
(1940) 08 BOM CK 0011
In the Bombay High Court
Case No : First Appeal No. 140 of 1938

Ambabai Bhaichand Gujar

APPELLANT

Vs

Keshav Bandochand Gujar

RESPONDENT

Date of Decision : 12-08-1940

Acts Referred:

Hindu Law of Inheritance (Amendment) Act, 1929 — Section 2

Citation : AIR 1941 Bom 233 : (1941) 43 BOMLR 114

Hon'ble Judges : Divatia, J;Broomfield, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Divatia, J.—The decree against which this appeal is preferred by defendant No. 1 was passed in favour of the plaintiff who sued to recover possession of certain property on the ground that he was a preferential heir of one Rajaram. The plaintiff was the natural brother of Rajaram, but the latter was adopted by his maternal grandfather and he therefore became his sister's son, Rajaram died on June 10, 1932, without leaving a widow or any issue, and the dispute arose about his property which was claimed by the plaintiff against defendant No. 1, who is the sister of Rajaram's adoptive father. The contest is thus between sister's son and father's sister. It is common ground between the parties, who are Jains, that their ancestors migrated from Gujarat and settled in the Belgaum District. It was agreed during the hearing of the suit that Rajaram's adoption was proved and Was valid, as a daughter's son could be adopted among the Jains. The plaintiff claimed to be the preferen, tial heir under the Hindu Law of Inheritance (Amendment) Act (II of 1929), Section 2 of which provides that "a son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother." His case was that defendant No. 1 being the father's sister was a remote gotraja sapinda, and therefore not entitled to priority over him.

2. It is clear that if the Act of 1929 applies, the plaintiff is a preferential heir. Before the passing of this Act a sister's son was only a bandhu, while a father's sister was held to be a gotraja sapinda in cases governed by the Mayukha, and, therefore, came before the bandhus; but under the new Act the sister's son is taken much higher up and placed even before a father's brother. Defendant No. 1, however, contended--and that was her main defence to the suit--that the case was not governed by the Act, firstly, because it applies only to Hindus and not to Jains, and, secondly, because it applies only to persons who are subject to the law of Mitakshara, while the parties' ancestors, having migrated from Gujarat, were subject to the law of Mayukha. The first two issues were, therefore, framed to cover this contention. The first issue was whether Mayukha or Mitakshara was applicable to the parties, and the second was whether the Act was applicable to Jains. The learned Judge below held that the parties were governed by Mitakshara subject to Mayukha, and that the Act was applicable to Jains. He, therefore, decreed the suit.

3. Mr. Desai on behalf of the appellant-defendant No. 1 has raised the same two points before us. Taking the second point first, he has urged that Jains are not Hindus and the Legislature has not expressly included them in this Act as it did in another Act passed in the same year, namely, the Indian Succession (Amendment) Act (XVIII of 1929), by which Section 57 of the Indian Succession Act of 1925 was enlarged by the addition of the new clause making it applicable to all wills and codicils made by any Hindu, Buddhist, Sikh or Jain after January 1, 1927. It is not necessary to dwell at length on the question whether Jains are Hindus for the purpose of the law of succession, as the point has been concluded by authority: vide (1878) L.R. 6 I.A. 15 (Privy Council) and *Ambabai v. Govind* (1898) ILR 23 Bom. 257. Even in the matter of adoption, although it has a secular and not a religious origin with Jains, it has been held by our Court in a series of decisions beginning from *Bhagwandas Tejmal v. Rajmai* (1873) 10 B.H.C.R. 241, and ending with the recent decision in *Himchand v. Rowji Sojpal* (1938) 41 Bom. L.R. 760 that the Hindu law of adoption applies to Jains, and the burden of proving any custom to the contrary lies on the party alleging it. Mr. Desai relies upon certain observations of Kumaraswami Sastri, Acting C.J., in *Gettappa v. Eramma* (1926) ILR 50 Mad. 228, to the effect that Jains were not Hindu dissenters and that the onus should be thrown on those who assert that in any particular they had adopted Hindu law and custom and had not followed the law as laid down by their own law-givers. Those observations, however, were his personal opinion, and he was constrained to hold that the matter was concluded by authority, and a series of decisions extending over several years had held that the presumption was that Jains were governed by ordinary Hindu law unless it was shown that by custom a different law prevailed among them. It is not necessary to discuss the origin of Jainism, because whatever its origin, it is clear that the Jains have adopted the Hindu law of succession from very ancient times. But Mr. Desai argues that although the Hindu law of succession might apply, the Act of 1929 does not apply to them as it does; not specifically say that; it is

applicable to Jains. The preamble to the Act speaks of altering the order in which certain heirs of a Hindu male succeed to his estate. As the Jains have been judicially recognized as governed by the Hindu law of succession, a legislative alteration in that law would presumably apply to them also unless it was specifically stated that it was not to apply to them. It is true that the Indian Succession (Amendment) Act of 1929 speaks of "Jains as well as Hindus and Sub-section 4 and 57 of the Indian Succession Act of 1925 also do the same. At the same; time it must be noted that Section 331 of the Indian Succession Act of 1865, which is replaced by Section 4 of the Indian Succession Act of 1925, did not make any separate mention of Jains but used the expression "Hindu, Mahomedan or Buddhist", and it has been held in *Bachebi v. Makhm Lal* (1880) ILR 8 All. 55. that the term "Hindu" in Section 331 included Jains. The Hindu Wills Act of 1870, which applied to the territories under the Lieutenant-Governor of Bengal and the cities of Bombay and Madras, no doubt mentioned Jains as well as Hindus as being governed by certain sections of the Succession Act of 1865, but the Indian Succession Act of 1925 was a consolidating Act which repealed the previous Act of 1865 as well as the Hindu Wills Act of 1870. It was, therefore, probably thought necessary ex majore cautela to separately mention the Jains in the consolidating measure. In all the other recent enactments affecting the Hindu law there is no separate mention of Jains along with the Hindus. I am, therefore, of opinion that Jains are also governed by the Act of 1929, and the learned Judge was right in his finding on the second issue.

4. The second point urged by Mr. Desai is more important. The Act applies to all persons who, but for the passing of the Act, would have been subject to the law of Mitakshara in respect of the provisions therein enacted. The parties are governed by the law of succession prevailing in Gujarat where Mayukha is said to be of paramount authority. It is contended that the law propounded by Mayukha is different from the law of Mitakshara and cannot be said to be included in it; Mayukha being the overriding authority in Gujarat and North Konkan, it has superseded in those parts of the Bombay Province the Mitakshara law which applies to all other parts of the province, and the Legislature has confined the operation of the Act to those places which are subject only to the law of Mitakshara. This argument is based upon the assumption that Mitakshara and Mayukha are two schools of Hindu law exclusive of each other and based upon different foundations. It is, therefore, necessary to examine the correctness of this assumption. As is well known, Vijnyaneshwar's Mitakshara is a standard commentary on the Yajnyavalkya Smriti. Vijnyaneshwar flourished towards the end of the eleventh and the beginning of the twelfth century. His commentaries mark a departure from the prevalent notion of the right of succession to property being based on the capacity to confer spiritual benefit on the deceased owner. He placed the right of succession on a new system based on sapinda in the sense of blood relationship and thus brought many near relations as heirs who would be excluded under the theory of spiritual benefit. His views having found favour with a large majority of public opinion, the authority of his work was soon established

in the Deccan where it was compiled, and it gradually extended to the whole of India except in Bengal. Even in the latter province the authority of Mitakshara was at one time supreme till it was ousted by the renowned work of Jimutavahana, the Dayabhaga, in the thirteenth century. The Dayabhaga was in some respects conservative and in other respects advanced. In matters of succession it stuck to the old theory of right to property being based on the capacity to offer pindas, meaning thereby the funeral cakes, while Vijnyaneshwar had revolutionized the old theory by interpreting the word "pinda" as the body, and therefore, "sapinda" as blood relationship. In other respects the Dayabhaga went beyond the Mitakshara doctrine of rights in the joint family being acquired by birth and by survivorship which was substituted by the new doctrine of a family consisting of co-tenants. It is sufficient to note for our purpose that in the midst of a large number of other commentaries of various Smritis and numerous digests, these two standard works, the Mitakshara and the Dayabhaga, hold the field for the last seven centuries and have been recognized as the two main schools of Hindu law. Subsequent writers have propounded various divergent interpretations of the original texts, but they all based their views on the subject of succession either on the theory of propinquity as propounded by the Mitakshara or the theory of religious efficacy as propounded by the Dayabhaga. One such prominent author was Nilkantha at the beginning of the seventeenth century who compiled among other works the Vyavahara Mayukha which is a digest of legal principles and procedure. He was a Deccani Brahmin whose ancestors¹ had migrated to Northern India. It soon attracted the attention of Deccani Shastris as it embodied in a lucid manner the popular views of that age. The prevalent law in the Maharashtra at that time was based on the Mitakshara, but thereafter the Mayukha also came to be consulted by the Shastris on points on which they could not get sufficient light from the Mitakshara. As observed by Colebrooke in his preface to the translation of the Mitakshara, the Mayukha had concurrently with the Mitakshara considerable weight among the Marathas and among those works which "agree in generally deferring to the authority of the Mitakshara, in frequently appealing to the text, and in rarely and at the same time modestly dissenting from its doctrines on particular questions." So also Borradaile observes in his preface to the translation of the Vyavahara Mayukha that in all the schools of Hindu law except in Bengal "the Mitakshara, one of the earliest of these compilations, is received with respect as the chief general authority, though in each some more modern local work is allowed to compete with it on a few points. The most remarkable of those are the Mayukha for the Maharashtra and the west, the Smriti Chandrika for the south of India, the Ratnakar and Chintamani for Mithila. Bengal proper alone denies authority to the Mitakshara having established for itself a totally different school, of which Jimutavahana is the head." The later development of how the Mayukha came to be regarded as the principal authority in Gujarat and the city of Bombay is well described by West J. in the full bench decision in Bhagirthibai v. Kahnujirav ILR (1886) 11 Bom. 285. He says (p. 294):--

The special and almost paramount authority which the Vyavahara Mayukha has gained in Gujarat, and in the city of Bombay is not recognized in other parts of this Presidency. Yet it must not be supposed that the Vyavahara Mayukha presents a development of the Hindu law connected in any peculiar way with the religious or social system of the Gujaratis. Before the Maratha conquest of Gujarat in the middle of the last century it had long been under Mahomedan rule. The customary law of the Hindus had almost dwindled away into mere rude caste usages, and the Brahminical influence had almost perished. The Vyavahara Mayukha was one of the latest products of the Maratha school, and had gained the eminent position which it has retained in the Deccan. The Maratha Brahmins, following the Maratha Chiefs into the newly conquered country, naturally took their law books with them. And of these, the Vyavahara Mayukha was the most comprehensive and characteristic. In Gujarat it had virtually no rival; and, as a Hindu polity was revived there, it took a place analogous to that of the Roman law in the mediaeval Europe, with the Maratha Brahmins as its expositors. Hence arose the somewhat strange consequence that the Maratha doctrines of the Mayukha gained a more undivided sway over Gujarat than amongst the Marathas themselves, who had men of wide learning and copious sources of information at hand.

And he concludes (p. 295):--

It follows, from what has been said, that, without in any way assailing the position of the Mitakshara as the principal authority in the Maratha country, we may properly construe it in doubtful cases by the light of the Vyavahara Mayukha.

5. A number of decided cases have emphasized the intimate relation between the doctrines of the Mitakshara and those of the Mayukha. The decisions in *Krishnaji Vyanktesh v. Pandurang* (1875) 12 B.H.C.R. 65, *Gojabai v. Shrimant Shahajirao Maloji Raje Bhaste* ILR (1892) 17 Bom. 114, 10 CWN 802 (Privy Council) , and *Bhagwan V, Warubai* ILR (1908) 32 Bom. 300 are relevant on this point. The gist of these decisions is summarized in Mayne's Hindu Law, at p. 47, 10th edn., as follows:--

In Gujarat, in the island of Bombay and also in the North Konkan, its authority [of Mitakshara] is controlled by the Mayukha on the very few points on which they differ, the general principle however being to construe the Mitakshara and the Mayukha so as to harmonise them as far as it is reasonably possible.

6. It would be clear from this discussion that there are only two fundamental schools of Hindu law, the Mitakshara and the Dayabhaga, and Mayukha, in spite of its different interpretation of the ancient texts on some points, belongs to the Mitakshara school of Hindu law. The phrase "the law of Mitakshara" used in Section 1 of the Act of 1929 includes all sub-divisions of the Mitakshara law and excludes the law of Dayabhaga. In fact, there is some indication in the Act itself to show that it recognizes the existence of different schools or sub-divisions of the general Mitakshara law and is applicable to them all. Section 3, Clause (b),

provides that the three female heirs elevated higher up in the order of succession shall have no estate larger than, or different in kind from, that possessed by a female in property inherited by her from a male according to the school of Mitakshara law by which the male was governed. The word "school" here evidently refers to the Bombay school on the one hand and the Benares and the Madras schools on the other. In the former, these heirs take the property absolutely while in the latter they take a limited estate. The Bombay school would include the Mayukha under which also they take an absolute estate. The Act could not have been applied to Bengal without shaking the foundation of the Dayabhaga law based upon the capacity to confer spiritual benefit by the offering of funeral cake which was not possessed by females except the five specified ones mentioned in the Dayabhaga.

7. The object of the Act appears to bring the heirs mentioned therein higher up in the order of succession on the ground of their being nearer in blood to the deceased than many of the heirs who formerly preceded them. The Act was, therefore, meant to apply to all the branches of the main school of the Mitakshara law which based succession on the principle of propinquity and the Mayukha is undoubtedly based on that principle. In the latest edition of Mayne's Hindu Law the opinion is expressed to the effect that the Act would apply to the Mitakshara law in Bombay or even where the Mayukha is supreme. That seems to me to be the correct interpretation of the intention of the Legislature.

8. The conclusion, therefore, is that Act II of 1929 applies to Hindus, including Jains, and to all persons governed by the Mitakshara law, including those governed by the Mitakshara law as modified by the Mayukha.

9. It is, however, contended on behalf of the appellant that even if the Act applies, the position of the father's sister is saved by the provisions of Section 3, Clause (a), of the Act, according to which the Act is not to affect any special family or local custom having the force of law. It is urged that under the Mayukha a paternal aunt is a gotraja sapinda and comes in before the bandhus, that that position is assigned to her by reason of a local custom recognized by a judicial decision in absence of a special text; a sister's son, being a bandhu, is, therefore, postponed to the paternal aunt. Reliance is placed on the decision in *Shidramappa Nilappa v. Neelawdbai* ILR (1932) 57 Bom. 377 where in holding that a sister in the Bombay Province retains her place immediately after the father's mother and before the father's father, even after the enactment of Act II of 1929--Rangnekar J. expressed an obiter dictum that if necessary he would be prepared to hold that a sister in Bombay was assigned a fixed place on the ground of a local custom having the force of law, and the cases such as *Mulji Purshotum V. Cursondas Natha* ILR (1900) 24 Bom. 563 and *Rudrapa v. Irava* ILR (1903) 28 Bom. 82 show that it was on the ground of usage that the right of a sister was based. It is argued on the analogy of this reasoning that a paternal aunt's place is also similarly fixed and her case is also saved under the Act, but the decision in *Ganesh v. Waghu* ILR (1903) 27 Bom. 610 which is relied upon in

support of this argument, does not put the right of the paternal aunt on the ground of usage. In that case it was held that the grandson of a paternal great-grandfather was entitled to succeed in preference to a paternal aunt, and it is observed in the course of the judgment that it was previously held by our Court in an unreported decision in Second Appeal No. 158 of 1870 that a paternal aunt even in Gujarat was not entitled to come in at the head of the gotraja sapindas but was postponed to distant male gotraja sapindas. There is nothing to show that the decision was based upon proof of any usage, and there is also no evidence of usage in the present case which might attract the application of the opinion expressed in *Shidramappa Nilappa V. Neelawabai* ILR (1932) 57 Bom. 377 The present case is, therefore, not saved by the proviso in Section 3(a) of the Act.

10. In my opinion, therefore, the decision of the lower Court is correct, and the appeal is dismissed with costs.

Broomfield, J.

11. The question for decision is whether among Jains from Gujarat governed by the Mayukha a sister's son or a father's sister is a preferential heir to a deceased male. Prior to the Hindu Law of Inheritance (Amendment) Act of 1929, the sister's son was a bandhu, whereas the father's, sister came in the order of succession after the most remote gotraja sapindas but before the bandhus. Section 2 of this Act places the sister's son before the father's brother, i.e. quite high up among the gotraja sapindas. Therefore, if this section applies to Jains, the plaintiff, who is a sister's son, will succeed. If it does not apply, defendant No. 1, who is a father's sister, will succeed.

12. Mr. Desai who appears for the appellant has argued, firstly, that the Act does not apply because its operation is limited to Hindus and the Jains are not strictly speaking Hindus. But there was no need to mention Jains separately because it is well settled that the Hindu law of inheritance applies to Jains in the absence of proof of a special custom or usage varying that law: (1878) L.R. 5 I.A. 87 (Privy Council); (1878) L.R. 6 I.A. 15 (Privy Council) . and *Ambabai v. Govmd* ILR (1898) 23 Bom. 257.

13. A more weighty argument is that the Act does not apply to Jains because it applies only to "persons who, but for the passing of the Act, would have been subject to the law of Mitakshara in respect of the provisions herein enacted." But, as my learned brother says, the most reasonable view seems to be that the Mitakshara is mentioned as one of the two main schools of Hindu law, in contradistinction to the Dayabhaga but not in contradistinction to the Mayukha, which is only a sub-division of the Mitakshara school. The reference in Section 3(b) to the school of Mitakshara law by which the male was governed shows that the "Mitakshara law" in the Act was intended to include its sub-divisions.

14. It is true that in Gujarat the Mayukha overrides the Mitakshara in the very few points in which there is a difference between them. But it is difficult to say

that there was any" difference between them before the Act as to the relative positions of the sister's son and the father's sister. The former was a mere bandhu according to both. According to the Mitakshara the position of the father's sister was, and still is, rather obscure. But in *Ganesh v. Wagh* ILR (1903) 27 Bom. 610. this High Court was prepared to concede that she might come in as a gotraja sapinda after all other gotraja sapindas were exhausted, that is to say, in accordance with the rule settled by the Courts in cases governed by the Mayukha. That means that prior to the Act the sister's son would have been postponed to the father's sister both under the Mitakshara and the Mayukha. But if the sister's son had been a gotraja sapinda, even the most remote in degree, the father's sister would have been postponed to him whether the Mayukha or the Mitakshara applied to the case. Now that the sister's son has been brought in high up among the gotraja sapindas, I can see no reason why he should not be a preferential heir even under the Mayukha law.

15. It is not as if the Mayukha had a specific text about the father's sister. She is nowhere mentioned. In *Ganesh v. Wagh*, the case to which I have referred just now, the argument was put forward that the reasons given in the Mayukha for treating a sister as a gotraja sapinda might apply equally to a father's sister. But the decision of the Court was based on the principle of stare decisis, and the father's sister was given a place after distant male gotraja sapindas because it had been so decided in a case of 1870. It is clear from Sir Lawrence Jenkin's judgment in that case that no custom justifying the inclusion of the father's sister among gotraja sapindas was found to exist comparable to the custom by which, according to some decisions, the sister had come to be treated as gotraja sapinda in Bombay. So far as I am aware, no such custom in the case of the father's sister has ever been alleged, and there is no evidence of it in the present case. That being so, it is impossible to accept Mr. Desai's argument that the position of the father's sister as a gotraja sapinda, and therefore as a preferential heir to all persons who are or ever had been bandhus is saved by Section 3(b) of the Act, which provides that it is not to affect any special family or local custom having the force of law. Whether or not Mayne (10 edn., p. 682) is right in saying that the custom referred to in the Act must be one in derogation of the law of the school governing the parties, it is, at any rate, clear that judicial decisions based either on inferences drawn from the texts or on the principle of stare decisis cannot constitute a custom within the meaning of the Act.

16. I agree with my learned brother that the decision of the lower Court should be confirmed.