APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Hayward.

DHARMA LAKSHMAN GHARAT (ORIGINAL DEFENDANT), APPELLANT *v.* SAKHARAM RAMJIRAO DESHMUKH (ORIGINAL PLAINTIFF), RESPONDENT.[*]

1919
August 22.

Hindu Law—Succession—Sudra—Illegitimate son not allowed collateral succession.

On the death of a Sudra, his property was claimed by two persons, one of whom was his divided brother, and the other was the illegitimate son of his father :—

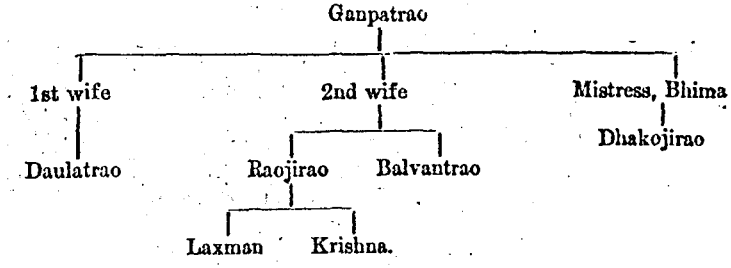
Held, that the former was entitled to succeed, since the illegitimate son was, under Hindu law, excluded from all collateral succession.

Ravji valad Mahadu v. *Sakuji valad Kaloji*[1]; *Shome Shankar Rajendra Varere* v. *Rajesarswami Jangam*[2] and *Ramalinga Muppan* v. *Pavadai Goundan*[3], followed.

SECOND appeal from the decision of K. B. Wassoodew, Assistant Judge of Thana, confirming the decree passed by K. V. Mehta, Subordinate Judge at Murbad.

Suit to recover possession of property.

The property belonged to one Daulatrao. On his death, it was claimed by the plaintiff who was an alienee from the sons of Raojirao, a separated brother of the deceased. It was also claimed by the defendant, who was an alienee from Dhakojirao, the illegitimate son of Daulatrao's father. The relationship is shown by the following genealogical tree :—



[*] Second Appeal No. 1203 of 1916.

(1) (1909) 34 Bom. 321.
(2) (1898) 21 All. 99.
(3) (1901) 25 Mad. 519.

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The parties belonged to the Rao Deshmukh community of Marathas of Murbad. Bhima was a woman of the Kunbi caste.

At the time of Daulatrao's death, his relatives in existence were Laxman and Krishna, who were the sons of Raojirao, a divided brother of the deceased. After Daulatrao's death, Laxman and Krishna sold his property to the plaintiff; and on the next day, Dhakojirao sold it to the defendant, who went into possession.

The plaintiff sued to recover possession of the property from the defendant.

The Court of first instance decreed the plaintiff's claim.

On appeal, this decree was confirmed with a slight amendment.

The defendant appealed to the High Court.

S. S. Patkar, for the appellant:—The question in this case is whether an illegitimate son of a Sudra is entitled to inherit to the legitimate son of his father. The point is decided against the illegitimate son succeeding collaterally: see *Nissar Murtojah* v. *Kowar Dhunwunt Roy*[1]; *Shome Shankar Rajendra Varere* v. *Rajesar Swami Jangam*[2]; *Ramalinga Muppan* v. *Pavadai Goundan*[3] and *Ravji valad Mahadu* v. *Sakuji valad Kaloji*[4]. But the trend of the decisions is opposed to the Full Bench decision of *Sadu* v. *Baiza*[5] and the Privy Council decision in the case of *Raja Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansingh*[6]. See also the judgment of Kumaraswami Sastriyar J. in *Subramania Ayyar* v. *Rathnavelu Chetty*[7]. The illegitimate son is the brother of the

(1) (1863) 1 Marsh. 609.
(2) (1898) 21 All. 99.
(3) (1901) 25 Mad. 519.
(4) (1909) 34 Bom. 321.
(5) (1878) 4 Bom. 37 at pp. 44, 54-56.
(6) (1890) L. R. 17 I. A. 128; 18 Cal. 151.
(7) (1917) 41 Mad. 44 at pp. 72-74.

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Aurasa Putra not only in the popular but also in the legal acceptation of the term : see Mitakshara, Chap. I, s. xii, pl. 1 and 2, where they are spoken of as brothers and brothers (Bhratarah) and therefore an illegitimate son would be the brother of a legitimate son of a Sudra : see the judgment of Nanabhai Haridas J. in *Sadu* v. *Baiza*[1] (at p. 46) and also the remarks at pp. 54-56. The right of an illegitimate son to succeed by survivorship is established. The Smritis assume that there is heritable blood between the illegitimate son of a Sudra and his putative father. The illegitimate son of a Sudra is referred to in the Mitakshara in the Chapter dealing with the unobstructed heritage and has been included in the category of sons. If so, there was no reason for making any special mention of an illegitimate son of a Sudra in dealing with the heirs of a person who left no sons. He comes within the word Bhratarah (भ्रातरः). All analogies of Hindu law are in favour of allowing him the right of succession to collaterals : vide the remarks of Kumarswami Sastriyar J. in the Full Bench case of *Subramania Ayyar* v. *Rathnavelu Chetty*[2].

P. B. Shingne, for the respondent:—The rule of succession of illegitimate sons among Sudras is only referred to in the Mitakshara while dealing with unobstructed heritage, that is, lineal inheritance. The appellant's claim is based upon the right of collateral inheritance which is treated separately in the Mitakshara (vide Chapter II). In this latter case, no mention is made of illegitimate persons who are entitled to inherit collaterally. On the contrary we have in the 11th section of Chap. I in the Mitakshara, a text of Manu, that an illegitimate son is not a collateral heir : see also ss. 30 and 31 in the same

(1) (1878) 4 Bom. 37 at pp. 44, 54-56. (2) (1917) 41 Mad. 44 at pp. 72-74.

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chapter. The said sections furnish a distinct authority for holding that an illegitimate son is not a collateral heir. If the illegitimate son takes the estate of his father, it is by virtue of an exceptional rule laid down in Chap. I, s. 12 of the Mitakshara. The point is also covered by authorities and is *stare decisis*: see *Nissar Murtojah* v. *Kowar Dhunwunt Roy*[1]; *Ramalinga Muppan* v. *Pavadai Goundan*[2]; *Shome Shankar Rajendra Varere* v. *Rajesar Swami Jangam*[3] and *Ravji valad Mahadu* v. *Sakuji valad Kaloji*[4].

Patkar, in reply :—The son of an unmarried woman mentioned in Mitakshara, Chap. I, s. xi, pl. 30 and 31 refers to the son called "Kanina" and does not refer to an illegitimate son of a Sudra.

SHAH, J. :—The question of law raised in this second appeal on the facts found by the lower Courts is whether an illegitimate son of a Sudra can inherit the separate property of his father's legitimate son as a brother.

The facts are that one Ganpatrao had a son Daulatrao by his first wife, two sons Raojirao and Balvantrao by his second wife, and an illegitimate son Dhakojirao by a kept mistress. Daulatrao was a separated member of the family and had acquired the property in suit; he died without an issue. The plaintiff claims his property under a sale deed passed in his favour by the sons of Raojirao, Balvantrao having died without any male issue. The defendant claims it under a sale deed by Dhakojirao. The contest between the two purchasers depends upon the rights of their respective vendors to inherit Daulatrao's property according to the Hindu law. The parties, whose right of inheritance we are concerned with, are Sudras. Both

(1) (1863) 1 Marsh. 609.
(2) (1901) 25 Mad. 519.
(3) (1898) 21 All. 99.
(4) (1901) 34 Bom. 321.

the lower Courts have decided against the defendant, who now appeals to this Court and raises the question stated above.

The point was not argued in the lower Courts, and the reported decisions are clearly against the contention: see (1) *Ravji valad Mahadu* v. *Sakuji valad Kaloji*[1], (2) *Shome Shankar Rajendra Varere* v. *Rajesar Swami Jangam*[2] and (3) *Ramalinga Muppan* v. *Pavadai Goundan*[3]. It is urged, however, that the *ratio decidendi* in *Subramania Ayyar* v. *Rathnavelu Chetty*[4] is not consistent with the view that an illegitimate son is excluded from all collateral succession and that the decision in *Sadu* v. *Baiza*[5] approved by their Lordships of the Privy Council in *Raja Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansingh*[6] has not been considered in the case of *Ravji* v. *Sakuji*[1]. It is urged that it is not possible to reconcile the view that a father is an heir to his illegitimate son and the express provision that an illegitimate son in the case of Sudras is entitled to share the property of his father with the other legitimate sons with the conclusion that the illegitimate son is excluded from all collateral succession in the family of his putative father. I have carefully considered these decisions and the provisions in the Mitakshara and the Mayukha bearing on this point. Personally I do not think that the two conclusions are irreconcilable. The question of collateral succession has been fully dealt with by Banerji J. in *Shome Shankar Rajendra Varere* v. *Rajesar Swami Jangam*[2], and I do not think that any further discussion of the texts can serve any useful purpose.

(1) (1909) 34 Bom. 321.
(2) (1898) 21 All. 99.
(3) (1901) 25 Mad. 519.
(4) (1917) 41 Mad. 44.
(5) (1878) 4 Bom. 37.
(6) (1890) L. R. 17 I. A. 128.

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Bhashyam Ayyangar J. in *Ramalinga Muppan* v. *Pavadai Goundan*[1] thought that it was tolerably well established that an illegitimate son, though he might succeed as heir to his paternal and maternal estate, had no claim to inherit to collaterals. Though the case of *Sadu* v. *Baiza*[2] has not been referred to in the case of *Ravji valad Mahadu* v. *Sakuji valad Kaloji*[3] it is clear on the facts of that case that the point as to collateral succession did not arise for decision. Nanabhai Haridas J. observes at p. 46 of the report as follows :—"Whether he can as a brother inherit anything 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". The judgments in *Subramania Ayyar* v. *Rathnavelu Chetty*[4], particularly the judgments of Sadasiva Ayyar J. and Kumaraswami Sastriyar J. show that the point for decision in that case was quite different, and that the decision as to the right of the putative father to succeed to his illegitimate son did not necessarily conflict with the view accepted by that Court in other cases as to the exclusion of an illegitimate son from collateral succession.

The current of decisions is strong and uniform and it would require very clear texts to induce any Court to re-consider the point. There is no such express text in favour of allowing an illegitimate son a right to collateral succession. On the contrary I think that the decisions are fully justified by the Mitakshara and the Mayukha. The well-known verses which lay down the order of succession in the case of obstructed

(1) (1901) 25 Mad. 519.
(2) (1878) 4 Bom, 37.
(3) (1909) 34 Bom. 321.
(4) (1917) 41 Mad. 44.

heritage are applicable to all classes (see Mitakshara, Chapter II, s. 1, pl. 1 and 2; Stokes' Hindu Law Books, p. 477), while the rule allowing the illegitimate sons to share the father's property with his legitimate sons is a special rule applicable to Sudras only. It seems to me very difficult to interpret the word भ्रातर: (brothers) used in the text relating to succession as including illegitimate sons of the father in the case of Sudras and excluding them in the case of other classes. Neither Vijnanesvara nor Nilkantha in expounding the text has suggested such an interpretation; and according to all recognised rules of construction such an interpretation does not appear to me to be correct. The fact that the same word is used in the immediately preceding text specially relating to Sudras and in the Commentary thereon with reference to illegitimate sons in relation to the legitimate sons of the same father does not appear to me to afford a sufficient basis for interpreting the same word in two different senses when applied to different classes in one and the same text expressly relating to all classes.

Besides a *dasiputra* does not get the full share which an *aurasa* son can get: and this differential treatment accorded to him by a special text cannot be applied to the case of collateral succession. At least there is no express text for it; and it would be extending the application of a special rule for Sudras beyond the limits mentioned in the text, if illegitimate sons were treated on the same footing as legitimate half brothers as to the order of succession and the extent of the shares.

I think that the view accepted in these decisions as to illegitimate sons not being entitled to collateral succession among Sudras is correct.

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I would, therefore, dismiss the appeal and confirm the decree of the lower appellate Court with costs.

HAYWARD J. :—I concur.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Heaton.

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NARHARI HARI VAIDYA, MINOR, BY HIS GUARDIAN, THE DEPUTY NAZIR, DISTRICT COURT, NASIK (ORIGINAL PLAINTIFF), APPELLANT *v.* AMBABAI KOM BALKRISHNA SAUSARIKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTES*

Indian Evidence Act (I of 1872), section 32—Admission of evidence—Erroneous omission to object to the admission of evidence—Relevancy of evidence.

Plaintiff sued to recover possession of a house. The defendants contended that their deceased father had spent a certain amount of money for the completion of the house and for the purpose of proving this relied upon their father's will and a memo. of expenses prepared by him. In the lower Courts no objection was taken to the admission of the will and the memo. as evidence. In second appeal, it was contended that the evidence was inadmissible :

Held, upholding the contention, that neither the will nor the memo. was admissible in evidence under section 32 of the Evidence Act, 1872 ; the erroneous omission before the lower Courts to object to the admission of evidence did not make that evidence relevant.

Miller v. *Babu Madho Das*[1], relied on.

SECOND appeal against the decision of R. B. Gogte, First Class Subordinate Judge, A. P., at Nasik, confirming the decree passed by D. M. Mehta, Joint Second Class Subordinate Judge at Nasik.

Suit to recover possession.

* Second Appeal No. 756 of 1917.

[1] (1896) L. R. 23 I. A. 106.