

(1875) 06 CAL CK 0003

Calcutta High Court

Case No: None

Gobind Chander
Lahoory

APPELLANT

Vs

Rajkishore Lahoory and
Rammoney Dossee
and Another

RESPONDENT

Date of Decision: June 18, 1875

Citation: (1878) ILR (Cal) 28

Hon'ble Judges: Macpherson, O.C.J.; Pontifx, J; Morris, J; Jackson, J; Birch, J

Bench: Full Bench

Judgement

Macpherson, Officiating C.J.

1. The answer to this question depends upon the construction to be put on the Dayabhaga of Jimutavahana, the founder of the Bengal school. The other authorities current in Bengal are all of them based on the Dayabhaga, and such differences as exist between them and the Dayabhaga scarcely ever involve conflicts of principle. According to the Dayabhaga, the whole theory of inheritance is founded on the principle of spiritual benefit conferred: and it is by that principle that questions relating to inheritance must be tested and determined see the judgment of the Full Bench in *Guru Gobind Shaha Mandal v. Anand Lal Ghose Mazumdar* 5. B.L.R. 15 the question now before us being no exception to this general rule.

2. It appears to me that the Dayabhaga (with the exception of one clause, Chap, xi, Section 5, Clause 35, to which I shall presently refer at length) clearly shows that, where there has been no separation, uterine brothers take to the exclusion of half brothers. The difficulty which has been felt has arisen out of this Clause 35, and an erroneous idea that it and certain other propositions laid down as applicable to brothers in cases where there has been a partial partition, or a separation and subsequent reunion, are applicable to cases in which there has been no partition.

3. There is no possible question as to the superiority, of the whole brother over the half brother as regards conferring spiritual benefits. For, whereas the whole brother presents six oblations to the ancestors of the deceased (three on the father's side, and three on the mother's side), the half brother present three only, viz., three on the father's side; see Dayabhaga, Chap, xi, Section 5, Clauses 3 and 12, So far therefore as concerns the principle which is the foundation of the whole law of inheritance in Bengal, the brother of the whole blood must inherit in preference to the brother of the half blood.

4. The rights of brothers as regards succession are discussed and declared in the Dayabhaga, Chap, xi, Section 5. Much that is to be found in this section is merely vague discussion. But it is generally easy to say what is authoritative, and what is not; and the whole section (excluding Clause 35, which is reserved for special consideration) may be summed up thus: Clauses 1 to 8 show that, failing the mother, brothers inherit to the exclusion of brothers' sons (owing to the inferiority of the latter in the matter of oblations); in Clauses 9, 11, and 12, it is laid down broadly that the brother of the whole blood takes before the brother of the half blood,--the latter being expressly placed (Section 12) between the whole brother and the nephew or brother's son : and the rest of the section, Clauses 10 and 13 to 39 (with the possible exception of Clause 35) are devoted to an argument as to what happens where there have been partition and reunion, whole or partial. From Clause 13 to the end there is not a word (unless in Clause 35) which touches a simple case of succession where there never has been a partition at all. The conclusion arrived at as the result of the discussion as to what is to happen where there have been partition and subsequent reunion, &c, is, that if there has been a partition, and there are whole brothers and half brothers, the whole brothers take alone if there has been no reunion; but a half brother, who has become reunited with the deceased, will share equally with a whole brother of the deceased, who has not become reunited. The reunion in fact is considered as advancing the half brother to a position better than that which he would otherwise have occupied, the reunion being treated as equal to blood--a result which of itself shows that the original position of the half brother was according to Hindu law inferior to that of the whole brother.

5. Besides the distinct declarations contained in this Section 5, there are indications in other parts of the Dayabhaga of the writer's opinion that the brother of the whole blood was superior to him of the half blood. For example, in Chap, xi, Section 1, which treats of "the widow's right of succession," uterine brothers are mentioned in Clauses 2 and 3 as near heirs: and in Clause 17 a text of Devala is quoted, which expressly gives priority to the whole brother over the half brother. The matter thereunder discussion is the position of the widow, and the brothers are only incidentally named. But in the discussion it never seems to have occurred to the commentator that there was anything unnatural or wrong in classing the half brother separately from and after him of the whole blood; while in Clauses 2 and 3 the use of the word "uterine" indicates the existence of some distinction between those who were uterine and those who were not.

6. The Dayabhaga, Chap, xi, Section 6, deals with the "nephew"s right of succession." Here it is expressly and unequivocally laid down that the succession devolves first on the son of the whole brother, and if there be none, on the son of the half brother. And the intelligible and natural reason given is that the son of the half brother, being a giver of oblations to the father of the late proprietor, together with his own grandmother (to the exclusion of the mother of the deceased proprietor), is inferior to the son of the whole brother, who gives oblations to the grandfather in conjunction with the mother of the deceased (Clause 2).

7. We thus have it that-

(a) applying the principle which is the basis of the whole scheme of inheritance propounded in the Dayabhaga, the whole brother undoubtedly succeeds in preference to the half brother:

(b) in the Dayabhaga, Section 5, Clauses 9, 11, and 12, it is expressly said that the whole brother succeeds before the half brother; and elsewhere there are indications that the Commentator accepted as a fact the superiority of the whole blood:

(c) the son of a whole brother is expressly declared to rank before the son of a half brother; and the principle upon which this is declared applies equally to the case of brothers and half brothers:

(d) when there has been a separation, a half brother, who becomes reunited, gains by the reunion a better position than he otherwise would have had, and is brought up to the level of a whole brother who has not become reunited,--which proves that the original position of the half brother was inferior to that of the whole.

8. There remains Clause 35, and the difficulties which it creates. After much discussion as to separation and reunion, &c, it is said in Clause 34: "Therefore, if whole brothers and half brothers only (not reunited brothers of either description) be the claimants, the succession devolves exclusively on the whole brothers. Accordingly, Vrihat Menu says: "If a son of the same mother survive, the son of her rival shall not take her wealth." This rule shall hold good in regard to the Immovable estate. But on failure of heirs, the half brother may take the heritage." "Then comes Clause 35, where, with reference to the declaration just quoted, "this rule shall hold good in regard to the Immovable estate," it is remarked: "This rule is relative to divided immoveables. For, immediately after treating of such property, Yama says: "The whole of the undivided Immovable estate appertains to all the brethren: but divided immoveables must on no account be taken by the half brother." "In Clause 36 the commentator proceeds to analyse this text of Yama, thus: ""All the brethren," whether of the whole or of the half blood. But among whole brothers, if one be reunited after separation, the estate belongs to him. If an unassociated whole brother and reunited half brother exist, it devolves on both of them. If there be only half brothers, &c." It is to be observed,--and I think it is shown by Clause 36 that this is so,--that in the

Dayabhaga itself this text of Yama is introduced only as being connected with the matter under discussion, viz., the succession in cases of separation with or without reunion, &c, and there really is nothing to lead to the supposition that it was referred to save as bearing on that matter, or that in quoting it in Clause 35 there was any intention of contradicting or throwing doubt on the law as already distinctly propounded by the writer himself in the earlier portion of Section 5.

9. In the Dayatatwa of Raghu Nandana (written in the beginning of the sixteenth century), which is based on and closely follows the Dayabhaga, it is laid down expressly (Chap, xi, Clauses 29 and 30) that the brother of the whole blood takes before him of the half. The commentator then proceeds in Clauses 31 to 56 to treat of what occurs in cases of partition and reunions, &c. In the course of this discussion he brings in the text of Yama (very much as it is brought in in the Dayabhaga) in connexion with Yajnavalkya's observation (set out in Clause 32) that "1, A reunited brother shall keep the share of his co-heir who is deceased; or shall deliver it to his issue. But a uterine brother shall thus retain or deliver the allotment of his uterine brother. 2, A half brother however, being again associated, may take the heritage: not a half brother (who is not reunited): or (a uterine brother), though not associated, may obtain the property, and not the son of a different mother who is reunited." Discussing this clause (which I give at length merely to show how entirely it referred to cases of separation and reunion, &c.) in Clauses 33 to 35, he in Clause 36 says: The passage "but a uterine brother shall thus retain or deliver the allotment of his uterine brother" (Section 32) is to be explained in the same way: "then he continues in Clause 37: "On this a special rule is propounded by Yama: "Undivided Immovable property goes to all (the brothers). But never should separated Immovable estate be taken by half brothers." "All," that is, all the whole and half brothers. The inference which is deduced from the sense of this text is that, exclusive of Immovable property, everything, whether divided or undivided, appertains to the uterine brother alone." Then Clause 38 deals with a question of reunion.

10. So that here, as in the Dayabhaga itself, the text of Yama is introduced only incidentally in the course of a discussion as to cases where there has been a separation, &c.

11. It is not easy now to interpret a text like this of Yama standing by itself and apart from the context in which it was originally placed by its author. What that context was, we do not know. Very likely, the text never was intended to mean more than that the estate of a father dying joint with his sons goes among all the sons equally, but that, after his death, on the death of a son, the son's uterine brother succeeds in preference to his half brother. It is impossible, however, to say for certain what the text meant.

12. It is quoted in Colebrooke's Digest, Bk. V, Chap, viii, Section 1, text 431. It is there treated not as laying down any general rule as regards succession, but as applying only to cases where there has been a separation between the brothers, but part of the joint property has remained undivided. It is interpreted thus by Jagannatha: "If any Immovable

property of divided heirs, common to brothers by different mothers, have remained undivided, being held in coparcenary, the half brothers shall have equal shares with the rest, but the uterine brother has the sole right to divided property, moveable or immoveable. The text of Vrihat Menu (that quoted in Dayabhaga, Chap, xi, Section 5, Clause 34) likewise intimates the same by alluding to a distinction in respect of Immovable property when the subject proposed was already ascertained by the former part of the text 428." The text referred to is as follows: "If a brother by the same mother be living, one by a different mother shall not take the estate: the law is the same, even though it be Immovable property: but on failure of the whole blood, one of the half blood may indeed possess the estate." It is to be noted further that this text from Vrihat Menu is also treated in Colebrooke's Digest as relating to the subject of succession in cases of separation, reunion, &c.

13. Although Clause 35 of Section 5 of Chap, xi of the Dayabhaga may in words appear to confine the rule, as to the whole blood succeeding in preference to the half, to cases of succession "to divided immoveables," it is quite clear to me that the restriction thus put upon the rule was not intended to be general, but was confined to the branch of the subject under discussion, viz., cases where there had been separation, total or partial, and with or without re-union. Were I of a different opinion, I should still not be prepared simply on account of Clause 35 to restrict the rule as suggested; for so to restrict it is directly opposed to the main principle of the Bengal scheme of inheritance, and to the express declarations of the writer of the Dayabhaga himself, and of Raghu Nandana. Yama, moreover, is not a lawgiver of very special authority, though no doubt he is one of the early propounders of the law whose rules are to be accepted when they are certain and intelligible, and not opposed to those laid down by other sages of equal or greater authority. As a matter of fact, the rule laid down in Clause 35, Section 5, Chap, xi of the Dayabhaga has never, so far as I can ascertain, been accepted (unless it can be said to be so accepted in the Dayatatwa) as laying down that, in the succession to an undivided estate, the whole brother does not take before the half, until the decisions of Division Benches of this Court which have led to the present reference.

14. Srikrishna Tarkalankar (who lived about 1700, and whose opinion is entitled to very great respect) construed the Dayabhaga as laying down that the whole brother succeeded when there had been no partition, in reference to the half brother: see his recapitulations of the order of succession (Stoke's edition of the Dayabhaga, p. 352), where he sums up the law as laid down in the Dayabhaga, thus: "If the mother be deceased, a brother is the successor. In the first place the uterine or whole brother; if there be none, a half brother. But if the deceased lived in renewed coparcenary with a brother, then in case of all being of the same blood, the associated whole brother is heir in the first instance, but on failure of him the unassociated brother. So in the case of all being of the half blood, the associated half brother inherits in the first place, and on failure of him the unassociated half brother. But if there be an associated half brother and an unassociated whole brother, then both are equal heirs."

15. The same view is propounded by him in his Dayakrama Sangraha, Chap, i, Section 7, Clauses 1 to 6: and it seems clear that Srikrishna, in laying down the law as he did, had no intention of departing in any way from the Dayabhaga.
16. To turn to more recent writers on the subject. In Halhed's "Gentoo Laws," published in 1776, Srikrishna is followed implicitly. I do not refer to Halhed's treatise as deeming it of much authority, but merely as showing what was in fact supposed to be the construction of the Hindu law on the question now before us.
17. Sir Francis Macnaghten, in his "Considerations of the Hindu Law," published in 1824 (pp. III, &c.) also follows Srikrishna. Referring to the question of separation and reunion, and the confusion existing in the texts on the subject, he remarks that it is certain that if all continue joint from the beginning, or if all are in an actual state of separation, or if all return to union. after having once been separated, the uterine excludes the half brother from the succession.
18. So Sir William Macnaghten, in his "Hindu Law" (Ed. 1828 1 26), lays it down quite distinctly that "after the mother brothers inherit; first the uterine associated brethren next the unassociated brethren of the whole blood; thirdly, the associated brethren of the half blood; and fourthly, the unassociated brethren of the half blood...."
19. Elberling adopts the same opinion (para. 175, p. 78).
20. In the second volume of Macnaghten, at page 66, there is a case which has been referred to as contradicting Macnaghten's own text. But so far as concerns the first of the two questions, which are supposed to be dealt with in that case, it turns upon a wholly different point, viz., that when the first of the three brothers (one of whom was of the half blood) died, his share went by survivorship to the other brothers, to the exclusion of his widow. This shows that the case must have been one under the Mitakshara law: and Baboo Shama Churn Sircar (Vyavastha Darpana, p. 1058, note) says it was an up-country case. The second question put does seem to involve the issue as to the superiority or equality of whole and half blood among brothers. But the answer given is so loose and so little in reply to the question asked, that but little value can be attached to it. The case stated is that the first son who died left a widow and a uterine brother. The reply assumes that he died leaving no widow.
21. The table of inheritance and succession, published some five and twenty years ago by the late Baboo Prosonno Coomar Tagore, purports to be framed in accordance with the Dayabhaga, Dayatatwa, Dayakrama Sangraha and other works of the Bengal school. In this table precedence is given to the brother of the whole blood, who stands No. 10 in the list of heirs, while the half brother stands as No. 11. In the footnotes to the table it is stated that the brother of the whole blood succeeds first. Then in continuation of a resume of the law of succession, where there has been separation and reunion, &c, there is this note: "The undivided Immovable estate on the death of the owner will be equally divided

among the whole and half brothers." This note may be said to throw some doubt on the table. But it is clear to me that Prosonno Coomar Tagore would never have framed the table as he did (and reproduced it, in pamphlet shape in 1868) if he had not intended the rule given in his note to be construed in a limited sense, as restricted to cases of succession to a portion of the joint estate which on a partial partition had remained undivided.

22. In the Vyavastha Darpana of Baboo Shama Churn Sircar, preference is given to the whole blood. The text of Yama is translated thus: "Whatever Immovable property may remain undivided, that appertains to all: but the divided immoveables must on no account be taken by the half brother:" and a distinct opinion is expressed that this is the real meaning of the text, in fact, that it must be read as suggested in Colebrooke's Digest, and that it does not apply to ordinary cases of succession amongst brothers who have never separated at all (Vyavastha Darpana, pp. 203, 204 and p. 1057, note).

23. No cases have been cited to us in which the question has been judicially decided, except those which are mentioned in the order of reference.

24. On the whole, I am of opinion that in Bengal the brother of the whole blood succeeds, in the case of an undivided estate, in preference to a brother of the half blood.

25. And this being the unanimous opinion of the Court, these cases will be sent back for final disposal to the Division Bench which referred the question for our decision.