represents all the other members of the tarwad and therefore it would seem to me to be unnecessary to make the other members parties, though if they made an application at the earliest possible stage to join on the record as parties to the suit, such an application ought to be favourably viewed. There was no such application in this case. Nor was there any application by the first defendant that the other members should be joined as parties. The mere objection, therefore, that they have not been joined seems to me to be of no validity whatever in a suit brought like the present one for the enforcement of an arrangement made by the predecessor of the present karnavan. I agree in dismissing the second appeal with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Krishnaswami Ayyar.

APPANDAI VATHIYAR AND OTHERS (NOS. 1 TO 3 LEGAL REPRESENTATIVES OF FIRST PLAINTIFF AND PLAINTIFFS NOS. 6 AND 7), APPELLANTS,

v.

BAGUBALI MUDALIYAR AND OTHERS (FIRST DEFENDANT, FOURTH LEGAL REPRESENTATIVE OF FIRST PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

1909. December 22 1910. January 25.

Hindu Law — Jains — Inheritance — Competition amongst heirs — Mother's sister's son preferred to maternal uncle's son — Observations on the principles regulating the order of succession among Bandhus.

Under Hindu Law a mother's sister's son is entitled to succeed to the estate of a deceased Hindu in preference to a maternal uncle's son.

SECOND APPEAL against the decree of F. Du P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 500 of 1906, presented against the decree of A. N. Anantarama Ayyar, District Munsif of Tanjore, in Original Suit No. 277 of 1904.

Suit by the original plaintiff, Annasawmi Vathi, as heir to one Gunapala Vathi, who died on 16th October 1901, to recover certain properties deposited by the latter with the defendants. The defendants contended, *inter alia*, that the original plaintiff as well as

* Second Appeal No. 1060 of 1907.

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plaintiffs Nos. 2–8 who were brought on record as the other heirs of deceased were not the heirs of the deceased Gunapala Vathi.

The following issues material to the decision in this case were framed :—

"Whether the plaintiff was the heir of Gunapala Vathi and was entitled to the property ?"

"Were the supplemental plaintiffs also heirs of the deceased Gunapala Vathi entitled to recover the property in suit ?"

The District Munsif recorded evidence on the question of relationship and found that the first plaintiff was entitled to recover the properties. His judgment on this point is as follows :—

"Under these circumstances I believe plaintiffs' evidence and find that the relationship set up by plaintiffs is true. Plaintiffs Nos. 1 to 3 and 6 to 8, being Gunapala's mother's bandhus, are, I think, his legal heirs. Plaintiffs Nos. 4 and 5, who are his mother's sisters, are not heirs. According to the Smiriti Chandrika plaintiffs Nos. 6 and 7 who are Gunapala's mother's sister's sons are preferential to her brother's sons, but this point is not quite settled. Plaintiffs Nos. 2, 3, 6 and 7 have relinquished their right in favour of the first plaintiff. Exhibit B is the notice sent by third plaintiff to first defendant. Exhibit L is the notice sent by second plaintiff. The first plaintiff is thus entitled to recover the properties."

The first defendant alone appealed; the sixth and seventh plaintiffs were not parties to the appeal.

The District Judge accepted the lower Court's finding on the question of relationship and following the text of the Smiriti Chandrika held that the son of a maternal uncle was postponed to the son of a maternal aunt.

He allowed the appeal and dismissed the first plaintiff's suit.

Plaintiff appealed to the High Court.

S. Varadachari for the Hon. the Advocate-General for first to fourth and sixth appellants.

T. R. Ramachandra Ayyar and *G. S. Ramachandra Ayyar* for first respondent.

JUDGMENT.—The only question for consideration in this case is whether the mother's sister's son or the maternal uncle's son is the preferential heir to the estate of a deceased Hindu. The matter is involved in considerable obscurity and no clear pronouncement can be gathered from the texts of the Hindu Law. The commentators

are also mostly silent upon the subject. The well-known text cited, as that of Vriddha Satatapa or sometimes as that of Baudhayana, divides Bhandhus into three classes, namely, Atma bandhus, Pitri bandhus and Matri bandhus. The Mitakshara is explicit that these three classes succeed in the order in which they are named; see "Mitakshara," Chapter ii, Sec. 6, Pl. 2. And the Privy Council accepting the decision of this Court in *Muttusami* v. *Muttukumarasami*(1) has approved of this order in *Muttusami Mudaliar* v. *Simambedu Muthukumaraswami Mudaliar*(2). The question of the order of succession of the three classes of bandhus being thus settled, the further question arises as to the order of succession *inter se* of the bandhus comprised in each class. The maternal uncle's son and the mother's sister's son are both expressly named in the class Atma bandhus. But there is no indication in the Mitakshara, unless the order in which they are placed is such an indication, as to their respective priority. Mr. Mayne observes in section 579 "Perhaps the order of enumeration is not intended to convey any right of precedence." The Smrithi Chandrika which is the next best authority after the Mitakshara in Southern India before giving the list of nine bandhus, quoting the same text of Vriddha Satatapa, says in Chapter XI, Sec. 5, Pl. 13, "Cognate kindred. A description of these is given as follows in a different Smrithi *according to their order of relationship.*" The learned translator in his summary at the end of the section gives the twenty-fourth place to the son of the mother's sister and the twenty-fifth to the son of the maternal uncle, thus recognising the order in which bandhus are named as indicating the order of succession. The Sarasvati Vilasa which is also a recognised authority in Southern India says in Pl. 595 "The bandhapas are exhibited in another law code in the order of their greater propinquity," and proceeds to quote the same text of Vriddha Satatapa which names the maternal aunt's son before the maternal uncle's son amongst Atma bandhus. It is strange, however, that though there is a discussion and a decision in placita 597 and 598 as to the precedence of Atma bandhus over Pitri bandhus and of the latter over Matri bandhus, there is none as to the order amongst the bandhus of each class. Again in the Vyavahara Mayukha which is an authority in the Mitakshara school, though

(1) (1893) I.L.R., 16 Mad., 23. (2) (1896) I.L.R., 19 Mad., 405.

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of special value only in the Presidency of Bombay, it is stated after citing the text of Vriddha Satatappa "Here, *i.e.* (among these) the order of succession is that stated in the text." Mr. Mandlik adds a note that this order applies to the three classes *as well as to the several members of those classes.* These are the only references that we have been able to find to the question of the order of succession among the bandhus of each class. There is of course the circumstance that the text of the ancient law-giver, whoever he was, has named the mother's sister's son before the maternal uncle's son. There is a rule of the Mimamsa that effect should be given to the order in which persons and things are named unless the sense requires a different order; see *Jaiminiya Nyayamala Ch.* v. *Adhikarana.* In the absence of any decisive principle dictating a different order the duty of the interpreter of the law is to accept the order in which they are named as based upon some rule which they may be unable to discover or upon the mere *ipse dixit* of the law-giver. The three commentaries that have been referred to, viz., the Smirithi Chandrika, the Sarasvati Vilasa and the Vyavahara Mayukha have stated no reason for placing the mother's sister's son before the maternal uncle's son. We cannot accede to the suggestion that the exigencies of metre may have dictated the order. It may not be difficult to speculate and suggest a reason as it was attempted to be done by Mr. Ramachandra Ayyar that the mother's sister's son offers oblations to the same three maternal ancestors to whom the deceased himself offers, while the maternal uncle's son in offering oblations to his three paternal ancestors offers only to two who are common to himself and the deceased. To this it may be answered that the offerings of the maternal uncle's son are superior because they are offered to paternal ancestors while those that are offered by the mother's sister's son are offered to maternal ancestors. It may also be that on the theory of propinquity which is the guiding principle in determining the order of succession according to the Mitakshara school the mother's sister's son is to be deemed to be nearer than the mother's mother's son, for while custom sanctions the marriage of the mother's brother's daughter it has not countenanced the marriage of the mother's sister's daughter. But we cannot regard such speculations as the above as a basis for judicial decisions, for the logical application of such theories is sure to land us in difficulties from which it will be impossible to escape.

Among the English text writers on the "Hindu Law", West and Buhler in Vol. I, page 134, say "the rule as to *the nine specified* bandhus may be expressed thus. A man's own bandhus are the sons of his own paternal aunt and of his maternal aunt and uncle. The same relatives of his father are his bandhus. The same relatives of his mother are her bandhus. *They succeed in the order* in which they have been enumerated." There can be no doubt that the order of succession referred to is in relation to the nine specified bandhus. Golap Chandra Sirkar Sastri lays down three rules as governing cases of competition between bandhus.

"(1) The nearer in degree on whichever side is to be preferred to one more remote.

(2) Of those equal in degree one related on the father's side is to be preferred to one related on the mother's side

(3) When the side is the same the circumstance of one being related to a male and another to a female makes no difference." Applying the last of these rules to the present case it is difficult to say in whose favour the author would decide the priority—the mother's sister's son or the maternal uncle's son. Perhaps there being no inferiority in consequence of his mother's sex, the author might accept the order in which the mother's sister's son is named as determining his precedence. Two other well-known writers, however, on the Hindu Law, namely, Bhattacharya (at p. 460) and Sarvadhicari (at pp. 700 and 716) have given precedence to the maternal uncle's son over the mother's sister's son. They have both elaborately discussed the principles determining the order of succession among bandhus. But their views have been strongly criticised by Mr. Golap Chandra Sirkar (pp. 48—54 and 65—76). One obvious criticism of the views of those eminent writers is that they conflict with the explicit pronouncement of the Mitakshara that all Pitri bandhus are postponed to the Atma bandhus. Both according to Sarvadhicari and Battacharya, the paternal grandfather's sister's son and the sister's son of even more distant paternal ancestors would come in before the Atma bandhus *ex parte materna*. It is also to be remembered that the theory of the religious efficacy of oblations has coloured their judgment in a matter which falls to be determined under the Mitakshara principle of propinquity. The theory of spiritual oblations has really no place in the Mitakshara scheme of succession.

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The definition of Sapinda in the Achara Kanda of the Mitakshara entirely repudiates the notion of connection by spiritual offerings. It is also expressly there stated "wherever the term *Sapinda* is used there, directly or mediately, connection with parts of one body is to be understood." See Golap Chandra Sirkar Sastri's Hindu Law, pp 58 and 59. Again in Chapter II, section 3, Verse 4, Vignaneswara reiterates his view as to propinquity being the sole governing principle thus "nor is the claim in virtue of propinquity restricted to Sapindas but on the contrary it appears from this very text that the rule of propinquity is effectual *without any exception* in the case of Samanodhokas as well as other relatives when they appear to have a claim to the succession." In the face, therefore, of these distinct pronouncements it is difficult to decide the question under consideration on any theory of superior religious efficacy. In the very text as to the succession of cognate kindred, chapter II, section 6, Pl. 2, Vignaneswara begins by saying "by reason of *mere affinity* the cognate kindred of the deceased are his successors in the first instance"; see also Mayne, sec. 579. It is plain on a consideration of the foregoing references that the Mitakshara pays no attention to the theory of funeral oblations. See the remarks of the Privy Council in *Lallubhai Bapubhai* v. *Cassibai*(1) and of Knox, J., in *Suba Singh* v. *Sarafraz Kunwar*(2). The Viramitrodaya which is an authority in the Benares school bases its rules of succession on considerations of propinquity though the capacity to confer spiritual benefit is sometimes referred to as a further ground of support; see *Suba Singh* v. *Sarafraz Kunwar*(2) and Sircar's Viramitrodaya, pp. 186 and 194. It must however be admitted that the Privy Council and the Madras High Court have occasionally adverted to considerations of the religious efficacy of oblations as a factor in determining the relative priority of competing claimants to succession; see *Bhyah Ram Singh* v. *Bayah Ugur Singh*(3), *Muttusami* v. *Muttukumarasami*(4), *Balusami Pandithar* v. *Narayana Rau*(5). Indeed Mr. Justice Muttuswami Ayyar in *Muthusami* v. *Muttukumarasami*(4) formulates his conclusion at page 30 thus: "As between

(1) (1881) I.L.R., 5 Bom., 110 at pp. 118, 121.
(2) (1897) I.L.R., 19 All., 215 at pp. 223, 224, 226, 231.
(3) (1870) 13 M.I.A., 373 at p. 392.
(4) (1893) I.L.R., 16 Mad., 23 at p. 30.
(5) (1897) I.L.R., 20 Mad., 342 at p. 348.

bandhus of the same class the spiritual benefit they confer upon the propositus is as stated in Viramitrodaya a ground of preference." As pointed out by us, however, the Viramitrodaya says at page 194; "Greatness of propinquity is alone the criterion of succession." Whatever may be the true position of the Viramitrodaya it cannot outweigh, so far as the Southern Presidency is concerned, the distinct pronouncement of the Mitakshara itself as to propinquity being the sole test of succession and the express statement of the order contained in the Smrithi Chandrika and the Sarasvati Vilasa. Our attention was drawn to the observations in *Balusami Pandithar* v. *Narayana Rau*(1) at p. 348 regarding the propriety of introducing considerations of religious benefit in some cases. Assuming they are well founded they are open to the same remarks that we have made as regards Mr. Justice Muthuswami Ayyar's dictum in *Muttusami* v. *Muttukumarasami*(2), *Tirumalachariar* v. *Andalammal*(3) was also relied on for the view "that all other considerations being equal the claimant between whom and his stem there intervenes only one female link may legitimately be preferred to the claimant who is separated from the stem by two such links." This observation may no doubt apply to the present case. But the important qualification of "all other considerations being equal" excludes the operation of the rule, for the express authority of the Smrithi Chandrika, the Sarasvati Vilasa, and the Vyavahara Mayukha must be given effect to.

The question has sometimes been discussed as to the place of bandhus not named in the list of Satatapa. It has been argued that they should all come in only after the enumerated bandhus. But this view has been rightly negatived in *Gunesh Chunder Roy* v. *Nil Komul Roy*(4) in the case of the sister's son as against the mother's sister's son and in *Mohandas* v. *Krishnabai*(5) in the case of the maternal uncle as against the mother's sister's son. It is obvious that the decision in these cases was in favour of the person of greater propinquity. Whatever might have been the reason for naming only certain of the bandhus there can be no implication that they have all priority over others unnamed in the text. But the introduction of the maternal uncle and the sister's

(1) (1897) I.L.R., 20 Mad., 342 at p. 348.
(2) (1893) I.L.R., 16 Mad., 23 at p. 30.
(3) (1907) I.L.R., 30 Mad., 406.
(4) (1874) 22 W.R., 264.
(5) (1881) I.L.R., 5 Bom., 597.

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son into the list of bandhus so as to effect a breach in the order of persons named is no reason for repudiating the notion of order amongst the persons *inter se* who have been named.

We are, therefore, inclined to hold that the mother's sister's son should be preferred to the maternal uncle's son. In rejecting the notion of superiority by reason of the religious efficacy of oblations we have felt ourselves more at liberty in this case in consequence of the fact that the parties to the suit are Jains and that though the Hindu Law is *primâ facie* held applicable to them, its religious developments should not have unrestricted operation; see Mayne, section 516.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Krishnaswami Ayyar.

1910. December 2, 9.

ABDULLA BEARY (DEFENDANT), APPELLANT,

v.

MAMMALI BEARY AND ANOTHER (PLAINTIFF AND SUPPLEMENTAL RESPONDENT IN THE LOWER APPELLATE COURT. PLAINTIFF'S ATTACHING CREDITOR), RESPONDENTS.*

Transfer of Property Act IV of 1882, *s.* 55, *cl.* 4 (*b*)—*Sale—Consideration therefor—Covenant by purchaser to discharge liabilities of seller—Breach of covenant gives rise to action for damages only—Statutory charge under cl.* 4 (*b*) *negatived by contract to the contrary arising by implication.*

When a purchaser of immoveable property covenants, in consideration of the transfer of such property to him, to discharge certain liabilities of the seller and further stipulates that, upon his failure to do so, he shall be liable for any damages resulting from such default:

Held, that upon breach of such a covenant the seller is entitled to be compensated in damages but has no charge upon the property in the hands of the purchaser under section 55, cl. 4 (*b*) of Act IV of 1882.

To negative the statutory charge afforded by section 55 it is sufficient if 'a contract to the contrary' arises by implication.

Webb v. *Macpherson*, [(1903), 30 I.A., 238], referred to.

In re Albert Life Assurance Company v. *Western Life Assurance Society*, [(1870), 11 Eq., 164], followed.

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* Second Appeal No. 1475 of 1907.