is that the decree so far as it sets aside the agreement A must be modified by declaring that it is not set aside against plaintiffs Nos. 2 and 3. It is then argued by appellants' vakil that first plaintiff cannot alone sue for that relief, as the agreement is a joint agreement of all three plaintiffs. If there was any technical defect in this respect, it was cured by the addition of the second and third plaintiffs before the decree was passed. But in our opinion, had the name of first plaintiff stood alone throughout, he was entitled to sue to evade his individual responsibility under the agreement because there was a several as well as a joint liability under it.

The appeal is therefore dismissed with costs as against first plaintiff. It is allowed as against second and third plaintiffs to the extent indicated above, and the decree of the lower Court will be modified accordingly.

These plaintiffs will bear their own costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SUNDRAMMAL AND ANOTHER (DEFENDANTS NOS. 4 AND 5), APPELLANTS,

v.

RANGASAMI MUDALIAR AND OTHERS (PLAINTIFFS NOS. 1 TO 3), RESPONDENTS.*

1894. Jan. 17, 18. May 2.

Hindu law—Inheritance—Bandhu ex parte paterna—*Bandhu* ex parte materna—*Limitation—Adverse possession—Alienation of an infant's property by his mother and guardian.*

Suit filed in 1891 to recover possession of certain land, the property of a Hindu, who died an infant leaving him surviving his adoptive mother, who entered into possession and enjoyed the property till her death in 1890. It appeared (1) that in 1861 the deceased and his adoptive mother had conveyed absolutely certain of the properties to the widow of one of his first cousins on his adoptive father's side for her maintenance and that of her daughter, and that it had been assigned by her to A, B and C; (2) that other portions of the property had been conveyed in 1889 by the same persons, with the concurrence of D, as a gift to the daughters of the adoptive sisters of the deceased; (3) that D was the son of a sister of the

* Appeals Nos. 63 and 64 of 1893.

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adoptive mother. The plaintiffs were grandsons of the brother of the deceased's adoptive father, being respectively the sons of his daughters :

Held, (1) that the plaintiffs being bandhus *ex parte paterna* were preferential heirs to D who was a bandhu *ex parte materna*.

(2) that the sisters' daughters had no title whether by the law of inheritance or under the gift asserted by them.

(3) that the plaintiffs' claim to the lands in the possession of A, B and C was barred by limitation.

APPEALS against the decree of L. A. Campbell, District Judge of Coimbatore, in original suit No. 7 of 1891.

The plaintiffs sued to recover possession of certain land as the heirs of Venkatachala Mudali, deceased, the adopted son of Chidambara Mudali whom he survived. On the death of Venkatachala Mudali, which took place before he attained his majority, the properties passed into the possession of his adoptive mother Muttammal who died in May 1890. The plaintiffs claimed that they and defendants Nos. 1 and 2, who refused to join in the suit, were entitled to inherit under Hindu law as being the grandsons of Chidambara Mudaliar's undivided brother named Venkatachala Mudali whose daughters were their mothers respectively. The third defendant, who was in possession of part of the property, claimed to be entitled to retain it on two grounds, firstly, because it had been conveyed to his wife by way of gift by Muttammal above referred to, secondly, because he was a preferential heir to the plaintiffs as being both a cousin in the male line of the deceased and also the son of his maternal aunt. Defendants Nos. 4 and 5, who were in possession of other portions of the property, were, respectively, the daughters of Sornatammal and Parvatiammal, the adoptive sisters of the deceased, and they claimed title under a gift made as they averred under his directions by his adoptive mother to them. They also pleaded that the gift had been acquiesced in and the deed relating to it attested by defendant No. 3. Certain other items of property, to which issue No. 8 related, were alleged to have been given in 1861 by the deceased and his adoptive mother to one Tanatiammal, the widow of one of Chidambaram's nephews, for her maintenance and that of her daughter; and the persons in possession of this part of the property, viz., defendants Nos. 7 to 11 and 13 to 20, claimed title in various ways through Tanatiammal. During the hearing the plaintiffs entered into a compromise with defendants Nos. 1, 2, 3, 6 and 12.

The District Judge held that the plaintiffs' claim was preferable

to that of defendant No. 3 as the son of the deceased maternal aunt and that it was not established that defendant No. 3 was a cousin in the male line as alleged. With regard to the defence of defendants Nos. 4 and 5, it was held that the consent of the deceased to the alleged gift was not proved, and even if established that it would not prevail against the claim of the reversioners. With regard to the gift to Tanatiammal the Judge was of opinion, regard being had to the amount of the property conveyed and to the wealth in possession of the family, that the grant was not beyond the powers of the mother and guardian of the deceased, and accordingly that the plaintiffs were not entitled to recover possession during the life time of Tanatiammal. In the result the District Judge passed a decree for possession in favour of the plaintiffs as against defendants Nos. 4 and 5 and made a declaration that the alienations by Tanatiammal were not binding upon the reversioners after her death. The rest of the decree was in conformity with the compromise above referred to.

Against this decree the contending defendants preferred the present appeals. Appeal No. 63 being preferred by defendants Nos. 4 and 5 and appeal No. 64 by the persons claiming title through Tanatiammal.

Bhashyam Ayyangar and *Jivaji* for appellants.

Subramanya Ayyar and *Ranga Ramanujachariar* for respondents.

JUDGMENT.—These two appeals are preferred from the decree of the District Court of Coimbatore in original suit No. 7 of 1891. No. 63 by defendants 4 and 5 and No. 64 by defendants 7, 10, 11, 13 to 15 and 17 to 20.

The properties in dispute belonged to one Chidambara Mudali. Upon his death, they devolved on his adopted son Venkatachella Mudali, the last full owner. He died unmarried during his minority and his adoptive mother Muttammal succeeded him. Upon her death in May 1890, several persons claimed the right of succession.

The three plaintiffs and defendants Nos. 1 and 2, the third defendant and defendants Nos. 4 and 5 are the several classes of relations who claimed the succession. The third defendant claimed to be a dayadi or sapinda of Venkatachella Mudali the last male owner and also his mother's sister's son. The fourth and fifth defendants are the daughters of two sisters of Venkatachella

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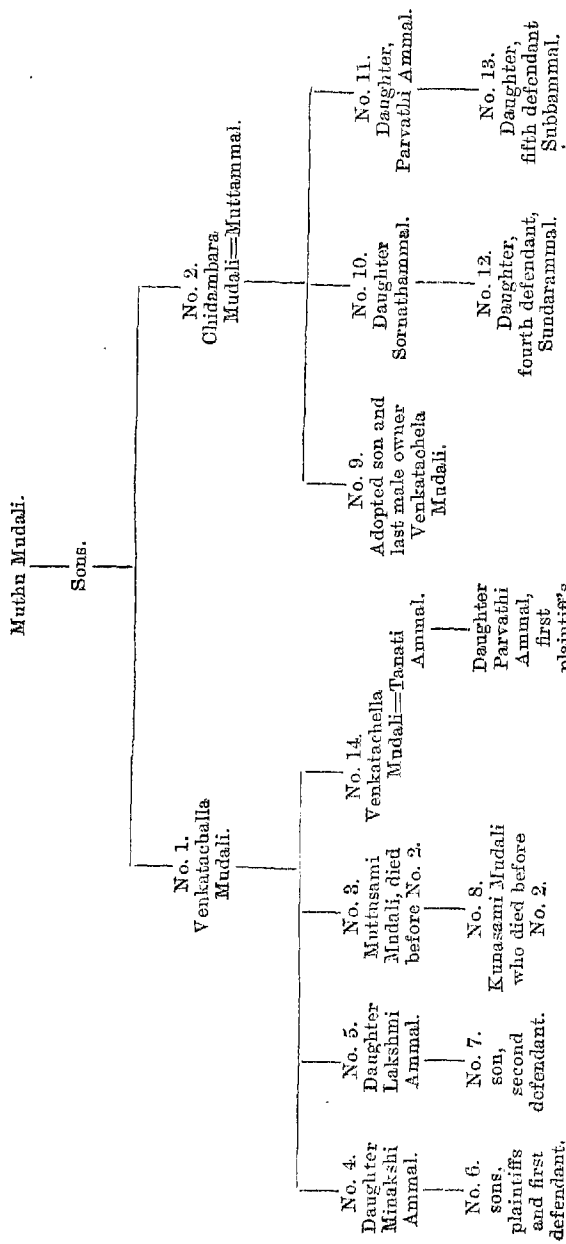
Mudali, and the plaintiffs and defendants Nos. 1 and 2 are the daughter's sons of Venkatachella Mudali, the senior, who was the paternal uncle of the last male owner. The subjoined genealogical table shows how the several claimants are related to each other and to Venkatachella Mudali.



The eight issues fixed in this case indicate the contentions of the parties now in possession of the several items of property and the several defences set up by them. The Judge decided the first issue for plaintiffs and the second and third issues against third defendant. As to the fifth and eighth issues, his decision is that Muttammal did make a gift of the lands to the several defendants, but that it is not proved that she had authority to do so.

As plaintiffs and defendants Nos. 1, 2, 3, 6 and 12 entered into a compromise pending decision, the Judge has recorded no findings on the fourth, sixth and seventh issues.

Against his decision two sets of defendants have appealed.

Appeal No. 63.—The appellants' first contention is that the Judge's finding that third defendant is not a dayadi is contrary to the weight of evidence. The Judge has stated his reasons for his finding in paragraphs 4 to 6 of his judgment. On reading the evidence, we see no sufficient reason to come to a different conclusion. The evidence consists in the main first of declarations made by Muttammal, and secondly of those alleged to have been made by Chidambara Mudali, her husband, and thirdly of statements of witnesses that he is a dayadi and that he performed the funeral and other obsequies of both Chidambara Mudali and his widow. The witnesses, who depose in appellants' favour and to admissions of third defendant's relationship, are mostly unconnected with the family and their statements are not consistent with each other. In endeavouring to help the appellants several go too far when they say that third defendant was not only a *gnati* but also a co-parcener or undivided *gnati* and that he performed Chidambaram's obsequies while the last male owner, his adopted son, was alive. It is true that there is documentary evidence in support of Muttammal's admission, but, as observed by the Judge, it is not safe to attach weight to it. Admittedly the third defendant is her sister's son and she made the admission on occasions when she had reason to be specially kind to him. The contention that he is a *gnati* or sapinda must be disallowed as not proved. Another contention in appeal is that fifth defendant's first witness Subbaraya Mudali is also a sapinda of the last full owner. The Judge refers to Subbaraya Mudali in paragraph 4 of his judgment and remarks that he has made no attempt to secure the reversion. We observe further that fourth and fifth defendants did not plead his *status* as a sapinda in answer to plaintiff's claim or ask for an issue in regard to it.

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It is, however, admitted, that third defendant is the son of Muttammal's sister and therefore mother's sister's son of the last male owner. The Judge finds, and it is also proved, that during her life, Muttammal gave portions of the property in dispute to fourth and fifth defendants who are her daughter's daughters, with the consent and approval of third defendant. It is in evidence that she gave other portions of her son's property to third defendant and his wife and to other defendants. As plaintiff's relationship to Vencatachella Mudali is admitted the question of law arising for decision is whether as the sister's daughters of Vencatachella or by reason of the consent of his mother's sister's son, the third defendant, fourth and fifth defendants exclude plaintiffs from succession. In paragraph 2 of his judgment the Judge relies on the table of succession in Mayne's Hindu Law, sections 466 and 535 and concludes that uncle's daughter's sons are preferable heirs as compared either with sister's daughters who have no place among bandhus or with the maternal aunt's son who is only related on the mother's side. Appellant's pleader contends that male bandhus are to be preferred to females only when they belong to the same class and that appellants are entitled to the reversion. In support of his contention he relies on *Muttusami* v. *Muttukumarasami*(1). On the other hand, it is urged for plaintiffs that as bhinna gotra sapindas on the father's side they are the next reversioners and reliance is placed on the decision in *Umaid Bahadur* v. *Udoi Chand*(2).

We are of opinion that the contention on appellant's behalf cannot be supported. As sister's daughters they are not bandhus in the sense that bandhus are bhinna gotra sapindas as stated in chapter II, section V, sloka 5 of the Mitakshara, and if they are heirs they can only take after them as female relatives—according to the decision of the High Court in *Muttusami* v. *Muttukumarasami*(1). There can be no doubt that whatever their rights may be as relatives, they cannot exclude male relatives who as bhinna gotra sapindas or regular bandhus are entitled to succeed under the Mitakshara law in preference to them.

The learned pleader for appellant argues that under Hindu law males exclude females only when they belong to the same class of relatives, but to this proposition we cannot accede. Take, for instance, the case of competition between a sister and the son of

(1) I.L.R., 16 Mad., 23, 29. (2) I.L.R., 6 Calc., 119.

another sister, and it cannot be denied the latter excludes the former, because he is a bhinna gotra sapinda, whilst the sister is a mere relative and being a female can offer no funeral oblations. Again it is a well-known principle of Hindu law that when, in the table of succession, one class of heirs ranks above another, the class that is named first must be exhausted before the class that is named next can be let in, as in the case of a brother and nephew or of nephew and brother's grandson. As female relatives form a class inferior to male bhinna gotra sapindas as in the case of a sister and sister's son, plaintiffs as daughter's sons of the last male owner's paternal uncle are preferable heirs to appellants who are only his sister's daughters who, if, as such in the list of heirs at all, have a place therein as mere relatives before the property escheats to the Crown. As between plaintiffs and the third defendant the latter is a bandhu *ex parte materna*, whilst the former are bandhus *ex parte paterna*. The decision in *Muttusami* v. *Muttukumarasami*(1) is not in point. There the competition was between a maternal uncle and the father's paternal aunt's son both of whom were bhinna gotra sapindas and bandhus. This appeal must fail and is dismissed with costs.

Appeal No. 64.—As regards appeal No. 64, it refers to the contention which forms the subject of the eighth issue. The properties to which it relates passed into appellant's possessions from that of one Tanatiammal, a widow of one of the first cousins of the last male owner, No. 14 in the pedigree. The Judge finds as a fact that Muttammal, the widow of Chidambara Mudali, and his adopted son, the last male owner, executed a deed by way of partition assigning certain lands to the mother and daughter in 1861. He was of opinion that Muttammal had no right to convey the lands absolutely and that her son was then a minor, but that effect could be given to the alienation as a provision for maintenance which it was competent to Muttammal to make. On this view he held that alienation was not binding upon the reversioners as a body after the demise of Tanatiammal, and that in the meantime, the plaintiffs were not entitled to claim possession and passed a decree accordingly. He declared the title of plaintiffs as reversioners and as a body after Tanatiammal's death because he did not desire to adjudicate on the effect of first plaintiff's attestation

(1) I.L.R., 16 Mad., 23, 29.

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of document IX, whereby Tanatiammal and her daughter Parvati who is first plaintiff's wife conveyed the lands in dispute for Rs. 6,000 in July 1876 to one Aravan Pusari. The contentions on appeal are—(1) that no declaration ought to have been made; (2) that defendants Nos. 3, 4 and 5 are as bandhus preferable heirs, (3) that a suit for a declaration of title was barred by limitation; and (4) that it was competent to Muttammal as the guardian and adoptive mother of her minor son to alienate absolutely a portion of the property in lieu of maintenance. We do not think that the Judge's decree can be supported so far as it is against these appellants. He finds as a fact that the alienation was made by Muttammal and her minor son and that what was conveyed was an absolute estate. As the last male owner was alive the alienation was not that of a widow's estate by a widow but that of an absolute estate by the guardian of the last male owner. It was open to any next friend of his to have stepped forward during his minority and set aside the alienation on the ground that it was an act done without adequate necessity or in excess of the limited authority of a guardian. As the alienation took place in 1861 whilst the present suit was brought in 1891, a suit to set it aside would be barred, if the minor were still alive and his reversioners cannot take a higher position. The plaintiff's claim must, therefore, be held to be time-barred.

This appeal must be allowed and the decree of the Judge set aside, so far as it refers to the properties in appellant's possession with costs throughout.