

*Special Appeal No. 505 of 1863.*1864.
July 8.

BAKU'BA'I, widow of RA'MDA'S VRIJBHU

KANDA'S *Appellant.*MANCHHA'BA'I, wife of MOTI'LA'L RA'MDA'S... *Respondent.**Hindú Law—Inheritance—Daughters—Priority—Maternity of Son—Blindness—Exclusion.*

Held that, as between two married daughters, the circumstance of having a son is no qualification on this side of India, giving the married daughter having a son a prior claim to inheritance of her parents' property over the married daughter not having a son ; such priority of claim depending on the several daughters being respectively endowed (*sadhan*) or unendowed (*nirdhan*), the unendowed daughter having the preference.

Semle a daughter who becomes incurably blind in her infancy has no right to inheritance, but only to maintenance.

THIS was a special appeal from the decision of C. Gonne, Joint Judge of the Konkan District, in Appeal Suit No. 264 of 1863, reversing the decree of the Munsif of Bassein.

The original suit was brought by Manchhábai (Wápi caste), wife of Motilál Rámdás, in the Court of the Munsif of Bassein, against her sisters Bakúbái and Jethíbái, and her maternal uncle Devídás Láldás, to recover one-third of the estate of her mother, who had succeeded to her father's estate, and died on the 5th Bhádrapad Shudha, Shake 1781, leaving no son.

Jethíbái answered that she herself was blind ; that her sister Bakúbái (co-defendant No. 2) had three sons and was poor ; that Manchhábai, the plaintiff, was rich ; and that she, Jethíbái, was willing to abide by whatever might be decided according to the Shástras.

Bakúbái answered that she had no property belonging to the deceased in her possession, as alleged by the plaintiff ; that the plaintiff had no issue and was well to do ; and that she herself had three sons and was poor, and had, therefore, a preferential right to succeed to the property of her deceased father.

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The defendant Devídás answered that he had not taken the property of the deceased of his own accord ; that the deceased, who was his sister, made over, while living, the property to him ; that this property was afterwards, on the petition of the plaintiff's husband, taken possession of by the Fouzdár of Bassein, but subsequently returned to his custody ; that he had not recovered any dues, nor appropriated them to his own use ; that he had requested the plaintiff and the other defendants either to apply to the Court to have the succession to the property settled, or to settle it amongst themselves amicably ; and that it was useless to make him a party to the suit.

The Munsif laid down the following points for decision :—

“ 1st. Was Jethíbái born blind, or has she become blind since her birth.

“ 2nd. If born blind, and consequently precluded from being her parents' heir, what are the circumstances of the sisters Manchhábái and Bakúbái : in order that it may be determined, whether the property should be divided equally between them, or whether the poorer sister, on account of her poverty, should be declared the heir, to the exclusion of her rich sister, in accordance with the exposition of the Hindú Law Officer.

“ 3rd. How has the property come into the hands of Devídás, third defendant ; and should he be made liable for any of the costs of this action.”

His decision was as follows :—

“ From the evidence of the parties and witnesses recorded in this case, it is clear that the defendant Jethíbái was not born blind, but became so at the age of about four years, when she was afflicted with the small-pox, and thereby lost her eyesight. As Jethíbái, then, was not born blind, and is the eldest daughter and a widow, she must, according to the exposition of the religious law of the parties as given by the Hindú Law Officer of the Ratnágirí Adálat (No. 37), be declared to be the heir to her deceased

mother Prānakúvarbái's property, to the exclusion of the plaintiff, Manchhábái, and of Bakúbái, the other sister.

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“The plaintiff Manchhábái's claim is, accordingly, dismissed with costs.”

The Joint Judge recorded the following judgment:—

“In appeal the point is raised, whether Jethíbái, though she became blind after birth, is not as much incapacitated from inheriting as if she had been born blind; and secondly, if so, whether the plaintiff can claim a share.

“Regarding the first point, the Court took the opinion of the Shástrí of the Adálat, and found it to differ from the opinion of the Ratnágir Shástrí, on which the Munsif had relied. The latter Shástrí stated that blindness after birth did not incapacitate for inheritance; but the former stated that no distinction was to be drawn between blindness at birth and blindness after: incapacity followed in either case.

“The Court, therefore, referred the question to a third Shástrí, the Shástrí of Puná; and his answer is, that when blindness occurs after birth, the share of inheritance is not to be given till the blindness has been cured, and the blind person is entitled to maintenance in the mean time. In the present case, however, Jethíbái became blind from small-pox when she was a child of four years old; and it is not pretended that there is any possibility of recovery; so that it would be absurd to hold her share in reserve. The majority of the three Shástrís, then, being against inheritance by a blind person, the Court reverses the Munsif's decree in favour of Jethíbái, who possesses only a right to maintenance.

“Regarding the second point, the Court finds from the works of Strange and Macnaghten, that where, as in the present case, none of the daughters are unmarried, there are three modes of settling the claims of the daughters to inherit, according to the different schools. The Bengal school makes the actual or possible mothership of a son the criterion of preference. The Benáres school makes comparative poverty the criterion, without any reference to the existence or

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chance of a son. The Mithilá school divides the property equally between poor and rich, mothers and childless. The Shástrí of Ratnágirí has started a new criterion, viz., widowship ; but this is not borne out by the Shástrís of Tháná and Puná, who agree in what is stated above as the doctrine of the Benáres school, viz., that the poor daughter inherits in preference to the rich.

“The Court, however, holds that this rule, whatever moral force it may have, is not of a nature that admits its enforcement in a Civil Court ; and, even if it were, there is not in this case evidence to establish the requisite difference between the circumstances of the plaintiff and the defendant Bakúbái.

“The Court would, therefore, have been inclined to decide that these two had claims to equal shares ; but the plaintiff has only asked for a third share of her deceased mother's estate, and that alone can be awarded to her.

“There seems to be no reason why any part of the costs should be paid by Devidás, the uncle of the other parties, who was quite justified in retaining the property till the parties' claims were settled.

“The Munsif's decree is reversed : costs on defendants Jethíbái and Bakúbái.”

Against this decision Bakúbái preferred a special appeal, which came on for hearing this day, before ARNOULD, Acting C.J., and NEWTON, J.

Vishvanáth Nárayan Mandlik, for the appellant :—The real point at issue was whether the appellant Bakúbái, as an unendowed daughter *with* male issue, had, according to Hindú law, a better title to the disputed property than the respondent, an endowed daughter *without* any issue. The Munsif had decided the case on the first point, and had excluded evidence of facts essential to the right determination of the appellant's claim. If the Judge did not agree with the Munsif on the first issue, he ought to have either received such evidence as the appellant had to give, or have remanded the suit.

The following authorities were cited:—3 Colebrooke's Digest, 419; *Lukheemonee Dosee v. Tarramonee Goptea* (a); T. L. Strange's Manual of Hindú Law, paras. 328 to 330; Borradaile's *Vyavahára Mayúkha*, p. 103; Colebrooke's *Mitákshará*, p. 267, note 11, pp. 341, 342, Chap. II., 2, 3, and 4, and p. 369, Chap. II., 11, 13.

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Shántárám Náráyaṇ, *contra* :—Priority of succession is claimed by the special appellant on two grounds, viz., maternity of a son, and non-endowment. The right of daughters to succeed is not founded upon their having sons. "It is observable," says Sir T. Strange, "that the *Mitákshará*, so far from sanctioning any such provision, has, in express terms, controverted the notion that women inherit only through male issue." (b) The *Vyavahára Mayúkha* also expressly controverts this notion; and neither of these authorities contains any provision for giving precedence to daughters with sons over daughters without sons. If the *Smritichandriká* contains such a provision, it is scarcely of authority here. So also the passage in Colebrooke's Digest, of which, however, it may be said that the text does not contain the provision; it is only the observation of the commentator. As regards the question of endowment, the *Mitákshará* and the *Vyavahára Mayúkha* give the preference to an unendowed daughter over an endowed one, but, the precise meaning of the terms being uncertain, it is an impracticable test. Moreover, the Judge has held that there was no evidence to establish the requisite difference between the circumstances of the parties; and his finding on that point is conclusive.

Mandlik in reply :—Succession in Hindú law is founded upon the capacity to perform funeral obsequies. Hence the exclusion of a childless widowed daughter in the case of *Mussumat Lukheemonee Dosee v. Tarramonee Goptea*, decided by the Bengal High Court. The *Smritichandriká* is a treatise of much repute, and has been quoted by Mr. Justice Strange, in his Manual, in support of the above position. 'Endowed' is a translation of *sadhan* (i.e., with wealth),

(a) 1 Ind. Jur. 22. (b) 1 H. L. 138.

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and 'unendowed' of *nirdhan* (*i.e.*, without wealth). The Munsif gave the whole property to Jeṭhíbái, and did not examine the witnesses called in support of Bakúbái's claim. In the event of the Court's over-ruling the first point, the case should be remanded for further investigation.

PER CURIAM :--The *Mitákshará* and *Vyavahára Mayúkha* are clear on the point. The test of sonship is not applicable on this side of India, and must, therefore, be disregarded. As amongst daughters, succession to their father's estate must be regulated by their comparative endowment or non-endowment. But the Munsif, in decreeing in favour of the blind daughter, Jeṭhíbái, had excluded the evidence offered by the appellant, who had a right to insist upon its reception. This the Judge below has overlooked; and the case must, therefore, go back.

The Court reverses the decree of the District Judge, and remands the suit, in order that the District Judge may take evidence on the following issue :—

Whether the pecuniary circumstances of Bakúbái, widow of Rámdás, and Manchhábái, wife of Motílál, are so far different, as to give Bakúbái a prior right of inheritance under Hindú law as compared with Manchhábái, on the ground that she is an unprovided (*nirdhan*) daughter.

A new decree to be passed : costs to follow the final decision.

Case remanded.

