

(1967) 07 KAR CK 0010

In the Karnataka High Court

Case No : Regular Appeal (B) No. 354 of 1956 and Civil Revision Petition No. 1375 of 1961

Ramachandra Shiddojirao Parvatrao

APPELLANT

Vs

Sadashiva Rao Shiddojirao and Others

RESPONDENT

Date of Decision : 21-07-1967

Acts Referred:

Hindu Succession Act, 1956 — Section 22, 8

Citation : AIR 1968 Kar 85 : (1967) 2 MysLJ 303

Hon'ble Judges : K. Bhimiah, J;B.M. Kalagate, J

Bench : Division Bench

Judgement

(1) This is an appeal by the plaintiff whose suit for partition and possession of one-fourth share in the suit schedule properties has been dismissed by the trial Court. He instituted the suit alleging that the suit schedule properties are the ancestral properties of the ownership of the deceased Shiddojirao Yeswantrao Parvatrao, who dies on 16th January 1942. He states that he is the dasiputra of the deceased Shiddoji Rao Yeswantarao and that defendant 1 is his (Shiddojirao's) natural son. Thus the plaintiff and the defendant 1 are members of a Hindu joint family and, according to law, he (plaintiff) is entitled to one-fourth share in the suit schedule properties.

(2) It is further alleged that the deceased Shiddoji Rao and defendant 1 executed a registered deed of maintenance in his favour and in pursuance thereof, he is in possession of some of the properties belonging to the family. Since the first defendant is alienating the properties belonging to the joint family, he does not desire to live in jointness with him and hence he has filed this suit for partition and possession of one-fourth share.

(3) Defendants 2 to 24 are in possession of the joint family properties being alienees from defendant 1 and hence they have been made party-defendants.

(4) Mr. Reddy, for the plaintiff-appellant states that in the event of a partition

being allowed, the properties in possession of the alienees could, in equity, be allotted to the share of defendant 1. Hence he does not wish to press his appeal against them. Thus the only contest is between the plaintiff and the first defendant.

(5) Defendant 1, by his written statement denied the allegations made by the plaintiff in para 2 of his plaint, and stated that plaintiff is born to one Ganga, the wife of Bhima Talwar. She was married to him prior to 1891 and they were living together as husband and wife. The relationship between the said Ganga and Bhima as husband and wife had not been extinguished at any time by divorce or in any other manner during the lifetime of the said Ganga. She died in about the year 1904. Bhima, her husband, died in about the year 1945. He contends that plaintiff's mother Ganga was a Koli by caste and was not the dasi of the deceased Shiddoji Rao and was not in his exclusive keeping. He states that even if it is presumed that the plaintiff is the dasi putra of the deceased Shiddoji Rao, he is not entitled to a share as claimed by him, since he was born as a result of adulterous intercourse during the subsistence of the relationship of Bhima and Ganga as husband and wife. The deed of maintenance was executed in favour of the plaintiff to avoid future troubles after the death of Shiddoji Rao. Thus he denied the plaintiff's claim to inherit the estate left by the deceased Shiddoji Rao.

(6) The trial Court raised the appropriate issues and found that Ganga, the plaintiff's mother, was the concubine and was in the exclusive and continuous keeping of Shiddoji Rao and that the plaintiff was born to her while she was in the exclusive keeping of Shiddoji Rao. He also found that plaintiff's mother Ganga was the legally married wife of Bhima Talwar and she died as his wife. He further found that the plaintiff was the offspring of an adulterous and incestuous intercourse and, therefore, he has no right to claim any share in the properties of Shiddoji Rao. Consequently, he dismissed the plaintiff's suit with costs.

(7) The only question involved in this appeal is whether the plaintiff, as the illegitimate son of a Sudra, is entitled to a share of the inheritance.

(8) Before we proceed to consider that question, we should state the facts which are not in controversy; they are:

(9) Ganga, the plaintiff's mother, was legally married to Bhima Talwar some time prior to 1891. She dies on 27th September 1904. Bhima, her husband, died in the year 1945. Shiddoji Rao died on 16th January 1942. Ganga gave birth to five children, and the plaintiff was born on 6th march 1897. Since plaintiff's mother was Koli by caste, she is a Sudra; Shiddoji Rao was a Lingayat by case and governed by the law applicable to Sudras. The marriage between Ganga and Bhima was not dissolved by divorce or by any other means till her death. Taking these facts as either proved or admitted, we proceed to examine the plaintiff's claim.

(10) The first question that we have to determine is whether Ganga, the plaintiff's mother was a dasi or an avaruddha stree being in the exclusive

keeping of the deceased Shiddoji Rao. The word "avarudhha" is explained by Vijnaneshwara in the commentary as:

"Women prohibited by the master from intercourse with other men with an injunction to stay at home with the object of avoiding lapse of service."

The exact words are:

Akku Prahlad Kulkarni Vs. Ganesh Prahlad Kulkarni, . It is for the plaintiff to establish that his mother Ganga was an Avaruddha stree being in the exclusive keeping of the deceased Shiddoji Rao. On this point, the only evidence is that of plaintiff and defendant 1, and the deed of maintenance.

(11) Plaintiff, in his evidence, states that his mother was in the exclusive keeping of the deceased Shiddoji Rao. But it is to be noted that he was born in the year 1897 and his mother died in the year 1904. Thus at the time of his mother's death, he was hardly 7 years old. He, in his cross-examination, admits that it was his mother's mother who told him after his mother's death that she was the kept mistress of Shiddoji Rao. He admits that he was at that time about 7 or 8 years old. therefore, it is obvious that he has no personal knowledge about his mother being in the exclusive keeping of the deceased Shiddoji Rao.

(12) Defendant 1, in his evidence, denies that Ganga was in his father's exclusive keeping as his mistress. But he has admitted that he has no personal knowledge about Ganga and her children, and what he has stated about Ganga and her children was based on the Birth and Death extracts and school-leaving certificates.

(13) Thus the evidence of these two witnesses is not helpful in determining whether Ganga was in the exclusive keeping of the deceased Shiddoji Rao.

(14) However, strong reliance was placed on the statement appearing in the deed of maintenance, Ext. 168, executed by the deceased Shiddoji Rao and defendant 1 in favour of the plaintiff. It is to the following effect:--

It means "You are the son of Gangabai, concubine of the person No. 1 out of us, and are born from him (No. 1), and the person No.1 himself has been maintaining you well uptill now."

(15) This, according to the learned counsel, is a clear admission made by the deceased Shiddoji Rao and defendant 1 that Ganga was Shiddoji Rao's concubine and that she was in his exclusive keeping till her death and, therefore, she must be held to be an avarudhha stree or dasi, and the plaintiff a dasiputra. The trial Court found that Ganga was an avaruddha stree being in the exclusive keeping of the deceased Shiddoji Rao. The admissions made by defendant 1 and his father in the deed of maintenance may justify this finding and, therefore, we proceed on the assumption that Ganga was an avaruddha stree being in the exclusive keeping of the deceased Shiddoji Rao and that the plaintiff was born to her. The question is whether the plaintiff, who is born in such circumstances, is

entitled to inherit the property of his putative father Shiddoji Rao.

(16) Now it is well established that illegitimate sons in the three higher classes are entitled to maintenance and not to any share of the inheritance. But the law applicable to an illegitimate son of a Sudra is not the same. His right to inherit the estate of his putative father rests upon two texts. Many says:

"A son begotten by a man of the servile class on his female slave, or on the female slave of his male slave, may take a share of the heritage, if permitted (by the other sons)."

(17) Yagnavalkya enlarges the rule as follows:--

"Even a son begotten by a Sudra on a female slave (dasiputra) 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 Many on Hindu law and Usage, p. 633). The question as to whether an illegitimate son of a Sudra, as in the present case, is entitled to inherit the estate of his putative father, has been the subject-matter of judicial decisions and is no longer integer.

(18) An avaruddha stree may be an unmarried woman or she may be a widow or she may be married woman. We are concerned in this case with a married woman being an Avaruddha stree. If an illegitimate son is begotten on an unmarried woman or on a widow, then such a son gets a right to inherit his putative father's estate, but an illegitimate son begotten on married woman would not be entitled to inherit his putative father's estate unless it is shown that he was not the offspring of an adulterous or incestuous intercourse; in other words, the illegitimate son of a Sudra begotten on a married woman would be entitled to inherit, provided it is shown that the connection has ceased to be adulterous when he was conceived, as where the husband dies before conception. That an illegitimate son of a Sudra begotten on a married woman is not entitled to a share of the inheritance if he is the offspring of an incestuous or adulterous intercourse, seems to be no longer in doubt.

(19) Ganga, the plaintiff's mother, was a married woman and though she was in the exclusive keeping of the deceased Shiddoji Rao and the plaintiff is born while she was in his exclusive keeping, Ganga's connection with the deceased Shiddoji Rao cannot but be considered as adulterous.

(20) So far back as in the year 1852, a question arose about the right of an illegitimate daughter to succeed to her father's estate, her mother having married her father during the lifetime of her first husband without getting a divorce from him. The Pandits replied that the marriage was not legal and that the daughter was illegitimate and couldn't get a share in the father's property, but her father's heirs who would take his assets must support her (West and Buhler's Hindu law, 4th Edn., p. 392). The learned authors have added the following remark at p. 393:--

"As the husband of the second Pat-wife, is still alive, the woman cannot be correctly called a Pat-wife, but is an adulteress..... "

Thus it would be seen that a married woman, if she is in the continuous keeping of another and, therefore, an avaruddha stree, her connection with that another is that of an adulteress.

(21) In the year 1869, in *Datti Praiai Nayadu v. Datti Bangaru Nayadu* (1869) 4 Mad HCR 204, it has been held that an illegitimate son of a Sudra being the offspring of an incestuous intercourse is not entitled to inherit or share in the family property according to Hindu Law. This conclusion was reached after a review of the Hindu law texts. Though there are other decisions of the said High Court we may refer only to the Full Bench decision in *Soundararajam v. Arunachalam Chetty* ILR 39 Mad 136 : AIR 1916 Mad 1170. In that case, the plaintiff was an illegitimate son of a dancing woman sought to recover one-third share of the joint family property as against the legitimate sons of his putative father. The question that was posed was whether the plaintiff, as the son of the deceased by a woman of the position and antecedents of his mother, is entitled to claim a share of the joint family property as the illegitimate son of the deceased. Here again, after an exhaustive review of the authorities, the Full Bench expressed the opinion that-

"The illegitimate son of a Sudra by a dancing woman who was by profession a prostitute before she came into his keeping but who was kept by him in continuous and exclusive concubine thereafter, is entitled to get her appropriate share in the joint family property after his father's death provided the connection between his father and mother was not incestuous or adulterous."

Thus the High Court of Madras has taken the view from 1869 that an illegitimate son of a Sudra is not entitled to inherit his putative father's estate if he is the offspring of an incestuous or adulterous intercourse.

(22) The High Court of Bombay, as long ago as 1876, considered the right of an illegitimate son of a Sudra to succeed as the dasiputra to his putative father's estate. That was a case where Gau, a Sudra woman, was married to one Teja, also a Sudra by Pat-marriage without having received a deed of release or divorce from her first husband who was then living or obtained any other sanction of her Pat-marriage. The learned Judges after examining the Hindu Law texts and relevant authorities held that-

"the intercourse between Gau and Teja was adulterous and that, therefore, the plaintiff, their son, being the result of such intercourse, was not entitled to take as heir even to the extent of half a share, and was not dasiputra within the scope of Yajnavalkya's text or recognised as such by other commentators."

There are other similar decisions of the said High Court, but I would refer only to the recent Full Bench decision of the said High Court in *Akku Prahlad Kulkarni Vs. Ganesh Prahlad Kulkarni*, . The question of Hindu law that was referred to the

Full Bench related the status of a permanently kept concubine, and her right to be maintained out of her paramour's estate after his death. The Court, after a review of the Hindu Law text and the various decision, held that such a woman was entitled to maintenance out of her paramour's estate, and in the course of their decision, they referred to her position, and considered whether such a woman could be considered as a *dasi* or *avaruddha stree* as understood in the Hindu Law, and what is the position of a child born out of such connection. Mr Justice Rajadhyaksha, in his judgment, referred to the decision in ILR (1875) 1 Bom 97 and also the Full Bench decision in ILR 39 Mad 136 : AIR 1916 Mad 1170, and stated that:

"Even though a concubine may be a married woman when the connection begins (and therefore the connection is adulterous) she can still be a *dasi* and her son a *dasiputra* provided the connection has ceased to be adulterous when the son is conceived (i.e. where the husband of the concubine dies before conception)." The Allahabad High Court, as far back as 1886, in *Dalip v. Ganpat* ILR (1886) 8 All 387, relying on the decisions in (1869) 4 Mad HCR 204 and ILR (1875) 1 Bom 97, held that-

"An heir who was the offspring of an adulterous intercourse, was incapable of inheriting his father's property, even as a *Sudra*."

In the Full Bench decision of the High Court of Calcutta in *Rajani Nath Das v. Nitai Chandra Dev* ILR 48 Cal 643 : AIR 1921 Cal 820 it was held that-

"Under the Bengal School of Hindu law correctly interpreted, an illegitimate son of a *Sudra* is entitled as a *dasiputra* to a share of the inheritance, provided that his mother was in the continuous and exclusive keeping of his father, and he was not the fruit of an adulterous or an incestuous intercourse."

We do not think it necessary to refer to other similar decisions except to state that Mulla in his *Hindu Law* (13th Den.), while dealing with the right of succession of an illegitimate son of a *Sudra*. at pp. 104 and 105, states that-

"illegitimate son of a *Sudra* is entitled to a share of inheritance provided he is the son of a *dasi*, that is a Hindu concubine, in the continuous and exclusive keeping of his father, at the time of his birth and he is not the fruit of an adulterous or incestuous intercourse.... It is not necessary to constitute a woman a *dasi* that she should not have been married woman she may be a widow when the illicit connection begins or she may even be a married woman when such connection begins provided that in the latter case the connection has ceased to be adulterous when the son is conceived, as where the husband dies before conception." and in support of that view, he refers among others, to the decisions referred to by me above. The same view has been expressed by Mayne in his *Hindu law and Usage* (11th Den.) at pp. 634 and 635, and also by N. R. Raghavachari in his "*Hindu Law*" (4th Ed.) at pp. 78 and 79.

(23) However, it has been contended by Mr. Reddy for the appellant that the

Hindu Law texts referred to above to not support the view taken by the Courts that an illegitimate son of a Sudra begotten on a married woman is not entitled to inherit his putative father's estate unless it is shown that he was not the offspring of an incestuous or adulterous intercourse. It is true that the texts referred to do not impose this condition, but the Courts have taken the view at least from 1852, i.e., for more than a century, that the connection such as of the plaintiff's mother, is that on an adulterous and any offspring born of such an adulterous intercourse is not entitled to inherit the estate of his or her putative father.

(24) Sri John Wallis, C. J., in the case reported in the Full Bench decision in ILR 39 Mad 136 : AIR 1916 mad 1170, observed at p. 151 as follows:--

"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 connection must not have been incestuous or adulterous was imposed on general grounds of morality."

Rajadhyksha J. in Akku Prahlad Kulkarni Vs. Ganesh Prahlad Kulkarni, , already referred to, observes at p. 227 that-

"It would thus be seen that the conditions that the connection must be non-adulterous is one not imposed by texts, but on general grounds of morality and that too only where a son born of such an intercourse claims a share in the estate of his father. And even that requirement is modified to this extent that even though in its inception the connection may be adulterous, the son is still entitled to a share in the estate of his father if the connection ceased to be adulterous at the time of the conception. Even if it has not ceased to be adulterous at the time of conception the son is still held entitled to maintenance although not entitled to a share in the estate of his father."

(25) Thus, after a careful review of the judicial decision, it appears to us that an illegitimate son of a Sudra born to a married woman as a result of an incestuous or adulterous intercourse, is not entitled to inherit his putative father's estate; and though the condition that the connection should not be adulterous or incestuous, is not to be found in the Hindu law text, yet it is supported by the consensus of the judicial opinion from the year 1852; and if it was considered that such connection as of plaintiff's mother is either incestuous or adulterous and opposed to good morale during the period of 100 years and more, we do not think that what was considered to be immoral then has ceased to be immoral today. In our view, such a connection being incestuous or adulterous, is opposed to good morale. Adultery is considered to be immoral and condemned by the Hindu law-givers. This is what has been stated in ILR (1875) 1 Bom 97. 116.

"That adultery was regarded and published by Hindu Law as a crime of grave character, is abundantly shown by the 19th Chapter of the Vyavahara Mayukha and the ancient Smriti texts there quoted."

Therefore, though the condition is not imposed by the texts, the said condition is sanctioned by judicial opinion based on the examination of the Hindu Law texts.

(26) Mr. Reddy also contended that the Courts ought not to have deprived an illegitimate son of a sudra, as in the position of the plaintiff, of his right of inheritance by imposing this condition for no fault of his. We do not think Mr. Reddy is right. When the Courts were called upon to consider whether an illegitimate son of a Sudra born to a married woman as a result of an incestuous or adulterous intercourse is entitled to inherit his putative father's estate, they decided that question with reference to the Hindu law texts, having regard to the fact that adultery was regarded and punished by Hindu law as a crime of grave character.

(27) In this context, we may also refer to the relevant provisions of the Hindu Succession Act, 1956. Section 8 of the Act states the general rules of succession in the case of males, and we find that there is no rule which entitles "the illegitimate male son of a male Hindu dying intestate, to any share of the inheritance, not even in case of a Sudra dying intestate after the commencement of this Act. The illegitimate son of a male Hindu of any caste is, however, entitled to claim maintenance from the father, and in case of death of the father, from his heirs out of his estate inherited by them, so long as the illegitimate son remains a minor, and does not cease to be a Hindu." (Mulla's Hindu Law, 13th Den., p. 794). We may also note that Section 21(viii) of the Adoptions and Maintenance Act, 1956, defines "his or her minor illegitimate son, so long as he remains a minor as one of the dependents. Section 22 provides maintenance of the dependents, and sub-section (2) states that the dependents shall be entitled, subject to the provisions of the Act, to maintenance from those who take the estate.

(28) Here, however, we wish to say that we have considered the plaintiff's claim to a share of the inheritance, having regard to the Hindu law text and the considered views of the various High Courts only, and without reference to the provisions of the Hindu Succession Act, 1956, and the Hindu Adoptions and Maintenance Act, 1956, since plaintiff's right as claimed by him has accrued to him prior to the commencement of these Acts.

(29) Thus, for the reasons stated above, we hold that the plaintiff is not entitled to inherit and claim partition and possession of one-fourth share in the suit schedule properties since he is born to Ganga as a result of an adulterous intercourse with the deceased Shiddoji Rao.

(30) No other question was urged.

(31) In the result, the appeal fails and the same is dismissed. But, in the circumstance, we make no order as to costs throughout.

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(32) This petition is directed against the order made by the trial Court directing

the plaintiff to pay double set of costs.

(33) In view of our order in R. A. No. 354 of 1956 just delivered, that there will be no order as to costs throughout, we allow this revision petition but without costs.

(34) Appeal partly allowed.