

(1942) 10 AHC CK 0009
In the Allahabad High Court

Mt. Sobadra and Others

APPELLANT

Vs

Shri Thakur Behari Ji Maharaj and Another

RESPONDENT

Date of Decision : 08-10-1942

Acts Referred:

Citation : AIR 1943 All 87 : (1942) 12 AWR 406

Hon'ble Judges : Dar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Dar J.

1. This is an appeal against a judgment and decree, dated 3rd April 1939, of the Civil Judge of Aligarh by which he reversed a judgment and decree, dated 18th July 1938, of the Munsif of Hathras in a suit for possession of immovable property and of its mesne profits. The property in suit which consists of a house and two shops at Hathras is the estate of a Hindu named Hetram, son of Radhe Lal, who died some time ago in the city of Hathras without leaving any issue. On his death his mother Mt. Renuka, widow of Radhe Lal, succeeded to his estate and shortly before her death on 26th May 1936, Mt. Renuka made a gift of the said property in favour of a Hindu idol Shri Thakur Behariji Maharaj. On 30th September 1937, Mt. Sahodra, who is a daughter of Naunidh Ram the brother of Radhe Lal and Mt. Sahodra's three sons, Gokal Chand, Moolchand and Bhagwandas, raised an action in the Court of the Munsif of Hathras against the idol Shri Thakur Behariji Maharaj and against its manager Hotilal for recovery of possession of the said property and for recovery of a sum of Rs. 48 as mesne profits of the property. The plaintiffs alleged that although the two brothers Naunidh Ram and Radhe Lal were separate in estate, the property in suit was held by them as an undivided property and Radhe Lal and after him his successors Hetram and Mt. Renuka only held a half share in the property in suit. The plaintiffs further alleged that they were the reversionary heirs of Hetram and in the events that had happened they were entitled to the possession of the said

estate. The defendants pleaded that Hetram and after him Mt. Renuka were the owners of the entire property in suit and that Hetram had a sister Mt. Maya whose daughter's three sons were still alive and in their presence no title accrued to the plaintiffs by inheritance.

2. The trial Court holding that the plaintiffs were the preferential heirs of Hetram decreed the claim, but on appeal the civil Judge holding that Mt. Maya's daughter's sons were the preferential heirs dismissed the claim, and against this judgment and decree the plaintiffs have made this appeal. Both the Courts below concurrently found that Hetram had only a half share in the property in suit and the other half was owned by Naunidh Ram, uncle of Het Ram, and brother of Radhe Lal, father of Hetram, and the other half share which was owned by Naunidh Ram has devolved by succession upon Mt. Sahodra, daughter of Naunidh Ram, who is plaintiff 1 in the action. Nevertheless, apparently by an oversight, the learned civil Judge of Aligarh has dismissed the entire claim. It has not been seriously disputed before us that on the findings arrived at by the Courts below the plaintiffs are entitled to a decree for joint possession with regard to half share of the house which was owned by Naunidh Ram and which has now devolved on Naunidh Ram's daughter, plaintiff by succession. But the question remains whether the plaintiffs are entitled to the remaining half share in the property in suit which was owned by Het Ram and after him was held by Mt. Renuka. This raises the question as between the plaintiffs, on one side, and Mt. Maya's daughter's sons, on the other side, who are the preferential heirs? The parties are governed by the Mitakshara or Benares School of Hindu law and the relationship of the plaintiffs and of Mt. Maya's daughter's sons with Hetram which is shown in the following pedigree is not in dispute.

ZAHIR MAL	_____		_____	
Naunidhram	Radhe Lal =		Mt. Renuka	Mt. Sahodro (plaintiff 1) _
_____				Gokalohand
Moolchand	Bhagwandas		(plaintiff 2)	(plaintiff 3) (plaintiff 4).
_____			_____	
_____			Het Ram	Mt. Maya (Propositus Mt. Chanda
_____			_____	
_____			Inder Mohan	Shyam.

3. It is common ground that the plaintiffs and Mt. Maya's daughter's sons are atma-bandhus of the deceased Hetram, that Mt. Sahodra as a female is precluded from succession and her sons alone can claim as bandhus, that they and Mt. Maya's daughter's sons both are within four degrees of their respective common ancestor and that while the plaintiffs Gokal Chand and his two brothers "confer some spiritual benefit upon the propositus, Mt. Maya's daughter's sons do not confer any such benefit. The controversy in the case is as between one's own sister's daughter's sons and one's paternal uncle's daughter's sons, who are the preferential heirs? The plaintiffs contend that under the Mitakshara law in a case of competition between bandhus the primary preference is to the

class and in the class the preference is to the degree and where the degrees are equal the bandhu who confers spiritual benefit is to be preferred against the bandhu who does not. The defendants, on the other hand, contend that within the class the preference is to the nearest bandhu, nearest from the point of blood relationship and where the degree of the two claimants is equal, the one claiming through a nearer ancestor is nearer in relation and is to be preferred against the one claiming through a more remote ancestor.

4. By three successive decisions of the Privy Council, it has now been settled that the order of succession amongst bandhus under the Mitakshara law is based upon consanguinity or nearness of blood and the primary test to apply is that of nearness of blood and it is only when that test furnishes no certain guide and the relationship between the competing bandhus is equal, the religious test may be applied : see *Vedachela Mudaliar v. Subramania Ghattiar* ("22) 9 AIR 1922 P. C. 33 , AIR 1931 268 (Privy Council) and AIR 1938 34 (Privy Council) , In the first and the third case, the claimant who was preferred by the Judicial Committee was nearer in degree and in the second case the claimants were of equal degree, but there was no difference in line and the question did not arise and was not determined by the Privy Council as to where degrees are equal but line is unequal and one claims through a nearer ancestor and the other claims through a more remote ancestor who is to be regarded as a nearer sapinda within the doctrine of the Mitakshara. In 43 ALL. 463,* the competition was between father's son's daughters's son and between grand-father's daughter's son, both claimants being in equal degree but in different lines and this Court preferred grand-father's daughter's son. The judgment in that case is mainly based upon the opinion of Trevelyan and of Sarvadhikari as expressed in their editions of Hindu Law which were current in 1921 when the judgment in *Musammam Sham Devi Vs. Babu Birbhadra Prasad, minor, through Musammam Munni Debi and Others*, was pronounced. Sir John Trevelyan in his 3rd Edn. of Hindu Law (1929) at p. 437 has laid down the order of succession amongst bandhus as follows:

All atmatbandhus precede pitribandhus, and all pitribandhus precede matribandhus. There is no rule that among bandhus of the same class those ex parte paterna are to be preferred to those ex parte materna. Subject to the above, the nearer line excludes the more remote.

5. Sarvadhikari in his Hindu Law of Inheritance, 2nd Edn., (1922) at p. 607 while discussing how far the rule of nearer line excluding a line more remote is applicable in the case of bandhus has stated as follows :

All other things being equal, the nearer line excludes the line more remote; and the nearer kinsman of the same line excludes the kinsman more remote.

6. Mayne in his Hindu Law, 10th Edn., (1938) at p. 676 has made the following comment on this case:

The decision in *Musammam Sham Devi Vs. Babu Birbhadra Prasad, minor, through*

Musammat Munni Debi and Others, where the paternal aunt's son's son was held to be nearer than the sister's daughter's son is even more open to criticism; for, while the sister's daughter's son is four degrees removed from the father of the propositus, the paternal aunt's son's son is four degrees removed from his grand father; and neither of them offers pindas to the ancestors of the deceased. The head note in the report is wrong.

7. Mulla in his Hindu Law, 9th Edn., (1940) at p. 61 has made the following observations about this case :

All other considerations being equal, the claimant Who is separated by only one female link is to be preferred to one who is separated by two such links.

* * * * * Following the same rule it has been held by the High Court of Allahabad that the father's father's daughter's son's son is to be preferred to the father's daughter's daughter's son. It is submitted that this case was erroneously decided. It was decided before the decisions of the Judicial Committee in 44 Mad. 7531 and AIR 1931 268 (Privy Council) . The rule in this paragraph should not be applied before the earlier rules have been tested. Only when they fail to furnish a guide, should we proceed to this rule. If we apply the test of nearnessRamess in degree laid down by the Judicial Committee, the result would be different.

8. In Musammat Sham Devi Vs. Babu Birbhadra Prasad, minor, through Musammat Munni Debi and Others, there is no discussion on principle of the question whether nearer line excludes the more remote in cases where degrees are equal. The ease proceeds upon the basis of certain rules which were enunciated by Sarvadhikari and subsequently adopted by Sir John Trevelyan in their commentaries on Hindu law. These rules have not received general recognition and some of them have been definitely rejected by judicial decisions. The rule of the intervention of two females upon which Musammat Sham Devi Vs. Babu Birbhadra Prasad, minor, through Musammat Munni Debi and Others, was mainly decided has now been definitely negated by high judicial authority and Musammat Sham Devi Vs. Babu Birbhadra Prasad, minor, through Musammat Munni Debi and Others, now cannot be regarded as good law. The basis of the entire law of Hindu inheritance is a well-known passage of Manu IX.187, which has been freely translated as: "To the nearest sapinda, the inheritance next belongs," and which is more literally translated by Sarvadhikari as: "The nearest sapinda is entitled to the property of his deceased sapinda-kinsman"; and which has been translated by Golapchandra Sarkar Sastri as: " He who is unremote from sapinda his property becomes his"; and the following commentary which has been made on this passage by Vignaneshwar in Mitakshara II.3.4 :

Nor is the claim in virtue of propinquity restricted to sapindas, but it appears from this very text (of Manu) that the rule of propinquity is effectual, without any exception, in the case of samanodakas, as well as other relatives, when they appear to have a claim to the succession.

9. It has now been settled by the highest judicial authority that the nearest sapinda who is entitled to inherit under the Mitakshara law is one nearest in blood to the deceased. It has also been settled by the highest authority that under the Mitakshara law the degrees are counted from the claimant to the common ancestor of the propositus and of the claimant. It follows, therefore, that the father's daughter's son's son and grand-father's daughter's son's son are both fourth in degree from the common ancestor as degrees are counted under the Hindu law. Can it be reasonably contended that a man's own father's daughter's son's son and a man's own grand-father's daughter's son's son are equally related to the deceased ? From the point of view of pure consanguinity and regardless of the peculiarity of computation of degrees sanctioned by Hindu law, there can be no doubt that from the point of view of blood relationship one's own sister's son's son is decidedly nearer than one's cousin's son's son and there is high authority of Sir Muttusami Ayyar that this should also be so under Hindu law in relation to bandhus. In *Muthusami v. Muthukumarasami* ("93) 16 Mad. 23 a decision which was affirmed by the Privy Council in *Muthusami Mudaliyar v. Muthukumaraswami Mudaliyar* ("96) 19 Mad. 405 and which was approved by the Privy Council in *Vedachela Mudaliar v. Subramania Chettiar* ("22) 9 AIR 1922 P. C. 33 Sir Muttusami Ayyar observed as follows:

Though sons born in the family are all gotrajas, yet the Mitakshara regulates the succession when there is competition between them with reference to the nearness or remoteness of propinquity, as, for instance, between a brother and a paternal uncle's son. It is not clear why this analogy should be ignored in the case of daughters born in the family, and why the father's sister and the grand-father's sister should be treated as related to the propositus in the same degree of affinity. Nor is it reasonable to regard one's own sister's son and one's grand-father's sister's son as related in the same degree.

10. There seems to us both reason and authority for the view that in a competition between bandhus where the bandhua are of the same class and where the degree is equal, the one claiming from nearer line is to be preferred to the other who is claiming from remoter line. On the question whether the nearer line within a class absolutely excludes the more remote line even in cases where the claimant in remoter line is nearer in degree, there is a difference of opinion. In *Balusami Pandithar v. Narayana Rau* ("97) 20 Mad 342 and in *Krishna Ayyangar v. Venkatarama Ayyangar* ("06) 29 Mad. 115 and again more fully in *Kalimuthu Pillai Vs. Ammamuthu Pillai and Another*, , the Madras High Court has definitely expressed the view that nearer line excludes the more remote even in cases where the claimant from the remoter line is nearer in degree, and the late S. Srinivasa Iyengar in *Mayne's Hindu Law and Usage*, Edn. 10 (1838) at page 674 fully supports the Madras view and it is also supported by Dr. Gour in his *Hindu Code*, Edn. 4 (1938), at page 956 and by Trevelyan in his *Hindu Law*, Edn. 3, (1929) at page 437. On the other hand, in *Uma Shankar v. Mt. Nageswari Koeri* ("18) 5 A. I. R. 1918 Pat. 1, a majority of the Pull Bench of the Patna High Court has preferred a bandhu nearer in degree but remoter in line. Mulla in his

Hindu Law, Edn. 9, (1940) has not expressed any definite opinion of his own on this question and Sarvadhikari in his Principles of the Hindu Law of Inheritance, Edn. 2, (1922), apparently favours the view that the rule of nearer line excluding a line more remote should be limited to cases where competition is in equal degree.

11. For the purpose of this case, it is not necessary to express any final opinion on the above controversy. It is sufficient to hold that between the same class and between the claimants of equal degree, the one in nearer line excludes the more remote. In our opinion, as between the plaintiffs and Mt. Maya's daughter's sons, the latter are the preferential heirs. The result is that we allow the appeal in part, set aside the decrees of both the Courts below and in lieu thereof we grant to the plaintiffs a decree for joint possession of the property in suit, the plaintiffs' share in the property in suit being half. As the success and failure has been even, the parties will bear their own costs in all the Courts.