

(1910) 05 CAL CK 0053
In the Calcutta High Court

Debi Prasanna Rai Chowdury and Others

APPELLANT

Vs

Harendra Nath Ghosh and Others

RESPONDENT

Date of Decision : 26-05-1910

Acts Referred:

Probate and Administration Act, 1881 — Section 69

Citation : 6 Ind. Cas. 534

Hon'ble Judges : Mookerjee, J;Carnduff, J

Bench : Division Bench

Judgement

1. We are invited in this appeal to set aside an order by which the Court below has overruled an objection, taken by the appellants to the grant of probate of a Will alleged to have been executed by one Anna Purna Dasi, the widow of their deceased elder brother. It appears that, upon the death of Anna Purna, an application for the probate of her Will was made by the respondents, who are the sons of her uterine sister. In the application, the nearest relations of the deceased were stated to be the younger brothers of her husband and the sons of her step-mother. Notices were duly served upon these persons, and they entered caveats. When the case came on for trial, the learned District Judge held that both sets of objectors could not be allowed to contest the validity of the Will, inasmuch as, if either set was held to be entitled to succeed to the estate of the deceased in the event of an intestacy, it must be to the exclusion of the other set; consequently, both sets of objectors could not be treated as persons claiming to have an interest in the (state of the deceased within the meaning of Section 69 of the Probate and Administration Act, 1881. In this view, the District Judge proceeded to determine whether the younger brothers of the husband of the deceased or her step-brothers would be the preferential heirs in the event of intestacy. He came to the conclusion that the younger brothers of the husband had no interest in the estate in the presence of the half-brothers. He, therefore, held that they had no locus standi to take exception to the genuineness of the Will propounded, and overruled their objections. Subsequently the step-brothers did not contest the proceedings with the result that the Will was prayed in

common form and probate was granted to the sons of the uterine sister of the testatrix. The younger brothers of the husband of the deceased have now appealed against the order by which their objection was overruled, and, on their behalf, it has been contended that they were preferential heirs to the step-brothers and were entitled to be represented in the proceedings in the Court below. Their claim has been contested on the ground that under the Dayabhaga School of Hindu Law, a stepbrother is entitled to succeed to the Ayantnka stridhan property of a childless widow in preference to the younger brother of her husband. In our opinion, there is no room for reasonable doubt that the view taken by the Court below is erroneous, and is contrary to the order of succession laid down by Jimuta Vahana.

2. In Chapter 4, Section 3 of the Dayabhaga, Jimuta Vahana discusses the question of succession to the separate property of a childless woman. The first nine paragraphs of the Section deal with the question of succession to nuptial presents and other matters, with which we are not at present concerned. Paragraphs 10 to 28 are then devoted to a discussion of the question of succession to stridhan property, which has been received as a present by a woman after marriage, inclusive of gifts by kindred and sulk. The result of the discussion is summarized in paragraph 29, which is in these terms: Therefore, the property goes first to the whole brothers; if there be none, to the mother; if she be dead, to the father; but on failure of all these, it devolves on the husband. Thus Katyayan says, "that which has been given to her by her kindred, goes, on failure of kindred, to her husband." Paragraph 30 then explains the text of Katyayana, and it is pointed out that the expression failure of the kindred" implies absence not merely of the father and mother, but, also of brothers. Paragraph 31 commences a discussion as to the order of succession upon failure of the first group of four successive heirs, already named, namely, the whole brother, the mother, the father and the husband. It may be observed, here in passing that paragraph 31 has been inaccurately translated by Colebrooke, inasmuch as, in his rendering of the text of Vrihaspati, between the mother's sister and the father's sister, should come, not the maternal uncle, but the maternal uncle's wife and the paternal aunt. The precise effect of the text of Vrihaspati is discussed in paragraphs 32 to 36, and in paragraph 37 it is laid down that the order of succession, after the failure of the first set of four successive heirs already named, is as follows: The husband's younger brother, the son of the brother-in-law, the sister's son, the husband's sister's son, the brother's son, and the son-in-law. Paragraph 39 then defines the order of succession upon failure of this second set of six successive heirs. The position, therefore, is fairly clear, that, while the younger brothers of the husband occupy the first place among the second set of six successive heirs, who come in upon failure of the first set of four successive heirs, the step-brother does not find any place at all in the list up to this stage. A desperate effort, however, has been made by the learned Vakil for the respondents to find a place for the step-brother before the younger brother of the husband. The argument is, of a two-fold

character, and is self-contradictory. It has been contended in the first place, that a step-brother is included in the expression sodara which is used in paragraph 29, and is correctly rendered by Colebrooke as whole brother. It has been argued in the second place, in the alternative, that a step-brother comes before the husband and consequently before the younger brother of the husband. In our opinion, there is not the remotest foundation for either of these positions.

3. In so far as the first of these contentions is concerned, it is manifestly negated by the express language of paragraph 29. As was pointed out by this Court in the cases of *Judoo Nath Sircar v. Busnunt Coomar Roy* 19 W.R. 264 : 11 B.L.R. 286 and *Ram Gopal v. Nurain Chandra* 33 C. 315 : 3 C.L.J. 15 : 10 C.W.N. 510, paragraph 29 gives the final resume of the various matters discussed in the preceding paragraphs, commencing from paragraph 10. It is not necessary for our present purpose to reproduce the line of elaborate reasoning by which this conclusion was reached by Mr. Justice Dwarka Nath Matter, a conclusion which is supported by the express opinion of three of the commentators on the *Dayabhaga*. If this be the true scope of paragraph 29, it is obviously not permissible to examine the previous paragraphs to determine whether the conclusion reached by Jimuta Vahanaisov is not legitimately deducible from the texts upon which he placed reliance. In this connection, it is well to bear in mind, the warning given by their Lordships of the Judicial Committee, in the case of *Collector of Madura v. Mutu Ramalinga Sathupathy* 12 M.I.A. 397 : 10 W.R. (P.C.) 17 : 1 B.L.R. (P.C.) 1, that the duty of a Judge administering Hindu Law is not so much to enquire whether the doctrine disputed is fairly deducible from the earliest authorities as to ascertain whether it is one that has been received by the particular School of Hindu Law which governs the litigant parties. We must, therefore, decline to adopt the course which we are invited to follow by the learned Vakil for the respondents, namely, to draw our own inference from an examination of the previous paragraphs where the expression used is bhrata, which, in may be assumed, is ambiguous and may include a half-brother as well as a whole brother. The essence of the matter is that Jimuta V ah ana, when he summarizes his conclusion, describes the first amongst the four heirs, not merely as bhrata or brother, but as sodara or uterine brother. It has not been disputed that the etymological meaning of the expression sodara, is uterine brother, and the numerous passages quoted in Bonttingk and Roth's *Sanskrit Wartertuct Volume V* "JI, column 1201, do not show that the word is over used to include a half brother. On the other hand, the learned Vakil for the appellants has pointed out that according to the well known Sanskrit lexicographer Horn Chandra, even the term bhrata ordinarily means uterine brother and the six equivalents given by Hem Chandra are all alternative expressions for uterine brother. This view is also strengthened by the definition of Nil Kantha that brotherhood is due to birth from the same mother and father ("*Vyavahara Mayukha* Ed., Mandalik, page 80). It is not necessary for us, however, to hold that the word bhrata does not include a, half-brother and it may be assumed that the context may show that it does; but the word used by Jiniuta Vahana in paragraph 29 is sodara and, in our

opinion, it is idle to contend that Jimuta Vahana intended to include a step-brother in the expression sodara. Apart from the circumstance that the etymological meaning of the expression directly negatives such a position, it may be observed that if Jimuta Vahana intended to include the step-brother in the expression sodara, either he or his commentators would have examined the question which must, in that view, necessarily arise as to the precise position of the step-brother, namely, whether the step-brother would take along with the whole brother or after him and in preference to the mother and father. On no conceivable principle, can the step-brother be allowed to take equally with the whole brother or to have precedence over the mother as well as the father. On the other hand, it is clear from paragraph 11, where Jimuta Vahana comments upon a text of "Yajna Valkya", that he intended to include in the term bhrata, in that place, the son of both the same mother and father. The first branch of the contention of the learned Vakil for the respondents cannot consequently be supported.

4. In so far as the second branch of the contentions of the learned Vakil for the respondents is concerned, it is, in our opinion, equally groundless. His argument in substance is that in paragraph 30, when the husband is described as an heir who takes on failure of the kindred, we must assume that all kindreds, inclusive of the stepbrother, are intended. In other words, the contention is that the expression bhrata in paragraph 30, includes the step-brother. This position is obviously untenable, because paragraph 30 is clearly subordinate to, and explanatory of, paragraph 29 and Jimuta Vahana could never have intended to define the first three heirs as the uterine brother the mother and the father, and then to have held that all kindreds had precedence over the husband. If this had been the intention, some provision would have been made for succession amongst the various kindreds. The learned Vakil for the respondents suggested that we might apply the doctrine of spiritual benefit to allow the step-brother to have precedence over the second group of six heirs and also over the husband. In our opinion, such a course is obviously inadmissible. We have a clear specification first of one group of four heirs and next of a second group of six heirs; as the step-brother is not one of these, he is clearly not entitled to preference over the younger brother of the husband. Reference has finally been made to the case of Dasharathi Kundu v. Bipin Behari Kundu 32 C. 261, where the question arose as to precedence between the son of a sister and the eldest brother of the husband. The determination of the question raised, turned upon the construction of paragraphs subsequent to those with which we are now concerned; but there is one passage in the judgment of the learned Judges which clearly indicates that they understood paragraph 29 as excluding a half brother. The case, therefore, does not support the position taken up by the respondents and the second branch of their contention is, in our opinion, quite as unfounded as the first branch.

5. The result, therefore, is that this appeal must be allowed, and the order of the Court below discharged. The consequence is that the probate which has been

granted in common form will stand revoked, and the propounders of the Will will be called upon to prove it in solemn form in the presence of the appellants. The appellants are entitled to their costs in this Court. We assess the hearing fee at five gold mohurs.