

(1922) 04 BOM CK 0006

In the Bombay High Court

Case No : Second Appeal No. 483 of 1921

Rajeppa Ranappa Kundagol

APPELLANT

Vs

Gangappa Jotappa Mandwe

RESPONDENT

Date of Decision : 10-04-1922

Acts Referred:

Citation : (1922) 24 BOMLR 789

Hon'ble Judges : Shah, J;Norman Macleod, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Shah, J.—The question of law arising in this appeal is as to how the property of a Hindu would devolve when the nearest relations of the deceased are his mother's sister's son and mother's brother's son.

2. The facts are not in dispute. Nagapa was the last male holder and the adopted son of Jivapa. On his death the property devolved on his adoptive mother Pirava. She alienated the property in suit to her brother's son who is defendant No. 1. She died, and thereafter defendant No. 2, who is found to be her sister's son, sold the property to the plaintiff. On Pirava's death the inheritance is to be traced to Nagapa. The plaintiff claims through the adoptive mother's sister's son: and defendant No. 1 claims as the mother's brother's son. The alienation by Pirava ceased to be operative on her death.

3. The trial Court held that the mother's sister's son was the preferential heir, and decreed the plaintiff's claim. The lower appellate Court held that the mother's brother's son was the preferential heir and accordingly dismissed the plaintiff's suit with costs.

4. In the appeal before us the same question arises, and we have to decide as to what are the rights of the competing heirs to the inheritance of Nagapa.

5. The view of the trial Court is in accordance with the decision of the High Court

of Madras in Appandai Vathiyar v. Bagubali Mudaliyar I.L.R.(1910) Mad. 439 and the view of the appellate Court is supported by the decision of the Allahabad High Court in Ram Charan Lal v. Rahim Baksh ILR (1916) All. 416. There is no decision of this Court on the point. The only decision to which a reference may be made is the case of Mohandas v. Krishnabai ILR 1881 5 Bom. 597 in which the mother's brother (an Atmabandhu not expressly mentioned) was preferred to the mother's sister's son (an Atmabandhu expressly mentioned) on the ground of propinquity.

6. Here we have to consider the claims of the mother's sister's son and the mother's brother's son. Both are males, both are Atmabandhus expressly mentioned in the Mitakshara and the Vyavahara Mayukha, both are equally removed from the propositus and they are both related on the mother's side.

7. Considering the point with reference to the texts exclusively apart from the decisions, it is clear from the Mitakshara Ch II, Section VI, placita 1 and 2 (Stokes' Hindu Law Books, p. 448) that both are Atmabandhus, and there is nothing to guide us beyond this that "by reason of near affinity the cognate kindred of the deceased himself are his successors in the first instance: on failure of them his father's cognate kindred ; or if there be none his mother's kindred." The only ground for determining the preference of one Bandhu over the other is "near affinity" or propinquity, the word in the text for it being antarangatva. It is now settled beyond controversy that the lists of Bandhus are merely illustrative and not exhaustive and that nothing is laid down by Vijnanesvara beyond this that Atmabandhus are to be preferred to Pitribandhus and that Pitribandhus are to be preferred to the Matribandhus, and that the reason of the preference is propinquity. In the Vyavahara Mayukha also we find the same thing, and nothing more. (See Mandlik's Hindu Law, p. 82). After referring to the Smriti texts, specifying the different classes of Bandhus, which have been quoted by Vijnanesvara in the Mitakshara, the author of the Mayukha says that the order (of succession) is as stated in the text. I have given the English translation of this passage as rendered by Mr. Mandlik, who has added a foot-note expressing his opinion that the order must be taken to have been specified in the texts even as regards each class of Bandhus. Apart from the argument based on this note, there is nothing in the Vyavahara Mayukha which throws any further light on the point now under consideration. It is not necessary to refer to other works on Hindu law. It is enough to point out that there is nothing in the texts or the commentaries which are accepted as authorities in this Presidency to show that any test for determining the question of preference among Bandhus of the same class other than that of propinquity is laid down.

8. All other considerations to be found in modern books on Hindu law are useful in determining the nearness of affinity : but there is no express reference thereto to be found in the texts, the only test mentioned being propinquity. Speaking with reference to this Presidency I think that the only test that has been applied, and that ought to be applied, is propinquity to the deceased. Applying that test

to the facts of this case without reference to any other consideration it seems to me that both are equally removed from the propositus.

9. It is urged, however, that when that is the case, considerations of the relative religious efficacy of the oblations offered by these relations ought to be considered. Both the Madras and Allahabad High Courts have rejected the argument of relative religious efficacy in the case of these two Bandhus. It is held that it affords no safe basis for preferring one to the other. I do not consider it necessary to deal with this argument at length. In this Presidency the test has not been accepted as sound in the case of distant relations-like Bandhus. Its application is apt to lead to confusion: also the test when applied to the case of the two Bandhus that we are concerned with fails to yield any such result as would justify the preference of one over the other. It is enough to state that on this point I accept the view of the Madras and Allahabad High Courts.

10. It is next urged that on the ground stated in the foot-note in Mr. Mandlik's book on Hindu Law to which I have already referred the mother's sister's son should be preferred to the mother's brother's son as having been mentioned first. Though there is no express reference to this foot-note in the judgment in Mohandas v. Krishnabai it appears that as far back as 1881 the opinion was expressed with reference to the words used by Nilakantha in the Vyavahara Mayukha that thereby he seems to intend no more than is stated in the Mitakshara. It is difficult to assume that the foot-note in Mandlik's Hindu Law, which was published in 1879, was not brought to the notice of the learned Judges. Apart from that, however, I think that the opinion expressed with reference to the meaning of the words used in the Vyavahara Mayukha is correct, if I may say so with respect. I do not desire to discuss this point in detail. I do not think it is reasonable to apply the rule referred to in the foot-note to the order mentioned in the Smriti texts relating to the illustrative lists of Bandhus. I can understand the force of this argument when applied to a text like the well-known text where the different heirs are mentioned in their order. But where the Bandhus are only intended to be indicated, it seems to me that it is not right to attach any importance to the order in which they are mentioned in each class. I feel justified in taking this view by the fact that Vijnaneshvara does not refer to this order as having any significance though he expressly points out that the order is indicated as regards each class of Bandhus.

11. It is further urged on behalf of the respondent that as two females intervene between the propositus and the defendant No. 2, he should rank after defendant No. 1 as an heir; and the decision in Tirumalachariar v. Andal Ammal I.L.R. (1907) Mad. 406 has been relied upon in support of that general consideration. The Allahabad High Court has decided in favour of the mother's brother's son relying to a certain extent upon this ground. It seems to me, however, that there is no basis in the Mitakshara or the Vyavahara Mayukha for the general proposition which has been stated in the above Madras case somewhat too broadly. I quite admit that the circumstance of more females than one

intervening would render it easy for the Court in many cases to apply the test of propinquity, and to decide who is the nearer Bandhu. But I do not think that a Bandhu could be necessarily described as being more remote than another on the mere ground of two females intervening between him and the propositus. It depends upon the particular relationship. No doubt among the modern writers on Hindu law there is weight given to this consideration; and in the various tables that are to be found the effect of this consideration is apparent. But all the writers are by no means agreed, for instance it appears from Golap Chandra Sarkar Sastri's treatise on Hindu Law, p. 96 (4th Edn.), that in his opinion there is no basis for preferring one to the other on this ground. I refer to this opinion as showing that the proposition is not universally accepted. But I base my view upon the fact that the propinquity is the only test sanctioned in the Mitakshara and no general proposition which is not in terms sanctioned by Vijnanesvara can be laid down as being decisive. I think that each case should be dealt with on the basis of the particular relationships existing between the Bandhus and the propositus: and speaking with reference to these two Bandhus in particular, I do not think that the mother's brother's son can be said to be nearer to the propositus than the mother's sister's son. In the recent case of Dattatraya v. Gangabai (1921) 24 Bom. L.R. 69 in which this Court had to consider the subject of the succession among Bandhus, we declined to prefer one Bandhu to the other on the ground of the mother of the one being a preferential heir to the mother of the other. If the preference which may exist among the mothers is not to have any decisive significance, I do not see how the fact of the father of one Bandhu being a preferential heir to the mother of another Bandhu, if those persons were alive, could be allowed to determine the relative rights of their respective sons. As regards these particular Bandhus, I think that this consideration is not sufficient to justify the preference of one to the other. The antarangatva (near affinity) of these two relations is much the same, and I am unable to discover any substantial ground for ranking one above the other. The result is that both are equally distant, and are equally entitled. It is clear that in the texts in which these Bandhus are mentioned as illustrative of the class, there is no indication as to their relative rights inter se: and generally speaking it may be said that where the relationship is equally distant and there is no firm basis to prefer the one to the other, there is no reason why both should not be allowed to take equally. Just as nothing is indicated as to the order in which the Bandhus in each class are to take inter se, nothing is indicated as to their taking equally in some cases. This alternative has been generally ignored in the discussions as to succession among Bandhus, and sometimes the order is settled as if this alternative was not open at all. It seems to me, however, that in the case of these Bandhus when there is nothing definite to enable the Court to decide the question of preference, there is no reason why we should go out of our way to find out some possible ground for such preference. In such a case there can be no objection to give effect to the view that as both are equally near to the propositus they ought to take equally.

12. I would, therefore, allow the appeal to that extent, set aside the decree of

the lower Court and direct that the property of Nagappa be equally partitioned between the defendant No. 2 and defendant No 1 and that the property sold to plaintiff be assigned to the share of defendant No. 2 as far as possible and handed over to the plaintiff.

13. Each party to bear his own costs throughout. The partition of lands liable to pay assessment to be effected by the Collector as provided by the Code of Civil Procedure.

Norman Macleod, C.J.

14. I have nothing to add. I entirely agree with the conclusions arrived at in the judgment which has just been read.