

(1889) 01 CAL CK 0005
In the Calcutta High Court

Jogdamba Koer

APPELLANT

Vs

Secretary of State for India in Council

RESPONDENT

Date of Decision : 31-01-1889

Acts Referred:

Citation : (1889) ILR (Cal) 368

Hon'ble Judges : W. Comer Petheram, C.J.; Banerjee, J

Bench : Division Bench

Judgement

W. Comer Petheram, C.J. and Banerjee, J.—The plaintiff (appellant) contends that she is entitled to the properties in dispute as well by inheritance as by right of survivorship, and that, consequently, there can be no escheat. We shall consider these two grounds of the plaintiff's claim separately.

2. Upon the question of the plaintiff's title by inheritance, the learned Counsel for the appellant; conceded (and, we think, very properly conceded) that in the face of the decisions of this Court in the cases of *Atyanrta Bibee v. Nownit Lal* ILR Cal. 315 and *Jullessur Kooer v. Uggur Roy* ILR Cal. 725, he could not contend for the broad proposition that the plaintiff, as the widow of a gottaja sapinda of Jankisaran, was entitled to a place in the order of succession immediately after her husband. What he contended for was that, though the plaintiff may not have such a high place, she was not excluded from the line of heirs altogether; that the rule excluding females from succession was a rule of partial and not total exclusion, and merely postponed their rights in favor of males; that the proper position of the plaintiff was one after all male relations, whether agnates or cognates; and that the two decisions of this Court, referred to above, did not conclude the present question, as they had only to determine whether certain female relatives were entitled to succeed in preference to the male relatives who opposed them. And in support of the theory of partial exclusion or postponement of claims of female relatives, we were referred to two Madras cases: *Kutti Animal v. Radhakristna Aiyar* 8 Mad. H.C. 88 and *Lakshman Animal v. Tiruvengada* ILR Mad. 241.

3. Now though the grounds upon which the two decisions of this Court, above referred to, are based, leave no room for the appellant's contention, yet, as the immediate question for decision was one of relative preference, and not of absolute exclusion of certain female heirs, those decisions cannot be held to conclude the present contention.

4. That being so, and there being the two Madras decisions in favor of that contention, it becomes necessary to examine the authorities bearing on the question now before us.

5. We shall consider these authorities under three heads: first, the original authorities; second, the opinions of later writers on Hindu Law; and, third, the decisions of Courts of Justice.

6. Under the first head, if it were necessary to refer to the remoter sources of the Hindu Law, we should find ample authority for the total exclusion of women from inheritance. There is the well-known text of the Taittiriya Yojur Veda Sanhita (Kanda VI, Prapathaka V, and Anuvaka VIII): "Therefore females are feeble and unworthy of inheritance." Then there is a passage of the Nirukta (Vedic Glossary) to this effect: "Therefore it is known that a male is the taker of wealth, and that a female is not a taker of wealth"-(see Roth's Edition of Yaska, p. 53 and Satyavrata, Samasrami's Edition, Vol. II, p. 259; and there is the Sutra or Aphorism of Baudhayana (Prasna II, Kanda II, 27): "Nor (ought she) to inherit. For the Veda (says) "women are not considered to have a right to use sacred texts, nor to take the inheritance," which forms the basis of the law on the point. Nor is this exclusion of females a feature peculiar to Hindu Law. The exigencies of primitive society stamped that feature more or less upon ancient law everywhere. In the present instance the text itself contains the reason for the rule it lays down. It says women are feeble, and, therefore, unworthy of inheritance. But we need not go behind works like the Mitakshara and the Viramitrodaya; our duty being, as the Judicial Committee point out in the case of the Collector of Madura v. Moottoo Ramlinga Sathupathy 12 Moo I.A. 397, not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which we have to deal, and has there been sanctioned by usage. We shall, accordingly, confine our attention to the consideration of the Mitakshara, the Viramitrodaya, the Vaijayanti, and the Commentaries on the Mitakshara by Visweswara and Balambhatta, these being the leading authorities at the present day of the Benares School of Law, which is the law governing this case; and we shall incidentally consider the Vyavahara Mayukha, the Smriti Chandrika and the Dayabhaga and the Vivada Chintamani, which supplement the Mitakshara in the Maharashtra, the Dravida and the Mithila School.

7. The Mitakshara lends no direct support to the appellant's contention. It divides the remoter heirs after the brother's son into three classes (ch. II, Section 1, v. 2, 3): (1) the gotrajas (gentiles); (2), the bandhaa (cognates); (3),

certain specified strangers, viz., the preceptor, the pupil, and the fellow-student in the Vedas; these classes come in the order in which they are named above; and, in default of all these, the King takes the property, except in the case of Brahmans tan exception which does not hold good in British India- See *The Collector of Masulipatam v. Caval Vencata Narrainapah* 8 Moore's I.A. 500]. Now the only class under which the appellant can come, is the first, she being a gotraja of her husband's brother in this sense, that she has by her marriage become of the same gotra as her husband and his brother; and she is also a sapinda of her brother-in-law according to the meaning assigned to that term in the Mitakshara (see the Commentary on Yajnavalkya, I, 52). But neither the brother's widow, nor the widow of any other collateral agnate, is mentioned as an heir. It might be contended that the text of Baudhayana cited above, upon which the exclusion of females is based (see Viramitrodaya, G. C. Sirkar's Translation, p. 198), is not referred to in the Mitakshara, and that the doctrine that only those female relatives are heirs who are named in special texts cannot be true, as the paternal great-grandmother, who is not named in any special text, is expressly mentioned as entitled to inherit as a gotraja sapinda in the Mitakshara. But to this the answer is that Baudhyana has been distinctly recognised as an authority by Vijnaneswara (see the Commentary on Yajnavalkya, 1, 4, 5), and that though the paternal great-grandmother may not be named in any text, yet her case; and that of other female lineal ancestors, closely follow that of the grandmother, and are, upon reason and common sense, very different from that of the widows of collateral agnates. And it is singular that if Vijnaneswara meant to include them, he should not have named any one of them as coming in the line of heirs. The preponderance of reason seems to be in favour of the view that the Mitakshara is opposed to the appellant's claim. As the Privy Council observed in the case of *Lallubhai Bapubhai v. Cassibai* ILR Bom. 110, perhaps the most that can be said is that the Mitakshara is not inconsistent with the appellant's claim, if such claim is otherwise made out. One thing, however, is clear: the Mitakshara lends no support to the appellant's contention that though, in consequence of texts and decisions adverse to women's heritable rights, the appellant's claim has to be postponed in favour of every male heir, whether a gotraja or a bandhu, she may yet come in as an heir in default of all male gotrajas and bandhus. If the appellant can come in as an heir at all under the Mitakshara, it must be as a gotraja sapinda; and if, therefore, her claim has to be postponed in favour of a bandhu, it must, so far as the Mitakshara is concerned, be postponed for ever. For it is only upon failure of gotrajas that bandhm inherit-(Mitakshara, ch. II, Section vi, 1).

8. Turning now to the Viramitrodaya, which is a work of high authority in the Benares School, and is followed in matters left doubtful by the Mitakshara see *Gridhari Lall Roy v. The Government of Bengal* 12 Moore's I.A. 448 we find that the appellant's claim is distinctly negatived there. The author notices an interpretation of the vedic text cited above, according to which it has nothing to do with inheritance, but he considers that interpretation unsatisfactory, as it

contradicts the text of Baudhayana "Hence," says he, "it cannot but be held that the text of Sruti does prohibit women's right of succession, inasmuch as otherwise the quotation (by Baudhayana) of that text as establishing the position would be unreasonable."-(G. C. Sarkar's Translation, pp. 198, 199.) And in another place, when speaking of succession to woman's property (with reference to which one would have expected the recognition of woman's heritable right to a larger extent) he says: "But the daughter-in-law, and others (of the sex), are entitled to food and raiment only; for the nearness as a sapinda is of no force when it is opposed by express texts. Since a text of the Sruti declares: "Therefore women are devoid of the senses and incompetent to inherit: and a text of Manu founded upon it, says: "Indeed the rule is that, devoid of the senses, and incompetent to inherit, women are useless." The conclusion arrived at by the author of the Smriti Chandrika, Haradatta and other southern commentators, as well as by all the oriental commentators, such as Jimuta Vahana, is, that those women only are entitled to inherit whose right of succession has been expressly mentioned in the texts, such as-"the wife and the daughters also, etc.-but that others are certainly prohibited from taking heritage by the texts of the Sruti and Manu."-(G.C. Sarkar's Translation, p. 244.)

9. As to this passage, West, J., in *Lallubhai Bapubhai v. Mankuvarbai* ILR Bom. 441, observes that Manu has been misquoted here. But as the Judicial Committee pointed out in the *Collector of Madura v. Moottoo Ramalinga Sathupathy* 12 Moore's I.A. 397, the question is not whether the authority of Manu has been misquoted, but whether the *Viramitrodaya* itself is an authority for the Benares School; and, as to this latter question, there can be no room for doubt or discussion. The truth is that commentaries and digests, like the *Mitakshara* and *Viramitrodaya*, owe their binding force not to their promulgation by any sovereign authority, but to the respect due to their authors, and still more to the fact of their being in accordance with prevailing popular sentiment and practice. Their doctrines may often have moulded usage, but still more frequently they have themselves been moulded according to prevailing usage of which they are only the recorded expression. This appears notably from the discussion in the *Mitakshara* in the section on the nature of property, where popular usage is referred to as one of the strongest points in favour of the author's doctrine, that the son's right in the father's property arises by birth (Ch. I, Section i, 23). Upon the present question, the doctrine stated by *Mitra Misra*, which is supported by the general consensus of opinion of a number of approved commentators named by him, should be accepted as a correct statement of the prevailing law, even though the reasoning in support of the doctrine may be in some respects faulty.

10. It should be observed that the exclusion of females, that is laid down in the texts of the *Sruti* and of *Baudhayana*, and is affirmed by *Mitra Misra*, is a total exclusion from inheritance, and is not a mere postponement of their claims in favour of male heirs.

11. Visweswara in his commentary on the Mitakshara, the Subodini (see Mandlick's Vyavahara Mayukha, pp. 360, 361), and in the Madana Parijata (see Sarbadhikari's Tagore Law Lectures, p. 440) clearly excludes the widows of collateral gotrajas, when he does not name them in his detailed list.

12. The Vijayaati places the widowed daughter-in-law immediately after the widow (a position which is directly opposed to the Mitakshara itself), but it does not help the appellant very much, for it does not name the widow of any collateral gotraja sapinda in its list of sagotra sapinda heirs-(see Sarbadhikari's Tagore Law Lectures, p. 478).

13. Balambhatta lends some support to the appellant's claim by assigning to the son's widow a place immediately after the grandmother. But since the decision in Ananda Bibee v. Nownit Lal ILR Cal. 315 that can no longer be considered good law as was conceded in the argument (see Sarbadhikari's Tagore Lectures, p. 481).

14. The Vyavahara Mayukha throws very little light upon the present question. West, J., in Lallubhai Bapubhai v. Mankuvarbai ILR Bom. 447 observes: "If the foundation of the rights of widows of gotrajas under the Mitakshara is slender, under the Mayukha it may be called almost shadowy."

15. The Smriti Chandrika is decidedly opposed to the appellant's claim. It rigidly enforces the Sruti text, declaring the incompetency of women to inherit, and it excludes even the grandmother from the line of heirs (see Ch. XI, Section v, 3-6).

16. The Dayavibhaga, in discussing the widow's succession, explains the text of Sruti cited above in a sense which makes it perfectly harmless as regards the heritable rights of women- (see Burnett's Translation, p. 33).

17. This might lead one to think that the author was in favour of a liberal admission of females into the order of succession. But, when considering the succession of gotrajas, he gives us no indication in that direction, and his enumeration of gotrajas is almost the same as that in the Mitakshara. The truth seems to be that the author's interpretation of the Sruti was only an additional argument in favour of the succession of the widow whose right had come to be generally recognized; but the author was not prepared to carry that argument to its consequences by admitting other females whose rights were not so recognised.

18. The Vivada Chintamani is wholly silent on the point.

19. The above examination of the Mitakshara and the leading authorities that supplement it in the different schools shows that none of them, expressly mentions the brother's widow or the widows of gotraja sapindas as entitled to succeed; only two of them, the commentary of Ballambhatta and the Dayavibhaga, afford any ground in favour of their claim; while two others, the Viramitrodaya and the Smriti Chandrika, expressly deny their right; and the rest are either silent on the point or imply their exclusion by omitting to mention

them in their detailed list of heirs In this state of things, considering the weight attached to the Viramitrodaya in the Benares School, we think, so far as the original works on Hindu law are concerned, the weight of authority is against the appellant's contention that she is in the line of heirs.

20. Turning now to the later writers, European and Indian, who have examined the subject, we find that, according to Sir Thomas Strange, the instances in which females are allowed to inherit are deemed as exceptional, "the general principle being that the sex is incompetent to inherit" (1 Strange's Hindu Law, 146). Sutherland, speaking of the daughter-in-law, says: "Nor does there exist any supposed case in which she could inherit" (2 Strange's Hindu Law, 235); and, in another place, speaking of the niece, he observes. "In the series of heirs the niece is nowhere enumerated, and my Pandit agrees with me that the estate of the deceased would escheat rather than descend to a niece." (2 Strange's Hindu Law, 240), Macnaghten does not name the widow of any collateral gotraja sapinda in his enumeration of heirs (Principles of Hindu Law, pp. 33, 34), nor does Shama Charan in the list given by him in the Vyavastha Chandrika (Vol. I, pp. 182, 204); while Mayne's (Hindu Law, para. 541), Mandlick (Vyavahara Mayukha, pp. 357-377), and Sarbadhikari (Tagore Law Lectures, pp. 665-673) distinctly affirm that the widows of gotraja sapindas are not regarded as heirs under the law of the Benares School. Against this view, however, there is the opinion of West and Buhler (Digest of Hindu Law, 2nd Ed., pp. 177, 178) that widows of gotraja sapindas are entitled to inherit under the Mitakshara; but that opinion has reference to the Mitakshara Law of the Bombay Presidency, and not to the law of the Benares School where the Mitakshara is supplemented by the Viramitrodaya.

21. We come next to the most important class of authorities, the decisions of Courts of Justice.

22. In *Lallubhai Bapubhai v. Kassibai* ILR Bom. 110, which is the leading case on the point in Bombay, while recognising the heritable rights of female gotraja sapindas, the Privy Council base that recognition not upon the Mitakshara, but upon the prevailing usage of the Bombay Presidency; and, with reference to the law of the other schools, the judgment of the Judicial Committee contains the following important observation: "According to the received doctrine of the Bengal and Madras Schools, women are held to be incompetent to inherit, unless named and specified as heirs by special texts. This exclusion seems to be founded on a short text of Baudhayana, which declares that women are devoid of the senses and incompetent to inherit. The same doctrine prevails in Benares; the author of the Viramitrodaya yields, though apparently with reluctance, to this text-(Ch. 3, Part 7.)"

23. In *Soodeso v. Bisheshur Singh* (1864) S.D.A. N.W.P. 375, the Sadr Court of the North-Western Provinces held that the brother's widow is not in the line of heirs. That is a case distinctly in point. In *Dilraj Kooniuar v. Sooltan Koonwar* (1862) S.D.A. N.W.P. 240, a son's widow was held to be no heir under the

Mitakshara. The Allahabad High Court in *Gauri Sahai v. Rukho* ILR All. 45 held that none but females expressly named as heirs can inherit under the law of the Benares School, and that the father's sister's sons are entitled to succeed to the exclusion of the paternal uncle's widow, and the learned Judges observed: "We think it, however, unnecessary to discuss the question so fully argued in the judgment of the Bombay Court, whether the wife of a gotraja sapinda is to be held under the Mitakshara to be a gotraja sapinda? We are of opinion that looking to the received interpretation of the law, and the customary law prevalent in this part of India, none but females expressly named as heirs can inherit." And this view of the law is affirmed as correct by a Full Bench of that Court in *Jagat Narain v. Sheo Das* ILR All. 311. Against these decisions there is only one case that can be cited on the other side, the case of *Bhuganee Daiee v. Gopaljee* (1862) 1 S.D.A. N.W.P. 306, . In that case the widow of a nearer gotraja sapinda was allowed to succeed in preference to a more remote male gotraja sapinda. But the decision is based, not upon the right of inheritance, but upon the right by survivorship. The question, whether the plaintiff in this case is entitled to succeed upon this latter right, will be considered presently.

24. In the case of *Lalla Jatee Lall v. Dooranee Kooer* W.R. Sp. No. 173, a Full Bench of this Court held that the step-mother is no heir under the Mitakshara. In *Ananda Bibee v. Nownit Lal* ILR Cal. 315, after an elaborate examination of the authorities, Mitter and Maclean, JJ., came to the conclusion that, according to the law and usage of the Benares School, no females, except those expressly named as heirs, can succeed, and they, accordingly, dismissed the claim of the daughter-in-law on the ground that she was not in the line of heirs at all. And in *Jullessur Kooer v. Uggur Boy* ILR Cal. 725 this Court disallowed the sister's claim to inherit upon the ground that, of female sapindas, only those that are specified by name as heirs can inherit according to the Mitakshara law.

25. It remains now to notice the Madras decisions. Neither of the two cases cited on behalf of the appellant is in point, as they both relate to the succession of the sister. But they were referred to in support of the argument that, though certain female relations are not entitled to succeed as gotraja sapindas or bandhus in preference to any male heir, yet they come in as heirs before the estate passes to any stranger; or, in other words, that the rule about exclusion of females is one of partial and not total exclusion, the claims of the excluded females being only postponed in favour of those of males. Now in the earlier of the two cases, that of *Kutti Animal v. Radhakristna Aiyar* 8 Mad. H.C. 88, the decision in favour of the sister's right is evidently based upon a mistake in Colebrooke's translation of the Mitakshara. The learned Judges, after citing the case of *Gndhari Lal Boy v. The Government of Bengal* 12 Moore's I.A. 448, and quoting the Mitakshara (Ch. II, Section vii, para 1), according to Colebrooke's translation, which runs thus: "If there be no relation of the deceased, the preceptor, or, on failure of him, the pupil inherits, by the text of Apastamba, "If there be no male issue, the nearest kinsman inherits, or, in default of kindred, the preceptor observe: "It follows from the above not only that in regard to

cognates is there no intention expressed in the law or to be inferred from it of limiting the right of inheritance to certain specified relationships of that nature, but that, in regard to other relationships also, there is free admission to the inheritance in the order of succession prescribed by law for the several classes, and that all relatives, however remote, must be exhausted before the estate can fall to persons who have no connection with the family." These observations would have been perfectly correct if the above passage of the Mitakshara, on which they are based, had been a correct translation of the original. But that is not so. The word translated "relations" is bandhu, and that rendered as "kinsman and kindred" is sapinda in the original, and these are technical words very much restricted in their signification. There is, therefore, really no authority for the proposition that all relations, however remote, must be exhausted before strangers can claim the estate.

26. In the second case, that of Lakshmanammal v. Tiruvengada ILR Mad. 241, though in the view that the Court took of the superior claim of the sister's son, it was not at all necessary to decide whether the sister was an heir or not, yet the learned Judges threw out the observation that Vijnanesivara recognized the texts excluding females so far as to give priority to males, and that it was not intended absolutely to exclude all but certain excepted females. Now reading the Mitakshara and the Viramitrodaya together, we must say, with all respect for the learned Judges, that we do not find any ground for limiting the texts excluding women in that way. The texts say "women are incompetent to inherit," and we can find no authority for saying that they mean that women are incompetent to inherit only in competition with males.

27. In a still later case-Man v. Channammal ILR Mad. 107- which is somewhat more in point, and in which a Full Bench of the Madras High Court has held that the step-mother was not entitled to inherit in preference to a paternal uncle turner, C.J., in delivering the judgment of the majority of the Court, made the following important observation: "No decision of the Sadr Adalat, the Supreme Court or this Court has been cited, nor has any usage been proved by which a right of succession has been recognized as appertaining to a step-mother or to any of the females who by marriage have entered the gotra and acquired sapindaship solely through their husband; for these reasons the claim of the step-mother as a gotraja sapinda has not been in my judgment established, and the claim of the paternal uncle must be allowed."

28. Upon a review of the foregoing authorities we come to the conclusion that, according to the law and usage of the Benares School of Hindu Law, which governs this case, the brother's widow is not in the line of heirs at all.

29. We have now to consider the second ground upon which the appellant puts her case. It is contended that, even if the appellant is not entitled to the properties in suit by right of inheritance she can claim them by right of survivorship as the last; surviving member of the family to which the same belonged. No authority was cited in support of this contention, and, perhaps, the

only authority that can be cited for the appellant is the case of Bhuganee Daiee v. Gopaljec (1862) 1 S.D.A. N.W.P. 306 already referred to. No authority is referred to in support of that decision except the opinion of the Pandit upon which it is based; and even that opinion is not given in extenso. On the other hand, there is the case of Ananda Bibee v. Nownit Lal ILR Cal. 315, which is binding upon us and which is clear authority to the contrary. In that case the same contention was raised in favour of the daughter-in-law, but the Court rejected it and allowed the estate to pass to remote baydhus, who were no members of the family, which originally owned it, to the exclusion of the daughter-in-law, MITTER, J., observing: "It has been said that she, while her father-in-law Gakul Chand was alive, was living with him as a member of a joint Hindu family, and, therefore, on his death, she is entitled to the property left by him. It seems to me that this contention is wholly untenable. The foundation of the right of survivorship is joint ownership. In this case, it cannot for a moment be contended that the plaintiff had any sort of ownership in the property in dispute during the life-time of her father-in-law." These observations are equally applicable, mutatis mutandis, to this case. The following passage of the Viramitrodaya may be cited in support of the same view: "Her right is only fictional but not a real one: the wife's right to the husband's property, which, to all appearance, seems to be the same (as the husband's right), like a mixture of milk and water, is suitable to the performance of acts which are to be jointly performed; but it is not mutual like that of brothers, hence it is that there may be separation of brothers, but not of the husband and wife, on this reason is founded the text, viz.,-"Partition cannot take place between the husband and wife," therefore it cannot but be admitted that upon extinction of the husband's right the extinction of the wife's right is necessary (-G. C. Sarlcar's Translation, p. 165).

30. It was contended that it would be most unlikely that the Hindu law, which so jealously guards against escheat as to interpose even strangers, such as the preceptor and the pupil, between the ordinary heirs and the Crown, should favour such hardship as the utter exclusion from inheritance of one whose husband was a joint owner of the estate. Now the recognition of the claims of the preceptor and the pupil is due, we think, not to any jealousy of the Hindu law to the claim of the Crown, but to a deserved deference to the relation between pupil and preceptor. In the good old days of Hinduism when every twice born man had to live in the house of his preceptor as a member of his family during his studentship extending over a long series of years, that relation was almost as intimate and as sacred as that between father and son. And then as for the hardship of the ease, it seems to be more imaginary than real. If, as it must be conceded, the appellant's claim has to be postponed in favour of the remotest samanodaka or bandhu who would practically be a stranger to her, there is no greater hardship in allowing escheat to the Crown from whose representatives she can well expect, and we hope will readily obtain, a much more liberal allowance for her maintenance with much less difficulty of realization than she

could from a distant relation succeeding to the estate.

31. Upon all these grounds we think the judgment of the Court below is right and ought to be affirmed with costs.