Bhairab Prasad Singh and Others Vs Birendra Pratap Singh and Others

Court: Patna High Court

Date of Decision: Jan. 21, 1949

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 1 Rule 10(2)

Citation: AIR 1950 Patna 1

Hon'ble Judges: Ramaswami, J; Manohar Lall, J

Bench: Division Bench

Advocate: L.K. Jha, S. Kumar, Shambhu Prasad Singh and Rameshwar Prasad Sinha, for the Appellant; B.C. De, M.N. Pal, B.B. Saran, R. Chaudhary and T.K. Prasad, for the Respondent

Final Decision: Dismissed

Judgement

Ramaswami, J.
This appeal raises an important question in the Hindu law of inheritance. The plaintiffs brought the suit alleging that they

were entitled to one tenth share in the properties of their deceased grandfather Kunj Bihari Singh and asking for a partition thereof. The relationship

of the parties will appear from the following pedigree :

KUNJ BIHARI SINGH

_____|_____

| |

Thakur bairab Prasad Suresh Prasad Singh

(Deft. 1) (Deft. 5)

| |

| Sachitanand Singh

| (Deft. 6)

|_____

_____|_____

| | | | |

Birendra Narendra Dhirendra Hirendra

Prasad Pratap Pratap Pratap

Singh Singh Singh Singh

(Plff. 1) (Deft. 2) (Deft. 3) (Deft. 4)

|_____

|

Arbind Singh alias

Bachha Babu,

minor (Plff. 2)

It is the agreed case that in 1940 Kunj Bihari Singh partitioned his properties with his sons, Bhairab Prasad and Suresh Prasad Singh; that in 1942

the plaintiffs became separate from defendants 1 to 4, who continued to remain joint. Kunj Bihari died in March 1944. The plaintiffs claimed that

they were entitled to one-tenth share of his inheritance Defendant 1, Phekur Bhairab Prasad, resisted the claim on the ground that only he and

defendant 5 were the heirs of Kunj Bihari. It was alleged that the plaintiffs could not claim any share in the inheritance since they were no longer

coparceners having separated from defendants 1 to 4. On these rival contentions the Subordinate Judge granted a preliminary decree to the

plaintiff for partition of one-tenth share of the property of Kunj Bihari Singh.

2. Against this decree defendants 1 to 4 have preferred this appeal.

3. The important question to be determined is whether the plaintiffs are entitled to a share in the inheritance left by Kunj Bihari Singh in spite of the

fact that the plaintiffs have already separated from their coparceners.

4. The cardinal principle of Mitakshara is that property in the father''s or paternal grandfather''s estate is by birth (Janmasvatvavada). In the

Mitakshara I. 1. 2., Vijnanesvara declares that ""the term heritage (daya) signifies the wealth which becomes the property of another solely by

reason of relation to the owner.

^^r= nk;''kCnsu ;)ua LokfelacU/kknso

fufeÃ¯Â¿Â½kknU;L; Loa Hkofr rnqP;rs A**

(Mitakshara I.1.2.)

5. This text is the key to the theory of inheritance propounded by Vijnanesvara. In I, 1, 3 he proceeds to explain;

^^l p f}fc/k%&&vizfocU/k% lizfrcU/k''p(r= iq=k.kka ikS=k.kka p iq=Rosu ikS=Rosu p fir`/kua firkeg/kua p Loa HkorhR;izfrcU/kksnk;% A

fir`O;=k=knhuka rq iq=kHkkos LokE;Hkkos p Loa Hkorhfr iq=lHnko% LokfelHnko''p izfrcU/k% rnHkkos fir`O;Rosu Hkzkr`Rosu p Loa

Hkorhfr lizfrcU/kks nk;% A ,oa rRiq=kfn""oI;wguh;% A

The wealth of the father, or of the paternal grandfather, becomes the property of his sons or of his grandsons, in right of their being his sons or

grandsons, and that is an inheritance not liable to obstruction. But property devolves on parents (or uncles), brothers and the rest, upon the demise

of the owner, if there be no male issue : and thus the actual existence of a son and the survival of the owner are impediments to the succession; and,

on their ceasing, the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction. The

same hold-good in respect of their sons and other (descendants).

6. In other words, the kinsmen are entitled to succeed to the deceased owner''s property solely by reason of their consanguinity with the latter.

This is confirmed by Visveswara Bhatta in Sobodhini, his commentary on the Mitakshara:

^^/kuLokfeuk fi=kfnuk lg lg ;% lEcU/kkstU;tudRokfn% rLekr lEcU/k:ifufeÃ¯Â¿Â½kkr A vU;L; lEcU/k% izfr;ksfxu% iq=kns% LoÃ¯Â¿Â½ ;n/kua Hkofr rn

nk;''kCnsuksP;r bfr A**

Wealth which becomes the property of another (as a son or other person bearing relation) in right of the relation of offspring and parent and the

like, which he bears to his father or other relative who is owner of that wealth, is signified by the term heritage. A son and a grandson have

property in the wealth of a father and of a paternal grandfather, without supposition of any other cause but themselves.

Balam Bhatta also states that by the word ''''solely'''' Vijnanesvara meant to ''''exclude any other cause such as purchase and the like. Relation or the

relative condition of parent and offspring, and so forth, must be understood of that other person, a son or kinsman, with reference to the owner of

the wealth.

^^Losu yksdizfl) Ã¯Â¿Â½;kfn:i fufeÃ¯Â¿Â½kkUrjek= O;oPNsn LkEcU/k''p tU;tudekokfn/kZuLokfeuk lg vU;L; iq=knscksZ/;% A ,rsu

iwoZnzO;LokfelacfU/kuka rRLokE;ksijes ;= nzO;s LoRoS] r= fu:

In chap. I, 27, Vijnanesvara concludes as follows:

^^rLekriSr`ds iSrkegs p nzO;s tUeuSo LoRoe% rFkkÃ¯Â¿Â½fi firqjko'';ds''''kq /keZÃ¯Â¿Â½R;s''''kq okpfuds''''kq izlknnkudqVqEcHkkokif}eks{kkfn''''kq p

LFkkojO;frfjÃ¯Â¿Â½nzO;fofu;ksxs LokrU=;fefr fLFkre ALFkkojs rq LokftZrs fi=kfnizkIrs p iq=kfnikjra=;eso**

Therefore it is a settled point that property in the paternal or paternal grandfather''s estate is by birth although the father have independent power

in the disposal of effects other than immovables for indispensable acts of duty and for purposes prescribed by law and so forth; but he is subject to

the control of his sons and the rest in regard to the immovable estate, whether acquired by himself or inherited from his father and others''''.

7. The opinion of Vijnaresvara that sons have by birth an equal ownership with the father in respect of ancestral immovable property is followed by

Mithila authorities. Vivada Chintamani, P. C. Tagore''s edition, p. 309: Vivada Ratnakara, II, 2-5 Madana Parijata, 8th stabaka, p. 660,

Bibliotheca Indica.

8. On behalf of the appellants it was conceded that had the plaintiffs been joint, they would be entitled to tbeir share of the grandfather''s

inheritance. Bat the argument was addressed that since the plaintiffs had separated from the joint family, their right was defeated, and the

grandfather''s estate devolved on defendant 1 and defendants 2, 3 and 4 who continued joint.

9. This argument, though plausible, must be rejected in view of the undisputed authorities. The principle of Mitakshara is that the son and grandson

get ''''unobstructed'''' right (apratibandha daya) by mere birth to the separate property of the grandfather. If the text of Mitakshara chap I, Section 6,

is closely examined, it will be apparent that partition does not annual the grandson''s right or convert it into an obstructed right, that the existence of

a son or united brothers would not defeat it, although both the son and grandson are separate from their ancestor and also from one another.

9a. In chap, 1, Section 5, Vijnanesvara discusses the text of Vajnavalkya (ii 122),

^^Hkw;kZ firkegksikÃ¯Â¿Â½kk fucU/kks nzO;eso pk A

r= L;kRlÃ¯Â¿Â½''ka LokE;a firq% iq=L; pSo fg AA121AA**

In placitum 3 Vijnanesvara sets forth certain doubts that arise in consequence of the rules laid down in placita 1 and 2:

^^v/kquk foHkÃ¯Â¿Â½s fir;Zfo|ekuHkzkr`ds ok ikS=L; iSrkkegs nzzO;s foHkkxks ukfLr A vf?kz;ek.ks firfj fir`rks HkkxdYiusR;qÃ¯Â¿Â½Rokr A Hkorq

ok LokftZror firqfjPN;SosR;k''kafdr vkg&&**

10. Dr. Jolly translates this p ac um follows (Tagore Lectures 1883, p. 125):

Supposing the father to be divided (from his coparceners) or to have no brothers, shall the estate which has been inherited from the grandfather

not be divided at all from the grandson in that case because it has been directed that fathers shall be allotted in the right of the father if he is

deceased (and not otherwise); or admitting partition to take place (in that case) shall it be instituted by the choice of the father; alone?

11. In placitum 5 Vijnaneavara explains the text and categorically answers the doubt.

In such a property which was acquired by the paternal grandfatber the ownership of father and son is notorious and, therefore partition does take

place''''

In Subodhini placitum 3 is explained in greater detail.

^^Ã¯Â¿Â½ rFkk p lfr ;nk firk thofr] foHkÃ¯Â¿Â½L;] vFkoSdiq=Rosu Hkzk=UrjkHkkokr Lofirq% ldk''kkn foHkÃ¯Â¿Â½ ,o thoUukLrs rFkk izFke

i{ksfoHkÃ¯Â¿Â½RoknsoiSrkegnzO;izkaIR;Hkkos Lofirq% A rLeknf?kz;ek.kRokPp ikS=L;&iSrkegnzO; izIR;Hkkoh }kL; fu:)Rokr A f}rh;a i{ks ;|fi

Lofirq/kus izkIrgfLr vfoHkÃ¯Â¿Â½Uokr rFkkÃ¯Â¿Â½fi firqfoZ|kekuRoknso ikS=L; firkeg/kus izkIrHkko% A vr ,o iSrkegs/ku ikS=L; thofRir`dL;&foHkkx

,o ukfLr A Hkor okfoHkkx tUeuSo LoRokr A rFkkÃ¯Â¿Â½foforfjfn""Vxrs fir`nkjoka"kfo|kukr thofr rfLeu lrjkfefr firq% iz/kkU; iqrhrS% firqfjPNoSo

foHkkx% A r=kfi ^^}koa"kks iqfr;sÃ¯Â¿Â½r Ã¯Â¿Â½** foHkstUukReu% firkÃ¯Â¿Â½**

If the father be alive, and separated from his own father, or ii being an only son with no brothers to participate with him, he be alive and not

separated from his own father, then, since in the first mentioned case he is separate, no participation of the grandson"s own father, in the

grandfather"s estate, can be supposed, and therefore, as well as because he is surviving, the grandson cannot be supposed entitled to share the

grandfather"s property since the intermediate person obstructs his title: and in the second case, although the grandson"s own father has pretensions

to the property since he is not separated, still the participation of the grandson in the grandfather"s estate cannot be supposed, for his own father is

living: hence no partition of the grandfather"s effects, with the grandson whose father is living, can take place in any circumstances: or, admitting

that such partition may be made, because he has a right by birth, still, as the father"s superiority is apparent (since a distribution by allotment to him

is directed, when he is deceased, and that is more assuredly requisite, if he be living), it follows that partition takes place by the father"s choice, and

that a double share belongs to him"".

Having thus stated the difficulty, the author proceeds:

To obviate the doubt the author says: "for the ownership of father and son is the same in land;" and in verse 5 he concludes; "In such property

which was acquired by the paternal grandfather, &C., the ownership of father and son is notorious: the right is equal or alike; therefore partition is

not restricted to be made by the father"s choice, nor has he a double share".

12. That partition cannot annual or destroy the right of the grandson to the gradfather"s estate is also supported by the Viramitrodaya:

Wherefore should it be restricted to the case of grandsons whose father is dead? Nor, can it agreeably, to what is maintained by Dharesvara, be

said, that the text is intended to prevent only unequal distribution by the choice of the father, and not the determination of the time for partition by

the father"s choice, nor his double share, which are without distinction applicable to this case. Because there is no ground of discrimination (as to

what is the intention). Moreover, the causality of the father"s desire, is literal, being expressed by the instrumental case in the text, "may separate

by his choice;'' but the determination, by the father''s desire, of the time for partition, is only inferential: it is very strange that when the literal

causality is prevented by this text, it does not prevent the determination (by the father''s choice) of the time for partition--which is inferential. And if

the ownership be admitted to be co-equal, as you have taken upon yourself the difficulty of admitting it, then the causality of the son''s desire and

the determination by it, of the time, cannot be opposed.

From chap. 5 of Mitakshara and Sobidhini''s commentary thereon it is patent that Vijnanesvara considered that even in the case of a father who

was separate from his coparceners, the grandson was entitled to partition, the reason being that

the ownership of the father and son is notorious: the right is equal or alike; therefore partition is not restricted to be made by the father''s choice"".

13. The conclusion, therefore, emerges that partition merely adjusts or resolves joint right into several rights, that it frees the father''s share from any

present proprietary right on the part of the divided son but it could not annul the filial relation nor the right of succession incidental to that relation.

In Marudayi v. Loraisami Karambian 30 Mad. 348 : 17 M. L. J. 275 , the plaintiff and his three deceased brothers partitioned the family

properties with their father who took one share. After the father''s death the plaintiff sued for possession of his share to the exclusion of his

nephews, defendants 2 to 4, who were the sons of the predeceased brothers. Plaintiff claimed the whole of his father''s share on the ground that he

being the sole surviving son excluded the nephews. The argument was that the plaintiff and his nephews being divided, there was no coparcenary

and where there was no coparcenary, there was no right of representation and the plaintiff took the whole of the father''s estate as the nearest

sapinda. This argument was negatived by the Madras High Court, who held that even in a separated family the rate of succession per stirpes

applied, and that partition did not extinguish the grandson''s right to succession of the estate.

To allow a rule of succession per stirpes in a separated family is to admit an exception to the rule of Hindu law by which the inheritance devolves

on the neatest sapinda ; but the exception is one which in our opinion necessarily follows from the exposition given in the Mitakahara of the rights

of sons and grandsons in the estate of the grandfather"".

The exception did not extend to cognate relations because they took an ""obstructed"" inheritance, where as the sons and grandsons took an

""unobstructed"" inheritance. In Muttuvaduganatha Tevar v. Periasami 16 Mad. 11 : 2 M. L. J. 265, Sir T. Muthusami Iyer explains the matter:

The distinction is material only to the extent that, in the one caae the nearer male heir excludes the more remote, while in the other the doctrine of

representation excludes this rule of preference. It is founded upon the theory that the spiritual benefit derivable from the three lineal male

descendants is the same, though among collateral male heirs the quantum of such benefit varies in proportion to the remoteness of the male heir

from the deceased male owner. The rule that to the nearest sapinda the inheritance belongs applies alike whether the inneritance is "obstructed" or

"unobstructed" with this difference, viz., that, where the last full owner leaves sons, grandsons, and great grandsons, their sapinda relationship

confers equal spiritual benefit on him though their blood relationship is not the same, and they are all coheirs within the meaning of the rule.

14. In Gangadhar Narayan Pandit Vs. Ibrahim Bava Dingankar, , the Bombay High Court also held that the right of divided sons, grandsons and

great-grandsons of the last male owner to succeed to his divided property, was the same as in the case of undivided family property. In that case

the plaintiff was son of one Naro, who had a four annas share in a certain milkiat. The pedigree was as follows :

NARO

_____|_____

| | | |

Vasudeo Gangadhur Narhar Vishnu

_____|_____ | |

| | | Yeshwant Vishwanath

Bhikaji Shripad Kashinath

Naro died leaving him surviving his son Gangadhur and grandsons (sic) who had predeceased Naro. In 1916 the plaintiff Gangadhur sued to

recover two-fifths share in the milkiat alleging that there had been a partition during the lifetime of Naro between Naro and his sons and, therefore,

on Naro"s death, his one-fifth share devolved on the plaintiff. Naro"s grandsons also claimed rateably in Naro"s one-fifth share and filed different

suits for their shares. The High Court held that the grandsons were entitled to their share in Naro"s one-fifth and that Gangadhur had no exclusive

title.

15. In my opinion the principle of ownership by birth which is the corner stone of Mitakshara inheritance is of such a character that in the

development of law we are bound to carry it to its logical consequence except only so far any other principle of greater or equal authority may

prevent our doing so. No such principle can be pointed out in this case. The position of Eon or grandson in the Mitakshara is similar to that of sui

heredes (in the Roman law) who are regarded as having a sort of dormant ownership in the estate of their father even during his lifetime and at his

death succeed without the need of any express acceptance. Their succession was in fact not so much a succession as coming into the enjoyment of

what in a sense bad already partly belonged to them (Digest 28-2. 11--Paulus).

16. In an address characterised by much painstaking research learned Advocate-General sought to convince us that in the Mithila school

succession to the grandfather''s inheritance was different from Mithakshara, that the son and grandson do not simultaneously succeed, but in

preference to grandson the son succeeds. In support of this argument he cited Vivada Chintamoni stanza 283 (page 269, Setlur Vol. II) :

Therefore the summary is this; first, the son; on failure of him, the grandson ; in his absence, the grandson''s son; on failure of him, a chaste wife, in

her default the daughter, in her default the mother, in her default the father, in his default the brother"".

17. But the summary in the first part does not appear authentic, for it is not supported by the discussion which precedes. Indeed, the whole chapter

deals with the succession to the estate of one ""who leaves no son"", and there was no occasion for Vachaspati Misra to discuss the order in which

the son and grandson was to inherit.

18. That the summary is not authentic is also apparent from para. 345 where Vachaspati Misra puts his own gloss on Vishnu''s text :

''The wealth of one dying without issue goes to the wife.. ..... Dying without issue (means) without SON, grandson or great-grandson.

vuiY;L; i= ikS= izikS= ghuL;

(Mr. Jha''s edition Page 232)

The right to perform sraddha being established in the order laid down in the text. The son, the grandson the great-grandson'', the right to succeed

to the wealth which is similar to it is also settled"" (page 265, Sethar).

19. In Vivada Ratnakara Chandesvar Thakur does not state that grandson is postponed to the grandson in succession to ancestral estate. On the

contrary, Obandesvar Thakur quotes the complete text of Baudhayana :

^^izfirkeg firkeg firk Lo;a lksnÃ¯Â¿Â½;h Hkzkrj lojkfr;k% iq= ikS= izikS= ,rkufoHkÃ¯Â¿Â½nk;knkue lfiUMkuk p{krs&foHkÃ¯Â¿Â½nk;k nku ldqY;k ukp{krs

A vlr`oÃ¯Â¿Â½t""kq r`{k AA eh Ã¯Â¿Â½;ksZ Hkofr lfi.MkHkkos ldqY;&Lr`nHkkosÃ¯Â¿Â½l;kpkI;ksÃ¯Â¿Â½Ursoklh =fRoXok gjrs rnHkko jktk A**

(Vivada Ratnakara, Biblotheea Indica, 602.)

20. Baudhayana''s text speaks of the three ascendants of a man, of himself, of his full brother and of his son, grandson and great-grandson from a

savarna wife as one group called avibkaktadaya sapindas, and in the absence of these only the wealth of a man goes to his Sakulyas. Farther the

texts of Manu, (IX, 187 and 186, Vasista (17.5), Vishnu (15.46) and Yagnavalkya (1.78) all suggest that son, grandson and great-grandson

equally confer spiritual benefit and hence simultaneously take the ancestral estate.

21. In Viramitrodaya, Mitra Misra places the matter beyond all doubt. He emphatically states that the three descendants, son, grandson, great

grandson, simultaneously succeed to the grandfather''s estate :

v;a p iq=k.kka foHkkx% iq=ikS=izikS=i;ZUra leks uk=ksIrfrr% izR;klfÃ¯Â¿Â½kÃ¯Â¿Â½es.kkf/kdkjÃ¯Â¿Â½e% A i=knhuka=;k.kkefi ikoZ.ks

fiaMnkukf/kdkjkr A vr ,o nsoy%

firk firkegÃ¯Â¿Â½So rFkSo izfirkeg% A

miklrs lqra tkra ''kdqUrk bo filiye AA

e/kqekalSÃ¯Â¿Â½ ''kkdSÃ¯Â¿Â½ i;lk ik;lsu p A

,''''k uks nkL;fr Jk)a o''''kkZlq p e?kklq p AA

bfr A rFkkp Ã¯Â¿Â½yksd''ka[kfyf[krxkSrek%&&

firk firkegÃ¯Â¿Â½So rFkSo izfirkeg% A

tkra iq=a iz''klfUr filiya ''kdquk bo AA

e/kqekalsu [kMxsu i;lk ik;lsu p A

,''''k nkL;fr uLr`flr o''''kkZlqp e?kklqp AA bfr A

,oa rqY;kf/kdkjkr tUeuk LoRoL;kfi rqY;RokrqY;HkkxHkkfxrk izlÃ¯Â¿Â½kfi ^^vusdfir`dk.kkarq** bfr opusu fuoÃ¯Â¿Â½kZrs A ^^thofIr=d;s% ikS=

izikS=;ks% ikoZ.kkuf/kdkjs.k fi.Mnkr`RokHkkokfRirkeg izfirkeg/kusÃ¯Â¿Â½f/kdkj% A ;nk pSdL; iq=L; i=% lUR;sdÃ¯Â¿Â½ iq= ,okfLr A rnk iq=L;Sdks

HkkxksÃ¯Â¿Â½ijÃ¯Â¿Â½Sd% losÃ¯Â¿Â½''''kka ikS=k.kke A Lofi=/khutUeewyRokr firkeg/ku lac/kL; ;koR;so/kus rL; LokfeRoa rkoR;so rs''''kkefi** bfr

thewrokguksÃ¯Â¿Â½a Roukns;e tUeuk ikS=k.kkefi firkeg/kus LoRoO;oLFkkiukr A rLekr ikS=k.kka firkeg/kus okpfudeso foHkkx oS''''kE;a u

RokSiiZfÃ¯Â¿Â½kde A

(chap. II part 1 Section 23 a.)

23a. This distribution among sons extends equally to them and to grandsons and great-grandsons in the male line. There is not here an order of

succession following the order of proximity according to birth. For the three descendants, namely, the son, the grandson and the great grandson

are competent to offer oblations in the parva occasions . . . Thus the competency being equal and the right by birth also being equal, equal

participation would have followed but is prevented by the text, ''among grandsons by different fathers the allotment of shares is according to the

fathers''.

Jimutarahana says : "The grandsons and the grant grandsons whose fathers are alive cannot confer oblations in the parva occasions, they are not

therefore entitled to the estate of their grandfather and greatgrandfather respectively, If there be one son, and sons of another son (who is dead),

then one share appertions to the surviving son, and the other share goes to all the grandsons ; for their interest in the grandfather''s wealth is

founded on their relation by birth to their own father, consequently they have a right to just so much as should have been their father''s share.''

This, however, is not acceptable ; because, it has been established that in the grandfather''s property the grandsons also acquire ownership by

birth; hence the equality of the grandsons'' share (with a son''s share) in the grandfather''s property is baaed upon the authority of the texts, and not

founded upon any equitable principle.'''' (Dr. Sarkar Sastri''s Translation.)

22. Even if Vachaspati''s summary is authentic, his incidental dictum that son is preferred to grandson cannot prevail over the doctrine held by

Mitakshara and Vivada Ratnakara and the tests of Manu, Baudhayana and Yagnavalkya, the last of whom it is important to remember was himself

a Smriti writer from Mithila. In Surja Kumari v. Gandhrup Singh (1887) 6 SDR 150, a Mithila case, Sadar Diwani Adalat stated that even is

Vachaspati Misra intended the exclusion of the daughter''s son, his opinion was inconsistent and ambiguous, and could not avail against the many

strong texts of Munis, decisive of the daughter'' son''s right and the concurring opinions of expounders including writers of Mithila.

23. As the Judicial Committee observed in AIR 1925 280 (Privy Council) the law of the Mithila school is the law of the Mitakshara except in a

few matters in respect of which the law of the Mithila school has departed from the Mitakshara. In Bacha Jha v. Jugmohan Jha 12 Cal. 348, the

succession to widow''s stridhan was held to go to the husband''s brother''s son in preference to her sister''s son. The learned Judges decided the

case in accordance with Mitakshara on the ground that the meaning and effect of a text of Brihaspati quoted by Ratnakara (a Mithila authority)

was too ambiguous to control the plain meaning of that work. In Kamala Prasad Vs. Murli Manohar, , a Division Bench of this Court held that the

sister''s son could not be preferred to the husband''s sapindas in succession to stridhan of a childless widow. The learned Judges pointed out that

the sister''s son was a special heir mentioned in Brihaspati''s test which was quoted in Kalpataru and Ratnakara and Vivada Chandra but not in

Vivada Chintamani or Madana Parijata. Since the former, authorities did not attempt to indicate whether the special heirs mentioned in that text do

or do not come before the husband mentioned is Manu Smriti which too they quoted, the learned Judges held that Mitakshara applied and the

sister''s son should not be preferred to the husband''s sapindas. In this contest, it is of great importance to remember the observation of the Judicial

Committee in, Collector of Madura v. Mootoo Ramalinga 12 M. I. A. 397 : 1 B l. R. 1 .

The Mitakahara is universally accepted by all the schools, except that of Bengal, as of the highest authority and in Bengal is received also as of

high authority, yielding only to the Dayabhaga on those points where they differ.

24. In the present case, therefore, I hold that the plaintiffs are entitled to one-tenth share of the inheritance left by Kunj Bihari Singh.

25. For the appellants it was next contended that the plaintiffs'' mother was necessary party and was entitled to a share. But from the previous

discussion it will be apparent that the mother had no share in the inheritance of Kunj Bihari and was not a necessary party to the present suit.

26. In my opinion, the decree of the Sub-ordinate Judge is correct and this appeal must be dismissed with costs.

Manohar Lall, J.

27. I have taken time to consider the elaborate and exhaustive judgment prepared by my learned brother. Mr. L. K. Jha advanced an attractive

argument, but upon a careful consideration I take the same view as my learned brother that this argument is not entitled to succeed. I wish to

indicate briefly why I agree entirely with my learned brother.

28. The relevant texts are to be found in Chap. I. S. V. Mitakshara. This deals with the equal rights of father and son in property ancestral.

29. Clause 2--Although grandsons have by birth a right in the grandfather''s estate, equally with sons, still the distribution of the grand-father''s

property must be adjusted through their father, and not with reference to themselves, and then an explanation is given as to how such a distribution

is to be made.

30. Clause 3--Obviates the doubt by stating : ""For the ownership of father and son is the same in land, which was acquired by the grandfather, ...

31. Clause 5--In such property, which was acquired by the parental grandfather, through acceptance of gifts, or by conquest or other means (as

commerce, agriculture, or service), the ownership of father and son is notorious : and therefore partition does take place. For, or because, the right

is equal, or alike, therefore, partition is not restricted to be made by the father''s choice: nor has he a double share.

32. Clause 6--Emphasises that it is ordained by the preceding text, that ""the allotment of shares shall be according to the fathers, (para. 1) although

the right be equal.

33. Clause 9--So likewise, the grandson has a right of prohibition, if his unseparated father is making a donation, or a sale, of effects inherited from

the grandfather, but he has no right of interference, if the effects were acquired by the father. On the contrary, he must acquiesce, because he is

dependent.

34. Clauae 10--Consequently the difference is this : although he have a right by birth in his father''s and his grandfather''s property, still, since, he is

dependent on his father in regard to the parental estate and since the father has a predominant interest as it was acquired by himself, the son must

acquiesce in the father''s disposal of his own acquired property, but, since both have indiscriminately a right in the grand-father''s estate, the son has

a power of interdiction (if the father be dissipating the property.) (This is from Subodhini).

35. Clause 11--Manu likewise shows, that the father, however, reluctant, must divide with his sons, at their pleasure, the effects acquired by the

paternal grandfathers, declaring, as he does" (""If the father recover paternal wealth not recovered by his coheirs, he shall not, unless willing, share it

with his sons, for in fact it was acquired by him,"") from Manu, 9.209,--that, if the father recover property, which had been acquired by an

ancestor, and taken away by a stranger, but not redeemed by the grandfather, he need not himself share it against his inclination, with his sons, any

more than he need give up his own acquisitions.

36. These clauses are so clear and distinct that it is difficult to understand how it can be argued that the grandson has no interest in the property

which descends from the grandfather. I draw attention here to the observations of Sir Shadi Lal when delivering the judgment of the Privy Council

in the case of AIR 1937 233 (Privy Council) ,

The rule of Hindu law is well settled that the property which a man inherits from any of his three immediate paternal ancestors, namely, his father,

father''s father and father''s father''s father is ancestral property as regards his male issue, and his son acquires jointly with him an interest in it by

birth. Such property is held by him in coparcenary with his male issue, and the doctrine of survivorship applies to it.

He also refers to 27th sloka in chap. I which is translated by Colebrooke, ""Therefore it is a settled point, that property is the paternal or ancestral

estate is by birth."" At the bottom of the page Sir Shadi Lal observed :

Indeed, there are other passages in the Mitakshasa which show that it is the property of the paternal grandfather in which the son acquires by birth

an interest jointly with, and equal to that of his father. For instance, in 5th sloka of Section 5 of Chapter 1, it is laid down that in the property

''which was acquired by the paternal grandfather .... the ownership of the father and son is notorious, and therefore, partition does take place, etc.

etc."

I am aware of the observation of the Privy Council in Balwant Singh v. Rani Kishori 25 I. a. 54 : 20 ALL. 267 that the statement in Clause 27 is

no more than a moral precept, whereas Clauses (8) and (9) of Section 5 lay down the positive law. I may also add that Clauses (3), (5) and (11)

of Section 5 make it clear that even in the self acquired property of the grandfather, the father and son have equal rights, but only when the

property comes by inheritance to the father on the death of the grandfather.

37. A somewhat similar question arose for decision in the Full Bench case of Bhatwat Shukul Vs. Mt. Kaparni, . Chatterji J. who delivered the

judgment of the Full Bench considered the various sections of the Hitakshara and came to the conclusion at p. 609 :

The effect of Clauses (1) and (9) of Section 4, read with Clauses (3), (5) and 11 of Section 5, seems to be that when a grandfather''s self-

acquired property is taken by the father by gift from him he takes it subject to the right of his own son, unless, of course, the grandfather expresses

a clear intention in the deed of gift that the property should be taken by the donee exclusively. IN my view, therefore, the decision in Muddun

Gopal v. Ram BUksh 6 W. R. 71 is supported by the text of the Mitakahara.

Earlier at p. 608, Chatterji, J. took the same view as I have expressed as to the right of the son in the estate of the grandfather when inherited by

the father. Reference may also be made to the Privy Council case of Ulagalum Perumal Sethurayar v. Subbulakshmi Nachiar 66 I. A. 134 : A. I.

R. 1939 P. C. 96 , where Sir George Rankin appears to indicate that the interest given to Minakshi Sundara should be regarded as joint family

property and not his self acquired.

38. A serious argument was advanced by the learned Advocate-General before us that here the position of the plaintiff is entirely different because

he is separate from his father. It is, therefore, suggested that the separation of the plaintiff from his father deprives him from the rule as

authoritatively and clearly laid down by Mitakshara in the clauses referred to above. He suggests that in such a case, at least the property vests in

the father and the separated son can have no right to claim a partition. This argument is not sound and conflicts with the clear meaning of the

authoritative texts. The learned Advocate General was forced to submit that it is unnecessary for us to consider the rights of the unseparated sons

of the father with regard to the property which has descended from the grandfather. It is true that it is not necessary to consider here the rights of

the ungeparated sons of the father, but we are bound to decide the nature of the interest which the father obtains in the property of the grandfather

when it descends on his death as ancestral.

39. My learned brother has shown the right of the grandson to share in the property of the grandfather by birth and not by reason of his being

undivided with his father.

40. The learned Advocate General relies upon the text in his book at p. 240 to the effect that the succession is firstly to the son, after him, to the

grandson, and then to the great grandson etc. Even if this test is assumed to be genuine, the explanation is quite simple. The term putra, or son in

the Mitakshara and its commentary, the Sabodhini, is frequently used as a generic term for male issue or a male descendant, and must be so

construed in several parts of the Mitakshara, otherwise the grandson, as well as the great-grandson, would be excluded from the immediate

succession, though acknowledged in every system to represent their deceased father and grandfather, and entitled with the sons to share the estate

of a person leaving sons, grandsons, and great-grandsons, the father of the grandson and father and grandfather of the grandson being previously

dead.

41. This view is supported by the elaborate decision pronounced by Sir Ameer Ali in delivering the judgment of the Board in Buddha Singh v.

Laltu Singh 42 I. A. 208 : A. I. R. 1915 P. C. 70 . In that case there was a competition between the great grandson of the grand-father and the

grandson of the great grandfather to succeed to the estate of the deceased. It is pointed oat at p. 220 after examining various texts that

Vijnaneswara has used the word ''putra'' in the sense of lineal male descendants in a comprehensive and generic sense. Dr. Sarvadhikari also in his

Tagore Law Lectures gives emphatic expression to the view that the word ''son'' includes three degrees of descendants. Sir Ameer Ali approves of

this opinion at p. 224 in these words:

Dr. Rajkumar Sarvadhikari''s construction appears to them to rest on a loginal foundation, and his views seem to be consistent and clear. In effect

he says that the Mitakshara propounds a definite scheme of succession; lineal male descendants of the deceased owner down to and including the

third degree, who constitute the first class of propinquous relations (the nearest sapindas), inherit in succession in the first instance,'''' etc. etc. and

then it is observed that

two recent Hindu writers of repute (Dr. Bhattacharyya and Mr. Ghosh) and also Dr. Jolly, who was at one time Tagore Law Professor in the

Calcutta University, and is one of the translators of the Books of the East, are in substantial agreement with Dr. Sarvadhikari''''.

Sir Ameer Ali then examined the conflict of decisions in the Indian Courts. At p. 227 it is observed:

It is admitted that the defendant confers greater benefit on the deceased by the offerings he makes to the manes of the common ancestor. Now, it

is absolutely clear that under the Mitakshara, whilst the right of inheritance arises from Sapinda-relationship, or community of blood, in judging of

the nearness of blood-relationship or propinquity among the Gotraja, the test to be applied to discover the preferential heir is the capacity to offer

oblations"".

42. For these reasons it is clear to me that the words ""son or male issue"" are not intended to exclude the grandsons. It may be that the text relied

upon by the Advocate General intends to mean that the property will go to the son if he is alive, otherwise to the grandson and great grandson, etc.

43. Our attention has been drawn to the various passages of the commentaries in Setlur''s books; but having read the passages over and over again

I am unable to come to any other conclusion than that which I have indicated above.

44. It was also argued by the learned Advocate General that this is a case governed by the Mithila School of Hindu Law, and therefore, the text of

Mitakshara will not be of any great assistance in deciding the question in controversy. I do not agree with this argument either. It is now well settled

that the law of the Mithila School is the law of Mitakshara except in a few matters in respect of which the law of the Mithila School has departed

from the law of Mitakahara. See the Pivy Council case of AIR 1925 280 (Privy Council) . It has not been shown to us that there is any clear law

of the Mithila School on this question different from the law of Mitakshara.

46. These are some of the reasons which have induced me to unhasitatingly reject the argument advanced by the learned Advocate General, and to

agree with the view of my learned brother. I entirely agree with him in his exposition of the various texts which he has examined so patiently and

exhaustively.