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## [282] APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Hart.*SHESGIRI AND ANOTHER (*Original Defendants*), *Appellants v.*  
GIREWA (*Original Plaintiff*), *Respondent*.\*

[8th October, 1889.]

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*Hindu law—Sudras—Inheritance—Succession—Illegitimate son's right to succeed to the whole estate—Right of survivorship.*

The plaintiff was one of three daughters of one Shivbassapa, a Lingayet, who died in 1870 leaving immoveable property. The defendants were his illegitimate sons. After his death, his widow, Satyawa, one of his daughters, and the defendants continued to live together in union, and managed the property jointly. The widow died in 1880, and the defendants took possession of all the property. In 1885 the plaintiff brought this suit to recover it, alleging that one of her sisters was disentitled from inheriting by disease; that the other was rich and that the defendants' illegitimacy excluded them. The Court of first instance rejected the plaintiff's claim. The District Judge in appeal held that she was entitled to one-sixth of the property only, and the defendants to one-half. The defendants appealed to the High Court, contending that on the death of the widow the entire property survived to them.

*Held*, that the defendants were not entitled to more than the half to which they succeeded immediately on the death of their father Shivbasapa. The other half went either to the widow or to the daughters. If it went to the widow, she plainly took it as one of a class of persons who exclude the illegitimate son's right to more than half; (Mayne's Hindu Law, para. 466, 4th ed.). If it went to the daughters on the father's death, there was no evidence to show that the defendants had had adverse possession of it as against the plaintiff before the widow's death in 1880.

[F., 15 M. 307; R., 23 B. 257 (265); 33 M. 226=4 Ind. Cas. 299=20 M.L.J. 359=7 M.L.T. 28=16 C. L. J. 335=17 C.W.N. 442=17 Ind. Cas. 276.]

THIS was a second appeal from a decision of Dr. A. D. Pollen, District Judge of Belgaum.

In 1870 one Shivbasapa, a Lingayet by caste, died possessed of immoveable property, leaving him surviving his widow Satyawa, three daughters, *viz.*, Girewa (the plaintiff), Satyawa and Basawa and two illegitimate sons, *viz.*, Shesgiri and Bhima (the defendants), the children of his mistress. After his death his widow, his daughter Basawa and the two illegitimate sons, (the defendants), continued to live together in union and to manage the property jointly.

In 1880 the widow Satyawa died, and all the property fell into the hands of the defendants.

[283] In 1885 the plaintiff brought this suit to recover the entire property, alleging that her two sisters were disqualified from inheriting the property—the one being blind and the other very rich, that she herself was very poor, and that the defendants were illegitimate.

The defendants admitted that they were the illegitimate sons of Shivbasapa, but contended that on the widow's death the entire property survived to them. They also alleged that by an agreement made between them and their sisters the latter had eight acres of land and a house as their share of the property. They further pleaded adverse possession.

The Subordinate Judge, who tried the suit, added the plaintiff's sisters as co-defendants. He rejected the plaintiff's claim, however, on

\* Second Appeal No. 107 of 1888.

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the ground, among others, that the plaintiff had relinquished her right to the property under the agreement set up by the defendants, and that the defendants were entitled only to one-half of the property as the illegitimate sons of Shivbasapa.

The plaintiff appealed to the District Judge, who held that the plaintiff was entitled to one-sixth of the property (and the defendants to one-half).

The defendants preferred a second appeal to the High Court.

*Telang (Mahadev Chimnaji Apte with him)*, for the appellants :—The widow and the sons (the appellants) took the estate jointly, and by the right of survivorship the appellants took the other half. If there are legitimate and illegitimate sons living in co-parcenary, on the death of the legitimate son without issue the illegitimate sons will succeed to the legitimate son's estate. That rule applies here: West and Buhler, p. 385; *Sadu v. Baiza* (1). The texts of Hindu law show that the illegitimate son of a Sudra inherits, under special circumstances, as if he were a legitimate son—Mandlik's Hindu Law, p. 220. Under the Hindu law the leaning is in favour of joint tenancy. The daughters would have excluded the illegitimate sons, had there not been the widow intervening. There is, besides, a family arrangement between the sisters and the illegitimate sons, which amounts to relinquishment of right on their part, and the plaintiff [284] cannot now claim anything beyond what is fixed under the arrangement.

*Shamrao Vithal*, for the respondent :—The appellants are entitled to half only. The case of *Parvathi v. Thirumalai* (2) decides that the widow excludes the illegitimate sons. See also Mayne's Hindu Law, s. 466 (4th ed.). The daughters and the widow lived together, and on her death they would succeed to the other half. As long as the widow or daughters or their sons exist, so long the illegitimate sons cannot get the whole estate; see Mayne's Hindu Law, s. 466 (4th ed.). The appellants came into possession only on the death of the widow in 1880. They have not held adversely to us. All that they can claim is half the estate; the other half must be distributed among the daughters. On the death of the father, half would go to the illegitimate sons and the other half to the widow: see Mayne's Hindu Law, s. 610, (4th ed.), and on her death that half goes to the daughters.

#### JUDGMENT.

The judgment of the Court was delivered by

SARGENT, C. J.—In this case one Shivbasapa died leaving two illegitimate sons, the defendants in this suit, a widow Satyawa, and three legitimate daughters, Girewa, Basawa and Satyawa. It is found by the lower appeal Court that after his death the widow, the daughter Basawa and the two illegitimate sons continued to live together in union and managed the property jointly. The widow Satyawa having died, Girewa has set up a claim to the entire property, alleging that her sister Basawa has a disease which prevents her from inheriting, and that Satyawa is rich. The appeal Court has found these allegations not proved, and that Girewa is only entitled to  $\frac{1}{6}$ th, the illegitimate sons, the defendants, being entitled to half of the property. The defendants now appeal, contending that on the death of the widow the entire property survived to them.

(1) 4 B. 37.

(2) 10 M. 334 (346).

It is clear that on Shivbasapa's death the defendants took half of the property—*Bahi v. Govinda* (1). But whether the widow would have succeeded to the other half in preference to her [285] daughters, is open to doubt, having regard to the expression of opinion by Sir M. Westropp in his judgment in *Bahi v. Govinda* (1) adverse to the claim of the widow, owing to her not being mentioned in the text of Mitakshara—Stokes, 426. This view is also adopted in West and Bühler's Hindu Law (3rd ed.), p. 85, whilst admitting the anomaly of the widow being postponed to her own daughter. On the other hand, the Madras High Court in *Parvathi v. Thirumalai* (2) referred with approval to a previous unreported decision of that High Court, that a widow would exclude the illegitimate son, and the correctness of this view is strongly urged by Mr. Mayne in s. 466 of his Hindu Law (4th ed.).

Assuming the widow to have succeeded to the other half, it was contended by Mr. Telang that she and the illegitimate sons would be co-parceners, on the authority of the Full Bench ruling in *Sadu v. Baiza* (3), that the legitimate and illegitimate sons took as co-parceners with the right of survivorship,—a decision which is followed by the Calcutta High Court in *Jogendro Bhuputi v. Nityanund Man Singh* (4), but is apparently disapproved of by the Madras High Court in *Parvathi v. Thirumalai* (2), where, however, the question was between an undivided brother and an illegitimate son. But, whatever the right rule may be as regards the sons, it is plain that if the widow's right to succeed is admitted, it must be on the ground, as stated by Mr. Mayne, Hindu Law, cl. 466, that "the obvious meaning of Yajnavalkya's text is that until the line which terminates with a daughter's son is exhausted, the illegitimate son cannot take the whole estate, but is only entitled to a part of it"—so that "being illegitimate he takes only half, the other half going to the widow, daughter or daughter's son respectively." It follows, therefore, that if the widow takes, she takes as one of a line of persons who exclude the illegitimate son's right to more than the half.

If, however, we assume that the daughters were entitled to succeed to half immediately on their father's death, there is no evidence to show that the illegitimate sons had had adverse [286] possession of it as against the plaintiff before the widow's death in 1880, nor was any case of that nature made by way of defence to the plaintiff's claim. We must, therefore, confirm the decree with costs.

*Decree confirmed.*

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(1) 1 B. 97 (104, 105, 106).

(3) 4 B. 37.

(2) 10 M. 234 (346).

(4) 11 C. 702.