

Bombay High Court

Vedachela Mudaliar vs Subramania Mudaliar on 7 July, 1921

Equivalent citations: (1922) 24 BOMLR 649

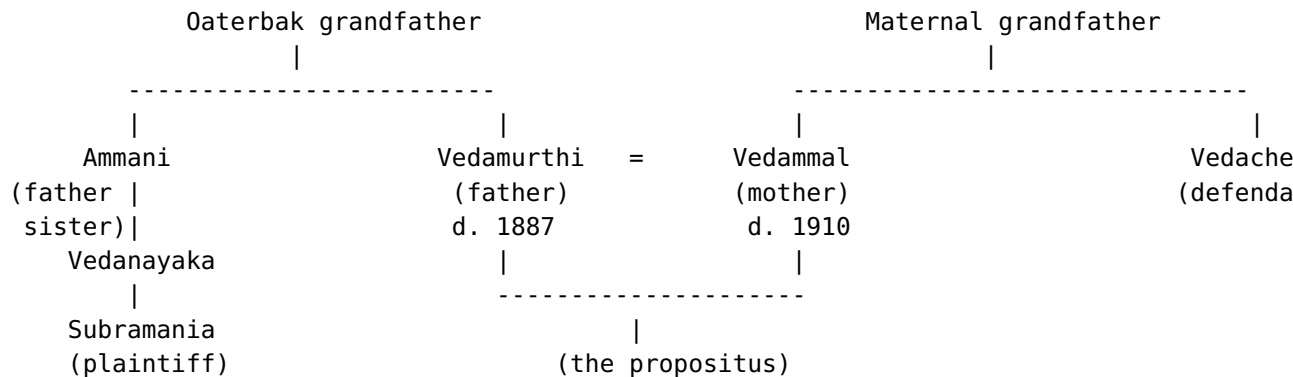
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Bench: Shaw, Phillimore, A Ali

JUDGMENT Ameer Ali, J.

1. The two actions which have given rise to the present consolidated appeal relate to the inheritance of one Sankaramurthi Mudaliar, a Hindu inhabitant of the Tinnevely District in the Madras Presidency, subject to the law of the Mitakshara as recognized in the Dravida country. The question for determination is of considerable importance and their Lordships cannot help regretting that, owing to the non-appearance of the respondents, it has been heard *ex parte*. Sankaramurthi died in 1900 without leaving any male issue or a widow. Consequently, on his death his mother, Vedammal, who was alive at the time, succeeded to his estate. She held the property until her own demise in 1910. Thereupon the two claimants, Subramania (since deceased) and Vedachela, came forward alleging title as bandhus to Sankaramurthi's inheritance, each claiming by virtue of his relationship to be preferentially entitled.

2. The following table will show the position in which they stand to each other and to Sankaramurthi:-



3. Subramania brought his action on January 27, 1911, in the Court of the Subordinate Judge

4. The two suits were numbered respectively 6 and 15 of 1911, and were tried together before the Subordinate Judge. The primary question for him to determine was which of the two claimants-namely, the son of the paternal aunt's son or the maternal uncle was entitled to the inheritance in preference to the other. The Subordinate Judge after examining the authorities came to the conclusion that the maternal uncle, Vedachela, had the superior title. He accordingly dismissed Subramania's suit and decreed Vedachela's claim. From his decrees there were two

appeals to the High Court of Madras. The learned appeal judges differed from the Subordinate Judge as to the respective rights of the parties, and accordingly reversed his decision in both the suits, the result being that Subramania's claim was allowed and Vedachela's was rejected. The present consolidated appeal before the Board is from the judgment and decrees of the High Court.

5. The point for determination turns on the construction of the rule laid down in the Mitakshara as to the succession of bandhus, for which the English word "cognate" has been used as a synonym in English translations and treatises on Hindu law and in a long series of judgments. The history of the law relating to bandhus and the principles governing their right to inherit have been explained at considerable length in the case of Ramchandra Martand v. Vinayak Venkatesh Kothekar. (1914) L.R. 41 I.A. 290; 16 Bom. L.R. 863 It is sufficient to observe here that under the Mitakshara the right of inheritance depends on sapinda relationship, in other words, "community of blood." Sapinda relations are divided into two groups-namely, samanagotra sapindas (blood relations of the same gotra or stock) and bhinna-gotra sapindas (consanguineous relations belonging to another gotra), in other words blood relations connected through females who have passed into other families or gotras. The bhinna-gotra sapindas on whom the law confers the right of inheritance are the inheriting bandhus.

6. The rule in the Mitakshara (ch. II., Section 6, para. 1) as to the succession of these bandhus is rendered into English by Mr. Colebrooke in the following words :

(1.) On failure of agnates, the cognates are heirs. 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 father's sister, the sons of his own mother's sister, and the sons of his maternal uncle, must be considered as 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 uncles, must be reckoned his mother's cognate kindred.' (2) Here, 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.

7. Mr. Colebrooke's rendering of the first part of para. 1 is a paraphrase of the original terms, "atma-bandhu," "(pitri) pitrubandhu" and "(matri) matru-bandhu." Then what follows has been judicially construed to be merely illustrative of what the three classes severally mean. It will be noticed that in the enumeration of bandhus in this illustration, several important bandhus, such as the maternal uncle and sister's son, are omitted. The maternal uncle's position as an inheriting bandhu was established so early as the sixteenth century by Mitra Misra, whose well-known commentary on the Mitakshara named the Viramitrodaya is regarded as a high authority wherever the law of that school is in force. Mitra Misra gives first an exposition of the rule enunciated in the Mitakshara:

On failure of the samanodakas the 'cognates' or 'bandhus' are heirs. The cognates are of three descriptions ; the cognates of a man himself, the cognates of the father, and the cognates of the

mother. To this effect is the following passage of the Smriti: 'One's father's sister's sons, one's mother's sister's sons and one's maternal uncle's sons are known to be one's own cognates; the father's father's sister's sons, the father's mother's sister's son and the father's maternal uncle's sons are known to be the father's cognates; the mother's father's sister's sons, the mother's mother's sister's sons and the mother's maternal uncle's sons are known to be the mother's cognates.' Amongst these also the order is, that, by reason of greater propinquity, first one's own cognates, after them the father's cognates, and after them the mother's cognates.

8. He then goes on to add :

The term bandhus in the text of Vijnaneswara and Yajnavalkya must comprehend also the maternal uncles and the rest, otherwise the maternal uncles and the rest would be omitted, and their sons would be entitled to inherit, and not they themselves, though nearer in the degree of affinity a doctrine highly objectionable.

9. The Judicial Committee in *Gridhari Lall Roy v. Government of Bengal* (1868) 12 Moo. I.A. 448 recognized the authority of the *Viramitrodaya*, and acting upon its exposition held that the maternal uncle, although not mentioned specifically in the illustration, was an inheriting bandhu. In that case the contest was between the father's maternal uncle and the Crown claiming the property by escheat. The Board held that as the maternal uncle was a bandhu of the deceased, the father's maternal uncle was a bandhu of the father. The maternal uncle's place, however, among the bandhus of his own class was not defined, and he has had many battles to fight in consequence.

10. The Subordinate Judge in the present case has held that both the claimants are no doubt atma-bandhus, but that the maternal uncle, both on the ground of nearness of blood as well as superior efficacy of oblations, was the preferable heir. One part of his judgment deserves notice. Referring to the decision in *Gridhari Lall Roy's* case he says as follows:

Their Lordships relied on the passages quoted from the *Viramitrodaya* in that case as well as on the passage in the *Mitakshara* dealing with the property of a trader dying abroad, The reference here is to Vijnaneswara's commentary on sloka 264, chapter 11 of Yajnavalkya. It occurs in the prakaranam (section) called Sambooya Samuthanam (concerns between partners). The sloka says that the property of a trader dying abroad goes to his (1) dayadas ; (2) bhandhavas ; (3) gnatis ; (4) returning partners, and on failure of these in order, to the king. Vijnaneswara explains dayadas as 'sons and the rest,' bhandhavas as 'on the mother's side the maternal uncle and the rest,' and the gnatis as 'gotraja sapindas as distinguished from the descendants.' It is clear from this that among the bandhus related through the mother, the mathula or maternal uncle takes the first place.

11. The learned judges of the High Court on appeal proceeded on a different line. Miller J. felt himself constrained to follow certain previous decisions of his own Court in holding that the maternal uncle's claim must be overruled. Whilst his learned colleague, Sadasiva Ayyar J., considered the passage in the *Mitakshara* laying down the order of succession among bandhus as "spurious" and "non-shastraic." His view should be given in his own words :

As I pointed out in the course of the arguments, the text is illogical, incomplete and inconsistent. However, it has to be accepted though, in my opinion, it is not a shastraic text, for, I am bound by the authority of the Privy Council not to rely upon the more ancient and authoritative Shastras where the law has been settled by the Courts according to the custom and practice of the Hindu community resident in a certain Province, even though the custom is based upon less authoritative treatises. (The mother's sister's son is unconditionally stated to come under the terms 'bhinna-gotra sapinda,' though very frequently he is of the same gotra as the propositus, that is when the mother and her sister have married husbands of the same gotra.) Though the bandhus are classified as atma-bandhus, pitru-bandhus and matru-bandhus, all three come in as heirs because they are bandhus of the propositus himself though the first class alone is technically called atma-bandhus (or own bandhus). With the greatest deference the fourth proposition laid down by Sir T. Muttusami Ayyar J. (1892) I.L.R. 16 Mad. 23, 30, viz., that between bandhus of the same class the spiritual benefit they confer on the propositus is a ground of preference, does not commend itself to me, though guarded obiter dicta to the same effect are found in other learned judgments also both earlier and later in date than Muttusami v. Muttukumarasami. (1892) I.L.R. 16 Mad. 23 Some of the pitru-bandhus and matru-bandhus mentioned in the text itself confer on spiritual benefit whatever on the propositus, and I fully agree with those judicial observations which hold that according to the Mitakshara (and ignoring the Benares branch of that school) the question of spiritual benefit or of death pollution, or of the right of performance of obsequial ceremonies, should not be introduced when considering the question of heirship. I go further and say that the introduction of such questions would lead only to inextricable confusion.

12. And the learned judge went on to add :

The enumeration in the Vridha Satatapa's text being clearly not exhaustive, several bandhus have been brought in by the decisions of the Courts even in precedence of the three atma-bandhus specially mentioned in the text (the said three being the father's sister's son, the mother's sister's son, and the mother's brother's son). When we once bring in others, atma-bandhus before pitru-bandhus it seems logical to hold that all atma-bandhus (lower in status to the three specially mentioned) should also be exhausted before even the first pitru-bandhu could come in. The only convenient and logical principle seems to me to so bring in all the atma-bandhus, though removed to the extreme limit of five degrees from the propositus, before bringing in a pitru-bandhu, though the latter may be removed by a less number of degrees from the propositus and (by the same analogy) to bring in all the pitru-bandhus even up to the fifth degree before a matru-bandhu though the latter is removed by less than five degrees.

13. It is hardly possible for their Lordships to pronounce an opinion on the authenticity of the passage condemned in such strong terms by a Hindu judge. They can only observe that it appears to have been accepted by a series of commentators and by eminent Hindu judges in the British Indian Courts. Any doubt at this stage as to its character or authority will, in their Lordships' opinion, lead only to perplexity and confusion. As regards the incompleteness of the rule, it is obvious that if the enumeration of bandhus was only intended by way of illustration the difficulty disappears, and the omission of such important bandhus as the mother's brother and the sister's son becomes easily intelligible, as both must have held in the social and religious system of the Hindus a position which

did not require a jurist's pronouncement to elucidate.

14. Respecting the learned judge's view in the latter part of the passage quoted above, their Lordships do not consider they are called upon to express an opinion by the facts of the present case. Both the contestors are found to be atma-bandhus, and the sole question is which among the two is preferentially entitled to Sankaramurthi's inheritance. Recent writers on Hindu law have divided each class of bandhus into two sub-classes respectively designated as cognates ex parte paterna, and cognates ex parte materna. This sub division is evidently based on an inference from the order in which the several bandhus are mentioned in the illustrative enumeration. For instance, among the atma-bandhus enumerated, the name of the father's sister's son is first given; then comes the mother's sister's son; and after him, the son of the mother's brother. Similarly, among the specifically named (pitri) pitru-bandhus first comes the son of the father's paternal aunt, and among (matri) matru-bandhus the son of the mother's paternal aunt. From this it has been inferred that the expounder of the rule in question intended that each class should be divided into two sub-classes according to the side of relationship, and that in every case preference should be given to the father's side. Their Lordships, again, in the view they take of the rights of the parties in the present case, do not think it necessary to express an opinion how far this proposition is in conformity with the express rule that in each class propinquity should be the governing factor. Assuming, however, the inference to be well founded, the question arises, what is the place of the mother's brother among the atma-bandhus? He is not specifically named; his sons are. He is unquestionably the nearest sapinda; and according to the ancient rule relating to sapinda descent, "to the nearest sapinda, the inheritance next belongs," he would undoubtedly be entitled to Sankaramurthi's estate, unless he is cut out, as the learned judges of the Madras High Court have cut him out in favour of the paternal aunt's grandson, by the inferential application of a rule of preference in each class to a person not named at all in the text, but who certainly stands nearest to the deceased by sapinda relationship.

15. The earlier decisions of the Madras High Court throw no light on the question at issue. In *Narasimma v. Mangammal* (1889) I.L.R. 13 Mad. 10 where the contest was between the mother's brother and the father's sister, preference was given to the maternal uncle. Again in *Chinnammal v. Venkatachala* (1891) I.L.R. 15 Mad. 421, where the contest was between the maternal grandfather of the deceased on one side and his paternal aunt on the other, the mother's father was preferred to the father's sister. In *Muttusami v. Muttukumarasami* (1892) I.L.R. 16 Mad. 23 the contest was between a maternal uncle of the half-blood and the father's paternal aunt. *Muttusami Ayyar J. and Parker J.* held in favour of the maternal uncle and their view was affirmed by the Judicial Committee: *Muttuswami v. Muttukumaraswami*. (1896) L.R. 23 I.A. 83

16. It was in the case last mentioned that the learned judges in the High Court laid down four broad principles for determining preferability among contending bandhus. (To one of these propositions *Sadasiva Ayyar J.* in the present case has taken exception.) They say as follows:

The conclusions we have come to are (1) that those who are bhinna-gotrasapindas or related through females born in or belonging to the family of the propositus are bandhus; (2) that as stated in the text of *Vridha Satatapa* or *Baudhayana* they are of three classes, viz., atma-bandhus, pitru-bandhus and matru-bandhus, and succeed in the order in which they are named; (3) that the

examples given therein are intended to show the mode in which nearness of affinity is to be ascertained ; and (4) that as between bandhus of the same class, the spiritual benefit they confer upon the propositus is as stated in Viramitrodaya, a ground of preference.

17. In Sundrammal v. Rangasami Mudaliar (1894) I.L.R. 18 Mad. 193 there was a triangular contest. The third defendant was the deceased's mother's sister's son, the fourth and fifth defendants were the daughters of his two sisters, whilst the plaintiffs and two other defendants were the sons of the daughters of the deceased's paternal uncle. The learned judges overruled the claim of the sisters' daughters and of the mother's sister's son. In rejecting the latter's claim the learned judges used the following terms:

As between plaintiffs and the third defendant the latter is a bandhu ex parte materna, whilst the former are bandhus ex parte paterna. The decision in Muttusami v. Muttukumarasami (1892) I.L.R. 16 Mad. 23 is not in point). There the competition was between a maternal uncle and the father's paternal aunt's son, both of whom were bhinna-gotra sapindas and bandhus.

18. In Balusami Pandithar v. Narayana (1897) I.L.R. 20 Mad. 342, 349, on which the decision of the High Court mainly rests, the contest was between the deceased's maternal uncle's son on one side, and the son of his sister's son on the other. The learned judges of the High Court held that the latter was nearer in degree to the propositus than the maternal uncle's son. Among other reasons for this conclusion they state at the end of the judgment "another fundamental principle of the law, in favour of the third defendant's preferable right is that among bandhus of a class those who are ex parte paterna take before bandhus ex parte materna."

19. It is to be noticed that in Balusami v. Narayana (1897) I.L.R. 20 Mad. 342, 349, the learned judges do not exclude from consideration in determining the question of preferability the fact of superior religious efficacy. They also recognize the high authority of the Viramitrodaya in the Mitakshara school.

20. The passage in the Mitakshara (ch. II., Section 6, paras. 1 and 2) which lays down the rules relating to the succession of bandhus, has already been quoted in a previous part of this judgment. It is expressly declared that among the classes, each takes precedence according to the order mentioned-namely, the deceased's atma-bandhus come first, the (pitri) pitru-bandhus (the father's bandhus) come next, and the (matri) matru-bandhus come last. The ground on which the rule is based is stated in express terms to be "nearness" of blood. "Here," the text fays, "by reason of nearness the atma-bandhus are his successors in the first instance," and so on.

21. In Southern India the Smriti Chandrika of Devananda Bhatta holds a parallel position to the Mayukha in the Bombay Presidency. Devananda Bhatta flourished before Mitra Misra, the author of the Viramitrodaya, for the latter frequently quotes Devananda. Although the Smriti Chandrika in the Southern Presidency is regarded as the most authoritative commentary on Vijnaneswara's work, the Viramitrodaya holds, as in Western India, a high position. It supplements many gaps and omissions in the earlier commentaries, and illustrates and and elucidates with logical preciseness the meaning of doubtful prescriptions.

22. The Smriti Chandrika (ch. XI., Section 5, paras. 13-15) states the rule as to the succession of bandhus in the following terms :

13. Brihaspati, bearing in mind all the above principles, declares ;-'Where there are many relatives (jnatayah), or remote kindred (sakulyah) or cognate kindred (bandhavah), whoever is nearest of kin, shall take the wealth of him who dies without male issue'. (Jnatayah) sapindas, or kinemen connected by funeral oblations of food. (Sakulyah) samanodakas or distant kinsmen connected by libations of water. (Bandhavah) cognate kindred, A description of these is given, as follows, in a different smriti, according to their order of relationship. 14. 'The sons of his own father's sister, and the sons of his own mother's sister, and the sons of his maternal uncle must be considered as 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,' 15. Of the kinsmen, distant kinsmen, and cognate kindred, in default of one that stands nearest in the order expressly given, he that may be somehow viewed to stand on a par with him may be selected ; it being generally declared by Gautama ;-'Let those take the inheritance who give the funeral cake (pinda), who are the descendants from the same gotra, or who are sprung from the same Rishi.'

23. The Sarasvati Vilasa, according to the editor of the Vivada Chintamani, is another work of authority in Southern India, It frequently refers to the Smriti Chandrika, and, consequently, its author must have flourished later than Devananda Bhatta. In the Sarasvati Vilasa, the principle relating to the succession of bandhus is thus given :

595. The bandhus are mentioned in another Smriti in the order of their propinquity. 'The sons of one's father's sister, the sons of one's mother's sister, and the sons of one's mother's brother should be known as one's atma-bandhus. The sons of one's father's father's sister, the sons of one's father's mother's sister, and the sons of one's father's mother's brother should be known as one's pitru bandhus. The sons of one's mother's father's sister, the sons of one's mother's mother's sister, and the sons of one's mother's mother's brother should be known as matru-bandhus. 596. These have a claim upon the wealth in default of the gotrajas. 597. Even there, one's atma-bandhus take the wealth first by reason of their propinquity. In default of them, the pitru-bandhus take the wealth, and in default of them, the matru-bandhus. This order should be known" : Setlur's Collection of Hindu Law Books on Inheritance, p. 183.

24. And then comes the passage on which the judges in Balusami Pandithar v. Narayana Rau (1897) I.L.R. 20 Mad. 342, 349 relied in their division of atmabandhus in two sub-classes-namely ex parte paterna and ex parte materna. That passage runs thus :

598. Nor could it be urged here that the mother being nearer than the father, the matru bandhus take the wealth before the pitru-bandhus. From the text, 'of these the mother is more important than the father'; (2) the mother's precedence alone is stated and not that of the mother's bandhus. Therefore, we think it sound that the matru-bandhus should take the wealth only after the pitru-bandhus.

25. A very small consideration would show that that passage has nothing to do with the members of the same class inter se. It only explains why pitru-bandhus are to be preferred to matru-bandhus. The mother's position being special to herself under an express rule.

26. The passage in the Viramitrodaya bearing on the subject has already been referred to, but attention may once more be directed to the words of Mitra Misra in which he declares the position of the maternal uncle as an heir.-"otherwise the exclusion of the maternal uncle and the like would be the result. And it would be extremely improper that their sons are heirs, but they themselves though nearer are excluded."

27. Among modern writers both Golap Chandar Shastri (Hindu Law, p. 296) and Raj Coomar Sarvadhikari (Hindu Law of Inheritance, p. 726) affirm that nearness of blood is the governing principle in the succession of bandhus. The Shastri lays down the rule in the following words : "(1) The nearness in degree on whichever side is to be preferred to one more remote ; (2) of those equal in degree, one related on the father's side is to be preferred to one related on the mother's side; (3) when the side is the same, the circumstance of one being related through a male and another through a female makes no difference." And Professor Raj Coomar Sarvadhikari states that in a case of a contest between two members of the same class and of the same degree or equally remote, the question of efficacy of oblations "determines the preferable right." The tables of succession in Professor Sarvadhikari's lectures, and in Mr. Mayne's and Mr. Bhattacharji's erudite works are very valuable in judging of the bandhus belonging to each class. But their Lordships are not satisfied that the place they have suggested for the maternal uncle in their respective tables of succession is correct.

28. Their Lordships think that, in the absence of any express authority varying the rule, the propositions enunciated in Muthusami v. Muthukumarasami (1892) I.L.R. 16 Mad. 23, 30, which on appeal was affirmed by the Judicial Committee, furnish a safe guide.

29. In the present case before their Lordships, the appellant and the deceased were sapindas to each other; and he (the appellant) is undoubtedly nearer in degree to the deceased than Subramania. He also offers oblations to his father and grandfather to whom the deceased was also bound to offer pinda. The deceased thus shares the merit, resulting from the appellant's oblations to the manes of his ancestors, whereas the father's sister's son's son offers no pinda to the deceased's ancestors. On all these grounds their Lordships think the view taken by the Subordinate Judge was well founded. They will therefore humbly advice His Majesty to reverse the judgment and decrees of the High Court and restore those of the first Court with costs.