FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Morris, and Mr. Justice Mitter.

UMAID BAHADUR (DEFENDANT) *v.* UDOI CHAND *alias* MUNMUN (PLAINTIFF).*

1880
June 1.

Hindu Law—Inheritance—Mitakshara—Definition of Sapinda—Sister's Daughter's Son.

A sister's daughter's son is an heir according to the Mitakshara.

The author of the Mitakshara, in verse 3, Sec. 5, Chap. II, uses the word "sapinda" in the sense of "connection by particles of one body," and not in the sense of "connection by funeral oblations."

In order to determine whether a person is a "sapinda" of the prepositus, within the meaning of the definition given by the author of the Mitakshara in Acharakanda (chapter treating of rituals), it is necessary to see whether they are related as "sapindas" to each other, either through themselves or through their mothers and fathers.

THE plaintiff, one Udoi Chand, stated, that his father was in possession of a certain village under a deed of gift from one Mussamut Nobo Bahu, dated the 5th January 1861; and that, after his father's death, he held possession of the property, but was forcibly dispossessed by the defendant on the 18th March 1877. He, therefore, instituted proceedings under s. 530 of the Criminal Procedure Code, but these were dismissed; and he thereupon brought the present suit for possession.

The defendant, who alleged that he was a son of a daughter of a sister of Mukhtab Bahadur (who had been the husband of Nobo Bahu) contended, that the plaintiff had not been in possession within twelve years from the date of the institution of the suit: and that the deed of gift was not valid in Hindu law, it being an absolute gift of property made by a widow who had, as such, only a limited interest in the property.

* Full Bench on Regular Appeal, No. 32 of 1878, from the decision of Baboo Kedar Nath Mozumdar, Additional Judge of Gya, dated 19th January 1878.

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The Subordinate Judge found that the suit was not barred by limitation; that the defendant was a stranger to the family, and not a reversionary heir to Mukhtab Bahadur, the husband of Nobo Bahu, and did not come within the definition of "bandhu," and therefore was not a competent person to question the alienation; and further found, that the plaintiff had been wrongfully dispossessed, and gave judgment in favor of the plaintiff.

The defendant appealed to the High Court.

Munshee *Mahomed Yusoof* and Baboo *Saligram Singh* for the appellant.

Mr. *C. Gregory* and Baboo *Mohesh Chunder Chowdhry* for the respondent.

The learned Judges (GARTH, C. J., and PRINSEP, J.) before whom the case was heard referred it to a Full Bench. The referring order was as follows:—

"A question of Hindu law has arisen in this case, which, being of general importance, we think should be referred to a Full Bench.

"The plaintiff in this suit, Udoi Chand, claims certain property as heir to his father, Poran Chand, under a conveyance from one Mussamut Nobo Bahu, the widow of Mukhtab Bahadur, to whom the property originally belonged: and for the purposes of the question at issue, it must be taken that the plaintiff has a right to recover the property from the defendant, unless the latter can show that by Hindu law he is the heir of Mukhtab Bahadur.

"The defendant claims to be the heir of Mukhtab Bahadur through Mussamat Jeswant Koer, his maternal grandmother, his mother having been the daughter of Jeswant Koer, and Jeswant Koer having been the sister of Mukhtab Bahadur.

"He contends that, standing in this relation to Mukhtab Bahadur, he is his 'bandhu,' or cognate, and as such his heir within the meaning of the rule laid down in the Mitakshara, Chap. II, Sec. 5, vv. 3 & 6, and in Sec. 6. It is contended on his behalf, that the term 'sapinda' in the latter portion

of v. 3, has been mistranslated by Mr. Colebrooke to mean 'connected by funeral oblations,' whereas its proper meaning is 'connected by ties of consanguinity.' If Mr. Colebrooke is right, the defendant could not be a 'bandhu' of Mukhtab Bahadur, although, on the other hand, Mukhtab Bahadur would be the 'bandhu' of the defendant.

"The defendant relies upon a passage in the untranslated portion of the Mitakshara (Achar Adhayaya), quoted by Mr. Justice Dwarkanath Mitter in his judgment in the case of *Amrita Kumari Debi* v. *Lakhinarayan Chuckerbutty* (1). See also a passage from Parasara Madhaba, quoted at page 34 of the same judgment; the cases of *Gridhari Lall* v. *The Government of Bengal* (2); and Mayne's Hindu Law, s. 436, &c., where the question is thoroughly discussed.

"We, therefore, refer the question, whether the defendant is the heir of Mukhtab Bahadur, for the opinion of the Full Bench."

Munshee *Mahomed Yusoof* for the appellant.—The question before the Full Bench is, whether a sister's daughter's son is an heir according to the law as laid down by the Mitakshara. The decision of the question depends on the construction of the Mitakshara, Chap. II, Sec. 5, v. 6. Does the defendant come within the principle on which that section is based? I shall show that Mr. Colebrooke's translation is not quite correct. There is no definition of the word "bandhu," and in order to define that word we must look at Sec. 5, cl. 3. I admit that some limit must be placed on the word "bhinnagotra," but, according to the true reading, persons who are six gotras removed from the deceased are entitled to succeed. The word "sapinda" merely means "consanguinity." Sec. 7 of Chap. II of the Mitakshara deals with the succession of strangers; therefore, this would show that, in a section in which provision is made for succession of pupils, fellow students, &c., a presumption arises that, before strangers can take, the relations contemplated by the Mitakshara must be exhausted. Clause 4, Sec. 3 of Chap. II further points out, that the meaning of the

(1) 2 B. L. R., F. B., at pp. 33, 34.

(2) 12 Moore's I.A., 448; S. C., 1 B. L. R., P. C., 44.

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word "sapinda" refers to "consanguinity." It shows that "sapinda" is something narrower than relationship. According to the Mitakshara there is a class of heirs who do not offer spiritual benefits to the deceased. Sapindas may be either male or female — *Lallabhai Bapubhai* v. *Mankuvarbai* (1). Clause 5 of Sec. 4 deals with the succession of brothers of the whole blood, and prefers them to brothers of the half-blood. There is, however, no religious reason given for this. What is, therefore, the principle which regulates the succession of "bandhu?" I say that "bandhus" come under the words "other relatives" mentioned in Chap. III, Sec. 4. Sec. 6, cl. 1, shows, that maternal uncles are "bandhus;" if so, then a sister's daughter's son is also a "bandhu." No doubt, the Dayabhaga bases inheritance on the theory of spiritual benefit—Chap. II, sec. 6, v. 18: but Menu says, that this is not the only principle, pp. 154, 191, 195, 196. The difference between the two is, that the Dayabhaga goes on the principle of religious grounds, whereas the Mitakshara goes on the principle of propinquity or consanguinity. The Viramitrodya, Pref., p. 12, gives the different doctrines of the laws of inheritance as laid down by the Dayabhaga and the Mitakshara. Mr. Colebrooke's opinion is given in 2 Strange's Hindu Law, p. 242. A "sapinda" under the Mitakshara is not necessarily connected with spiritual oblations. The case of *Amrita Kumari Debi* v. *Lakhinarayan Chuckerbutty* (2) was the case of a sister's son. It was there held, that a sister's son was a "sapinda" under the Hindu law as administered in the Benares school; and further, that he was a "bandhu," and, as such, entitled to inherit. A sister's son is not provided for in the Mitakshara. The case further shows, that spiritual benefits are not the sole guide to inheritance. The case of *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose* (3) was a case under the Bengal law; but still, on p. 35, it is pointed out what the word "sapinda" meant as used by Menu. In the Acharakanda of the Mitakshara, Vijnyaneswara states his views as to what constitutes sapinda-relationship, and the case of *Lallabhai Bapubhai* v. *Mankavarbai* (1) points out that the author abandoned the doctrine, that the right to offer

(1) I. L. R., 2 Bomb., 388. (2) 2 B. L. R., F. B., 28.

(3) 5 B. L. R., 15.

funeral oblations alone constituted sapinda-relationship, and adopted the theory that sapindaship is based upon community of corporal particles, or in other words upon consanguinity. In the case of *Gridhari Lall Roy* v. *The Bengal Government* (1), it was contended that the maternal appellant, who was held to be a "bandhu" of the father, was not competent to offer funeral oblations; and that, therefore, he was not entitled to inherit; but Sir James Colville (see p. 462) held, that, if he was incompetent to offer funeral oblations, it followed that his right to inherit was wholly independent of the doctrine of spiritual benefits, and was to be determined solely by kinsmanship. In West and Bühler, p. 55 (2d edn.), a list of "bandhus" is given. The case of *Mussamut Umroot* v. *Kulyandas* (2) shows, that persons within seventh generation, though in the female line, can be heirs. According to the Hindu law of succession in force in Madras, a sister's son is an heir, and it seems he is also a "bandhu:" *Chelikani Tiripati Rayaningaru* v. *Rajah Suraneni Vencata Gopala Narasimha Rau Bahadur* (3); see also *Kutti Ammal* v. *Badakristna Aiyan* (4) and *Mussamut Doorga Bibee* v. *Janaki Pershad* (5), which was the case of a brother's daughter's son.

Baboo *Mohesh Chunder Chowdhry* for the respondent.—The word "sapinda" must have some limit. It cannot include every kind of relation. The meaning of the word as used by the plaintiff seems to me inconsistent with all the decisions on the subject. [MITTER, J.—The Mitakshara says, that the word "sapinda" includes both males and females, but he further adds, that male sapindas alone inherit.] No doubt, consanguinity is recognized as a ground of inheritance, but there are two principles,—one, that of consanguinity; the other, the conferring of spiritual benefits to the deceased. As to the doctrine of spiritual benefit being the key to the Hindu law of inheritance, see *Amrita Kumari Debi* v. *Lakhinarayan Chuckerbutty* (6). Chap. II, Sec. 2, para. 6 of the Mitakshara gives a right of inheritance to one of a different family, but it does so on religi-

(1) 12 Moore's I. A., 448; S. C., 1 B. L. R., P. C., 44.

(2) 1 Borr., 284.

(3) 6 Mad. H. C. Rep., 278.

(4) 8 Mad. H. C. Rep., 88.

(5) 10 B. L. R., 341; S. C., 18 W. R., 331.

(6) 2 B. L. R., F. B., 28.

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ous grounds. [JACKSON, J.—It seems clear that Menu refers to consanguinity in Chap. IX, ss. 186, 187.] The other side referred to *Lallabhai Bapubhai* v. *Manhuvarbai* (1); but that decision is not in conformity with the following decisions:—*Lala Joti Lall* v. *Mussamut Durani Koer* (2), *Amrita Kumari Debi* v. *Lakhinaryan Chuckerbutty* (3), *Sheo Sehai Singh* v. *Omed Kunwar* (4). See also the Viramitrodaya, p. 235, and Smriti Chandrika, p. 196.

Baboo *Kally Mohun Doss* on the same side.

Munshee *Mahomed Yusoof* was not called upon to reply.

The opinion of the Full Bench was as follows:—

We think that the question referred to us should be answered in the affirmative. If the defendant is a "sapinda" of Mukhtab Bahadur within the meaning of v. 3, Sec. 5 of Chap. II of the Mitakshara, there cannot be any doubt that he is a bandhu of the deceased.

The "sapinda" relationship has been defined by the author of the Mitakshara in Acharakanda (chapter treating of rituals). The following is a translation of the passage as given in West and Bühler, pp. 174 and 175. "(He) should marry a girl who is non-sapinda (with himself). She is called his sapinda who has (particles of) the body (of some ancestor, &c.,) in common (with him). Non-sapinda means not his sapinda. Such a one (he should marry). Sapinda-relationship arises between two people through their being connected by particles of one body. Thus the son stands in sapinda-relationship to his father, because of particles of his father's body having entered (his). In like (manner stands the grandson in sapinda relationship) to his paternal grandfather and the rest, because through his father particles of his (grandfather's) body have entered into (his own). Just so is (the son a sapinda-relation) of his mother, because particles of his mother's body have entered (into his). Likwise the grandson stands in sapinda-relationship to his maternal grandfather and the rest through

(1) I. L. R., 2 Bomb., 388.

(2) B. L. R., Sup. Vol., 67, at p. 69; S. C., W. R., Sp. No., 173.

(3) 2 B. L. R., F. B., 28, at p. 43.

(4) 6 Sel. Rep., 301; S. C., New Ed., at p. 378.

his mother. So also (is the nephew) a sapinda-relation of his maternal aunts and uncles and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs); likewise does he stand in (sapinda-relationship) with paternal uncles and aunts and the rest. So also the wife and the husband (are sapinda-relations to each other), because they together beget one body (the son). In like manner brothers' wives also are (sapinda-relations to each other), because they produce one body (the son), with those (severally) who have sprung up from one body (*i. e.*, because they bring forth sons by their union with the offspring of one person, and thus their husbands' father is the common bond which connects them). Therefore, one ought to know that, wherever the word 'sapinda' is used, there exists (between the persons to whom it is applied) a connection with one body, either immediately or by descent."

"Verse 53. After the fifth ancestor on the mother's and after the seventh on the father's side. On the mother's side in the mother's line, after the fifth, on the father's side in the father's line, after the seventh (ancestor), the sapinda-relationship ceases; the latter two words must be understood; and therefore the word 'sapinda,' which on account of its (etymological) import, (connected by having in common) particles (of one body) would apply to all men, is restricted in its signification, just as the word *pankaja* (which etymologically means 'growing in the mud' and therefore would apply to all plants growing in the mud, designates the lotus only) and the like; and thus the six ascendants, beginning with the father, and the six descendants, beginning with the son, and one's self (counted) as the seventh (in each case), are sapinda-relations. In case of a division of the line also, one ought to count up to the seventh (ancestor), including him with whom the division of the line begins (*e. g.*, two collaterals, *A* and *B*, are sapindas, if the common ancestor is not further removed from either of them than six degrees), and thus must the counting of the (sapinda-relationship) be made in every case."

If in v. 3, Sec. 5, Chap. II, the author of the Mitakshara used the word "sapinda" in the meaning which he has given

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to it in the passage cited above, the translation of Mr. Colebrooke of the verse in question is not correct.

Having taken great pains in accurately defining the word "sapinda" in the beginning of his work, and having said in clear words in the passage in question that "one ought to know that *wherever the word sapinda is used* there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent," it is hardly reasonable to suppose that the author used the word in another part of the same work in a different sense. It is a well-understood rule of construction amongst the authors of the Institutes of Hindu law, that the same word must be taken to have been used in one and the same sense throughout a work, unless the contrary is expressly indicated.

It has been said that, in the chapter on inheritance, the word "pinda" has been used by the author of the Mitakshara in the sense of "funeral cake." No passage has been cited to support this contention. On the other hand, it appears abundantly clear from the passage to which we refer below, that the author has used the word "pinda" in the sense of "body," wherever the word sapinda occurs.

In v. 6, Sec. 5 of Chap. II, the author, after laying down that "samanodokas" succeed after "sapinda," proceeds to support this rule by citing an authority thus: Accordingly Vrihat Menu says:—"The relation of the sapinda ceases with the seventh person, and that of samanodokas extends to the fourteenth degree: or, as some affirm, it reaches as far as the memory of birth and name extends. This is signified by gotra or the relation of family name."

In commenting upon slokas 252 and 253 of Yajnavalkya, the author in Acharakanda (chapter on rituals) cites this text of Vrihat Menu, and says with reference to it, that "sapinda-relationship with the father does not arise by reason of the connection through funeral cakes, but through the connection of particles of one body." In this part of his work, the author treats of the subject of the funeral cakes. If here he assigns to the word "sapinda," occurring in the text of Vrihat Menu beforementioned, the meaning which he has assigned to it in the

definition given above, it is but reasonable to hold that in v. 6, Sec. 5 of Chap. II, he has used the word "sapinda" in the same sense.

Again the author, in v. 3, Sec. 3, Chap. III, discussing the question whether or not the mother is preferential heir to the father, says:—"Besides, the father is a common parent to other sons, but the mother is not so; and since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance conformably with the text 'to the nearest sapinda the inheritance next belongs.'" Here it is evident that the word "sapinda," occurring in the quoted text of Menu, has been used not in the sense of "connection by funeral cake," but of "connection of particles of one body." Two of the well-known commentators of the Mitakshara, *viz.*, Ballam Bhutto and Bissessur Bhutto, the author of Subadhini, in commenting upon this passage, give the same meaning to the word "sapinda" in the cited text of Menu.

These considerations leave no room for doubt that in v. 3, Sec. 5, Chap. II, the author of the Mitakshara has used the word "sapinda" not in the sense of "connection by funeral oblations," but of "connection by particles of one body" as defined in Acharakanda (chapter on rituals). That this is the case is evident from the fact that some of the enumerated bandhus in v. 1, Sec. 6 of Chap. II, admittedly do not confer any religious benefit on the deceased, and therefore cannot be said to be connected by funeral oblations with him. Our conclusion upon this point is supported by a decision of the High Court of Bombay in the case of *Lallabhai Bapubhai* v. *Mankuvarbai* (1).

The next question for consideration is, whether the defendant in the case that has been referred to us stands in such a relation to Mukhtab Bahadur, that they are each other's "sapindas" as defined by the author of Mitakshara in Acharakanda.

The defendant in this case is a descendant three degrees removed from Mukhtab Bahadur's father, the common ancestor. Mukhtab Bahadur is the son of the maternal grandfather of the defendant's mother. Therefore they are related as "sapindas"

(1) I. L. R., 2 Bomb., 388, see p. 422.

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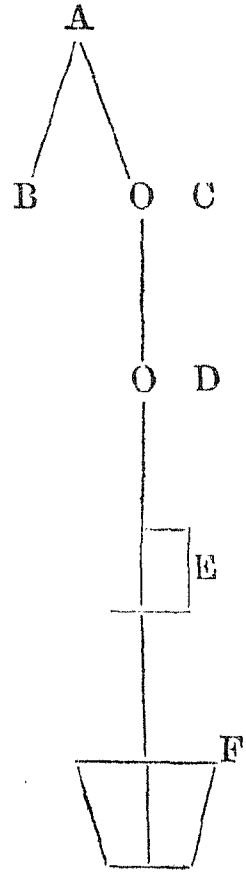
to each other. The defendant is a "sapinda" of Mukhtab Bahadur, because he is within six degrees from the common ancestor,—*viz.*, Mukhtab Bahadur's father; and Mukhtab Bahadur, of the defendant, because he is the son of defendant's mother's maternal grandfather. In order to determine whether a person is a "sapinda" of the prepositus within the meaning of the definition, it is necessary to see whether they are related as "sapindas" to each other, either directly through themselves or through their mothers and fathers. Take for example the following table for illustration :—



A is the common ancestor; *B*, his son, is the prepositus. *C*, a daughter of *A*; *D*, her daughter, both dead, *E* is the son of *D* and has a son *F*.

Now *B* and *E* are sapindas to each other, but not *B* and *F*. Although *F* is within six degrees from the common ancestor, yet *B* not being a descendant of the line of the maternal grandfather, either of *F* or of his father and mother, they are not sapindas to each other; but *B* being a sapinda of *E* through

his mother, they are sapindas of each other. The defendant stands in the same relation to Mukhtab Bahadur as *E* does to *B*. Therefore, the question referred to us should be answered in the affirmative.

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PRIVY COUNCIL.

RAMKRISHNA DAS SURROWJI (PLAINTIFF) *v.* SURFUNNISSA BEGUM AND OTHERS (DEFENDANTS).

P.C.*
1880
Feb. 27 & 28.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Attachment before Judgment—Civil Procedure Code (Act VIII of 1859), *s.* 240—*Objection as to non-compliance with requirements of s.* 239—*Burden of Proof—Civil Procedure Code (Act X of* 1877), *ss.* 274, 276.

A suit on a mortgage foreclosed under Reg. XVII of 1806, s. 8, comprising property attached before the date of the mortgage under s. 81 and the following sections of Act VIII of 1859, was brought against the purchaser of the attached property, which had been sold under the decree obtained by the attaching creditor. The defence was, that the mortgage falling within the provisions of s. 240 of the Act was void as against the attaching creditor and those claiming under him. For the mortgagee it was contended, that the attachment could not prevail, it not having been proved affirmatively that the requirements of s. 239 relating to the intimation of the attachment had been complied with.

Held, that this objection to the validity of the attachment could not be raised for the first time on this appeal, even if it was not rather for the mortgagee, seeking to deprive the attaching creditor of his possession, to prove the non-observance of the formalities in question.

Semble.—A re-attachment of property after decree does not imply an abandonment of an attachment obtained before decree.

APPEAL from a decree of a Divisional Bench of the High Court, Bengal (24th November 1876), affirming that of the District Judge of the 24-Pargannas (13th September 1875), and dismissing the suit in which the appellant was plaintiff.

In 1872, the respondent, Richard Hendry, representing, with J. P. Hubbard, the firm of Anderson, Wallace, & Co., who had carried on business in Calcutta as builders, brought a suit in the Court of the Subordinate Judge of the 24-Pargannas

* *Present:*—SIR J. W. COLVILE, SIR B. PEACOCK, and SIR R. P. COLLIER.