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Court : Chennai

Decided On : Apr-26-1883

Reported in : (1883)ILR7Mad407

Judge : Charles A. Turner, Kt., C.J. and ;Muttusami Ayyar, J.

Appellant : Krishnayyan and ors.

Respondent : Muttusami

Judgement :

Charles A. Turner, Kt., C.J.

1. The respondent, Muttusami Goundan, sued to recover possession of five lands described in the schedule attached to his plaint, and mesne profits for the years 1878 and 1879. Virappa Goundan and Sundara Goundan were two brothers who had formed a joint Hindu family. Of these, Virappa died in 1866, leaving him surviving a concubine named Ammachi and Maruthamutta and Periyannan, the second and third defendants, two sons by her; and Sundara died in 1867 leaving two widows named Virammal and. Minakshi. On the 6th October 1867, these two widows mortgaged the lands in suit with possession for Rupees 2,000 to Sadaya Goundan who transferred his right to Annammal on the 29th May 1869. Annammal assigned the mortgage again to Sabapathi Goundan, the father of the respondent. The respondent's case was that the several mortgagees had been in possession, that the first appellant, Olaipalaiyam Krish-nayyan, had been their gumashta, and,

as such, superintended the cultivation of the lands in question, and accounted to them for the net produce until two years prior to the suit. The respondent further alleged that the property under mortgage had been acquired by Sundara.

2. The appellants, Krishnayyan (first defendant), Periyannan (third defendant), Krishnachari (fourth defendant), and Perumal Nayak (fifth defendant), impugned the mortgages as fraudulent, and denied that lands 1 and 4 belonged to the joint Hindu family. They contended that Ammachi was the wife of Virappa, that upon the death of Sundara, his property survived to Marutha Muttu and Periyannan as his co-parceners, and that even as Virappa's illegitimate children, these persons were entitled to succeed to his interest in the undivided property. Of the five items of land in suit, the third appellant, Krishnachari claimed items IV and V, the fourth appellant, Perumal Nayak, claimed item I, and the second appellant, Periyannan, claimed items II and III. As to item I, it was alleged that it belonged originally to one Uddandi Goundan, that it was mortgaged by him to Virappa and Sundara who assigned the mortgage to the first appellant, that his interest therein ceased in 1873, and that on the 6th October 1868, Uddandi Goundan sold the land in two equal shares to the fourth appellant and to one Kesava Nayak who is not a party to this suit. As to items II and III, it was asserted that they belonged to the two brothers, Virappa and Sundara, that they were mortgaged to the first appellant, and redeemed in 1879, and that the second appellant and his brother were in possession. As regards item IV, it was contended that it had belonged originally to one Vagutha Sellan, that it had been mortgaged by him to Sundara and Virappa, and by them to the first appellant, that Sundara obtained a decree against Vagutha Sellan who, for the purpose of satisfying it, sold the land to his own brother, Virappa, that this purchaser redeemed Sundara's lien by payment to Virammal and the second appellant who satisfied the claim of the first appellant, that the purchaser, Virappa, resold the land to the third appellant, and that under a mortgage executed by this appellant, one Marappa Goundan, who was not a party to this suit, remained in possession. With reference to item V, it was alleged that it belonged to Virappa and Sundara, that it then passed into the first appellant's possession under a mortgage, that it was again mortgaged to one Muttukaruppa Goundan, that the first appellant relinquished possession to him, that in 1876, Muttukaruppa Goundan re-mortgaged the land to the third appellant, and that the

second appellant, his brother, and his mother sold the right of redemption to the third appellant in 1879.

3. It is to be observed that, according to all the appellants, the lands in suit were held by the two brothers, Virappa and Sundara, either as owners or as mortgagees, that they were all hypothecated to the first appellant in 1862, that they were placed in his possession in 1868 by the second appellant's mother, that the first appellant continued in possession as mortgagee until 1872, that he relinquished one of the lands in 1873, that the other four were again mortgaged to him in 1874, and that his interest therein ceased by virtue of the transactions since concluded with the other appellants. The respondent urged that the transactions set up by the appellants were not real, and that the evidence offered in proof of them was prepared by the first appellant in collusion with the other appellants in order to defraud the widows of Sundara and their assigns. If, as found by the Judge, the lands in suit had been the self-acquired property of Sundara, his widows would take it in preference to the second appellant and his brother, and the appellants who profess to derive their title from Virappa's widow and sons must fail. But the Judge refers to no evidence in support of his finding, and although the patta stood in Sundara's name, which is the only fact to which our attention was drawn at the hearing, it is by no means conclusive. We are of opinion that the respondent has not established that the property in suit had belonged exclusively to Sundara. We see, however, no sufficient reason to think that the second appellant, Periyannan's mother, had been married to Virappa. The Judge discusses the evidence on this subject in paragraph 14 of his judgment, and we entirely concur in his opinion as to its weight. We would only add that when the first appellant purchased a plot of land belonging to the family at Periyeri, he dealt with Sundara's widow's only. This is certainly evidence to show that he did not then believe that the second appellant and his brother had any interest therein, and lends probability to the conclusion that the description of Ammachi as Virappa's widow in Exhibits G and H was a misrepresentation. Nor are we prepared to assent to the appellant's contention that the mortgages on which the respondent relies are only nominal. All the mortgages are registered and the several mortgagees were persons of respectability who had no adequate motive for colluding with Sundara's widows. There is evidence to show that the

consideration recited in A was paid, and there is also considerable evidence in support of the statement that Sadaya Goundan and Sabapathi Goundan had been in possession and that the first appellant's interference in the cultivation of the lands had been in his capacity of gumashta. The Judge has carefully considered the evidence, which the several appellants adduced to prove their contentions, and we agree in the conclusions at which he has arrived. So early as 1867 the second appellant's mother was fined for trespassing upon the lands in dispute, and it is not explained how and when she and her sons got possession, if not, as asserted by the respondent, through the fraud of the first appellant who had been in the service of Sabapathi Goundan. There is no documentary evidence in support of the hypothecation of 1862. Nor do the magisterial proceedings of 1867 render the story that possession was transferred to Krishnayyan in 1868 probable. Neither is it clear what necessity there was in 1874 for the execution of a fresh mortgage. Although the series of transactions set up by each appellant is apparently elaborate, yet the first appellant's connection with many of them, the very unsatisfactory manner in which he has given his evidence, and the discrepancies and improbabilities pointed out by the Judge show that the appellant's contention is not *bona fide*. The only question, therefore, which it is necessary to consider is, whether any, and what interest, Virappa's illegitimate sons have in the property in suit. Virappa was a Goundan by caste, and we see no reason to doubt that his illegitimate sons would be entitled to inherit to him under the Mitakshara law by which his family is governed. The Sanskrit words used in Mitakshara, Chapter 1, Section XII, are 'Dasi' and 'Dasi Putra,' and the very same words are to be found in Sarasvati Vilasa, and there can therefore be no doubt as to the words in the original text.

4. In the translations of commentaries of authority in Southern India these terms are rendered as a female slave, or a slave girl and as the son of a female slave or slave girl. (Mitakshara, Chapter 1, Section XII, Dr. Burnell's translation of Madaviya, paragraph 33, Foulkes translation of Sarasvati Vilasa v. 395 to 398 Dr. Burnell's translation of Viyavahara Nirnaya, page 21). It must be here noted that the words 'other unmarried Sudra woman' to be found in the translation of Dayabhaga, Chapter IX, 29, are not to be found in the commentaries in the South. The question then is whether a concubine is a Dasi within the meaning of the

Mitakshara. We should entertain no doubt on the subject upon the authority of decisions in this Presidency, in Bombay and in Allahabad, Pandaiya Telaver v. Puli Telaver 1 M.H.C.R. 478 Dantulnri Rayapparaz v. Mallapudi Rayudu 2 M.H.C.R. 360 Datti Parisi Nayudu v. Datti Bangaru Nayudu 4 M.H.C.R. 204N. Krishnamma v. N. Papa 4 M.H.C.R. 241 Rahi v. Govinda Valad Teja I.L.R. 1 Bom. 104 Sarasutiv Mannu I.L.R. 2 All. 134 and of Chuoturya R. M. Syn v. S.P. Syn 7 M.I.A. 18 in which the Judicial Committee also expressed a similar opinion, but for the dictum of the High Court at Calcutta in Narain Dhara v. Rakhal Gain I.L.R. 1 Cal. 1 that the term Dasi under the Dayabhaga law applied only to certain descriptions of slaves and did not include a continuous concubine. It was there observed that the Sanskrit word for a concubine was Avarudda, and that Dasi referred only to a woman who was a slave, as defined by the ancient Hindu law, which was repealed by Act V of 1843.

5. To this view, however, we are unable to assent. Having regard to the description of slaves or Dasis given by Narada, we are of opinion that the status of a slave ensued under the Hindu law also from certain occupations and conditions. Narada declares that slaves are of 15 sorts--(1) Graha Dasan, one begotten on a Dasi in the house; (2) one paid for; (3) one accepted in gift; (4) one inherited; (5) one maintained during a famine in order that he might become a dasa; (6) one pledged; (7) one who became a slave by being relieved from debt; (8) one taken captive in war; (9) one won as a stake; (10) one who becomes a slave of his own choice with the declaration, 'I am thine;' (11) one who is an apostate from the order of Sannyasi; (12) one who becomes a slave for a stipulated time; (13) one who becomes a slave by becoming a Bakta; (14) a slave for the sake of his bride; (15) one who sells himself. These 15 sorts of slaves are also recognized by the Mitakshara. In Datta Mimamsa, Section IV, 16, the author says, 'A female purchased for price and enjoyed or cohabited with is termed by former sages a slave. The son who is born of her is considered a Dasi putra.' Again, one who is adopted after tonsure, or otherwise than in accordance with law, is termed a slave in Section IV, 40. Adverting to the higher castes, Brihaspati says in the section relating to an unmarried Sudra woman that a virtuous and obedient son born of a Sudra woman unto a man who leaves no legitimate offspring shall take a provision for his maintenance and the kinsmen shall inherit the remainder of the estate.

Gautama is cited as laying down a similar rule. Vyavahara Mayakha, Ch. IV, S. IV, para. 30.

6. According to Katyayana (cited in II Dig. p. 28) the slave girl with whom her master cohabits and to whom she bears a son, he not having at the time any other son legitimate or adopted, is enfranchised together with her issue, and this is important as showing that the right of inheritance originally attached not to the status of a slave, but to exclusive intercourse with the woman and to the birth of a son. We may here refer to the authority of the Mitakshara itself, Sloka 288, Vyavahara Kanda, wherein Avarudda and Bunjiya are classed among Dasis.

7. Adverting to the prohibition of marriage in Kaliyug between the higher classes and Sudras the author of the Smriti Chandrika refers to the son begotten on 'an unmarried Sudra,' as not entitled to heritage when there are sons of other classes. The text therein attributed to Manu speaks of the son of a Brahmana, a Kshatriya, or a Vaisiya by a woman of the Sudra or servile class.

8. Although the primary meaning of the word Dasi was a slave, it included also a concubine or a woman of the servile class in a secondary sense, and there is reason to hold upon the texts that an unmarried Sudra woman kept as a continuous concubine came within its scope. The right of an illegitimate son among Sudras to succession where the Sudra woman is unmarried and is in the position of a continuous concubine is within the reason of the rule, viz., that the Dasi's son succeeded not as a slave, but as the son of one who was in the position of a substitute for the wife though not legally married. For these reasons and upon the authorities already cited, we are not prepared to depart from the course of decisions in this Presidency.

9. But while we concede the claim of the illegitimate son we are unable to uphold the contention that he is entitled to take the undivided interest of his father. He is placed in the Mitakshara on the same footing with a daughter's son and the conception of co-parcenary presupposes sapinda relationship and a legal marriage.

10. Inasmuch as neither a widow, nor a daughter, nor a daughter's son can exclude a co-parcener's right of survivorship, it appears to us that neither can an illegitimate son do so.

11. Another question is whether, as illegitimate sons, the second appellant and his brother are entitled to succeed to their paternal uncle Sundara. Adverting to the several secondary sons known to the ancient Hindu Law, six of them are declared to be heirs to kinsmen in Datta Chandrika, Section, V. 22. It follows that illegitimate children who are inferior to them all and who do not exclude the daughter's son, cannot succeed to collateral heirs.

12. There can be no sapinda relationship between them as it is founded upon legal marriage.

13. Therefore this appeal fails and is dismissed with costs.

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