1894

PROFULLAH CHUNDER BOSE v. SAMIRUDDIN MONDUL.

This is an appeal from the decision of the District Judge of the 24-Parganas, dated the 5th of December 1893, reversing a decision of the second Munsif of that District, dated the 11th of March 1893.

The plaintiff in this case sued for rent, and at the hearing it appeared that the succession had opened out to him long before the Tenancy Act came into operation. The question is whether sections 15 and 16 of the Tenancy Act apply to this case, so as to affect him. Section 16 certainly takes away a substantial right; and if we interpreted sections 13 and 14 in the same manner as the Judge in the Court below has interpreted sections 15 and 16, we should arrive at a most unreasonable conclusion. We think the sections have not retrospective effect.

The order of the lower Court is set aside, and the case remanded to the District Judge in order that he may try it on the merits.

The respondent will be entitled to the costs of this appeal.

J. V. W. *Appeal allowed.*

Before Mr. Justice Norris and Mr. Justice Banerjee.

BABU LAL (ONE OF THE DEFENDANTS) v. NANKU RAM AND ANOTHER (PLAINTIFFS.) *

1894 *February* 27.

Hindu law—Inheritance—Sapindas—Bandhus—Mitakshara law—Descendants in third degree from common ancestor—Second cousins.

The plaintiffs were descended in the third degree from *M* who was *R*'s maternal great-grandfather, and *R* was descended in the third degree from *M* who was the plaintiffs' maternal great-grandfather. *Held*, with reference to the definition of *bandhu* and *sapinda* in the Mitakshara (by which school of Hindu law the parties were governed) that the plaintiffs were *R*.'s *sapindas* through his mother, and *R* was the plaintiffs' *sapinda* directly; and being thus mutually related as *sapindas*, the plaintiffs were heritable *sapindas* and *bandhus* of *R*, *ex parte materna*, and on his death without issue were entitled to his property as his heirs.

* Appeal from Appellate Decree No. 1942 of 1892 against the decree of G. G. Dey, Esq., Officiating District Judge of Shahabad, dated the 17th of August 1892, affirming the decree of Babu Abinash Chunder Mitter, Subordinate Judge of that District, dated the 3rd of December 1891.

1894

BABU LAL v. NANKU RAM.

THIS suit was brought to recover two one-third shares of certain immoveable property with mesne profits.

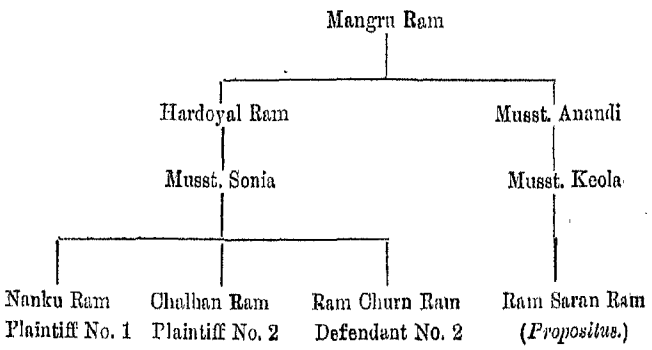
The plaintiffs alleged that the property in suit belonged to one Ram Saran Ram, who died in 1292 (1885) without issue; that after his death they and their brother Ram Churn, the second defendant, became entitled to the property as Ram Saran's heirs; but that they were dispossessed by the first defendant Babu Lal, who was a purchaser of the property from the second defendant, who claimed the property under a gift (which the plaintiffs alleged to be collusive) from one Dolia, the maternal aunt of Ram Saran. The parties were governed by the Mitakshara law.

The suit was contested by the first defendant (the second defendant not appearing), who set up the defence, the only one material to this report, that the plaintiffs were not the heirs of the deceased Ram Saran.

The Subordinate Judge found in favour of the plaintiffs' case. He said :—

"Weighing the whole evidence and the probabilities of the case, I am of opinion that the plaintiffs' genealogical tree or allegation of relationship is correct. As such they (plaintiffs) are the near *bandhus* of Ram Saran, who had left no other near agnate or cognate. Even according to the defendants' genealogical tree the plaintiffs, who are three degrees removed from the common ancestor Mangru Ram, will under the Mitakshara be the heritable *bandhus* of Ram Saran."

On appeal by the defendant the Judge found the relationship between the parties to be according to the following genealogical tree :—



He said :—

"Then, are the plaintiffs as son's daughter's sons of Mangru Ram, who was the mother's mother's father of Ram Saran, legal heirs of Ram Saran in the absence of nearer kin?

"The appellant contends that they do not come within the list of heritable *bandhus*, and refers to the pedigree given in section 465 of Mayne's Hindu Law of '*Bandhus ex parte materna*' in which this relationship is not found. But it is explained in section 466 that this list is a collection of examples specifically mentioned in different commentaries and not an exhaustive list. From the more elaborate definitions of heritable *bandhus* given in Raj Kumar Sarvadhikari's Tagore Law Lectures of 1880, pages 703, 705, &c., I conclude that the plaintiffs come within that category, as being cognate *sapindas* within four degrees, counting from the mother's maternal grandfather of Ram Saran (see page 705), and that they are consequently legal heirs."

The Judge upheld the decree of the Subordinate Judge.

The first defendant appealed to the High Court on grounds which, as well as the authorities cited, are sufficiently referred to in the judgment of that Court.

Mr. *C. Gregory*, and Babu *Karuna Sindhu Mukerjee*, for the appellant.

Dr. *Troylokya Nath Mitter*, and Babu *Makhun Lal*, for the respondents.

The judgment of the Court (NORRIS and BANERJEE, JJ.) was as follows :—

This appeal arises out of a suit brought by the plaintiffs, respondents, for possession of two-thirds of two houses with mesne profits, on the allegation that the houses belonged to one Ram Saran Ram ; that on Ram Saran Ram's death the two plaintiffs and their brother defendant No. 2, as Ram Saran Ram's mother's sister's sons and his nearest heirs, became entitled to the same in equal shares ; and that defendant No. 1, setting up a purchase from defendant No. 2, has been keeping the plaintiffs out of possession of their two-thirds share.

Defendant No. 2 did not enter appearance, but defendant

1894

BABU LAL v. NANKU RAM.

No. 1 defended the suit, urging, among other matters, not necessary now to consider, that the plaintiffs were not the heirs of Ram Saran Ram; that they were not related to him as they alleged, their mother Sonia and Ram Saran Ram's mother Keola not being sisters, but being cousins, that is, daughters respectively of one Hardoyal and his sister Anandi, as shewn in the genealogical table filed with the written statement; and that Ram Saran Ram had a sister's son, named Gokul, who was his nearest heir if the adoption of Ram Saran Ram by his maternal uncle as set up in the defence was not made out.

The first Court overruled all the objections of the defendant No. 1, and gave the plaintiffs a decree, holding that it was not shewn that Ram Saran had any sister's son, that the plaintiffs were related to Ram Saran as stated by them, and that, even if the genealogy given by the defendant was correct, still the plaintiffs would, under the Mitakshara, be the heirs of Ram Saran as his *bandhus*.

On appeal by the defendant No. 1 the lower Appellate Court, while setting aside the finding of the first Court upon the question of the plaintiffs' relationship with Ram Saran, and accepting the genealogy set up by the defendant as correct, has affirmed the first Court's decree on the ground that, according to the defendants' genealogy, the plaintiffs are still the heirs of Ram Saran Lal as his *bandhus*.

Against this decision the defendant No. 1 has preferred this second appeal, and it is contended on his behalf: *first*, that the relationship set up by the plaintiffs being found not established, the lower Appellate Court is wrong in giving them a decree upon a case not made in the plaint; and, *secondly*, that the lower Appellate Court is wrong in holding that, according to the genealogy set up by the defendant and accepted as true, the plaintiffs were heirs as *bandhus* of Ram Saran.

We do not think there is any force in the first contention. If the defence had been a simple denial of the plaintiffs' alleged relationship and right to inherit, then upon their failure to make out that relationship they would not have been entitled to succeed upon establishing a different relationship, at any rate without

showing further that there was no nearer heir in existence. But that was not the nature of the defence here. The defendant not only denied the relationship set up in the plaint, but alleged what according to him was the true relationship between the plaintiffs and the late proprietor. He put in a genealogical table setting out this relationship, and he alleged that one Gokul, who was Ram Saran's sister's son, was the nearest heir, and after the first Court had held that Ram Saran had no sister's son, and that even according to the defendants' genealogical table the plaintiffs were the heirs of Ram Saran, the defendant, who was the appellant in the Court of appeal below, did not object to the plaintiffs being allowed to succeed upon the basis of a different relationship from that alleged in the plaint, on the ground of his being taken by surprise, and being prejudiced by such a course being followed, nor did he suggest that there was any nearer heir of Ram Saran. We are, therefore, of opinion that this contention must fail.

The second contention also, we think, is untenable.

The relationship that is found by the lower Appellate Court to have subsisted between the plaintiffs and the late proprietor Ram Saran Ram will appear from the following genealogy (see *ante* p. 340.)

The parties are admittedly governed by the Hindu law as laid down in the Mitakshara, and there is no question that the plaintiffs, if they are the heirs of Ram Saran Ram at all, can be his heirs only as his *bandhus*. The question, therefore, is, whether the plaintiffs are *bandhus* of Ram Saran Ram.

The term '*bandhu*' is defined in the Mitakshara (Chapter II, section v, verse 3) as a '*bhinna gotra sapinda*,' that is, one sprung from a different family and connected by common corporeal particles, or by consanguinity. Colebrooke incorrectly rendered *sapinda* as one connected by funeral oblation, but this inaccuracy in his translation was pointed out long ago, and the above rendering has now been accepted as the correct one. [See *Lallubhai Bapubhai* v. *Mankuvarbai* (1), the same case on appeal *Lallubhai Bapubhai* v. *Cassibai* (2), and *Umaid Bahadur* v. *Udoi Chand* (3).]

(1) I. L. R., 2 Bom., 388. (2) I. L. R., 5 Bom., 110.
(3) I. L. R., 6 Calc., 119.

1894

BABU LAL v. NANKU RAM.

There is also an enumeration of *bandhus* in the Mitakshara (Chapter II, section vi, verse 1), which is as follows: "*Bandhus* (cognates) are of three kinds—related to the person himself, to his father or to his mother, as is declared in the following text: The sons of one's own father's sister, the sons of one's own mother's sister, and the sons of one's own maternal uncle are his own *bandhus*. The sons of one's father's father's sister, the sons of one's father's mother's sister, and the sons of one's father's maternal uncle are his father's *bandhus*. The sons of one's mother's father's sister, the sons of one's mother's mother's sister and the sons of one's mother's maternal uncle are his mother's *bandhus*." (The above translation is slightly different from Colebrooke, which is somewhat inaccurate.)

If this enumeration of *bandhus* had been exhaustive it would have been unnecessary to consider the definition of the term quoted above. But it has now been authoritatively settled that the enumeration is not exhaustive: see *Giridhari Lall Roy* v. *Government of Bengal* (1); *Amrita Kumari Debi* v. *Lakhi Narayan Chuckerbutty* (2); and *Umaid Bahadur* v. *Udoi Chand* (3). It becomes necessary therefore to consider the definition of the term '*bandhu*,' and to see whether the plaintiffs come within that definition, that is, whether they are '*bhinna gotra sapindas*' of Ram Saran, or of his father, or of his mother. For in any one of these cases they will be entitled to inherit. See Mitakshara, Chapter II, section vi, verse 1; *Umaid Bahadur* v. *Udoi Chand* (3); *Ananda Bibee* v. *Nownit Lall* (4). Now there is no question that the plaintiffs are *bhinna gotras* of Ram Saran, that is, that they are sprung from a *gotra*, or family, different from his. So the question is reduced to this, namely, whether they are the heritable *sapindas* of Ram Saran, either directly or through his father or his mother.

Now the term '*sapinda*' is explained in an earlier part of the Mitakshara in the section relating to marriage when commenting on verses 52 and 53 of Chapter I of Yajnavalkya's Institutes. Translations of portions of that explanation are set out in the

(1) 1 B. L. R., P. C., 44: 10 W. R., P. C., 31.
(2) 2 B. L. R., F. B., 28: 10 W. R., F. B., 76.
(3) I. L. R., 6 Calc., 119. (4) I. L. R., 9 Calc., 315 (327).

judgment of this Court in *Umaid Bahadur* v. *Udoi Chand* (1), and a complete translation of the entire passage is given by Babu Rajkumar Sarvadhikari in his Tagore Law Lectures on the Principles of the Hindu Law of Inheritance, pp. 601—605.

According to that explanation or definition a *sapinda* of a man means and includes (1) any descendant within the seventh degree reckoned from and inclusive of himself, that is, any of his first six descendants; (2) any ascendant within the seventh degree reckoned from and inclusive of himself in the paternal line, that is, any of his first six ascendants, in his paternal line; (3) any collateral descendant within the seventh degree reckoned from and inclusive of any of the six paternal ascendants, that is, any of the first six descendants of any of the first six ascendants in the paternal line; (4) any ascendant within the fifth degree reckoned from and inclusive of himself in the maternal line, that is any of the four maternal ancestors, namely, the mother, her father, her grandfather and the rest; and (5) any collateral descendant within the fifth degree reckoned from and inclusive of any of the three maternal ancestors, beginning with the mother's father, that is, any of the first four descendants of any of the three maternal ancestors, beginning with the mother's father.

The mother's descendants are not here included, as they being ordinarily also the descendants of the father are included among collaterals on the paternal side. As to how the mother will stand with reference to descendants of the mother by a second husband upon her re-marriage after widowhood under the Widow Marriage Act we need not here consider.

Again, a *sapinda* of the *propositus* to be capable of inheriting must satisfy a further condition, namely, that he must be so related to the *propositus*, that the *propositus* is also a *sapinda* of him, either directly or through the father or the mother. This mutuality of *sapinda* relationship between the *propositus* and his heritable *sapindas* is assumed as a necessary condition in the case of *Umaid Bahadur* v. *Udoi Chand* (1), and the authority for this is to be found in the text of Manu (Chapter IX, 187), cited in the Mitakshara, Chapter II, section iii, verse 3, as inter-

(1) I. L. R., 6 Calc., 119.

1894

BABU LAL v. NANKU RAM.

preted by Balambhatta and Visweswara Bhutta, the two leading commentators on the Mitakshara. That text according to these commentators means this: "The property of a near *sapinda* shall be that of a near *sapinda*." *

From this it is clear that a man in order to be a heritable *sapinda* of the *propositus* must be so related to him that they are *sapindas* of each other.

Let us now apply this definition of *sapinda* relationship, and this test of mutuality of that relationship, to the present case, and see whether the plaintiffs are heritable *sapindas* of Ram Saran, either directly or through the father or the mother.

We find that the plaintiffs are descended in the third degree from Mangru Ram who was Ram Saran's mother's maternal grandfather, and so they are Ram Saran's *sapindas* through his mother. We also find that Ram Saran was the third in descent from Mangru Ram, who was the plaintiffs' maternal great-grandfather, and so he was their *sapinda* directly. Thus we find that the plaintiffs and Ram Saran are mutually related as *sapindas*, the former through the mother and the latter directly. The plaintiffs are therefore *sapindas* and *bandhus* of Ram Saran, *ex parte materna*, and are his heirs.

The grounds urged before us, therefore, both fail, and this appeal must consequently be dismissed with costs.

J. V. W. *Appeal dismissed.*

* The passage in the original runs thus :—

"यः सपिण्डात् अनन्तरः सन्निहितः तस्य सपिण्ड सन्निहितस्य धनं सपिण्ड सन्निहितस्य धनं भवेत्"

See the commentary of Visweswara Bhutta on the portion of Mitakshara, which appears in Colebrooke's Translation as Chapter II, section iii. The passage is given in Sarvadhikari's Tagore Law Lectures, p. 569.—*Judge's note.*