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Before Justice Sir Pramada Charan Banerji and Mr. Justice Piggott.

RAM CHARAN LAL (PLAINTIFF) v. RAHIM BAKSH (DEFENDANT)*.

Hindu Law—Mitakshara—Succession—Bandhu—Mother's brother's son preferred to mother's sister's son.

According to Hindu law of the Mitakshara school, the mother's, brother's son takes precedence as an heir over the mother's sister's son. *Appandai Vathiyar v. Bagubali Mudaliyar* (1), dissented from. *Buddha Singh v. Lattu Singh* (2), referred to.

THIS appeal arose out of a suit for the possession of a 9/20ths share in certain properties which originally belonged to one Hori Lal, who died childless many years ago. He was succeeded by his mother, Musammat Jhummun, who died about seven years ago. The plaintiff's case was that on the death of Musammat Jhummun, as there were no nearer relations alive, the estate was inherited by Kalyan Rai, Birbal, Maidai Lal, Mithan Lal and Jiwan Sahai, who were the sons of the maternal uncles (mother's brothers) of Hori Lal; that three of these persons viz. Maidai Lal, Mithan Lal and Jiwan Sahai subsequently sold to the plaintiff 3/4ths of their share in 9/20ths of the whole property and that the defendants were trespassers in possession; hence this suit for possession of the 9/20ths share and mesne profits. The defence, *inter alia*, was that after the death of Musammat Jhummun the estate was inherited by one Narain Das, the son of the sister of the mother of Hori Lal; that under the *Mitakshara* a mother's sister's son is a preferable heir to a mother's brother's son. Consequently the plaintiff's vendor, not having any title, could not transfer any title to the plaintiffs.

The court of first instance decreed the suit, holding that the mother's brother's son was a preferable heir to a mother's sister's son.

The defendants thereupon preferred separate appeals which were heard together and the appellate court held that the mother's sister's son was the preferable heir and following the decision in *Appandai Vathiyar v. Bagubali Mudaliyar* (1), dismissed the suit.

* Second Appeal No. 1386 of 1914, from a decree of V. N. Mehta, District Judge of Bareilly, dated the 30th of July, 1914, reversing a decree of Baijnath Das, Subordinate Judge of Bareilly, dated the 16th of December, 1913.

(1) (1908) I. L. R., 33 Mad., 439. (2) (1915) I. L. R., 37 All., 604.

Babu *Sital Prasad Ghose*, for the appellant :—

Both the mother's brother's son and the mother's sister's son are *atma bandhus*. The *Mitakshara* only prescribes that the *atma bandhus* would come before the *pitri bandhus* who in their turn come before the *matri bandhus*. *Mitakshara*, Chapter II, section 6, paragraph 102. The *Mitakshara* does not prescribe any order of succession *inter se* between the different members of each of the different classes. The order given in the text is only for the exigencies of the *metre*. If the mother's brother's son be placed next to the father's sister's son then there would be one letter more in the first line and one letter less in the second than what the *metre* would require. The ruling in *Appandai Vathiyar v. Bagubali Mudaliyar* (1), is based upon Smriti Chandrika which is an authority in Southern India but not here. It was a case between Jains. In the case of a mother's sister's son two females intervene, whereas in the case of a mother's brother's son only one female intervenes and therefore the latter is to be preferred ; *Tirumala Chariyar v. Andal Ammal* (2).

I rely upon the observations of BANERJI, J., in *Suba Singh v. Sarfaraz Kuer* (3). The test imposed by the Privy Council in *Buddha Singh v. Lattu Singh* (4), is that when consanguinities are equal, he who confers the greater spiritual benefit is to be preferred. Although the mother's brother's son offers only two full *pindas* whereas the mother's sister's son offers three full *pindas* to the ancestors to whom the propositus was bound to offer *pindas* in his paternal line, which are of superior benefit, he is to be preferred. On the ground of superior spiritual benefit the *Dayabhaga* has preferred the mother's brother's son. Moreover, the mother's brother's son offers *pinda lepas* to three higher ancestors in his paternal line ; Ram Krishna's Hindu Law, Vol. II, p. 182. Further, by giving the property to the mother's brother's son you perpetuate the offering of oblations in his son, grandson and so on. Not so in the case of the mother's sister's son as his sons, grandsons, etc., do not offer any *pindas* to the ancestors of the propositus. Reliance was placed upon *Mayne's Hindu Law*, 8th edition, pages 713, (paragraph 512), 714 (footnote),

(1) (1908) I. L. R., 33 Mad., 499. (3) (1993) I. L. R., 19 All., 215 (236).

(2) (1905) I. R. L., 30 Mad., 403. (4) (1915) I. L. R. 37 All., 604 (618).

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810, 811 (chart) and 812; *Trevelyan's Hindu Law of Inheritance*, p. 42, 386; *Sarodhicary's Hindu Law of Inheritance*, pages 698, 700 and 701; *Tirumala Chariyar v. Andal Ammal* (1).

The Hon'ble Munshi *Gokul Prasad* (with him Munshi *Harnandan Prasad*), for the respondents:—

The conferring of funeral oblations will be one criterion. Now on that basis Hori Lal himself cannot give *pindas* to any ancestor beyond the grandfather of his own maternal grandfather. So we are not to go beyond that ancestor. The mother's sister's son will offer the same kind of full *pindas* to the same maternal ancestors as the propositus would have done. They both offer three full *pindas* whereas the mother's brother's son will offer only two full *pindas* and a divided *pinda* to these ancestors. Divided oblations are of less benefit than full oblation; *Sarvadhicary's Hindu Law of Inheritance*, pages 648—650; *Ram Chander Martand Waikar v. Vinayek Venkatesh Kothekar* (2). *Lepas* offered to the ancestors beyond the grandfather of the maternal grandfather does not confer any benefit on the propositus; *J. C. Ghose's Hindu Law*, page 182. As to the capacity of the sons, grandsons, etc., of the mother's brother's son to offer *pindas*, one must look to the present state of affairs and not to a future possibility. Turning now to the text of the *Mitakshara*, we find that the same order is maintained in the case of *pitru bandhus* and *matri bandhus*. This is not by mere accident and this is significant. If we put the maternal uncle's son first and the two others afterwards then the metre would not be changed if we transpose the line. Balam Bhatta in his *Subodhini* says that the order is to be maintained. This is also the order given in *Vyavahara Mayukha*, a commentary on *Mitakshara*; *Mandlik's Translation*, page 82. Ordinarily under the *Mitakshara* the succession opens out according to the enumeration; why should it not be in the case of *bandhu*? The father's sister's son offers three full cakes to three paternal ancestors of the propositus and hence comes first, then comes the mother's sister's son who offers three full cakes to the maternal ancestors of the deceased and the mother's brother's son who offers only two full cakes will come last. Unless there is a rule

(1) (1905) I. L. R., 30 Mad., 406. (2) (1915) I. R. L., 42 Calc., 384, 406.

that the order should not be followed it should not be departed from; *Kishori Lal Sarcin's Tagore Law Lectures*, page 154. The mother's brother is introduced by the *Viramitrodaya*. He will come after the mother's sister's son. The principle of the exclusion of the female line ought not to be followed in cognatic succession. If that be so several *pitri bandhus* would come before the *atma bandhus*. There is no warrant in the Hindu Law for the proposition laid down in *Tirumala Chariyar v. Andal Ammal* (1), *Trevelyan's Hindu Law*, page 389. Propinquity being the same the mother's sister's son has got preference inasmuch as he confers greater spiritual benefit.

Babu *Sital Prasad Ghose*, in reply :—

The enumeration of *bandhus* given in the *Mitakshara* is not an exhaustive one as held by the Privy Council in 12 M. I. A., 448. Several persons who are admittedly *bandhus* do not find places there, the maternal uncle is one of these. The order given in all the three classes viz. *atma bandhus*, *pitri bandhus* and *matri bandhus* is similar for the sake of symmetry, euphony and also for the sake of metre. Further, this order is due to association of ideas and the father's son is juxtaposed with the mother's sister's son. The transposition of the line will detract from the euphony. Hence there is no special virtue in the fact that the same order is maintained in all the three classes. The governing principle of the *Mitakshara* is that the female line is excluded by the male line. On that principle the cognate in whose case two females intervene ought to be excluded by him in whose case only one female intervenes. As for the postponement of *pitri bandhus* who ought on this hypothesis alone to have come earlier than certain *atma bandhus*, is due to express wordings of the texts. Note the place where the word *kram* occurs in the text. As for the spiritual benefit: no doubt in *parvana sraddhas* as well as in *Nandi mukh sraddhas* the mother's sister's son offers *pindas* to the maternal ancestors of the deceased to whom the deceased was bound to offer *pindas*, whereas the mother's brother's son does only offer two full and a divided *pinda* to them, yet these are not the only *sraddhas* that the latter performs as in *ekodishka sraddhas* which are performed for the ancestors in the

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paternal line only; the mother's brother's son will be offering the two full *pindas* to these very ancestors. Hence, although in individual cases he may be offering a less number of *pindas*, yet the occasions for him to offer *pindas* will be more numerous. Moreover, the offering of *pindas* will be perpetuated in his line as his sons, and so on will continue to offer *pindas*, whereas in the case of the mother's sister's son the offering of *pindas* will cease with his death. The Hindu law does not overlook this perpetuation of *pindas*. Further, in the *tarpan* the mother's brother's son will be offering a larger number of libations of water to his own paternal female ancestors who according to Hindu notions are incorporated with the names of their respective husbands (the maternal ancestors of the *propositus*) than the mother's sister's son. All these must be kept in view in testing the amount of spiritual benefit.

BANERJI and PIGGOTT, JJ. :—The question raised in this appeal is whether under the Benares School of the *Mitakshara* law, by which the parties to this case are governed, the mother's brother's son succeeds as a *bandhu* in preference to the mother's sister's son. The question arises out of the following facts. One Hori Lal, who is said to have originally owned the property in dispute, died many years ago leaving him surviving his mother Musammat Jhumma, who succeeded him and remained in possession till her death, 7 or 8 years ago. Musammat Jhumma had two brothers, Kishun Das and Jhanjhan Rai, and two sisters, Musammats Lachminia and Behia. Narayan Das, son of Behia, is admittedly alive but is not a party to this suit. Three of the sons of Kishun Das sold three-fourths of what they alleged to be their interest in the property to the plaintiff appellant. On the strength of the sale deed executed in his favour the plaintiff brought the present suit for partition of a 9/20th share, for possession of that share and for other reliefs. The respondent to this appeal and the connected appeal No. 1387, contended that the vendors of the plaintiff did not succeed to the estate of Hori Lal in preference to Narayan Das, the son of Hori Lal's mother's sister, and that the plaintiff has consequently acquired no title under his purchase and has no right to sue. They thus set up the *jus tertii* of Narayan Das. They put forward other pleas

also with which we are not concerned in this appeal. The court of first instance held that the mother's brother's son had precedence over the mother's sister's son and over-ruling the other pleas raised by the defendants decreed the claim. This decision was reversed by the lower appellate court on the sole ground that in its opinion the mother's sister's son was a preferential heir. It has followed the recent ruling of the Madras High Court in *Appandai Vathiyar v. Baguba'i Madaliyar* (1). The question is by no means free from difficulty and except the ruling to which we have referred there is, as far as we are aware, no case in which the point was directly raised and decided. And we have not been referred to any text, authoritative in the Benares School, in which the order of succession among *bandhus* of each class has been clearly laid down. According to the *Mitakshara*, *bandhus* who succeed on failure of gentiles or *gotrajas*, are of three classes : (1) related to the person himself (2) to his father and (3) to his mother. The author then refers to the following text which is attributed to SATATAPA or BAUDHAYANA:—"The sons of his own father's sisters, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred" (*atma bandhus*). The same relations of his father and mother are mentioned as his father's *bandhus* (*pitri bandhus*) and his mother's *bandhus* (*matri bandhus*) respectively (*Mitakshara* chapter II, section 6, paragraph 1). In the following paragraph it is stated that "by reason of mere affinity, the cognate kindred of the deceased himself are his successors in the first instance, on failure of them his father's cognate kindred, or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended." The order of priority among cognate *bandhus* of each of the three classes mentioned is thus clearly laid down; but not among persons constituting cognate *bandhus* of each class. Had the enumeration of each class of *bandhus* been exhaustive it might with much force be contended that the son of the mother's sister having been mentioned before the maternal uncle's son would take priority over the latter. But it has been

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held by their Lordships of the Privy Council in *Girdhari Lal v. The Bengal Government* (1), that the enumeration of *bandhus* in the *Mitakshara* is not exhaustive but only illustrative of the proposition that there are only three classes of *bandhus* among whom one's own *bandhus* must be exhausted before those of other classes can come in. The enumeration not being exhaustive it can not be said that the three persons named as one's own *bandhus* (*atma bandhus*) take in the order in which they are named. In addition to the nine persons mentioned in the *Mitakshara* many others have been held to be *bandhus* and their place in the order of succession has to be determined otherwise than by reference to the list in the *Mitakshara* itself. The order of succession is not set forth in any of the commentaries on the *Mitakshara*. The learned Judges of the Madras High Court, who decided the case mentioned in an earlier part of this judgement, relied on the *Smriti Chandrika* and the *Saraswati Vilas*, which are of high authority in the Madras Presidency but not in these Provinces, and the *Vyavahara Mayukha*, which is a high authority in the Western Presidency; but a reference to these authorities shows that in them also no order of succession was prescribed as between persons who came within each of the three categories of *bandhus*. All that they declare is that as between each class of *bandhus* one's *atma bandhus* take precedence over *pitri bandhus* and the latter over *matri bandhus*. In chapter XI, section 5, paragraph 13, of the *Smriti Chandrika*, what the learned author, Devananda Bhat, says, quoting Brihaspati, is that when there are many cognate kindred (*Bandhewak*) "whoever is nearest of kin takes the wealth of him who dies without male issue." He then gives the same description of the *bandhavas* as is contained in the *Mitakshara*; but does not lay down any order of precedence among *bandhus* of each class *inter se*. It is in the summary given at the end of the section that the translator, T. Kristnasawmy Iyer, gives, among the nine *bandhus* mentioned in the *Mitakshara* lists, the mother's sister's son a higher place than the maternal uncle's son. It may be pointed out that this translation was first published in 1866, before their Lordships of the Privy Council decided the

(1) (1868) 12 Moo., I. A., 448.

case of *Girdhari Lal Roy v. The Bengal Government* (1) in 1868. The learned translator apparently considers the list to be exhaustive. As for the *Saraswati Vilas* the learned Judges themselves point out, as strange, that "though in this treatise 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."

As regards the Vyavahara Mayukha the learned Judges of the Bombay High Court held in *Mehudar v. Krishna Bai* (2) that by the text in the Vyavahara Mayukha that "the order of succession is even the order of the text" the author intended "no more than is stated in the *Mitakshara* (chapter II, section II, paragraph 2) viz. that by reason of near affinity the cognate kindred of the deceased himself are his successors in the first instance, on failure of them his father's cognate kindred; or if there be none, his mother's cognate kindred." It is thus manifest that none of the three authorities relied upon by the learned Judges of the Madras High Court supports their view that the order of succession among *bandhus* of each class should be that mentioned in the text of SATATAPA quoted in the *Mitakshara*. In the case of *Girdhari Lal Roy v. The Bengal Government* (1), the Judicial Committee of the Privy Council expressed the opinion that the *Mitakshara* only laid down the order of precedence among the three classes of *bandhus*, and the enumeration of each class of *bandhus* being only illustrative, the maternal uncle, who was not mentioned by the *Mitakshara* succeeded as a *bandhu*. In the Bombay case referred to above the maternal uncle was held to take precedence over the mother's sister's son. The learned Vakil for the respondent referred to a passage in the *Madanaparijat*, which has been translated in Sarvadhicary's *Tagore Law Lectures* and in *Setlur's Hindu law*. The two translations differ from one another, but in any view the author of the *Madanaparijat* seems only to lay down, as the *Mitakshara* does, the order of priority among *bandhus* of each of the three classes of *atma bandhus*, *pitri bandhus*, and *matri bandhus*.

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(1) (1868) 12 Moo, I. A., 448.

(2) (1881) I. B. L., 5 Bom., 597.

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There being thus an absence of authority among Sanskrit text writers and commentators as to the order in which *bandhus* of each class should take precedence among themselves we have to follow the text of Manu "to the nearest *sapinda* the inheritance next belongs" and determine the order of precedence with reference to that text. The *Mitakshara* itself assigns the reason for preference to be nearness of affinity (Chapter II, Section vi, sloka 2). We have therefore to see whether the maternal uncle's son is a nearer *sapinda* than the mother's sister's son. Mr. Mayne places the former before the latter on the ground of nearness of propinquity in the chart on page 810 of the 8th Edition of his well-known work. He points out, as indeed the whole scheme of the *Mitakshara* shows, that the *Mitakshara* gives preference to the male over the female line (page 811) and following this preference he assigns the 9th place to the maternal uncle, the 10th to his son, and the 11th to the mother's sister's son. Professor Sarvadhicari, in the *Togore Law Lectures on the Hindu Law of Inheritance*, gives preference to the maternal uncle and his son over the mother's sister's son (See page 712), and so does Bhattacharya in his *Commentaries on Hindu Law* (page 460). The Madras High Court in *Triumala Charriyar v. Andal Ammal* (1) expressed the opinion that "the general preference exhibited by the *Mitakshara* for the male over the female line . . . may legitimately be extended so as to prefer, all other considerations being equal, that claimant between whom and the stem there intervenes only one female link, to that claimant who is separated from the stem by two such links." In this view the mother's brother's son, who is separated by only one female link is to be preferred to the mother's sister's son who is separated by two such links. The weight of authority, therefore, seems to be in favour of the proposition that the maternal uncle's son is a preferential heir as compared with the mother's sister's son and we are unable to agree with the decision in *Appandai Vathiyar v. Bagubali Mudaliyar* (2). According to Mr. Golap Chandra Shastri (*Hindu Law*, page 295), these *bandhus* are of equal degree, but we

(1) (1905) I. L. R., 80 Mad., 406.

(2) (1908) I. L. R., 33 Mad., 439.

see no reason to agree with him. Even according to him the plaintiff's vendors would not be totally excluded.

We were asked to consider the question of religious efficacy and the recent ruling of the Privy Council in *Budha Singh v. Lattu Singh* (1), was referred to. As we hold that the maternal uncle's son is of nearer consanguinity than the maternal aunt's son, the question of funeral oblations need not be considered. We may observe that the plea of superior efficacy of oblations was fully answered by the Madras High Court in the case in I. L. R., 33 Mad., 439.

As the mother's brother's son is, for the reasons stated above, a preferential heir, as compared with the mother's sister's son, the court below was wrong in dismissing the claim, and its decree must be set aside and the case remanded for trial of other questions which were not determined by that court. We, accordingly, allow the appeal, reverse the decree of the court below and remand the case to that court under Order XLI, rule 23, of the Code of Civil Procedure, with directions to re-admit it under its original number and try the other questions which arise in the appeal. Costs here and hitherto will be costs in the cause.

Appeal decreed and cause remanded.

REVISIONAL CIVIL.

Before Justice Sir Pramada Charan Banerji.

CHHOTRY LAL (PLAINTIFF) v. LAKHMI CHAND MAGAN LAL (DEFENDANT)*
Act No. IX of 1887 (Provincial Small Cause Courts Act), section 17—Civil Procedure Code (1908), section 24—Suit transferred from Subordinate Judge with Small Cause Court powers to Munsif—Ex parte decree—Procedure.

Held, that section 24, sub-clause 4, of the Code of Civil Procedure contemplates a court vested with the powers of a Court of Small Causes and that when a suit is transferred from that court to another court, the court trying it is to be deemed a Court of Small Causes and its procedure is to be governed by the provisions of the Provincial Small Cause Courts Act. Therefore when such a suit is transferred to a Munsif from the court of a Subordinate Judge vested with Small Cause Court powers and the former passes an *ex parte* decree in the suit, an application to have the *ex parte* decree set aside must be accompanied by a deposit of the amount of the decree or a security in respect of the amount as required by section 17 of the Provincial

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