THE

# INDIAN LAW REPORTS,

## Calcutta Series.

## APPELLATE CIVIL.

*Jenkins C. J., and N. R. Chatterjea J.*

KEDAR NATH BANERJEE 1915

*v.* June 1.

HARI DAS GHOSE.*

*Hindu Law. Succession—Dayabhaga School—Whether great-grandfather's son's daughter's son or maternal uncle preferential heir—Stare decisis.*

In a Dayabhaga family the great-grandfather's son's daughter's son is entitled to succeed as heir in preference to the maternal uncle.

*Kailash Chandra Adhikari* v. *Karuna Nath Chowdhry* (1) followed.

The principle of spiritual benefit regarding the succession in a Dayabhaga family laid down by the Full Bench in *Gooroo Gobind Shaha's Case* (2) cannot be questioned now.

SECOND Appeal by Kedar Nath Banerjee, the defendant No. 1.

The relationship of the parties will appear from

Appeal from Appellate Decree, No. 1160 of 1913, against the decree of B. G. Bose, Subordinate Judge of Burdwan, dated Dec. 23, 1912, affirming the decree of Purna Chandra Bose, Munsif of Kalna, dated Sep. 12, 1911.

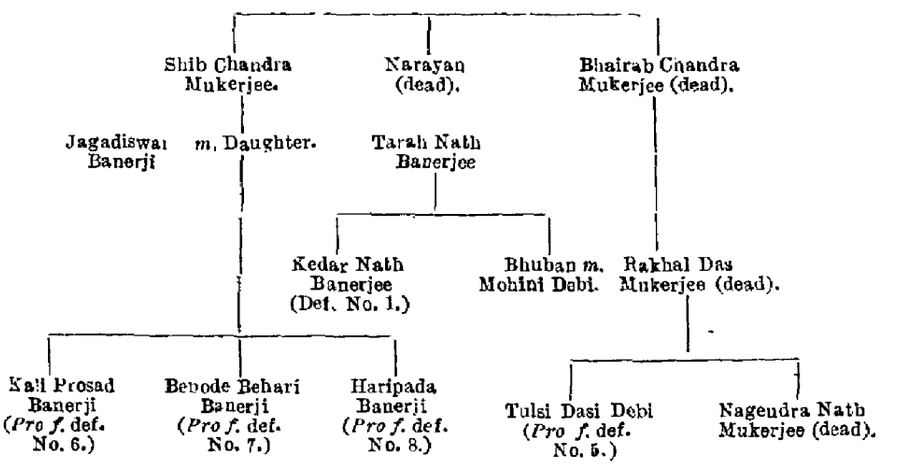
(1) (1913) 18 C. W. N. 477.

(2) (1870) 13 W. R. (F. B.) 49 : 5 B. L. R. 15.

1915

KEDAR NATH BANERJEE v. HARI DAS GHOSE.

the following genealogical tree :—




Plaintiff purchased the properties in suit in 1910 from the *pro formâ* defendants Nos. 6, 7, 8, who are Nagendra Nath Mukerjee's great-grandfather's son's daughter's sons. After Nagendra Nath's death his mother Bhuban Mohini succeeded to the properties. After her death in 1900 the *pro formâ* defendants Nos. 6, 7 and 8 have been in possession of the properties in suit. In 1910 the defendant No. 1, who is the maternal uncle of the late Nagendra Nath Mukerjee, took possession of the said properties dispossessing the plaintiff who, thereupon, brought this suit for declaration of title and recovery of possession. Both the Courts below held that the *pro formâ* defendants Nos. 6, 7 and 8 being Nagendra Nath Mukerjee's great-grandfather's son's daughter's sons succeeded to the properties in suit in preference to the defendant No. 1, the maternal uncle, who then preferred this second appeal to the High Court urging that the maternal uncle was the preferential heir.

*Babu Rishindra Nath Sarkar*, for the appellant. As my learned leader Babu Golap Chandra Sarkar is too ill to attend Court, it now devolves on me to try and discuss the texts of Hindu law on this vexed

question of the position of the maternal uncle as heir. Two questions are raised in this appeal.

*First*, whether on the face of plaintiff's case, as stated in the plaint, he is entitled to any relief, for I say his suit is not maintainable.

*Secondly*; whether defendant No. 1 who is the maternal uncle is preferable as heir to the great-grandfather's son's daughter's son.

Shib Chandra is the brother of Bhairab Chandra, and Nagendra Nath Mookerjee the grandson of Bhairab was the last male owner.

[*Babu Nagendra Nath Ghose* (for respondent). In *Kailash Chundra Adhikari* v. *Karuna Nath Chowdhry* (1), a similar question was decided—Mr. Justice N. R. Chatterjea being a party to that decision. The point was never taken that the suit is not maintainable.]

But it arises all the same, and the suit ought to have been dismissed, because the property is in the enjoyment of Tulsidas Debi who is legally entitled to maintenance out of the estate left by Nagendra, and so long as she is living—as they say the property was given to her for maintenance—the purchaser has purchased nothing. The property belongs to Nagendra and Tulsi is his widowed sister and Nagendra maintained his sister.

[N. R. CHATTERJEA J. Can that right be enforced? A married widowed sister is not entitled to maintenance: see *Mokhada Dassee* v. *Nundo Lall Haldar* (2), a decision of Maclean C. J. and two other Puisne Judges.]

I shall explain that ruling later. Now I shall deal with the second question, *viz.*, of the maternal uncle being the preferential heir.

[N. R. CHATTERJEA J. In spite of the decision in

(1) (1913) 18 C. W. N. 477. (2) (1901) I. L. R. 28 Calc. 278.

1915

KEDAR NATH BANERJEE v. HARI DAS GHOSE.

*Kailash Chandra Adhikari* v. *Karuna Nath Chowdhury* (1), grandfather's brother's daughter's son is preferable to the maternal uncle as heir.]

I am trying to re-open the question only as regards the position of the maternal uncle.

[N. R. CHATTERJEA J. Is not this matter concluded by the Full Bench decision in *Gooroo Gobind Shaha* v. *Anund Lal Ghose* (2), though it may not be right?]

I respectfully submit that the Full Bench left open the question of preferential right.

The maternal uncle is a *bandhu*, *bhinna-gotra sapindas* are *bandhus*. Sister is not an heir under the Bengal school though sister's son is.

[N. R. CHATTERJEA J. We have to go by the *Dayabhaga* as interpreted the Full Bench decision in *Gooroo Gobind Shaha's Case* (2).

The principle is that this question should be finally decided and fixed. The House of Lords have held that when there is doubt as to a principle decided previously by a Bench consisting of two or more Judges the matter ought to be re-opened.

In *Kedar Nath Roy* v. *Amrita Lal Mookerjee* (3), Mookerjee J. declined to re-open the matter because it was not *res integra*. That the great-grandfather's son's daughter's son is an agnate is not expressly laid down in the *Dayabhaga*. The *Mitakshara* is the law in Bengal save and except when and as modified by the *Dayabhaga*. I rely on Chapter IX, section 6, paragraph 20 of the *Dayabhaga* and also on the *Dayatatwa* paragraphs 60—62 (*vide* Golap Chandra Shastri's translation, 2nd Edition, page 74). Only the three ancestor's daughter's sons are mentioned as heirs.

(1) (1913) 18 C. W. N. 477.
(2) (1870) 13 W. R. (F. B.) 49; 5 B. L. R. 15.
(3) (1912) 16 C. L. J. 342, 348.

[*Babu Nogendra Nath Ghose.* It is really a matter for the Legislature. Once Your Lordships decide to go into this question you must re-open the whole matter and upset all the Full Bench decisions.]

[JENKINS C.J. Your point is that the maternal uncle is named, but nowhere is the great-grandfather's son's daughter's son named.]

Yes, father's brother's daughter's son can, in some respects, be called a preferential heir in point of propinquity.

I can cite cases followed for 40 years which have been upset in Bombay and England.

See Dayabhaga (Colebrook's Translation, edited by G. C. Sarkar), Ch. XI, s. VI, paras. 20—26, 33, also the translation of Sree Krishna's Commentary, p. 192. These authorities were not placed before Mr. Justice Banerjee.

Golap Chandra Sastri's Hindu Law, 4th Edition. p. 332, says "down to these." In Dayatatwa, p. 74, the author says that the list is exhaustive.

[N. R. CHATTERJEA J. What does एतावत्पर्य्यन्तानां mean in the passage एतावत्पर्य्यन्तानां धनिभोग्यपिण्डदातृणामभावे धनिदेयपिण्डदातृणां मातामहमातुलादीनामधिकारः तत्रापि प्रथमं मातामहस्तदभावे मातुलतत्पुत्रयौत्राणां क्रमेणाधिकारः * just referred to by you from Srikrishna's Gloss on the Dayabhaga?]

It means those heirs that are specifically mentioned by Jimutavahana, the author of the Dayabhaga.

[N. R. CHATTERJEA J. But Colebrooke has translated the passage as "on the failure of all such kindred." "Such kindred" includes those that are held to be heirs by the Full Bench.]

The meaning of the passage is to be gathered not from a single word or passage but from the whole section which deals with the subject. Jimutavahana

* Srikrishna's Gloss on Dayabhaga, Ch. 11 (end).

1915

KEDAR NATH BANERJEE v. HARI DAS GHOSE.

has specifically mentioned his list of heirs to be exhaustive.* In this connection your Lordships will be pleased to see Sarkar's Hindu Law, pages 322, 324 and 346, 359 and Dr. J. N. Bhattacharaya's Hindu Law, pages 477, 487 of 2nd edition.

[N. R. CHATTERJEA J. Can you explain why these extra words "*as offer*, etc.," are added ?]

Paragraphs 20 and 26 show that the list given in Dayabhaga is exhaustive. This translation of the Dayatatwa has been made after the Full Bench decision in *Digumber Roy Chowdhry* v. *Moti Lal Bundopadhya* (1). The author of the Dayabhaga did not contemplate that these relations would be added by the Full Bench.

So far as regards text-books. There are in addition several decisions of this Court.

[*Babu Nagendra Nath Ghose.* It cannot be said that the principle of propinquity supersedes the principle of *spiritual benefit.*]

According to principles of Hindu Law, the throwing of bones in the Ganges confers the greatest spiritual benefit.

[N. R. CHATTERJEA J. Offering *pinda* at Gaya (which can be done even by a co-villager) and throwing bones in the Ganges can be done *once* only, but the *Parban Sradh* is performed several times in the year.]

In *Gooroo Gobind Shaha's Case*(2) the question was whether the father's brother's daughter's son was an heir. But their Lordships, including Sir Barnes Peacock C. J. and Mitter J., kept open the question of priority.

[N. R. CHATTERJEA J. For nearly half a century this theory has been followed.]

*Dayabhaga, Ch. XI, Sec. VI, 20-26. (1) (1883) I. L. R. 9 Calc. 563.
(2) (1870) 13 W. R. (F. B.) 49.

But the Judicial Committee of the Privy Council, in spite of the principle of *stare decisis* which is also binding on it, set aside the adoption of an only son, in an appeal from the Madras High Court, and this is followed in Bombay where for forty years it had been otherwise. And your Lordships have the power to reconsider this question of the maternal uncle in a Full Court. I am told that the vakil, who appeared for the respondent in the Full Bench case of *Gooroo Gobind Shaha* (1) and conceded about the preferential position against the *sakulyas*, afterwards sat as a Judge in the subsequent Full Bench case of *Digumber Roy Chowdhry* v. *Moti Lal Bundopadhya* (2).

The principle of spiritual benefit has been held to be inapplicable to *stridhan* property. Regarding the powers of the Full Court and the binding effect of previous decisions or the principle of *stare decisis*, I refer to Halsbury's Laws of England, Vol. XVIII, para. 536, pages 211 and 212, also to *The Queen* v. *Edwards* (3), *Pearson* v. *Pearson* (4), *Mills* v. *Armstrong* (5), and recently in the case of *Kreglinger* v. *New Patagonia Meat & Cold Storage Co.* (6), Haldane, L. C. has modified the principle "once a mortgage always a mortgage" that has been followed for more than 100 years.

[*Babu Nogendra Nath Ghose.* What Shastri Golap Chandra Sarkar overlooks is the fact that the daughter's sons have a place in the scheme of the Hindu family which at its foundation is agnatic, whereas the maternal uncle is a rank outsider. At present the spiritual theory works out an order of succession which is more in accord with the

(1) (1870) 13 W. R. (F. B.) 49.
(2) (1883) I. L. R. 9 Calc. 563.
(3) (1884) 13 Q. B. D. 586, 590.
(4) (1884) 27 Ch. D. 145, 154, 158.
(5) (1888) L. R. 13 A. C. 1.
(6) [1914] A. C. 25.

1915

KEDAR NATH BANERJEE v. HARI DAS GHOSE.

feelings of the people whatever reformers like Shastri Golap Chandra Sarkar have to say to the contrary for the principle he has been fighting for. Perhaps a time may come when the Hindus would require an alteration of the rule of succession to some other principle: but it is not yet. And when it does come, it will have to be settled by the Legislature as was done in England where ascendants could not inherit before the Act of 1833. But there the Judges did not upset the principle that real property could not devolve upwards though the ground alleged was the ridiculous one that water cannot flow upwards. The Legislature had to intervene].

For the view that the principle of spiritual benefit is not the only principle of succession, see the decision of Sale J. in *Toolsee Dass Seal* v. *Srimati Luckhymoney Dassee* (1).

In *Akshay Chandra Bhattacharya* v. *Hari Das Goswami* (2), Mitra J. sitting alone followed the principle of affinity and affection. After the Full Bench decision of *Gooroo Govind Shaha* v. *Anund Lal Ghose* (3) there was another case, *viz.*, of *Kashee Mohun Roy* v. *Raj Gobind Chuckerbutty* (4) which was reversed by the later Full Bench decision in *Digumber Roy Chowdhry* v. *Moti Lal Bandopadhya* (5). Then, in *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (6) and in *Braja Lal Sen* v. *Jiban Krishna Roy* (7) this principle has been doubted; and also in *Toolsee Dass Seal* v. *Luchhymoney Dassee* (8), *Dino Nath Mohunto* v. *Chundi Koch* (9), and *Kedar Nath Roy* v. *Amrit Lal Mookerjee* (10).

(1) (1900) 4 C. W. N. 743.
(2) (1908) I.L.R. 35 Calc. 721, 726.
(3) (1870) 13 W. R. (F. B.) 49.
(4) (1875) 24 W. R. 229.
(5) (1883) I. L. R. 9 Calc. 563.
(6) (1888) I. L. R. 15 Calc. 292, 309.
(7) (1898) I. L. R. 26 Calc. 285.
(8) (1900) 4 C. W. N. 743.
(9) (1889) 16 C. L. J. 14, 17, 18.
(10) (1912) 16 C. L. J. 342, 348.

1915

KEDAR NATH BANERJEE v. HARI DAS GHOSE.

The true test of succession ought to be nearness of blood as well as the doctrine laid down by the Full Bench, *viz.*, the spiritual benefit.

[JENKINS C.J. The Privy Council followed certain works which had been characterised as forgeries in spite of that fact, simply because those works had been followed so long: see the case of *Bhagwan Singh* (1).]

The Full Bench in *Gooroo Gobind Shaha* v. *Anund Lall Ghose* (2) has not expressly laid down that the doctrine of spiritual benefit is the only principle. I am fortunate in that your Lordship Mr. Justice N. R. Chatterjea who decided the case of *Kailash Chundra Adhikari* v. *Karuna Nath Chowdhry* (3) is sitting on this Bench. This question affects every Hindu.

[N. R. CHATTERJEA J. It seems rather too late to object now.]

In the life of a nation 40 years is nothing.

[JENKINS C.J. The present rule was laid down by Mr. Justice Dwarkanath Mitter.]

I do not challenge his decision in the Full Bench case. He left the question of preferential heir open: see *Gooroo Gobind Shaha* v. *Anund Lall Ghose* (2).

[*Babu Nogendra Nath Ghose.* Regarding the Allahabad High Court decision on adoption in *Jai Singh Pal Singh* v. *Bijay Pal Singh* (4) in a recent case that went up to the Privy Council on appeal, *viz.*, *Puttu Lal* v. *Parbati Kunwar* (5), the Subordinate Judge had refused to follow the Allahabad High Court decision and discussed the texts of Hindu Law, but was overruled by the Allahabad High Court

(1) (1899) I. L. R. 21 All. 412, 419; L. R. 26 I. A. 153.

(2) (1870) 13 W. R. (F. B.) 49, 62; 5 B. L. R. 15.

(3) (1913) 18 C. W. N. 477.

(4) (1904) 1. L. R. 27 All 417.

(5) (1915) 19 C. W. N. 841, 847.

1915

KEDAR NATH BANERJEE v. HARI DAS GHOSE.

whose decision was affirmed by the Judicial Committee of the Privy Council, who made strong remarks regarding the conduct of the Subordinate Judge; and that is a very strong argument in my favour.]

Further, I submit, the widowed childless daughter is entitled to maintenance from the estate devolving from her father, and the plaintiff purchased the property with knowiedge that she was in possession as being entitled to maintenance: *see* Sastri's Hindu Law, 4th edition, p. 373.

*Babu Nagendra Nath Ghose*, for the respondent, was not called upon to reply.

JENKINS C.J. The point in contest in this litigation is whether in a Dayabhaga family the great-grandfather's son's daughter's son or the maternal uncle is to be preferred. The proposition only has to be stated to make one realize what an amount of learning and industry the problem might demand. We have had the advantage of having the position of the maternal uncle advocated before us by one who is worthily following in the steps of his distinguished father, and we can say, much as we regret the absence of Babu Golap, we do not feel we have suffered anything in view of the argument that has been addressed to us.

Undoubtedly there are, as Babu Rishindra Nath Sarkar has brought clearly to our notice, a number of considerations that might be brought into play were the matter untouched by authority. But a Full Bench of this Court [in *Gooroo Gobind Shaha's Case* (1) as far back as 13 Weekly Reporter] came to a conclusion as to the principle of succession in a Dayabhaga family which governs this case. It has been treated as governing cases of a similar

(1) (1870) 13 W. R. (F. B.) 49 ; 5 B. L. R. 15.

description by other distinguished Judges whom I name in this particular connection merely because they are Judges who would be particularly familiar with and interested in the questions. The learned Judges are Mr. Justice Gurudas Banerjee (1), Mr. Justice Mookerjee (2) and Mr. Justice N. R. Chatterjea (3). And they one and all have felt that it is not for this Court, at any rate, to question the propriety of that Full Bench decision.

In the case of *Kailash Chundra Adhikari* v. *Karuna Nath Chowdhry* (3), the contesting parties were in the precise position, curiously enough, of those who are now litigating before us, that is to say, the contest there was as here, between the great-grandfather's son's daughter's son and the maternal uncle. There it was decided in favour of the great-grandfather's son's daughter's son. And I see no ground on which we can refuse to follow that ruling. The learned vakil in the course of his argument before us has done his best to depreciate the value of the maxim *stare decisis*. But that is an argument that must be addressed to a higher authority and not to this Court.

There was another argument advanced before us namely, that the possession of Tulsi was such that her existence offers a complete bar to the suit. But that was a point not taken in the lower Courts, or in the original grounds of appeal here. It was a very late development. But obviously the basis of that argument involves an investigation into facts on which it is beyond our competence to embark. We cannot, therefore, give effect to it.

As to the first point, our decision, in obedience to the authorities, is that the plaintiff who claims under

(1) (1889) 16 C. L. J. 14. (1898) I. L. R. 26 Calc. 285.
(2) (1912) 16 C. L. J. 342, 348.
(3) (1913) 18 C. W. N. 477.

1915

KEDAR NATH BANERJEE v. HARI DAS GHOSE.

the great-grandfather's son's daughter's son is entitled to succeed. This is in accordance with the view of the learned Subordinate Judge and the Munsif.

The result is the appeal must be dismissed with costs.

N. R. CHATTERJEA J. I agree that the principle of succession governing this case must be taken to have been settled by the Full Bench decision in *Gooroo Gobind Shaha* v. *Anund Lall Ghose* (1). The particular point raised in this case was decided in the case of *Kailash Chundra Adhikari* v. *Karuna Nath Chowdhry* (2), and I see no reason to alter the opinion which I expressed in that case.

G. S. *Appeal dismissed.*

(1) (1870) 13 W. R. (F. B.) 49; 5 B. L. R. 15.

(2) (1913) 18 C. W. N. 477.