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MADHAVAN NAIR J.

Code the respondent can claim rateable distribution under section 73, Civil Procedure Code.

It cannot be doubted that in equity the distribution of the assets in this case should abide the passing of the final decree. The respondent was the first to attach the amount in question and the delay in passing the final decree should not in our opinion be allowed to stand in the way of her obtaining rateable distribution. She has made the application under section 151, Civil Procedure Code, also. We think this is pre-eminently a case for the application of that section. In our opinion, both under section 73 and under section 151 of the Civil Procedure Code the respondent's claim for rateable distribution should be recognised. We confirm the lower Court's order and dismiss this civil revision petition with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Curgenven.

1934, April 11.

KALIMUTHU PILLAI, MINOR BY HIS MOTHER AND NEXT FRIEND THIRUPILLAI AMMAL, (PLAINTIFF), APPELLANT,

v.

AMMAMUTHU PILLAI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Inheritance—Bandhus—Atmabandhus—Preference among—Principle applicable—Daughter's daughter's son—Sister's son—Preference as between—Order of succession among Bandhus—Rules as to.

According to Hindu Law as between the daughter's daughter's son of the propositus and the sister's son of the propositus

* Second Appeal No. 272 of 1930.

the former is the preferential heir. Both are Atmabandhus of the propositus but the daughter's daughter's son is a descendant of the propositus himself while the sister's son is a descendant of the father of the propositus and the former is to be preferred to the latter on the great principle pervading the law of inheritance under the Mitakshara system, namely, that the nearer line excludes the more remote. Though the principle of spiritual benefit may be resorted to even under the Mitakshara, it should not be so resorted to as to defeat the rule that the nearer line should exclude the more remote.

Balusami Pandithar v. *Narayana Rau*, (1897) I.L.R. 20 Mad. 342, followed.

Rules as to the order of succession among Bandhus summed up.

APPEAL against the decree of the District Court of Tinnevelly in Appeal Suit No. 57 of 1929 preferred against the decree of the Court of the District Munsif of Palamcottah in Original Suit No. 37 of 1928.

M. Balasubramania Mudaliar for appellant.—The appellant is the daughter's daughter's son, and the first defendant the sister's son, of the propositus. Both of them are Atmabandhus. Among Atmabandhus one's own descendants must be preferred to one's father's descendants because the Mitakshara scheme of succession is based on the principle that the nearer line excludes the more remote. [*Tirumalachariar* v. *Andal Ammal*(1), *Ajudhia* v. *Ram Sumer Misir*(2) and *Ram Phal Thakur* v. *Pan Mati Padain*(3) referred to for the position that a daughter's daughter's son is an Atmabandhu.] In the table given in Mayne's Hindu Law, 9th edition, page 852, the daughter's daughter's son comes third, while the sister's son comes eighth. Rule 1 of the rules of preference given on page 849 of Mayne's Hindu Law is correct and ought to be applied first; and it is only if that fails that recourse can be had to the other rules. [*Muthusami Mudaliyar* v. *Simambedu Muthukumaraswami Mudaliyar*(4) referred to.] In *Krishna Ayyangar* v. *Venkatarama Ayyangar*(5) and *Balusami Pandithar* v. *Narayana Rau*(6) the descendant of a nearer ancestor was preferred

(1) (1907) I.L.R. 30 Mad. 406.
(2) (1909) I.L.R. 31 All. 454.
(3) (1910) I.L.R. 32 All. 640.
(4) (1896) I.L.R 19 Mad. 405 (P.C.).
(5) (1905) I.L.R. 29 Mad. 115.
(6) (1897) I.L.R. 20 Mad. 342.

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to that of a remoter ancestor. In the former case two females intervened in the case of the descendant of the nearer ancestor. Nevertheless he was preferred on the ground that the nearer line excludes the more remote. In the latter case it is stated at page 348 that the first principle of the Mitakshara scheme of succession is that the nearer line excludes the more remote and that the doctrine of spiritual benefit ought not to be resorted to in supersession of that first principle. In *Vedachela Mudaliar* v. *Subramania Mudaliar*(1) it was held that the distinction between Bandhus *ex parte paterna* and *ex parte materna* ought not to be used to defeat the cardinal rule of the Mitakshara scheme of succession that nearness in degree excludes the more remote. At page 764 of that case, *Balusami Pandithar* v. *Narayana Rau*(2) is noticed and discussed at length. In *Adit Narayan Singh* v. *Mahabir Prasad Tiwari*(3) the principle is stated and *Krishna Ayyangar* v. *Venkatarama Ayyangar*(4) is applied. In *Rami Reddi* v. *Gangi Reddi*(5) the ascending ancestor was the same but the descent in the case of one claimant was more remote than in the case of the other. According to the theory of spiritual benefit the claimant whose claim was not recognized in that case ought to have been preferred. But it was held that that theory ought not to be applied so as to defeat the rule in favour of the nearer line. *Buddha Singh* v. *Laltu Singh*(6) was not a case of Bandhu succession but it is authority for the position that the descendants of a nearer ancestor should be exhausted before recourse is had to the descendants of a remoter ancestor. [*Muttusami* v. *Muttukumarasami*(7) referred to.] Among Bandhus equally removed from the propositus one in the direct line of descent is to be preferred to one in the collateral line ; *Bhimrao* v. *Gangabai*(8). In Trevelyan's Hindu Law, third edition, pages 436-7, the rules of succession among Bandhus are laid down and *Vedachela Mudaliar* v. *Subramania Mudaliar*(1) is referred to but its effect is overstated there. As to when the spiritual benefit rule comes into play, see page 852 of Mayne. The principal ground of decision in *Vedachela Mudaliar* v. *Subramania Mudaliar*(1) is propinquity or near-

(1) (1921) I.L.R. 44 Mad. 753 (P.C.). (2) (1897) I.L.R. 20 Mad. 342.
(3) (1921) L.R. 48 I.A. 86; 40 M.L.J. 270.
(4) (1905) I.L.R. 29 Mad. 115. (5) (1924) I.L.R. 48 Mad. 722.
(6) (1915) I.L.R. 37 All. 604 (P.C.). (7) (1892) I.L.R. 16 Mad. 23.
(8) (1921) I.L.R. 46 Bom 541, 546.

ness and spiritual efficacy is a subsidiary ground. This is how that case is understood in *Rami Reddi* v. *Gangi Reddi*(1). *See* also *Jatindranath Ray* v. *Nagendranath Ray*(2).

R. Krishnaswami Ayyangar (with him, *T. K. Sarangapani Ayyangar*) for respondents.—Assuming that propinquity is the governing rule according to the Mitakshara scheme of succession, the question is what is propinquity. The whole law of inheritance is based on Manu's text which is translated as: "The inheritance of a near sapinda is that of a near sapinda." Nearness must be tested both from the point of view of the claimant and of the propositus. The test of nearness has been stated to be spiritual benefit. The limitation to three degrees can only be justified on the theory of spiritual benefit. In *Buddha Singh* v. *Laltu Singh*(3) the limitation and the basis thereof are given. The rule applies alike to cases of male descendants and to cases of cognate succession. The cardinal principle is the spiritual benefit theory. From that is evolved the nearer line theory. The nearer line theory is inapplicable to cases of Bandhus. Nearer line does not necessarily mean nearer in blood. Nearness of sapindaship is counted by counting degrees from the common ancestor. Where one claimant is a descendant of the propositus himself and the other is a descendant of his ancestor, to test nearness degrees are counted from the propositus in the former case and from the common ancestor in the latter case. Judged by that test a sister's son is nearer than a daughter's daughter's son, because the former is removed by three degrees while the latter by four.

[Is this method of counting from the common ancestor confined to sapinda relationship or does it also extend to the ascertainment of propinquity?—*Curgenven J.*]

Nearness also has to be tested by the test of mutuality. The rule that the nearer line excludes the more remote is not a rule of the Mitakshara but is deduced from the rule as to spiritual benefit. It can properly apply only to the case of gotrajas and cannot be applied to cases of Bandhu succession. The test of nearness of affinity is to be applied to ascertain the class, but the test of nearness among Bandhus of the same class

(1) (1924) I.L.R. 48 Mad. 722.
(2) (1931) I.L.R. 59 Calc. 576, 583-4; L.R. 58 I.A. 372.
(3) (1915) I.L.R. 37 All. 604, 617 (P.C.).

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is spiritual benefit. As to spiritual benefit being the test of propinquity, see *Buddha Singh* v. *Laltu Singh*(1).

M. Balasubramania Mudaliar in reply.

Cur. adv. vult.

JUDGMENT.

RAMESAM J.

RAMESAM J.—The question arising in this second appeal is one of Hindu Law, the facts not being disputed. The plaintiff is the daughter's daughter's son of the last male owner, Kalimuthu Pillai, who died in 1883. Kalimuthu had four wives of whom two survived him. The last of these died in January 1923. According to the plaintiff the property has devolved under the Hindu Law on him as the nearest Bandhu. The first defendant is the sister's son of Kalimuthu. He had previously obtained a decree for possession of the properties of Kalimuthu on the ground that he is the reversioner but the present plaintiff was not a party to that suit. The plaintiff in this suit now seeks to recover the properties from him. The present suit was filed on the 24th January 1928 and there is no question of limitation in the case.

The only question for decision therefore is who according to Hindu Law is the preferential heir—the plaintiff (the daughter's daughter's son) or the first defendant (the sister's son)? As the succession opened in 1923 this case is not governed by the Hindu Law of Inheritance (Amendment) Act II of 1929. Both parties are Bandhus, i.e., cognates or Bhinna Gotra Sapindas. The nature of the Bandhu relationship and to some extent the order of succession among the Bandhus was discussed by me and our brother VENKATASUBBA

(1) (1915) I.L.R. 37 All. 604, 623 (P.C.).

RAO J. in *Rami Reddi* v. *Gangi Reddi*(1). A further question of order of succession has now arisen. It is unnecessary for me to repeat my observations made in that judgment. It is enough for the present purpose to start from the principles of succession for Bandhus laid down by the Privy Council. One of such principles was laid down so early as in *Muttusami* v. *Muttukumarasami*(2) affirmed by the Privy Council in *Muthusami Mudaliyar* v. *Simambedu Muthukumaraswami Mudaliyar*(3). That principle is that the nearest Bandhus of a person may be divided into three classes, viz., the Atmabandhus, the Pitrubandhus and the Matrubandhus There may be Bandhus other than these three classes, but we are not concerned with them in this case, and it is unnecessary to discuss the order of succession among them. So far as these three classes are concerned, they take in the order enumerated, i.e., the Atmabandhus take first, then the Pitrubandhus and then the Matrubandhus ; *Muttusami* v. *Muttukumarasami*(2) (at page 30), *Muthusami Mudaliyar* v. *Simambedu Muttukumaraswami Mudaliyar*(3) (at page 409) also approved in *Vedachela Mudaliar* v. *Subramania Mudaliyar*(4). Now the question at once arises who are Atmabandhus, who are Pitrubandhus and who are Matrubandhus? The Mitakshara, section 6, enumerates one's own first cousins as one's own Bandhus, the father's first cousins as Pitrubandhus and the mother's first cousins as Matrubandhus. But it has now been repeatedly held in all the Courts that this enumeration

(1) (1924) I.L.R. 48 Mad. 722.
(2) (1892) I.L.R. 16 Mad. 23.
(3) (1896) I.L.R. 19 Mad. 405 (P.C.).
(4) (1921) I.L.R. 44 Mad. 753 763 (P.C.).

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is not exhaustive and other persons fall within these headings or classes. Now the Atmabandhus of a person as enumerated by the Mitakshara are the descendants of his paternal or maternal grandfather. If these are Atmabandhus, it is an *a fortiori* case that the descendants of one's father and of himself should also be regarded as Atmabandhus and this is indeed the view taken by the Courts. For instance, in *Balusami Pandithar* v. *Narayana Rau*(1) a sister's son was held to be an Atmabhandhu. At page 346 the learned Judges observed :

"As to the third defendant, the learned Vakil for the plaintiff urges that he is not Vasudeva's Atmabandhu. But that he is such a Bandhu seems to be necessarily implied by the passage of the Mitakshara cited above. For it lays down that the father's sister's son, that is, a descendant of even the paternal grandfather, is an Atmabandhu. How then can a Bandhu, like the third defendant, who is able to trace his relationship to the deceased owner through a nearer ancestor, viz., the father, be held to be other than an Atmabandhu? The plaintiff's objection on this point is, consequently, untenable."

In *Krishna Ayyangar* v. *Venkatarama Ayyangar*(2) it was held that a father's sister's daughter's son is an Atmabandhu. In *Sham Dei* v. *Birbhadra Prasad*(3) it was held that a sister's daughter's son and also a father's sister's son's son are Atmabandhus. In *Umashankar Prasad Parasari* v. *Mussammat Nageswari Koer*(4) the maternal uncle was described as an Atmabandhu. In *Adit Narayan Singh* v. *Mahabir Prasad Tiwari*(5) the Privy Council in an appeal from Patna held that a mother's sister's grandson was

(1) (1897) I.L.R. 20 Mad. 342.
(2) (1905) I.L.R. 29 Mad. 115.
(3) (1921) I.L.R. 43 All. 463.
(4) (1918) 3 Pat. L.J. 663 (F.B.).
(5) (1921) L.R. 48 I.A. 86; 40 M.L.J. 270.

an Atmabandhu. In all these decisions the descendants of the father of the propositus and the descendants of the grandfathers other than those enumerated in the Mitakshara were held to be Atmabandhus. For the same reason it is obvious that the descendants of the propositus himself should be held to be Atmabandhus. Thus the term Atmabandhus has a wider scope than the terms Pitrubandhus or Matrubandhus. Whereas Atmabandhus include the descendants of a man's paternal and maternal grandfathers, just as one's Pitrubandhus denote the descendants of one's father's paternal and maternal grandfathers, and the term Matrubandhus denotes the descendants of one's mother's paternal and maternal grandfathers, the term Atmabandhus also includes the descendants of the propositus's father and descendants of the propositus himself. Accordingly a man's Atmabandhus may be divided into three sub-classes :

A.—His own cognate descendants.

B.—His father's cognate descendants and

C.—The cognate descendants of his paternal grandfather and the descendants of his maternal grandfather.

Group A is Group I at page 725 of my judgment in *Rami Reddi* v. *Gangi Reddi*(1). Group B is Group II on the same page. Group C is Group III on the same page.

The question now arises, how is the succession to be regulated as between the members of the different sub-classes of Atmabandhus? The answer to this question is to be sought from the

(1) (1924) I.L.R. 48 Mad. 722.

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basis of the classification in the Mitakshara into the Atmabandhus, the Pitrubandhus and the Matrubandhus. The reason mentioned in the Mitakshara itself is "by reason of nearer affinity". The Atmabandhus enumerated in the Mitakshara are preferred to the Pitrubandhus and the Matrubandhus because they are the descendants of nearer ancestors, viz., the paternal and maternal grandfathers of the propositus, than the ancestors from whom the Pitrubandhus and the Matrubandhus are descended. Applying the same principle we arrive at the conclusion that among Atmabandhus one's own descendants should be preferred to the father's descendants and the father's descendants to the descendants of the grandfathers. This is the principle applied in *Balusami Pandithar* v. *Narayana Rau*(1). There it was observed :

> "But . . . granting that the plaintiff's capacity is superior, does that give him a better title ? Now, though the doctrine of religious benefit has exercised very much influence upon many of the great writers on Hindu Law, yet it is now rightly recognised that Vignaneswara as well as most of his followers put their system on a radically different basis . . .
>
> But, be this as it may, there need be no hesitation in saying that the doctrine ought not to be resorted to in derogation of the great principles pervading the Law of Inheritance under the Mitakshara system. The first of such principles is that the nearer line excludes the more remote."

Accordingly in that case it was held that a man's sister's son was entitled to preference over his maternal uncle's son. The former was a descendant of the father of the propositus. The latter was a descendant of the maternal grandfather of the propositus. On the same principle a man's

(1) (1897) I.L.R. 20 Mad. 342, 347, 348.

own descendants ought to be preferred to the descendants of his father. One's own line is certainly a nearer line than the line of descendants from one's father. This is also the principle adopted in Mayne's Hindu Law where the descendants of the propositus are enumerated as Nos. 1 to 7 whereas the descendants of the father of the propositus are enumerated as Nos. 8 to 15.

The learned Advocate for the respondents contended that the principle of spiritual benefit ought to be applied and that one's daughter's daughter's son makes no offerings to the propositus whereas the sister's son offers oblations to the father of the propositus in which he participates. To this it is enough to reply that, though the principle of spiritual benefit may be resorted to even under the Mitakshara, it should not be so resorted to as to defeat the rule that the nearer line should exclude the more remote. This is exactly what the learned Judges have held in *Balusami Pandithar* v. *Narayana Rau*(1). In fact, if the learned Advocate's contention is accepted, we have to hold that the decision in *Balusami Pandithar* v. *Narayana Rau*(1) is erroneous. That decision has stood in the books for thirty-seven years and has been repeatedly cited before the Privy Council and its correctness has not been questioned and we do not see why we should unsettle the law by doubting its correctness. The learned Advocate relied on three decisions for his contention, viz., that the principle of spiritual benefit should be given preferential recognition under the Mitakshara Law. Those decisions are *Chinnasami Pillai* v.

(1) (1897) I.L.R. 20 Mad. 342.

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Kunju Pillai(1), *Buddha Singh* v. *Laltu Singh*(2) and the judgment of our learned brother KUMARASWAMI SASTRI J. in *Subramiah Chetty* v. *Nataraja Pillai*(3). All the above three cases relate to succession among Sagotra Sapindas and not Bandhus, and the decision of the Privy Council expressly rests on various texts laying down that among Gotraja Sapindas the principle of spiritual benefit should be specially looked to. One of these tests is the Viramitrodaya which was also quoted in *Balusami Pandithar* v. *Narayana Rau*(4) but was not applied to Bandhus. In my opinion we are not called upon to discuss these three decisions in this case and it is enough to observe that whatever the stage at which the principle of spiritual benefit may be applied among Gotraja Sapindas, it should not be applied to Bandhus so as to defeat the rule of "nearer affinity". Even among Bandhus, when the above principles fail, the principle of spiritual benefit will have to be resorted to ; *Jatindranath Ray* v. *Nagendranath Ray*(5). In Mayne's Hindu Law, section 597 (*a*), at page 849, it is suggested that the first rule should be that a nearer ancestor and his descendants should exclude a more remote ancestor and his descendants. This is in accordance with the decisions in *Balusami Pandithar* v. *Narayana Rau*(4) and *Adit Narayan Singh* v. *Mahabir Prasad Tiwari*(6).

The result is that in our opinion the plaintiff is entitled to the properties in preference to the first defendant.

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(1) (1911) I.L.R. 35 Mad. 152. (2) (1915) I.L.R. 37 All 604 (P.C.).
(3) (1928) 58 M.L.J. 468. (4) (1897) I.L.R. 20 Mad. 342.
(5) (1931) I.L.R. 59 Calc. 576 ; L.R. 58 I.A. 372.
(6) (1921) L.R. 48 I.A. 86 ; 40 M.L.J. 270.

I may now sum up for convenience of reference the rules as to the order of succession among Bandhus. Atmabandhus get in preference to Pitrubandhus and Matrubandhus. Atmabandhus are divided into three sub-classes. (i) Descendants of the propositus. Excluding unlikely descendants, these will generally include son's daughter's son, daughter's son's son and daughter's daughter's son. All these three are entitled to come in before the descendants of the father. As to the order between these three I do not wish to discuss the question as between the first two as the point does not arise. That the second is entitled to preference over the third has been decided in *Tirumalachariar* v. *Andal Ammal*(1). It is only after this sub-class of descendants of the propositus are exhausted that we go to the next sub-class, viz., (ii) the father's descendants. It is only after these are exhausted that we go to the next sub-class, viz., (iii) the descendants of the grandfathers. It is only after this third subclass of Atmabandhus are exhausted that we go to the Pitrubandhus or the Matrubandhus as the case may be. For instance, in *Krishna Ayyangar* v. *Venkatarama Ayyangar*(2), a father's sister's daughter's son who is in the third sub-class of Atmabandhus was given preference over the paternal grandfather's sister's son who is a Pitrubandhu. In *Adit Narayan Singh* v. *Mahabir Prasad Tiwari*(3) a mother's sister's grandson who is in the third sub-class of Atmabandhus was given preference over the mother's paternal aunt's son who is a Matrubandhu. And the next rule

(1) (1907) I.L.R. 30 Mad. 406. (2) (1905) I.L.R. 29 Mad. 115.
(3) (1921) L.R. 48 I A. 86; 40 M.L.J. 270.

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would be that when the Pitrubandhus are exhausted, we go to the Matrubandhus. Another rule would be that in each sub-class of Atmabandhus or among the Pitrubandhus or Matrubandhus the nearer descendant from the common ancestor or from the ancestor of equal degree is entitled to preference over a remoter descendant. In other words, the nearer excludes the more remote. This last rule is illustrated by the decision in *Nucherla Chengiah* v. *Subbaroya Aiyar*(1), where the mother's father's sister's son's son is preferred to the mother's father's brother's grandson's son the latter being a lower descendant from the common ancestor than the former. If these rules fail, we have to resort to other rules: (i) Preference is given to Bandhus who confer greater spiritual benefit, *Jatindranath Ray* v. *Nagendranath Ray*(2); (ii) Bandhus *ex parte paterna* are entitled to preference to those *ex parte materna*; and (iii) A claimant in whose relationship two females intervene would be postponed to another in whose relationship there is only one female; this is illustrated by the judgment of myself and VENKATASUBBA RAO J. in *Rami Reddi* v. *Gangi Reddi*(3). I may suggest another illustration of the first rule but, as the case has not arisen and as I do not wish to prejudge it, I abstain from giving the illustration.

The result is that the second appeal must be allowed and the decision of the District Judge is reversed and that of the District Munsif restored with costs here and in the lower appellate Court.

(1) (1929) 58 M.L.J. 562.
(2) (1931) I.L.R. 59 Calc. 576; L.R. 58 I.A. 372.
(3) (1924) I.L.R. 48 Mad. 722.

I may add that it is so much in accordance with the sentiments of Hindus that a man's descendants should be preferred to his collaterals that the Hindu Law of Inheritance (Amendment) Act II of 1929, while it followed a right policy in elevating a son's daughter, daughter's daughter, sister and sister's son above Sagotra Sapindas, is faulty in that it does not provide for the man's cognate descendants, viz., son's daughter's son, daughter's son's son and daughter's daughter's son, being given preference over the sister and the sisters's son who are only collaterals, and it would be in accordance with the sentiments of Hindus if the Act is amended on such lines. Even on the principle of spiritual benefit, one's son's daughter's son should be preferred to a sister's son; and, even on any non-Hindu mode of computation of the steps between the propositus and the claimants, the three bandhu-descendants abovementioned cannot be inferior to the sister's son and ought to precede him, if not the sister.

CURGENVEN J.—I agree.

A.S.V.