

32 C. 261 (=9 C. W. N. 119.)

[261] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Geidt.

DASHARATHI KUNDU v. BIPIN BEHARI KUNDU.*

[30th Aug. 1904]

*Hindu Law—Dayabhaga Chapter IV, ss. 3, 29, 31, 33, 35, 39—Stridhan, succession to—Step-sister's Son—Husband's elder brother.*Under the Dayabhaga law a step-sister's son is entitled to succeed to a woman's *stridhan* in preference to her husband's elder brother.

[Appr. 7 Bom. L. R. 622; Expl. 37 Cal. 863; Ref. 40 Cal. 82]

SECOND APPEAL by the plaintiff, Dasharathi Kundu, a minor, by his mother and next friend, Srimati Chanchala Dasi.

The plaintiff brought the suit for the recovery of possession of certain properties on the allegation that they were the *stridhan* of one Ranibala Dasi by virtue of a deed of gift executed in her favour by her father; that on the death of Ranibala the properties descended to her mother; that on the death of the latter, the plaintiff, who was the son of Ranibala's step-sister, became entitled to the properties as the next heir of Ranibala; and that he was kept out of possession by the defendants who claimed title to the properties under a collusive *kabala* executed by the eldest brother of Ranibala's deceased husband.

The defendants resisted the plaintiff's claim on the ground, amongst others, that the plaintiff was not entitled to the *stridhan* property of Ranibala Dasi, deceased, in the presence of her husband's elder brother, Doyal Mandal, under whom the defendants claimed most of the properties in suit.

The Munsif, who tried the suit, held that the plaintiff was not the preferential heir of Ranibala in comparison with her deceased husband's elder brother, and dismissed the suit without going into the other issues raised in the case. This decision having been affirmed by the Subordinate Judge, on appeal, the plaintiff preferred this second appeal.

[262] Babu *Golap Chandra Sarkar*, for the appellant. It is not correct to say that succession to *stridhan* is not governed by the doctrine of spiritual benefit,—the author of the Dayabhaga expressly relies on it in the chapter on *stridhan*. The step-sister's son confers the same spiritual benefit as the full sister's son, and is an heir in the same way as the latter; the fact of being a male offspring of one common parent makes one a brother: Sreekrishna's Commentary to the Dayabhaga, Ch. XI, s. 5, paras. 7—12; so of the sister. The expression “*নিজ ভগিনী পুত্র*” (own sister's son) in the Vyavastha Darpana, is used by Shyama Charan in contradistinction to the “husband's sister's son” who is mentioned immediately below.

Babu *Basanta Kumar Bose* (Babu *Gobinda Chundra Dey Roy* with him), for the respondents. The distinction of whole blood and half blood was well known to Jimutavahana: see Dayabhaga, Ch. IV, s. 3, paras. 27; 28, 29 where he expressly speaks of the uterine brother. Rule of *pinda* does not apply to succession to *stridhan*, for the husband's elder brother comes long after his younger brother, though they offer the same *pindas*:

* Appeal from Appellate Decree, No. 757 of 1902, against the decree of Srinath Pal, Subordinate Judge of Bankura, dated Jan. 30, 1902, affirming the decree of Nagendra Nath Chatterjee, Munsif of Kotalpore, dated Jan. 9, 1901.

1904

AUG. 30.

APPELLATE
CIVIL.32 C. 261=9
C. W. N. 119.

1904
AUG. 30.

APPELLATE
CIVIL.

32 C. 261-9
C. W. N. 119.

Dayabhaga, Ch. IV, s. 3, para. 37. The half-brother and half-sister are nowhere mentioned. Whenever the word sister is mentioned it must mean sister of the whole blood, as half blood nowhere finds a place in Ch. IV, s. 3.

Babu Golap Chandra Sarkar, in reply.

GHOSE AND GEIDT JJ. The question involved in this appeal is one of succession to a woman's *stridhan*, the competition being between her step-sister's son and her deceased husband's elder brother.

The Dayabhaga in Ch. IV, s. 3, after enumerating certain heirs to the woman's *stridhan* down to the husband, in verse 31 says as follows :—

"On failure of heirs down to the husband, this rule again is provided, which Vrihaspati thus delivers, 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 pronounced similar to mothers. If they leave no issue of their bodies, nor son (of a rival wife), nor daughter's son, nor son of those persons, the sister's son and the rest shall take their property."

[263] That is to say, that such persons to whom the deceased stood in a position similar to a mother—such as sister's son, husband's sister's son, etc., etc., succeed to her *stridhan*. This verse, we may here mention, does not lay down the order of succession but only a description of the heirs : see verses 35, 36 and 38.

The order of succession is given in verse 37, in which the author of the Dayabhaga, after referring to the succession of the husband's younger brother and the son of her husband's brother, says as follows :—

"On failure of such, the sister's son, though he be not a kinsman (*sapinda*), inherits the separate property left by his mother's sister, because he presents oblations to her, and to three persons (her father and the rest) to whom oblations would have been offered by her son. In default of him the son of her husband's sister (for it is reasonable, since the husband has a weaker claim than the son, that persons claiming under them should have similar relative precedence) is heir to the property of his uncle's wife ; because he presents oblations to three persons to whom they were to be offered by her husband, and also presents oblations to her and to her husband. On failure of him, the brother's son is the successor to his aunt's property, for he presents oblations to the father, to her grandfather, and to herself. If there be no nephew, the husband of her daughter is heir to his mother-in-law's property, since he presents oblations to his mother-in-law and father-in-law."

The author then says in verse 39 :—

"Again, on failure of these six, it must be understood, that the succession devolves on the father-in-law, the husband's eldest brother and the rest, according to their nearness of kin (the nearest *sapinda* being the heir)."

It will thus be seen that the husband's elder brother comes in after the sister's son. And the only question that we have to determine is whether "sister's son" includes step-sister's son.

On examination of the various portions of Chap. IV, s. 3, it will be found that though spiritual benefit to the deceased is indicated as the principle of succession, the relative degrees of such benefit is not necessarily the rule which determines the question of the order of succession.

But however that may be, so far as the immediate question we have to determine in this case is concerned, it will be observed that the mother's step-sister stands to one in a position similar to mother, almost precisely in the same way as his mother's uterine sister does. And he also confers upon the deceased and to three persons, her father, etc., spiritual benefit by the offering of oblations. Thus taking the principles underlying the succession of a [264] sister's son, there is no just reason to exclude the step-sister's son from the category of heirs.

Reference has been made to verse 29, which referring apparently to the succession to a woman's *sulka*, speaks of the "whole brother." This rather supports the contention of the plaintiff than that of the defendants in this case; for the verse indicates that when a person connected by half blood is meant to be excluded, the author says so. And it seems to us that if the son of a rival wife is entitled to succeed, under verse 31 and two succeeding verses 32 and 33, it is very difficult to exclude the step-sister's son.

1904
AUG. 80.
—
APPELLATE
CIVIL.
—
32 C. 261=3
C. W. N. 119.

The Subordinate Judge has referred, in his judgment, to the translation as given by Shyama Charan Sarkar of the words "sister's son," as occurring in the table of succession in his book "Vyavastha Darpana." Those words have been translated as "নিজ ভগিনী পুত্র" (own sister's son.) The words in the original text simply mean "sister's son," "her sister's son;" and it would seem that in the table of succession the next in order being the husband's sister's son, the author probably used the words "নিজ ভগিনী পুত্র" as contradistinguished from her husband's sister's son.

The Subordinate Judge, we observe, is not prepared to hold that the step-sister's son is no heir at all, for he says: "they may however come to succeed after the list given is exhausted," meaning the list given by Shyama Charan Sarkar. But it seems to us that if he is an heir he is entitled to succeed in preference to husband's elder brother, he being, so far as the question before us is concerned, practically in the position of the "sister's son" of the deceased woman, as mentioned in the verses to which we have referred.

Upon all these grounds, we set aside the judgments of the lower Courts dismissing the claim of the step-sister's son, and send back the case to the Court of first instance for a decision upon the other questions arising in the case.

Costs will abide the result.

Appeal allowed : case remanded.

32 C. 265.

[265] APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Mitra.

KHETRAPAL SINGH ROY, v. SHYAMA PROSAD BARMAN.*

[25th November, 1904.]

Execution of Decree—Mortgage—Decree for sale—Civil Procedure Code (Act XIV of 1882) s. 244, cl. (c)—Jurisdiction.

A judgment-debtor against whom a decree for sale has been passed as the legal representative of the mortgagor, is not entitled to object, in the execution proceedings, to the property being sold on the ground that it was not the property of the mortgagor.

Section 244 (c) of the Civil Procedure Code does not apply to a case where the judgment-debtor tries to set aside the effect of a decree.

Sanwal Das v. Bismillah Begam (1), *Liladhar v. Chaturbhuj* (2), and *Hiralal Sahu v. Parmeshar Rai* (3) followed.

Ram Chandra Mukerjee v. Ranjit Singh (4) distinguished.

[Fol. 30 Mad. 26=16 M. L. J. 545; Ref. 8 C. L. J. 20.]

* Appeal from Order, No. 126 of 1904, against the order of G. K. Deb, District Judge of Hooghly, dated Jan. 28, 1904, reversing the order of Kalidhan Chatterjee, Subordinate Judge of that District, dated Sept. 14, 1903.

(1) (1897) I. L. R. 19 All. 480.

(3) (1899) I. L. R. 21 All. 356.

(2) (1899) I. L. R. 21 All. 277.

(4) (1899) I. L. R. 27 Cal. 242.