

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

DEBIPRASANNA ROY CHOWDHRY

v.

HARENDRA NATH GHOSE.*

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May 26.

Hindu Law—Dayabhaga—Ayautuka stridhan—Succession—Property of childless widow—Step-brother—Husband's younger brother.

Under the Dayabhaga law, the younger brother of the husband of a childless widow is entitled to succeed to her *ayautuka stridhan* property in preference to her step-brother.

APPEAL by Debiprasanna Roy Chowdhry and others.

Harendra Nath Ghose and others, the sons of the uterine sister of one Annapurna Dasi, applied for the grant of probate of a will alleged to have been executed by the said Annapurna Dasi, and it was alleged that the testatrix died leaving the following near relations: her adopted son, her husband's younger brothers, and her step-mother's son. Notices were served upon these persons who entered caveats. On the case coming on for hearing, the District Judge held that both sets of objectors ought not to be allowed to contest the validity of the will, as both sets of objectors could not be treated as persons claiming to have an interest; and held further that, during the lifetime of the testatrix' half-brothers, the husband's younger brothers had no interest in the estate and had no *locus standi* to object to any will propounded, and disallowed the objection of her husband's younger brothers. The step-brothers, however, did not contest the proceedings, and the will was proved in the common form and probate was granted to the sons of the uterine sister of the testatrix. The younger brothers of the husband of the testatrix now appealed.

* Appeal from Original Decree, No. 187 of 1909, against the order of F. Bose, District Judge of 24-Parganas, dated Feb. 23, 1909.

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Babu Golap Chandra Sarkar, Babu Ram Chandra Mazumdar
and *Babu Abinash Chandra Guha*, for the appellants.

Babu Braja Lal Chakravarti and Babu Mohini Mohan
Chatterjee, for the respondents.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. We are invited in this appeal to set aside an order by which the Court below has overruled an objection taken by the appellants to the grant of probate of a will alleged to have been executed by one Annapurna Dasi, the widow of their deceased elder brother. It appears that upon the death of Annapurna, an application for the probate of her will was made by the respondents, who are the sons of her uterine sister. In the application the nearest relations of the deceased were stated to be the younger brothers of her husband and the sons of her step-mother. Notices were duly served upon these persons, and they entered caveats. When the case came on for trial, the learned District Judge held that both sets of objectors could not be allowed to contest the validity of the will, inasmuch as if either set was held to be entitled to succeed to the estate of the deceased in the event of an intestacy, it must be to the exclusion of the other set; consequently, both sets of objectors could not be treated as persons claiming to have an interest in the estate of the deceased within the meaning of section 69 of the Probate and Administration Act, 1881. In this view the District Judge proceeded to determine whether the younger brothers of the husband of the deceased or her step-brothers would be the preferential heirs in the event of intestacy. He came to the conclusion that the younger brothers of the husband had no interest in the estate in the presence of half-brothers. He therefore held that they had no *locus standi* to take exception to the genuineness of the will propounded, and overruled their objections. Subsequently, the step-brothers did not contest the proceedings with the result that the will was proved in common form, and probate was granted to the sons of the uterine sister of the testatrix. The younger brothers of the husband of the deceased

have now appealed against the order by which their objection was overruled, and, on their behalf, it has been contended that they were preferential heirs to the step-brothers and were entitled to be represented in the proceedings in the Court below. Their claim has been contested on the ground that, under the Dayabhaga school of Hindu law, a step-brother is entitled to succeed to the *ayautuka stridhan* property of a childless woman in preference to the younger brother of her husband. In our opinion, there is no room for reasonable doubt that the view taken by the Court below is erroneous, and is contrary to the order of succession laid down by Jimutavahana.

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In chapter 4, section 3 of the Dayabhaga, Jimutavahana discusses the question of succession of the separate property of a childless woman. The first nine paragraphs of the section deal with the question of succession to nuptial presents and other matters with which we are not at present concerned. Paragraphs 10 to 28 are then devoted to a discussion of the question of succession to *stridhan* property which has been received as a present by a woman after marriage, inclusive of gifts by kindred and *sulka*. The result of the discussion is summarised in paragraph 29, which is in these terms: "Therefore, the property goes first to the whole brothers; if there be none, to the mother; if she be dead, to the father; but on failure of all these, it devolves on the husband." Thus Katyayana says: "that which has been given to her by her kindred goes, on the failure of kindred, to her husband." Paragraph 30 then explains the text of Katyayana, and it is pointed out that the expression "failure of the kindred" implies absence not merely of the father and mother, but also of brothers. Paragraph 31 commences a discussion as to the order of succession upon failure of the first group of four successive heirs already named, namely, the whole brothers, the mother, the father, and the husband. It may be observed here, in passing, that paragraph 31 has been inaccurately translated by Colebrooke, inasmuch as in his rendering of the text of Vrihaspati, between the mother's sister and the father's sister

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should come, not the maternal uncle, but the maternal uncle's wife and the paternal aunt. The precise effect of the text of Vrihaspati is discussed in paragraphs 32 to 36; and in paragraph 37 it is laid down that the order of succession after the failure of the first set of four successive heirs already named, is as follows: The husband's younger brother, the son of the brother-in-law, the sister's son, the husband's sister's son, the brother's son and the son-in-law. Paragraph 39 then defines the order of succession upon failure of this second set of six successive heirs. The position, therefore, is fairly clear, that while the younger brothers of the husband occupy the first place among the second set of six successive heirs, who come in upon failure of the first set of four successive heirs, the step-brother does not find any place at all in the list up to this stage. A desperate effort, however, has been made by the learned vakil for the respondents to find a place for the step-brother before the younger brother of the husband. The argument is of a twofold character, and is self-contradictory. It has been contended in the first place that a step-brother is included in the expression *सोदर* (*sodara*) which is used in paragraph 29, and is correctly rendered by Colebrooke as whole brother. It has been argued in the second place, in the alternative, that a step-brother comes before the husband and consequently before the younger brother of the husband. In our opinion, there is not the remotest foundation for either of these positions.

In so far as the first of these contentions is concerned, it is manifestly negatived by the express language of paragraph 29. As was pointed out by this Court in the cases of *Judoonath Sircar v. Bussunt Coomar Roy Chowdhry* (1) and *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (2), paragraph 29 gives the final *réssumé* of the various matters discussed in the preceding paragraphs, commencing from paragraph 10. It is not necessary for our present purpose to reproduce the line of elaborate reasoning by which this conclusion was reached by Mr. Justice Dwarka Nath Mitter,—a conclusion which is

(1) (1873) 11 B. L. R. 286 :
19 W. R. 264.

(2) (1905) I. L. R. 33 Calc. 315.

supported by the express opinion of three of the commentators on the *Dayabhaga*. If this be the true scope of paragraph 29, it is obviously not permissible to examine the previous paragraphs to determine whether the conclusion reached by Jimutavahana is or is not legitimately deducible from the texts upon which he placed reliance. In this connection, it is well to bear in mind the warning given by their Lordships of the Judicial Committee in the case of *Collector of Madura v. Mootoo Ramalinga Sathupathy* (1), that the duty of a Judge administering Hindu law is not so much to enquire whether the doctrine disputed is fairly deducible from the earliest authorities, as to ascertain whether it is one that has been received by the particular school of Hindu law which governs the litigant parties. We must, therefore, decline to adopt the course which we are invited to follow by the learned vakil for the respondents, namely, to draw our own inference from an examination of the previous paragraphs, where the expression used is *bhrata* (भ्राता) which, it may be assumed, is ambiguous and may include a half-brother as well as a whole brother. The essence of the matter is that Jimutavahana, when he summarises his conclusion, describes the first amongst the four heirs, not merely as *bhrata* or brother, but as *sodara* or uterine brother. It has not been disputed that the etymological meaning of the expression *sodara* is uterine brother, and the numerous passages quoted in Bohtlingk and Roth's Sanskrit Worterbuch, Vol. VII, col. 1201, do not show that the word is ever used to include a half-brother. On the other hand, the learned vakil for the appellants has pointed out that, according to the well-known Sanskrit lexicographer Hem Chandra, even the term *bhrata* ordinarily means uterine brother, and the six equivalents given by Hem Chandra are all alternative expressions for uterine brother. This view is also strengthened by the definition of Nilkanta, that brotherhood is due to birth from the same mother and father मातृत्वमेकपितृमातृजन्तुत्वं (Vyavaharamayukha, Ed. Mandalik, page 80). It is not necessary for us, however, to hold that the word *bhrata* does not include a half-brother,

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(1) (1868) 12 Moo. I. A. 397.

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and it may be assumed that the context may show that it does; but the word used by Jimutavahana in paragraph 29 is *sodara*, and in our opinion it is idle to contend that Jimutavahana intended to include a step-brother in the expression *sodara*. Apart from the circumstance that the etymological meaning of the expression directly negatives such a position, it may be observed that if Jimutavahana had intended to include the step-brother in the expression *sodara*, either he or his commentators would have examined the question, which must in that view necessarily arise as to the precise position of the step-brother, namely, whether the step-brother would take along with the whole brother or after him, and in preference to the mother and father. On no conceivable principle can the step-brother be allowed to take equally with the whole brother, or to have precedence over the mother as well as the father. On the other hand, it is clear from paragraph 11, where Jimutavahana comments upon a text of Yajnavalkya, that he intended to include in the term *bhrata*, in that place, the son of both the same mother and father. The first branch of the contention of the learned *vakil* for the respondents cannot consequently be supported.

In so far as the second branch of the contention of the learned *vakil* for the respondents is concerned, it is in our opinion equally groundless. His argument in substance is that in paragraph 30, when the husband is described as an heir who takes on failure of the kindred, we must assume that all the kindreds inclusive of the step-brother are intended. In other words, the contention is that the expression *bhrata* in paragraph 30 includes the step-brother. This position is obviously untenable, because paragraph 30 is clearly subordinate to, and explanatory of, paragraph 29, and Jimutavahana could never have intended to define the first three heirs as the uterine brothers, the mother and the father, and then to have held that all kindred had precedence over the husband. If this had been the intention, some provision would have been made for succession amongst the various kindreds. The learned *vakil* for the respondents suggested that we might apply the doctrin

of spiritual benefit to allow the step-brother to have precedence over the second group of six heirs and also over the husband. In our opinion, such a course is obviously inadmissible. We have a clear specification, first, of one group of four heirs, and next, of a second group of six heirs; as the step-brother is not one of these, he is clearly not entitled to preference over the younger brother of the husband. Reference has finally been made to the case of *Dasharathi Kundu v. Bipin Behari Kundu* (1), where the question arose as to precedence between the son of a sister and the eldest brother of the husband. The determination of the question raised, turned upon the construction of paragraphs subsequent to those with which we are now concerned, but there is one passage in the judgment of the learned Judges which clearly indicates that they understood paragraph 29 as excluding a half-brother. The case, therefore, does not support the position taken up by the respondents, and the second branch of their contention is, in our opinion, quite as unfounded as the first branch.

The result, therefore, is that this appeal must be allowed, and the order of the Court below discharged. The consequence is that the probate which has been granted in common form will stand revoked, and the propounder of the will will be called upon to prove it in solemn form in the presence of the appellants. The appellants are entitled to their costs in this Court.

Appeal allowed.

S. A. A. A.

(1) (1904) I. L. R. 32 Calc. 261.

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