputra*), expressly mentioned in that law. A *Dásiputra*, according to the writers on Hindu law, is "the son of a female slave". No more extended meaning should be given to that term. Plaintiff is not a *Dásiputra* within the meaning of that definition. His mother, Gau, was not the *Dási* (a female slave) of Tejá, whose property plaintiff now seeks to recover. The subject has been fully discussed in *Parisi Nayudu* v. *Bangaru Nayudu* (3). According to that case, to entitle the illegitimate sons of a Sudra by a Sudra woman to inherit a share in the family property, the woman must have been unmarried. The learned pleader also referred to Vyav. May. Ch. IV., Sec. 4, pl. 32 (Sto. H. L. Bks. 55); Mit., Ch. I., Sec. 12, pl. 2 (Sto. H. L. Bks. p. 426); I. West and Bühler, pp. 47, 48; Steele on Hindu Law and Customs, pp. 41, 179.

Shántárám Náráyan for the respondent.—The objection that plaintiff is not entitled to inherit, on the ground that he is not

(1) 10 Bom. H. C. Rep. 381. (2) 2 Bom. H. C. Rep. 117.
(3) 4 Mad. H. C. Rep. 204.

Teja's illegitimate son by a slave or *Dási*, was never taken in the Courts below. Moreover, the meaning of the word *Dási*, as given by Professor Wilson in his Sanskrit and English Dictionary, is sufficiently large to include a woman of Gau's position in the present case, and to entitle her son to succeed to Teja's property. The cases mentioned by Messrs. West and Bühler at pages 53, 56, 57, and 59 of the first volume of their work support plaintiff's claim.

The judgment of the Court was delivered by

WESTROPP, C.J., who having stated the facts proceeded as follows:—

The findings of fact of the Joint Judge are, in special appeal, binding on this Court. Teja Kurad, Gau, and all of the parties to this suit, are admitted to belong to the Sudra tribe, and it has not been denied that their caste is one in which the custom of remarriage prevails. The pleader for the special appellants at first contended that non-access of Bhágu to Gau was not found as a fact, but when offered by this Court an issue on the question of access or non-access, declined it, and abandoned that point. He contended, however, that as the *Pát* marriage was void, inasmuch as Gau had not been divorced from Bhágu, who was still living, the plaintiff must be regarded as the result of an adulterous intercourse, and, therefore, could not be deemed such an illegitimate child as might, by the Hindu law applicable to Sudras, succeed to the estate of his putative father. Whether, under such circumstances, the plaintiff is entitled, as illegitimate son of Teja Navsáji, to succeed to the land in dispute, is the main question now before us.

In the arguments upon that question, the scope of the term *Dásiputra*, frequently employed by Hindu jurists who have treated of the rights of illegitimate offspring, has been much discussed. Translators of those authors have usually rendered that term as "the son of a female slave"; and for the special appellants it has been contended that *Dásiputra* cannot be accepted as having any more extended signification. Whether it can be so limited, we shall proceed to consider after we have referred to those passages in the Sanskrit works of chief importance in this Presidency which touch the rights of illegitimates, first, however,

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premising, as the general result of the authorities both juridical and forensic, that amongst the three regenerate classes of Hindus, (Brahmans, Kshatriyas and Vaisyas,) illegitimate children are entitled to maintenance; but, unless there be local usage to the contrary, cannot inherit (1), and that amongst the Sudra class, illegitimate children, in certain cases at least, do inherit (2). The extent to which this right exists we shall presently consider.

The Smriti writer Yajnyávalkya says: "A son begotten by a man of the servile class on his female slave, may receive a share by his father's choice; or, after the death of the father, the brethren shall allot him half a share (3). Should he have no brother, he shall take the whole, unless there be a daughter's son" (4).

It will be observed that, in the concluding exception in that text, Yajnyávalkya mentions only the daughter's son, and omits the widow and the daughter, both of whom, in the ordinary course of succession amongst legitimates, rank before the daughter's son. The most probable explanation of this omission is that Yajnyavalkya, by the daughter's son (*putrika putra*), meant the appointed daughter's son—the phrase *putrika putra*, though literally meaning daughter's son, yet technically denoting the appointed daughter's son (5). In the days of Yajnyávalkya and Manu the son of an appointed daughter ranked next in succession to the Aurasa (legitimate born son) (6). Since, however, the commencement of the *Kali-Yug* the filiation of any but a son legally begotten or given in adoption by his parents is prohibit-

(1) Manu, Ch. IX., pl. 155; 3 Dig. Bk. V, Ch. 3, pl. CLXVI, CLXXVII; 7 Moore Ind. App. 18; 1 Stra. H. L. 69-70-71-187; 2 *Id.* 70-71; Daya Vibhaga (Burnell's translation) p. 25, pl. 33; I. West and Bühler, 47, Q. 2; 1 S. D. A. (Calc.) Rep. 28 (*Mohun Sing* v. *Chumun Rai*); 3 *Id.* 132 (*Pershud Sing* v. *Rance Muhesree*).

(2) 1 Stra. H. L. 69-70-173; 3 Dig. Bk. V, Ch. III, pl. CLXXIV. to pl. CLXXVI; Elberling, pl. 160; 1 Macn. H. L. 18; 2 *Id.* 15-16 *n*; Manu, Ch. IX, pl. 179; Daya Vibhâga (Burnell) p. 17, pl. 24; I. West and Bühler, 47—Q. 1, 48—Q. 3, *et seq.*

(3) 3 Dig. Bk. V, Ch. III, pl. CLXXIV.

(4) *Ibid.* pl. CLXXV. Acc. Vivada Chintamani 274, 275 (Tagore's translation).

(5) Mitak., Ch. 1, Sec. XI, pl. 3.

(6) 3 Dig Bk. V, Ch. 4, S. 2, pl. CC, CCI, CCIII, to CCXIII, CCXV, CCXVI, CCXX, to CCXXII; Manu, Ch. IX, pl. 127 to 140; Mitâk., Ch. I, Sec. XI, pl. 1-3.

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ed (1). Vijnyánesvara in the Mitákshara, which is of great authority in this Presidency, in commenting on the above text of Yajnyávalkya, would, in the passages which we are about to quote, appear to have given to *putrika putra* its literal signification of "any daughter's son" rather than its technical value "appointed daughter's son", and thus to have expanded Yajnyávalkya's text by bringing daughter's sons at large, as distinguished from the more limited category of appointed daughter's sons, into competition with such illegitimate sons of the last owner as may fall within the scope of the term *Dásiputra*. The word used in Yajnyávalkya's text, which, in the translation by Colebrooke, has been rendered "female slave", is *Dási*. The 12th Section of the 1st Chapter of Colebrooke's translation of the Mitákshara, pages 322, 323, which contains the commentary of Vijnyánesvara, to which we have referred, is as follows :—

"1. The author (Yajnyávalkya) next delivered 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. [*Jatopi dasyam* (*i. e.*, on a *Dási*) *Sudrena Kamaptonsaharo bhavet*]. But, if the father be dead, the brethern 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)".

"2. The son, begotten by a Sudra on a female slave [*Sudrena dasyam* (*i. e.*, on a *Dási*) *samut-pannah putrah*] obtains a share by the father's choice, or at his pleasure. But after [the demise of] (3) the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave (*Dásiputra*) to participate for half a share ; that is, let them give him half [as much as is the amount of one brother's] (4) allotment. However, should there be no sons of a wedded wife, the son of a female slave [*Dásiputra*] takes the whole estate, provided there be no

(1) 3 Dig. Bk. V, Ch. IV, S. 8, pl. CCLXXIX, CCLXXX ; general note to translation of Manu, p. 431 ; Vyav. Mayuka, Ch. IV, Sec. IV, pl. 46 ; Datt. Mimansa, S. 1, pl. 64 ; 10 Bom. H. C. Rep. 268, 275 ; Smriti Chandrika Ch. X, pl. 5, 6, 7, p. 142.

(2) Yajnyávalkya.

(3) *Balam Bhatta.*

(4) The *Subodhini* and *Balam Bhatta.*

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daughter of a wife nor sons of daughters. But if there be such, the son of the female slave (*Dásiputra*) 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 [*dvijatina dasyam* (*i.e.*, on a *Dási*) *utpannah*] 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."

The result of the foregoing commentary appears to us to be that Vijnyánesvara holds that, amongst Sudras, the father of an illegitimate son by a *Dási* may in his (the father's) life-time allot to such son a share equal to that of a legitimate son; and, if the father die without making such an allotment, the illegitimate son by the *Dási* is entitled to half of the share of a legitimate son; and, if there be no legitimate son, and no legitimate daughter or son of such a daughter, the illegitimate son by the *Dási* takes the whole estate. If, however, there be a legitimate daughter or legitimate son of such a daughter, the illegitimate son would take only half the share of a legitimate son; and such daughter or daughter's son would take the residue of the property, subject, of course, to the charge of maintaining the widow of the deceased proprietor. The cases, (with perhaps two exceptions,) in this Presidency, mentioned by Messrs. West and Bühler, and our own experience lead us, without hesitation, to the conclusion, that the law has here been administered in accordance with what has been just stated as the doctrine expressed or implied by Vijnyánesvara in the Mitákshara. He is silent as to the widow, who, in the ordinary course of succession, would come before either the daughter or the daughter's son. The position should be noted of the passages, which we have quoted from his work in that portion of it which treats of the rights of sons at large to inherit, and the prelude to that which immediately follows, viz :— "That sons, principal *and secondary*, take the heritage, has been shown. The order of succession among all (tribes and classes) *on failure of them*, is next declared" (1). He then proceeds to treat of the rights of the wife, daughters, parents, brothers, &c. The

(1) Colebrooke's translation of the Miták., Ch. II, S. 1, pl. 1.

preference of the daughters and sons of daughters, in the case of Sudras, to illegitimate sons, and the omission to mention or give precedence to the widow in the case of such sons, appear to be the result of arbitrary arrangement rather than of logical sequence or consistency with the general scheme of inheritance. Such an arrangement is one of numerous disturbances of that general scheme: for instance, Vijnyánesvara's preference of the paternal grand-mother to the paternal grand-father (1). A note to Dr. Muir's Sanskrit Texts, Vol. II, pages 170, 171, taken from Roth, indicates the source of these deviations: "Vedic interpretation could impose on itself no greater obstruction than to imagine that the Indian commentators were infallible, or that they had inherited traditions which were of any value. Even a superficial examination shows that their plan of interpretation is the very opposite of traditional; that it is really a grammatical and etymological one, which only agrees with the former method in the erroneous system of explaining every verse, every line, every word by itself, without inquiring if the results so obtained harmonise with those obtained from other quarters," &c. Jimuta Vahana, in a passage in the Daya Bhága (Ch. IX., pl. 31), gives to the son of a Sudra by an unmarried woman the whole property if there be no legitimate son and no daughter's son, and, if there be a daughter's son, permits the son by an unmarried woman to share equally with the daughter's son, assigning a reason for this disposition, which proves that he too departed from the more strict and technical signification of *putrika putra*, viz., son of an appointed daughter, and used the term in its ordinary literal signification of son of any daughter, whether appointed or not. That reason is, —"it is fit that the allotment should be equal; since the one, though born of an unmarried woman, is the son of the owner; and the other, though sprung from a married woman, is only his daughter's son". Devanda Bhatta, whose authority prevails more in the southern part of the peninsula than in this Presidency, interprets the term daughter's son (*putrika putra*) occurring in the text of Yajnyávalkya commented on, as above mentioned, in the Mitákshara, as including the wife and daughters, and as permiting them to share equally with the illegitimate son by a *Dási* (2).

(1) Colebrooke's translation of the Miták., Ch. II, S. V., pl. 1, 2, 3.

(2) Dattaka Chandrika, Sec. V., pl. 31.

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The *obiter dictum* of the shastri, in favour of a widow if there had been one, in his reply to Question 12 at page 56 of I. West and Bühler, and the opinion of the shastri in favour of equality of shares between the daughter and son in his reply to Question 17 at page 60; and also the reply of the shastri to Question 1, Section 5, at page 63, where he assigns one-half to the daughter and one-half to the son of an illegitimate son, may have been suggested by the views of Devanda Bhatta and Jimuta Vahana, although they do not refer to those authors. The *obiter dictum*, in reply to Question 12, is, in the remark of Messrs. West and Bühler (page 57), rightly denied to be law amongst Súdras in this Presidency. They say: "The illegitimate son would inherit the whole estate of his father, even though a widow of the latter be living"; and their remark, at page 63, to the effect that the son of the illegitimate son takes only the latter's half share, rightly denies the equality of shares assigned to him and the daughter by the shastri. Those observations of Messrs. West and Bühler are certainly in accordance with the Mitákshara. The exclusion of the *Mahatar* widow (a widow who has been twice married), is also supported by the case embodied in Question 8, and the shastri's reply thereto at page 53 of I. West and Bühler. The Vyavahara Mayukha (by Nilakanthá), the other leading authority here, contains, as regards the respective rights, amongst Sudras, of the widow and illegitimate sons, nothing inconsistent with the Mitákshara; and not only makes no reservation in her favour, but is silent also as to daughters and their sons. Placitum 28 of Chap. IV, Sec. 4, in quoting Devala as to sons of a Sudra woman by a man of equal class, probably applies to legitimate sons only. In plac. 32 alone does he distinctly deal with the rights of the illegitimate sons of a Sudra woman by a man of equal class, and there merely with reference to their rights as against legitimate sons, and not with reference to daughters or their sons. His silence, however, as to the latter, cannot be regarded as implying any contradiction of the Mitákshara. He was manifestly only partially treating of the subject of illegitimate children amongst Sudras, and, in fact, touching upon it very lightly. Where Nilakanthá does not expressly or by direct implication contradict the Mitákshara, our safest course in this Presidency is generally, we will not say universally, to follow it.

We now proceed to refer to a *dictum* of Lord Cairns in *Sri Gajapathi Radhika Patta* v. *Sri Gajapthi Nilamani Patta Maha Devi*, and another appeal consolidated with it (1). The decision, however, solely turned upon the construction of documents containing certain terms of compromise. The remarks of Lord Cairns, at page 512 of the report by Mr. Moore and throughout it, show this to have been so. The *dictum*, to which we refer, was, therefore, extra-judicial. Any expression, however, of the opinions of their Lordships of the Privy Council necessarily carries with it great weight. It is at page 506, where, in giving the judgment of the Privy Council, and while speaking of what would have been the rights of the sons of Padmanabha, if there had not been any compromise, his Lordship is reported as having said :—

"Supposing the sons, or either of them, to have been legitimate, the widow (of Padmanabha) could have been entitled to maintenance only. Had both the sons been illegitimate, their claim, unless some special custom governed the case (which is not in proof), would have been to maintenance only. In this last-named case the widow would have had the ordinary estate of a Hindu widow." The marginal note to the report is erroneous, clearly referring to Padmanabha under the letter A, it describes him as "a Hindu, either without caste or of the Sudra class". But their Lordships of the Privy Council did not announce that they had come to any such conclusion, and, so far as we can perceive, there was not any allegation in the pleadings that Padmanabha was a Sudra or below a Sudra. There was, however, in the pleadings on one side an assertion that Gopinadha, one of his sons, and Gopinadha's son, the appellant, were outcastes or at best of the Sudra class (page 499). The Civil Judge, however, found Gopinadha to be of the Kshatriya class (page 500). The High Court of Madras held his father Padmanabha to be a Rajput by caste which they deemed to be a mixed class between the second (Kshatriya) and the third (Vaisya) of the regenerate classes, and that the mother of Gopinadha was a concubine of Padmanabha and a woman of the Karnam caste, and, as such, they regarded her as, at least, a Vaisya, and perhaps more pro-

(1) 13 Moore Ind. App. 497; S. C. 6 Beng. L. R. 202; 14 Calc. W. R. P. C. 33, reversing 2 Mad. H. C. Rep. 369.

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bably a woman of a mixed caste, inferior to the second (Kshatriya), but superior to the third (Vaisya) of the regenerate classes. The High Court accordingly came to the conclusion that Gopinadha, being the illegitimate son of Padmanabha, whom it held to be one of the mixed classes between the second and the third of the regenerate classes, could not succeed simply as heir of Padmanabha (1), although it was of opinion that under the compromise he (Gopinadha) and Krishnachandra, another son of Padmanabha, whose legitimacy was also disputed, were entitled to succeed to the property of Padmanabha. It is unnecessary, for the purpose of considering the above *dictum* of Lord Cairns, to enter more deeply into the facts of those appeals. If Padmanabha were a Sudra, as stated in the head note to Mr. Moore's report, no school of Hindu law would, on account of illegitimacy (uncomplicated by the stain of adultery or incest), have wholly excluded his sons from inheriting. On the supposition, then, that Padmanabha was a Sudra, that part of the *dictum* of Lord Cairns, in which he says that, had both of Padmanabha's sons been illegitimate, they would have been entitled to maintenance only, could not be reconciled with any school of Hindu law. We have already referred to the doctrines of the Benares, Mahardtta, Dravida and Bengal schools as represented by the Mitákshara, Mayukha, Dattaka Chandrika, and Daya Bhága, respectively. That of the Mithila school will be found at pages 274, 275, of the Vivada Chintamani (Tagore's translation). We think, however, that, when so speaking, Lord Cairns must have been regarding the status of those sons from the same point of view as that of the Madras High Court, which pronounced them to be the illegitimate sons of a Rajput, *i. e.*, of a man of mixed caste between the second and third regenerate classes, and, therefore, above the degree of a Sudra. This would completely reconcile his Lordship's *dictum* with the Hindu law (2).

We now revert to the question as to the force of the term *Dásiputra*. The masculine noun *Dás* or *Dása* is, by Professor H. H. Wilson in his Sanskrit and English Dictionary published at Calcutta in 1819, explained as "a fisherman, a servant, a slave, a Sudra, or man of the fourth tribe." He further says that it is

(1) 2 Mad. H. C. Rep. 373,374. (2) See 7 Moore Ind. App. 18.

(as is well known here) used as an affix to the names of Sudras, and adds that it is occasionally employed to indicate "a person to whom it is proper to make gifts" and "a sage—one to whom the proper nature of the soul is known". The feminine, *Dási*, he describes as "a female servant or slave, the wife of a slave or a Sudra." Professor Monier Williams, in his Sanskrit and English Dictionary, published at Oxford in 1872, describes *Dása* as "a fisherman, a boatman", and *Dási* as "a female servant or slave, servant-maid, whore, harlot." Mr. Burnell, in the introduction to his translation of the Daya Vibhága of Madháviya (p. XIV. and note), says that, in Southern India, the word *Dási* signifies also a female dancer attached to a temple (1). And Devanda Bhatta, in the Smriti Chandrika, Ch. XI., S. 1, pl. 10, 11, in speaking of a wife married in the Asura form, observes: "That woman, who has been purchased for value paid, is not styled a *Patni*; she associates neither in rites relating to deities nor in rites relating to the manes. The learned call her a *Dási*." The affinity between slavery and the condition of a Sudra is illustrated by a text from Manu in the second volume of the Digest, Book III, Ch. 1, S. 2, pl. XXXVI:—"A Sudra, though emancipated by his master, is not released from a state of servitude; for, of a state which is natural to him, by whom can he be divested?" Culluca Bhatta's comment upon that text (*Ibid.*) is:—"Emancipated by him to whom he had become a slave by capture in war or the like, a Sudra is not released from a state of servitude to Brahmanas, since servitude is natural to him, who can divest him of a state of slavery proper to the servile class? Hence it is necessary that obedience be paid by a Sudra to a Brahmana or twice-born man. This is intended: else the subsequent enumeration of slaves would be nugatory."

Mr. Colebrooke (2) remarks that "issue by a concubine" (by which we understand him to mean *Dásiputra*) "is described in the law as a son by a female slave or by a Sudra woman. If the father were a Sudra, he might have allotted a share to his illegitimate son"; and for this he cites the passages in the Mitákshara, above quoted, which circumstance shows that, although

(1) See 12 Moore Ind. App. 203 to the same effect.
(2) 2 Strange H. L., p. 68.

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Mr. Colebrooke, in his translation of them, rendered the term *Dási* a female slave, he understood it to include a Sudra woman. And the commentator (Jagannatha) upon pl. CLXXIV. (the text of Yajnyávalkya) in Colebrooke's translation of the Digest, Vol. III, Bk. V. Ch. III., page 143 of the edition of 1801, referring to Jimuta Vahana (presently to be again mentioned), says :—"The son of a Sudra by a female slave or other Sudra woman not lawfully married, shall, with his father's consent, have an equal share with other sons." Vachespati Misra (1), purporting to quote Yajnyávalkya, says :—"A son of a Sudra by an unmarried woman may receive a share by the permission of his father; but, if the father be dead, he shall receive half of the share of his brothers who are born by married wives. Should he have no brother, he shall take the whole, unless there be a daughter's son." In the note, at pages 15 and 16 of Sir William Macnaghten's Hindu Law, that author gives it as his opinion that, "if the woman were not his (the putative father's) female slave, the son begotten on her by him would have no right to the inheritance, but only a claim to maintenance." For that remark he has not given any reference; and, although in Bengal he deservedly enjoys a high reputation as a writer on Hindu law, his opinion, so far as it denies the right of inheritance to the son of a Sudra by a concubine, who is not a female slave, is at variance, not only with that of authors whom we have already quoted, but also with the Daya Bhága, the leading treatise on the law of inheritance amongst Hindus in Bengal, at Chap. X, pl. 29, of which the author, Jimuta Vahana, is, in Colebrooke's translation, represented as saying :—"But the son of a Sudra by a female slave, or other unmarried Sudra woman [*Sudrasya aparinita dasyadi Sudraputra*], *i.e.*, literally, 'the son (born) to a Sudra by an unmarried *Dási* or other Sudra' [female] may share equally with other sons by consent of the father." For this he cites Manu, Ch. IX, pl. 179. And in pl. 30 he says that "without such consent he shall take half a share"; and in pl. 31, already above referred to, he continues thus :—"Begotten *on an unmarried woman*, and having no brother, he may take the whole property : provided there be not a daughter's son. So Yajnyávalkya ordains : 'one who has no brothers may

(1) Vivada Chintámani, p, 274, translated by Prosonno Coomar Tagore.

inherit the whole property for want of daughter's sons.' But, if there be a 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 daughter's son." In support of these latter placita he cites the texts of Yajnyávalkya already set forth in the quotations which we have made from the Mitákshara. These three placita 29, 30 and 31 in the Daya Bhága show that Jimuta Vahana understood the term *Dási* in a wide sense, including, speaking generally, any unmarried Sudra woman kept for the purpose of concubinage; for Manu (Ch. IX, pl. 179) speaks only of the *Dási* of the putative father, or of the *Dási* of his *Dás* or *Dása (Dása-Dási* or, in the locative case, *Dása-Dásyam)*, explained by Chudámani as the wife of the putative father's male slave, and by Srikrishna as the unespoused concubine of his male slave (see Colebrooke's translation of the Daya Bhága, page 151, *in notis*), and Yajnyávalkya uses only the term *Dasyam* (on a *Dási*), or *Dásiputra* (son of a *Dási*).

Sir William Macnaghten's opinion would appear to rest on the limited view of the scope of the term *Dási*, which the High Court of Madras seemed disposed to repudiate (1). Maintenance only was sought in that case, and was granted, though opposed on the ground that the plaintiff was not the son of a female slave but was the son of a zamindar (a Sudra) by a concubine. Mr. Mayne, for the defendant, had there argued that the plaintiff, being the son of a Sudra, might be entitled to inherit, although illegitimate, but was not entitled to maintenance. If it be true that the son of a Sudra by a female slave may inherit, but that the son of a concubine, who is free, cannot do so, an absurd consequence would seem to follow. It is laid down by Katyayana (2 Dig., Bk. III, S. 2, pl. 49) that, "if a man approach his own female slave, and she bear him a son, she must, in consideration of her progeny, be enfranchised with her child"—which rule, Jagannatha, the commentator, referring to other authorities, says "is applicable if her master have no legitimate or adopted son, for in that case she need not be enfranchised." Assuming

(1) 2 Mad. H. C. Rep. 293-295.

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that, under such circumstances, the Sudra father of the illegitimate son emancipates the female slave, and she, subsequently when free, bears to him another son—the former illegitimate son would inherit and the latter illegitimate son, though by the same father and mother, would not, if Sir W. Macnaghten's doctrine be correct.

Nilakanthá, in the Vyavahara Mayukha, Chap. IV, S. 4, pl. 28, quoting Devala, says :—"The son begotten on a Sudra woman by any man of a twice-born class is not entitled to a share of land : but one begotten on her, being of equal class, shall take all the property (whether land or chattels) : thus is the law settled.' *Of land* acquired by purchase and the other modes also. Yet he does obtain a share of the moveable wealth.". That passage, as already observed, refers to Sudra women who are *married*. He next refers to Sudra women, who are not married, thus :—

"29. But the son by a Sudra woman, not legally married, does not obtain a share, even of the moveable property." (If he stopped here, we might suppose that he was speaking of the son of a Sudra woman by a man of her own class, but the sequel shows that he was speaking only of the son of a Sudra woman by a man of one of the twice-born classes.) He continues :—"And Manu: 'The son of a Brahman, a Kshatriya, or a Vaisya, by a woman of the servile class, shall inherit no part of the estate [unless he be virtuous ; nor jointly with other sons unless his mother was lawfully married :] whatever his father may give him, let that be his own." A previous passage (pl. 27 quoted by Nilakanthá from Yajnyávalkya) (1) contemplated the possession by a Brahman of wives of the four tribes, including the Sudra ; by a Kshatriya of three, including the Sudra ; and by a Vaisya of two including the Sudra—a luxury, however, forbidden to the twice-born classes since the *Kali-yug* commenced (2). This is one of many instances in which comparatively modern writers on Hindu law discussed, with as much zest as if it were living law, doctrine which in the lapse of time had become obsolete.

(1) And see Manu, Ch. IX, pl. 149 to 151.

(2) 3 Dig., Bk. V, Ch. III., pl. CLXXIII. 1 Stra. H. L., 40 (Ed. of 1830). Note to Translation of Manu, p. 430. Smriti Chandrika, Ch. X, p. 7.

In Plac. 30 Nilakantha still appears to treat of the offspring of a Sudra woman by one of the twice-born classes, and Plac. 31 applies to Pratilomas only. In Plac. 32 he treats of the Sudra class. Mr. Borradaile translates that passage thus :—"Yajnyá-valkya states a distinction with regard to a son begotten by a Sudra on a woman not married to him." [The words "to him" are not in the original, and appear to have been improperly introduced. The expression used is *aparinitayam*, which simply means "an unmarried woman".] The translation continues :—"'Even a son begotten by a Sudra on a female slave may take a share by his father's choice.'" [*Jatopi dasyam* (*i. e.*, on a *Dási*) *Sudrena Kamatonsaharo bhavet.*] The words "his father's" are not in the text, but the word *Kama*, which means "desire" or "choice", is, as we shall see, interpreted by Nilakanthá to mean "pleasure of the father". The translation continues :—"'But if the father be dead, the brethren should make him partaker of the moiety of a share.'" Choice (*Kama*), the pleasure of the father. From specifying *by a Sudra*, it is clear that a son begotten by a twice-born man on a female slave does not obtain a share, even by the father's choice : neither, after the death of the father, will he get the half : nor, in the absence of sons or other heirs, will he get the whole. This is the argument of the Madana Ratna and others."

It certainly would appear that Jimuta Vahana and Nilakanthá concurred in thinking that, in order to entitle the illegitimate offspring of a Sudra woman by a Sudra to inherit the property of the latter, or a share in it, she should be "an unmarried woman" (1), which expression, *aparinita* (or *aparinitayam*), when occurring in pl. 28 of Chap. IX. of the Daya Bhága, is in the note to Colebrooke's translation, p. 150, explained as "not married to any one, but kept for sensual gratification"—and for this interpretation Srikrishna is relied upon.

The condition, that the Sudra woman should never have been married to any man, has, in practice, as the cases in I. West and Bühler, to which we shall refer, show, been discarded in the Presidency of Bombay.

(1) Acc. Vivada Chintámani, p. 275, Tagore's translation.

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With a view to a clear understanding of some of those cases, it is desirable to refer to the custom, which undoubtedly extensively prevails among castes belonging to the Sudra class, and has, for a long time previously to Act XV. of 1856 (which relates to widows only) (1), existed in this Presidency, of the remarriage of wives and widows. Such remarriage amongst Mahrattas is called *Pát* or *Pátta*, and amongst the inhabitants of Guzerât is named, *Nátrá*. An instance, in which the Sadr Adálat refused to grant a divorce to the first wife on the ground of the husband having contracted a *Nátrá* marriage, occurs in 1 Borr. Rep., 1st edition, p. 59; 2nd edition, p. 65. Other instances of the custom of contracting such marriages are mentioned in 2 Strange H. L., pp. 399, 400. Mr. Steele, who is, on such a subject, a high authority in this Presidency, says that, though forbidden in the present age (*Kali-yug*) to twice-born castes, it is not forbidden to Sudras (2). Manu (3) appears to have limited the prohibition to the twice-born classes; Devala expressly permits remarriage to all classes (but is not followed to that extent by any other author), and almost recommends it to the servile classes (4). A text of Harita implies that Sudras may remarry (5).

Mr. Steele (6) says that "all the lower castes admit the second marriage of wives in particular instances, and of widows, the ceremonies at which differ in many respects from those at a first marriage." At pp. 168, 169, 170, 171, 174, 181, 1st ed., (7) he enumerates many instances in which it is allowed, in the cases of women whose husbands were living; but on such occasions the proper course would appear to be for the first husband to give the wife a *chhor chithi*, or writing of divorcement, and generally the concurrence of the caste is required, but not invariably. The general rule in the castes in which remarriage is permitted to a woman, although it has been disputed by some pandits, is that the children by a *Lugun* (*Lagna*) marriage (*i.e.*, first marriage of

(1) The words "with certain exceptions" in the preamble of that Act should be noted.

(2) Law and Custom of Hindu Castes, 1st ed., pp. 32, 37; 2nd ed., pp. 26, 30.

(3) 2 Dig., Bk. IV, C. IV, S. 2, pl. CLVI, p. 473.

(4) *Ibid.*, pl. CLIII, p. 471. (5) *Ibid.*, S. III, pl. CLVIII.

(6) Law and Custom of Hindu Castes, 1st ed., p. 161; 2nd ed., 159.

(7) 2nd ed., pp. 166, 167, 168, 169, 172, 173, 179.

a woman) and those by a duly contracted *Pát* marriage have equal rights of inheritance (1).

We think that the remarks of Messrs. West and Bühler, at page 60, Vol. I. of their work, to Case 16 (p. 59) and at page 61 to Case 17 (p. 60) and Case 18 (p. 61), must be regarded as referring to the general Hindu law; and that, in making those remarks, they had not in their immediate contemplation the custom of remarriage so generally prevalent amongst the lower castes in this Presidency. The sons of a *Punarbhu* (twice-married woman) by a duly contracted *Pát* marriage, *i. e.*, in accordance with the custom of the caste, are legitimate; and rank, as to the right of inheritance and extent of shares, on a par with the sons by a *Lagna* marriage. In the second volume of their work, at pp. 15 and 16, the same learned authors mention two decisions (Cases 6 and 7) to that effect.

In the introduction to their book, Vol. I, p. XLIII, Messrs. West and Bühler, following the Mitákshara, lay down the rule as to the rights of inheritance of the illegitimate issue of a Sudra, thus:—"In the case of a Sudra being an *avibhakta* (separated man) his share, on failure of the three legitimate descendants, is inherited by his illegitimate sons, grandsons, or great-grandsons. If legitimate descendants be living, the illegitimate inherit half a share." The precedents which they have collected, establish that in this Presidency, amongst Sudras, the illegitimate offspring of a kept woman, or continuous concubine, are on the same level as to inheritance as the issue of a female slave by a Sudra. Case 3 at page 48; Case 4 at page 49; Cases 6 and 7 at page 52; Case 8 at page 53; Case 12 at page 56; and Cases 13 and 14 at page 57 in I. West and Bühler—all show that this is so under ordinary circumstances in this Presidency.

Under such circumstances the plaintiff, being the son of a kept woman, would, as against the legitimate daughters of Tejá Kurad, have been entitled to a half share. This being so, we have next to consider whether the special circumstance, that the intercourse between Tejá Kurad and Gau, the mother of the plaintiff,

(1) 1st ed. p. 181, Appx. 23; 2nd. ed., p. 179.

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was adulterous—she never having received a *chhor chithi* from her first husband, or other sanction from him of her marriage by *Pát* to Tejá Kurad—alters the case.

That adultery was regarded and punished by Hindu law as a crime of grave character, is abundantly shown by the 19th Chapter of the Vyavahara Mayukha and the ancient Smriti texts there quoted.

It has been held in the High Court that a custom of a particular caste, which permitted a woman in the life-time of her husband to contract a second marriage *without his consent* was invalid, and the remarriage punishable, as regarded the woman, under Section 494 of the Penal Code; and the act of the man, who contracted the marriage and had sexual intercourse with her, was held to be punishable, as adultery, under Section 497 of the same Code: *Reg.* v. *Karsan Goja* (1). In the case of the man, he would not be punishable if, at the remarriage, he honestly believed that the woman was not the wife of another man: *Reg.* v. *Manohar Raiji* (2).

In the case of *Khemkor* v. *Umiáshankar* (3), which arose in the caste of Sompura Brahmans, which was found by the Court of Small Causes at Ahmedabad to have a custom permitting *Nátrá* or remariage, the High Court held that a woman, who, in the life-time of her husband, had remarried *without his consent*, was not the legal wife of the person whom she so married; but, as his concubine and mother of his illegetimate children, was entitled to maintenance after his death out of his estate. Steele (4) says that the children of a woman living in adultery have no caste. In *Dati Parisi Nayudu* v. *Datti Bangaru Nayudu* (5) the High Court of Madras held that the illegitimate son of a Sudra, being the offspring of an incestuous intercourse (between a father-in-law and his daughter-in-law), is not entitled to inherit or share in the property of his putative father. That Court expressed an opinion that the decision should be the same in a case of adultery, it being an intercourse in violation of law. At page 92 of West and Bühler, Vol. I, there is a case of the year 1852 which is

(1) 2 Bom. H. C. Rep. 117. (2) 5 Bom. H. C. Rep. Cr. Ca. 17.
(3) 10 Bom. H. C. Rep. 381. (4) 1st ed., p. 182; 2nd ed., p. 180.
(5) 4 Mad. H. C. Rep. 204.

directly in point here. A man had two wives, one by *Lagna* and the other by *Pát*. He married a third by *Pát*; her first husband, who was living, had not assented to her second marriage. She bore a daughter to her *Pát* husband. The question was whether the daughter could succeed to her father's property after his death; and the shastri advised the Zillah Court at Sholápur that "it is not legal for a woman to enter into a *Pát* marriage without having previously obtained permission of her husband, unless he is dead. The daughter, therefore, can have no share in the property of the deceased father. But as she was the result of the *Pát* marriage, the heirs, who will take the assets of the deceased, must support her. The *Lagna* and the first *Pát* wives will be the heirs of the deceased, entitled to take all his property."

Upon these authorities we think that the plaintiff, being the result of an adulterous intercourse between Tejá Kurad and Gau, cannot take *as heir* even to the extent of half a share, and is not a *Dásiputra* within the scope of Yajnyávalkya's text or recognized as such by the commentators. But, having been recognized as his son by Tejá Kurad, we think that the plaintiff is entitled to maintenance; and, in order to prevent further litigation, we shall direct the Court of first instance to ascertain and allot to him out of the estate of Tejá Kurad a liberal but suitable maintenance, having due regard to the extent of the estate.

In *Muttusawmy* v. *Vencataswara* (1) Sir J. Colvile in giving the judgment of the Privy Council said :—"It appears, however, to their Lordships that, if it be established that the respondent 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 be 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."

The claim of the plaintiff to *inherit* being disposed of in the negative, the estate (subject to his maintenance) will descend according to the ordinary canons of descent in force in this Presidency; but it is unnecessary to make any special reference in the

(1) 12 Moore Ind. App. 203.; see p. 220.

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decree to that effect, and we have not been invited by the parties so to do.

We shall, therefore, simply reverse the decree of the Joint Judge, and dismiss the claim of the plaintiff as heir of Tejá Kurad to his estate; but we declare that the plaintiff is entitled to maintenance out of that estate, and we direct the Court of first instance to fix a liberal and suitable maintenance for him, having due regard to the extent and value of the estate of Tejá Kurad.

Looking at the conduct of the family, we think that the fairest direction which we can make as to costs, is that the parties respectively should bear their own costs of the suit and of both appeals.

We are indebted to Mr. Justice Nánábhái Haridás and to the Honourable Ráv Sáheb V. N. Mandlik for valuable assistance as to the original Sanskrit of the texts of Hindu law to which we have referred.

Note.—Compare *Narain Dhara* v. *Rakhal Gain*, 1 Ind. L. R. (Calc.) 1.

[ORIGINAL CIVIL JURISDICTION.]

Ecclesiastical.

1876. January 29.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF RA'MCHANDRA LAKSHMANJI.

VINA'YAKRA'V RA'MCHANDRA LAKSHMANJI .....APPLICANT.

Will—Probate—Annuity— "Value"—Court Fees Act (VII. of 1870), Schedule I., Clause 11.

For the purpose of determining the probate fee to be paid in respect of an annuity the word "value" in the Court Fees Act (VII. of 1870), Schedule I., Clause 11, must be taken to mean the market value of the annuity, and not ten times the amount of a yearly payment.

Where the property, in respect of which probate is sought, is mortgaged, the amount of the mortgage incumbrance must be deducted from the market value of the property, and the probate fee charged on the balance.

THE applicant in this case applied to J. W. Orr, Ecclesiastical Registrar, for probate of the will of Rámchandra Lakshmanji, which was dated the 16th May 1874, and made in Bombay, and, therefore, came under the provisions of the Hindu Wills Act (XXI. of 1870).