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kill v. *Powell* (1); and a like construction was put upon the same words in another but somewhat analogous section in *Wood* v. *Perry* (2); and *Bonsey* v. *Wordsworth* (3).

I wish to guard against expressing any opinion wider than is necessary for the purposes of this case. It is enough to say that, in my opinion, where there are two breaches of one term in one contract, and both occur before any suit is brought, the cause of action within the meaning of s. 43 is the non-performance of the promise, and only one suit will lie. In this case I think the cause of action is that the defendant contracted to take and pay for ten bales of yarn and failed to do so. I should therefore answer the second question in the negative.

The point raised by the first question was abandoned on the argument before us. That question should be answered in the negative.

T. A. P.

Attorneys for plaintiffs: Messrs. *Morgan & Co.*

Attorney for defendant: Baboo *N. C. Bose.*

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

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BACHHA JHA AND ANOTHER (TWO OF THE DEFENDANTS) *v.* JUGMON JHA AND OTHERS (PLAINTIFFS) AND OTHERS (DEFENDANTS.)*

Hindu Law—Stridhan—Mithila Law—Succession.

The *stridhan* property of a widow, governed by the Mithila law and married in one of the approved forms of marriage, goes to her husband's brother's son in preference to her sister's son.

IN this case the plaintiffs sought to obtain possession of certain property left by one Choona Ojhain, deceased, which they alleged had formed portion of the estate of her late husband, and which had been taken possession of by the defendants.

* Appeal from Original Decree No. 202 of 1884, against the decree of J. Pratt, Esq., District Judge of Purneah, dated the 23rd of April 1884.

(1) 19 L. J. N. S., Ex., 363; 1 L. M. & P., 550.

(2) 18 L. J. N. S. Ex. 161; 6 D. & L. 194; 3 Exch. 442.

(3) 25 L. J. N. S. C. P., 205.

It was admitted that the parties were governed by the Mithila law, and that the plaintiffs were the sons of Choona Ojhain's husband's brother.

Defendant No. 1 was the son of Choona Ojhain's sister, and the other defendants were servants of his, who were alleged to be in possession of the property on his behalf.

Defendant No. 1 claimed that the property in suit was the *stridhan* of Choona Ojhain, and he claimed to be a preferential heir thereto as being her sister's son.

The main questions raised in the case were, whether or not the property in suit was *stridhan*, and which of the parties was the preferential heir, and though there were other questions raised in the lower Court, they were not raised in the appeal, and are immaterial for the purpose of this report.

The findings of the lower Court upon the main questions are sufficiently stated in the judgment of the High Court.

Baboo *Mohesh Chunder Chowdhry*, and Baboo *Uma Kally Mookerjee*, for the appellants.

Baboo *Nilmadhub Bose*, for the respondents.

The judgment of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows :—

The contest in this case is between two persons who claim to be entitled to certain properties left by one Choona Ojhain, deceased. The plaintiff substantially claims upon the ground that the said properties belonged to Choona Ojhain's husband and were part of his estate, and that on Choona's death he is entitled to the same under the Hindu law, he being her husband's brother's son. The defendant, on the other hand, contends that the properties were the *stridhan* of Choona, and that he being her sister's son is entitled to the same in preference to the plaintiff. The parties in the case are governed by the Mithila law.

The Court below has found that only some of the properties were Choona's *stridhan*, but has held that, whether the rest were *stridhan* or not, the plaintiff, as her husband's brother's son, is entitled to succeed under the Hindu law in preference to the defendant.

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We may here observe that in addition to the contention mentioned above some other pleas were raised by the defendant, *viz.*, that he had been adopted as *kurta-pooter* by Choona Ojhain before her death, and that she had made a gift of all her properties to him, but these pleas were found against him by the Court below, and the learned vakeel for the appellant has very properly refrained from insisting upon them before us.

There was also a further question in the Court below as to whether all the properties claimed by the plaintiff belonged to Choona Ojhain or not, and also as to the value of some of the moveable properties. The Court below has determined the said question partly in favour of the plaintiff and partly in favour of the defendant, and as against this part of the case there is no contention raised before us by the learned vakeel for the defendant-appellant.

The questions that have been discussed before us are :—

1*st.*—Whether the properties decreed to the plaintiff by the Court below were Choona Ojhain's *stridhan* within the meaning of the Hindu law as it obtains in the Mithila school, or should they be regarded as part of Choona's husband's estate ?

2*nd.*—Supposing that they were the *stridhan* of Choona, as contended by the defendant, whether the plaintiff, as the husband's brother's son of the deceased, or the defendant as her sister's son, is the preferential heir according to the Mithila school.

In the view that we take of the second question it is unnecessary to express any opinion upon the first question, but if it were necessary we should be inclined to hold that the properties were acquired by Choona Ojhain under circumstances which would give her complete control over them and would make them her *stridhan* within the meaning of the Mithila law (see *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (1).

The second question that has been raised before us and which is the true question in the case is rather a difficult one, and of a novel character. There is not a single decided case bearing upon it, and the Hindu law books of authority in the Mithila school which have been translated into English are altogether silent on the matter.

(1) L. R., 5 I. A., 1.

The question is shortly this: whether in default of issue, daughter's son and the like, as also the husband, the *stridhan* property of a woman married in one of the approved forms of marriage, goes to her husband's brother's son in preference to her sister's son.

The Vivada Chintamani, a work of the highest authority in the Mithila school, after stating that a woman's separate property is inherited in the first instance by her children and then by her daughter's son and the like, lays down that the property devolves on her husband if she was married according to one of the approved forms, but if she was married in the Ashura or any other unapproved forms, the wealth goes to her mother and father.

The author of the Vivada Chintamani does not proceed to discuss or lay down who are the next in succession, but he stops short with the husband and the parents, and we are left therefore completely in the dark as to who among the two claimants, according to that authority, would be the preferential heir.

We observe that the author of the Vivada Chintamani in his introduction states that he has compiled the work after studying the "works styled Krito Kalpadruma, Parijata, Ratnakara and others."

Unfortunately these books have not been translated into English.

The learned vakeel for the appellant has provided us with a translation of that portion of Ratnakara which treats of *stridhan*. This book is no doubt one of considerable authority in the Mithila school, and if the matter were clear upon what Ratnakara says on the subject, we should perhaps have no difficulty in deciding the matter.

The author of Ratnakara, after quoting various texts of certain sages, which indicate that the law of succession is very nearly the same as that laid down by the Vivada Chintamani, and after commenting thereupon, cites a text of Vrihaspati which is as follows: "The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law and the wife of an elder brother are declared to be similar to the mother. If they have no issue nor son of their body, nor

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daughter's son, nor son of these persons, the sister's son and the rest shall take the property." The author then makes the following commentary.

"The meaning is that in default of the son and the rest, the sister's son, &c., shall take the property of their mother's sister and others."

And with this commentary, and without saying anything further Ratnakara concludes the chapter on the partition of *stridhan*.

We may here observe that it is upon the above text of Vrihaspati adopted by Ratnakara that the defendant-appellant mainly relies in support of his contention that the sister's son is the preferential heir in this case. Tho learned vakeel contended that it must be understood that the said text laid down not only that the sister's son was an heir, but also that the several heirs mentioned therein should succeed in the order specified, sister's son being the *first*.

Now the first observation that arises upon the above text of Vrihaspati is that it is extremely doubtful, both as to the exact position of the group of heirs mentioned therein, and as to their relative positions *inter se*. According to the wording of the text, this group of heirs would come in after the issue, and before the husband and the parents. Then, again, the kinsmen of the husband, and of the parents, mentioned therein, are enumerated without having regard to the distinction that exists in the devolution of *stridhan* property arising from the form of the marriage.

We find, however, that the text has received interpretation in certain schools of law in India, and we proceed to notice them.

The Smriti Chandrika, which is the great authority in the Dravida School, in chapter IX, section III, after giving the text of Vrihaspati in verse 36, says in verse 37 as follows:—

"The sons of the sisters of the deceased take the property of their maternal aunt. Likewise it must be understood by the words 'and the like' in the text that the other heirs are to take the wealth of their respective secondary mothers in due order."

It is doubtful whether the author of the Smriti Chandrika

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meant to lay down that the heirs mentioned in the text succeed in the order enumerated therein, or in the order of their propinquity to the deceased as, we shall presently show, has been enunciated by the Viramitrodaya. We observe, however, that in the law of partition and succession translated by Mr. A. C. Burnell, from the manuscript Sanscrit text of Varadaraja's Vyavaharanirnaya, a work of authority in Southern India, the compiler, after referring to the text of Vrihaspati, gives, and we may assume approvingly, the observation of Colebrooke as follows.

"This text does not take effect if there be *sapindas* as far as the fourth. This text is of effect if there be *sapindas* commencing with the fifth. Thus it is explained by commentators. By others, however, the arrangement is made as follows: If there be six relations, such as sister's son, &c., of the six persons beginning with the mother's sister, then when a husband succeeds to a childless woman's *stridhan* in case of his default, of the three relations who (are so) through the husband, the husband's younger brother first succeeds to the elder brother's wife's wealth by reason of his greater affinity. In his default the husband's brother's son takes (it). In his default the husband's sister's son takes (it). When, however, the mother and father would succeed, then in their default, of the three relations (who are so) through them, the deceased woman's sister's son takes first. In his default her brother's son takes (it). In his default the son-in-law takes it," and so on.

The author of the Dayabhaga in quoting the same text, gives reasons why it could not be held that the heirs mentioned therein would succeed in the order enumerated, and observes that it is contrary to the opinion and practice of venerable persons. He then says : " Therefore the text is propounded not as declaratory of the order of inheritance, but as expression of the strength of the fact." He ultimately lays down that the order of succession should be in accordance with the various degrees of benefits conferred on the owner by the oblation of food at obsequies. (Dayabhaga, Ch. IV, s. III, verses 35, 37.) (See also Srikrishna Tarkalankar's Commentaries; Colebrooke's Digest, vol. IV, pp. 319-324.

The author of the Viramitrodaya, a book of considerable authority

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in the Benares School, after laying down that the property of a childless woman dying without issue belongs to her husband, and on failure of him, to the husband's nearest relations, cites the said text of Vrihaspati, and then expounding the reasons why the woman's issue and the issue of her co-wife should succeed, proceeds to observe as follows: "Hence on failure of these the sister's son, and the rest alone, in spite of the *sapindas*, such as father-in-law, are by virtue of this text, which is not reconcileable in any other way, entitled to succeed, according to their comparative propinquity, to the property of their mother's sister and the rest." (Viramitrodaya, pp. 240—244.)

It is pretty clear, as we understand it, from what the Viramitrodaya says, that according to his view the sister's son, and others mentioned in the text of Vrihaspati, do not succeed in the order they are enumerated therein, but in the order of comparative propinquity to the woman. That the Viramitrodaya could not have meant to lay down that the order of succession should be as the enumeration of the heirs given in Vrihaspati's text would seem to suggest, is clear from the following considerations: of the six heirs mentioned therein, two, *viz.*, the sister's son and the brother's son, are the *sapindas* of the woman's father; three, *viz.*, husband's sister's son, husband's brother's son and the husband's younger brother's son, are the *sapindas* of the husband. Now it is well settled that in case of a competition between two *sapindas*, the *sogotra sapinda* takes precedence over a *bhinna gotra sapinda*, and therefore as between the sister's son and the brother's son, the latter would be the preferential heir. Then among the three *sapindas* of the husband, the order should be first, the husband's brother, second the husband's brother's son, and the third the husband's sister's son. According to the Viramitrodaya and some other writers on the subject, comparative propinquity is evidenced by the amount of spiritual benefit conferred on the deceased, and the degrees of propinquity are tested by religious merit.

If that principle be followed in this instance, it will be found that the sister's son cannot be regarded as having the most preferential right of succession, as would be the case were we to follow implicitly the order in which the several heirs are enumerated in the text of Vrihaspati.

Then, again, if propinquity be determined by consanguinity only, the preferential heirs would be her brother's son, and sister's son, but we find that the brother's son is mentioned as the fifth in order.

The text of Vrihaspati has been adopted in the Mahratta School. The Vyavahara Mayukha, which is a work of paramount authority in that school, merely quotes the text as showing that the group of heirs mentioned therein comes in after the husband or the parents, as the case may be, with reference to the form of the marriage of the woman; but beyond that, there is nothing to show that in that school the succession is regulated in the order in which the said heirs are enumerated in that text, but on the contrary on a careful consideration of the Vyavahara Mayukha itself (chapter IV, sec. X, verses 22-28) it seems to be doubtful whether the author really meant it to be so. The author, after speaking of the succession of the woman's issue, daughter's son and so forth, quotes the text of Yajnavalkya, *viz.*, "her kinsmen take it if she die without issue;" and then, after referring to the exposition of that text according to the different kinds of marriage, says,—"failing the husband the nearest to her in his family takes it; similarly failing the father the nearest to her in her father's family succeeds." The author then alludes to the observation of the Mitakshara on the same subject, and to the text of Manu showing that in the case of a marriage according to one of the approved forms, the property goes to the husband, whereas in the case of a marriage in one of the unapproved forms, it goes to her parents. The author then says: "On failure of the husband of a deceased woman in the case of marriage according to Brahma, or the like form, or on failure of her parents in the case of marriage according to the Asura or the like form, Vrihaspati names the person entitled to the technical *stridhan.*" Then follows the text itself.

We are inclined to think that what the author perhaps meant to lay down was that the succession of the heirs mentioned in Vrihaspati's text is to be taken to be subject to the rule of law laid down by him in accordance with the Mitakshara (see Shama Churn's Vyavastha Chandrika, vol. II, pp. 537, 538.)

While, therefore, on the one hand it is left in doubt whether

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the authors of the Vyavahara Mayukha and Smriti Chandrika were of opinion that the text of Vrihaspati was intended to lay down the order of succession, the Dayabhaga school on the other hand distinctly repudiates the said construction, and the Viramitrodaya lays down that the heirs mentioned in the text are to succeed according to their propinquity to the woman.

Upon the above considerations we are unable to accept the construction of the text of Vrihaspati for which the learned vakeel for the appellant contends.

We now turn to the two other books which have been, as already stated, specially mentioned in the introduction of the Vivada Chintamani. They are the Krito Kalpadruma and Parijata. Neither of these books has been translated into English, and we have been unable to obtain the first of them. The other book (Madan Parijata) so far as it bears upon the present subject, does not quote Vrihaspati's text, but, after quoting a text of Yajnavalkya on the subject, says as follows: "If (*stridhan*) goes to her kindred, *i.e.*, husband and others, she being childless, *i.e.*, dying without issue, *i.e.*, without daughter, daughter's son, son, son's son. If a woman is married according to either Brahma Daiva, Arsha, or Prajapatya form of marriage, the husband takes her property; in his default those that are nearest of kin in the husband's family; in their absence, the nearest of kin in the father's family. This is the construction."

It thus appears that out of the three books referred to in the introduction to the Vivada Chintamani as the principal books consulted by the author in making his compilation, two do not lay down that the succession after the husband should be according to the order in which the sister's son and others are enumerated in Vrihaspati's text, but on the contrary one of them, the Parijata, gives the order in a very different manner and upon a different principle. The order given by this book, we may here observe, is what the plaintiff contends for.

In this state of the authorities in the Mithila school, we must refer to the Mitakshara for our guidance in this matter. It is, as the Judicial Committee says, in the case of *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1) "universally accepted by all

(1) 12 Moore's I. A., 397; 1 B. L. R., P. C., 1.

the schools, except that of Bengal, as of the highest authority and which in Bengal is received also as of high authority, yielding only to the Dayabhaga on those points where they differ." The author of the Mitakshara, after describing the different classes of woman's property, lays down (Chapter II, s. XI, verse 9) that "if a woman dies without issue, that is bearing no progeny, in other words leaving no daughter nor daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property, as above described, shall be taken by her kinsmen, namely her husband and the rest, as will be forthwith explained;" and then in verse 11 says as follows: "Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated, Brahma, Daiva, Arsha and Prajapatya, the property as before described belongs in the first place to her husband. On failure of him it goes to his nearest kinsmen (*sapindas*) allied by funeral oblations." And in verse 25 the author states: "On failure of grandsons also, the husband and other relatives above mentioned are successors to the wealth."

It is thus clear that, according to the Mitakshara, the husband's kinsmen are preferred to the father's kinsmen; and it follows that the plaintiff as the husband's brother's son of the deceased is entitled to preference, as against the defendant, the sister's son.

The result is that the appeal will be dismissed with costs.

H. T. H. *Appeal dismissed.*

Before Mr. Justice Prinsep and Mr. Justice Pigot.

HARENDER KISHORE SINGH (PLAINTIFF) *v.* THE ADMINISTRATOR-GENERAL OF BENGAL, ON BEHALF OF THE ESTATE OF MR. J. S. ROCHFORT, DECEASED, (DEFENDANT).*

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Limitation—Principal and Agent—Breach of Contract—Account—Registered Agreement—Limitation Act (XV of 1877), Sch. II, Arts. 89, 90, 116—Beng. Act VIII of 1869, s. 30—Costs—Administrator-General's Act (II of 1874), s. 35.

A suit to recover from the representatives of a deceased Agent certain sums of money which had been received by such Agent in the course of his

* Appeal from Original Decree No. 52 of 1884, against the decree of Baboo Amrit Lal Pal, Rai Bahadur, Second Subordinate Judge of Sarun, dated the 18th December 1883.