(1868) 07 CAL CK 0027

Calcutta High Court

Case No: None

Giridhari Lal Roy		APPELLANT
	Vs	
The Government of Bengal		RESPONDENT

Date of Decision: July 17, 1868

Judgement

@JUDGMENTTAG-ORDER

1. The facts on which the determination of this appeal depends, are few and undisputed. Upendra Chandra Roy, the owner of the zamindari and other property in dispute, died on the 7th of August 1860, an infant, and unmarried. He was of a family which had formerly come from the Upper Provinces, and though settled in Lower Bengal, where the zamindari is situated, is admitted to have retained the ceremonial and other law of its original habitat. There is, therefore, no dispute that any question touching the succession to Upendra Boy is determinable by the law of inheritance current at Benares. On Upendra''s death, the appellant, as the nearest male relative surviving him, performed his Sradh, claimed his property as heir, and shortly afterwards applied to have his own name substituted for that of the deceased, as owner of the zamindari, on the Collector''s register. He is, however, but a remote kinsman of the deceased, being only the brother of his grandmother ex parte patterned, or, to use the phraseology of the Mitakshara, his father''s maternal uncle. And, accordingly, at the time of this application for mutation of names, some question whether the appellant was entitled to inherit, and whether the property did not pass for want of heirs to the Crown, was raised. Thereupon, the Board of Revenue consulted their adviser, the Legal Remembrancer, and on his opinion, fortified by that of a Pandit, which he had procured through the Registrar of the High Court, determined to recognize the title of the appellant, who accordingly was put into possession, or left in possession of the property, recorded as proprietor of the zamindari in the Collector''s books, and continued to pay the Government revenue assessed upon it up to the date of the institution of this suit.

2. In 1863, the Government authorities appear to have changed, for reasons which have not been explained, their view of the appellant''s title; and on the 3rd of August in that year, the suit, out of which this appeal has arisen, was commenced against him, in the name of the Government of Bengal, as representing the Grown, for the recovery of the real and personal property of Upendra, on the allegation that upon his death it had escheated, for want of heirs, to the Crown.

3. By a decree dated the 30th of September 1864, the Zillah Judge dismissed the suit, holding that the Government was not entitled to oust the appellant. The precise grounds of his judgment, it is unnecessary to examine.

4. On appeal to the High Court, this decision was reversed by two of the Judges of that Court, and the present appeal has been preferred against their decree.

5. The points ruled by the judgment of the High Court were--

1st.--That the Government was not estopped by the acts of its officers in 1861, when the appellant applied for and obtained the mutation of names, from bringing this suit.

2nd.--That upon the true construction of the section in the Mitakshara, which will be hereafter considered, the appellant, as the maternal uncle of the father of the deceased, was excluded from the class of "Bandhus" capable of inheriting; and that, consequently, as between him and the Government, he had no title to the property sued for.

6. Upon these findings the Court decreed that Government should obtain possession of all the real property admittedly in the appellant''s possession, with a certain specified exception, but that, for want of proof as to its value, their claim to the moveable property should be dismissed; and the judgment then proceeded as follows:--

This decree of Government against Giridhari is final, but it does not become absolute until the claim of Sohan Lal and Mohan Lal, who represent themselves to be maternal grandmother''s sister''s sons, and that of Hara Bhoja Misra," the spiritual preceptor of the deceased, have been inquired into.

The last-named person has filed no evidence, but his claim cannot be determined until that of Sohan Lal and Mohan Lall has been set at rest, and they" have filed no evidence at all. They, as well as the Acharjya or spiritual preceptor, do not oppose the defendant Giridhari''s claim, but only prefer a claim in "case his is declared to be invalid; and if they prove themselves to be what "they allege that they are, they are, undoubtedly, entitled to succeed as" enumerated Bandhus.

The case must, therefore, be remitted to the Judge, with instructions that "he will, without delay, take up the case, and call on these parties and any others "who may appear to claim the property of the deceased minor, within a reason-" able time, to

file their evidence. He will then examine it thoroughly, and, guided "by his estimate of it, and by Hindu Law, he will either confirm the present order in "favour of Government as against them also, or pass in their favour whatever decree "the law of the case seems to require.

7. The able arguments before this Committee have been principally addressed to the question raised by the second of the above findings, viz., whether, under the law current at Benares, the appellant has not a title to inherit the property preferable to the claim of the Government by escheat: and that question their Lordships will first consider.

8. Its determination will ultimately be found to depend on the construction to be given to the first article of the sixth section of the second chapter of the Mitakshara. The absolute exclusion of the father''s maternal uncle from the list of possible heirs, for which the respondents contend, can rest on no other ground.

9. Mr. Forsyth, indeed, argued strongly against the right of the appellant to inherit, on the assumption that he was not entitled to offer the funeral oblations. But is this assumption well-founded? There is evidence, the uncontradicted evidence of the family priest and others, that the appellant did, in point of fact, perform the Sradh of Upendra; and he seems, in the judgment of the priest, properly to have performed that function in the absence of any nearer kinsman. It is, however, unnecessary to determine whether this act of the appellant was regular or not. The issue in this case is not between two competing kinsmen, but between a kinsman of the deceased and the Crown. Let it be supposed, for the sake of argument, that the nearest existing relative of Upendra at the time of his death had been, not the appellant but a natural-born son of the appellant. It is admitted that, on the strictest interpretations of the Mitakshara, such a person is a Bandhu; that the three classes of Bandhus must be exhausted before the King can take for want of heirs; and, therefore, that the title of the appellant''s son would prevail against the Crown. Now such a Bandhu either is competent to perform the Sradh of the deceased, offering some kind of funeral oblation, or he is not. If he be incompetent, it follows that his right to inherit is wholly independent of the doctrine of spiritual benefits derivable from funeral oblations, and is determined solely by kinsmanship. If he be competent, it follows a fortiori that his father, who would have been one degree nearer akin to the deceased, would also have been competent; and that his exclusion from the line of inheritance, if it exists, depends upon some other principle.

10. It is impossible to read the second chapter of the Mitakshara without remarking the extreme jealousy with which the Hindu Law regarded the right of the King to take on a failure of heirs. The 7th section refuses altogether to recognize that right where the property was that of a Brahman. Admitting it as to the property of the other castes or classes, it expressly says, "if there be no relations of the deceased, the preceptor, or on failure of him, the pupil;" and again, "if there be no pupil, the

fellow-student is the successor." It thus exhausts the relatives, and then interposes between them and the King three classes of heirs not connected with the deceased by blood, or participation In funeral oblations. The title of the King is afterwards stated affirmatively, thus: "The King may take the estate of a Kashatriya, or other person of an inferior tribe, on failure of heirs down to the fellow-student." So Manu ordains : "But the wealth of the other classes, on failure of all (heirs), the King may take." So far, then, the law would seem to be clear that the King cannot take the property to the prejudice either of a maternal uncle, or a maternal grand-uncle, each of whom is obviously "a relation" of the deceased. What grounds, then, does the sixth section afford for the hypothesis that these two relations are arbitrarily excluded from the list of possible heirs? That section begins by stating broadly, "On failure of gentiles, the Bandhus (rendered by Mr. Colebrooke ''cognates'') are heirs." Much has been said about this word "Bandhu." It seems[3] to be sometimes used as equivalent to "kinsmen" generally. But in this particular section it may be taken, as defined elsewhere by the Mitakshara itself, to import kinsmen springing from a different family (and, therefore, opposed to "gobraya" or "gentiles"), and connected by funeral oblations. From this class the maternal uncle, or the father''s maternal uncle, (assuming their connection with the deceased by funeral oblations) can be excluded only by some arbitrary definition. Such a definition, the respondents contend, is found in the passage which immediately follows the last citation from the Mitakshara. But is that necessarily so? The author of that treatise goes on to state, "Cognates (Bandhus) are of three kinds: related to the person himself, to his father, or to his mother, as is declared by the following text." And then follows, as a quotation, a more ancient text, (the authorship of which seems, from Mr. Colebrooke''s note, to be uncertain), which says: "The sons of his own father''s sister, the sons of his own mother''s sister, and the sons of his own maternal uncle must be considered as his own cognate kindred. The sons of his father''s paternal aunt, the sons of his father''s maternal aunt, and the sons of his father''s maternal uncle must be deemed his father''s cognate kindred. The sons of his mother''s paternal aunt, the sons of his mother''s maternal aunt, and the sons of his mother''s maternal uncle must be reckoned amongst his mother''s cognate kindred."

11. This sub-division of Bandhus into three classes is possibly a consequence of that part of the definition already referred to, which treats them as kinsmen connected by funeral oblations. It may be that the Bandhus of the patent, though connected with him by funeral oblations, would, by reason of remoteness of kinsmanship, not be so connected with the son.

12. If, for the determination of the question under consideration, their Lordships were confined to the four corners of the Mitakahara, they Would feel great difficulty in inferring, from the omission of" the material uncle" and "the father''s maternal uncle" from the persons enumerated in this text, that either of those relatives is incapable of taking by inheritance the property of a deceased Hindu in preference of the King. Such an inference, in the teeth of the passages which say that the King can

take only if there be no relatives of the deceased, seems to be violent and unsound. For the text does not purport to be an exhaustive enumeration of all Bandhus who are capable of inheriting, nor is it cited as such, or for that purpose, by the author of the Mitakshara,--it is used simply as a proof or illustration of his proposition that there are three kinds or classes of Bandhu; and all that he states further upon it is the order in which the three classes take, viz., that the Bandhus of the deceased himself must be exhausted before any of his father''s Bandhus can take, and so on.

13. Again, further doubt is thrown upon the theory of exhaustive enumeration by the passage of the Mitakshara, which is not found in that portion of the Treatise which was translated by Mr. Colebrooke, but has been translated for the purposes of this suit.[4] The general effect of that passage is to introduce, in the case of a trader dying abroad, anew class of remote heirs, viz., his returning co-traders. But this provision is preceded by an enumeration of preferable heirs, which includes among Bandhus, the maternal uncle. Here, then, is a passage, written by the author of the Mitakshara himself, which treats the maternal uncle as capable of inheriting. The learned Judges of the Court below meet this authority by suggesting that the heirship of the maternal uncle, as well as that of the co-trader, may be exceptional, and confined to the case of the trader dying abroad. Their Lordships, however, cannot admit the reasonableness of this hypothesis, and think that even on the Mitakshara, the question under consideration is at least uncertain. That question, however, is not to be governed by the Mitakahara alone. Adhering to the principles which this Board lately laid down in the Ramnad case Ante 1, their Lordships have no doubt that the Viramitrodaya, which by Mr. Colebrooke and others is stated to be a treatise of high authority at Benares, is properly receivable as an exposition of what may have been left doubtful by the Mitakshara, and declaratory of the law of the Benares School.

14. The passage cited from that commentary in the Record, and more fully in 9 Sevestre''s Reports of Cases in the High Court, p. 552[5], is explicit. After stating that the term "Sakulya," or distant kinsman, found in the text of Manu, comprehends the three kinds of cognates, the commentator goes on to say,--The term cognates (Bandhus), in the text of Jogeswara, must comprehend also the maternal uncles and the rest, otherwise the maternal uncles and the rest would be omitted, and their sons would he entitled to inherit and not they themselves, though nearer in the degree of affinity, a doctrine highly objectionable." The passage, aft translated in the Record, has "then they themselves," in place of "not they themselves." If this be the correct reading, it would follow that even if the exclusion of the maternal uncle and others not mentioned in the text relied upon by the respondents from the list of Bandhus were established, they would still, as relations, be heirs, whose title would be preferable to that of the King. But the passage on either view of it declares that they are not so excluded; and it is, therefore, unnecessary to consider whether the title of any remote relation who could not be brought within the category of Bandhus, or other class of heirs specified by the Mitakshara, would prevail against

that of the Crown. The learned Counsel for the respondents remarked that this passage of the '' Viramitrodaya '' goes no further than to affirm the right of a maternal uncle, and that it says nothing of a maternal grand-uncle. But to say nothing of the use of the term" and the rest," the text is at least an authority for the proposition. that a maternal uncle is a Bandhu. The maternal uncle of the father is, therefore, a Bandhu of the father, and it is admitted that, failing the Bandhus of the deceased, the Bandhus of the father are entitled to inherit.

15. This view of the law is confirmed by the majority of the consulted Pandits; it seems also to make the law of the Benares School consistent, on the point in question, with that of Bengal; and the concurrence of opinions of Mitramisra, the author of the '' Viramitrodaya,'' with Jimuta Vahana, the author of the ''Dayabhaga,'' is not unimportant, since they are stated by Mr. Colebrooke (Preface, p. viii) to differ on almost every disputed point of Hindu Law.

16. Their Lordships do not think it necessary to consider at any length the decided oases [6] which are cited in the judgment under review. It is admitted that there is no case precisely in point; and the authority of those cited, in so far as they go to support the theory that the enumeration of Bandhus, in the text quoted in the Mitakshara, is to be taken as exhaustive, has been shaken, if not altogether overruled, by the decision which, we are informed, has been recently passed by the High Court of Bengal in the case of Amrita Kumari v. Lakhinarayan Chuckerbutty 9 Sevestre, 547. The question under consideration must, therefore, be held to be an open one even in the Courts of India.

17. Their Lordships, then, have come to the conclusion that, according to the law by which this case is to be governed, the appellant was capable of inheriting the property in dispute, and that his title thereto is preferable to that of the Crown; and, therefore, without adopting the reasons given for his judgment, they think that the Zillah Judge did right in dismissing the suit. This conclusion necessarily disposes of this appeal. Their Lordships, however, deem it right to add that even had they agreed with the learned Judges of the High Court in their view of the law of inheritance, they could not have concurred in the decree under appeal. Their Lordships do not impugn the correctness of the conclusion to which both the Courts below came on the question whether the proceedings in 1661 estopped the Government from bringing this suit. But the effect of these proceedings was to determine, if it were previously doubtful, the fact of possession. The respondents therefore, were in the position of plaintiffs in an ordinary suit in the nature of an ejectment. They could only recover by the strength of their own title. Accordingly, it lay upon them to prove at least prima facie that Upendra died without heirs; and, on the other hand, the appellant was entitled to defend his possession not only by proof of his own title, but by setting up any jus tertii that might exist. By an alternative plea, he did set up such a bar to the respondent''s suit; and the title of those persons who, he says, are, failing himself, the heirs to Upendra, has never yet

been determined. The decree under appeal would remit the cause to the Judge, in order to allow those persons who, according to the practice in India, have intervened as objectors, to litigate their title with Government, casting, apparently, the burden of proof on them. But it seems to deprive the appellant of his right to defend his possession, on the ground of an existing jus tertii. It is unnecessary, however, to say more on this point, since the conclusion to which their Lordships have come on the appellant''s own title obliges them humbly to recommend to Her Majesty that the decree of the High Court be reversed, and that in lieu thereof it be ordered that the appeal to the High Court from the decree of the Zilla Judge be dismissed with costs. The respondents must pay the costs of this appeal.

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[1]Mitakshra II., section 6, art. (i)--"On failure of gentiles (that is of Samanodakas to" the 14th generation) the Bandhus or cognates are heirs. Cognates are of three kinds--"personal, paternal, and maternal--as is declared by the following text: ''the sons of his own "father''s sister, the sons of his own mother''s sister, and the sons of his own maternal uncle must be considered his personal cognates. The sons of his father''s paternal aunt, the "sons of his father''s maternal aunt, and the sons of his father''s maternal uncle must be "deemed his paternal cognate kindred. The sons of his mother''s paternal aunt, the sons of "his mother''s maternal aunt, and the sons of his mother''s maternal uncle must be reckoned "his maternal cognate kindred."

On this passage, Macnaghten has the following note: "In this series, no provision" appears to have bean made for the maternal relations in the ascending line; but Vachaspa-" ti Misra, in the Vivada Chintamani, assigns to the maternal uncle and the rest (Matuladi) "a place in the order of succession next to the Samanodakas; and Mitra Hisra in the Viraodaya expresses his opinion that, as the maternal uncle''s son inherits, he himself "should be held to have the same right by analogy."

[2]The decisions both of the Zillah Court and of the High Court in this case, will be found in 4 W. R., 13.

[3]See Note at p. 350 of Mr. Colebrooke''s translation of the Mitakshara.

[4]Text.--" A person having gone to a foreign country, his goods would be taken by his heir and those related through a Bandhu or to a Bandhu, or cognatic relation, or person returning from that country. In default of heirs, the king will take."

Commentary.--" When a person, of those trading in fellowship, goes to a foreign country" and dies there, his share will be taken by his heir, i.e., offspring, i. e., son and other off-"spring, Bandhus, relations on the mother''s side, maternal uncles and the rest, or others" cogenatic relations, that is to say sapindas, other than offspring; or by those coming back." Those of the co-traders who return from a foreign country shall take. In their default, "the king."

[5]"In default of the Samanodakas, bandhus (cognates) are heirs. Cognates are of three kinds, related to the person himself, to his father, or to his mother. Accordingly the following text : The Sons of his own father''s SISTER, the SONS of his own mother''s SISTER, and the Sons of his maternal uncle most be considered as his own cognate kindred. The SONS of his father''s paternal aunt, the Sons of his father''s maternal aunt, and the sons of his father''s maternal uncle must be deemed his father''s cognate kindred. The sons of his mother''s paternal aunt, the sons of his mother''s maternal aunt, and the Sons of his mother''s maternal uncle must be reckoned his mother''s cognate kindred. Then by reason of near affinity, the cognate kindred of the deceased himself in the first instance, then the father''s cognate kindred, and next his mother''s cognate kindred succeed. This is the order of succession. In the text of Mann : Then the distant kinsmen shall be the heir, or the spiritual preceptor, or the pupil; the term Saleulya comprehends the persona descended from the same family (Sagotra), and the kinsman allied by common libation of water (Samanodakas); the maternal uncles and the rest; and the three kinds of cognates."

[6]Nagalinga Pillai v. Vaidilinga Pillai--Madras S. D. A. 1860, p. 245.

Doedem, Kullammal v. Kuppu Pillai--1 Madras H. C. R. 85.

Chotilal v. Goordyal--S. D. A. (N.W.P.) 1865, 200.

Ilias Koonwar v. Agund Rai--3 Select Reports, S. D. A. Bengal 37 to 40.

Jawahir Rahut v. M. Kailasu, 1 W. R. 74.

B. Sahoo v. B. Sahoo--Legal Remembrancer, 1864, 168.