

decree passed in a contested suit there would be a right of appeal. That view is, I think, opposed both to the general scheme of this Act and to the language of section 37, which must be read together with section 38. For these reasons, I agree with my learned colleague in thinking that this application should be refused.

1909.

IN RE
SHIVLAL
PADMA.

Rule discharged.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

RAVJI VALAD MAHADU PATIL (ORIGINAL DEFENDANT), APPELLANT,
v. SAKUJI VALAD KALOJI AND ANOTHER (ORIGINAL] PLAINTIFFS),
RESPONDENTS.*

1909.

November 29.

Hindu Law—Sudras—Mitakshara—Legitimate son—Illegitimate son—Vatan—Collateral succession—Suit by reversioner for declaration as nearest heir—Widow of the last male holder—Vested right—Limitation Act (XV of 1877), Art. 120.

Amongst Sudras governed by the Mitakshara an illegitimate son cannot inherit a vatan collaterally in preference to legitimate heirs.

The right to sue for a declaration of heirship to a vatan does not accrue until the death of the widow of the last male holder of the vatan, the widow having a vested interest in it as the nearest heir.

SECOND appeal from the decision of C. Fawcett, District Judge of Ahmednagar, confirming the decree of G. L. Dhekne, Subordinate Judge of Kopargaon.

The plaintiffs, who were cousins, sued for a declaration that they, and not the defendant, were the heirs to the Patilki Vatan of their paternal uncle Ganpati Hari, deceased, or of Reubai, the widow of the deceased. The plaint alleged that Ganpati died about thirteen years before the suit, that the defendant fraudulently represented himself to be the heir of Ganpati and got

* Second Appeal No. 475 of 1909.

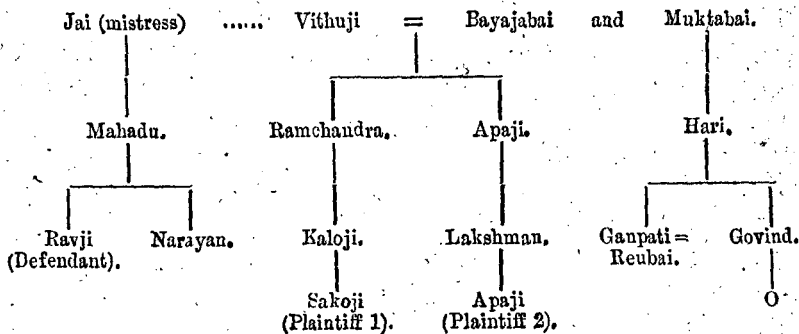
1909.

RAVJI
VALAD
MAHADU
v.
SAKUJI
VALAD
KALOJI.

his name entered as such in the Vatan Register in the year 1899 though Ganpati had left him surviving his widow Reubai, that the defendant was *Dasiputra* (illegitimate son) in the plaintiffs' family and was, therefore, not entitled to the vatan, that Reubai died in or about the year 1902 in the Baroda territory where she lived, and that the plaintiffs having learnt of the defendant's fraud in October 1905, they brought the present suit in the year 1906 for a declaration of their heirship.

The defendant answered that he was not a *Dasiputra*, that he was the son of Mahadu, the natural brother of Hari the father of Ganpati, that he was thus a nearer heir to Ganpati than either of the plaintiffs and that the suit was time-barred.

The following is the genealogical tree :—



The Subordinate Judge found that the plaintiffs were the heirs of the deceased Ganpati, that the defendant was the son of Mahadu who himself was a *Dasiputra* of the plaintiffs' ancestor Vithuji and was not the heir of Ganpati, that the defendant acted fraudulently in getting his own name entered as heir in the Vatan Register, and that the plaintiffs having learnt of the defendant's fraud about four years before the suit, the claim was not time-barred under Article 120 of the Limitation Act. The Subordinate Judge, therefore, decreed the claim, observing :—

The evidence shows that plaintiffs are the heirs of Ganpati and that the defendant is not shown to be born of their ancestor Vithuji. Even for the sake of argument if it be held that Mahadu was born of the mistress of Vithuji, still it can't be held that Mahadu's son Ravji is a preferential heir to the plaintiffs. There is no exact decided case to guide me. Referring to the cases under the

heading of "Illegitimate sons" on pp. 3488 to 3494 of Woodman's Digest, I think the case of I. L. R. 21 All. 99 goes against the defendant even if it be conceded that the defendant's father was a *Dasiputra*. As regards vatan property the sentiment of the Hindus even of the Sudra class would be that it should go to the legitimate heirs rather than to the descendants of the illegitimate heirs. The cases referred to above are most of them cases of inheritance by an illegitimate son to his father. There are few cases of collateral succession and the few that are cited are against the defendant. I think that sentiment and opinion even amongst the Sudras would be to give the plaintiffs a preference as against the defendant and especially so when vatan property is concerned. I therefore declare that plaintiffs are the heirs to the vatan share of Ganpati Hari and they are the reversionary heirs to Ganpati Hari now after the death of Ganpati's widow Reubai as regards the property in dispute. * * *

I declare that the defendant is not the heir as claimed by him. All costs on the defendant.

1909.

KAVJI
VALAD
MAHADU
v.
SAKUMI
VALAD
KALOJI.

On appeal by the defendant the District Judge confirmed the decree. With respect to the defendant's illegitimacy he agreed with the Subordinate Judge, and on the point of limitation he made the following remarks :—

The only remaining question is that of limitation. The suit clearly falls under Article 120 of the Limitation Act, *cf.* I. L. R. 15 Bom. 422, and the question is, when did the right to sue accrue to the plaintiffs? As to this I agree with the lower Court that it did not accrue till Reubai's death, which was within six years of the institution of the suit. No doubt plaintiffs were adversely affected by the entry of defendant's name in place of Ganpati's in the vatan Register in 1899, but this in itself gave them no right to sue for the relief claimed in the present suit, *viz.*, that they were entitled to have their names entered in the register as heirs of Ganpati in preference to the defendant, because the latter in such a suit could at once have pleaded that even on plaintiffs' case they had no right to such a declaration so long as Reubai was alive. And if, as appears from one of the documents tendered in evidence in this appeal and as is not unlikely from the fact that Reubai lived in Baroda, except for 7 years or so after her husband's death when defendant says she lived with him, Reubai was a consenting party to the defendant's name being entered in the register, it virtually amounted to an alienation of her share of the vatan by Reubai, which would, under section 5 of Bombay Act III of 1874, be valid during her life-time. And the mere fact that plaintiffs could have brought a suit to declare such alienation valid (invalid?) (illustration (e) to section 42, Specific Relief Act) does not bar a suit like the present, after the plaintiffs have obtained a vested interest in the property in regard to which they seek a declaration. The "right to sue" is a different one and arises out of a different cause of action.

The defendant preferred a second appeal.

1909.

RAVJI
VALAD
MAHADU
P.
SAKUMI
VALAD
KALOJI.

R. B. Desai for the appellant (defendant):—The plaintiffs sued for the declaration of their status as Vatan-dars. Civil Courts have no jurisdiction to entertain such a suit.

[Scott, C. J.:—It has been recently held that such a suit can be entertained by Civil Courts: *Rahimkhan v. Dadamiya*⁽¹⁾.]

Our next point is that we are entitled to inherit the vatan though it has been found that our descent was illegitimate in a collateral branch of the family. The parties are Sudras, and under Hindu Law the illegitimate son of a Sudra has the rights of a legitimate son in the family of his father and his share in the family property is half of what a legitimate son is entitled to, and in the absence of a legitimate son he takes the whole of his father's property. The decision in *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam*⁽²⁾ is no doubt against our contention, but we submit that it is not conclusive on the point. There is nothing in Hindu Law to exclude illegitimate sons among Sudras from succeeding to collaterals: West and Bühler (3rd edn.), pp. 72, 81, 83, 461, 462; Macnaghten's Hindu Law (3rd edn.), pp. 14, 15. The ruling in *Ramalinga Muppan v. Pavadai Goundan*⁽³⁾ shows that the sons of an illegitimate son are entitled to succeed to their grandfather. The principle of survivorship is also held to apply by the Privy Council in the case of illegitimate sons surviving the legitimate sons: *Jogendro Bhupati v. Nityanand Man Sing*⁽⁴⁾. If that is so, then there is no reason why an illegitimate son should not succeed to the collaterals of his father.

The next point is that the suit is time-barred. Our name was entered in the Vatan Register as next heir after due inquiry under the Vatan Act in the year 1899, while the present suit was filed in the year 1906, that is, more than six years after the entry. It is true that Reubai died in 1902. But the cause of action accrued to the plaintiffs on the date our name was entered in the Vatan Register as the next heir. Such a suit is governed by Article 120 of the Limitation Act: *Chhaganram Astikram v. Bai Motigavri*⁽⁵⁾; *Ramaswami Naik v. Thayammal*⁽⁶⁾.

(1) ante p. 101.

(2) (1898) 21 All. 99.

(3) (1901) 25 Mad. 519.

(4) (1890) 18 Cal. 151.

(5) (1890) 14 Bom. 512.

(6) (1902) 26 Mad. 488.

V. M. Mone for the respondents (plaintiffs):—The question as to the inheritance of illegitimate sons is clearly covered by the rulings in *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam*⁽¹⁾ and *Nissar Murtojah v. Kowar Dhunwunt Roy*⁽²⁾. The cases cited and the passages relied on from West and Bühler do not support the defendant's contention.

1909.

RAVJI
VALAD
MAHADU
v.
SAKURJI
VALAD
KALOJI.

As to the point of limitation, our claim is not time-barred. So long as Reubai was alive she was entitled to inherit the vatan as the widow of the last male-holder. Our cause of action accrued on her death. She died in the year 1902 and the present suit was filed in the year 1906, that is, within six years after her death; therefore, under Article 120 of the Limitation Act the suit is not beyond time.

Desai in reply.

SCOTT, C. J.:—In this case two points have been argued. First, that the suit is barred by limitation, and, secondly, that the defendant was entitled as an heir of Vithoji in preference to the plaintiffs. This latter point does not appear to have been argued in the District Court possibly because it was thought to be a hopeless point. The authorities are all against the defendant's contention, dating from the case of *Nissar Murtojah v. Kowar Dhunwunt Roy*⁽²⁾ up to that of *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam*⁽¹⁾, and *Ramalinga Muppan v. Pavadai Goundan*⁽³⁾. The contention is also opposed to the opinion expressed by the learned authors of West and Bühler's Hindu Law at page 83 (3rd edn.). There is no caste custom proved in this case to support the defendant's contention (see also *Mitakshara*, chap. I, section 11, placitum 31).

With regard to the point of limitation we agree with the view taken by the learned District Judge. The plaintiffs' right to sue for a declaration would not accrue until the death of Reubai, whose existence at any time between the death of Ganpati and her own death would have defeated the suit for a declaration by

(1) (1898) 21 All. 99.

(2) (1863) 1 Marsh. 609.

(3) (1901) 25 Mad. 519.

1909.

RAVJI
VALAD
MAHADU
v.
SAKUMI
VALAD
KALOJI.

the plaintiffs, on the ground that she had vested right as the nearest heir of the last vatandar.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

G. B. R.

CRIMINAL REFERENCE.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1909.

December 2.

EMPEROR v. ARJUN AMBO KATHODI.*

Criminal Procedure Code (Act V of 1898), sections 109, 123, 397—Penal Code (Act XLV of 1860), section 329—Concurrent sentences—Consecutive sentences.

The accused was proceeded against under section 109 of the Criminal Procedure Code, and sentenced on the 6th July 1909, under section 123 of the Code, to rigorous imprisonment for nine months, in default of security for good behaviour. He was then tried for an offence of theft committed by him in November 1908, and was, on the 17th August 1909, sentenced to suffer rigorous imprisonment for three months: the second sentence was directed to take effect on the expiry of the first sentence.

Held, that the two sentences ought not to run consecutively; but must run concurrently.

REFERENCE made by J. L. Rieu, District Magistrate of Thána.

Arjun Ambo Kathodi was proceeded against under section 109 of the Criminal Procedure Code before the Honorary Magistrate First Class, Thána, who, in default of his giving the security demanded, sentenced him under section 123 of the Code to undergo rigorous imprisonment for nine months. This order was passed on the 6th July 1909.

Arjun was subsequently prosecuted in the Court of the First Class Magistrate, Sálsette, for an offence of theft committed by him in November 1908, and convicted and sentenced to suffer rigorous imprisonment for three months on the 17th August 1909.

* Criminal Reference No. 100 of 1909.