BOMBAY HIGH COURT

Bhimacharya Venkatacharya

Vs

Ramacharya Bhimacharya

(Chandavarkar and Heaton, JJ.)

14.04.1909

JUDGMENT

Chandavarkar, J.

1. The question of Hindu law in this Second Appeal is, when a married Hindu woman dies, leaving no issue, and the competition for heirship to her stridhan is between her husband and a son by another wife of the latter, who is entitled to the property-the husband or the step-son of the woman?

2. The case is governed by the Mitakshara law.

3. Both the Courts below have decided the question in favour of the husband; and the step-son of the deceased woman has preferred this Second Appeal.

4. Yajnyavalkya's text regarding succession to the property of a woman, who dies leaving no issue, says: "Her kinsmen take it, if she die without issue". [The Mit., Chap. II Section XI, pl. 8, page 460, Stokes's Hiudu Law. Books].

5. Vijnaneshwara's gloss on the text is, as follows:

If a woman die 'without issue' that is, leading no progeny; in other words, having no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son : the woman's property as above described, shall be taken by her kinsmen, namely, her husband and the rest as will be forthwith explained". [Do. pl. 9, page 460].

6. Further on, that is, in his gloss on the next text of Yajnyavalkya, Vijnaneswara says: "in all forms of marriage, if the woman 'leave progeny', that is, if she have issue, her property devolves on her daughters". [Do. pl. 12, page 461],

7. The original for "have issue" is prasuta, i. e., a woman who has children born.

8. "In default of daughters, or their daughters, or their sons, the sons, if any, of the woman deceased, take her stridhan", says Vijnaneshwara on the authority of the text, the (male) issue succeeds in their default." [PI. 19, page 462].

9. He further supports the right of the male issue by a text of Manu which runs as follows:

Whenthe mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate". [PI. 19].

10. He explains this text to mean, not that the uterine brothers and sisters, that is, the daughters and sons born of the woman, take the estate as joint heirs, but that the daughters inherit first, and, in default of them, the sons.

11. The original for "mother" in Manu's text is janani, which means, the woman who has given birth to children and left them surviving her. That word and the word uterine "emphasise the rule that on her death it is her own daughters, and in default of them, her own sons who are her heirs. Hence Vijnaneshwara adds the explanation that step-ehildren are excluded from this category of heirs. [PI. 21, page 462].

12. It is urged for the appellant that this exclusion means no more than that step-sons cannot inherit so long as the woman has left sons of her own to inheirt her property; but that there is nothing in either Manu's text or Vijnaneshwara's gloss to prevent the step-sons coming in as heirs before her husband as her sons" in the secondary sense of the word.

13. But the right of the step-son so to come in, after he has once been expressly excluded from the primary sense of the word sons" by Manu's text and Vijnaneshwara's explanation, must be founded on some authority discoverable in the Mitakshara. It is impossible to argue that Vijnaneshwara uses the word sons "in his gloss in placitum 19 or the word male issue" as including step-sons. Had he intended to include them, he would not have cited Manu's text in support of his meaning and added his gloss that it excludes step-children.

14. The argument for the appellant just stated comes in effect to this that Vijnaneshwara intends to use the word "sons "in its primary sense, that is, in the sense of sons born of the woman, where such sons are living at her death; but that he uses the same word in its secondary sense, meaning sons of a rival wife, if she has left no sons of her own. But we cannot ascribe to Vijnaneshwara this double interpretation of the word without charging him with the violation of a well-known rule of mhnansa or construction, that in the same passage a word occurring once cannot be taken in its primary and its secondary sense." See Bhattacliarya's Hindu law, second Edn., page 64. Such construction of one and the same word occurring in a text or a rule, involving two interpretations at the same time, is con-demned by the commentators on Hindu law as "illogical,"

as may be seen from the remarks of Nilakantha in the Vyavahara Mayukha in the chapter on "Determination of Heritage". Mandlik's Hindu law, page 36, lines 11 to 13.

15. No doubt "the more comprehensive, interpretation may be adopted where it is supported by authority." Bhattacharya's Hindu law, 2nd Edn., page 65, citing Dayabhag'a XI, V. 9.

16. But for our present purposes the authority must be found either in the Mitakshara itself or, where it is silent, in the Vyavahara Mayukha. None can be found in either.

17. On the other hand, both what Vijnaneshwara has omitted to say and what he has gone on to point out after explaining Manu's text as excluding step-sons from the category of "sons" show plainly that he did not intend step-sons to come in as heirs of the woman before her husband.

18. After having given his explanation of Manu's text, he studiously omits to say that in default of sons born of the woman, her step-sons (sons of a rival wife) come in. This omission is significant, because, in dealing with the compact series of heirs, in a case of what is called "obstructed succession," wherever he is in favour of the admission of the half-blood immediately after the full-blood into the class of enumerated heirs, he says so and does not leave the matter to mere inference or conjecture. [See the Mit., Ch. II. Section IV., plac. 6, Stokes's Hindu Law Books, page 445].

19. The omission becomes all the more significant when we have regard to what Vijnaneshwara goes on to say after having given his explanation of Manu's text. On the authority of another text of Manu he declares the right of a step-daughter of the woman to inherit before the latter's husband, provided that the step-daughter is of a caste superior to that of the woman. [The Mit. Ch. II, Section XI, plac. 22: Stokes's Hindu Law Books]

20. The express inclusion of this particular class of step-children in the class of heirs taking before the husband implies the exclusion from that class of all other step-children.

21. It is true that this rule as to the right of a step-daughter of a superior caste is supposed by some commentators to apply also where the step-daughter and the woman happen to be of the same, that is, "equal" caste. But Vijananesh wara's remarks and the illustrations he gives are clearly opposed to the suppostion; and Nilakantha in the Vyavahara Mayukha plainly says that the authority for the supposition is questionable". [See Mandlik's Hindu Law : Vyav-Mayu., page 96, lines 25 and 26].

22. It follows then from all these considerations that, under the Mitakshara and the Mayukha law, where a married woman dies, leaving her husband and a son by a rival wife, the latter is entitled to inherit her property only after and in default of the former. The interpretation of the

Mitkashara is confirmed by Kamalakara, the author of the Nirnaya Sindhuand the Vivada Tandava, quoted at page 580 of Bhattacharya's Hindu Law, 2nd Edition. Kamalakara says:In default of the husband, the daughter's son, and daughter's sons of the rival wife; and, in their default, the mother-in-law, the father-in-law, the husband's brother, his sons, and other next-of-kin of the husband (succeed), according to the text: The wife and the daughter also etc. This is the opinion of Vijnaneshwara and Apararka.

23. But the learned pleader for the appellant relies in support of his argument on certain remarks of Mitra Misra in the Viramitrodaya, which occur on page 243, plac. 14, of Mr. Golap Chandra Sarcar's Edition of that work.

24. The remarks in question, it will be noticed, refer at the very outset to certain heirs "to a childless woman's property" enumerated in a text of Brihaspati, and Mitra Misra begins by pointing out that those heirs come in "when there is a failure of the above mentioned heirs", that is, the heirs mentioned in. the preceding placita. Among these latter is the woman's husband, as placitum 13 shows.

25. No doubt in his gloss on Brihaspati's text, Mitra Misra says that by the term son "used in that text is intended the son of a co-wife" and he cites the following text of Manu in support of that:If among all the wives of the same person, one be a mother of a son, then all of them by that son become mothers of male issue; this is ordained by Manu.

26. But it does not follow from this that Mitra Misra intended the son of a co-wife to' be heir to the woman's property in prefernce to her husband. It is true that he says in the placitum in question that in default of the aurana (born) sons of the woman, their sons, and grandsons, the son of a rival wife, his son, and grandson, (become heirs in their order); by reason of their being, under the circumstances, the giver of the pinda, and the liquidator of debts, and "by reason of the text of Manu cited above." But he cannot have meant by that to bring in the son of a rival wife before the husband. For, he goes on to say, that "on failure of these," that is the son of a rival wife, his son and grandson, "the sister's son and the rest alone," that is, the secondary sons specifed in Brihaspati's text, take the property "in spite of the sapindas such as the father-in-law". Does that mean that if there is no son of a rival wife, or his son, or grandson, the secondary sons enumerated in Brihaspati's text come in as heirs, ignoring the husband of the woman? Mitra Misra could not have meant that, because he begins his citation of Brihaspati's text by saying that the heirs mentioned therein come in after the husband.

27. Mitra Misra's remarks, therefore, must be understood as merely pointing out in a general way the heirs who fall under the category of the word son" in its more comprehensive sense, not as laying down the order of their succession so as to postpone the husband's right of heirship to that

of a son of a rival wife. Had he intended to postpone the right in that way, and to bring in a step-son immediately on failure of a son born of the woman, his son, or grandson, he would have said so where he has discussed Manu's text in which the word ' uterine ' occurs. He deals with that text much in the same way that Vijnaneshwara has dealt with it.

28. As to the text of Manu which Mitra Misra has cited in construing the word son' occurring in Brihaspati's text, and which is relied upon for the appellant as showing that a son of a co-wife of a woman becomes the latter's son also, it is to be remarked: that the object of the text in question is explained by the more important of the commentators on Mann in such a way as to imply that its application is of a limited character, having no necessary reference to questions of inheritance. [See Mandlik's Mauava Dharma Shastra, page 208]. For instance, Sarvajna Narayana explains the text as meaning that the wife who has no son shall not resort to niyoga (levirate), if her co-wife has a son born of her. Culluca Bhatta and Raghav.ananda explain that the text is intended to prohibit adoption by the wife who has no son born of her. And the context in which this text of Manu finds its place in his Smriti supports that view. It is immediately preceded by another text which declares : If among brothers, sprung from one (father), one have a son, Manu has declared them all to have male offspring through that son," [Sacred Books of the East: Vol. XXV, Ch. IX, 183]. Vijnaneshwara in the Mitahshara

quotes

this text and explains that it is intended to forbid the adoption of others if a brother's son can possibly be adopted. It is not intended to declare him son of his uncle." [The Mit. Ch. I, Section XI, plac. 36, Stokes's Hindu Law Books, page 424]. If this text has this limited meaning and scope, the other text,, relating to the son of.: a co-wife, must have its scope similarly narrowed, having regard to the fact that it occurs immediately after the former. And that is the view which has; commended itself to their Lordships of the Privy Council as to the scope of both these texts of Manu. *See Annaparni Nachiar v. Forbes*[1] where their Lordships say: Reference has been made to the text of Manu (Book IX, Sloka 183), in which he declares that if of several wives one brings forth a male child, all shall by means of that child be mothers of male issue. In the preceding Sloka he declared that if among several brothers of the whole blood one have a son born, they are all made fathers of a male child by means of that son. We must suppose that all take the spiritual benefits of male issue; but the law is clear; for the purposes of inheritance the natural mothers and fathers respectively are preferred. "

29. Certain commentaries such as the Madana Parijata and the Vivadarnava Setu no doubt, assert the right of the son of a rival wife of a woman to inherit the stridhan of the latter before her husband: but for the reasons we have given in this judgment, their view must be held to find no support from either the Mitakshara or the Vyavahara Maynkha or the author of the Smriti Chandrika. The last says:

The issue of a rival wife takes the property of the step-mother, where the latter leaves no progeny,

husband, or the like." [Smriti Chandrika, Kt'ishnaswamy Iyer's Ed., 2nd, Page 135, Section 35].

30. That the husband of a childless woman is entitled to inherit her stridhan before a son by another wife of his seems to us to follow as a necessary corollary to certain decisions of this Court. In Kesserhai v. Valab Raoji 4 B. 188 at p. 208 it was held that a step-mother could not inherit her stepson's property under the term mother "but that she could come in only as a gotraja sapinda on the authority of the decisions in *Lakshmibai v. Jayram Hari* [2]and Lallubhctd Bapubhai v. Mankuuarbai 2 B. 388. If a step-mother cannot come in as mother" in the line of heirs to her step-son but can only come in as a gotraja sapinda, it follows, from the same reasoning, that the step-son cannot come in as ' son," bat can inherit only as a gotraja sapinda, of his step-mother.

31. For these reasons the decree appealed from must be confirmed with costs.

Cases Referred.

120 I.A. 150 : 23 M. 1 : 3 C.W.N. 730
26 B.H.C.R. 152