

(1874) 12 CAL CK 0002
In the Calcutta High Court
Case No : Special Appeal No. 273 of 1874

Mohesh Chunder Surma Ghuttuck

APPELLANT

Vs

Gobind Proshad Talookdar and Another

RESPONDENT

Date of Decision : 14-12-1874

Acts Referred:

Citation : (1874) 12 CAL CK 0002

Judgement

Sir Richard Couch, Kt., C.J.—The question thus raised is one upon which the authorities upon the law in Bengal do not agree. In the Dayabhaga, Ch. xi, s. 6, v. 9, it is said: "The succession of the grand-father's and great grandfather's lineal descendants, including the daughter's son, must be understood in a similar manner, according to the proximity of the funeral offering; since the reason stated in the text "for even the son of a daughter delivers him in the next world, like the son of a son" is equally applicable; and his father's or grandfather's daughter's son, like his own daughter's son, transports his manes over the abyss by offering oblations, of which he may partake." The verse which precedes this is: "But, on failure of heirs of the father down to the great grandson, it must be understood that the succession devolves on the father's daughter's son (in preference to the uncle) in like manner as it descends to the owner's daughter's son (on failure of the male issue, in preference to; the brother)." The brother's daughter's son, or grandfather's granddaughter's son, is not included here. It is only a daughter's son who is included with the lineal descendants, the reason for it being given. The brother's daughter's son is not anywhere expressly mentioned by this author; but he is, nevertheless, entitled to be recognized as an heir for the reasons given in the judgment which we shall presently refer to. In Srikishna's Commentary on the Dayabhaga, the brother's daughter's son is in like manner omitted, but in the Dayakrama Sangraha he states a different rule. Ch. i, s. 10, v. 1, is: "On failure of the brother's grandson, the succession goes to the father's daughter's son, for he presents three funeral oblations, namely, to the father, paternal grandfather, and paternal great grandfather of the deceased owner,—i.e., to his own maternal grandfather,

maternal great grandfather, and maternal great great grandfather." V. 2 is: "In default of the father's daughter's BOO, the brother's daughter's son succeeds, for he presents two funeral cakes, in which the deceased owner participates,-- namely to his (the owner's) father, and paternal grandfather." V. 3 is: "Failing him; the paternal grandfather is the successor, for as the father is entitled to succeed on a failure of the heirs of the deceased owner ending with the daughter's son, so by the rule of analogy the succession devolves on the grandfather in default of heirs down to the father's daughter's son; and because he presents one oblation (namely, to the owner's paternal great grandfather, i.e., his own father) in which the deceased owner participates." The three verses are not consistent. It by "failing him" in the 3rd is meant the brother's daughter's son, who is named in the 2nd, there is an inconsistency with the words "so by analogy the succession devolves on the grandfather in default of heirs down to the father's daughter's son." But if the second verse be omitted, "failing him" will refer to the father's daughter's son named in the first, and there will be no inconsistency. In the first verse the author gives a different reason for the succession going to the father's daughter's son from that given in the Dayabhaga. It is the presentation of three oblations, but they are to maternal ancestors. So are the oblations mentioned in v. 2, but the one oblation in v. 3 is to a paternal ancestor. An appearance of consistency is given to the three verses by treating this as only of the same efficacy as an oblation to a maternal ancestor and making the succession go according to the number of oblations. But this seems not to be correct. In Colebrooke's Digest, Bk. 5, Ch. viii, sec. 1, it is said in the commentary on v. 434 by Jagannatha: "The oblations presented to the maternal grandfather and the rest are secondary, because they must follow funeral cakes offered to paternal ancestors, the son of a granddaughter can have no claim, while the giver or sharer of a principal oblation exists. Nor should it be objected as a consequence that the son of the late proprietor's daughter, or of his father's daughter and so forth, could have no title, if any kinsman within the degree of a sapinda were living. The Mahabharata showing that a daughter's son procures advantage even by his birth alone (cv), it appears that he does confer important benefits." Srikrishna deals with the uncle's daughter's son and paternal grandfather's daughter's son in the same way in vv. 9 and 13, but when he comes to the heirs on the maternal side, they are omitted. According to the Dayatatwa, on failure of the heirs of the father down to his daughter's son, the paternal grandfather succeeds; on failure of him, the paternal grandmother; in default of her, the descendants of the paternal grandfather, including his daughter's son; in their default, the paternal great grandfather, paternal great grandmother, and the descendants of the paternal great grandfather, including his daughter's son, succeed. Previous decisions having been overruled by a Full Bench decision of this Court, it will be better at once to refer to that. In *Guru Gobind Shaha Mandal v. Anand Lal Ghose Mazumdar* 5 B.L.R. 15, at p. 34 the question was whether, under the Hindu law current in the Bengal school, the son of a paternal uncle's daughter is entitled to succeed to the estate of a deceased Hindu, if no nearer heirs are forthcoming, Hitter, J., who delivered the judgment,

began by saying: "The solution of this question depends upon the true construction of the Dayabhaga, a treatise on the Hindu law of inheritance by Jimuta Vahana, the acknowledged founder and chief of the Bengal school. The other authorities current in that school, such as the Dayakrama Sangraha of Srikrishna Tarkslankar, the Dayatatwa of Raghunandana, and the Vivada Bhangamal of Jagannatha Tarkapanchanana are all of them almost exclusively founded on the Dayabhaga, and such a difference of opinion as there is between them and the fundamental treatise is entirely confined to a few cases of detail which involve no conflict of principal of any kind whatever. Such then being the state of our authorities, it is necessary first of all to ascertain whether the Dayabhaga itself is founded on any general doctrine or principle, which will enable us to arrive at a satisfactory conclusion on the point now under our consideration. We are of opinion that there is such a principle, and it is no other than that of spiritual benefit. That the Hindu law of inheritance, in the widest acceptation of the term, is essentially based upon considerations relating to the spiritual welfare of the deceased proprietor, is a proposition beyond all dispute. All the ancient Rishis, or Hindu sages, whose texts are regarded as the fundamental source of that law, and all the commentators on it whose opinions are recognized as authorities in the different schools current in the country, are unanimously agreed in accepting these considerations as their chief, if not as their exclusive, guide. The author of the Dayabhaga is no exception to the rule. On the contrary, he is clearly and expressly of opinion, as we will presently show, that the whole theory of inheritance is founded upon the principle of spiritual benefit, and that it is by that principle alone that questions relating to it must be determined." After illustrating and enforcing this proposition, the learned Judge says 6 B.L.R, 15 at p.38; "As to the male heirs we may divide them for the sake of convenience into the following classes:

1. Sapindas, strictly so called, or in other words, relatives connected through the medium of undivided oblations.
2. Sakulayas, or relatives connected through the medium of divided oblations.
3. Samanodakas, or relatives connected by libations of water.
4. Certain specified strangers, commencing with the spiritual preceptor, and ending with the learned Brahmin of the same village, leaving aside the king, who is entitled to come in more by right of escheat than by that of inheritance.

2. Here again we find that the same principle is in operation throughout. The sapindas are allowed to come in before the sakulayas, because undivided oblations are considered to be of higher spiritual value than divided ones; and the sakulayas are in their turn preferred to the samanodakas, because, divided oblations are considered to be more valuable than libations of water. The members of the last class are not competent, it is true, to offer either oblations of food or libations of water; but even in their case the doctrine of spiritual benefit is not forgotten. Thus, for instance, the lowest amongst them, namely

the learned Brahmin of the same village, is allowed to come in upon the express ground that the virtue of the deceased proprietor is renewed by the acquisition of fresh merit through the circumstance of his wealth devolving on a Brahmin,--v. 26, s. 6, Ch. xi. This, no doubt, is an extreme, case of the kind; but we wish to draw particular attention to it as an instance of the extreme solicitude evinced by the author of the Dayabhaga to provide for the spiritual welfare of a deceased proprietor. Again, when we come to look at the internal arrangement of each of these classes, so far as the details of such arrangement are actually given in the Dayabhaga, we find that the same principle is always kept in view. Thus, among the sapindas, those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only; and the reason assigned for the distinction is that the first kind of cakes are of superior religious efficacy in comparison to the second. Similarly, those who offer larger numbers of cakes of a particular description are invariably preferred to those who offer a less number of cakes of the same description; and where the number of such cakes is equal, those that are offered to nearer ancestors are always preferred to those offered to more distant ones." He then determines that the son of a paternal uncle's daughter is competent to confer spiritual benefit on the deceased proprietor. Referring to the objections that had been urged against his right he says, that his being nowhere mentioned as an heir in the Dayabhaga is entitled to no weight whatever. And referring to an argument that the precise position which the son of a paternal uncle's daughter would be entitled to hold according to the principle of spiritual benefit would interfere with that which has been assigned by the author of the Dayabhaga to some of the heirs specified in the earlier part of Ch. xi, he says 5 B.L.R., at p.45: "Whether this is really the Case or not we need not pause to enquire, for what we have to determine in the present case is not the precise position which the son of a paternal uncle's daughter is entitled to occupy in the category of heirs, but whether he is entitled to inherit at all." If the author of the Dayabhaga has in fact given to any particular heir or heirs a position which is not strictly consistent with the principle which he has himself laid down for our guidance, the utmost that can be said is that that particular heir or heirs should be allowed to retain that position. But that circumstance, even if true, cannot be accepted as a sufficient reason to justify the total exclusion of one single individual who is really competent to satisfy all the requirements of that principle. If in any case which may arise hereafter, it should become necessary for us to determine the precise position which the son of a paternal uncle's daughter is entitled to hold in the order of succession, the question would fairly arise whether the details of a work like the Dayabhaga ought to be permitted to override the principle upon which it is admittedly based. We have already shown that, according to the author's own interpretation of Menu, the nearest heir is he "who is competent to confer the greatest amount of spiritual benefit on the deceased proprietor." Now it is to be observed that in this judgment the passages in the Dayakrama Sangraha, which are expressly in point, are nowhere relied upon. They are not even referred to by

Mitter, J. In *Gobindo Hureekar v. Woomesh Chunder Roy* W.R., F.B., 176 the learned Judge, being counsel for the appellant, had convinced three Judges of this Court, one being Shumbhoonath Pundit, J., that the passage declaring the right of a brother's daughter's son to succeed as heir is an interpolation, and no part of the original text of *Srikrishna*. It is true that the decision in that case that a paternal uncle's daughter's son cannot inherit is overruled; but it is not upon the authority of the *Dayakrama Sangraha*, and the question which would be settled by it is deliberately left an open one. We may then at least say that the authority of the *Dayakrama Sangraha* upon the question before us is so doubtful that we may disregard it; and with it must be placed the authorities which are only founded upon it. We must consider which of the parties to this suit are competent to confer the greatest amount of spiritual benefit on Chundee Proshad. The defendants offer one oblation in which he participates,--namely to his grandfather and their great grandfather. The plaintiff offers two, namely, to his father and grandfather, being the plaintiff's great grandfather and great great grandfather. But these are maternal ancestors of the plaintiff, whilst the oblation of the defendants is offered to a paternal ancestor. Mitter, J., in one of the passages already quoted, says that among the sapindas those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor are invariably preferred to those who are competent to offer such cakes to maternal ancestors only, because the first kind of cakes are of superior religious efficacy in comparison with the second. The oblations offered by the defendants being of superior religious efficacy to those offered by the plaintiff, both being participated in by the paternal ancestors of the deceased proprietor, it seems to follow that the defendants should be preferred. The difference of number is not a ground of preference when the cakes are not of the same description. "Similarly," Mr. Justice Mitter says, "those who offer a larger number of cakes of a particular description are invariably preferred to those who offer a less number of cakes of the same description." It is true that the author of the *Dayabhaga* makes three exceptions to this order of succession in the father's grandfather's and great-grandfather's daughter's son, but a special reason is given for it, which is not applicable to others. Adopting the principle of the Full Bench decision, that of spiritual benefit, it appears to us that the defendants ought to be preferred to the plaintiff, and are now the heirs of Chundee Proshad. The decrees of the Lower Courts will therefore be reversed, and the suit will be dismissed with costs in all the Courts.