FULL BENCH.

1910
April 9.

Before Mr. Justice Sir George Knox, Mr. Justice Banerji and Mr. Justice Richards.

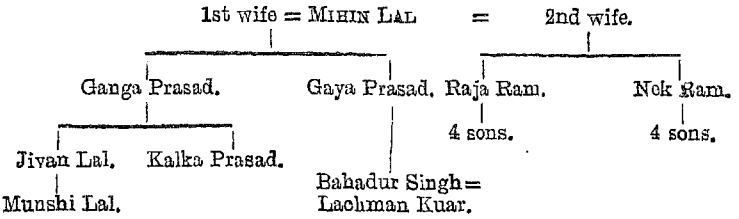
KESRI AND OTHERS (DEFENDANTS) *v.* GANGA SAHAI (DEFENDANT) AND KALKA PRASAD AND ANOTHER (PLAINTIFFS).*

Hindu Law—Mitakshara—Succession—Competition between uncle of the half blood and the son of an uncle of the whole blood.

Held that according to the Hindu law of the Mitakshara school an uncle of the half blood succeeds in preference to the son of an uncle of the whole blood, the former being nearer in propinquity than the latter. *Suba Singh* v. *Sarafraz Kunwar*, (1) distinguished.

THE facts were briefly these :—

The relationship between the parties appears from the following pedigree :—



Bahadur Singh was the last male holder of the property in dispute. After him his widow, Lachman Kunwar, remained in possession till her death. At her death Raja Ram, Jivan Lal and Kalka Prasad were alive. All of them claimed the property. Suits were brought by all of them and a decree was passed in favour of Kalka Prasad. Raja Ram having died, his sons preferred an appeal.

The Hon'ble Pandit *Sundar Lal* (with him Pandit *Ramakant Malaviya* for The Hon'ble Pandit *Madan Mohan Malaviya*), for the appellants :—

It is settled law that a step-mother is no heir under the Hindu Law. The question is whether Raja Ram is the heir or Kalka Prasad and Jivan Lal. Under the Hindu Law an uncle has a better title. The question of the whole or the half blood arises only when the claimants stand in the same degree of

* First Appeal No. 57 of 1907, from a decree of Daya Nath, Subordinate Judge of Farrukhabad, dated the 10th of December 1906.

(1) (1896) I. L. R., 19 All., 215.

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relationship, but where the one is further removed than the other, the nearer succeeds. Manu, Chap. IX, v., 187. The earliest texts of the Hindu Law are very general. We have to see what interpretations have been placed upon them by the Mitakshara. Among the brothers preference is given to whole blood. In the case of nephews and brothers the former have a right on failure of the latter. The brothers referred to may be of the whole or half blood. Manu, Chap. II, section 5, pl. 1—5. After the parents and their descendants are exhausted, come the paternal grandfather and his descendants, the uncles and their sons successively. After Bahadur's death the property would have gone to Mihin Lal and after his death to his sons, among whom only Raja Ram was alive at the time the succession opened. According to the Bombay High Court the question of the whole or half blood does not arise in the succession of *gotrajas*. The Punjab Chief Court, too, has taken the same view. It is for the other side to show that notwithstanding the clear terms of the Mitakshara the nephews are entitled to succeed. Other text writers have put the same interpretation on the Mitakshara as I do. Reference was made to Viramitrodaya, p. 199; Smriti Chandrika, Sarvadhikari's Togore Lectures, 1880, p. 436, also to *Ganga Sahai* v. *Lekhraj Singh* (1). At page 439 of Sarvadhikari's Tagore Lectures is a translation of Madana Parijata. The rule is that one must find out the nearest heir.

The following authorities were also cited :—

Mandlik, *Vyavahara Mayukha* (Translation of Parijata), pp. 384, 385; Sarvadhikari, *op. cit.*, p. 481 (translation of Nanda Pandit's Vaijayanti); Subodhini, translated by Mandlik, *op. cit.*, 360, 361; Shama Churn Sircar, *Vyavastha Chandrika*, Vol. I, pages 172, 177, 182; West and Buhler, Digest p. 114; Ghose, *Hindu Law*, p. 125; Mayne, *Hindu Law*, 774, 777 (7th edn).

There is no case directly in point. The only case in this Court is that of *Suba Singh* v. *Sarafraz Kunwar* (2). In that case all the parties were of the same degree of relationship to the deceased. *Vithalrao Krishna Vinchurkar* v. *Ramrao Krishna Vinchurkar* (3) and *Hira Nand* v. *Maya Das* (4) were also referred to.

(1) (1886) I. L. R., 9 All., 253.
(2) (1896) I. L. R., 19 All., 215.
(3) (1899) I. L. R., 24 Bom., 317.
(4) Punj. Rec., 1894, 284.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondents:—

The principle laid down in *Suba Singh* v. *Sarafraz Kunwar*, (1) governs the case. It has been rightly decided there that whole blood should have precedence over half blood. The Mitakshara is the supreme authority in these provinces, and the verses cited by the other side show that even where there is a difference of degree, the order of succession is the same. Most commentators admit that the distinction between the whole and the half blood applies to remote heirs as well as to near heirs. The distinction in section 4 is not exhaustive. The various sections of the Mitakshara should not be construed in the manner suggested by the other side, *e.g.* Chap. II, section IV, verses 5 and 6. Every relationship mentioned here refers to relationship of the whole blood. After the brother the line of succession is considered in pl. 7, and the brother there referred to is a brother of the whole blood. The question is what the word 'brother' means there. If 'uncles' in section 5, pl. 4, means uncles of both classes, can it be said that an uncle of the half blood ranks equally with one of the whole blood? The author of the Mitakshara has dealt with the case of brothers of the whole and half blood in pl. 5 and left the principle to be applied elsewhere. There is no direct authority bearing on the point but the text of the Mitakshara as interpreted in I. L. R., 19 All., p. 215, shows that such would be the case. The rule of propinquity lays stress on the nearness of the son to the mother. We have to see how far there is community of particles of blood between the deceased and the claimants. In the case of Raja Ram there is no community of particles through the mother between him and Bahadur Singh. The Ful Bench Ruling in I. L. R., 19 All., 215, lays down that proposition and it supports the case of the plaintiffs respondents.

The Hon'ble Pandit *Sundar Lal* was not heard in reply.

BANERJI, J.—The suit out of which this appeal and the connected appeal No. 58 of 1907 arise relates to certain property left by one Bahadur Singh. The plaintiffs in each case claim to

(1) (1896) I. L. R., 19 All., 215.

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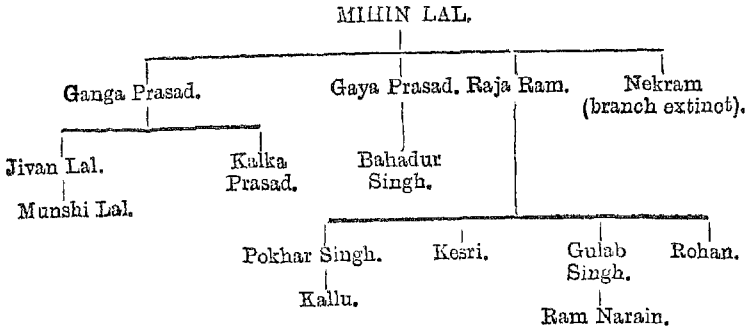
be the next heirs to Bahadur Singh. The relationship between the parties appears from the following pedigree:—



It is admitted that the four sons of Mihin Lal were separate and that after the death of Bahadur Singh, his widow, Musammat Lachman Kunwar, succeeded to his property. When Lachman Kunwar died, Raja Ram, Jivan Lal and Kalka Prasad were alive, as also was Musammat Gulab Kunwar, the step-mother of Bahadur Singh. She was admittedly not an heir to Bahadur Singh. The question is whether Raja Ram was his heir or whether Jivan Lal and Kalka Prasad inherited his property. Raja Ram and Jivan Lal died subsequently. The property in dispute is claimed on the one hand by the sons of Raja Ram, and on the other by Kalka Prasad and by Munshi Lal, the son of Jivan Lal. There was a controversy as to whether Raja Ram was the half brother of Gaya Prasad, the father of Bahadur Singh or his uterine brother, but the case has been argued on the assumption that he was Gaya Prasad's half brother. It is admitted that Gaya Prasad and Ganga Prasad were born of the same mother. The question therefore is whether an uncle of the half blood succeeds in preference to the sons of an uncle of the whole blood. If Raja Ram was entitled to Bahadur Singh's estate in preference to the sons of Ganga Prasad, his sons are entitled to the property in question and their claim must succeed.

The question raised in this appeal was not decided in *Suba Singh* v. *Sarafraz Kunwar* (1) and the court below is wrong in thinking that it was decided in that case. What was held in that case was that "among *sapindas* of the same degree of

(1) (1896) I. L. R., 19 All., 215.

descent from a common ancestor those who are descended from the same mother as the propositus are nearer in propinquity than those descended from a different mother" (see p. 232), and that the distinction of whole blood and half blood is not confined to the brother and his sons but extends further. The question which we have to determine in this appeal is whether, when there is a difference in the degree of relationship, the rule of whole blood and half blood applies.

The order of succession after parents is thus laid down in the Mitakshara:—"On failure of the father, brethren share the estate." (Chapter II, s. 4, § 1.)

"Among brothers, such as are of the whole blood take the inheritance in the first instance under the text [of Manu] 'To the nearest *sapinda*, the inheritance next belongs,' since those of the half blood are remote through the difference of mothers." § 5).

"On failure of brothers also, their sons share the heritage." (Section 7).

"In case of competition between brothers and nephews, the nephews have no title to the succession: for their right of inheritance is declared to be on failure of brothers." (§ 8).

This rule of exclusion of nephews by brothers also applies to brothers of the half blood, and sons of brothers of the full blood inherit on failure of half brothers. (See West and Buhlers' Hindu Law, p. 112, and Mayne's Hindu Law, section 569, p. 774, 7th edn.). Except in Bombay, where the authority of Vyavahar Mayukha is supreme, this rule applies to all cases governed by the Mitakshara.

In section 5, chapter II of the Mitakshara the rule of succession in default of brothers' sons is laid down, the heirs being *gotraja sapindas* and after them *bhinna gotra sapindas* or *bandhus*. Among the former "the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons." (Section 5, § 4). The word in the original Sanskrit which has been translated as "successively" is *kramena*, which means one after another. Among *gotraja sapindas*, therefore, the paternal grandmother takes first; after her, the paternal grandfather; after him, uncles, that is, the paternal grandfather's sons, and, in default of

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them, their sons. The son of the paternal uncle thus comes in after the paternal uncle whether he is of the whole blood or the half blood. As we have seen, a brother of the half blood excludes the son of a brother of the whole blood. On the same principle, which is that of propinquity, a paternal uncle of the half blood excludes the son of a paternal uncle of the whole blood. The learned advocate for the respondents contends that paragraph 4, section 5, is intended to apply only to relations of the whole blood, but there is no authority, as far as we are aware, in support of this contention, and none has been cited. On the contrary, the Madana Parijata by Visvesvar Bhatta, a commentary on the Mitakshara of great authority, clearly explains what the meaning of the rule is The passage in the Madana Parijata bearing on the point is thus translated by Professor Sarvadhikari in the Tagore Law Lectures for 1880, p. 440:—"Among the paternal uncles, the succession of uterine and half blood uncles should be regulated in the same manner as in the case of brothers, that is, the paternal grandmother's sons first inherit, and after them the step-grandmother's sons, and in their default the paternal uncles' sons inherit in the same manner as brothers' sons." The same passage is quoted in Mandlik's Hindu Law, p. 384, foot note, and is similarly translated. Reading the text of the Mitakshara by the light of this commentary there can be no room for doubt that an uncle of the half blood succeeds in preference to the son of an uncle of the whole blood, the former being nearer in propinquity than the latter.

As Raja Ram was alive when the widow of Bahadur Singh died, he inherited the latter's property, as he was Bahadur Singh's uncle, although of the half blood, and the plaintiffs respondents, who are lower in degree, have no right to his estate. Their suit ought, therefore, to have been dismissed and the claim of the sons of Raja Ram ought to have been decreed. I would allow this appeal, set aside the decree of the court below and dismiss the suit of the plaintiffs respondents with costs.

KNOX, J.—I have had the advantage of reading and considering the judgement of my brother BANERJI and have nothing to add.

RICHARDS, J.—I concur.

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BY THE COURT.—The appeal is allowed, the decree of the court below is set aside, and the suit of the plaintiffs dismissed with costs.

Appeal decreed.

APPELLATE CIVIL.

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April 9.

Before Mr. Justice Richards and Mr. Justice Tudball.

NATHU MAL (OPPOSITE PARTY) *v.* THE DISTRICT JUDGE OF BENARES (PETITIONER.)*

Act No. III of 1907*—(Provincial Insolvency Act), section* 43 *(2)—Insolvency—Inquiry as to alleged fraudulent acts committed by debtor—Procedure—Evidence.*

Held that proceedings under section 43 (2) of the Provincial Insolvency Act, 1907, should not be based merely upon the evidence given on behalf of the creditors when opposing the debtor's application to be adjudged an insolvent, but evidence as to the specific acts alleged against the debtor should be recorded *de novo*. *In the matter of Rash Behari Roy* (1) referred to.

THE facts of this case were as follows:—

The appellant, Nathu Mal, made an application on the 21st of September, 1908, to be adjudged an insolvent. The application was, owing to some formal defects, returned to him on the next day. A fresh application was thereafter made on 21st January, 1901. In disposing of this application the Judge found that it was clearly proved that the applicant had been guilty of very bad faith; that he had in his second application suppressed assets shown in the first application; and that he had, shortly before the second application, fraudulently disposed of valuable movable property to certain alleged creditors. The Judge however made, on the 11th of March 1909, the order of adjudication prayed for and appointed a receiver. The receiver called upon the insolvent to produce his account books; he did not do so, although in his deposition he had admitted keeping regular account books, but produced only "a sort of memorandum book" instead. The receiver reported the matter to the Judge, who commenced proceedings under section 43 (2) of the Provincial Insolvency Act (III) of 1907). He framed four charges or counts against the

* First Appeal No. 114 of 1909 from an order of E. H. Ashworth, District Judge of Benares, dated the 2nd of September, 1909.

(1) (1889) I. L. R., 17 Calc., 209.