Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sri Sri Sri Gajapati Radhika v. *Vasudeva Santa Singaro, from the High Court of Judicature at Madras; delivered* 31*st May* 1892.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MORRIS.
SIR RICHARD COUCH.
LORD SHAND.

[*Delivered by Lord Hobhouse.*]

The only question, on which their Lordships have heard any argument, is whether the Appellant, who is the Plaintiff in the suit, shall be permitted to open a case which she did not bring before either the Court of First Instance or the Court of Appeal below. The material facts are as follows.

Padmanabha, talookdar of Tekkali, had two sons by different women. The Plaintiff is the widow of one of them named Gopinadha. The first Defendant Radhamani is the widow of Krishna the other son, and the second Defendant is a boy whom Radhamani has purported to adopt. The Plaintiff alleges that the adoption is invalid, and that, as the widow of Gopinadha, she is the heir of Krishna, subject to his widow's interest. She has brought this suit to set aside the adoption. It is plain therefore that she cannot obtain a decree unless, setting aside the

70778. 125.—6/92. A

adoption, she would stand next to Radhamani in the line of succession to Krishna.

For the defence it is alleged that Krishna and Gopinadha were not *sapindas* to one another. Krishna, as the Defendant has pleaded, was the son of a Kshatriya woman married to Padmanabha, who was himself a Kshatriya, whereas Gopinadha was born to Padmanabha by a woman of some inferior caste.

On these pleadings issues were settled, the first being whether Gopinadha was a *sapinda* of Krishna. The District Judge found that Gopinadha was of illegitimate birth, and therefore was not a *sapinda*, and on that ground he dismissed the suit. He did not come to any finding on the other issues in the suit; but he intimated an opinion adverse to the Plaintiff on the question whether she could claim to succeed to the collaterals of her husband.

The Plaintiff appealed to the High Court, insisting on the legitimacy of her husband, but the High Court agreed with the District Judge on this point. They also expressed an opinion that, by the law prevalent in Madras, a widow is not in the line of succession to her husband's male collaterals. The appeal therefore was dismissed.

Connected with this suit, both in the original Court and in the High Court, was another suit to set aside the adoption, brought by one Brundavana, an illegitimate son of Krishna, claiming to be his heir according to the law applicable to the *Sudra* caste. The Plaintiff was no party to this suit, but the Defendants were the same as in her suit. The two were tried simultaneously, and the evidence in one was admitted in the other.

In Brundavana's suit the District Judge found that Krishna was not a *Sudra*, and that an illegitimate son could not succeed to him,

and on appeal the High Court took the same view. That view of course was fatal to the suit, which was dismissed. The High Court also expressed an opinion that Krishna was an an illegitimate son of Padmanabha, a point which does not appear to have been put directly in issue, but which was discussed as incidental to the question of caste, and was treated by the District Judge as of no moment and not requiring a decision. They further held that the adoption was lawful and valid.

As the Plaintiff's case has been opened on this appeal, she now takes the ground that if, as has been conclusively decided, her husband was illegitimate, so also it has been held by the High Court that Krishna was illegitimate, and her Counsel contend that the two illegitimate sons, neither of whom could inherit from their father, can yet inherit from one another.

Their Lordships will assume for the present purpose that the Plaintiff is entitled to avail herself of the finding of the High Court in Brundavana's suit, to establish the illegitimacy of Krishna. And of the legal inference which is put forward, as they have not heard the argument for it, they will only say that it does not command assent at first sight. But they do not further examine it, because they think that the appeal cannot be maintained on a ground so inconsistent with all the previous proceedings in the case.

In both the Courts below, and indeed up to the moment when her case was lodged in this appeal, the Plaintiff has been insisting on the legitimacy of her husband and his brother. It may be conceded that she might originally have framed her case in the alternative, so as to claim heirship if the disputed issue of legitimacy was decided against her. Then the case would have been tried with reference to that contention, and all facts ascertained, and researches into the law

conducted accordingly. Possibly she might, on application to the High Court, have obtained some indulgence enabling her to amend the record and try the question. Mr. Mayne has urged that the question he submits is one of pure law, which he says this Committee may decide upon the facts found by the Courts below. No doubt there are cases in which the Court of Appeal will entertain questions of law not argued below, but which are raised by the facts stated in the pleadings. It is impossible to lay down any precise rule for such cases. But Mr. Mayne could not, after time for search, find any case in which this Committee had allowed a Plaintiff to rest his appeal upon a legal theory never presented to the Courts below, and rested on a state of facts inconsistent with the facts on which he had previously rested his case. In the judgment of this Committee in *Sreemutty Dossee* v. *Ranee Lalunmonee* (12 Moore, I. A., 470), it is said: "Their Lordships "cannot but feel that it would be most "mischievous to permit parties who had had "their case upon one view of it fairly tried, "to come before this Board, and to seek to have "the appeal determined upon grounds which "have never been considered, or taken, or tried "in the Court below. It is obvious that if they "wished to make the case which they now make "they would, by their answer, have put the case "in the alternative."

Indeed in cases of this kind, which may involve subtle and difficult questions of personal status, it is not easy to say what matters of fact would have to be ascertained for the proper decision of each proposition of law. One may be specified. There is no issue and no finding by either Court as to Gopinadha's caste. And yet it is impossible to suppose that the question whether two brothers can inherit from one another because they are equal in point of illegitimacy, could be properly

tried without knowing how they stand relatively in point of caste. It is indeed clear that to lay down a rule of inheritance between rival claimants, without a trial of the case in view of that rule, may involve serious risk of miscarriage.

But even viewing the question as one of abstract law, the rule now propounded is of a very peculiar kind, so unfamiliar as not to have occurred to the Plaintiff's advisers in India, though they must have been quite awake to the possibility that both brothers might be found illegitimate. It is part of a law of inheritance confined to Hindoos; perhaps, if we may judge by the utterances of the Courts below, confined to Madras, and certainly varying with the caste of the persons concerned. It is not right that Her Majesty in Council should be asked to decide such a point without any assistance from the Courts in India.

It is clear to their Lordships that this new contention cannot properly be heard by them on this appeal: and considering the length of this litigation, and the fact that another appeal is awaiting the result of this one, it would be wrong to give the Plaintiff any indulgence by way of amending the record.

They will humbly advise Her Majesty to dismiss the appeal, and the Appellant must pay the costs.