Vimla Bai (Dead) By Lrs vs Hiralal Gupta And Ors on 22 December, 1989

Equivalent citations: 1989 SCR, SUPL. (2) 759 1990 SCC (2) 22, AIRONLINE 1989 SC 51, 1990 (2) SCC 22, (1990) 1 HINDU LR 306, (1990) 1 CUR CC 693, (1990) 1 APLJ 66, (1990) MARRI LJ 194

Author: K. Ramaswamy

Bench: K. Ramaswamy, L.M. Sharma

PETITIONER:
VIMLA BAI (DEAD) BY LRS.

Vs.

RESPONDENT:
HIRALAL GUPTA AND ORS.

DATE OF JUDGMENT22/12/1989

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
SHARMA, L.M. (J)

CITATION:
1989 SCR Supl. (2) 759 1990 SCC (2) 22
JT 1989 Supl. 448 1990 SCALE (1)49

ACT:
Hindu Law: Hindu governed by his personal branch of law-Migration cannot be presumed but to be established by evidence.
Indian Evidence Act: Sections 37, 57, 81--Statements made in Government Gazetteer--Admissibility as evidence.

HEADNOTE:
One Hariba Bhagwat had a son Appaji and daughter Baja-bai. Appaji in turn had a son Rakhmaji and a daughter Bhiku-bai, the plaintiff who had flied a suit for possession and mesne profits of two houses. The suit was decreed by the Trial Court but on appeal reversed by the High Court. The Legal representative of the plaintiff then preferred this appeal by special leave confined to one of the houses, the

parties having settled their dispute regarding the other house.

Bajabal and her husband Ganpat Rao Page being issueless had adopted Rakhmaji. All of them belonged to villages situated in Ahmednagar District of Bombay Province, and are Dhangars (Shepards) by caste but had migrated to Indore. On Rakhmaji's death Sonubai his childless widow succeeded to the properties as limited owner. She gifted the suit property i.e. house No. 88 to Shanker Lanke a Brahmin, the first defendant by a registered gift deed dated October 31, 1944. Shanker Lanke in turn hypothecated the House to one Hira Lal, the first respondent on September 21, 1948. Sonubai died in 1947.

The case of the plaintiff was that the family is governed by the Bombay School of Hindu Law wherein female Bandhu is an heir and thereby she was entitled to succeed to the estate of Rakhmaji; Sonubai, the issueless widow of Rakhmaji as limited owner had no power to dispose of the properties, so the gift deed and mortgage are void and do not bind her and the respondents are in unlawful possession as trespassers. The material defence relevant for the disposal of this appeal is that the persons concerned are governed by the Banaras School of Hindu Law under which a female bandhu is not an heir. Hiralal's case was that he had no objection to hand over the possession provided he was paid the consideration of Rs. 12,000 borrowed by Shanker Lanke, the donee.

760

The Trial Court came to the conclusion that the parties are governed by the Bombay School and not the Banaras School ,of Hindu Law and the plaintiff is the heir of Rajkhmaji. The gift deed was declared void and not binding on the plaintiff and the suit was decreed and the claim for refund of the mortgage money was rejected. Hira Lal appealed. It was contended before the High Court that the plaintiff's family belonged to Dhangar caste, being migrants from U.P. (Mathura) to Aurangabad from where they had migrated to Central Province (now Madhya Pradesh) and were governed by the Banaras School of Hindu Law. This contention found favour with the High Court which placing reliance solely on the recital of the Gazetteer concluded that the parties had migrated from Mathura and thereby they were governed by the Banaras School of Hindu Law under. which the female Bandhu is not an heir to succeed to the estate of the last male holder. Reversing the decree passed by the Trial Court, the suit was dismissed.

This Court in allowing the appeal by the legal representative of the plaintiff,

HELD: In India a Hindu is governed by his personal branch of law which he carries with him where ever he goes. But the law of the province wherein he resides prima facie governs him and in this case and to this extent only the law of domicile is of relevance or importance. But if it is

shown that a person came from another Province, the presumption will be that he is governed by the law or the special custom by which he would have been governed in his earlier home at the time of migration. [767B-C]

Migration is changing one's abode, quitting one's place of birth and settling permanently at another place. The burden of proving migration lies on the person setting up the plea of migration. Migration can not be presumed but it mast be established by abduction of evidence. [764D-G]

Section 37 of the Evidence Act 1872 postulates that any statement made in Govt. Gazette of a public nature is a relevant fact. Section 57(13) declares that on all matters of public history, the Court may resort for its aid to appropriate books or documents of reference and section 81 draws a presumption as to the genuineness of Gazettes coming from proper custody. [764H; 765A]

The State of facts contained in the official Gazetteer made in the course of the discharge of the official duties on private affairs or on
761
historical facts in some cases is best evidence of facts stated therein and is entitled to due consideration but should not be treated as conclusive in respect of matters requiring judicial adjudication. [766B-C]

The onus lies on the person alleging that the family had renounced the law of the origin and adopted that prevailing in the place to which he had migrated. The plaintiff and her family on migration from Ahmednagar carried with them to Indore their personal law, namely the Bombay School of Hindu Law under which a Hindu female is recognised to be an heir to last male holder of the Estate and takes the property as an absolute owner. The Plaintiff being the only nearest bandhu of Rakhmaji, is entitled to succeed to his estate as an heir and thus entitled to the possession of the House in question with mesne profits. [767D; 768B; A]

Keshao Rao Bapurao & Anr. v. Sadasheorao Dajiba, AIR 1938 Nagpur 163; Rajah Mattu Ramalinga Setupati v. Perianayagum Pillai, [1873-74] L.R. 11A 209 at p. 238; Martand Rao v. Malhar Rao, [1927-28] L.R. 551 A 45 at 48; Arunachellam Chetty v. Venkatachellapathi Guru Swamigal, [1919] L.R. 46 IA 204; Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi & Ors., [1960] 1 SCR 773 at p. 788; The Poohari Fakir Sadavarthy of Bomdilipuram v. The Commissioner, Hindu Religious & Charitable Endowments, [1962] Suppl. 2 SCR 276: Mahant Shri Srinivasa Ramanuj Das v. Surajnarayan Dass & Anr., [1966] Snpp. SCR 436 at p. 447; Balwant Rao & Ors. v. Bali Rao & Ors., AIR 1921 P.C. 59; Udebhan Rajaram v. Vikram Ganu, AIR [1957] M.P. 175; Bhagirathibai v. Kahnujirav, ILR 11 Bombay 285; Girdhari Lall Roy v. The Bengal Government, [1867-79] Moore's Indian Appeals 448 and Muthuswami Mudaliyar & Ors. v. Sunamedu Muthukumaraswami Muddaliyar, [1895-96] LR 23 IA 83, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 322 of 1973.

From the Judgment and Order dated 4.12.1970 of the Madhya Pradesh High Court in First Appeal No. 90 of 1962. Awadh Bihan Rohtagis Vivek Gambhir and S.K. Gambhir for the Appellants.

U.R. Lalit and G.B. Sathe for the Respondents. The Judgment of the Court was delivered by K. RAMASWAMY, J. 1. This appeal by special leave by the legal representatives of the plaintiff, Bhikubai, arises from decision in First Appeal No. 90/62 of the High Court of Madhya Pradesh, Indore Bench, dated July 18, 1982 reversing the decree of the trial court in O.S. No. 29/51 filed for possession and mesne profits of two houses, Nos. 88 of 89 situated at Nandlalpura, Indore City, mentioned in the plaint'schedule. In this appeal, we are only concerned with House No. 88 as the parties have settled their dispute regarding to the other house. The admitted facts are that one Hariba Bhagwat of Mouza Pisore village had a son by name Appaji and a daughter Bajabai. Appaji in turn had a son by name Rakhmaji and a daughter Bhikubai (the plaintiff). Bajabai was married to Ganpatrao Page of Madhavagoan vil- lage. As they were issueless they adopted Rakhmaji. Both the villages are situated in Ahmednagar District of Bombay Province. They are Dhangars (Shepard) by caste. All of them migrated to Indore. Rakhmaji died in 1918 and Sonubai his childless widow succeeded to the two houses and other properties as limited owner. She gifted House No. 88 to Shankar Lanke, a brahmin, first defendant by a registered gift deed dated October 31, 1944 under Ex-DI-5. Shankar Lanke in turn hypothecated House No. 88 to Hiralal, fifth defendant/first respondent on September 21, 1948 under Ex-5-D3. Sonubai died on March 11, 1949. Rakhmaji was the natural brother of Bhikubai, but by operation of law namely adoption, he became her father's sister's son, i.e. a band- hu. The case of the plaintiff was that the family is gov- erned by the Bombay School of Hindu Law wherein female bandhu is an heir and thereby she was entitled to succeed to the estate of Rakhmaji. Sonubai, as limited owner, had no power to dispose of the properties by way of gift and so the gift deed and the mortgage are void and do not bind her. The respondents are in unlawful possession as trespassers. The suit was resisted by the first defendant, the donee, on diverse grounds. The material defence relevant for the disposal of this appeal is that the persons concerned are governed by the Banaras School of Hindu Law under which a female bandhu is not an heir, Hiralal's case was that the mortgage was for consideration and that he had no objection to hand over the possession of the property provided the consideration of Rs. 12,000 borrowed by Shankar Lanke was paid to him.

2. The trial court framed as many as 14 issues with sub-issues on each count. It found on issue No. 6a, which is material for the purpose of this case, that the parties are governed by the Bombay School, and not the Banaras School, of Hindu Law; the plaintiff is the heir of Rakhmaji as his mother's brother's daughter, and though the consi-

deration was paid under the mortgage obtained by Hiralal, it was not taken after due inquiry about existence of legal necessity and in good faith. The gift deed was declared void and does not bind the plaintiff. The plaintiff was held entitled to possession and mesne profits. The claim for refund of the

mortgaged money was rejected. Accordingly, the suit was decreed. Hiralal and another filed the appeal. Shankar Lanke did not file any appeal. It was contended before the High Court that the plaintiff's family belonging to Dhangar caste were migrants from U.P. (Mathura) to Auran- gabad from where they had further migrated to Central Prov- ince (now Madhya Pradesh). They are governed by the Banaras School of Hindu Law. There is no proof that they abandoned the personal law, namely, Banaras School of Hindu Law, and adopted Bombay School of Hindu Law. This contention found favour with the Hindu Court, which relief upon the statement made in Indore State Gazette of 193 1 at page 20, wherein it was claimed to have been recorded that Holkars belonged to Dhangar caste and it would appear that they were originally residents of the country-side around Mathura and they mi- grated to Aurangabad District and thereafter Phaltan Parga- na. At page 90, it was mentioned about Dhangars in general and that in Indore Shepard caste was the ruling family. Many of the Dhangars were Shivail's trusted Maoles used for Gureilla warfare. In domestic life as also in language, dress and food they closely resemble the Marathas, though in the caste scale their position is lower. Their deity is Khandoba. The High Court also found that the parties, name- ly, Rakhmaji's father and Ganpatrao Page were residents of Ahmednagar District. Their family God is Malhar Jijori, which is situated in the District of Poona. They migrated from Maharashtra to Indore. This finding is based on the evidence of, not only the plaintiff (PW-4), but also the admission made by the defendant No. 1 and his witness, D.W. No. 8- Placing reliance solely on the recital in the Indore State Gazette, it was concluded that the parties had migrat- ed from Mathura and thereby they are governed by the Banaras School of Hindu Law, under which the female Bandhu is not an heir to succeed to the estate of the last male holder. Alternatively, it also found that even applying the Bombay School of Hindu Law (Mitakshara), the plaintiff had not established that she was an heir to Rakhmaji. Accordingly, the appeal was allowed.

3. At the outset, it is made clear that neither Hiralal, nor Shankar Lanke pleaded that the plaintiff or her ances- tors had migrated from Mathura and settled down in Ahmedna- gar District. The specific plea of the plaintiff in para- graph 5 of the plaint that they were original residents of Ahmednagar District was not disputed. Hiralal did not also plead that the Banaras School of Hindu Law would apply to the plaintiff's family. Shankar Lanke vaguely pleaded this but adduced no evidence in proof thereof. Both the Courts have concurrently found that the plaintiff, Rakhmaji, and Ganpatrao Page are Dhangars by caste; their family God is Khandoba of Jijori; their manners and customs were also of Maharashtrian, vide D.W. 8 Khsumrao; and the High Court also further found that, "Undoubtedly true that the customs, manners, marriages and the way they worship the God are all the same as that of Maharashtrians or of the Marathas." But the customs, dress, language and manners may not by themselves show that person migrating from Mathura has given up the law of origin, though they are relevant facts. It must also be proved that in a particular case that they have given up their law of origin, i.e. the Banaras School of Hindu Law, and adopted the law of domicile, i.e. the Bombay School of Hindu Law. Accordingly, it was held that the parties are governed by the Banaras School of Hindu Law.

4. Migration is changing one's abode, quitting one's place of abode and settling permanently at another place. The burden of proving migration lies on the person setting up the plea of migration. As seen the respondents neither pleaded nor proved that the plaintiff's family migrated from Mathura to Ahmednagar in Bombay Presidency. When the plain- tiff was examined as a witness no

attempt Was made to elicit from her that they or their ancestors were migrants from Mathura and settled down in Ahmednagar. On the other hand the specific plea of the plaintiff in her plaint that they were the original residents of Ahmednagar District remained undisputed. In Hindu Law by Raghavachariar, 8th Edition, 1987 edited by Prof. S. Venkataraman who was himself an authority on Hindu Law, in paragraph 32 stated that a fami- ly's original place of abode can be inferred from the Chief characteristics of the family. In Keshao Rao Bapurao & Anr. v. Sadasheorao Dajiba, AIR 1938 Nagpur 163. Vivian Bose, J., as he then was, held that wherever a family is found cling- ing to its individuality and retaining its identity as Maharashtrian, it must be presumed until the contrary is shown that it hailed from the race of group of people known as Maharashtrians and carried the law of Maharashtra with them. Thus, it is clear that migration cannot be presumed but it must be established by abduction of evidence. The question then arises is whether the recital in Indore State Gazette relied on, at the appellate stage, can form the sole base to establish that the plaintiff's family were the migrants from Mathura in U.P. Section 37 of the Evidence Act, 1872 postulates that any statement made in a Government Gazette of a public nature is a relevant fact. Section 57(13) declares that on all matters of public history, the Court may resort for its aid to appropriate books or documents of reference, and Section 81 draws a presumption as to genuineness of Gazettes coming from proper custody. Phipson on Evidence, The Common Law Library (Thirteenth Edition) at page 510 paragraph 25.07 stated that the Government Gazettes ..... , ... are admissible (and sometimes conclusive) evidence of the public, but not of the private matters contained therein. In Rajah Muttu Ramalinga Setupati v. Perianayagum Pillai, [1873-74] L.R. 1 IA 209 at p. 238 the Judicial Committee, while considering the reliability of a report sent by the District Collector to the Commissioner about the management of a temple, held that when the reports express opinions on the private rights of parties, such opinions are not to be regarded as having judicial authority or force. But being the reports of public officers made in the course of duty, and under statutory authority, they are entitled to great consideration so far as they supply infor- mation of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them, and the pro- ceedings of the Government rounded upon them. Same view was reiterated in Martand Rao v. Malhar Rao, [1927-28] L.R. 55 IA 45 at 48 on the question of reliability of official reports relating to succession to a Zamindari, and held that "their Lordships consider it necessary at the outset to point out that, though such official reports are valuable and in many cases the best evidence of facts stated therein, opinions therein expressed should not be treated as conclu- sive in respect of matters requiring judicial determination, however, eminent the authors of such reports may be. In Arunachellam Chetty v. Venkatachellapathi Guru Swamigal, [1919] L.R. 46 IA 204 it was held that while their Lordships do not doubt that such a report (Inam register) would not displace actual and authentic evidence in individual cases; yet the Board, when such is not available, cannot fail to attach the utmost importance, as part of the history of the property, to the information set forth in the Inam register. This view was followed by this Court in Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi & Ors., [1960] 1 SCR 773 at p. 788. Same is the view expressed in The Poohari Fakir Sadavarthy of Bomdilipuram v. The Commissioner, Hindu Religious & Charitable Endowments, [1962] Suppl. 2 SCR 276 and held that Inam register is of great evidentiary value but the entries cannot be accepted on the face value without giving due consideration to other evidence on record. In Mahant Shri Srinivasa Ramanuj Das v. Surajnarayan Dass & Anr., [1966] Supp. SCR 436 at p. 447 relied on by Shri Lalit, learned senior counsel for the respondents, it was held that the statements in the Gazetteer can be consulted

on matters of public history. This is also the case relating to entries in Inam Register. Inam Fair Registers are maintained while exercising the statutory power and the entries were made in the relevant columns during the course of discharging official duties and so they are entitled to weight and great consideration, while as- sessing the evidence. Therefore, this Court did not lay any rule contrary to what has been laid by the Judicial Commit- tee or by this Court in the decisions referred to hereinbe- fore.

5. The Statement of fact contained in the official Gazette made in the course of the discharge of the official duties on private affairs or on historical facts in some cases is best evidence of facts stated therein and is enti- tled to due consideration but should not be treated as conclusive in respect of matters requiting judicial adjudi- cation. In an appropriate case where there is some evidence on record to prove the fact in issue but it is not suffi- cient to record a finding thereon, the statement of facts concerning management private temples or historical facts of status of private persons etc. found in the Official Gazette may be relied upon without further proof thereof as corrobo- rative evidence. Therefore, though the statement of facts contained in Indore State Gazette regarding historical facts of Dhangars' social status and habitation of them may be relevant fact and in an appropriate case the Court may presume to be genuine without any further proof of its contents but it is not conclusive. Where there is absolutely no evidence on record in proof of the migration of the family of the plaintiff or their ancestors from Mathura area, the historical factum of some Dhangars having migrated from U.P. and settled down in Aurangabad District or in the Central Province by itself cannot be accepted as sufficient evidence to prove migration of the plaintiff family. Further no evidence was placed on record connecting Holkars of Indore with Dhangars of Bombay Province. Shri Lalit, learned counsel, admits that the statement of facts of Dhangars contained in Indore State Gazette is not conclusive evidence but he says that it may be taken into account as evidence connecting the family of the plaintiff. In the absence of any evidence proving migration of the family of the plain- tiff or their ancestors from Mathura to Ahmednagar, the historical factum of the migration of Dhangars from U.P. State mentioned in Indore State Gazette is of little assist- ance to the respondents so as to hold that they carried with them to Indore the Banaras School of Hindu Law prevailing in Uttar Pradesh. Even as regards the Dhangars as migrants, Thurston on Caste and Tribes of Southern India in Vol. III p. 167 stated that the statement of the census Report of 190 1 establishes that Marathi Caste of Shepard are Dhangars and their home speech is Marathi and they are the residents Of Bombay Presidency. It would, thus, show that even in 1901, Dhangars were held to be original Marathis of Bombay Presidency. We, therefore, hold that the case before us that Bhikubai, the plaintiff, and her family had migrated from Mathura to Ahmednagar District in Bombay Presidency has not been proved and admittedly, they migrated from Ahmednagar to Indore.

6. In India a Hindu is governed by his personal branch of law which he carries with him wherever he goes. But the law of the province wherein he resides prima facie governs him and in this sense and to this extent only the law of domicile is of relevance or importance. But if it is shown that a person came from another Province, the presumption will be that he is governed by the law or the special custom by which he would have been governed in his earlier home at the time of migration. An inference of migration can well be made from the known facts of the chief characteristics of the family, the language, observance of customs and rites though they are not sufficient to prove that

they are gov- erned by a particular school of law. The presumption can be displaced by showing that the immigrant had renounced the law of the place of his origin and adopted the law of the place to which he had migrated. The onus lies on the person alleging that the family had renounced the law of its origin and adopted that prevailing in the place to which he had migrated vide Hindu Law by Raghavachariar, Eighth Edition, para 32 at pages 30 & 31. The same view was expressed in Mulla's Hindu Law, edited by Justice S.T. Desai, 15th Edn., in para 13A and 14. In Hindu Law By S.V. Gupta (Vol. 1, Third Edition p. 50) Art. 10 it is stated that in case of migration of a Hindu from one part of India to another, it is presumed that he and his descendants continue to be governed by the law of the school to which he belonged before migration. Such presumptions are rebuttable. In Balwant Rao & Ors. v. Baji Rao & Ors., AIR 1921 PC 59. Lord Dunedin speaking for the Board held that it is absolutely settled that the law of succession in any given case is to be determined according to the personal law of the individu- al whose succession is in question. In that case it was found that Bapuji's ancestors at one time lived in Bombay Province and his migration at the place of death was ob- scured. Therefore, it was held that the original law that prevailed in Bombay Province at the time of migration gov- erns the succession to a Maharashtra Brahmin and Bombay School of Mitakshara Law would apply and the daughter would take her father's property as an absolute owner and her hefts alone would be entitled to succeed to her estate. This was reiterated by Bose, J. in Keshav Rao's case in consider- ing the question of migration by a Maharashtra Brahmin residing in Central Provinces and was held to be governed by the Bombay School of Mitakshara Hindu Law when migration is not proved in the sense that the exact origin of the family cannot be traced. Same view was followed in Udebhan Rajaram v. Vikram Ganu, AIR 1957 MP 175. Accordingly, we hold that the plaintiff and her family carried with them to Indore their personal law, namely, Hindu Law of the Mitakshara applicable to Bombay Province and not Banaras School of Hindu Law.

7. The question then is whether the plaintiff is an heir to Rakhmaji, the last male holder of the estate left by Sonubai, his widow. In Bhagirathibai v. Kahnujirav, ILR 11 Bombay 285 the Full Bench held that under the Hindu Law as prevailing in Bombay Presidency, a daughter inheriting from a mother or a father takes as an absolute estate, which passes on her death to her own heirs, and not to those of the preceding owner. Thereby Hindu female is recognised under the Bombay School of Hindu Law to be an heir to last male holder of the estate and takes the property as an absolute owner. The immediate question, therefore, is wheth- er the plaintiff is an heir as bandhu. In Mayne's Hindu Law, 12th edn., revised by Justice Alladi Kuppuswami, Chief Justice (Retd.) of Andhra Pradesh High Court, in paragraph 504 at p. 735 & 736 stated the meaning of the word 'bandhu' thus: The term 'bandhu' or 'bandhava' meant relations in general and included both agnates and cognates though it was sometimes confined to agnates in some of the Smriti texts relating to succession and gotra kinship, as for instance in the Vishnusmriti and in some of the verses in Manusmriti. The Mitakshara explains that the term 'bandhavas' in the above test of Manu means Atma Bandhus, Pitrubandhus and Matrubandhus, vide Mit. on Yajn. III, 24 (Setlur edn. 1169)Naraharayya's translation 56.

In paragraph 543, at page 761, dealing with the third division of heirs, namely, 'bandbus' and of their enumera- tion in paragraph 544 it was stated that the enumeration is only illustrative, which read thus:

Para 543 "Bandhus--The third division of heirs consists of bandhus (Table B). They are the sapindas related through a female, being within five degrees from and inclusive of common ancestor, in the line or lines in which a female or females intervene (paras 121-126), In the portion of his work relating to succes- sion, Vijnanesvara styles them as sapindas of a different gotra. The term 'bandhu' has therefore acquired in the system of the Mitak- shara a distinctive and technical meaning and signifies bhinnagotra sapindas. They are the three classes: (1) atmabandhus or one's own bandhus, (2) pitrubandhus or the father's bandhus and (3) matrubandhus or the mother's bandhus. The relevant passage in the Mitaksha- ra is as follows: "Cognates are of three kinds; related to the person himself, to his father, or to his mother, as is declared by the following text. The sons of his own fa- ther's sister, the sons of his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle, must be reckoned his mother's cognate kindred. Here, by reason of near affinity, the cognate kin- dred of the deceased himself, are his succes- sors in the first instance; on failure of them, his father's cognate kindred; or if there by none, his mother's cognate kindred. This must be understood to be the order of succession here intended.

Para 544 Enumeration only illustrative--Evidently, the enumeration of the above nine bandhus was not intended to be exhaustive, but only illustrative. When defining sapinda, Vijnanesvara says, "So also is the nephew a sapinda rela- tion of his maternal aunts and uncles and the rest, because particles of the same body (the maternal grandfather) have entered into his and theirs; likewise does he stand in sapinda relationship with paternal uncles and aunts and the rest. In the light of this, his definition of bandhus or bhinnagotra sapindas makes it clear that maternal aunts and uncles and their descendants as well as paternal aunts and their descendants are bandus and that his enumeration is purely illustrative. Visvarupa and Mitra Misra in his Vir amitrodaya recognised this by including the maternal uncle and the like in the term 'bandhu' purely by way of illustra tion. Referring to the maternal uncle's sons, the Virami trodaya says that it would be extremely im- proper that their sons are heirs but they themselves though nearer, are not heirs. After some fluctuation of opinion, it was finally settled that the enumeration of bandhus in the Mitakshara is not exhaustive but illustrative only."

In paragraph 536, at page 757, it is stated that in Bombay, the daughters of descendants, ascendants and collat- erals within five degree inherit as bandhus in the order of propinquity, such as the son's daughter, the daughter's daughter, the brother's daughter, the father's sister and so on. In Raghavachariar's Hindu Law at page 412 in para 458, it is stated that the daughters of descendants, ascendants and collaterals upto fifth degree are bandhus and the test of nearness of blood is to be applied in ascertaining their order of succession. In Mitakshara and Dayabhaga by Colebrooke, 1883 Edn., at p. 99, it is stated in Sec. VI on the succession of cognate

kindred, bandhu that on failure of gentiles, the cognates are heirs. Cognates are of three kinds; related to the person himself, to his father, or to his mother. At page 100, it is further stated that heir, by reason of near affinity, the cognate kindred of the deceased himself, are his successors in the first instance: on failure of them his father's cognate kindred: or, if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended.

8. In Girdhari Lall Roy v. The Bengal Government, [1867] 79 Moore's Indian Appeals 448 the question arose whether the maternal uncle of the last male holder is a bandhu entitled to succession of the estate of the deceased. While consider-

ing the question exhaustively of the texts of Hindu Law on this topic including Sec. VI of Colebrooke's referred to above of the order of succession by bandhus, it was held by the Judicial Committee that if for the determination of the question under consideration, their Lordships were confined to the four corners of the Mitakshara, they would feel great difficulty in inferring, from the omission of "the maternal uncle" and "the father's maternal uncle" from the persons enumerated in this text, that either of those relatives is incapable of taking by inheritance the property of a deceased Hindu in preference to the King. Such an inference, in the teeth of the passages which says that the King can take only if there be no relatives of the deceased, seems to be violent and unsound. For the text does not purport to be an exhaustive enumeration of all Bandhus who are capable to inheriting, nor is it cited as such, or for that purpose, by the Author of the Mitakshara, as is used simply as a proof or illustration of his proposition, that there are three kinds of classes of bandhus, and all that he states further upon it is, the order in which the three classes take, viz., that the bandhus of the deceased himself must be exhausted before any of his father's bandhus can take, and so on. Accordingly, it was held that 'the maternal uncle is capable of inheriting the estate. This view was followed in Muthus- wami Mudaliyar & Ors. v. Sunamedu Muthukumaraswami Mudali- yar, [1895] 96 LR 231 A 83. Accordingly, we hold that the enumeration of bandhus in various schools of Hindu Law of the rule of succession to the estate of the last male Hindu as agnates or cognates or collaterals, are only illustrative and not exhaustive. The Hindu Law of succession of Mitakshara School prevailing in Bombay Presidency recog- nises that a female is an heir as a bandhu to succeed to the estate of the-last male holder through her mother's side within five degrees to the last male holder. The plaintiff being the only nearest bandhu of Rakhmaji within five de- grees through her mother, is entitled to succeed to his estate as an heir. Accordingly, we hold that the plaintiff is entitled to the possession of the plaint schedule House No. 88 with mesne profits from the respondents.

9. The contention of Shri Lalit that the mortgagee respondent is entitled, in equity, to a decree for refund of the mortgage money which was admittedly found to have been paid cannot be accepted as the same was not paid to the plaintiff. So far an the mortgagee's claim against the mortgagor is concerned, he may pursue any remedy available to him under law.

10. Accordingly, the appeal is allowed, the decree of the High Court is set aside and that of the trial court is restored to the extent of House No. 88, with proportionate costs throughout.

R.N.J. Appeal

allowed.