

(1919) 08 CAL CK 0034
In the Calcutta High Court

Pitambar Chandra Shaha Chowdhury and Another and Shishu Kumar Saha APPELLANT

Vs

Nishi Kanta Saha and Another RESPONDENT

Date of Decision : 26-08-1919

Acts Referred:

Citation : 55 Ind. Cas. 5

Hon'ble Judges : Panton, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. The subject-matter of the litigations which have resulted in these two appeals is the estate of one Peary Mohan Saha Chowdhury, who died unmarried on the 18th February 1904. He left two stepsisters Shilamoyee and Prastarmoyee. The former has a son Siau Kumar Saha, the latter has two infant sons Pitambar Chandra Saha and Hetmanta Kumar Saha. The rival claimants to the estate are, on the one hand, these three nephews of the deceased, and, on the other hand, the great great grandson of the great-great-grandfather of the deceased, by name Nisikanta Saha. The relationship between the parties appears from the following genealogical table:

SHIBU SAHA | _____
 _____ | | Jiban Hazura | |
 _____ Shibram | | Tilak Bilak Madan
 Saha | Sarnamayee | | Nishi Kanta Saha | (Principal defendant). _____

_____ | | | Doman Pyari Shilamoyee Prastarmoyee
 died unmarried. died unmarried M. Haricharan M. Balaram 1904. | | |
 _____ | | Sishu (plaintiff in
 _____ Suit No. 107, | | App. 330). Pitambar
 Hemanta (plaintiff No. 1 (plaintiff No. 2 in Suit No. 132, in Suit No. 132 App.
 134). App. 134). 2. The two sons of Prastarmoyee have instituted one of these
 suits for recovery of two-thirds share and the son of Shilamoyee has instituted

the other suit in respect of the remaining one-third share. The contest thus is between the sisters' sons on the one hand, and the great-great-grandfather's great-great grandson on the other hand, If the family is governed by the Dayabhaga Law, the plaintiffs are the preferential heirs; if the family is governed by the Mitakshara Law, the defendant is entitled to succeed. The cardinal question in controversy consequently is, whether the family is governed by the Dayabhaga Law as the plaintiffs allege or by the Mitakshara Law as the defendant asserts. There was also a controversy in the Court below as to whether the defendant was at all a member of the family. Upon that point, as also upon the question of the personal law applicable to the parties, the Subordinate Judge has found against the plaintiffs. The plaintiffs have appealed to this Court and have assailed the decision of the Subordinate Judge upon both the matters. As regards the question of relationship, we are of opinion that the conclusion of the Subordinate Judge is amply supported by the evidence on the record. We shall consequently proceed to deal with the question of the personal law which governs the parties in matters of inheritance.

3. The plaintiffs assert that the family is governed by the Dayabhaga Law, the defendant alleges that the family migrated from Behar, where the Mitakshara Law prevails, and that, notwithstanding migration into Bengal, the members of the family have adhered to the law of their origin. The Subordinate Judge has accepted the contention of the defendant.

4. Before we proceed to examine the evidence on the record, it is desirable to consider how the question should be approached, as there has been considerable discussion at the Bar upon the subject of burden of proof. It is well settled that a Hindu family residing in a particular province of India is presumed to be governed by the law of the place where it resides. *Bom Das v. Chandra Dass* 20 C. 409. But where a Hindu family is shown to have migrated from one province to another, the presumption is that it carried with it the laws and customs as to succession and family relation prevailing in the province from which it came. *Parbati Kumari v. Jogadis Chundtr* 29 C. 433 : 29 I.A. 82 : 6 C.W.N. 490 : 4 Bom. L.R. 365 : 8 Sar. P.C.J. 205; *Soorendronath Roy v. Musammatt Heeramonee Burmoneah* 10 W.R. 35 (P.C.) : 1 B.L.R. 26 (P.C.) : 12 M.I.A. 81 : 2 Suth. P.C.J. 147 : 2 Sar. P.C.J. 372 : 20 E.R. 271 This presumption, however, is rebuttable by proof that the family has adopted the laws and usages of the place to which it has migrated. *Gobind Chandra v. Badha Kristo Das* 3 Ind. Cas. 563 : 31 A. 477 : 6 A.L.J. 591; *Jogannath v. Narayan Lal* 7 Ind. Cas. 469 : 34 B. 663 : 12 Bom. L.R. 545, *Mailathi Anni v. Subbaraya Mudaliar* 24 M. 650 : 11 M.L.J. 309, *Kuhda Prosad Pandty v. Haripada Chattopadhyaya* 17 Ind. Cas. 257 : 40 C. 407 : 17 C.W.N. 102 : 16 C.L.J. 811.

5. We start then with the position that as the family is resident in the district of Dinajpur in the Presidency of Bengal where the Dayabhaga Law prevails, the presumption is that the family is governed in matters of succession by that Law. This presumption may be rebutted by proof that the family migrated from a

province where the Mitakshara Law prevailed. The case developed in the evidence is that the family migrated from Behar, but no such statement was explicitly made in the written statement of the defendant. There is no evidence, direct or indirect, that this family did migrate from Behar. No evidence is forthcoming as to the original place of residence or as to the time when the alleged migration took place. This is not a matter for surprise. The family is not of sufficient importance to have preserved a history of its antecedents or movements, the origin of the family is unknown, its original place of residence is unascertainable, and the time when the family may have moved from one place to another is equally uncertain. The assertion of the defendant that the migration took place during the time of his grandfather is not corroborated by independent evidence, and if true, would tend to cast doubt upon his connection with this family as a member of the junior branch. Besides, if the alleged migration was an event of so recent a date, confirmatory evidence, oral or documentary, might have been expected. There is this further difficulty that even if tangible evidence of migration had been available, the time of migration would be a vital point for consideration. It is a historical fact that the Brahmins and Ksyasthas of Bengal migrated from Kanauj and originally brought with them the Mithila Law; it was after their settlement in this province, that the Dayabhaga School of Hindu Law was founded by Jimutavahana about the 14th century (Jolly, Tagore Lectures 22; Sarbadhikari, Tagore Lectures 403), and that is the law which now governs the Hindu population of this Presidency even though they may have originally migrated from North Behar. Consequently, the defendant would have to establish, not merely that the family migrated from Behar, but that the migration took place after the foundation of the Bengal School of Hindu Law by the author of the Dayabhaga. There is no trace of evidence on the record to enable the defendant to meet this requirement. The fundamental fact, which if proved would have shifted the burden of proof from the defendant, thus remains established. The burden consequently lies upon the defendant to prove that the family is governed in matters of succession by the Mitakshara Law. This burden may be discharged by proof of instances of succession consistent with the Mitakshara Law and inconsistent with the Dayabhaga Law. The evidence to support the case that the family has conformed to religious or social rites and usages consistent with the Mitakshara Law and inconsistent with the Dayabhaga Law may also strengthen his case, because as was pointed out by the Judicial Committee in the case of Soorendronath Roy v. Musammat Heeramonee Burmoneah 10 W.R. 35 (P.C.) : 1 B.L.R. 26 (P.C.) : 12 M.I.A. 81 : 2 Suth. P.C.J. 147 : 2 Sar. P.C.J. 372 : 20 E.R. 271 there is in Hindu Law a close connection between their religion and their succession to property. We shall proceed now to scrutinise the evidence from this standpoint.

6. The first instance given by the defendant to prove devolution of property according to the Mitakshara is that of Doman. The family priest Bisnu Dutt asserts that after the death of Doman, his agnate Gobardhan took his property to the exclusion of Chandra Mohan, the son of his sister Bhagyamani. But

Chandra Mohan completely demolishes this case and proves that he succeeded to the estate of his maternal uncle. This is corroborated by rent receipts, of which the genuineness has been established by the evidence of Manindra and Nisikanta. This instance supports the theory of the applicability of the Dayabhaga Law.

7. The next instance relates to the property of Radha Chaudhuri. Bisnu Dutt states that Madan, the agnate of the deceased, took to the exclusion of the daughter's son Kamalakanta, but he admits that Madan lived in a separate house. If this be true, whether the Mitakshara or the Dayabhaga applies, Madan as a cousin was not entitled to succeed, notwithstanding the assertion of Bisnu Dutt that an agnate even though separate, under the Mitakshara Law, takes in preference to the daughter's son, nor is there any tangible evidence to support the allegation that Radha Chaudhuri had jotes which Madan took by inheritance and sold to Balaram.

8. The next instance cited is that of Amrita Saha, whose property is said to have been inherited by his agnatic nephew Pabana in preference to his daughter Kalamani and his daughter's son Kandura. This instance is fictitious. Pabana was separate from his uncle and was not a preferential heir even according to the Mitakshara. It is doubtful whether Amrita left any land, but whatever property he had, passed to his daughter Kalamani according to the testimony of Chandra Mohan and Manindra.

9. The next instance mentioned is that of Belku, whose property, according to Bisnu Dutt, was inherited by his agnatic cousin Jhulu in preference to his wife, daughter and mother. There can be no foundation for this statement, as Jhulu could have no claim to supersede the wife, daughter and mother, either by right of survivorship or by right of inheritance, according to the Mitakshara or the Dayabhaga.

10. Another instance adduced is that of Umakanta, whose property is said to have been inherited by his agnate Sudhap in preference to his sisters' sons Lakshmi and Sitaram. But according to Kamal Lochan and Nishi Kanta, Sudhap was the son of Gokul who was the brother of Umakanta. The instance is consequently consistent with the Dayabhaga.

11. The next instance brought forward is that of Mathur, whose estate is said to have been inherited by his agnate Balia in preference to Nanda Hari, the son of his sister. But Nisikanta admits that Mathur had no land, and according to Manindra, Mathur was a leper and had no property. There is good reason to hold that this instance is spurious, specially as Balia who is alive has not been called.

12. The next instance offered is that of Naba Saha, whose estate is said to have been inherited by his mother in preference to his daughters. But a mother cannot inherit in preference to a daughter under either the Mitakshara or the Dayabhaga.

13. The next instance is that of Atmaram, whose estate is alleged to have been

inherited by his agnatic nephew Chandra Mohan, in preference to his daughters Ano, Jano and Bbanga. Nisikanta is the son of Ano and Tapa the son of Bbanga. Nisikanta is not corroborated on this point and is obliged to admit that Chandra Mohan was separate from Atmaram when he succeeded to the estate of the latter by inheritance. The principle of survivorship had consequently no application and, even according to the Mitakshara, the daughters were preferential heirs to the separated agnatic nephew. The instance is probably spurious, as Nisikanta admits that Atmaram left no land.

14. The next instance is that of Laban whose estate, it is alleged, was taken by his nephews, living in commensality with him, in preference to his widow. Bhairab, one of the nephews, has been examined for the defendant and admits that Madhab, the elder brother of Paresmani, the widow of Laban, managed the property of Paresmani. This seems to indicate that she inherited her husband's estate, though she lived sometimes jointly with, some times separate from, her husband's co sharers.

15. The next instance is that of Dhanapati, whose estate is said to have been taken by his brothers in supersession of his widow. Bhairab attempts to prove this, but breaks down in cross-examination. Dhanapati predeceased his father and his childless widow could not inherit either according to the Mitakshara or the Dayabhaga.

16. These instances, adduced by the defendant, do not help his case in the least. On the other hand, some of them have the appearance of inventions based upon an inaccurate knowledge of the Mitakshara Law. We pass on to some instances relied up in by the plaintiffs.

17. The plaintiffs lay stress upon the case of Swarnamoyi, the widow of Bilak, the paternal uncle of Peary Mohan whose estate is in dispute. Bilak was joint, with his brother Tilak and yet his estate was taken by Swarnamoyi. Her name was registered under the Land Registration Act in place of her deceased husband, Bilak. After the death of Swarnamoyi, the name of Tilak was registered as the next reversioner by right of inheritance. This is supported by the deposition of Tilak in the land registration case and is strengthened by the registered Kabuliat executed by Morad Baksh in favour of Tilak and Swarnamoyi on the 18th September 1885. The balance of oral evidence is undoubtedly in favour of this instance. The defendant was consequently driven to start the story that Tilak was insane, but the evidence on the point is hopelessly contradictory. We may add that in this Court an endeavour was made to negative the effect of this instance by invoking the aid of the theory that specification of shares causes a severance of interest in a family governed by the Mitakshara Law and reliance was placed upon the decisions in *Ram Pershad Singh v. Lakhpati Koer* 30 I.A. 1 : 30 C. 231 : 7 C.W.N. 162 : 5 Bom. L.R. 103 : 8 Sar. P.C.J. 380; *Kawal Nain v. Budh Singh* 40 Ind. Cas. 286 : 26 C.L.J 101 : 15 A.L.J. 581 : 2 P.L.W. 57 : 21 C.W.N. 986 : 33 M.L.J. 42 : 19 Bom. L.R. 642 : (1917) M.W.N. 514 : 6 L.W. 300 : 39 A 496 : 44 I.A. 159 (P.C.); *Girja Bai v. Sadathiv Dhundiraj* 37 Ind. Cas. 321 : 24 C.L.J. 207 :

20 C.W.N. 1885 : 14 A.L.J. 822 : 20 M.L.T. 78 : 12 N.L.R. 113 : (1916) 2 M.W.J. 455 : 43 C. 031 : 43 I.A. 151 (P.C.) but such a theory was not started in the Court below and facts which would have been material to enable the Court to determine the point are not on the record. In our opinion, this instance militates against the view that the family is governed by the Mitakshara Law.

18. The plaintiffs rely upon another instance from the family of Peary, Binod and Lalbihari. They were the sons of Bhuban, who had two brothers Sonaram and Balaram. Balaram married Prastarmoyi, and was the father of Pitambar and Hemanta, the plaintiffs in suit No. 132 and Appeal No. 134. Sonaram had a son Jagabandhu. Peary married Pratibha. Lalbihari had a daughter Milan Dasi. Nimai was the rephew of Lalbihari. The case for the plaintiffs is that Pratibha took the estate of her husband Peary in preference to her husband's brother. In support of this view, reliance is placed upon proceedings in two suits which were instituted against the members of the family by creditors. These are consistent only with the theory that the family was deemed to be governed by the Dayabhaga Law. Subsequently Jagabandhu and Balaram separated, while Pratibha, Lalbihari and Binod continued joint. This is sufficiently indicated by the fact that two conveyances were executed, one in favour of the heirs of Bhuban, the other in favonr of Jagabandhu. An endeavour was made to neutralise the effect of these facts by reliance on the proposition laid down by the Judicial Committee in Balabux v. Rukhmabai 30 C. 725 : 7 C.W.N. 642 : 30 I.A. 130 : 5 Bom. L.R. 469 : 8 Sar. P.C.J. 470 that the separation of one member of a family operates in law as a disintegration of the entire family. That principle could have no application to the present case. The withdrawal of Jagabandhu from the family could not affect the position of the descendants of Bhuban, if the family was governed by the Dayabhaga Law. There is no need to assume a separation in law followed by an imaginary reunion amongst them. The evidence conclusively shows that Jagabandhu alone went out of the family, leaving unaffected the mutual relation of his cousins as members of a joint Hindu family. This instance is clearly inconsistent with the case of the defendant.

19. Another instance mentioned by the plaintiffs is that of Harin Dasi, who is said to have succeeded to the estate of her son Gopal living jointly with his brother Ananda. The defendant seeks to minimise the effect of this instance by invoking the aid of the theory that as Gangaram, the brother of Ananda and Gopal, separated, there must have been a complete disruption of the family. But the fact remains that Gangaram left the family during the lifetime of his father, that Gopal and Ananda remained joint with their father and that after his death the two brothers remained joint till Gopal died.

20. The last instance relied upon by the plaintiffs is that of Chandra Mohan, who succeeded to the estate left by his maternal uncle Doman. The assertion of Bishnu Dutt that the property passed to Gobardhan, an agnate of Doman, is not corroborated by independent testimony. On the other hand, the allegations of Chandra Mohan are confirmed by a long series of rent receipts, which are

undoubtedly genuine and prove his possession.

21. It is thus plain that of the four instances mentioned by the plaintiffs, the first and fourth are consistent only with the theory that the family is governed by the Dayabhaga Law, the second and third instances also point to the same conclusion, unless we adopt the theory of the defendant that in each of those cases there was a separation in law, though the parties in fact continued joint. But even on that view, the only result is that the instances become neutral, they become consistent with either school of law and do not advance the case of the defendant that the family is governed by the Mitakshara Law.

22. Here we may mention that stress has been rightly laid by the plaintiffs on the circumstance that succession certificates have been repeatedly taken out where a succession certificate would be needless if the parties were governed by the Mitakshara Law: *Beejrai v. Bhyroopersaud* 28 C. 912; *Patishuri Partab Narain Singh v. Bhagwati Prasad* 17 A. 678 : A.W.N. (1895) 132 *Jagmohandas v. Allu Maria* 19 B. 338; *Subramanian Chetti v. Rakku Servai* 20 M. 232 : 7 M.L.J. 100. Amongst relevant instances may be mentioned the following. After the death of Tilak in 1898, the defendant NisikaDta, who was then in the employ of Balaram, took a guardianship certificate for the infants Doman and Peary and a succession certificate on their behalf. After the death of Doman, three years later, Nisikanta took out another succession certificate on behalf of Peary. After the death of Peary, Nisikanta applied for a succession certificate as his heir. The certificate so granted was revoked at the instance of Sisukumar as soon as he attained majority. After the deaths of Binod and Pratibha, Lalbihari took out three succession certificates. Hiramani, the widow of Dhanapati, took out succession certificates on behalf of Jogendra and his minor brother, after the death of their mother, for collection of debts. These instances converge to the conclusion that the parties are governed, not by the Mitakshara, but by the Dayabhaga Law.

23. The inference deducible from the instances of succession and the grant of succession certificates is in no way weakened by the evidence of alleged peculiarities in religious and social ceremonies, which are said to be consistent with the Mitakshara and inconsistent with the Dayabhaga. The parties, no doubt, have employed a Maithili Brahmin as their priest. This, however, is by no means conclusive, and he admits that he uses books on ceremonial matters, which are in use in Bengal, such as *Hindu Satkarmimala* and *Purohit Darpan*. The evidence as to the performance of special ceremonies is of an entirely inconclusive character. In connection with marriages, a ceremony called the ring ceremony is mentioned which consists in the sprinkling of vermilion as soon as marriage proposal is finally settled. The evidence shows that this is common amongst Bengal Telis and is not peculiar to Maghya Telis (the sect to which the defendant claims that the family belongs). The only peculiarity alleged is a conversation carried on ostensibly for the purpose of ensuring that the marriage is not contracted with a person outside the sect. Other ceremonies stated to be prevalent are *Astamangal*, *Kankanbandhan*, *Telhalud*, *Patrakaran*, *Nandimukh*,

Satpak; Maladan, Bason, Kuaundika and Saptapadigaman, But it is plain that these are in vogue equally amongst Bengal Telis. Indeed, some of them, such as the Nandimukh Sradh on occasions of marriage and rice ceremony, Saptapadigaman at the time of the marriage ceremony, and the Yajna are obligatory under both the Dayabhaga and the Mitakshara Schools. Some stress was laid on the period of impurity resulting from the death of a relation, and the defendant sought to prove that the Sradh was performed on the 32nd instead of the 31st day. The attempt was futile, because the same period of impurity is prescribed by the Bengal and Benares Schools. The evidence of Bisnu Dutt is on these matters singularly unreliable : he has endeavoured to substantiate imaginary differences in religious and ceremonial matters between the two schools which have no real existence. But his attempt in this direction has been quite as futile as in the case of instances of succession which were alleged to be in conformity with the one school and not the other. It may be a matter for argument whether this is due to his ignorance or is a deliberate departure from truth; in any view, we cannot place the same reliance upon his assertions as the Subordinate Judge did.

24. It is worthy of note that whatever differences may or may not exist in matters ceremonial, there are several instances of the performance of Sradhs by persons who were entitled to the property of the deceased according to the Dayabhaga School. Thus, Sisu Kumar performed the Sradh of Peary. Dharani, the daughter's son of Gangaram, performed his Sradh and the estate was inherited by his mother. Bhairab had to admit that on the death of his own agnatic cousin Bigaroo, the widow performed the Sradh, although he himself and other agnates were present at the time of his death.

25. An attempt has been made to show that the Maghya Telis are of the same class as Purnea Telis and that there is social intercourse between the two sects. There is no reliable evidence in support of this assertion. On the other hand, the evidence indicates that an attempt at such intercourse on the occasion of a marriage in the family of Madhab led to acute caste disputes. The truth seems to be that there may have been some commingling of customs, as Purnea in Behar and Dinajpur in Bengal are not separated by an impassable barrier. But as pointed out by the Sadar Court in an early case, such mixture of customs and ceremonies can be of no assistance to the party seeking to establish the applicability of a personal law not prevalent in the locality. *Raj Chunder Narain v. Gocul Chund Goh* 1 Mac. Sol. Rep. 50 : 6 Ind. Dec. (O.S.) 42. Reference may in this connection be made also to *Chundro Seekhur Roy v. Nobin Soondur Roy* 2 W.R. 197; *Ram Bromo v. Kaminee Soonduree* 6 W.R. 295, *Junaruddeen v. Nobin Chunder* (1862) Marsh. 232; *Obtmnessurree v. Kishen* 4 Wym 226; *Sonaton v. Ratun* W.R. (1861) 95; *Pirthee Singh v. Musammat Sheo Soonduree* 8 W.R. 261; *Bhagdbati Koer v. Sohodra Koer* 13 Ind. Cas. 691 : 16 C.W.W. 831; *Kulada Prasad Pandey v. Haripaia Chattopadhyaya* 17 Ind. Cas. 257 : 40 C. 407 : 17 C.W.N. 102 : 16 C.L.J. 811; *Gobind Chandra v. Raiha Kristo Das* 3 Ind. Cas. 563 : 31 A. 477 : 6 A.L.J. 591; *Jagannath v. Naraym* 7 Ind. Cas. 469 : 34 B.

663 : 12 Bom. L.R. 545; Soorendronath Roy v. Musammat Heeramonee Burmoneah 10 W.R. 35 (P.C.) : 1 B.L.R. 26 (P.C.) : 12 M.I.A. 81 : 2 Suth. P.C.J. 147 : 2 Sar. P.C.J. 372 : 20 E.R. 271 which reversed the decision of Trevor, Seton, Karr and Jackson, JJ., in Heeramonee v. Nuffaree 1 Hay 29z. If we apply the principle deducible from these cases, it is plain that the defendant has failed to discharge the burden which rested on him, namely, to prove that the family came from a province where the Mitakshara Law prevailed, into Bengal and that it has adhered to Mitakshara Law in matters of succession. But we may add that even if the family be assumed to have migrated into Bengal and to have retained some of its religious rites and ceremonies, the evidence points to the conclusion that the family has acquired a course of devolution of property in accordance with the common course of descent of property in the district under the Bengal School of Hindu Law. In either of these views, the defendant cannot successfully resist the claim of the plaintiffs.

26. The result is that these appeals are allowed and the decrees of the Subordinate Judge set aside. The suits are decreed in respect of the Immovable properties mentioned in the scheduler to the plaints. The claim to. moveables is dismissed, as we agree with the Subordinate Judge in his finding that the plaintiffs have failed to establish their claim to the movables; the evidence in regard to the alleged moveables and their values in scanty and unsatisfactory. The plaintiffs will be entitled to half their costs in both the Courts.