FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice McDonell, Mr. Justice Prinsep and Mr. Justice Wilson.

DIGUMBER ROY CHOWDHRY AND OTHERS (DEFENDANTS) *v.* MOTI LAL BUNDOPADHYA (PLAINTIFF).* 1883 *February* 28.

Hindu Law—Inheritance—Bengal School of Hindu Law—Sapinda—Brother's daughter's son.

According to the Bengal School of Hindu law a brother's daughter's son is a *sapinda*, and is, therefore, a preferable heir to the great-great-great-grandfather's great-great-great-grandson.

THIS case was referred to a Full Bench by Mr. Justice McDonell and Mr. Justice Field, two of the Judges of the Court, on the 7th June 1882, with the following opinion :—

FIELD, J.—The question raised in this appeal is whether a brother's daughter's son is a preferable heir to the great-great-great-grandfather's great-great-great-grandson. That the brother's daughter's son is an heir depends upon the principle which was laid down and defined in the Full Bench case of *Guru Gobind Shaha Mandal* v. *Anund Lal Ghose Mazumdar* (1). In that particular case it was the father's brother's daughter's son who was declared an heir, but the principle is the same in the case of a brother's daughter's son. That case merely decided that such a son is an heir. It left undetermined the further question—what precise position is such an heir to occupy in the category of heirs. In the judgment of Mr. Justice Dwarka Nath Mitter at pages 45 and 46, this question was expressly stated to be left undetermined. On the present occasion it becomes necessary to decide this question. The doctrine of spiritual welfare must, as the law is now settled, determine the order in which any person entitled to succeed is to rank in the category of heirs. Now, in the present case referring to the genealogical tree to be found at page 10 of the paper-book,

* Full Bench Reference made by Mr. Justice McDonell and Mr. Justice Field, dated the 7th June 1882, in Appeal from Appellate Decree, No. 2445 of 1880.

(1) 5 B. L. R., 15 : S. C., 13 W. R., F. B., 49.

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Byddo Nath is the late owner. The plaintiff Moti Lal Banerjee offers a *pinda* or undivided oblation to Anund Chunder, Ram Sunker and Basdeb Roy. The deceased Byddo Nath participates in two of these *pindas*, that is, those offered to Ram Sunker and Basdeb. The defendants offer *pindas* to three persons, Ram Prosad (or Ram Cumar), Ram Sunker and Nund Kishore. They offer a *lepa* or divided offering to Bissessur Roy, Ram Bullubh Roy and Ram Bullubh Roy's father. The deceased Byddo Nath participates in two *lepas*, *viz.*, those offered to Ram Bullubh Roy and Ram Bullubh Roy's father. The question then is reduced to this: "Is the efficacy of two *pindas* offered by a cognate superior to that of two *lepas* offered by an agnate"? It appears to us that this question ought to be answered in the affirmative; and in support of this view we may refer to paragraphs 425, 426 and 432 of Mr. Mayno's work on Hindu Law. In the last paragraph Mr. Mayne says: "The result of these rules in Bengal is, that not only do all the *bandhus* come in before any of the *sakulyas* or *samanodakas*, but that the *bandhus themselves* are sifted in and out among the agnates, heirs in the female line frequently taking before very near *sapindas* in the direct male line, on the principle of superior religious efficacy. In fact, if the test of religious efficacy is once admitted, no other arrangement would be logically possible." To the same purport are para. 5, s. 1, chap. XI of the Dyabhaga; and the passages to be found at pages 763, 771, 772 and 830 of the Principles of the Hindu Law of Inheritance by Baboo Raj Cumar Sarvadhicari, and at page 276 of the second edition of Baboo Shyama Churn Sircar's work on Hindu law. We think that these passages establish, *first*, that the plaintiff in this case is a *sapinda* of the deceased Byddo Nath; and, *secondly*, that no *sapinda*, even a *sapinda* whose *sapindaship* depends upon cognate relationship, is an inferior heir to any *sakulya*. We do not overlook the fact that a *pinda* offered by a cognate is of secondary importance as compared with a *pinda* offered by an agnate; but we think it clear that a *pinda* offered by a cognate is of superior efficacy to any *lepa* or divided offering by an agnate. The case of *Kashee Mohun Roy* v. *Raj Gobind*

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Chuckerbutty (1) is opposed to the view which we take. In that case the plaintiff Raj Gobind Chuckerbutty offered one *pinda* or undivided offering in which the deceased Bharut participated, *viz.*, that which was offered to the common ancestor Ram Sunker. The defendant Kripa Nath Bagchi offered one *lepa* or divided offering to the same Ram Sunker Bagchi. In that case, therefore, the question really was whether a *pinda* offered by a cognate was of superior efficacy to a *lepa* or divided offering offered by an agnate. That case differs from the present case merely in this, that in the case which we have to decide the parties stand in different degrees of propinquity; and the number both of divided and undivided offerings is double. The decision in the case of *Kashee Mohun Roy* v. *Raj Gobind Chuckerbutty* (1) was not based altogether upon the principle of spiritual efficacy; and it would no doubt be possible to draw a distinction between that case and the present case on the ground that in that case the relationship of the contending parties to the deceased was different from the similar relationship of the parties in the present case; and that, therefore, much of the reasoning upon which the decision in that case was based would not be applicable to the case which we have to decide. We think, however, that the true test is that of spiritual efficacy; and, tried by this test, the cases are exactly analogous. As the question is one of some doubt and is of considerable importance to the Hindu community, we think that it will be better to refer it to a Full Bench. We therefore refer the following question to a Full Bench: "Is a cognate *sapinda* a preferable heir to an agnate *sakulya*?"

Baboo *Rash Behary Ghose*, Baboo *Golap Chunder Sircar*, Baboo *Hem Chunder Banerjee*, Baboo *Bipro Dass Mookerjee* and Baboo *Umakali Mookerjee*, for the appellants.

When the appellants' case was opened, Mr. Justice Mitter said: "Is not the question settled by Dayabhaga, XI, 6, 20?"

Baboo *Rash Behary Ghose*—See Sarvadhicari's Principles of Inheritance, p. 857—The spiritual benefit conferred by the plaintiff is of superior efficacy—Dayabhaga, XI, 1, 4; XI, 2, 27.

(1) 24 W. R., 229.

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Baboo *Golap Chand Sircar* on the same side :—Dayabhaga, XI, 6, 20, does not include a brother's daughter's son, for he does not offer three oblations in which the deceased participates, Dayatattwa, XI, 78 ; Dayabhaga, XI, 6, 9. Fifth in descent being excluded, the brother's daughter's son is excluded. Srikrishna's Dayakrama Sangraha has not been followed—*Gobind Proshad Talookdar* v. *Mohesh Chunder Surma Ghuttuck* (1). See also Dayabhaga, XI, 230 ; XI, 6, 29, 33.

Baboo *Guru Dass Banerji* and Baboo *Saroda Prosunno Roy* for the respondent.

The judgment of the Full Bench was delivered by

MITTER, J.—We are of opinion that according to the Hindu law current in the Lower Provinces of Bengal a brother's daughter's son is a preferable heir to the great-great-great-grandfather's great-great-great-grandson.

In the Full Bench decision in *Guru Gobind Shaha Mandal* v. *Anund Lal Ghose Mazumdar* (2) Mr. Justice Dwarkanath Mitter was of opinion that a cognate of this description is a *sapinda*, as defined in the Dayabhaga. A brother's daughter's son offers two *pinds* or undivided oblations to the father and the grandfather of the deceased in which he participates. Whereas the great-great-great-grandfather's great-great-great-grandson is not connected with the deceased through the medium of undivided oblations. He is a *sakulya* or an agnate, connected with the deceased through the medium of divided oblations. Therefore, the competition in this case is between a cognate who is a *sapinda* and an agnate who is a *sakulya*. According to the Dayabhaga, it does not admit of any doubt, that a *sapinda*, though a cognate, is a preferable heir to a *sakulya* agnate. The following passages of the Dayabhaga are clear upon this point :—

"The order of succession then must be understood in this manner : On failure of the father's daughter's son or other person who is a giver of three oblations (presented to the father, &c.), which the deceased shares or which he was bound to offer,

(1) 15 B. L. R., 35 : S. C., 23 W. R., 117.
(2) 5 B. L. R., 15 : S. C., 13 W. R., F. B., 49.

the succession devolves in the next place on the maternal uncle and others, (namely, his son and grandson)"—Chap. XV, s. 6, para. 20.

But on failure of kin in this degree, the distant kinsman (*sakulya*) is successor. For Manu says: "Then, on failure of such kindred the distant kinsman shall be the heir, or the spiritual preceptor or the pupil." The distant kinsman (*sakulya*) is one who shares a divided oblation (s. I, § 37) as the grandson's grandson or other descendant within three degrees reckoned from him, or as the offspring of the grandfather's grandfather or other remote ancestor," paragraph 21.

But it has been contended that the question referred to the Full Bench in the case cited above being whether a father's brother's daughter's son is entitled to be recognized as an heir according to the Hindu law current in the Bengal School, it is binding upon us upon that question only; that we are not concluded by the grounds upon which it was based; and that we are competent to reconsider them. But this contention is not sound. The Full Bench decided that a father's brother's daughter's son is an heir *because he is a sapinda*. If we are to follow this decision, we must hold that a father's brother's daughter's son or any other cognate conferring similar spiritual benefits upon the deceased is a *sapinda*. It is to be further borne in mind that the heritable rights of such cognates either must be based upon their *sapinda* relationship, or they would not be in the line of heirs at all.

"If the right of the father's son, and of the maternal uncle and the rest," says the author of the Dayabhaga in para. 28, s. 6, Chapt. XI, "be not considered as intended by the text, 'To three must libations of water be made, &c.,' *they would have no right of succession* since they have not a place among distant kinsmen and others whose order of succession is specified."

Therefore unless we decline to follow the Full Bench decision in *Guru Gobind Shaha Mandal* v. *Anund Lal Ghose Mazumdar* (1), we must hold that a brother's daughter's son is a *sapinda*, and therefore a preferable heir to the great-great-great-grandfather's great-great-great-grandson.

(1) 5 B. L. R., 15: S. C., 13 W. R., F. B., 49.

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The learned Judges who have referred this question to a Full Bench are also of this opinion. The reference was made in consequence of a contrary ruling in *Kashee Mohun Roy* v. *Raj Gobind Chuckerbutty* (1). It appears to us that in that case the learned Judges held that a *sakulya* relative was a preferable heir to a cognate *sapinda*. That decision is therefore clearly opposed to the rule of law laid down by the author of the Dayabhaga in the passages cited above.

The result is that this appeal fails. It is accordingly dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Cunningham and Mr. Justice Maclean.

1883 *January* 24.

MOHUN CHUNDER KURMOKAR AND ANOTHER (DECREE-HOLDERS) *v.* MOHESH CHUNDER KURMOKAR AND OTHERS (JUDGMENT-DEBTORS).*

Limitation—Act XV of 1877, Sch. II, Art. 179.—Execution of Decree—Partition—Joint Decree—Decree for Partition.

A consent decree for partition made between three parties contained a provision that if the plaintiffs should not have the property partitioned within two months from the date thereof, any one of the other parties to the suit might obtain partition by executing the decree. One of the parties sued out execution and obtained partition and possession of his own share. More than three years after the date of the decree, but less than three years from the date of the application just mentioned, another of the parties applied for partition under the decree.

Held, that the application was not barred by limitation under the provisions of the Limitation Act, Act XV of 1877, Sch. II., Art. 179, cl. 3, exp. 1.

THE facts of this case are stated as follows in the judgment appealed from: "The parties in this case were originally

* Appeal from Appellate Order No. 316 of 1882, against the order of F. W. D. Peterson, Esq., Judge of Jessore, dated the 12th July 1882, reversing the order of Baboo Monmoth Nath Chatterjee, First Munsiff of Baghat, dated the 20th May 1882.

(1) 24 W. R., 229.