In the case of *Cort* v. *The Ambergate Railway Company* (1), which appears to have been somewhat relied upon in the Court below, it will be found that the goods, which were the subject of sale, were not marketable articles, nor was it suggested in the course of the argument that they were so. The contract there was for the supply of several thousand tons of railway chairs, which, from their very nature, would not be bought and sold in any general market, and, consequently, the ordinary rule affecting marketable articles would not apply to such a contract.

In this view, we are of opinion that the ordinary rule does apply, and we therefore award the plaintiffs the sum of Rs. 3,900, claimed in the plaint, which is a somewhat smaller sum than the evidence would warrant.

The appeal is decreed with costs on scale No. 2.

Appeal allowed.

Attorneys for the appellants: Messrs. *Chauntrell, Knowles,* and *Roberts.*

Attorney for the respondent: Mr. *Goodall.*

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice McDonell.

HURRYMOHUN SHAHA (DEFENDANT) *v.* SHONATUN SHAHA (PLAINTIFF).*

1876
March 2.

Hindu Law—Inheritance—Stridhan.

With respect to property given to a woman after her marriage by her husband's father's sister's son, the brother, mother, and father are preferable heirs to the husband.

SUIT by a Hindu, to recover certain immoveable property as heir to his deceased wife. The plaintiff alleged that the pro-

* Special Appeal, No. 1501 of 1875, against a decree of the Subordinate Judge of Zilla Dacca, dated the 30th of April 1875, reversing a decree of the Sudder Munsif of that district, dated the 22nd of August 1874.

(1) 20 L. J., Q. B., 460; S. C., 17 Q. B., 127.

1876

HURRYMOHUN SHAHA v. SONATUN SHAHA.

perty in dispute had been given to his wife after her marriage by the defendant, who was the plaintiff's father's sister's son. Amongst other grounds of defence, the defendant, in his written statement, contended, that the plaintiff could not inherit or claim his wife's stridhan, inasmuch as her mother, father and brother were all living.

The Munsif did not go into this question, but dismissed the suit upon other grounds. On appeal the Subordinate Judge reversed the Munsif's decision as regards the grounds on which it rested. As regards the plaintiff's right to maintain the suit as the right heir under the Hindu law to the property claimed, he said:—"The plaintiff's right of inheritance is questioned, and thus I have to decide, first, whether plaintiff has such right of property as to have a right of action against the defendant. According to Hindu law, the property, under the denomination of annadheya, gift subsequently given by her kindred, means anything given to her by her father or mother or by her brother, and the heir to such property is the brother in preference to her husband, *vide* Shamachurn's Vyavastha, sec. 463, first edition (1). But to property not given by her father or kindred, the husband first succeeds; sec. 466 (2). In the present case, the gift was not by the father, or kindred of the donee, and the husband therefore is the heir. Upon these grounds, I find the plaintiff has a right of action."

From the above decision, the defendant now appealed.

Baboo *Mohinee Mohun Roy* (Baboo *Lall Mohun Dass* with him) contended, that, on the death of the plaintiff's wife, her brother, and not the plaintiff, was entitled to succeed to her stridhan, and that this suit was consequently not maintainable. He cited the Dayabhaga, Chap. iv, §§ 10 and 16, and the Vyavastha Darpana, 2nd edition, vyavastha 470, cl. 3, and the first column of the table of succession to a childless married woman's stridhan given at p. 733.

Baboo *Hurry Mohun Chuckerbutty* for the respondent.—§ 10, Chap. iv, sec. 3 of the Dayabhaga is one of several para-

(1) Vyavastha 470 in the 2nd edit. (2) Vyavastha 473 in the 2nd edit.

graphs, *viz.*, §§ 4 to 28, in which the order of succession to the separate property of a childless woman is discussed, and the result of the discussion is summed up by Jimuta Vahana in § 29, where, in support of his conclusion, he quotes the text of Catyayana "That which has been given to her *by her kindred* goes, on failure of kindred, to her husband," thereby clearly indicating the scope of the previous discussion. [JACKSON, J.—It is expressly stated in § 10 that "wealth, received by a woman, after her marriage, from the family of her husband, goes to her brothers, not to her husband."] In his summary of the Chapter Srikrishna says of property not received at the wedding, and not given by the father, that, in the absence of the persons specified by him, "the order is the same with that of property received at Brahma nuptials," *i.e.*, the husband comes first. In the present case, it is not contended that any of the persons there specified are in existence, and the plaintiff is accordingly the preferable heir. The other authorities are clearer than the Dayabhaga, see the Dayatattwa, Chap. x, §§ 10 and 26, and the Dayakrama Sangraha, Chap. ii, sec. 4, §§ 10 and 11. Sec. 5 shows that the only exception to the general rule now recognised is with regard to gifts subsequent by the father, see also Macn. Pr. H. L., pp. 38—40. But assuming that the brother is the preferable heir to property received after the marriage from the family of the husband, it is submitted that the defendant, the donor in this case, is not a member of the plaintiff's family; see Dayabhaga Chap. iv., sec. 1, § 3.

Baboo *Mohinee Mohun Roy* in reply contended, that the defendant was a sapinda of the plaintiff, and must therefore be deemed a member of his family, and he referred to the judgment of Mitter, J., in *Judoonath Sircar* v. *Bussunt Coomar Roy Chowdry* (1), as showing that the plaintiff was not the preferable heir to the property in dispute.

The judgment of the Court was delivered by

JACKSON, J.—The question which we have been called upon

(1) 11 B. L. R., 286, at p. 299.

1876

HURRYMOHUN SHAHA v. SONATUN SHAHA.

to consider in this special appeal is whether the plaintiff has any right to maintain the present suit as the right heir, under the Hindu law, to the property which is claimed in this suit. That property was given to the deceased wife of the plaintiff after their marriage and during the continuance of the marriage state by the husband's father's sister's son. It is admitted that this property was the stridhan of the deceased wife, and that the plaintiff claims it as being preferable heir to such property on her decease. This was a matter objected to by the defendant in his written statement. The Munsif dismissed the suit upon other grounds, but did not go into this question. On appeal before the Subordinate Judge, he reversed the decision of the Munsif as regards the grounds on which it rested, and, having then to decide this question, he disposed of it in this wise.

(The learned Judge read the portion of the Subordinate Judge's judgment set out above, and continued):—

There is some obscurity in the language of this judgment, but, setting that aside, I must observe that it is not satisfactory to find a Subordinate Judge, himself a Hindu and sitting in a Court of appeal, disposing of a question of this kind merely on the authority of a text book, however valuable, such as Baboo Shamachurn Sircar's Vyavastha Darpana. That is a book of which I am far from underrating the excellence, but after all it is merely a collection of various authorities upon the main points of Hindu law, and any Judge, who has to decide a question of this description, ought undoubtedly to refer to those authorities themselves, although, in the decision of it, he is of course not precluded from considering and using such a valuable commentary as that of Baboo Shamachurn Sircar. I think we are bound to decide the case entirely upon the authority of the Dayabhaga, and if we can satisfy ourselves as to the meaning of the author of the Dayabhaga on this question, it will be unnecessary to go to any inferior authority. But we have the express authority of Jimuta Vahana himself. In Chap. iv, sec. iii, the question of succession to the separate property of a childless woman is fully discussed, and we find that the author, after propounding the text of Yajnyavalkya in the second verse of that section, goes on, and in the fourth verse,

says:—"It is not right to interpret the text as signifying that any property of whatever amount which belongs to a woman married by any of those ceremonies termed Brahma, &c., whether received by her before or after her nuptials, devolves wholly on her husband by her demise;" he goes on to give reasons for that, and then we find it stated in the 10th verse of the same chapter and the same section; "But wealth received by a woman after her marriage, from the family of her father, of her mother, or of her husband, goes to her brothers (not to her husband), as Yajnyavalkya declares, that which has been given to her by her kindred, as well as her fee or gratuity, and anything bestowed after marriage, her kinsmen take, if she die without issue:" and after the brother there is no doubt, that, where the husband does not first take, the mother and the father come in between. The husband, therefore, in such a case would not be the heir, if the text applies, until after brother, mother, and father. The question is whether the text applies to this case. It seems to me that it very clearly does. The property in dispute is undoubtedly wealth received by a woman after her marriage, and it was received, not from the family of her father, or of her mother, but from the family of her husband. That the expression "family of her husband," includes the degree of kindred in which the donor of this property stood to the deceased woman I have no doubt. The question was raised before us to-day whether such a relation could be properly called *sapinda*. It is not necessary that we should decide that point, but we think that the "family of the husband" is a term wide enough to include this kind of relation, and it appears to us that, if the Subordinate Judge, in deciding this appeal, had looked carefully to the very author to whom he does refer, he would have found ample authority so far as the book itself goes for not coming to the conclusion that he arrives at. He appears to have referred to text 473, which is at page 722 of the second edition of the book; but if he had referred to the preceding texts, 470 and 471, he would have found what we now decide set out very fully, and moreover in the table of succession set out at page 733 we find that the order of succession to property given by the parents before

1876

HURRYMOHUN SHAHA v. SONATUN SHAHA.

marriage or *bestowed after marriage*, is, first the brother, second the mother, third the father, and fourth the husband. Pages 712 and 720 are here referred to us, showing what was meant by the words "bestowed after marriage," and the explanation is given under the third branch of vyavastha 470, which says:—"Wealth received by a woman after her marriage, from the family of her father or mother or of her husband, goes to her brothers." A great deal has been sought to be made of the language of the Dayakrama Sangraha and Dayatattwa upon this point, but it seems to us that the contention so raised is based entirely upon the very concise language used in some places by the authors of those two books who, when they mean to designate a particular class of persons, use the person who heads the class to designate the whole. We are reminded by Baboo Mohinee Mohun Roy, who argued this case for the appellant, of the careful explanation given of this very matter by my late colleague, Dwarkanath Mitter, J., in the very able judgment which he delivered in the case of *Judoo nath Sircar* v. *Bussunt Coomar Roy Chowdry* (1), a judgment to which I was a party, and in which I at the time entirely concurred. For these reasons we think that in this case the plaintiff is not the next heir, and therefore the Subordinate Judge has come to an erroneous decision on the point of Hindu law involved, and that his judgment must be set aside, and the plaintiff's suit dismissed with costs.

I am bound to say that, as far as we have been able to judge, it seems to us that it is a suit which in every way deserves to be dismissed on the merits. I should observe that the contention that the donor of this property is not a member of the husband's family involves the contention that he was a stranger, and this is contrary to the admitted fact that the property was stridhan.

Appeal allowed.

(1) 11 B. L. R., 286.