# APPELLATE CIVIL.

*Before Mr. Justice Mitra.*

## AKSHAY CHANDRA BHATTACHARYA
*v.*
## HARI DAS GOSWAMI.*

1908
*Feb. 24.*

*Hindu law—Dayabhaga—Inheritance—Spiritual efficacy doctrine of, discussed—Propinquity—Affection—Natural justice—Mitakshara, principles of, applicable, where Dayabhaga silent—Reunion.*

Mere spiritual benefit is not always the guiding principle of inheritance under the Bengal school of Hindu law.

Propinquity has also been accepted in the Bengal school as a principle of succession.

*Toolsee Dass Seal* v. *Luckhymoney Dassee* (1), referred to.

In cases not contemplated by Jimutavahana or his followers, the law should be interpreted on rational lines consistently with the principles followed in similar cases, and the decisions of our Courts should not be based on a blind adherence to the principle of spiritual efficacy, as it may lead to the violation of other recognised principles consistent with natural justice.

In all cases of absence of any express texts or precedents under the Dayabhaga law, Courts should have recourse to the theory of propinquity and natural love and affection, as adopted by Vijnaneswara and the commentators of the more ancient and orthodox schools of Hindu law.

Reunion, the Sanskrit word being *samsrista,* implies a state of union or jointness, a partition and a subsequent state of jointness amongst co-parceners by mutual consent and through affection, and one, who is never joint, cannot afterwards be said to be re-united or *samrist.*

*Balabux* v. *Rukhmabai* (2) followed.

SECOND APPEAL by Akshay Chandra Bhattacharya and another, the defendants Nos. 4 and 6.

The lands in dispute originally belonged to one Kashi Nath Haldar of Hassanhati. He had four sons, Braja Mohan, Krishna Mohan, Peari Mohan and Lal Mohan, all of whom are dead. Braja Mohan married at Baidyapur and left his father's place in

* Appeal from Appellate Decree No. 408 of 1906, against the decree of A. E. Harward, District Judge of Burdwan, dated December 6, 1905, affirming the decree of Krishna Kumar Sen, Munsif of Kalna, dated December 23, 1904.

(1) (1900) 4 C. W. N. 743.

(2) (1903) I. L. R. 30 Calc. 725; L. R. 30 I. A. 130.

1908
AKSHAY CHANDRA BHATTACHARYA
v.
HARI DAS GOSWAMI.

the life time of Kashi Nath and lived in his father-in-law's house and separated from his paternal family. After the death of Kasi Nath, Braja Mohan, it is alleged, asked for a share of the paternal properties, but his brothers declined to give him any share, unless he gave a portion of the family debt, which Braja Mohan refused to pay. Braja Mohan died over 40 years ago. He or his sons, Gopal and Hari, were never in possession of any properties of Kashi Nath. Gopal died before the cause of action in this suit arose. The defendant appellants claimed title to a portion of the property in dispute by transfer from Hari Nath.

Of the three sons of Kasi Nath, who were jointly holding exclusive possession of his properties, Krishna Mohan died first, leaving his unmarried daughter, Kumud Kamini, as his only heir. Kumud Kamini inherited one-third share. Peari Mohan died next and his share was inherited by his son, Nanda Gopal. Lal Mohan died last, leaving him surviving his two nephews. Hari Nath and Nanda Gopal, as possible heirs. The plaintiff contended that Lal Mohan's share passed to his brother's son Nanda Gopal alone. The plaintiff claimed the property in suit by purchase from Giribala and Kumud Kamini, viz. $\frac{2}{3}$rds from Giribala, and $\frac{1}{3}$rd from Kumud Kamini. When Nanda Gopal died childless, Achala, his widow, and on her death, Giribala, his mother, inherited his share. Both the Courts below held that Nanda Gopal was the sole heir of Lal Mohan and decreed the suit for possession with a declaration of the plaintiff's title. Hence this appeal.

*Babu Ram Chandra Mazumdar* (*Babu Hara Kumar Mitra* with him), for the appellants. Mayne's opinion that a joint brother inherits to the exclusion of the separated brother, is based upon cases under Mitakshara law, in which propinquity is the sole basis of succession. In the Dayabhaga there is no difference between a joint and a separated brother. The *sloka* in the Dayabhaga applicable to this case has reference to reunion (*samsrista*), which pre-supposes a partition and depends upon a contract. Refers to passages "what is mine is thine" etc. In this case there was no partition, nor reunion, and spiritual benefit is the only thing to be considered.

1908

AKSHAY CHANDRA BHATTA-CHARYA v. HARI DAS GOSWAMI.

MITRA J.

*Babu Sarat Chandra Khan*, for the respondent. The *sloka* in Dayabhaga relating to reunion expressly speaks of jointness and the word *samsrista* includes jointness. The *tu* ( তু ) is significant and by implication at least the sloka has reference to jointness and not to reunion only.

MITRA J. The argument before me has turned on a question of Hindu law not touched by the text-writers or commentators of the Bengal school of law or any decision in British India. Such a case was not in the contemplation of the ancient Hindu lawyers.

Kashi Nath died, leaving four sons, Braja Mohan, Krishna Mohan, Peari Mohan and Lal Mohan. But Braja Mohan had been excluded from inheritance by his father. He did not inherit any share of Kashi Nath's property. His property was inherited by his three other sons, Krishna Mohan, Peari Mohan and Lal Mohan. If Braja Mohan had got a share of his father's property, either by partition during his life-time, or by inheritance after his death, there would have been no difficulty in the case. The case of partition during the life-time, of the father, or after the father's death is contemplated by Hindu lawyers and rules of inheritance are laid down for cases of continued separation or of reunion. Exclusion for causes not expressly mentioned in the text-books was not contemplated.

Braja Mohan died, it is said 40, or 50 years ago. He was never in possession of any portion of the estate left by Kashi Nath; neither had his son, Hari Nath, from whom the defendants claim by transfer, ever possession. The exclusion, therefore, was complete, and if the bar of limitation could be set up, the bar would be fully effective. Both the father and son were entirely separate from the rest of the family and had never at any time anything to do with the family property. Re-union as understood in Hindu law could not take place between them and the rest of the family, because there never was a union followed by separation: See *Balabux* v. *Rukhmabai* (1).

Krishna Mohan died leaving him surviving Kumud Kamini, his daughter: Peari Mohan had a son Nanda Gopal. Nanda

(1) (1903) I. L. R. 30 Calc. 725; L. R. 30 I. A. 130.

1908

AKSHAY CHANDRA BHATTACHARYA v. HARI DAS GOSWAMI.

MITRA J.

Gopal inherited his father's one-third share of Kashi Nath's property and, when he died sonless, Achala, his widow, and on her death, Giribala, his mother, the widow of Peari Mohan, inherited his share. Lal Mohan died, leaving Nanda Gopal and Hari his nephews, surviving him. He had no son or widow and it is alleged that his share passed to his brother's son, Nanda Gopal alone.

Lal Mohan, it appears, died within 12 years of the institution of the present suit. There is no express finding one way or the other in the judgment of the lower Appellate Court, and I must assume for the purpose of the appeal, that there is no bar of limitation to the claim of the plaintiffs or acquisition of title by adverse possession by any party.

Of the two nephews of Lal Mohan, Hari and Nanda Gopal, Hari was, like his father, separate and not joint with Lal Mohan, but Nanda Gopal was a member of a joint family with Lal Mohan. Did Nanda Gopal inherit Lal Mohan's share—excluding Hari? This is the only question in the case.

The text of Jimutavahana and his followers, the authorities of the Dayabhaga school of law, are clear on one point. Chapter XI, Section 5, paragraph 39 of the Dayabhaga, as well as section 6, speak of inheritance by brother's sons. If Braja Mohan or his son, Hari, had been joint or re-united with Lal Mohan, the texts would make Nanda Gopal and Hari co-heirs. If, on the other hand, Braja Mohan and Hari had been separated co-parceners without a subsequent reunion, the succession would, undoubtedly devolve on Nanda Gopal to the exclusion of Hari. Re-union is a technical expression and has been defined by text-writers. The Dayabhaga as well as the Dayakrama Sangraha, define it and the definition is based on the texts of the sages. Reunion, the Sanskrit word being *samsrista*, implies a state of union or jointness, a partition and a subsequent state of jointness amongst co-parceners by mutual consent and through affection. Hari could not, therefore, be a reunited co-parcener, nor was he a separated kinsman after partition, though he was, in fact, separate without a division. The contention before me—a contention which it appears was faintly pressed in the lower Court, is that the sages and the text-writers, not having dealt with a case lik

the present one, the theory of spiritual benefit should be applied in the Dayabhaga school for determining heirship; that is to say, inasmuch as Hari and Nanda could offer the same number of oblation cakes to Lal Mohan and his paternal ancestors, and so far as spiritual benefit was concerned, Hari and Nanda Gopal stood on the same level, they should divide the inheritance; on the other hand, it has been contended by the learned vakil for the respondent that the Sanskrit word *samsrista* does not only include the state of reunion, but also jointness, and, therefore, Nanda Gopal, having been joint with Lal Mohan, would alone obtain the inheritance, excluding Hari, who was separate.

I cannot accept either of these grounds of contention. I cannot give a meaning to the word *samsrista*, which has not been given to it by the authorities, and call a co-parcener *samsrista* when he was always joint and there never was a partition. He was joint, but not reunited. Neither am I prepared to hold that the ancient sages and commentators intended that mere spiritual efficacy would control succession in such a case. If I were to hold that both the cousins would inherit the share of Lal Mohan, I would, in my opinion, go against the spirit of the texts of the sages and commentators.

Notwithstanding the predominance given to the theory of spiritual benefit by the writers on the Bengal school of law, they have not adhered to it in the case of re-united co-parceners, they have excluded separated co-parceners and given preference to re-united co-parceners, instead of applying the theory of spiritual benefit. It is clear they have ignored the theory of spiritual benefit, whenever there is a contest between separated and re-united co-parceners, in the same way as they have ignored it in several other cases. Principles other than spiritual benefit have often been applied, as will be apparent from even a cursory reading of the great work of Jimutavahana. I am quite sure that, if they could contemplate a case like the present, they would have laid down that preference should be given to the joint as against the separate kinsman.

In Chapter IV, section 2, Jimutavahana gives here and there his reason for succession to be spiritual efficacy, but the wife or a daughter or the mother cannot confer spiritual benefit and in

1908

AKSHAY CHANDRA BHATTACHARYA v. HARI DAS GOSWAMI.

MITRA J.

cases of *stridhan*, a maiden daughter supersedes sons, and in succession to father's property, she supersedes her married sisters. Propinquity has been accepted in the Bengal school as a principle of succession, *Toolsee Dass Seal* v. *Luckhymoney Dassee*(1), though spiritual benefit is also taken into consideration. In the case of succession to the property of a man, who dies leaving both a joint nephew, and a nephew, who or whose father was never joint, other principles and not spiritual efficacy should be in my opinion taken into consideration, as Jimutavahana has done so in similar and numerous other cases. In cases not contemplated by him or his followers in the Bengal school of law, the law should be developed on rational lines consistently with the principles followed in similar cases and the decisions of our Courts should not be based on a blind adherence to a principle, which would lead us to the violation of other recognised principles consistent with natural justice.

Spiritual benefit, notwithstanding some authorities to the contrary, is not always the guiding principle of inheritance under the Bengal school of law. The theory of spiritual benefit cannot apply to a good many cases of inheritance under the Dayabhaga school of law. Spiritual efficacy as a principle guiding rules of succession must fail in the cases of all female relations. The widow, the daughter, the mother, the paternal grand-mother are said to inherit under express texts. It was necessary in their cases to have recourse to a different principle, and that principle must have been affinity and affection, which had led the more ancient sages to say that they come in the line of heirs. Yajnavalkya's text, as well as the texts of many other sages, could not be either easily avoided or reconciled with the theory of spiritual efficacy in all cases. In most cases, propinquity, spiritual efficacy and natural love and affection run in the same lines and no difficulty arises, but whenever they run in different lines, Jimutavahana was compelled to ignore spiritual efficacy and have recourse to other principles or express texts.

The reason for inheritance by a reunited co-parcener is not spiritual benefit, but a *quasi*-contractual relation and affection for each other. Spiritual benefit has no place. Affection is an

(1) (1900) 4 C. W. N. 743.

important element (Vrihaspati XXV, 72-77). "The agreement "the wealth, which is thine, is mine, that which is mine, is thine" is also another element (Dayakarma Sangraha, Chapter V, section 1, paras. 2 and 3). The criterion is not expressly spiritual benefit.

We must next see what in such a case as the present, the older authorities have laid down and whether they have been expressly dissented from by Jimutavahana. An express dissent by the authorities of the Bengal school of law will preclude our adopting the rules laid down by the older and the more orthodox authorities. The sages, whose texts have been interpreted in the Mitakshara, were undoubtedly of opinion that a co-parcener, who is joint, is entitled to preference under the law of survivorship. If, as has been found in this case, Lal Mohan was joint with Nanda Gopal, he would succeed according to the Mitakshara, which in my opinion, should be the guiding principle in the absence of any express texts or commentaries of the Dayabhaga school of law. I would, in all cases of absence of texts or precedents under the Dayabhaga law, have recourse to the theory of propinquity and natural love and affection, as adopted by *Vijnaneswara* and the commentators of the more ancient and orthodox schools of Hindu law. They are highly respected by lawyers of the Bengal school, and I would make the law of Bengal correspond with the law as administered in the rest of India.

On the ground also of implied agreement and convenience Nanda Gopal should exclude Hari. A and B, uncle and nephew, remained joint and acquired property jointly assisting each other. The one loves the other and each relies on the help of the other. They are in the nature of joint owners—joint tenants. The admission of a third person like Hari to succeed to the share of one of these on his death is a clear infringement of the natural order of things and the principles that regulate descent of property in all civilized systems of jurisprudence.

I am, therefore, of opinion that, in this case, the decision of the lower appellate Court is correct and that Hari was not entitled to a ⅛th share of the inheritance left by Kashi Nath as a co-heir with Nanda Gopal.

The appeal, therefore, fails and is dismissed with costs.

S. M. *Appeal dismissed.*