presentation of a [37] plaint for the specific performance of the contract of mortgage; and the proceedings consequent thereon constituted a *lis pendens*, during which a mere money-decree-holder, like Lakhmiram, could not, by any proceedings which he might take, defeat the object of the plaintiff's application to the Court. For these reasons we reverse the decrees of the Courts below, and direct that the plaintiff be put in possession of the Pokhran Vadi, and the house thereon situated. The defendant must bear all costs throughout.

Decrees reversed.

1879 JUNE 17. APPELLATE CIVIL. 4 B. 34= 4 Ind. Jur. 519.

4 B. 37 (F.B.)

FULL BENCH—APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Kemball and Mr. Justice Pinhey.

SADU (*Plaintiff*), *Appellant v.* BAIZA AND GENU (*Defendants*), *Respondents.** [25th June, 1878.]

Hindu law—Inheritance of an illegitimate son among Shudras — Dasiputra—Res-judicata.

A Hindu of the Shudra caste died in 1850 leaving him surviving his two widows, B and S; a son Mahadu, and daughter Darya, the children, respectively, of B and S; and an illegitimate son Sadu, the plaintiff. Sadu and Mahadu continued to live together for some time after their father's death. But subsequently, owing to domestic quarrels, they lived separately and Sadu was allowed by Mahadu a portion of the family property under an agreement in writing. They were, however, joint and undivided in estate and continued to be so until the death of Mahadu in 1865. In 1866 Sadu brought a suit on the agreement, and obtained a decree against B, S, Darya and R (a lessee of B) for the property mentioned in the agreement. In 1870 Sadu brought a second suit as heir of his father and brother, and claimed the whole of the ancestral property. Both the lower Courts rejected his claim as barred by the previous suit.

Held in special appeal by MELVILL and NANABHAI HARIDAS, JJ., that the claim was not barred, inasmuch as the former suit was brought on the agreement, while the latter was instituted to establish plaintiff's general rights as heir of his father and brother. They accordingly reversed the decree of the Courts below, and remanded the case for its trial on the merits. On remand, the Subordinate Judge held that the plaintiff was entitled, as heir of his father and Mahadu, to all the ancestral immoveable property. Two of the defendants appealed.

[38] *Held*, by a Full Bench (WESTROPP, C.J., KEMBALL and PINHEY, JJ.) that, after the death of their father, Mahadu and Sadu succeeded as co-parceners to the whole property, subject to the maintenance of B, S and Darya, if she were then unmarried, and in that event also to her reasonable marriage expenses, —Sadu, however, as an illegitimate son taking only half a share.

Held, also, that inequality of shares did not prevent co-parcenary and succession by survivorship, and that as Mahadu and Sadu were co-parceners from the death of their father until the death of Mahadu, the usual result of co-parcenary followed on the occurrence of the latter event, *viz.*, the surviving co-parcener (*i.e.*, the plaintiff Sadu) took the whole property.

Rahi v. *Govinda Teja* (I.L.R. 1 Bom. 97) referred to and followed.

[N.F., 28 C. 194 (202); F., 6 C.P.L.R. 144 (152); Appr., 11 C. 702; 18 C. 151 (P.C.) =17 I.A. 128=5 Sar. P.C.J. 596; R., 21 A. 99=18 A.W.N. 170; 14 B. 282; 23 B. 257; 25 M. 519=11 M.L.J. 399; 34 M. 68=5 Ind. Cas. 919=20 M.L.J. 350=7 M. L.T. 161=(1910) M.W.N. 138; 16 C.L.J. 335=17 C.W.N. 442=17 Ind. Cas. 276; Expl., 19 C. 91; D., 25 B. 189 (194); 10 M. 334 (346).]

THIS was an appeal under s. 15 of the Letters Patent, 1865, against the decision of a Division Bench (M. Melvill and Nanabhai Haridas, JJ.) dated the 25th January 1877.

*Appeal No. 1 of 1877 under s. 15 of the Letters Patent, 1865.

1878
JUNE 25.
FULL BENCH.
4 B. 37 (F.B.).

The facts of the case are these: One Manaji, who belonged to the Shudra caste, died in or about the year 1850. His family then consisted of his two widows, Baiza and Savitri; a son Mahadu, by Baiza; a daughter, Daryabai, by Savitri; and an illegitimate son Sadu, the plaintiff. After Manaji's death Mahadu and Sadu lived together for a time, but subsequently they parted, and Sadu lived separately from Mahadu and was allowed five compartments of the family house and 7½ bighas of the ancestral land, under an agreement in writing. They remained, however, undivided in estate. Mahadu died in 1865 without issue, and left him surviving, his mother Baiza, his step-mother Savitri, his step-sister Daryabai and the plaintiff Sadu. In 1866 Sadu brought a suit against Baiza, Savitri, and one Ramling (a lessee from Baiza), basing his claim on the agreement. The Munsif of Barsi rejected the suit. But his decree was reversed in appeal (No. 66 of 1870), and the case was remanded for re-trial. The Munsif then awarded the plaintiff's claim to the property mentioned in the agreement. On the 16th November 1870 Sadu brought a second suit in the Court of the Subordinate Judge at Barsi against Baiza, Ramling, Genu (Daryabai's husband) and Daryabai, and sought to recover possession of the whole property, moveable and immoveable, left by his father Manaji, on the ground that he alone was entitled to it after Mahadu's death. Baiza denied his right, and contended that his claim was barred by limitation and by his former suit (No. 1244 of 1866). Ramling based his [39] claim upon a lease from Baiza and Savitri. Genu answered that the property had been mortgaged to him by Baiza in order to pay off the debts of her husband Manaji. Daryabai contended that she, and not Sadu, was entitled to the property as heir to Manaji and Mahadu. The Subordinate Judge rejected the plaintiff's claim, and his decision was upheld in appeal (69 of 1872) by Mr. Cordeaux, Assistant Judge at Sholapur (9th April 1873). Both the Courts held that Sadu's claim was barred by his former suit No. 1244 of 1866. One of the issues in appeal was whether Mahadu and Sadu were undivided in estate. The Assistant Judge found that they were undivided, and that the property mentioned in the agreement (Ex. No. 3), was given by Mahadu to Sadu, not as the latter's share in the family estate, but in lieu of his maintenance only. On special appeal (No. 361 of 1873) the High Court (M. Melvill and Nanabhai Haridas, JJ.) on the 1st April 1874 reversed the decrees of the Courts below, holding that the plaintiff's claim was not barred by the previous suit. Genu did not appear either in appeal or special appeal. The following is the High Court's remanding order:—

PER CURIAM.

"We think the Assistant Judge was right in deciding that there had been no separation of interest between the plaintiff and his brother Mahadu, but wrong in holding that the present suit is barred by the judgment in the suit No. 1244 of 1866. It seems to us that the cause of action in the suit No. 1244 of 1866 was a breach of the agreement (No. 3), and that what was decided was that the agreement should be enforced. It may be that the parties to the agreement thought that the plaintiff had no rights except such as were reserved to him by that agreement, and that when the plaintiff brought his former suit he was still under the impression that he had no other rights. But that does not prevent him, now that he is better informed, from suing to establish his general rights as heir and survivor of his father and brother,

1878
JUNE 25.
FULL BENCH.
4 B. 37 (F.B.).

which rights were not, in our opinion, adjudicated on in the former suit. We accordingly reverse the decrees of the Courts below, and remand the case for disposal on its merits. If the plaintiff's claim be awarded, provisions should be made in the decree for Baiza's maintenance. Costs to follow."

[40] On remand, the Subordinate Judge held that the plaintiff was the heir of Manaji and Mahadu, and, as such, was entitled to the whole of the ancestral immoveable property; that the suit was not barred by limitation; that the mortgage by Baiza to Genu was collusive and without competent authority, and that Baiza was entitled to maintenance at the rate of Rs. 48 a year, and to have five compartments of a house set apart for her residence. The Assistant Judge (Mr. H. J. Parsons) affirmed this decree in appeal. On the 10th January 1876 Baiza and Genu preferred a special appeal to the High Court.

The appeal was heard by M. Melvill and Nanabhai Haridas, JJ., on the 4th December 1876.

Bhairavnath Mangesh appeared for the appellants.

Shantaram Narayan appeared for the respondent.

The following are the judgments of the Courts:—

25th January 1877. M. MELVILL, J.—When Manaji died, his family consisted of two widows, Baiza and Savitri; a legitimate son, Mahadu, by Baiza; a legitimate daughter, Daryabai, by Savitri; and an illegitimate son, Sadu, who is the plaintiff in the present suit. The members of the family now surviving are the plaintiff, and Baiza and Daryabai, who were both defendants in the suit.

The whole family property has been, since the death of Mahadu, in the possession of Baiza; and the plaintiff now seeks to recover it, on the ground that he and Mahadu were undivided, and that, on the death of Mahadu, he became entitled to the whole estate.

Baiza relies on her own title as widow of Manaji. Daryabai, in the Court of first instance, claimed to succeed as daughter of Manaji; but she acquiesced in the decree made in favour of the plaintiff, and has not brought her claim before this Court, or the lower Court of Appeal.

The rule of Hindu law, which in this Presidency regulates the claims of a person in the position of the plaintiff, may be taken as stated in *Rahi* v. *Govinda Teja* (1), and to be as follows:—Amongst Shudras, if the father die without making an allotment [41] an illegitimate son, such as the plaintiff, is entitled to half 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 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.

Under this rule it seems to me that, as there is a legitimate daughter of Manaji in existence, the plaintiff, who is now claiming the property for the first time, is not entitled to more than half the share of a legitimate son.

It was, as I understand (2), admitted in the argument that such a half share would be all that could be awarded to the plaintiff, if there were

(1) 1 B. 97.

(2) After the delivery of this judgment, Mr. Shantaram asked his Lordship to make a note that he did not intend to make such an admission, which was done.

1878
JUNE 25.
FULL BENCH.
4 B. 37 (F.B.).

any claim by the daughter before the Court. But it was argued that the daughter had acquiesced in a decree which disinherited her, and should, therefore, be treated, for the purposes of this appeal, as if she were not in existence. If she were put out of view, then it was said that the plaintiff must necessarily succeed, since under no circumstances could the other defendant, Baiza, be entitled to anything more than maintenance.

It appears to me that this argument is unsound. It may be that Baiza has no title. But she is a defendant in possession, and that is sufficient for her, until some one proves a good title. It seems to me to make no difference that Daryabai has not appealed, and that Baiza relies on her own and not on Daryabai's title. The fact remains that Daryabai is in existence, and that, so long as she is in existence, the plaintiff is not entitled to the whole estate. As plaintiff in ejectment he can only succeed on the strength of his own title; and on the admitted facts of the case, he has no title to anything more than a legitimate son's half share. Under this view I do not think it necessary to decide whether, if there had been no daughter of Manaji now surviving, the plaintiff would be entitled to the whole estate.

[42] The decree of the Senior Assistant Judge must, I think, be amended, and the plaintiff's claim allowed to the extent of one-third only of the immoveable property mentioned in the plaint. As Baiza will continue in possession of a large portion of the property, it is not necessary in this suit to make any order regarding her maintenance. Any right which she may have, she can assert hereafter, if she would stand in need of maintenance.

Baiza and Genu must bear one-third of the plaintiff's costs throughout, and the plaintiff must bear two-thirds of the costs, incurred by Baiza and Genu.

NANABHAI HARIDAS, J.—This is a suit by Sadu bin Manaji, special respondent, to recover possession of the whole estate, moveable and immoveable, left by his deceased father Manaji.

He states in his plaint that his father died about twenty or twenty-two years ago; that the whole of his property then devolved upon his brother Mahadu and himself as Manaji's heirs; that they jointly managed the same for some time, but that, finding it impossible to get on amicably together, he lived separate, without, however, coming to any partition with his brother; that his brother died in 1865, leaving no son, when his mother Baiza took possession of the whole of that property; that she was only entitled to maintenance, which he was ready and willing to give her; and that, though requested to do so, she refused to make over the property to him.

Baiza (defendant No. 1) replied that the property was ancestral, and was managed by her husband Manaji during his life-time and by herself since his death; that the plaintiff was not at all entitled to it; and that a portion of it was mortgaged to Genu (defendant No. 3) for family purposes. She also pleaded limitation, and raised a number of other questions, which it does not become necessary for us in this appeal to deal with.

Ramling (defendant No. 2) alleged that a portion of the property was leased to him for a term of eleven years by the deceased Mahadu, and that he could not be deprived of his possession before the expiration of that term.

[43] Daryabai (defendant No. 4) stated that her father Manaji had two wives, Savitri and Baiza; that, after the death of Manaji and of her brother Mahadu, the whole of the property in dispute came into the

1878
JUNE 25.
FULL BENCH.
4 B. 37 (F.B.).

possession of Savitri and Baiza, who jointly managed the same: that Savitri, her mother, died two years ago; and that, therefore, she was the only person entitled to the property as Manaji's daughter.

The Subordinate Judge rejected the claim, and on appeal that decision was confirmed by the Assistant Judge, on the ground that, although there had been no separation of interest between the plaintiff and his brother Mahadu, the present suit was barred by the judgment in a previous suit, No. 1244 of 1866. This Court, however, while upholding the finding of "no separation," reversed the decrees of the Courts below, and remanded the case for disposal on its merits, being of opinion that the previous suit, which was one in respect of a breach of an express agreement, was no bar to the maintenance of the present one, in which the plaintiff sought "to establish his general rights as heir and survivor of his father and brother."

On re-trial, the Subordinate Judge awarded the plaintiff's claims, but only as to the immoveable property, and declared Baiza entitled to maintenance at the rate of Rs. 48 a year, and also to have five compartments of a house to live in. He held the suit not barred by the law of limitation, and also that the alleged mortgage by Baiza to Genu (defendant No. 3) was unauthorised and collusive.

The plaintiff was evidently satisfied with this decree, and so were also defendants 2 and 4, as none of them appealed against it; and the remaining defendants, Nos. 1 and 3, appealing, the Assistant Judge confirmed the decision of the Subordinate Judge.

In this special appeal, therefore, preferred by those defendants (Nos. 1 and 3), the only question we have to determine is whether the plaintiff, as against them, is entitled to the property awarded to him by the lower Courts, subject, of course, to the award of maintenance, which he has not appealed against. The question of limitation, though expressly raised by them in their memorandum of special appeal, was not argued before us by their pleader, and we do not, therefore, find ourselves called upon to express any opinion upon it.

[44] The parties to this appeal are Shudras, and it is admitted that the plaintiff is an illegitimate son of Manaji. It would appear that, when Manaji died, his family consisted of his two widows, Baiza (first defendant) and Savitri, a legitimate son named Mahadu, by the first widow Baiza, a legitimate daughter, named Daryabai, by the second widow Savitri, and the plaintiff Sadu, an illegitimate son by a concubine. The third defendant (second appellant) Genu is the husband of Daryabai, and the alleged mortgagee, whose mortgage, as already stated, has been declared to be unauthorised and collusive. It does not appear whether, at the time of Manaji's death his concubine, the plaintiff's mother, was alive, nor whether Daryabai was married.

Amongst Shudras, contrary to the rule obtaining among the regenerate classes, a son begotten on a female slave (*dasiputra*) inherits his father's property (1); and in this Presidency a Shudra's son by a concubine is treated as a *dasiputra* (2). In the state of the family above described, therefore, the plaintiff and Mahadu, jointly succeeded to Manaji's estate. No portion of that estate vested in either of the widows or in the concubine, assuming her to be alive at Manaji's death, though they would all be entitled to maintenance out of that estate; nor did any portion of

(1) Mitak. ch. i, sec. xii, 1, 2. 3; Vyav. May. ch. iv, sec. iv. 32; *Rahi* v. *Govinda*, I.L.R. 1 Bom. 97.

(2) 1 West and Buhler (1st ed.), pp. 48, 49, 52, 53, 56, and 57; *Rahi* v. *Govinda*, I.L.R. 1 Bom. 97.

1878
JUNE 25.
FULL BENCH.
4 B. 37 (F.B.).

it vest in Daryabai, though she would be entitled, if unmarried, to have the charges of her marriage defrayed out of it. Such being the case the plaintiff might have enforced a partition and obtained his share of that estate; and Mahadu could not have legally resisted his claim any more than Daryabai or the widows. But he and Mahadu chose not to come to a partition, and continued joint in estate, though separate in food and lodging, down to Mahadu's death in 1865. Did that event, then, deprive him of the right he unquestionably had during Mahadu's life-time? I do not see how it could possibly have any such effect. Nor do I see how Baiza's position or rights in the family, as Manaji's widow, could improve in the least by such event, or by the death of Savitri. The plaintiff would thus continue entitled, under any circumstances, to as much of [45] the joint estate as he might, in the event of a partition, have obtained from Mahadu during his lifetime. If Mahadu had left a son, he could not, therefore, have legally resisted the plaintiff's claim to that extent, for the son's position would have been in no respect better than the father's. But Mahadu died without a son, and, as already mentioned, without coming to any partition with his illegitimate brother, the plaintiff. Has not that event, then, added to what rights the plaintiff had before? It is not denied that the plaintiff, if he had been an *aurasaputra* of Manaji, would, on Mahadu's death, have taken the whole estate as the sole surviving male member of the family (1). It is, therefore, necessary to see whether in this respect the position of a *dasiputra* in a Shudra family differs from that of an *aurasaputra*.

It is argued that his position is not the same as that of an *aurasputra*; that, strictly speaking, he cannot be regarded as a member of the family at all; that he is not, except in the popular acceptation of the term, a brother (*bharatri*) of the legitimate son of his father: that he cannot inherit as such (*i.e.*, as a brother), for the term, in Yajnavalkya's canon of inheritance, has the force of 'whole brother' according to the Mayukha (ch. iv, s. viii, 16); that he is not included in the series of heirs given in the Mitakshara, ch. ii, ss. 1, 2: that he does not inherit from collaterals; that he is not a co-parcener; that, therefore, he does not take by survivorship; and that although there was no partition, still as the proportions which he and Mahadu were entitled to take of Manaji's estate were fixed by law, Mahadu's share vested in his mother upon his death.

It must be allowed, I think, that the position of a *dasiputra* in a Shudra family does differ in several respects from that of *aurasputra*. The latter may, during his father's lifetime, enforce a partition of ancestral property, even against the father's wish. Whether the former can do so has not yet formed the subject of a judicial decision; but should the question ever arise, it seems very unlikely that any such claim on his part would be recognized, seeing that his right to take a share during his father's lifetime is expressly made to depend on "the father's choice." Besides, [46] when a partition takes place among brothers, *aurasputras*, after their father's death, they share equally; whereas the share of a *dasiputra* is only half the share of an *aurasputra* (2). Again, an only son, who is an *aurasputra*, takes the whole estate to the exclusion of every other heir; while an only son who is a *dasiputra* takes the whole estate, "provided there be no daughters of a wife, nor sons of daughters." While admitting, therefore, that the position of a *dasiputra* in a Shudra family does differ in important

(1) Mitak., ch. i, sec. xii, 1; Vyav. May., ch. i, sec. iv, 32.
(2) Mitak., ch. i, sec. xii, 2; I.L.R., 1 Bom. 97.

1878
JUNE 25.
FULL BENCH.
4 B. 37 (F.B.).

particulars from that of an *aurasputra*, I am not prepared to allow that the former is not a member of the family at all, nor that he is not a co-parcener, and not, therefore, entitled to succeed by right of survivorship. His legal *status* as a son is unquestionably recognized, and accordingly he inherits from his father even before the latter's widow (1); and if there are *aurasputras* of his father, he succeeds to the father's estate jointly with them. He is clearly, therefore, their co-parcener. That he is their brother, not only in the popular, but also in the legal, acceptation of the term is evident from the Mitakshara, ch. i, s. xii, 1, 2, where they are spoken of both by Yajnyavalkya and Vijnaneshvara as his "brethren" and "brothers" (*bhratarah*). Whether he can as a brother inherit any thing from them or not, is a question upon which we are not called upon to pronounce any opinion in this case, for the plaintiff here does not claim any self-acquired property of Mahadu; nor are we called upon to express any opinion upon the other question, whether he can inherit anything from collaterals. That a *dasiputra* is not included in the enumeration of heirs given in the Mitakshara, ch. ii, s. i, *placitum* 2, cannot be any argument against the plaintiff's claim. That *placitum* only lays down the order of succession *on failure of sons*, a rule of *sapratibandha daya*, or obstructed heritage, and therefore, has no application to this case, Manaji having died *leaving two sons*, the plaintiff and Mahadu. The last argument, that, as the proportions which the plaintiff and Mahadu were each entitled to take were fixed by law, the latter's share upon his death vested in his mother Baiza, will not hold, at least in this Presidency. If good, it [47] must apply with equal force in every case of death, without male issue, of a co-parcener in an undivided Hindu family.

It was, indeed, conceded in argument, and very properly so, that if Manaji had died without leaving Mahadu, the son of his "wedded wife" Baiza, the plaintiff, would have been entitled to half a share only, the remainder going to Daryabai, under Mitak., ch. i, s. xii, 2; but it was contended that the contingency had not occurred, upon which alone, according to that authority, Daryabai's right to take a share could arise, namely, a legitimate son not surviving Manaji; and that, therefore, her existence made no difference whatever in the plaintiff's right now to take the whole estate upon the death of his only co-parcener Mahadu without male issue. I consider this contention to be perfectly sound. As already observed, when Manaji died, his sons, the plaintiff and Mahadu, jointly succeeded to the whole of his estate (their respective shares being one-third and two-thirds), Daryabai taking nothing. They continued joint till Mahadu's death. The question is, what, upon that event, became of his undivided share of two-thirds. Did it vest in the plaintiff? If so, he is entitled to recover the whole of the property now in dispute. If it did not vest in him, he is entitled to recover only to the extent of his own one-third share, and Baiza being in possession may resist his claim to more, although Daryabai is out of the case. The brothers having been found to be members of an undivided family, it is quite clear to my mind that, upon the death of one of them, Mahadu, without male issue, his undivided share of two-thirds vested in his surviving brother and co-parcener the plaintiff, and not in Daryabai or any one else: see on this subject 2 Strange, 231, 232; 2 Norton's L.C. 463; and also Questions 9,11 and 12, and the answers to them at pp. 53, 55 and 56, respectively, of West and Buhler's Digest, Book I, together with the authors' "remark" upon the last at p. 57; see also Introduction,

(1) 1 West and Buhler (1st ed.), p. 53.

1878
JUNE 25.
FULL BENCH.
4 B. 37 (F.B.).

XLIV, XLVI. He is, therefore, entitled to recover the whole of the property from Baiza. But as she is entitled to maintenance out of her husband's estate, it is desirable properly to secure it for her before she is deprived of her possession of it.

I would, therefore, hold that the plaintiff and Mahadu, being male members of an undivided Hindu family, governed by the [48] Mitakshara law, the former, upon Mahadu's death without male issue, became entitled to the whole of the immoveable property of that family, there being no question about any moveable property in this special appeal and that his claim to that extent must accordingly be allowed, with costs throughout, subject, however, to the award of maintenance to Baiza, widow of Manaji, against which he has not appealed. While thus confirming the decree of the lower Court, so far as it goes, I would at the same time declare that Baiza's maintenance, Rs. 48 a year, is a charge upon the immoveable property, the subject of this suit.

In consequence of the above difference of opinion between the Judges of the Division Bench, the decree of the High Court was in accordance with the decision of the senior Judge. That decree held the plaintiff Sadu entitled only to one-third of the ancestral immoveable property, and made him liable for the costs of Baiza and Genu.

On the 24th March 1877 the plaintiff Sadu appealed to a Full Bench against the decree of the Division Court.

Shantaram Narayan, for the appellant.—The decision of Mr. Justice Melvill is based upon a supposed admission by me. This is a mistake. No such admission was either made or intended to be made. But, even upon the assumption of the admission wrongly supposed to have been made by me, Baiza is not entitled to any thing beyond the maintenance. The effect of the decree of the Division Court, however, is to leave her two-thirds of the property. This is wrong. Upon the state of facts found or admitted in this case, the plaintiff is entitled to the whole property sued for. The Court ought not to have thrown the costs of Genu upon the plaintiff. Genu died before the decision of the special appeal, and no heir was substituted for him.

Gokuldas Kahandas, for the respondent, Baiza. I admit that Baiza has no right to any share in the property in dispute. But she is in possession, and may partially defeat the object of the plaintiff in this case, by availing herself of the right of Daryabai. She is no party to this appeal. But two-thirds of the property stand vested in her in consequence of the death of her half-brother Mahadu without any issue or a widow. In order to have a right of inheritance by survivorship it is essential, that the ownership should have been originally created by birth. The doctrine of [49] Vijnaneshvar, Nilkanth, Mitra Mishra and other recognized authorities of the Benares school is, that by birth sons acquire ownership in their father's property: Mitak., ch. i, s. i, pl. 27 (Stokes' H. L. Bks., p. 375); Vya. May., ch. iv, s. i, pl. 3 (Stokes' H. L. Bks., p. 42). The doctrine of the Bengal school, founded upon Jimut Vahan is different. According to that school, no ownership is acquired by birth. It is acquired only on the destruction of the father's ownership by civil or natural death or by abandonment. An illegitimate son has no such ownership by birth, and, therefore, has no right of inheritance by survivorship. The principal test of this ownership by birth is the right to claim partition from the father, independently of his will. A legitimate son has a right of partition in his father's life-time and independently of his will, under certain circumstances: Vya. May., ch. iv,

1878 JUNE 25. FULL BENCH. 4 B. 37 (F.B.).

s. i, pl. 5 (Stokes' H. L. Bks., p. 43), and s. iv, pl. 2, 4, 6 (Stokes' H. L. Bks., pp. 48, 49); Mitak., ch. i, s. ii, pl. 5, 6, 7 (Stokes' H. L. Bks., p. 378). An illegitimate son has no such right of partition. He may be permitted to participate by the father's choice or pleasure only: Vya. May., ch. iv, s. iv. pl. 32 (Stokes' H. L. Bks., p. 55); Mit., ch. i, s. xii, pl. 1, 2 (Stokes' H. L. Bks., p. 426). An illegitimate son is not and cannot be considered a coparcener, as he does not take an equal share with the legitimate son. He is only a kinsman, not an heir, as a legitimate brother is. He cannot inherit the property of his collateral relations as a legitimate son can: Mitak., ch. i, s. xi, pl. 30, 31, 32 (Stokes' H. L. Bks., p. 442). [WESTROPP, C.J.—If Sadu had died before Mahadu, and left no male issue, can you maintain that Mahadu would not have taken the whole estate by survivorship?] I am not prepared to say, no. The learned pleader also referred to *Bhaskar Trimbak Acharya* v. *Mahadev Ramji and others* (1), *Vijiarangam* v. *Lakshman* (2).

JUDGMENT.

The judgment of the Court was delivered by

WESTROPP, C.J.—The family in which the present litigation has arisen belongs to the Shudra class.

Manaji died in or about the year 1850, leaving surviving him his wives Baiza and Savitri, a son Mahadu by Baiza, an illegitimate [50] son Sadu by a continuous concubine, and a daughter Darya by Savitri.

Subsequently Mahadu died in 1865, and it was found as a fact by the Acting District Judge in 1873, that down to the time of the death of Mahadu he and Sadu were undivided in estate. That finding was approved by a Division Bench of the High Court in April 1874. The case was, however, then remanded for re-trial on the merits, inasmuch as the Division Bench held that the District Judge had erroneously decided that the suit of Sadu was *res judicata*. The Subordinate Judge, upon the re-trial, and afterwards the Assistant Judge, upon regular appeal, found that Mahadu and Sadu were undivided in estate until the death of Mahadu. A decree made by the Subordinate Judge, holding Sadu to have become entitled on the death of Mahadu to the whole of the immoveable property, which had formerly belonged to Manaji and constituted the family estate, and awarding Rs. 48 per annum to Baiza as maintenance, was then affirmed by the Assistant Judge. Both Courts held that a mortgage made by Baiza of that estate to Genu, the husband of Darya, within six days before the commencement of this suit, was fraudulent and void. Baiza, the elder widow of Manaji, had, upon the death of her son Mahadu, taken possession of the family estate, and this suit was brought by Sadu in 1870, and therefore within the period allowed by law, to recover it from her. She, a tenant named Ramling, Genu and his wife Darya were the defendants. Neither Ramling nor Darya joined in the regular appeal to the Assistant Judge. That appeal was brought by Baiza and Genu only, and, it having been unsuccessful, they made a special appeal to the High Court. The finding of the lower Courts, that Mahadu and Sadu were undivided in estate at the date of Mahadu, was not questioned in the memorandum of special appeal, nor, as we understand, in argument. The special appeal was heard by the same Division Bench (Melvill and Nanabhai Haridas, JJ.,) which had

(1) 6 B. H. C. R. O. C. J. 1. (2) 8 B. H. C. R. O.C.J. 244.

1878
JUNE 25.
FULL BENCH.
4 B. 37 (F.B.).

previously remanded the suit for re-trial. The learned Judges differed in opinion, and Mr. Justice Melvill being the senior Judge, the decree was made in conformity with his view, varying the decrees of the Courts below by awarding to Sadu, the plaintiff, only one-third of the [51] immoveable estate, and by omitting the award to Baiza of maintenance (the effect of the decree being to leave the remaining two-thirds in the possession of Baiza). Against that decree Sadu has, under s. 15 of the High Court Charter of 1865, appealed, and that appeal has been heard by three Judges.

In the argument before us on the part of Baiza (Genu having died before the hearing, and no representative having been substituted for him), it has not been contended that she has any title, or that the mortgage by her to Genu is valid, or that his heir or representative is a necessary party; but the action being one in the nature of an ejectment by Sadu, it is said that Baiza, in order to defeat or partially defeat him, is at liberty to rely on the *jus tertiæ* of Darya (although the latter has not joined in the special appeal), in whom it is contended that two-thirds of the immoveable property vested on the death of her half-brother Mahadu, and that Sadu, the illegitimate son of Manaji, only took one-third of that property. That Darya and Sadu were so respectively entitled, was the opinion of Mr. Justice Melvill. He, however, had arrived at his decision while under a misconception as to the scope of an admission made by Mr. Shantaram Narayan when arguing the case on behalf of the plaintiff Sadu. Mr. Justice Melvill's supposition was that Mr. Shantaram Narayan admitted that, if Darya had been before the Court on the hearing of the second special appeal, only half the share of a legitimate son, *i.e.*, one-third of the immoveable property, could have been awarded to Sadu, and that the remaining two-thirds should be awarded to Darya. Mr. Justice Melvill, in his judgment, referred to this supposed admission, but has made a note in the margin of that judgment to the effect that, after delivery of the judgment, Mr. Shantaram Narayan asked him to make a note that he did not intend to make such an admission. Mr. Justice Nanabhai Haridas has, in his judgment, stated what he conceived the admission to be, he said: "It was, indeed, conceded in argument, and very properly so, that if Manaji had died without leaving Mahadu, the son of his 'wedded wife' Baiza, the plaintiff would have been entitled to half a share only, the remainder going to Daryabai, under Mitak., ch. i., s. xii, pl. 2." This, Mr. Shantaram Narayan says, was the admission which he made, [52] and such an admission seems to us to have been the most probable, as being one which the law, in our opinion, would have warranted him in making.

If Mahadu had not survived his father Manaji, then, indeed, under Mitak., ch. i, s. xii, pl. 2, Sadu would have been entitled to only half a share *i.e.*, one-third of the property, and the remaining two-thirds would have vested in Darya as the legitimate daughter of Manaji, and Baiza and Savitri would have been entitled to maintenance. But that was not the state of facts. Mahadu, the legitimate son of Manaji, having survived him, he and Sadu took the whole property between them, subject to the maintenance of Baiza, Savitri and Darya, if she were then unmarried, and, in that event also, to her reasonable marriage expenses. This right of Mahadu and Sadu to succeed to the property of Manaji on his death is, we think, clear from Mitak., ch. i, s. xii, pl. 1, and the Mayukha, ch. iv, s. iv, pl. 32, which authorities show also that those heirs would not be entitled to equal shares, but that the illegitimate son would only take

1878. JUNE 25. FULL BENCH. 4 B. 37 (F.B.).

half a share and the legitimate son the residue. It was argued that this was not a co-parcenership; but Hindu law more ancient than the Mitakshara admitted inequality of partition, which inequality the Mitakshara assailed and exploded. We, however, know not of any authority for saying that under the ancient law the elder son, who was entitled to a larger share, was not a co-parcener of the younger brethren, or that they would not have taken from each other by survivorship if they were undivided in estate. We asked Mr. Goculdas, the learned pleader for Baiza, whether if Sadu, the illegitimate son, had died before Mahadu and left no male issue, it could be maintained that Mahadu would not by survivorship have taken the whole estate, and Mr. Gokuldas declined to answer that question in the negative. We see nothing in the books which would justify us in regarding them as tenants in common and not as joint tenants. There was no reason why they should be compelled to make a severance of their shares if their pleasure were, as it was in this instance, to remain undivided in estate. What we have to consider is, not what would have been the rights of the parties if [53] Mahadu had died in the lifetime of his father, but what were their rights on the death of Mahadu, he having survived his father. It appears to us that Mahadu, at least from the time of his father's death in 1850 until his own death in 1865, and Sadu were co-parceners, and consequently that on the occurrence of the latter event the usual result of co-parcenery followed, *viz.*, that the surviving co-parcener took the whole property.

We proceed to examine the authorities. Manu(1) says: "But a son, begotten by a man of the servile class on his female slave, or on the female slave of his male slave, may take a share of the heritage, if permitted by *the other sons*; thus is the law established." This has been expanded by Yajnyavalkya, who says: "Even the son begotten by a Shudra on a slave woman shall have such share as (the father) may allot. (But if there be no partition till) after the father's death, then the brothers (born in marriage) are to assign him half a share: if there be no brothers, nor daughters' sons, he then takes the whole" (2). The chapter into which these texts are introduced by Jagannatha in his Digest is headed "On partition among brothers." The Mitakshara, ch. i, s. xii, pl. 1, after observing that "the author" (Yajnyavalkya) "next delivers a special rule concerning the partition of a Shudra's goods," quotes at length the passages of Yajnyavalkya above given, and then in pl. 2 proceeds thus:—"The son begotten by a Shudra 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 a 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 (3), provided there be no daughters of a wife nor [54] sons of daughters(4). But if there be such, the son of the female slave

(1) Ch. ix, pl. 179; 3 Dig., p. 144, Bk. V, ch. iii, pl. clxxvi.

(2) II Yajnyavalkya by Roer and Montriou, pl. 133, 134; 3 Dig., p. 143, Bk. V, ch. iii, pl. clxxiv, clxxv.

(3) See Shidset Deshmukh's case mentioned in *Gopal Narhar Safray* v. *Hanmant Ganesh Safray*, 3 B. 273 (at p. 285) and Printed Judgments for 1879, pp. 320, 325.

(4) Note by WESTROPP, C.J.—In giving the judgment in *Rahi* v. *Govinda* (I. L.R. 1 Bom. 97, see pp. 102, 103, 105) I was under the impression that the Sanskrit term used by Yajnyavalkya and in the Mitakshara was *putrika putra*, but in this respect I was misinformed. The expression employed in the Mitakshara, as well in its

1878
JUNE 25.
FULL BENCH.
4 B. 37 (F.B.).

participates for half a share only." Hence it appears that Vijnyaneshvara was dealing, 1st, with partition in the father's lifetime, when it depended on the pleasure of the father whether the son of the female slave took a full share or less; 2ndly, with the right of the son of the female slave on the death of the father. Then, if there were a son or sons of the wedded wife, and there had not been any partition in the lifetime of the father, the son of the female slave would become entitled to half the share of a son by the wedded wife, and if there were no son by her, but if there were a legitimate daughter, or son of such a daughter, the son of the female slave would only be entitled to a half share. And if there were neither son of a wedded wife, nor legitimate daughter, nor son of such a daughter, the son of the female slave would take the whole. No special provision is here made by Vijnyaneshvara for the case of the death either of the son of the wedded wife or the son of the female slave after the death of their father and before partition. But the effect of what he has said being as we think, to create a co-parcenery between the son of the wedded wife and the son of the female slave, we understand him as tacitly leaving such a case to the ordinary rule of survivorship incidental to a co-parcenery, and that accordingly the survivor would take the whole if the other died without leaving male issue.

It has already been so fully stated in *Rahi* v. *Govinda* (1) that, in this Presidency, among Shudras the illegitimate offsprings of a kept woman, or continuous concubine, are on the same level as to inheritance as the *dasiputra*, or son of a female slave by a Shudra, that we think it unnecessary to dwell any longer on that point.

[55] The argument for Baiza, that a *dasiputra* is not mentioned in the list of heirs given by Yajnyavalkya and repeated by the Mitakshara in ch. ii, s. i. pl. 2, and by the Mayukha in ch. iv, s. viii, pl. 1, is without any weight; for, in the immediately preceding slokas of Yajnyavalkya he stated the rights of illegitimate sons amongst Shudras in the manner already mentioned, and the portions of the Mitakshara and the Mayukha which contain the list of heirs occur in the chapters of those works relating to obstructed heritage, *i.e.*, succession on the failure of sons, principal and secondary (2). It has, to a certain extent, been already noticed in *Rahi* v. *Govinda* (1), though not as clearly expressed as it might be, that the place in which the author of the Mitakshara has in his work dealt with illegitimate sons is important. He does so (3) before he treats of obstructed heritage, *i.e.*, of the rights of succession after the failure of sons, principal and secondary (2), and he has treated the *dasiputra* as amongst these in the case of Shudras. Regarding the *dasiputra* in that class as amongst sons generally, there was no anomaly in placing him before the wife who enters the list as an heir only on failure of sons, principal and secondary; but, on the same hypothesis, there is, no doubt, an inconsistency on the part of Yajnyavalkya in bringing in by implication, and on the part of Vijnyaneshvara in bringing in

quotations from Yajnyavalkya, as in its comments upon it, is (as I am now informed by Mr. Trimbak B. Mayadev, of our Translation Department, who has examined the Mitakshara at my request) *duhitrinam suta*. Therefore, my supposition founded on the term *putrika putra*, that Yajnyavalkya was speaking of the appointed daughter's son, is unfounded. In all other respects I adhere to what was said in the judgment in *Rahi* v. *Govinda*.—M.R.W.

(1) 1 B. 97 (101, 104) 108 to 112, 113 to 115, and see the cases mentioned in p. 115 cited from 1 West and Buhler.

(2) Mitak. ch. ii, s. i, pl. 1.

(3) Mitak. ch. i, s. xii.

1878 JUNE 25. FULL BENCH. 4 B. 37 (F.B.).

expressly, the daughter or daughter's son as co-heir with the *dasiputrá* if there be no legitimate son in existence at the death of the father; for, in the general list of heirs after the failure of sons, principal and secondary, the daughter and her son are postponed to the widow. The omission to name the widow does not, however, exclude her from the right to maintenance, which right is acknowledged in the judgment in *Rahi* v. *Govinda* (1) and in the case of the *mohatur* widow of the Mali caste, mentioned in 1 West and Buhler (1st ed.) (2), and has been recognised in the present case by the two lower Courts, which have accordingly allotted maintenance to Baiza. This right of maintenance is what, according to the invariable practice of this Presidency, is given to the widow in lieu of a share [56] when the estate of her husband descends upon his male issue in coparcenery. The inconsistency in the law is in bringing in the daughter or her son where the deceased, being a Shudra, has left no legitimate male issue, but has left a *dasiputra*, who, amongst Shudras, is regarded as a son and as an heir. It is, however, one of those arbitrary arrangements not uncommon in Hindu law, as observed in *Rahi* v. *Govinda* (1).

What Nilakantha has said with respect to illegitimate sons has been so fully discussed in *Rahi* v. *Govinda* (1) as to render it unnecessary to say more here than that the 32nd *placitum* of Vyav. Mayukha, ch. iv, s. 4, relating to Shudras, is the only passage material in this case. It is as follows:—"Yajnyavalkya states a distinction with regard to a son begotten by a Shudra on a woman not married to him" (a mis-translation 'for an unmarried woman'). "Even a son begotten by a Shudra 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. Choice, the pleasure of the father. From specifying *by a Shudra* 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 will be perceived that, though this passage does not treat the succession of *dasiputras* as fully as Vijnyaneshvara in the Mitakshara, it contains nothing repugnant to the Mitakshara doctrine.

For the reasons which we have given, we think that the decree of the High Court of the 25th January 1877 should be reversed, and the decree of the Acting Senior Assistant Judge of the 4th October 1875 and the decree of the Subordinate Judge (then affirmed) should be restored with costs of both appeals in the High Court, save so far as regards the defendant Genu, he having died pending the appeals in the High Court, and his heir not having been substituted for him as a party thereto.

Order accordingly.

(1) 1 B. 104 (105, 112). (2) P. 53.