

APPELLATE CIVIL.

Before Ghose and Mukherjee J.J.

1939

ANUKUL CHANDRA BHATTACHARJYA

Feb. 15, 17, 20,
21.

v.

SURENDRA NATH BHATTACHARJYA.*

Hindu Law—Inheritance—Dâyabhâga School—Deaf and dumb persons when excluded from inheritance.

Per GHOSE J. Under the Hindu law prevailing in Bengal deafness and dumbness, in order to be a bar to inheritance, must be shown to be both congenital and incurable.

Charu Chunder Pal v. Nobo Sunderi Dasi (1) distinguished.

When there are texts of two *smṛiti*-writers on points as to which one is silent they must be read as supplementing each other as far as possible.

Opinion of Shah J. in *Savitribai v. Bhaubhat Sakharambhat Khadilkar* (2) approved and relied on.

As regards the principle of exclusion from inheritance, the law-givers and commentators on Hindu law have in view only those defects which are of a very serious nature.

Gunjeswar Kunwar v. Durga Prashad Singh (3) and *Mohesh Chunder Roy v. Chunder Mohun Roy* (4) referred to.

Per MUKHERJEE J.—Deafness and dumbness, in order that they might exclude a person from inheritance, must be in existence from the date of his birth.

There is nothing in the text of *Jimutavâhan* or even of the *Mitâksharâ* or of the *smṛiti*-writers which goes to support the view that according to Hindu law, before a person can be excluded from inheritance, it must be established that deafness and dumbness which are proved to be congenital are beyond cure.

Mohesh Chunder Roy v. Chunder Mohun Roy (4) and *Charu Chunder Pal v. Nobo Sunderi Dasi* (1) distinguished.

*Appeal from Appellate Decree, No. 1801 of 1936, against the decree of M. H. B. Lethbridge, District Judge of Burdwan, dated Aug. 5, 1936, reversing the decree of Narendra Nath De, First Munsif of Burdwan, dated Nov. 14, 1935.

(1) (1891) I. L. R. 18 Cal. 327.

(3) (1917) I. L. R. 45 Cal. 17;

(2) (1926) I. L. R. 51 Bom. 50.

L. R. 44 I. A. 229.

(4) (1874) 14 B. L. R. 273.

The word "ādi" in *Yajnavalkya's* text cannot be construed *ejusdem generis* along with the expression "suffering from incurable disease," which connotes a separate group altogether, and the words "and others" must be construed as including persons who suffer from similar defects but not necessarily from a disease, which is incurable.

View of Shah J. in *Savitribai v. Bhaubhat Sakharambhat Khadilkar* (1) dissented from.

1939

*Anukul Chandra
Bhattacharjya*
v.
*Surendra Nath
Bhattacharjya.*

APPEAL FROM APPELLATE DECREE by the plaintiff.

The facts of the case are sufficiently stated in the judgment.

Amarendra Nath Bose and *Nanibhushan Mukherjee* for the appellant. In order to exclude Kangali, from inheritance, through whom the plaintiff is claiming, it must be shown not only that he was born deaf and dumb but also that this particular defect of his was incurable. This is the view of modern text-book writers supported by recorded decisions. Mulla's Hindu Law, 8th Ed., s. 98 and p. 103, and cases cited therein.

Hira Lal Chakravarti and *Rabindra Nath Bhattacharya* for the respondents. This particular question which arises for decision in this case was neither raised nor decided in the cases referred to by Mulla, which are all on different points. All the original texts from Manu downwards only speak about these ailments as being a bar to inheritance when they are congenital. Incurability is spoken of in connection with other classes of infirmities. It is therefore not necessary that deafness and dumbness should be proved to be incurable also. Original texts cited.

Cur. adv. vult.

GHOSE J. This is a Second Appeal by the plaintiff in a suit for establishment of title to land and for recovery of *khas* possession. The land belonged originally to one Ekkarhi Bhattacharjya, who died leaving a son named Kangali and a daughter named

1939

*Anukul Chandra
Bhattacharjya*

v.

*Surendra Nath
Bhattacharjya.**Ghose J.*

Shilabati. Kangali, who was born in 1315 B.S., left home in 1333 B.S. and has not been heard of since then, so it is presumed that he is dead. He did not marry. Shilabati died childless in 1336 B.S. The plaintiff's case is that he being the nearest heir as the son of Ekkarhi's brother has inherited the disputed property. The suit is contested by defendant No. 1, who is the husband of Shilabati, now deceased. His case is that Kangali was born deaf and dumb and so was excluded from inheritance, and that the property ultimately devolved on defendant No. 1 after the death of Shilabati and her son.

The learned Munsif took up the question whether Kangali's alleged deafness and dumbness were congenital and incurable. Upon the evidence he held in the negative and in that view he decided that Kangali had inherited the disputed properties on his father's death and so the plaintiff has now become the heir of Kangali. Accordingly he decreed the suit. On appeal, the learned District Judge decided upon the evidence that Kangali was a congenital deaf mute and as such debarred from inheritance. He, therefore, disagreed with the Munsif and dismissed the suit. Hence the Second Appeal by the plaintiff.

In this Second Appeal, it is contended that the judgment of the learned Judge below is not a proper judgment of reversal as he has not properly considered the points upon which the trial Court decided in favour of the plaintiff's case. The learned Judge has considered three items of documentary evidence saying that they were mainly relied on by the Munsif, namely, the fact that Kangali's name was recorded in the settlement proceedings, that, when filing objections under s. 103 of the Bengal Tenancy Act, the defendant did not base his case on the allegation that Kangali was deaf and dumb, and thirdly, that Kangali's name was mutated in respect of a revenue paying estate in the *Touzi* Register. The learned Judge holds that these items of documentary evidence

cannot outweigh the oral evidence in favour of the defence and he remarks that the learned Munsif admitted that the oral evidence that Kangali was deaf and dumb was clearly in favour of the defence. The learned Judge, however, omits to consider what the Munsif did consider, *viz.*, whether the witnesses are interested and how far their evidence would stand the test of consideration in the light of probabilities. The learned Munsif also pointed out that the plaintiff had bitter enmity with the defendant No. 1 and his witness Dr. Manmatha Nath Mukherji (D. W. 6). It seems to me that the learned Judge below did not consider the evidence in all its aspects as the learned Munsif did.

I, therefore, accept the contention that the judgment is not a proper judgment of reversal. On that ground it must be set aside and the matter should be remanded to the lower appellate Court for fresh consideration.

There is, however, a point of law taken in this appeal and it is necessary that it should be decided at this stage. Mr. Bose for the appellant before us has contended that in order to exclude Kangali from inheritance it must be shown not only that he was born deaf and dumb, but also that this particular defect of his was incurable. He points out that the learned Judge below, although he finds that Kangali was a congenital deaf and dumb, said nothing about the defect being incurable. The judgment of the learned Munsif, on the other hand, shows that he had before him the question as to whether Kangali's alleged deafness and dumbness were both congenital and incurable. There was no dispute on the question of law before him and it seems to have been assumed that even if it was proved that Kangali was born deaf and dumb then, having regard to the circumstances, his deafness and dumbness were also incurable. I cannot say that such a view is unreasonable and it seems to me that the parties went

1939

*Anukul Chandra
Bhattacharjya*

v.

*Surendra Nath
Bhattacharjya.**Ghose J.*

1939
 Anukul Chandra
 Bhattacharjya
 v.
 Surendra Nath
 Bhattacharjya.
 Ghose J.

to trial upon the case that, if it was proved that Kangali was born deaf and dumb, then his defect was not only congenital but incurable.

In this case, therefore, it must be said that if the lower appellate Court finds upon the evidence that it has been proved that Kangali was born deaf and dumb, then a separate question of fact as to whether that deafness and dumbness were also incurable would not arise for decision. Nevertheless, the question has been raised in the form of a question of law, namely, that in order to disqualify from inheritance it must be shown that deafness and dumbness should be both congenital and incurable. That position is contested by Mr. Chakravarti for the respondent.

Modern text-book writers state that deafness and dumbness, in order to exclude from inheritance, must be both congenital and incurable. In these text-books this statement is sought to be supported by reference to reported decisions. See, for instance, D. F. Mulla's Principles of Hindu Law, 8th Ed., s. 98, p. 103, where the cases are cited. Mr. Chakravarti has pointed out that these cases do not contain any express decision on the point and it, therefore, remains to be decided whether this statement of the text-book writers can be supported by authorities. The point was suggested to be raised in the case of *Charu Chunder Pal v. Nobo Sunderi Dasi* (1). That case, however, was decided upon a different point and a different set of facts. At p. 332 of the report Banerjee J. says as follows:—

A good deal of argument was addressed to us on behalf of the appellant to show that dumbness in order to disqualify a person from inheriting need not be congenital; and if it were necessary to decide that question in this case, I should have felt inclined to answer it in favour of the appellant's contention. But I do not think it necessary to go into that question here.

So the point was not decided. The opinion of Banerjee J. which was undoubtedly of great weight,

was considered by Shah J. in the case of *Savitribai v. Bhaubhat Sakharambhat Khadilkar* (1). In that case it was expressly decided that, under the Hindu law, dumbness must be congenital in order to be sufficient to disqualify an heir from inheritance. Shah J. went further and gave it as his opinion that in order to constitute a disqualification, this particular infirmity must be shown to be incurable. In coming to the decision that dumbness must be congenital, the learned Judges relied on the case of *Vallabhrám Shivnáráyan v. Bái Harigangá* (2); and some other Bombay decisions were referred to. This Bombay case appears to be the only express decision on the point we are considering. We have been referred to the *Dáyabhága*, Ch. V., the relevant provisions being in verses 6, 7, 9, 10, 11, 17 and 18 and also to the *Mitákshará*, Ch. II, Sec. X, the relevant provisions being in verses, 1, 2, 3 and 7. It is conceded that the relevant passages in other commentaries like *Dáyakrama Sangraha* and *Dáyatatwa* throw no further light on the subject. As between the *Dáyabhága* and the *Mitákshará*, there is a difference in the reading of the text of *Yájnavalkya*. *Jimutaváhana* and *Vachaspati Misra* favour the reading "adi" (and others) which gives to the text of *Yájnavalkya* perhaps a wider significance. But it is not contended before us that with regard to the question of exclusion from inheritance on this particular point there is a difference in the law in vogue in the two provinces, and therefore we are not concerned here with a supposed conflict of authorities as between the two commentaries. For this reason, I am disposed to agree with the reasoning of Shah J., when he refers to a rule that where there are texts of two *smṛiti*-writers on points, as to which one is silent, they must be read as supplementing each other as far as possible. The

1939

Anukul Chandra
Bhattacharjya

v.

Surendra Nath
Bhattacharjya.

Ghose J.

(1) (1926) I. L. R. 51 Bom. 50.

(2) (1867) 4 B. H. C. R. (A. C. J.)

1939
 Anukul Chandra
 Bhattacharjya
 v.
 Surendra Nath
 Bhattacharjya.
 —
 Ghose J.

reference is to the texts of Manu and *Yājñavalkya* on which both commentators rely on this point. For my purpose, I may take the two defects, deafness and dumbness, together, as indeed they go together in real life when the defects are congenital. As to the first question as to whether they should be congenital in order to disqualify from inheritance, it is to be noted that the texts quoted in the commentaries are not clear on the point. Manu mentions "born blind and "deaf" but "dumb" without the qualification "born"; *Yājñavalkya* does not mention "dumb" or "deaf" but mentions "blind" without "born" and he ends with the words "incurable disease", as read in the *Dāyabhāga*. But the annotations both in the *Dāyabhāga* and the *Mitāksharā* show that the commentators themselves adopt a liberal interpretation and, reconciling the texts, they assume dumbness to be a disqualification in the same sense as blindness. In the 18th verse the *Dāyabhāga* considers an argument suggesting deafness and dumbness to be congenital. It is too late in the day now to say that dumbness, like deafness, in order to disqualify need not be congenital. In some cases before the Judicial Committee the point was not disputed; for instance the case of *Hira Singh v. Ganga Sahai* (1) and the case of *Muddun Gopal Lal v. Khikhinda Koer* (2). There it was assumed that a person born deaf and dumb was excluded from inheritance under the Hindu law. From this it would be a small step further to say that deafness and dumbness should not only be congenital, but also incurable. On this point, I am in sympathy with the reasoning adopted by Shah J. in the Bombay case. I have already referred to the 10th verse in the *Dāyabhāga* which gives a reading of the text of *Yājñavalkya* as concluding with the words "a person afflicted with an "incurable disease". The corresponding passage in the *Mitāksharā* concludes with the words "as well as "others similarly disqualified". As I have already

(1) (1883) I. L. R. 6 All. 322 ;
 L. R. 11 I. A. 20.

(2) (1890) I. L. R. 18 Cal. 341;
 L. R. 18 I. A. 9.

stated, the reading of the text in the *Mitāksharā* is wider, and advantage is taken of this by the commentator in the 3rd verse, where he seeks to embrace in the term "others" a number of persons including the dumb, the whole group being composed of diverse and incongruous elements. See the remarks of Coutts Trotter J. in *Pudiava Nadar v. Pavanasa Nadar* (1), where he points out that some of the disqualifications are so vague that no Court of law could now assert their validity. But although the concluding words of *Yājñavalkya* are differently read, it is clear on both readings that *Yājñavalkya* does not profess to give an exhaustive list of disqualified persons. I agree with Shah J. in thinking that the law-givers and commentators have in view only those defects which are of a very serious nature. If it be possible to read in the commentaries the provision that deafness and dumbness must be congenital, it does not seem to be difficult to read the further provision that those infirmities must also be incurable. *Yājñavalkya* mentions "incurable disease" as a generic class and it seems to me to be too narrow a view to take to say that a physical infirmity, which may not be a disease but which at the same time is incurable, is not included as a disqualification. In the case of *Gunjeshwar Kunwar v. Durga Prasad Singh* (2), their Lordships of the Judicial Committee quote with approval the remarks of Jackson J. in the case of *Mohesh Chunder Roy v. Chunder Mohun Roy* (3):—

A rule of Hindu law, which is relied upon as preventing the natural course of inheritance, ought to be clear and unmistakable.

It seems to me that where there is evidence to show that deafness and dumbness, though congenital may be cured by treatment, to hold that such a defect would still be a bar to inheritance would be repugnant to one's sense of justice. So in the 7th verse the

(1) (1922) I. L. R. 45 Mad. 949, 970.

(2) (1917) I. L. R. 45 Cal. 17 ;

L. R. 44 I.A. 229.

(3) (1874) 14 B. L. R. 273, 276.

1939

Anukul Chandra
Bhattacharjya

v.

Surendra Nath
Bhattacharjya.

Ghose J.

1939

*Anukul Chandra
Bhattacharjya*

v.

*Surendra Nath
Bhattacharjya.**Ghose J.*

Mitāksharā states that if the defect be removed by medicaments or otherwise the right of participation takes effect.

In my view, therefore, the modern text book writers are correct in stating that deafness and dumbness in order to be a bar to inheritance, must be shown to be both congenital and incurable. It may be that in a particular case the one would follow from the other. It may also be that with the progress of medical science incurability may not be a reasonable inference. In that case the disqualification would be obsolete. But that is a matter with which I am not concerned here.

The result is that the judgment appealed against must be set aside and the case remanded to the lower appellate Court for fresh consideration upon the evidence on the record. As I have already stated, if it be held upon the evidence in this particular case that Kangali was born deaf and dumb then it would follow upon the case made by the parties that these defects in this case are incurable. So the further question of incurability as a question of fact will not arise for consideration.

Costs will abide the result.

MUKHERJEA J. I regret that I have not been able to take the same view as my learned brother has taken on the question of law involved in this case. Having regard, however, to the opinion which he has expressed on the particular facts of the present case, the difference of opinion would not affect the result of this appeal and I would concur in the order of remand which has been passed by my learned brother.

It is necessary, however, to state my own reasoning in support of the view, which I am taking on the point, as to whether for excluding an heir from inheritance according to Hindu law, it is necessary not only that he must be born blind and deaf but that the defects must be proved to be incurable.

In this case the facts are not disputed. The properties in suit belonged admittedly to one Ekkarhi who died in 1314 B.S. leaving a widow Panchu Bala and a daughter named Shilabati. Panchu Bala gave birth to a posthumous son shortly after the death of her husband and this son was named Kangali. Kangali left his house some time in the year 1333 B.S. and since then has not been heard of. It is the case of both sides that Kangali is either dead or must be presumed to be so. The question arose as to who would succeed to the properties left by Ekkarhi. According to the plaintiff the properties left by Ekkarhi would devolve upon Kangali and after Kangali's death upon the present plaintiff, who is the nearest agnate and heir according to Hindu law. The case of the defendant No. 1, on the other hand, is that Kangali was born blind and deaf and consequently he was excluded from inheritance. The properties of Ekkarhi, therefore, devolved upon his widow, his daughter Shilabati and Shilabati's son in succession and on the death of Shilabati's son it devolved upon defendant No. 1, who is the husband of Shilabati. The whole controversy, centres round the point as to whether or not Kangali was excluded by reason of his physical infirmities from succeeding to the properties left by his father. The trial Court answered this question in the negative but the lower appellate Court has answered it in the affirmative.

Mr. Bose, who appears in support of the appeal, has put forward a two-fold contention. In the first place he has argued that the finding of the lower appellate Court is insufficient to warrant the dismissal of the plaintiff's suit, inasmuch as it is not enough, according to Hindu law, to exclude a person from inheritance simply because he is born deaf and dumb; it must further be proved and established as a fact that that infirmity was of an incurable type. In support of this contention Mr. Bose has placed reliance upon the statement of law as contained in

1939

*Anukul Chandra
Bhattacharjya*
v.
*Surendra Nath
Bhattacharjya.*
Mukherjea J.

1939

D. F. Mulla's Principles of Hindu Law, 8th Ed.,
s. 98.

Anukul Chandra
Bhattacharjya

v.
Sarendra Nath
Bhattacharjya.

Mukherjee J.

The second argument of Mr. Bose is that the judgment of the lower appellate Court is not a proper judgment of reversal in law and the lower appellate Court has not considered several material points upon which the trial Court based its decision.

I may say at once that I am in entire agreement with the view taken by my learned brother on the second contention raised by Mr. Bose. The lower appellate Court has not considered the entire evidence on the record and he has omitted to advert to certain material things upon which the trial Court placed reliance. One fact is that Kangali was invested with sacred thread at the proper time and in the usual way and the second thing is that there was a long silence on the part of both defendant No. 1 and his wife, for which no explanation is forthcoming. In these circumstances, I agree with my learned brother that the case should be sent back for further investigation.

On the first question, however, I am constrained to take a different view from that taken by my learned brother. In my opinion there is no rule of Hindu law which requires that, for the purpose of excluding an heir from inheritance, it is not only necessary to prove that the defects of the ear or the speech were congenital but were also incurable. I would first of all refer to the texts of the earliest *smṛiti*-writers on this point.

The text of *Yājñavalkya*, upon which *Matāksharā* bases his statement of law, is contained in verse 141, Chap. 2 of his book. The verse runs as follows :—

An impotent person, an outcaste, and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others (similarly disqualified), must be maintained; excluding them, however, from participation.

It is to be seen that the text does not expressly mention a deaf or dumb person in the category of excluded heirs. They come, however, under the residuary clause "as well as others" according to *Mitáksharâ*. The residuary clause is thus interpreted by Vijnaneswar :—

Under the term "others" are comprehended one who has entered into an order of devotion (*i.e.*, has become an ascetic), an enemy to his father, a sinner in an inferior degree and a person deaf, dumb or wanting an organ.

Here again we notice that *Mitáksharâ* does not say that blindness or deafness should be congenital. It is held, however, by all the High Courts that these infirmities, in order that they might exclude a person from inheritance, must be in existence from the date of his birth. This is deduced from the text of Manu which lays down that a person must be born blind and deaf in order that he may be prevented from participating in the share of his ancestral property. The same principle has been held to be applicable to dumbness, and this position has not been challenged before us by the learned advocates on both sides. *Vide* the cases of *Muddun Gopal Lal v. Khikhinda Koer* (1), of *Vallabhrám Shivnáráyan v. Báí Harigangá* (2) and of *Savitribai v. Bhaubhat Sakharambhat Khadilkar* (3). In the last-mentioned case, however, Shah J. expressed his opinion that dumbness must not only be congenital; it must be incurable also. According to him this follows in the first place from the text of *Yájnavaalkya* where the word "*achikitsya*" (incurable) is used. Shah J. is of opinion that as 'deaf' and 'dumb' are brought under the word "*adi*" ("others") as used in *Yájnavaalkya's* text, the same characteristic must apply to deafness and dumbness, namely, that they should be incurable. He says, in the second place, that it would be in accordance with the rule that where there are texts of two *smriti*-writers on points, as to which one is silent, they must be read as supplementing each other

1939

Anukul Chandra
Bhattacharjya

v.

Surendra Nath
Bhattacharjya.

Mukherjea J.

(1) (1890) I. L. R. 18 Cal. 341;
L. R. 18 I. A. 9.

(2) (1867) L. R. 4 Bom. H. C. R. 135.

(3) (1926) I. L. R. 51 Bom. 50.

1939

Anukul Chandra
Bhattacharjya

v.

Surendra Nath
Bhattacharjya.

Mukherjee J.

as far as possible. I do not think that the process of reasoning employed by the learned Judge is at all sound.

In the first place, the interpretation that the learned Judge has placed upon the word "*adī*" is in contradiction with that which Vijnaneswar himself has put upon this particular word in *Yājñavalkya's* text, and I am unable to hold that the interpretation put upon this text by *Mitāksharā* which is the recognised authority throughout India should be ignored. As I have said already, the word "others" is interpreted by *Mitāksharā* to mean a variety of persons, namely, one who has entered into an order of devotion or is an enemy to his father, *etc.*, and by no process of reasoning it can be said that the word "*adī*" must be construed *ejusdem generis* along with the expression "suffering from incurable disease" when none of the persons specifically mentioned by *Mitāksharā* suffer from any disease and much less from any incurable disease. I think that the expression "afflicted with an incurable disease" connotes a separate group altogether and the words "and others" must be construed as including persons who suffer from similar defects but not necessarily from a disease which is incurable.

I am also unable to agree with Shah J. that, if the text of Manu be taken as supplementing the text of *Yājñavalkya* on this point, this conclusion would necessarily follow. As it would be seen presently, Manu mentions specifically the blind and deaf persons who are born so but with regard to neither of them it is said by Manu or by any of the commentators that the defect must be incurable.

If we now come to the law that is in force in Bengal, we find that *Jimutavāhana* devotes the 5th Chapter of his book to the treatment of this subject. In para. 7 he quotes the text of Manu as follows:—

Impotent persons and outcastes are excluded from a share of the heritage ; and so are persons born blind and deaf ; as well as madmen, idiots, the dumb, and those who have lost a sense. (Manu, Chapter 9, verse 201).

In para. 9, Jimutavâhana explains that the word "born" must be connected in construction with the words "blind and deaf". This is also the explanation given by Sri Krishna in his Dâyakramasangraha. In para. 10 Jimutavâhana quotes the text of Yâjnavalkya, but his reading is slightly different from that which is adopted by Vijnaneswar. The text of Yâjnavalkya is thus quoted in *Dâyabhâga* :—

An impotent person, an outcaste, and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, must be maintained ; excluding them, however, from participation.

It will be seen from the above that Jimutavâhana drops the residuary clause altogether and he uses the words "*achikitsya rogârta*", that is to say, "persons afflicted with incurable disease" in place of "*achikitsyarogâdya*" which means "persons suffering from incurable disease as well as other". In fact it was not necessary for Jimutavâhana, who relies primarily upon Manu and quotes Yâjnavalkya only as a subsidiary authority, to bring a deaf and dumb person within the residuary clause at all, as these disqualified persons have been specifically mentioned by Manu in his text. In my opinion, there is nothing in the texts of Jimutavâhana or even of the *Mitâksharâ*, which go to support the view that, according to Hindu law, it must be established that deafness and dumbness which are proved to be congenital are beyond cure before a person can be excluded from inheritance. The decisions upon which Sir D. F. Mulla purports to base his statement of law also, in my opinion, do not support this view and this has been practically conceded by Mr. Bose who appears for the appellant. So far as the case-law in Bengal is concerned, one of the earliest pronouncements is to be found in the case of *Mohesh Chunder Roy v. Chunder Mohun Roy* (1). There, it was a case of blindness which was not proved to be congenital. It was held by the learned Judges that blindness which under the Hindu law, as recognised in Bengal, excludes an afflicted person

(1) (1874) 14 B. L. R. 273.

1939

*Amkul Chandra
Bhattacharjya*

v.

*Surendra Nath
Bhattacharjya.*

Mukherjea J.

1939

Anukul Chandra
Bhattacharjya

v.

Surendra Nath
Bhattacharjya.

Mukherjee J.

from inheritance refers to congenital blindness and not to loss of sight which has supervened after birth. In course of argument it was argued on the side of the appellant that, even though Manu expressly stated that the person must be born blind and deaf, yet a person who became blind afterwards might come under the general description of people "deprived of "senses" (*nirindriya*) as used in Manu's text. In reply to that it was said that if the subsequent portion of the text carried the matter beyond what was implied in the previous portion it must be clear that the person excluded from inheritance must be incurably blind or such who had lost the sense of sight. This particular question, therefore, which arises for decision in this case, was neither raised before nor decided by the learned Judges. In the case of *Charu Chunder Pal v. Nobo Sunderi Dasi* (1), which is also referred to by Mulla, the question that arose for decision was, as to whether under the Bengal School of Hindu law a widowed daughter who had a dumb son at the time when the succession opened out, was entitled to succeed to her mother's *stridhan* property. Banerjee J. pointed out that this matter did not come within the purview of the texts at all, as the question was not as to whether a dumb son could inherit, but whether the mother who had got a dumb son could be said to be a daughter having no son at the time when the question of succession to the *stridhan* property of her own mother arose. But at the same time, Banerjee J. pointed out that even if it was necessary to decide that question he should feel inclined to answer it in favour of the appellant's contention. This question was also not touched upon in any of the other cases to which reference has been made by Sir D. F. Mulla with the exception of the passage found in the case of *Savitribai v. Bhaubhat Sakharambhat Khadilkar* (2); and there also it was an opinion expressed by Shah J. alone which was not shared by

(1) (1891) I. L. R. 18 Cal. 327.

(2) (1926) I. L. R. 51 Bom. 50.

his learned colleague. It may be that some of the Judges who decided the cases used the words "congenital" and "incurable" as mere convertible terms and it may be that the Hindu law-givers when they insisted upon the defects being congenital in order to deprive a man of his right of inheritance had in mind the idea of their being incurable. But nowhere, either in the texts of the *smriti*-writers or in the discussions of the digest-makers, with which we are primarily concerned, any statement of law is to be found that incurability is also an additional fact which has got to be established from evidence over and above the fact that the defect was congenital. In fact curability or incurability of the defect has never been considered to be a material factor in connection with this matter. In the case of *Gunjeshwar Kunwar v. Durga Prashad Singh* (1), their Lordships of the Judicial Committee approved of the following statement of law given by Raj Kumar Sarvadhikari in his Principles of Hindu Law of Inheritance and wherein he referred to the question of blindness:—

Blindness, to cause exclusion from inheritance, must be congenital. Mere loss of sight which has supervened after birth is not a ground of disqualification. *Incurable blindness*, if not congenital, is not such an affliction as, under the Hindu law, excludes a person from inheritance.

I think, the same remarks apply to the case of deafness and dumbness as well. It cannot be disputed for one moment, as was pointed out by their Lordships of the Judicial Committee, that the rule of Hindu law, which is relied upon as preventing the natural course of inheritance, ought to be clear and unmistakable. It is also true that a rule of law, which deprives an heir of his legal rights and therefore might work harshly, has got to be construed strictly, but at the same time if this rule is to be enforced at all and not ignored the Courts, in my opinion, cannot but give effect to the plain interpretation of the texts as are contained in the works of the digest-makers who are regarded as authorities in a particular province.

1938

Anukul Chandra
Bhattacharjya

v.

Surendra Nath
Bhattacharjya.

Mukherjee J.

(1) (1917) I. L. R. 45 Cal. 17; L. R. 44 I. A. 229.

1939

*Anukul Chandra
Bhattacharjya*

v.

*Surendra Nath
Bhattacharjya.*

Mukherjee J.

I agree, for the reasons given above, that the case should be sent back to the lower appellate Court. My learned brother has expressed the opinion that the enquiry by the Court below should be confined to the question as to whether the defect in this particular case was congenital or not and, if it is found to be congenital, it must be presumed to be incurable. I do not differ therefore from the order which my learned brother has passed.

Appeal allowed; case remanded.

A. A.

