Karhiley And Ors. vs Hira And Ors. on 12 November, 1951

Equivalent citations: AIR1952ALL229, AIR 1952 ALLAHABAD 229

Author: V. Bhargava

Bench: V. Bhargava

JUDGMENT

Malik, C.J.

1. This second appeal filed by defendants 1 to 3 was referred to a larger Bench as a point, very similar to the point now raised, was the subject-matter of a decision by a Pull Bench of this Court. One Lachman had five sons. We are not concerned with all the five, but one of his sons was Badan who died in the year 1938 leaving a widow Sm. Badana. Sm. Badana died in the year 1941 and after her death the names of the defendants, sons of Himma, brother of Badan, were mutated over a grove which it has now been found was the self-acquired property of Badan. At the time of Badan's death he had two brothers, Churai and Himma, surviving him. He bad another brother Ujagar who had predeceased him, whose son Chunnu is defendant 5. Churai had four sons and plaintiffs are three of the sons of Churai. The plaintiffs claimed a three-fourth out of one third share in this grove on the ground that on the death of Sm. Badan succession opened and the plaintiffs were entitled to the share mentioned above.

2. The contesting defendants 1 to 3 claimed that Badan was joint with their father Himma, and the grove was joint family property. They further pleaded that even if it was separate property of Badan, Himma, being a reunited brother, was a preferential heir.

3. The lower appellate Court has held that the grove, in suit was the self-acquired property of Badan, that Badan and Himma remained joint while Churai, plaintiffs' father, had separated but that it made no difference and the plaintiffs were entitled to the share claimed.

4. The findings of fact are not challenged before us. The only point urged is that Himma, having remained joint with Badan, on Badan's death he became a preferential heir and Churai, the other brother of Badan, who had separated was excluded. Learned counsel has relied on four decisions : (1) Jadub Chunder v. Motee Lal, 1 Hyde's Rep. 214: (2) Keshub Ram v. Nand Kishore, 11 W. R. 308; (3) Pettambur Dutt v. Hurish Chunder, 15 W. R. 200; (4) Devibai v. Dayabhoy Motilal, A.I.R. (13) 1926 Sind 42. Learned counsel has also relied on certain observations in a Pull Bench decision of the Allahabad High Court in Ganesh Prasad v. Hazari Lal, A. I. R. (29) 1942 ALL. 201, and has urged that there was no difference in principle between succession by a son and a brother and, as in the case of son it has now been held that a united son is entitled to inherit in preference to a son who

had separated, it should similarly be held that a united brother has preference over a separated brother.

5. We may mention that the case before us is governed by the Mitakshara system of Hindu law and in the decision of Ganesh Prasad v. Hazari Lal, A. I R. (29) 1942 ALL. 201, and a later Full Bench decision of this Court, Mt. Ram Dei v. Mt. Gyarsi, A. I. R. (36) 1949 ALL. 545, reliance was placed on certain texts of the Mitakshara dealing with the rights of inheritance by a son who had remained joint with his father while the other sons had separated. It was pointed out that a son's interest in his father's self-acquired property arose by birth and it, therefore, passed by survivorship on father's death and, in the case where some of the sons had separated and others had remained joint, or a son was born after the partition, the entire property of the father, including his self-acquired property, came to the after-born son or the son who was joint with him. The provision of Mitakshara relied on in those judgments is Mitakshara chap. I, Section 6, placita 4 and 6, which expressly provided that all the wealth including the wealth acquired by the father himself shall go to the after born son or those who were joint with him to the exclusion of his separated son. A brother becomes entitled to property not by birth but his interest arises on the death of the propositus and the principle applicable, therefore, to son's succession cannot, by any application of logic, be made applicable to the succession of a brother. As regards joint family property, it must go by survivorship to the other coparceners to the exclusion of those who are not members of the coparcenary, but as regards separate property of a brother it goes by inheritance. A brother whether he is united or separated has the same nearness of blood relationship and it has not been suggested that the united brother has any greater rights to offer oblations than a separated brother. Their Lordships of the Judicial Committee in Buddha Singh v. Laltu Singh, 42 Ind. App. 208, at p. 227 pointed out that "It is absolutely clear that under the Mitakshara, whilst the right of inheritance arises from sapinda-relationship or community of blood, in judging of the nearness of blood-relationship or propinquity among the gotrajas, the test to be applied to discover the preferential heir is the capacity to offer oblations."

Applying this test there seems to be no reason why a separated brother should be excluded from inheritance by a brother who is joint.

6. Reliance is placed on Mitakshara, chap. II, Section 9, placita 7 and 8 which provide that in case of a re-union with a half brother, on the death of the propositus, the separated whole brother is entitled to share the property with a half brother, and it is urged that this clearly shows that even in the case of a brother some importance is attached to the question whether he was joint or separate with the propositus. The reason for this rule is that under the Mitakshara a whole brother is preferred to a half brother and when there is a whole brother he excludes the half brother from inheritance, but the verse mentioned above lays down that if this half brother is united with the propositus then the separated whole brother and the united half brother will share the property. Prom this verse which is in the Chapter on the "Re-union of Kinsman after Partition" it cannot be laid down that it was intended that the brother of full blood who is joint should be preferred to the separated brother of full blood even with regard to the self-acquired property of the propositus.

7. Learned counsel has also relied on a quotation from the Dayakrama Sangraha in Sarvadhikari's Principles of the Hindu Law, 1922, Edn. at page 886 where it is mentioned that:

> "If there be no uterine or whole brother, the half-brothers of the same class with the deceased are entitled to the succession since they also offer three funeral oblations to the father and the other ancestors above-named of the deceased owner in which he participates.
>
> "If there are two brothers, the one uterine and the pother a half-brother, and both were unassociated with the deceased owner, the uterine brother exclusively takes the wealth of his uterine brother where an associated half-brother and an unassociated whole brother are the competitors for the succession, it devolves equally on both of them."

We fail to see how this quotation helps learned counsel and we could not find anywhere any mention of the claim put forward by the learned counsel that a brother joint with the deceased is entitled to exclude from inheritance a separated brother with respect to his self-acquired property.

8. Sarvadhikari on the Principles of the Hindu Law of Inheritance (Second Edn.) Lecture XVI, p. 804 has no doubt said:

> "It there be a competition between whole brothers associated and whole brothers unassociated, and between half brothers associated and half brothers unassociated, the former exclude the latter."

The texts of the Mitakshara quoted by him relate to the question of preference of whole brothers to half brothers in matters of succession and about unassociated whole brothers ranking together with associated half brothers for purposes of succession. The rule given by Sri Krishna quoted by the learned author, which supports the learned author may be applicable to the Dayabhag system of law, but bearing in mind the principle of succession in the Mitakshara we cannot hold that it is applicable to Mitakshara succession. There is a fundamental divergence between the Mitakshara and the Dayabhag school about the principles on which the rule as to devolution of property is based. Speaking broadly, while under the Dayabhag Law, it is the capacity for conferring spiritual benefit, under the Mitakshara the right to inherit arises from propinquity, that is, proximity of relationship. Though under the Mitakshara the right to inherit does not arise from the right to offer oblations, the test to be applied when a question of preference arises is in the case of sagotra sapidas the capacity to offer oblations, See Ram Singh v. Agar Singh, 13 Moo Ind. App. 373 at p. 392. And when the decree of blood relationship furnishes no certain guide, the test is the capacity for conferring spiritual benefit. See Vedachela Mudaliar v. Subramania Chettiar, 48 Ind. App. 349 (p. c.)

9. Coming to the case law on the point, the cases relied on by learned counsel do not appear to be under the Mitakshara law. Learned counsel has not been able to cite the first case of Jadub Chunder v. Motee Lall, 1 Hyde's Rep. 214 as the book was not available. The next decision, Keshub Ram v. Nund Kishore, 11 W. R. 308, is merely based on that previous decision but the judgment makes it

clear that the learned Judges were applying the law prevalent in Bengal, that is the Dayabhag system. In the other case of Petambur Dutt v. Hurish Chunder, 15 W. R. 200, the first case of Jadub Chunder v. Motee Lal, was relied on and the learned Judges did not examine the point for themselves. These two cases were followed by a learned Judicial Commissioner of Sind in Devibai v. Dayabhoy Motilal, A. I. R. (13) 1926 Sind 42. It does not appear whether in this case the property that the learned Judge was dealing with was the self-acquired property of the deceased or was the property of the joint family. The point arose in two recent decisions of the Calcutta High Court under the same law, that is the Dayabhag Law, and in both these cases the Calcutta High Court held that the brother who was merely living jointly with the deceased could not be said to have re-united and there was, therefore, no question of giving him any preferential right. The cases are Jyotish Chandra v. Profulla Chandra 43 Cal. W. N. 937 and Gokul Pati v. Pashu Pati, I. L. R. (1942) 1 Cal. 85. The point was carefully considered by a single Judge of the Nagpur High Court in Shamrao v. Krishnarao, I. L. R. (1941) Nag. 598 where the learned Judge was inclined to take the same view that we have taken to-day. He observed:

> "In view of the fundamental points of difference indicated above (that is, a son acquiring a right in the self-acquired property of the father by birth and a brother acquiring a tight in that property merely on the death of the brother) the circumstances as to the inheriting brother being joint with or separate from the deceased brother whole property he inherits becomes in my opinion wholly immaterial."

10. We are, therefore, of the opinion that there is no reason to hold that Himma had any preferential right as against Churai, the separated brother of Badan deceased. The case was, therefore, rightly decided by the lower Court.

11. The appeal has no force and is dismissed with costs.