(1924) 08 BOM CK 0025

Bombay High Court

Case No: None

Jagubhai Hiralal Heir of the deceased Hiralal Nathubhai Desai		APPELLANT
	Vs	
Kesalal Girdharlal and Others		RESPONDENT

Date of Decision: Aug. 25, 1924

Citation: (1925) ILR (Bom) 282

Hon'ble Judges: Marten, J; Fawcett, J

Bench: Division Bench

Judgement

Marten, J.

[After dealing at considerable length with the various other points that had arisen, the learned" Judge observed in conclusion:] There yet remains the question whether Himatlal''s nephews are entitled to share along with their uncle Hiralal, or whether Hiralal alone takes so much of Himatlal''s one-fifth share as did not pass under the sale-deed, Exhibit 358. I have had the advantage of reading the judgment which my brother Fawcett has prepared on that point, and I need only say that I concur in it.

Fawcett, J.

2. [On the above question of law proceeded.] The dispute resolves itself into one whether under the law of succession contained in the Mayukha, which is the leading authority in the province of Gujarat, whence the parties come, the sole heir of Himatlal was Hiralal, his only surviving brother, or whether the nephews of Himatlal, plaintiffs Nos. 2, 3 and 4 and defendants Nos. 1 and 2, who are the sons of predeceased brothers, are entitled to share along with Hiralal, as if their fathers had survived Himatlal. The son of the deceased plaintiff No. 1, namely Jagubhai, puts forward the former contention, while plaintiffs Nos. 2, 3 and 4 and defendants Nos. 1 and 2 contend that they are entitled, as nephews, to share in the succession.

3. It is common ground that, although it is now a question of the legal representation of Bai Chaturba, who {as already mentioned) was brought on the record as the legal representative of Himatlal, the original defendant No. 3, this only entails a question of heirship to her husband Himatlal, for the marriage between Himatlal and Chaturba being presumably in an approved form, and Chaturba having died leaving no issue, her stridhan inherited from her husband goes to his, and not her, heirs. There is no dispute on this point, The sole question, therefore, before us is whether Hiralal was entitled to succeed to Chaturba''s stridhan alone, or whether the nephews, being sons of predeceased brothers, are entitled to share along with plaintiff: No. 1.

4. This question turns upon the meaning of paragraph 17 of section VIII of Chapter IV of the Vyavahara Mayukha, and there is a dispute as to the correct translation of this paragraph. According to the translations of Messrs. Borrodaile and Stokes, the sons of brothers share the inheritance, without any restriction as to their father being alive at the death of their uncle, and the rule has accordingly been taken to be a general one that the sons of a deceased brother succeed along with the surviving brother or brothers. The translation, however, of the same passage made by Messrs. Mandlik, Jamietram and Gharpure limits the right to the case where the father of any nephew was alive at the death of the paternal undo, and allows such a nephew to take the share of his father on a division with the other paternal uncles.

5. Before us no expert evidence has been adduced as to which of these two translations is correct, nor has there been any detailed discussion on this point. In any case it would obviously be difficult for us, without a knowledge of Sanskrit, to decide which translation is to be preferred. I understand on good authority that the difference between the two translations turns upon whether an unexpressed negative should be read into one or two words which are in this passage, and that Sanskrit allows a negative to be read in or the reverse, according to the context. There is, therefore, obviously room for legitimate difference of opinion as to the correct translation. In view of this it seems to me that, in considering this question as it arises before us, we should be mainly governed by the principle laid down by the Privy Council in The Collector of Madura v. Moottoo Ramalinga Sathupath (1868) 12 M I.A. 397 where their Lordships, after stating that the different commentaries had given, rise to the different schools of law, say (p. 436):

The duty, therefore, of an European Judge, who in under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities [Smritis], as to ascertain whether it has been received by the particular school which governs the District with which he has to deal, and has there boon sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law.

6. Similarly in Mtithukaruppa Pillai v. Sellathammal (1914) 39 Mad. 298 it is observed: It is not the literal meaning of the original text that has to be looked to in the

administration of Hindu law. Though commentators may have been wrong in their interpretation of an original text, their opinion should be enforced as having the sanction of usage.

7. No doubt this principle has reference primarily to ancient commentaries: but in a case like the present I think it can almost equally be applied to usage based on an interpretation accepted by modern commentators. In the present case, we have the fact that undoubtedly for a long time it has boon accepted as a rule laid down by the Mayukha that the sons of full brothers succeed with full brothers and in Chandika Bakhsh v. Mana Kuar (1902) L.R. 29 IndAp 70: 24 All. 273 this was accepted as being a definite rule in cases governed by the Mayukha. It is true that the translation there referred to was Stoke''s and that there was no discussion and, therefore, no decision, on the point now before us. On the other hand, the fact remains that this was taken as a definite rule, and the case affords a strong instance of usage. Practically all the modern commentators accept without any questioning this particular rule (see, for instance, Mayne''s Hindu Law, 9th Edition, p. 834; Trevelyan''s Hindu Law, 2nd Edition, p. 391; Mulla''s Hindu Law, 4th Edition, p. 91; and even Gharpure''s Hindu Law, 1921, Edi, p. 307). Again in Haribhai Gulab v. Mathur Lallu (1923) 47 Bom. 940 Shah J., who himself comes from Gujarat, treats the rule as unquestioned, Russell J. in Haridas v. Ranchordas (1903) 5 Bom. L.R. 516 also follows the interpretation of the rule accepted in the Privy Council case I have already mentioned. The construction which the learned Judge there gives to "the share of their father" in the translation that was furnished to him, is no doubt open to criticism; but on the other hand, this case affords a definite judicial recognition of the rule about all nephews sharing in the succession, and no subsequent case has been cited where this interpretation has been questioned.

8. The only commentators who appear to favour the view put forward by Mr. Ramdutt Desai for plaintiff No. 1 are Messrs. West and Majid, who in the 4th Edition of West and Buhler''s Hindu Law, at page 104, limit the right of a nephew to succeed to the particular case of his father being alive when the succession opens, but dying before the partition of the estate takes place; and it is added that "Representation is not recognised in the case of a predeceased brother who has left sons. These nephews are excluded by their surviving uncles. It is only on the complete failure of brothers of the deceased that brothers sons succeed to him". In a foot-note on the same page it is stated:

Some surprise may be felt that this rule should have seemed necessary. But according to Hindu notions as possession is generally necessary to the completion of ownership, so separate possession is essential in theory to the completion of a separate ownership of a share derived from a prior joint ownership of the aggregate. The father, however, having once become a coparcener, his son has acquired a concurrent interest which is but expanded by the father''s death.

9. Two cases are cited in support of this proposition, viz., Burhum Deo Roy v. Punchoo Roy (1865) 2 W.R. 123 and Chandika Bakhsh v. Muna Kuar (1865) 2 W.R. 123. With great respect, I cannot follow how these two cases really support it. I have referred to the report of Burhum Deo Roy v. Punchoo Roy (1865) 2 W.R. 123 and the head note of that case sufficiently shows the nature of the decision. It says: "According to the Mitakshara law, a stepbrother inherits after the widows, if he survives them; otherwise a uterine brother''s son succeeds". The Privy Council case of Chandika Bakhsh v. Muna Kuar (1902) L.R. 29 IndAp 70; 24 All. 273 contains, so far as I can see, nothing on the subject. It merely assumes the existence of the rule, as I have already mentioned, that the sons of a brother who is dead share along with the surviving brothers. There is another thing which goes against their view. Among the replies of Shastri collected in West and Majid''s Hindu Law at p. 492 will be found a case at Ahmednagar in 1859, where the question put to the Shastri and his answer were as follows:

Q.: A deceased woman has no sons or other near relations, but there are one brother-in-law and four sons of another brother-in-law, who are all united in interests. The question is: Which of these will be her heir?

A.: The brother-in-law and the sons of brother-in-law will all be her heirs.

10. This seems to show that in 1859 the Shastri who advised was following the Mayukha rule, as generally interpreted by modern commentators, and the Mayukha is in fact mentioned among the authorities given below the reply, for the Shastri can hardly have rested his opinion on the fact that the brother-in-law and the sons of the brother-in-law were united in interest, as this affords no basis either under the Mitakshara or the Mayukha for the sons of the other brother-in-law joining in the succession.

11. Ahmednagar is one of the places where the Mayukha is considered to be of equal authority with the Mitakshara but generally not capable of overruling it (see The Collector of Madura v. Moottoo Hamalinga Sathupathy (1868) 12 M 1. A. 397 and Bhagirthibai v. Kahnujirav [1908] A.C. 1). In the Ahmednagar Zilla, however, the Mayukha was then supposed to have a special authority, as mentioned by West J. in the case last cited, and this seems to account for the adoption of the Mayukha rule in this case. The learned authors Messrs. West and Majid have put a foot note to this case that "the brother-in-iaw must have the preference as nearer by one degree", but the case shows the contrary interpretation of the rule is fairly old.

12. No doubt the rule is an exception to the general principle that the nearer Sapinda excludes the more remote, and the view of! Messrs. West and Majid may be the correct one, but the exception seems to be so well established that, in the absence of something fairly conclusive to the contrary, I do not think we should. hold that the accepted rule is erroneous, and decide in favour of the suggested restriction that the brother''s sons'' father must be alive when the deceased uncle

died. The principle of stare decisis is clearly applicable to a question of the present kind which relates to properly and title. Lord Loreburn in West Ham Union v. Edmonton Union (1886) 11 Bom. 285 says:

Great importance is to be attached to old authorities, on the strength of which may transactions may have been adjusted and rights determined. But win-re they arc plainly wrong, and specially where the subsequent course of judicial decisions has disposed weakness in the reasoning on which they were based, and practical injustice in the consequences that must How from them, I consider it is the duty of this House [of Lords] to overrule them, if it has not lost the right to do so by itself expressly affirming them.

13. But in the present case it has not been shown that the previous interpretation of this paragraph 17 in the Mayukha is plainly wrong or that any of the other considerations mentioned by his Lordship applies.

14. Therefore I would answer the question by holding that the nephews, namely plaintiffs Nos. 2, 3 and 4. and defendants Nos. 1 and 2, are entitled to be treated as the legal representatives of Bai Chaturba, and to share in the estate of the deceased Himatlal, which is now in question, along with plaintiff No. 1.

15. [Their Lordships then proceeded to pass a decree in conformity with the above remarks.]