

**(1873) 03 CAL CK 0007**  
**In the Calcutta High Court**  
**Case No : Special Appeal No. 1198 of 1870**

Judoonath Sircar

APPELLANT

Vs

Bussunt Coomar Roy Chowdhry

RESPONDENT

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**Date of Decision :** 13-03-1873

**Acts Referred:**

**Citation :** (1873) 03 CAL CK 0007

**Final Decision :** Dismissed

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## Judgement

Mitter, J.—The property which forms the subject-matter of this litigation originally belonged to one Hurrynarain Mitter, who gave it by will to his daughter Prosonomoye. Soon after the death of her father, Prosonomoye married Judoonath Sircar, the plaintiff in this case, and died shortly after, leaving her husband and her mother surviving her. In this state of facts, the question we have to determine is whether the mother or the husband is entitled to inherit the property above described. Before proceeding, however, to determine this question, we think it necessary to make a few preliminary observations on the legal character of the property in dispute. It has been argued on behalf of the respondent that this property cannot be treated as the stridhan of Prosonomoye, inasmuch as it was acquired by her, not under an ordinary gift, but under a testamentary devise, a mode of disposing of property not recognized by the ancient law of the Hindus. We are of opinion, however, that this objection is not valid. Whatever might have been the ancient Hindu law on the subject, it seems to have been settled by a uniform course of decisions of unimpeachable authority that testamentary dispositions are not opposed to the spirit of that law, and we may add that, in the recent case of Tagore v. Tagore 9 B.L.R., 377, it has been expressly held by the Privy Council that such dispositions are to be treated as a species of gift. "As to gifts by way of will," their Lordships observe, "whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions, both here and in India, proceeding upon the

assumption that gifts by will are legally binding, and recognizing the validity of that form of gift as part and parcel of the general law. The introduction of gifts by will into general use has followed in India, as it has done in other countries, the conveyance of property inter vivos. Such a disposition of property to take effect upon the death of the donor, though revocable during his lifetime, is until revocation a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries. They take upon the death of the testator as they would if the property had been given to them during his lifetime, &c. The law of wills has, however, grown up from a law which furnishes no analogy but that of gifts, and it is the duty of tribunals dealing with a case new in the instance, to be governed by the established principles and the analogies which have prevailed in like cases" 9 BLR 377; see pp. 397, 398. The above observations are, we think, sufficient to justify us in holding that the property in dispute falls within that category of stridhan which is described in the Hindu shastars as "property given to a woman by her father before her marriage;" and we accordingly overrule the preliminary objection of the special respondent.

2. With reference to the main question itself, we are of opinion that the mother, and not the husband, is the preferential heir.

3. It is admitted on both sides that the case before us is governed by the Hindu law current in the Bengal school, and as the Dayabhaga is the highest of all the authorities recognized in that school, it is to the Dayabhaga that we will first direct our attention. Now cl. 29, s. 3, Ch. IV. of that treatise (Colebrooke's translation, page 95) appears to us to be conclusive on the point. That clause is as follows:--"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 Katayana says:--"That which has been given to her by her kindred goes on failure of kindred to her husband."" It has been argued that the passage above quoted refers to that kind of stridhan only which is called sulka (fee or perquisite). But this argument is evidently founded on a mistake. The very text of Katayana, cited by the author in the passage in question, shows that it also refers to property given to a woman by her kindred, that is to say, by her father and mother; and if this is not sufficient to remove all doubts on the point, we have only to examine a few of the preceding clauses. In cl. 10 of the same section and chapter, the author introduces the subject by saying that "property received by a woman after her marriage from the family of her father, of her mother, or of her husband, goes to her brothers" ("not to her husband,") and in support of this position, he cites a text of Yajnavalkya, which declares "that which has been given to her by her kindred, as well as her fee or gratuity (sulka), and anything bestowed after marriage, her kinsmen take if she die without issue." It should be borne in mind that this text of Yajnavalkya refers to three different kinds of stridhan, namely, first, property given to a woman by her kindred; second, her (sulka) fee or gratuity; and third, property bestowed on her after her marriage. In the next clause (cl. 11), the author takes up the first

of these three kinds of stridhan, and says, that "property given by her kindred" means property "given by her father or mother." He then adds that brothers are signified by the word "kinsmen." In cl. 12 he cites a text of Vriddha Katayana declaring that "immoveable property given to a woman by her parents goes always to her brother if she die without issue," and adds, that "the brother's right of succession is founded on her leaving no issue." In cl. 13 he says that, according to the opinion of Viswarupa, the brother is entitled to inherit such property without any reference whatever to the particular form of marriage, and adds that this opinion ought to be respected. In cl. 14 he says that the above rule is a fortiori applicable to every other kind of property. In cl. 15 he says that the phrase "given by her kindred" signifies "that which was given to her by her parents during her maiden state." In cls. 16, 17, and 18 he defines "a gift subsequent," which is the third kind of stridhan mentioned in the text of Yajnavalkya above referred to. In cl. 19 he takes up the second kind of stridhan mentioned in that text, namely, sulka property. In cls. 20 and 21 he explains what sulka means. In cls. 22, 23, 24, 25, 26, and 27 he discusses the opinions of several authors about the order of succession to be followed in regard to such property, and in v. 28 he concludes the discussion by saying that "in the first place it goes to brothers of the whole blood, then to the mother, and on her default to the father." It is clear, therefore, that the proposition laid down in cl. 29 is nothing but the final resume of the various matters discussed in the preceding clauses, commencing from cl. 10; and its applicability to all the three kinds of stridhan mentioned in the text of Yajnavalkya referred to in the last-mentioned clause is, consequently, beyond all dispute. It would be absurd to contend that the author of the Dayabhaga has laid down, in the case of property given by a woman's kindred, a rule of succession different from that laid down by him in the case of sulka property, when it is beyond all question that both those kinds of property are governed by the same text of Yajnavalkya which is cited by him at the very threshold of the discussion.

4. The next authority to which we wish to refer is the Dayatatwa of Raghunandana. In page 43 of the printed copy, the author says:--"In default of barren and widowed daughters, the husband succeeds, but this does not relate to property given by parents, since in that case the brother succeeds;" and this passage clearly shows that the author of the Dayatatwa is of the same opinion as the author of the Dayabhaga. It has been said that the mother is not expressly mentioned in the passage above referred to. But this argument does not appear to us to be of any force whatever. The object of the author of the Dayatatwa was merely to indicate the line of succession, and not to enumerate all the heirs one after the other; and as the right of the mother and father to come in immediately after the brother did not admit of any dispute or doubt, it was sufficient for his purpose to say that the brother, and not the husband, is entitled to succeed to property given to a woman by her parents. There is nothing in the Dayatatwa, or in any other work on Hindu law that we are aware of, on the strength of which it can be contended that the husband is entitled to come in between the brother

and the mother.

5. The author of Vivada Bhangarnaba also appears to be of the same opinion, as may be seen from the following text of Katayana quoted by him in page 317 of the 4th volume of Colebrooke's Digest "On failure of her parents and brothers what she received from her kinsmen as a gift, descends to her husband Ed. of 1801, Vol. III, Ch. 9 v. 512.

6. Much stress has been laid by the pleader for the appellant on para. 3, s. 5, Ch. II of the Dayakrama Sangraha of Sreekissen Turkalunkar. That paragraph is as follows:--"Next the succession devolves on the barren and widowed daughters, and in default of all daughters, the son and the rest succeed, as in the case of property received at nuptials; for a text of Menu declares:--"The wealth of a woman which has been in any manner given to her by her father and mother, let the Brahmani damsel take, or let it belong to her offspring." It has been argued that, in the case of property received at nuptials celebrated in the brahma form, the husband is entitled to come in immediately after the great-grandson of the co-wife, in preference to the brother, mother, and father; and as the marriage of the lady to whose property this dispute relates was admittedly celebrated in the brahma form, the plaintiff, as her husband, and not her mother, is the preferential heir under the authority of the paragraph quoted above. This contention, however, does not appear to us to be sound. No doubt, if the paragraph in question had stood alone, there might have been considerable force in the argument that the word "rest" in the phrase "the son and the rest" includes, not only all the heirs down to the great-grandson of the co-wife, but also the husband, the brother, the mother, and the father, who are entitled to come in after such great-grandson. But such a construction would be directly contrary to the provisions of the 15th and 16th paragraphs of the 3rd section of the same chapter, in which it is distinctly laid down that, in the case of property given to a woman by her father and mother, the brother is entitled to succeed (without any reference whatever to the form of marriage) if she die without issue. Those two paragraphs as translated by Mr. Wynch stand as follows: Para. 15.--"On failure of her husband, her brother is the next successor, according to the text of Yajanavalkya:--"That which was given to her by her kindred, as well as her fee or gratuity and anything bestowed after marriage, her kinsmen take if she die without issue."" Para. 16.--"The term "kindred" means her father and mother, and consequently by the term "kinsmen" her brothers are signified. The same is declared by Katayana, who says:-- "Immoveable property which has been given by parents to their daughters goes always to her brother if she die without issue." Here, since the terms "immoveable property" are used, other property is of course intended by the argument drawn from the loaf and staff. Thus it is stated in the Dayabhaga. By the, use of the term "always," it appears that the eight forms of marriage, namely, brahma and the rest are included." It should be borne in mind that the original work is not divided into chapters, sections, and paragraphs, and that there are two errors of printing in paragraph 15 as quoted above. In the first place there should be a full stop after the word

"successor," and in the next place the words "according to the text of Yajnavalkya" ought to be read as commencing a new sentence, having no connection whatever with the first portion of that paragraph (down to the word "successor"), which relates to property received by a woman at her nuptials. These two paragraphs, therefore, clearly show that there is no conflict between the Dayakrama Sangraha and Dayabhaga in regard to the brother's right to succeed to property given to a woman by her parents if she die without issue. On the contrary, the author of Dayakrama Sangraha expressly adopts the view taken by the author of the Dayabhaga, as may be seen from the words "thus it is stated in the Dayabhaga" in paragraph 16. How then are we to reconcile these two paragraphs with para. 3, s. 5, Ch. II of the Dayakrama Sangraha. It cannot be said that the author of the Dayakrama Sangraha has been guilty of laying down two contradictory rules in two different parts of the same work, and the only way of escaping from this difficulty is to hold, as we think we are bound to do, that the word "rest" in para. 3, s. 5, Ch. II, includes all the heirs down to the great-grandson of the co-wife, but not those who are entitled to come in after such great-grandson. For the above reasons we dismiss this special appeal, and affirm the judgment of the lower Appellate Court with costs.