

(1926) 12 MAD CK 0082
In the Madras High Court

P.M.A.M. Vellaiyappa Chetty and Others	APPELLANT
Vs	
Natarajan and Others	RESPONDENT

Date of Decision : 06-12-1926

Acts Referred:

Citation : (1927) ILR (Mad) 340 : 100 Ind. Cas. 655 : (1927) 25 LW 493

Hon'ble Judges : Odgers, J; Krishnan, J

Bench : Division Bench

Judgement

Krishnan, J.—This is an appeal in a suit by certain minor plaintiffs-represented by their mother Chinnammal as their next friend for maintenance against the 1st defendant in the first instance. The learned Judge on the Original Side has given a decree to the plaintiffs at the rate of Rs. 100 a month for each of the two boys, the first two plaintiffs, for their lifetime and Rs. 50 a month to the girl, the 3rd plaintiff, till she attains the age of 18. The appeal is against this decree by defendants Nos. 2 to 5.

2. The plaintiffs' case is that they are the sons of the 1st defendant by their mother Chinnammal who was a continuously and exclusively kept concubine of the 1st defendant, Muthiah Chetty, and that as Sudras they are entitled to at least a right of maintenance against their putative father. Muthiah Chetty died after filing the written statement in which he denied that these plaintiffs were his children. He also denied that Chinnammal was a continuously and exclusively kept concubine of his, though he admitted that he used to visit her occasionally as a dancing girl, Chinnammal being a member of the dancing girl caste. Defendants Nos. 2 to 5 were brought on record as his legal representatives, they being the co-parceners in the joint family to which Muthiah Chetty belonged. The real question now is, whether the plaintiffs can claim any maintenance against the joint family property in the hands of the defendants assuming that they were the sons of Muthiah Chetty.

3. The issues framed in the case are set out in the 5th page of the printed book, Part 1, and are as follows:

(1) Was Chinnammal kept continuously and exclusively by the defendant as concubine?

(2) Are the plaintiffs the children of the defendant by such continuous concubinage?

(3) Is the defendant bound to pay any maintenance to the plaintiffs and is the said maintenance a charge on the family property as alleged in the plaint?

(4) Is the defendant a Vysia, and if so, are plaintiffs entitled to maintenance beyond the period of their majority?

(5) What maintenance, if any, are the plaintiffs entitled to?

4. No alteration was made in the form of these issues on account of the defendants Nos. 2 to 5 coming on record.

5. Now, the main question of fact tried in the case is the first issue. On that the learned trial Judge after taking the evidence and discussing it very fully in his judgment has come to a decided conclusion that Chinnammal was kept continuously and exclusively by the 1st defendant as his concubine from 1904 or 1905 to about 1919. The learned Judge has set out the circumstances at length and it seems hardly necessary, therefore, to do so once again in appeal in detail.

6. [His Lordships then considered the evidence and proceeded:]

7. I have no doubt on a consideration of the whole evidence in this case that the plaintiffs' version that Chinnammal was a continuously and exclusively kept concubine of the 1st defendant Muthiah Chetty, is true and would, therefore, confirm the finding of the learned Judge on that point.

8. On this finding the question that arises for decision is what relief, if any, can be given to the plaintiffs in this case. So far as the two boys are concerned, namely, the first two plaintiffs there does not seem to be much difficulty in the law that has to be applied. In the Mitakshara there is an express text which deals with illegitimate children of Sudras. That Nattukottai Chetties are Sudras has been settled by authority. In Section 12, Ch. 1, there is a text which says, "Even a son begotten by a Sudra 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, and one, who has no brothers, may inherit the whole property, in default of daughter's sons." (See Setlur's translation of law books on Inheritance, page 35).

9. As a commentary on this it is stated that "the son begotten by a man of a regenerate class or a female slave does not obtain a share even by the father's choice, nor the whole estate after his death. But if he be docile, he receives only maintenance.?"

10. This is the text upon which the right of the illegitimate children among Sudras has been based. The present case is not one in which any share can be

asked for and it is, therefore, that maintenance only is asked for by the two boys. The text does not expressly deal with maintenance of Sudras. It is true, but the authorities are quite clear that where the illegitimate son cannot ask for a share he is entitled to get maintenance from his putative father's joint family estate even in the hands of his co-parceners.

11. It has now been settled that the children to get a share need not be the children of a dasi strictly speaking, but may be of any concubine provided that the concubine is a continuously and exclusively, kept concubine and the children are not born in either adulterous or incestuous connection. The fact that the woman kept is a dasi or slave, or a dancing girl is immaterial. The children would take the right of illegitimate children under the text, that is, where they claim a share in the property of their father, but where they merely claim maintenance even this does not seem necessary. It is sufficient to show that they are the children of their putative father. It is recognised by a Bench of this Court in Subramanya Mudali and Others Vs. Velu and Another, that where the illegitimate son of an unmarried woman is claiming maintenance only out of the estate of his putative father it did not matter whether he was the result of adulterous intercourse or not. In the present case it is not necessary to go so far, for we have here evidence that Chinnammal Was a continuously kept concubine of Muthiah Chetty. As pointed out by Sir John Wallis, C.J., in the Full Bench ruling in Soundararajam v. Arunachalam Chetty 33 Ind. Cas. 858 : 39 M. 136 : 1916 29 M.L.J. 793 : 2 L.W. 1247 : 18 M.L.T. 552 : (1916) 1 M.W.N. 31. "The limitation as to her being an exclusive and continuous concubine is not to be found in the texts and appears to have been imposed by the Courts as necessary to secure due evidence of the paternity, just as the further restriction that the connection must not have been incestuous or adulterous was imposed on general grounds of morality." As I have already stated we have here clear evidence to show that the children were born to Chinnammal who was kept in exclusive and continuous concubinage by Muthiah Chetty and there can be no doubt whatever about the paternity and the rights of the boys under the text of Mitakshara already cited. In Ananthaya v. Vishnu 17 M. 160 : 6 Ind. Dec. (N.S.) 110 it was held that under the Mitakshara Law an illegitimate son is entitled to maintenance as long as he lives in recognition of his status as a member of his father's family and the question is not one of giving maintenance during the minority of the illegitimate son or anything of that sort, but the giving of maintenance is really in lieu of his rights in his father's estate. The case in Ananthaya v. Vishnu 17 M. 160 : 6 Ind. Dec.110 is a case of the regenerate class and the commentary on the text in the Mitakshara expressly applies to it nevertheless the further question as to what is the period for which the maintenance should be given is the same whether it is a case of the regenerate class or of a Sudra son. In the case of a Sudra son, the position seems to be that, because he could not be given a share that the text allows him to get in certain circumstances, he is given in lieu thereof a right to maintenance against his father's estate, very much in the same manner as a widow gets a right to maintenance against her husband's estate when he dies

undivided from his co-parceners. There again the maintenance is given not for any particular period but for the whole lifetime. It has been conceded by Mr. Alladi Krishnaswami Ayyar that the authorities have invariably laid down that the illegitimate son of a Sudra is entitled to maintenance if he is not entitled to get a share in his father's property and that it is too late for him now to argue that no maintenance could be given; but he tried to argue that the maintenance could not be enforced against the joint family property in the hands of the father's co-parceners. It seems to me that this argument is untenable; the maintenance will be a charge upon that estate for so long as the illegitimate children are alive. The whole law on the subject has been considered rather fully in the Full Bench decision, *V. Subramania Iyer Vs. Rathnavelu Chetty and Others*, . There again it is recognised that the illegitimate sons have a right to get maintenance if they do not get their share. In these circumstances it seems to me that the decree so far as it gives maintenance to the sons for their life is correct.

12. As to the question of the claim for maintenance by the illegitimate daughter, the 3rd plaintiff, it seems to me that there is some difficulty in the matter. The learned trial Judge has given her also maintenance on the ground, so far as I can make out, that she is a member of the joint family. The learned Judge says that the father being bound to maintain his illegitimate daughter, the co-parceners who take his property by survivorship are equally bound to do so. It seems to me that there is no legal basis in Hindu Law for the view that the father is bound to maintain his illegitimate daughter; he is under no more than a personal obligation to do so under the Criminal Procedure Code. An illegitimate daughter gets no kind of right against her father's property so far as I can make out. There is no text in her favour, the Mitakshara being expressly confined to sons. The learned Advocate for the respondent tried to put it on the ground that joint family property is burdened with the liability to maintain all the members of the joint family and consequently that an illegitimate daughter being a member of the joint family the liability is on the joint family property to maintain her. The very fact that the learned Judge has found it necessary to restrict the maintenance up to the age of 18 indicates that, whatever her right of maintenance may be, it is very different from those of the sons. It seems to me that, whether the child is legitimate or illegitimate, it has got a personal right of maintenance against its father only during its minority when it is unable to look after itself and that the right under the Hindu Law to get maintenance out of the father's estate in lieu of a share in it is a different right. It is not possible to postulate that the illegitimate daughter of a person is a member of the joint family to which he belongs. In fact it cannot be said even as regards illegitimate sons that they are members of a joint family, for no rights exist between the illegitimate sons and the collaterals or co-parceners of the father in the joint family. They cannot be treated as relations of one another and they are not entitled to share and can not ask for a partition against the co-parceners, and except for the bare right of maintenance charged on the joint family property of their father the illegitimate sons have no right against the other co-parceners.

The cases cited to us have all been cases of illegitimate sons and not of illegitimate daughters except one or two cases which I shall refer to presently. One is the case in *Parvati v. Ganpatrao Balal* 18 B. 177 : 9.Ind. Dec.626 where Sargent, C.J., says:--"Unless, therefore, the expression 'dasiputra' can be held to include 'daughter' there is no authority for a daughter having a claim to maintenance. It was said that a 'son' is to be construed as including a daughter, as 'brethren' was interpreted as including 'sisters' by Nanda Pandita. But that mode of interpretation has been much controverted, as may be seen by the discussion of the authorities in the judgment in *Vinayak Anandrav v. Lakshmibai* 1 B.H.C.R. 117, which was decided upon the authority of the *Mayukha*. Moreover, the right of illegitimate children to be maintained by the family is clearly an exceptional one as shown by the language of the text; and, as the right to maintenance is laid down in terms in favour only of illegitimate sons, the proper inference, from the absence of any express provision for daughters is, we think, that they were not contemplated as having the same right."

13. If it was contemplated by the text in the *Mitakshara* that besides the illegitimate sons, illegitimate daughters also should get some right of maintenance, such right would certainly have been extended by the commentator to regenerate classes as well. But it does not seem that, under the text, any right passes to the daughter for maintenance. This view of the Bombay High Court was supported and followed again in *Bhikya Sakharam v. Babu Vedu* 32 B. 562 : 10 Bom. L.R. 736 where it was held that an illegitimate daughter could not succeed to her father's property in preference to the son of a divided brother among Sudras. The learned Judges declined to construe the word "son" occurring in the text so as to include daughters. With all respect, it seems to me that this is the correct view. They even held that the illegitimate daughter had no right of succession at all. It would follow from this that she has no right of maintenance either which is something given in lieu of the right of succession.

14. The learned Advocate for the respondent tried to put the claim of the illegitimate daughter to maintenance on the ground that she was a member of the family as stated already. It seems to me impossible to support that view. No authority has been cited in support of it, nor indeed for the position that he is taking up that the illegitimate daughter has got any right to maintenance at all. I have, therefore, come to the conclusion, though with considerable reluctance, that the 3rd plaintiff cannot be given any right to maintenance, she being only an illegitimate daughter of Muthiah Chetty. Before concluding this case I may mention that though an issue was raised as to whether Nattukottai Chetties were Vysias or not, it has been conceded that they are Sudras. The matter has been settled by authority in this Court.

15. The last question that has been argued is as to the amount of maintenance which has been granted to the sons. It is urged by the learned Vakil for the appellants that Rs. 100 a month for each boy is excessive and out of proportion to the property of the father. The learned trial Judge has discussed this question

and, no evidence having been given against the circumstance mentioned by him in his judgment, it is not clear how we can interfere with the amount that has been fixed by the learned Judge. If the defendants really meant to contest the point, they ought to have adduced proper evidence as to what the income of Muthiah Chetty was and what the value of his share of the family property was. This they have not done. In these circumstances I think that it would not be right to interfere with the award of Rs. 100 for each of the boys. I have already stated that in my view the illegitimate daughter is not entitled to any relief in this suit.

16. In the result, I would modify the decree of the lower Court and dismiss the suit of the 3rd plaintiff and confirm the decree that has been given to the 1st and 2nd plaintiffs. The defendants will pay costs of the plaintiffs Nos. 1 and 2 in this appeal, but as between the 3rd plaintiff and themselves they will each bear their own costs.

Odgers, J.

17. This is an appeal from the decree of Mr. Justice Kumaraswami Sastri sitting on the Original Side whereby he allowed a sum of Rs. 100 a month for each of the 1st and 2nd plaintiffs during their lifetime and Rs. 50 a month for the 3rd plaintiff till she attains the age of 18. The suit was brought by the mother of these minor plaintiffs against the defendant claiming that she was the exclusive and continuously kept concubine of the defendant. The first point that has been urged before us is that the continuous and exclusive intercourse between the mother of the plaintiffs and the 1st defendant alleged to have existed from 1901 to 1919 was not proved. The appellant alleged that from 1913 for about a year and a half intimacy existed with a certain Muhammadan called Kadir Meera Sahib and that another man called Thiyagaraja Pillai was also keeping her upto 1917. Mention was also made of certain others, Kannan and Swami. Mr. A. Krishnaswami Iyer for the appellants has in my view very properly not relied on the evidence of intimacy with other men very seriously except with regard to the Muhammadan and this only in so far as the oral evidence is corroborated by letters which passed between him and the plaintiffs' mother. I feel at a disadvantage in judging of the character of these letters because I am naturally not in a position to judge of the average love letter of a Muhammadan to a Hindu woman or vice versa, but I am content to express my agreement in this matter with the opinion of the learned trial Judge. He came to the conclusion that these letters are nothing more than mere business requests or transactions and I must say the tone of the letters strikes me as the very reverse of amorous. These are letters from Chinnamal to the Muhammadan as her Doctor and even more definitely as a magician in whose spells Chinnamal relies to win back the affections of the Chetty. I ought to add that I further state the doubts of both my learned brothers as to the genuineness of these letters and for the reasons stated by them. We have been taken through the evidence at great length and I have come to the conclusion that the attempt to show that the plaintiffs' mother was not the continuous and exclusively kept concubine of the defendant has

failed. The bedroom incident referred to in my learned brother's judgment is quite incredible.

18. Then arises an interesting question of law, for it is said, to begin with, that the illegitimate sons, though they may be entitled to maintenance from their putative father personally, have no right as against the joint family property of which their father was a member at the time of his death. This argument is now raised owing to the fact that the defendant is now dead and the allowance given to the male plaintiffs has been charged on the family property of which the deceased was a member. Texts referring to this matter are extremely meagre and they are contained in the Mitakshara Chap. I Section 12, Placita Nos. 1 to 3. There it is said that "a son begotten by a Sudra 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; and, one who has no brothers may inherit the whole property in default of daughter's sons." The law developed from the texts seems to be perfectly clear. In *Krishnayyan v. Muttusami* 7 M. 407 : 8 Ind. Jur. 427 : 2 Ind. Dec. 867, a continuous concubine was held to be a *dasi* within the meaning of the Mitakshara and an illegitimate son cannot take the interest of his father or succeed as collateral heir, as there is no *sapinda* relationship as it is founded on a legal marriage. In *Ranoji v. Kandoji* 8 M. 557 : 3 Ind. Dec. 382, the texts are all examined and an illegitimate son is held not entitled to a share of joint family property at partition but he is entitled to maintenance. In *Parvathi v. Thirumalai* 83 M 334 : 3 Ind. Dec. 986, an illegitimate son of a Sudra is always entitled to maintenance as a member of his father's family by reason of his *sunship* even though he may be the son by a married woman. *Yagnavalkya's* text applied to a separated house-holder. In *Ananthaya v. Vishnu* 17 M. 160 : 6 Ind. Dec. 110, the case of a Brahmin, an illegitimate son was held entitled to maintenance for life in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes. This maintenance may be secured on the family property. In *Annayyan v. Chinnan* 5 Ind. Cas. 84 : 33 M. 366 : 7 M.L.T. 140 : 20 M.L.J. 355, the rule is regarded as well established in Madras that an illegitimate son of a Sudra by an unmarried Sudra woman is entitled to a share of the family property if the concubinage was continuous and if the connection was not incestuous or adulterous or in violation of or forbidden by law. This rule was confirmed by the Full Bench in *Soundararajam v. Arunachalam Chetty* 33 Ind. Cas. 858 : 39 M. 136 : 29 M.L.J. 793 : 2 L.W. 1247 : 18 M.L.T. 552 : (1916) 1 M.W.N. 31. There are other authorities in Madras, as for instance, *Kuppa v. Singaravelu* 8 M. 325 : 3 Ind. Dec. 223, *Gopalasami Chetti v. Arunachalam Chetti* 27 M. 32 and *Subramanya Mudali and Others Vs. Velu and Another*, and *Muthusawmi Jagavera Yettappa Naicker v. Vencataswara Yettaya* 12 M.I.A. 203 : 11 W.R.P.C. 6 : 2 B.L.R.P.C. 15 : 2 Suth. P.C.J. 175 : 2 Sar. P.C.J. 395 : 20 E.R 316 : 4 Mad. Jur. 137 : 1 Ind. Dec. 492. Therefore, it seems to me it is well established in Madras that though an illegitimate son may be entitled to a share of the family property if there are no collaterals he is at least entitled to maintenance for life such as he

has been awarded here. The learned Judge sitting on the Original Side was, therefore, in my opinion, quite right in awarding such maintenance and nothing has been shown to us to induce me to think that the rate of maintenance is excessive. The latest case appears to be *Panchapakesa Odayan v. Kanaka Ammal* 42 Ind. Cas. 344 : 33 M.L.J. 455 : 6 L.W. 408, where it was held that the illegitimate son of a permanently kept concubine is entitled to maintenance against the co-parcenary property of the family of which the father is a member.

19. Turning to the daughter, 3rd plaintiff, more difficulty exists. From what has been said it is clear that the right of a son by a female slave in the case of Sudras" estate which is the heading of the section of the Mitakshara, is an altogether exceptional provision, and it is at least doubtful whether one ought to assume that the same provision would have appeared to the ancient sages fit to be made for an illegitimate daughter in the same way. An argument has been addressed to us by the learned Counsel for the respondent, if one may say so in general terms, based on the fact that even an illegitimate daughter may be regarded as a member of the family and the duty of a father to provide for his infant children. In *Parvati v. Ganpatrao Balal* 18 B. 177 : 9 Ind. Dec. 626 Sargent, C.J. uses the following words which I think are exceedingly useful in coming to a decision of the present nature: "Unless, therefore, the expression "dasiputra" can be held to include "daughter" there is no authority for a daughter having a claim to maintenance. It was said that a "son" is to be construed as including a daughter, as "brethern" was interpreted as including "sisters" by Nanda Pandita. But that mode of interpretation has been much controverted, as may be seen by the discussion of the authorities in the judgment in *Vinayak Anandram v. Lakshmibai* 1 B.H.C.R. 117, which was decided upon the authority of Mayukha. Moreover, the right of illegitimate children to be maintained by the family is clearly an exceptional one as shown by the language of the text; and as the right to maintenance is laid down, in terms, in favour only of illegitimate sons, the proper inference, from the absence of any express provision for daughters, is, we think, that they were not contemplated as having the same right." In *Ghana Kanta Mohanta v. Gereli* 2 Ind. Cas. 550 : 32 C. 479 : 13 C.W.N. 150 the real point that was decided was that the order of the Magistrate under the Criminal Procedure Code, was no bar to a civil suit for maintenance. The learned Judges said that under the Hindu Law the father of an illegitimate child is bound to provide for its maintenance. Whether the child was a daughter or not it does not appear. Further in *Bhikya Sakharam v. Babu Vedu* 32 B. 562 : 10 Bom. L.R. 736 a case of inheritance, it was held that the language of the texts and their context prohibits the idea that illegitimate daughters were intended to be included as heirs. Even illegitimate sons in order to inherit were expressly mentioned and among Sudras illegitimate daughters cannot succeed to their father's property in preference to the son of a divided brother of which the father is a member. One is, therefore, driven with some reluctance to decide that as the right of an illegitimate child under Hindu Law depends on the special text and that his recognition is of a somewhat exceptional nature the illegitimate daughter was not

so recognised and there is no authority or justification for holding that she must stand in the same position as an illegitimate son. There is no case that has been cited to us where an illegitimate daughter has been held entitled to maintenance from the joint family property of which the father was a member. I do not think we shall be justified on the general ground that the father should provide for his infant children or by some generality of language that an illegitimate daughter is a member of the family ingrafting a further exception in Hindu Law in her favour. I, therefore, think that that part of the learned Judge's decree must be varied and that the illegitimate daughter, 3rd plaintiff, must be declared not entitled to any allowance from the estate of the deceased father. As to the amount of the boys' maintenance, I agree that we cannot now go into this. I agree with the order proposed by my learned brother.