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impossible to make any substantial distinction between the present case and *Damodar Gopal Dikshit* v. *Chintaman Balkrishna Karve*[1], or *Narayan* v. *Balaji*[2]. The question of title arises incidentally and does not therefore remove the suit from the cognizance of the Court of Small Causes.

Then Mr. Shah contended that the plaint purports to represent that the money now claimed by the plaintiff had been wrongfully received by the defendants and that in this view of the pleadings the suit should be brought within clause 31 of the second schedule of the Small Cause Court Act. But even if we read into the plaint the allegation of wrongful receipt by the defendants—and there is no such plain allegation in the plaint as drawn,—still this addition would not suffice to bring the suit under the operation of clause 31, for this reason that that clause requires as a condition precedent to its applicability that the suit be a suit for an account, and this is not a suit for an account.

We think, therefore, that the objection must prevail and that the appeal must be dismissed with costs, on the ground that no second appeal lies.

Appeal dismissed.

R. R.

(1) (1892) 17 Bom. 42. (2) (1895) 21 Bom. 248.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Chaubal.

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BHIKYA AND TUKYA VALAD SAKHARAM (ORIGINAL PLAINTIFF), APPELLANTS, *v.* BABU MARD VEDU TELI (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu Law—Succession—Shudras—Illegitimate daughters.

Under Hindu law among Shudras an illegitimate daughter cannot succeed to her father's property in preference to the son of a divided brother.

SECOND appeal from the decision of B. C. Kennedy. District Junge of Násik, confirming the decree passed by R. B. Gogte, Subordinate Judge at Sátára.

* Second Appeal No. 795 of 1907.

Suit to recover possession of property.

There were two brothers, Dagdu and Sakharam. They were Shudras. The two brothers were divided. Dagdu had a mistress, the defendant, by whom he had a daughter. The plaintiffs were sons of Sakharam.

At Dagdu's death, which took place on the 11th November 1904, the defendant went into possession of his property.

The plaintiffs, the sons of Sakharam, sued to recover the possession of the property from the defendant.

The Subordinate Judge dismissed the plaintiffs' suit, holding that the illegitimate daughter of Dagdu was a preferential heir to them. His reasons were as follows:—

"The question is whether illegitimate daughter can succeed as illegitimate son. There is no direct authority on this point. The word "offspring" includes both sons and daughters. The decision of *Sarsuti* v. *Mannu* (I. L. R. 2 All. 134) states that the *illegitimate* offspring of a kept woman or continuous concubine amongst *Shudras* are on the same level as offspring of a female slave. The daughter of defendant as illegitimate offspring of Dagdu should be given a preference to plaintiffs as heir of Dagdu."

The decree was on appeal confirmed by the District Judge on grounds which he stated as follows:—

"But at present the sole point is as to the right of illegitimate daughters to succeed to the estate of a Shudra. As regards illegitimate sons there can be no doubt. The case has never been decided by authority. It is true that in certain reports the word illegitimate offspring is used, but this is a loose use of the word, for it is clear from the text of the reports, and apparently from the text cited therein, that what was being discussed is the right of the illegitimate son and that there is no specific reference in any of the texts to the daughter.

In 18 Bom. 177 it is laid down, though by way of an *obiter dictum*, yet very forcibly and precisely, that the daughters being illegitimate, of a twice born man, have no right of maintenance under the texts which give such right to illegitimate sons. Now the right of a son of a Shudra to inherit rests, as appears from the texts cited in 1 Bom. 97, on the very same texts and words as those which confer a right on the illegitimate son of the Brahman to maintenance; consequently if it were definitely held that in those texts and by those words the feminine was excluded by the use of the masculine from it would seem necessarily to follow that the illegitimate daughters would have no right to succeed. That the rule of law, if it be such, is peculialry hard is of course immaterial. If there was ever a person to be compassionated it would be the daughter of a Shudra in such a case.

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Precluded from receiving gifts or bequsets by the personal law of her father's family, precluded from marriage by the conditions of her birth, and precluded by her sex from earning her living she would be inevitably and by fatal necessity driven into a life of abomination.

Is it possible to introduce a difference between the right of an illegitimate daughter of a Brahman to receive maintenance and the right of an illegitimate daughter of a Shudra to receive the inheritance?

In the country of the Mitakshara the claims of women to share in the inheritance of their original family is greater than in countries where other schools of law reign. This is clear from a consideration of the rights of the daughter and sister. The reason for this appears to be that in our country affinity by blood and not affinity by sacrifice is what is regarded. It seems then possibly doubtful whether if the point had been considered the illegitimate daughters of even the twice bron castes would have been put in an inferior position to illegitimate sons. For more than in the case of a Shudra it seems that affinity and not religious efficacy should be the test, and there can be no doubt that in point of view of affinity a daughter is as close as a son.

The total exclusion of acknowledged bastards from all share in the inheritance of their father is unknown to all the great schools of law with the exception of the English, and as far as I am concerned I would rather be guided where there is no certain guide by the dictates of reason and humanity than by doubtful analogies drawn from obscure texts."

The plaintiffs appealed to the High Court.

S. R. Bakhle for the appellants:—The text of the Mitakshara (clause I, section 12, page 2) which speaks of an illegitimate son does not mention the daughter; and according to the canon of construction a daughter is excluded unless she is specially mentioned. Thus, an illegitimate son of a *Shudra* takes in preference to the widow because the latter is not mentioned in the text (*Rahi* v. *Govinda*[1] and *Sadu* v. *Baiza*[2]). Again, among the three regenerate classes the illegitimate son is entitled to maintenance while such a right is denied to the illegitimate daughter: *Parvati* v. *Ganpatrao Balal*[3].

K. M. Taleyarkhan for the respondent:—The word *putra* in the text includes daughters. *See* Vyavastha Darpana (2nd Edn.), p. 639; Dattaka Mimansa, s. 7, c. 7; *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn*[4]: *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver*[5].

(1) (1875) 1 Bom. 97.
(2) (1878) 4 Bom. 37.
(3) (1893) 18 Bom. 177.
(4) (1857) 7 Moo. I. A. 18.
(5) (1869) 13 Moo. I. A. 141.

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Among the Shudras, inheritance goes by affinity only, and in principle it makes no difference between a son and a daughter.

BATCHELOR, J. :—Dagdu and Sakharam were divided brothers, and the question involved in the suit was as to the right of inheritance to Dagdu. That right was claimed by the plaintiffs as the sons of Sakharam, and was resisted by the defendant who was the mistress of Dagdu and was by him the mother of one daughter now living. The parties are Shudras, and what the Courts had to decide, therefore, was whether the illegitimate daughter of a Shudra was entitled to inherit in preference to his brother's sons. Such cases as *Rahi* v. *Govinda*[1], *Kuppa* v. *Singaravelu*[2] and *Dalip* v. *Ganpat*[3], indicate that this question of law turns partly on the question of fact as to the character of the connexion between the father and mother ; and upon this point we are satisfied from the findings of the learned Subordinate Judge that the defendant was the permanently kept mistress of Dagdu so that the relation between them was an established concubinage, and not merely a casual or temporary intimacy. Upon this footing it is settled law that an illegitimate son would be entitled to succeed to his Shudra father in preference to the father's suparated nephews. The question is whether the illegitimate daughter is accorded by law the same position. The learned District Judge has answered this question in the affirmative, but, though we appreciate the force of the considerations on which he has relied, it must be conceded that those considerations affect rather the question of what the law ought to be than the question of what the law is. And in passing we may observe that even if the illegitimate daughter's claim be disallowed, her position is hardly so specially unfortunate as the learned Judge appears to have supposed. But however that may be, this matter is not one which can be allowed to form the basis of our decision ; that must ultimately be grounded upon our understanding of what the law on the subject actually is.

On behalf of the respondent reliance is placed on the texts which have been held to authorize the succession of the illegiti-

(1) (1875) 1 Bom. 97. (2) (1885) 8 Mad. 325.
(3) (1886) 8 All. 387.

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mate son : they are Manu, Chapter IX, section 179 and Yajnavalkya, Chapter II, clauses 133, 134, and a translation of them may be found in paragraph 547 of the sixth edition of Mayne. The commentary of the Mitakshara is at Chapter I, section 12, clause 2, and will be found translated in paragraph 550 of Mayne's treatise. The argument is that the word "son" appearing in the texts should be construed so as to include daughters. But apart from the inherent grammatical difficulty of this construction, as to which reference may be made to Sir Charles Sargents observations in *Parvati* v. *Ganpatrao Balal*[1] and to the discussion in *Vinayek* v. *Luxumeebaee*[2], it appears to us that the context in which the foregoing passages occur prohibits the idea that, illegitimate daughters were intended to be included as heirs. For the context seems to us to suggest that, in the discussion which they were then conducting, the authors were considering merely the question what persons were entitled to a share on the partition of a joint family, and the claim of the illegitimate son is distinguished according to the class or caste of the father. These texts, we think, can throw no light on the claim of the illegitimate daughter to inherit; her position in this respect must be ascertained not from these passages, but from the discussion held under the specific heading of succession. And here the rule is that females must be excluded unless expressly named as heirs. Now the texts name simply the daughter, and unless this word can be read so as to include an illegitimate daughter, we see no means of admitting the present defendant's claim. Against this liberal construction we have the fact that where the case of illegitimate sons was to be considered, they were expressly mentioned, a circumstance which indicates that the writers were conscious of the difference in legal position between legitimate and illegitimate offspring. Thus, since the right of the illegitimate son is conceded in express terms, and no mention is made of any such right belonging to the illegitimate daughter, we are of opinion that the proper inference is that such right was refused. To read the word daughter as inclusive of illegitimate daughters seems to us contrary to accepted principles of construction; and if that

(1) (1893) 18 Bom. 177. (2) (1861) 1 Bom. H. C. R. 117 at p. 123.

reading were adopted, we do not see how it would be possible to refuse a similar extension to all other words denoting relation.

We come, therefore, to the conclusion that the texts negative the defendant's claim here. And we are of opinion that this view is not inconsistent with the decisions. The only case we have been shown where the actual point now before us was noticed is a case reported, under date 1816 at Dacca, at page 256 of the third edition of Macnaghten's Principles and Precedents of Hindu Law. That was a case where the son of a concubine, having obtained possession of his father's landed property, died leaving no children. He was succeeded by a widow, and the question was whether an alienation by the widow was valid during the existence of a daughter's son, or of another concubine of the original proprietor. It was held that, if the parties were Shudras, the widow might enjoy the whole estate during her life-time and might also alienate a small portion for certain laudable purposes, but that her power extended no further. It is clear that this sufficed to dispose of the point then in issue, and we do not think that any great weight attaches to the Shastri's further expression of opinion that "by the term 'a son begotten by a Shudra on a female slave,' must be understood daughters, daughters' sons and other heirs," especially as, though a vague allusion is made to the authorities, it does not appear on what particular authority or on what process of reasoning the opinion was grounded. So in *Rahi* v. *Govinda* (1) the head note to the effect that "among the Shudra class, illegitimate *children*, in certain cases at least, do inherit" appears to go beyond the decision. The question then before the Court was whether the plaintiff, as the illegitimate *son* of one Teja Navasji, was entitled to succeed, and the point turned mainly upon whether his mother could properly be considered a *dasi* within the meaning of the word in the compound *dasiputra*. There was no question as to the rights of illegitimate daughters.

(1) (1876) 1 Bom. 97.

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In *Parvati* v. *Gonpatrao Balal*[1] the question was referred to in argument, but was not decided. Sir Charles Sargent, however, went so far as to suggest doubt whether the word *dasiputra* could be held to include daughters.

In the other cases to which our attention has been directed, namely, *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn*[2]; *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver*[3] and *Sarasuti* v. *Mannu*[4] it is apparent that any expression of opinion as to the illegitimate *daughter's* position would be extra-judicial, inasmuch as in these cases the Courts were concerned only with the claim of illegitimate *sons*. That being so, where the word "children" or "offspring" is used, it must be read as male children, who alone were then in the consideration of the Courts.

The result, therefore, is that the question now arising for determination is not covered by judicial decision, and must be answered in accordance with the authoritative texts, which have been considered above. In our opinion the effect of these texts is that no right of inheritance is recognised in the illegitimate daughter of a Shudra, and consequently the plaintiffs are entitled to succeed in their suit. A decree must be made accordingly, the decree of the lower Court being reversed, and the plaintiffs-appellants must have their costs throughout. The decree will give the plaintiffs the declaration asked for, and will direct that the plaintiffs do recover possession of the property in suit from the defendant.

Decree reversed.

R. R.

(1) (1893) 18 Bom. 177.
(2) (1857) 7 Moo. I. A. 18 at p. 50.
(3) (1869) 13 Moo. I. A. 141 at p. 159.
(4) (1879) 2 All. 134.