

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

MUTTUSAMI AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

MUTTUKUMARASAMI (DEFENDANT), RESPONDENT.*

1892.
April
20, 21, 22.
May 5.

Hindu law—Inheritance—Bhandu—Maternal uncle of the half blood—Father's paternal aunt's son—Kindred of half blood.

Under the Hindu law of inheritance prevailing in the Madras Presidency a maternal uncle of the half blood is entitled to succeed in preference to the son of the father's paternal aunt. The former is an *atma bandhu*, the latter is a *pitru bandhu*.

APPEAL against the decree of J. W. Best, District Judge of Chingleput, in original suit No. 25 of 1889.

The plaintiffs sued to establish and enforce their right to certain property as the reversionary heirs of one Muttusami Mudali deceased. Muttusami Mudali died in 1879 without male issue, leaving him surviving his widow, who died in April 1888, and his daughter, who died in 1883 without issue. The plaintiffs were the three sons of one Parvathammal, who was admittedly the sister of the paternal grandfather of Muttusami Mudali. But a question was raised as to whether or not she was his uterine sister. The defendant claims title from Vadapathi Nagappa Mudali, the maternal uncle of the half blood of Muttusami Mudali, whose sons had released their interest in the estate to him by an instrument dated the 27th November 1888. It is admitted that Vadapathi Nagappa Mudali was only the half-brother of Muttusami Mudali's mother. On these facts the District Judge held that the defendant had a higher title to the estate than the plaintiffs, and accordingly dismissed the suit.

The plaintiffs preferred this appeal.

Anandachari and *Masilamony Pillai* for appellants.

Bhashyam Ayyangar, *Ramachandra Ayyar* and *Desikachariar* for respondent.

JUDGMENT.—The contest in this appeal is as to the right of succession to the property of one Muttusami Mudali deceased. He died without issue in 1879, leaving him surviving a widow,

* Appeal No. 132 of 1891.

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This appeal having come on for final hearing, the parties being represented as before, the Court delivered judgment as follows:—

JUDGMENT.—It is contended that, as an appeal lies from the order made by the District Judge, the appellant's petition under section 622 was not maintainable, and that, therefore, it was properly rejected. It must be conceded that the order is appealable under section 244 of the Code of Civil Procedure—*Vallabhan v. Panguuni*(1) and *Muttia v. Appasami*(2).

It is urged on behalf of respondent that as he is not an assignee of the decree, but one who attached it under section 273, the above rulings are not applicable. This, however, makes no difference in principle, as one who attaches a decree is the decree-holder's representative within the meaning of section 244, as was also held by the Calcutta High Court in *Peary Mohun Chowdhry v. Romesh Chunder Nundy*(3).

It is further contended that the objection that the District Judge's order is appealable was not urged before the learned Judge or before us when we made our former order. This is true; but the objection is one that goes to the jurisdiction of the Court to interfere at all under section 622. We must, therefore, entertain the objection.

The learned Judge's order dismissing the petition was, therefore, correct; but it should have proceeded on the ground that the application under section 622 could not be entertained, the order objected to being appealable.

We dismiss this appeal, but, under the circumstances, without costs.

(1) I.L.R., 12 Mad., 454.

(2) I.L.R., 13 Mad., 504.

(3) I.L.R., 15 Cal., 371.

APPELLATE CIVIL.

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The plaintiffs preferred this appeal.

Anandachari and Masilamony Pillai for appellants.

Bhashyam Ayyangur, Ramachandra Ayyar and Desikashariar for respondent.

JUDGMENT.—The contest in this appeal is as to the right of succession to the property of one Muttusami Mudali deceased. He died without issue in 1879, leaving him surviving a widow,

* Appeal No. 182 of 1891.

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Swarnathammal, who died in the year 1888. Appellants Nos. 1 and 2 are the sons and appellant No. 3 is the son's son of Parvathammal, sister of Arumugatta Mudali, who was Muttusami Mudali's paternal grandfather. The respondent claims under one Nagappa Mudali and his sons, the former being the step-brother of Muniyammal, Muttusami's mother. The main question for decision in this appeal is whether, as held by the Judge, a maternal uncle of the half blood is entitled to succeed in preference to the son of the father's paternal aunt. It was alleged for the respondent that Parvathammal was only the step-sister of Arumugatta Mudali, but the Judge did not consider it necessary to determine this question, as he was of opinion that the distinction between the whole blood and the half blood was not material for the purposes of the present suit. Another question, therefore, arising for determination in this appeal is whether a maternal uncle of the half blood is one's *own* cognate kindred as much as a maternal uncle of the whole blood.

As regards the difference in blood, the appellant contends that mother's step-brother is not at all one's bandhu or cognate kindred. It is argued for him that the term used in the text cited in Mitakshara, chapter II, section 6, verse 1 is "matula," and that as it is derived from the word mother, it cannot refer to any other than her uterine brother. We observe, however, that in ordinary parlance the term "matula" includes also mother's step-brother. In Amarakosa Manushiya Varga, verse 31, mother's brother is said to be known by the name of "matula," and in the Sanskrit Dictionary of Taranatha Tarka Vachaspati the term "brother" is said to denote one born of the same *father*. (See Appendix Extracts Nos. 1 and 2.)

Turning to the etymology, it is true that the word "matula" (maternal uncle) is derived from the term "matri" (mother) and formed by adding to it the terminational particle "dulach," but there is no authority for the contention that the word so formed means only mother's uterine brother. In the Vartika, under Panini Sutra, adhiyaya IV, pada 2, rule No. 36, the following passage is found, which appears to be conclusive:—"When the brother is to be indicated after the words pitru and matru (father and mother) the terminations 'vya and dulach' are prescribed. The word 'pitriyva' is the father's brother and the word 'matula' is the mother's brother." (Appendix Extract No. 3.)

Passing on to the sense in which the term brothers (bhrata-
 rau) is used by commentators, the conclusion that it is a generic
 term and includes brothers of the half as well as of the whole
 blood is irresistible. In Mitakshara, chapter II, section 4, verses
 5 and 6, the commentator treats the word "brothers" used in the
 text of Yajnavalkya cited in Mitakshara, chapter II, section 1,
 paragraph 2, verse cxxxv, as indicating brothers both of the
 whole and half blood. The only rule of preference indicated
 by him as resting on the difference in propinquity, consequent
 on the difference of the mothers, is that the uterine brother ex-
 cludes the half brother in cases in which there is a competition
 between them. Even to this rule, the author of the Mitakshara
 mentions an exception in chapter II, section 9, verse 7, viz., that
 when the half brother is reunited and the uterine brother is *not*
 reunited, both take together and divide the estate. Again, he
 explains that the rule of preference is applicable only as between
 brothers, and that the nephews are not entitled to inherit
 when there are brothers even of the half blood since their right of
 succession arises only on failure of brothers. Moreover, the author
 of the Smriti Chandrika follows the Mitakshara and says in
 chapter XI, section 4, verse 5 (Kristnasamy Aiyar's Translation,
 page 198) that the use of the general term "brothers" in the text
 of Yajnavalkya is intended to denote both the uterine brother and
 a brother by a different mother. It is clear then that the lead-
 ing commentaries use the term brother as generic, and that the
 difference of the mothers is only material when there is com-
 petition between heirs of parallel grades. The fallacy in the
 contention of the appellant lies in the assumption that a brother
 is one born of the same mother instead of the same father. As
 regards the several passages relating to pollution or impurity cited
 from the Mitakshara by the appellant's pleader (Appendix No. 4),
 they do not show that the term "matula" does not include the
 mother's half-brother. On the contrary they prescribe pollution
 alike on the death of maternal uncles both of the whole and the
 half blood, though its duration varies according as the deceased is
 of the whole or half blood. There is only one passage on which
 much stress is laid for the appellants as deserving special notice.
 The author of the Mitakshara cites a text of Manu regarding
 impurity consequent on death, and it runs in these terms:—
 "Impurity lasts for three days if a Srotriya dies; but pakshini

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MUTTUSAMI "pollution, that is to say, pollution for ninety Indian hours, is to
 Muttu- "be observed in the case of *matula*, pupil, guru and *bandhava*."
 KUMARASAMI. The Mitakshara explains, however, that the term "*matula*" here indicates also mother's sister and others, whilst the term "*bandhava*" denotes *atma bandhus*, *pitru bandhus*, and *matru bandhus* (one's own cognate, one's father's cognate, and one's mother's cognate), and the suggestion, therefore, that the term "*matula*" is used here in addition to the word *bandhava*, because a maternal uncle of the half blood is not a *bandhu* is not entitled to weight. Moreover, it would be unsafe to draw from the use of the word *matula*, in addition to the word *bandhava* in an isolated text, the inference suggested for the appellants when the author of the Mitakshara gives a special reason for it. Again, Vyadinatha Dikshatar, a recent commentator of authority in Southern India, observes that the word "*matula*" in the above text refers to a maternal uncle of the whole blood who is absent from the place where death occurs, and to maternal uncle of the half blood (Appendix No. 5). As it is conceded that a maternal uncle of the full blood is a *bandhu*, and as it has been so held by the Privy Council in *Gridhari Lal Roy v. The Bengal Government*(1), the contention for the appellants is not tenable. Further, mother's step-brother is a *bhinna-gotra-sapinda* whether the term "*sapinda*" is taken in the sense of consanguinity by virtue of the presence of particles of one body or of capacity to offer funeral oblations. Through the maternal grandfather the maternal uncle is related to his sister's son as *sapinda* in the sense of consanguinity, and to that grandfather both the maternal uncle and his step-sister's son offer funeral oblations. We think the decision of the Judge that maternal uncle of the half blood is one's own cognate kindred or *atma bandhu* is correct.

The next and the most important question is whether under the Mitakshara law the maternal uncle excludes the father's paternal aunt's son. The Judge, who determines it in the affirmative, rests his decision on the ground that the former is one's own cognate kindred, whilst the latter is only the father's cognate, and that as being the nearer in affinity, the former excludes the latter. It is not denied for the appellants that *bandhus* are of three classes—one's own cognate kindred, one's father's kindred, and

(1) 12 M.I.A., 448.

one's mother's kindred, and that each class succeeds in the order in which it is named by reason of affinity. It is also not disputed that the text cited in Mitakshara, chapter 11, section 6, verse 1, mentions the maternal uncle's son as one's own bandhu, whilst it mentions the father's paternal aunt's son only as the father's cognate kindred, and that if the text is accepted as binding so far as it illustrates the order of affinity, it is conclusive. But it is argued that the illustrations given in the text are not intended to denote the classes of bandhus in which maternal uncle's son and father's paternal aunt's son are to be placed for the purposes of inheritance, that the text itself has reference to relatives for whom pakshini or ninety Indian hours' pollution is intended to be prescribed, that hence it is first cousins, or cousin-brothers, are alone mentioned, and the more important bandhus are not named, and that though the author of the Mitakshara cites the text, he does not mean that the illustrations ought to be accepted as denoting that the several relatives named are to be treated for purposes of inheritance as belonging to the several classes in which they are placed. After thus endeavouring to put out of consideration the text cited by the Mitakshara, it is suggested that one's own sister, the father's sister, the grandfather's sister, are all daughters born in the family, and that, as such, their sons should be placed in the class of one's own cognate kindred so as to exclude the maternal uncle, who is only a maternal relative. In support of this contention, our attention is also drawn to a recent publication on Hindu Law by one Siromani. The text in question is in these terms:—"The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle must be considered as his own kindred or *atma* bandhus. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle must be considered as his father's cognate kindred or *pitru* bandhus. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle must be reckoned as his *matru* bandhus or his mother's cognate kindred."

The text is clear that the maternal uncle's son and, therefore, the maternal uncle are *atma* bandhus, whilst the father's paternal aunt's son is only a *pitru* bandhu. There is no foundation for the suggestion that the Mitakshara did not intend to adopt the

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text so far as it illustrates the nearness or remoteness of affinity. The commentator expresses no dissent from the text, nor does he say that the illustrations are not correct; on the other hand, he finds upon it a rule of preference, and adopts it as a test of nearness or remoteness of affinity. It is also remarkable that all the commentaries of the Benares school follow the Mitakshara and cite the same text as illustrating the order of affinity. See Smriti Chandrika, Kristnasamy Aiyar's Translation, chapter XI, section 5, verses 14 and 15; Vyavahara Mayuka, chapter IV, section 8, verses 22 and 23; Sarasvati Vilasa, Foulkes' Translation, 595-8; Madhaviya, Dr. Burnell's Translation, section 41, page 29. It is anything but reasonable to hold that a commentator like the author of the Mitakshara would indicate a rule of preference with reference to a text which, according to appellants' contention, erroneously places father's paternal aunt's sons, who are atma bandhus, among pitru bandhus. It is true that certain relatives only are named in the text as illustrations of each class of bandhus, but it does not follow that those who are named by way of illustration are either named incorrectly, or are not named as examples of the order in which affinity is to be traced. It may be that the author of the Mitakshara having defined bandhus as bhinna-gotra-sapindas, considered it sufficient to cite a text which contained illustrations as to the mode in which nearness or remoteness of affinity is to be ascertained, and to leave it to be determined in each case whether any particular relative who is not named and who claims to be bandhu is really a bhinna-gotra-sapinda, and comes as such within the definition of bandhu. It was on this view that the Privy Council held in *Gridhari Lal Roy v. The Bengal Government*(1) that a maternal uncle is a bandhu, though not expressly named in the Mitakshara. The circumstance of the text cited not naming all the bandhus of each class, and even the most important of them, is no valid ground for treating the text as of no authority in regard to those who are expressly named as belonging to a particular class of bandhus.

Another argument urged for the appellants is that the term bandhava used in the text means first cousin or cousin-brother. It is not denied that it signifies also cognates in general as appears from several extracts contained in the appendix. This

variation in the reading is noticed by Balambhatta, a commentator of the Benares school, who comes to the conclusion that it produces no essential difference in the interpretation.

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It is next alleged that the text was intended only to denote the relatives who have pakshini or ninety Indian hours' pollution, and that it has no connection with inheritance. This objection is not tenable. It ignores the fact that Vijnaneswara cites the text in the chapter on inheritance in order to indicate a rule of preference in cases of competition between bandhus of different classes. If it were intended only for describing those who observe pakshini pollution, there was no apparent necessity for classifying the bandhus, inasmuch as the duration of pollution consists of one night and two days, or two nights and one day. Again, as to the Smṛiti of Yajñavalkya, in the chapter on pollution or impurity, Vijnaneswara states that by the word matula in the text are indicated one's own cognate kindred, the mother's cognate kindred, and the father's cognate kindred, all connected with a common ancestor. They have been defined in the portion which begins with Yajñavalkya's text on inheritance, "The wife, daughter," &c. (Mitakshara, chapter II, section 1, paragraph 2, verse cxxxv.) The question is not whether the relatives named, by way of illustration, are all first cousins or cousin-brothers having pakshini or ninety hours' pollution, but it is whether the text has application to inheritance. That it is applicable is clear from the above passage, wherein Vijnaneswara explains the word matula as being a generic term which includes the three classes of bandhus and refers to his comments thereon in the chapter on inheritance.

As to Siromani's doctrine, it is discussed by him in chapter IX, section 9 of his book. He admits that the Mitakshara cites the text of Vṛidha Satatapa not to enumerate all the cognate heirs, but as an authority for determining the order of succession among such heirs. He then observes that the text cannot be taken to classify and give examples of bandhus of each class, and states that in that case it would be difficult to say under which class the sister's son, the brother's daughter's son or the uncle's daughter's son should be placed. He then proceeds to suggest his own order of succession, according to which he places all related through daughters born in the family among atma bandhus. Though sons born in the family are all gotrajas, yet the Mitakshara regulates the succession when there is competition between

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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 grandfather'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 grandfather's sister's son as related in the same degree. As for the difficulty pointed out by Siromani, it is not clear why sister's son, brother's daughter's son, and son's daughter's son should not be treated as *atma bandhus* in the same way in which the maternal uncle is treated as an *atma bandhu*.

We may refer here to a passage in the Viramitrodaya (chapter III, part I, section 2, page 158):—" Since in the chapter on "partition of heritage, the conferring of spiritual benefit is by "the term, 'therefore,' set out as the reason: hence it is indicated "that he alone is entitled to get the estate on whom the estate "being devolved conduces to the greatest amount of spiritual "benefit of the deceased owner, and that proximity in this way is "to be accepted as a general rule and reasonable." This passage indicates that as between *bandhus* of the same class, a rule of preference may be found in the quantity of spiritual benefit which they confer.

The conclusions we come to are (i) that those who are *bhinna-gotra-sapindas* or related through females born in or belonging to the family of the *propositus* are *bandhus*; (ii) that as stated in the text of Vridha Satatapa or Baudhayana they are of three classes, viz., *atma bandhus*, *pitru bandhus*, and *matru bandhus*, and succeed in the order in which they are named; (iii) that the examples given therein are intended to show the mode in which nearness of affinity is to be ascertained; and (iv) that as between *bandhus* of the same class, the spiritual benefit they confer upon the *propositus* is as stated in Viramitrodaya, a ground of preference. However this may be, Siromani's theory is in direct conflict with the Mitakshara so far as it places the father's paternal aunt's son among *atma bandhus*, and transfers the latter from among *pitru bandhus* in which the text of Vridha Satatapa or Baudhayana places him. In the case before us, there was no allegation nor evidence of any local or special custom in support of the order of succession suggested by Siromani in amendment of the Mitakshara and the commentaries that follow it; and in the absence

of such custom, we are not prepared to overrule an express text mentioned in them, and to hold that one who is expressly named therein as a pitru bandhu is an atna bhandu. Another contention is that the maternal uncle and his sons must be considered, though alive, as civilly dead, inasmuch as they alienated their interest. This is manifestly untenable. The decision of the Judge is right, and we dismiss this appeal with costs.

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APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Parker.*

STRINIVASA AYYANGAR AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

STRINIVASA SWAMI (DEFENDANT), RESPONDENT.*

1892.
March 9, 14.
April 6.

*Civil Procedure Code, s. 539—Suit to eject one claiming to be the jheer of a mutt—
Specific Relief Act—Act I of 1877, s. 42—Consequential relief.*

Three disciples of a mutt brought a suit, with the consent of the Advocate-General, under s. 539 of the Code of Civil Procedure, alleging that the defendant was in possession of the mutt under a false claim of title as the successor to the late jheer, and praying that it be declared that he was not the duly appointed successor to the late jheer, and that an appointment to the vacant office of jheer be made by the Court, but no consequential relief was asked for:

Held, that Civil Procedure Code, s. 539 was inapplicable to the suit, and that the suit was not maintainable for the reason that relief consequential on the declaration sought under s. 42 of the Specific Relief Act was not asked for.

APPEAL against the decree of J. W. Best, District Judge of Chingleput, in original suit No. 23 of 1888.

The plaintiffs were three disciples of the Ahobalam mutt, and alleged in the plaint that on the death of the last head of the mutt in August 1888, the defendant, falsely alleging that he had been appointed the successor in office of the late jheer, trespassed upon the mutt. The prayer of the plaint was that it be declared that the defendant was not the duly appointed successor of the deceased jheer, and that the Court should appoint a duly qualified disciple of the mutt in his place. The suit was filed, with the con-