CASES

DECIDED IN THE

ORIGINAL CIVIL JURISDICTION.

OF THE

HIGH COURT OF BOMBAY.

Original Suit No. 595 of 1868.

1869
Jan. 7.

Bhaskar Trimbak Acharya... .....*Plaintiff.*

Mahadev Ramji, Hiru, Pusu Lakshuman, Pranjivandas Mathuradas, Mussa Abdul, Nasarvanji Mehervanji, and The Advocate General... ... *Defendants.*

Hindu Law—Widow's power to dispose of Immoveable Property inherited from her husband, limited–Religious uses—Dharm, Gift in—Krishnarpan, Gift in—Sister's Estate as Heir to her Brother—Stridhan–Inheritance.

A Hindu widow who has inherited immoveable property from her husband, though possessed of a limited power of alienating portions of such property for necessary purposes or spiritual uses, cannot dispose by a gift in Dharm or Krishnarpan of the whole of such immoveable property without the consent of the heirs of her husband.

A sister on this side of India taking as heir to her brother, takes his property as stridhan with an absolute power of disposition over it; and such property upon her death passes in the first instance to her daughters. The sons of such sister have not a vested interest in it as coparceners with their mother.

Property acquired by a married woman by inheritance, with the exception of property inherited by a widow from her husband, classes as stridhan, and descends accordingly.

The facts of this case fully appear from the judgment of the Court. The suit was tried by Arnould, J., in December 1868, and occupied several days.

White and *Dunbar* for the Plaintiff.

1869

Bhaskar Trimbak Achaya v. Mahadev Ramji et al.

Marriott (with him *Pigot*) for the first defendant.

Taylor and *Farran* for the fourth defendant.

Macpherson for the Advocate General.

The other defendants appeared in person.

Cur. adv. vult.

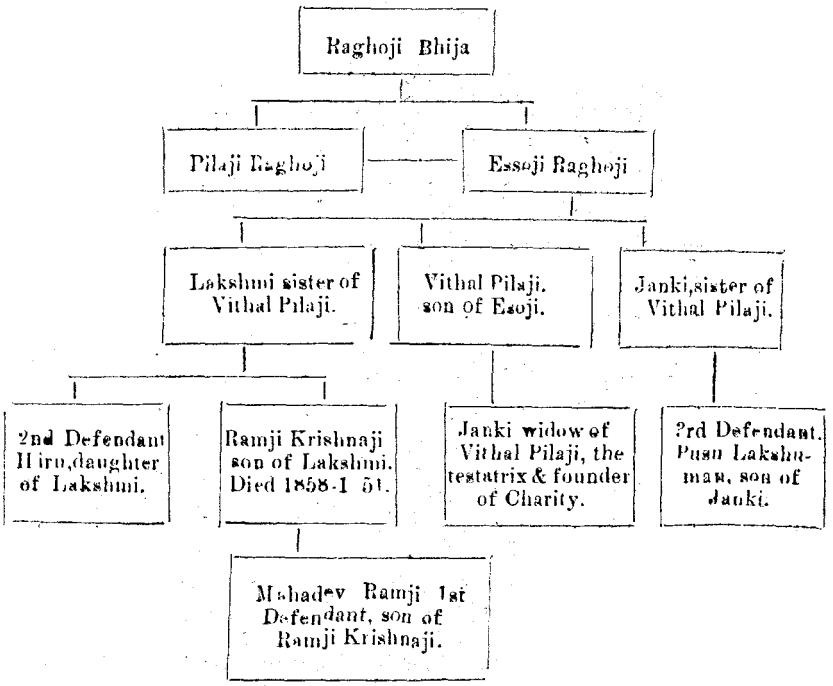
Jan. 7—ARNOULD, J.—In this suit the plaintiff, who stated in evidence that his proper style was that of *Upadhia*, or hereditary priest, of the family of Vithal Pilaji having hereditary charge of the temple of Shri Vithoba Rakhmai in Mugbhat *cart*, seeks for a declaration that a certain portion of Mugbhat *cart*, and a certain house, No. 167, Novroji Hill, with the rent and profits thereof, were well devised by Janki, the widow of the said Vithal Pilaji, to religious and charitable purposes. He also seeks that a certain mortgage executed in October 1865, of the Novroji Hill house to the fourth defendant, Pranjivandas Mathuradas, a mortgage of the 7th April 1867 of a portion, (550 square yards) of Mugbhat *cart*, to the fifth defendant, Mussa Abdul Rahim, and an alleged sale of the last mentioned portion on the 8th of June 1868, to the sixth defendant, Nasarvanji Mehervanji, should respectively be declared invalid; he further seeks for a declaration that he, the plaintiff, is entitled to the possession and enjoyment of that part of Mugbhat *cart* in which the temple stands, and of the house (No. 167) on Novroji Hill, and of the rents and profits of both, subject to the obligation of maintaining the temple and worship of Shri Vithoba Rakhmai. The plaintiff also seeks other descriptions of relief which it is not material to consider.

In dealing with this case the more convenient course will be first to state the facts as they result from the evidence; 2ndly, to consider the questions of law arising on the facts as found; and then, 3rdly, to apply the conclusions of fact, and law arrived at to the issues as originally framed and as subsequently in some respects modified by the Court.

The first point is to ascertain the pedigree of the family of Vithal Pilaji, the husband of Janki the widow, by whom the

temple and charity were founded, and the state of that family at the period of Janki's death.

The following is the pedigree as far as we are concerned with it, in this case :—



Of Raghoji Bhija, the root of the family, nothing was known to any of the witnesses in the case, and not much of his two sons, Pilaji and Esoji, except that Pilaji, the elder, who had no issue, survived Essoji; and that Essoji, who died first, left issue one son, Vithal, called after his uncle Vithal Pilaji, and two daughters, Janki the mother of Pusu Lakshuman, the third defendant, and Lakshmi the mother of Hiru the second defendant, and the paternal grandmother through her deceased son, Ramji Krishnaji, of Mahadev Ramji, the first defendant

As there is no evidence to show that Pilaji and Essoji were divided, the usual presumption must prevail, and it must be held that they lived and died undivided. There was some vague and very uncertain evidence given as to

1869

Bhaskar Trimbak Acharya v. Mahadev Ranji *et al.*

Vithal Pilaji having been adopted by his uncle Pilaji Raghoji, evidence chiefly resting on his having been called Vithal Pilaji after the name of his uncle, not Vithal Essoji after the name of his father; but, apart from the difficulty arising from the general rule of Hindu law, that an only son such as Vithal was, cannot be the subject of adoption, a rule recently re-affirmed and illustrated in a judgment of a Division Court of the Calcutta High Court consisting of *L. S. Jackson* and *Dwarkanath Mitter J.J.*: *Rajah Opendur Lall Roy v. Ranee Bromo Moyee(a)*; apart also from the consideration that any adoption of Vithal by Pilaji is not made out by the evidence, the result of the evidence I take to be this, that Vithal, on the death of Pilaji, succeeded to the property as sole surviving male member of an undivided Hindu family.

The family was of the *Koli* (or fisherman) caste, and the property to which Vithal succeeded consisted, first, of a large *oart* called Mughbhat, in the district of Panaswadi; secondly of a house No. 167, on Novroji Hill, the family house; thirdly of certain fishing boats in Chinch Bunder and certain fishing stakes in the harbour.

Vithal died without issue about the year 1836, leaving two widows, both named Janki—Janki the elder and Janki the younger. Janki the elder lived only a few years after him; and in June 1840 Janki the younger, as sole surviving widow, obtained letters of administration of his estate and effects.

Janki, then must be taken as having, at all events since 1840, the status of a sole surviving widow of a childless separated Hindu who had died the owner of ancestral immoveable property, and she must be taken as having had such rights of disposition and control over her late husband's property as are accorded by Hindu law to a widow so situated, and no other or different rights.

Janki continued to live in the family house, No. 167, on Novroji Hill, and herself during the residue of her life col-

(a) 10 Calc. W. Rep. Civ. R. 347.

lected the rents of such portion of it as was let to tenants. Lakshmi, the sister of her late husband, Vithal, and who had been also for some time a widow, assisted Janki in the management of the fishing-boats at Chinch Bunder, and the fishing stakes in the harbour; and one Sadoba Yesoba, a Bhandari by caste, collected for Janki the rents and profits accruing from the *kadjan* huts and toddy trees then standing in Mugbhat *oart*.

Janki, who had, it seems, previously sold a portion of Mugbhat *oart* on the 17th of January 1848, made a Will in English, at the office of Mr. Ayrton,(now M. P. for the Tower Hamlets and one of the joint Secretaries of the Treasury in Mr. Gladstone's administration, but then a Solicitor in Bombay). By this Will, after making certain bequests and legacies amongst others a portion of Mugbhat *oart* to Sadoba Yesoba, Rs. 500 to Lakshmi, for the care she had taken of her fishing-boats and stakes, Janki directs that half the residue of Mugbhat *oart* shall be sold and a portion of the proceeds of such sale be applied in building a temple to Shri Vithoba Rakhmai on the half of the residue of the *oart* that remains unsold; that such temple, when built shall be placed in the care of Bhasker Trimbak Acharya (the plaintiff in the present suit), and that the rents and profits of the unsold half of the oart and of the house, No. 169, on Navroji Hill shall be applied in keeping the said temple and premises in proper repair and in supplying the said Bhaskar Trimbak Acharya and his successors with a proper maintenance and provisions and with flowers and all things required for the daily *puja* of Shri Vithoba Rakhmai, and all other things required for the said temple and images. Of this Will, Janki appointed Sadoba Yesoba executed.

On the 23rd of November of the same year, 1848, Janki duly executed a codicil to her said Will, by which she ratified and confirmed the same but appointed to Lakshmi, the sister of her late husband Vithal Pilaji, co-executrix with Sadoba Yesoba and joint manager with him of the estate mentioned in the Will as directed (so runs the language of the codicil) to the charity purposes.

1869

Bhaskar Trimbak Acharya v. Mahadev Ramji *et al.*

On the day the codicil was executed, Janki, being then sick but in perfectly sound mind, performed at the family house, No. 167, on Navroji Hill, with the assistance and the full assent of Laskhmi the religious ceremony called *sankalpa* and made a gift in *krishnarpan* of all the property devised to charity purposes in the Will of the 17th of January 1848.

The nature of the ceremony, and the circumstances attending it, are fully described in the evidence of the plaintiff, and also in that of another eye-witness, Narsi Kattu, a highly respectable and wealthy member of the Bhathia caste formerly in partnership with the late Gokuldas Tejpal. From the evidence of the latter witness I take the following passage;— "Lakshmi brought water and *tulsi* leaves and handed them to Janki ; Bhaskar (the plaintiff,) recited the incantation of *krishnarpan*, and Janki repeating the words *krishnarpan* poured the water into the Brahman's hand, by which ceremony the Mugbhat *oart* and the Novroji Hill-house were given in *dharm*." Janki said: "This, my dwelling-house and the Mugbhat *oart* I give in charity; and as for that *oart*, half of it should be sold for the endowment of a temple, and a temple should be built out of the proceeds and given to Bhaskar; and as to the Novroji Hill house the income as it should also be given to Bhaskar," "Lakshmi" adds the witness, "was present throughout the whole ceremony, and did not object, but in words gave her entire consent, saying to Janki, 'You are quite welcome to give that in charity."

To the same effect, as to Lakshmi's co-operation and express consent, Bhaskar,the plaintiff, deposed in his cross-examination as follows:—"Lakashmi took part in the *sankalpa* ceremoney by bringing water from the well by direction of Janki, and by handing her the *tulsi* leaf, and by giving her consent in express words. Lakshmi said to Janki: 'as you express your desire to give in charity I give my consent; do you do so.' " In re-examination the same witness said, "Lakshmi gave her consent in consequence of a request from Janki asking her to consent."

About a month or so after the execution of the codicil and the performance of the *sankalpa* ceremony, and the gift in *krishnarpan*, before the close of December 1848, Janki died.

The rents and profits of the property devised and given in *dharm* were recovered and appropriated to her own use by Janki until her death. They were then received by Lakshmi and Sadola Yesoba. It does not appear that any portion of the rents and profits even of Mugbhat *oart* were received by the plaintiff, as *upadhia* or hereditary priest and manager, until after the completion and dedication of the temple, when he was formally put in possession.

At the death of Janki the following members of Vithal Pilaji's family were alive:—His sister, Lakshmi, who had then long been a widow; her daughter, Hiru, the second defendant in this suit, who had been married but whose husband had died in the first year of wedlock; Lakshmi's son Ramji Krishnaji (born in 1806, and who died in 1850 or 1851); and his son, Mahadev Ramji, the first defendant, who was born about 1838, and who was, therefore, about ten years old at Janki's death. The other sister of Vithal Pilaji, who was also called Janki, had died some years before Janki his widow (the testatrix), leaving as her sole issue Pusu Lakshuman, the third defendant in the suit.

In February 1849, Lakshmi and Sadoba Yesoba applied for probate of Will of Janki. Their application was opposed and a *caveat* entered by certain persons, who set themselves up as next of kin, according to Hindu law, of Vithal Pilaji, collateral descendants, as they averred, of Raghoji Bhiga.

This opposition was unsuccessful; their *caveat* was dismissed with costs, and probate of Janki's Will was granted to Lakshmi and Sadoba Yesoba in September 1849.

Lakshmi and Sadoba Yesoba, in execution of the trusts created by the Will, and the gift in *krishnarpan*, soon after they obtained probate (apparently in the course of the year 1850), proceeded to sell a moiety of what then remained undisposed of of Mugbhat *oart*, reserving a space of 2,710

1869

Bhaskar Trimbak Acharya v. Mahadev Ramji et al.

square yards in the central portion of the oart, as the enclosure within which the future temple was to stand. They sold to Narayan Balaji for Rs. 6,000, two strips of the *oart*, respectively on the north and south of the central portion; a plot containing 519 square yards was also assigned to Sadoba Yesoba under the bequest to him in Janki's Will.

The erection of the temple on the unsold portion of the *oart* was then commenced and proceeded with. The money for the works was supplied by Lakshmi and Sadoba as long as Sadoba lived, and after Sadoba's death (which took place in October 1851) by Lakshmi alone.

The temple itself cost Rs. 2,500, and some other immediately adjacent buildings from Rs. 1,000 to Rs. 1,500; altogether, say, from Rs. 3,500 to Rs. 4,000. Before Sadoba's death, on the 25th of September 1850, Pusu Lakshuman, who as sister's son of Vithal Pilaji, living at the death of Janki the testatrix, asserted a claim to the inheritance, and who, on petition, had been allowed to refer the question of such alleged claim to the Attorney for Paupers, executed a release to Lakshmi and Sadoba, formally renouncing all his claims on the inheritance for the sum of Rs. 1,750. The execution of this release by Pusu, with full knowledge of its nature and effect, together with the payment to him by instalments of the full sum of Rs. 1,750, were facts clearly proved by Moroba Damodhar, now a clerk of Mr. C. Tyabji, then a clerk of Messrs. Ayrton and Walker. Pusu himself admitted the execution and the payment, and finally, after many equivocations, on his examination by the Court, just before the close of the case, further admitted what he had up to that time attempted to deny, that the release and all its endorsements were fully read over and explained to him; that he knew what he was about, and that the sums he had received were received by him as the consideration for his giving up all claim on the inheritance.

On the 2nd March 1852, the temple being complete, and ready for worship, was dedicated. On this occasion, Lakshmi, Hiru, the second defendant, then about twenty-two or twen-

1869

Bhaskar Trimbak Acharya v. Mahadev Ramji *et al.*

ty-four years of age, and Mahadev, the first defendant, then about fourteen years of age, were present. Ramji Krishnaji (Lakshmi's son, and father of Mahadev) had died the year before, but before his death had shown his assent to the gift in *dharm* by actively superintending the works connected with the building of the temple.

Just before the actual ceremony of dedication, Lakshmi performed the ceremony of *sankalpa*, and she took an active part in the day's proceedings as partroness of the charity, telling the people who were assembled there that she had caused the temple to be built and endowed.

By Lakshmi's direction a stone slab was affixed at one side of the entrance of the temple bearing an inscription, which was read aloud in the presence and hearing of Lakshmi and the other persons present at the ceremony. The inscription, engraved in Marathi-Balbodh characters, was in these words :—

"In the Shake 1773 (being Vembhut) in the month of Falgun Shudhya 12th, Wednesday" (2nd. March 1852), "Jankibai, the widow of the late Vithal Pilaji, with the intention of erecting a temple of Sbri Vithoba in Magbhat *oart* made a *dharm* writing ; afterwards shedied. Lakshmibai, her husband's sister, then accomplished her object, by building a temple agreeably to the same *dharm* writing. For the purpose of defraying the expenses of this temple, this *oart* has been made over to Krishna. The authority over this religious foundation has been given over to Vedmurti (learned in the Vedas) Bhaskar Trimbak Acharya."

The clear result of this evidence as to what took place at the dedication is that Lakshmi represented herself, and allowed herself to be represented, as having caused the temple to be built in pursuance of the *dharm* writing and will of Janki. That Hiru also assented to what was done is clear from her evidence, in the course of which she said, "I was present when the temple was consecrated, with my mother, Lakshmi; Mahadev was also there, a boy ; Ramji (Krishnaji) was dead. I was twenty-two or twenty-four

1869

Bhaskar Trimbak Acharya v. Mahadev Ramji *et al.*

when the temple was consecrated : thought it a very good thing in my mother to consecrate the temple ; thought she was quite right in doing what Janki enjoined her to do. I assented to all that was done at the consecration."

Elsewhere she said, "The property cannot be sold ; it is charitable property. The temple was built by Lakshmi under the direction of Janki in order that her name might be known and made famous." Again, she said. "Lakshmi and Ramji, while they lived, considered themselves trustees of the Novroji Hill property and of this *cart* for the purposes of the charity." As to Ramji she said, "Ramji used to superintend the works at Mugbhat till he died. He did so as one of the family interested in the *dharm*."

From this evidence it clearly appears that Ramji till his death, and Hiru to the present time, must be taken as assenting to the *dharm* writing and Will of Janki.

Immediately upon the dediction the plaintiff was put in possession of that portion of Mugbhat *cart* enclosed by walls on which the temple stands, and from that time he collected all the rents and profits of that part of the *cart* down to 1862, when Lakshmi, then hostile to him, gave notice to the *Bhandaris*, and to the occupants of the *kadjan*-roofed buildings in the enclosure, not to pay rents to the plaintiff, since which time the plaintiff has not received the rents of these two buildings, nor any payments from the toddy drawers, but has continued to take all the other rents and profits of Mugbhat *cart*.

With regard to the rents of the Novroji Hill charity house (No. 167), only three payments were made by Lakshmi to the plaintiff for charity purposes from those rents, and these three payments seem also to have been made shortly after the dedication of the temple, though at what precise time the last was made does not distinctly appear. Lakshmi, according to the plaintiff's evidence, never refused expressly to make him payments for charity purposes from these Novroji Hill rents, never distinctly denied his right to claim them under Janki's *dharm* writing, but simply failed to pay, and put him off with promises from time to time.

The plaintiff, who, according to his own statement, had built a house and *chal* in the temple enclosure out of his own moneys, for which he had got repaid, soon found that the rents of that part of Mugbhat *oart* in which the temple stood were not alone sufficient for the proper maintenance of the charity; a state of ill-feeling sprung up between him and Lakshmi, the first overt act of which seems to have been the notice given by Lakshmi, in 1862, to the *Bhandaris* and to the tenants of the two *kuljan* roofed buildings not to pay rents or moneys to the plaintiff.

On the 5th of June 1863, Lakshmi, as surviving trustee under the Will of Janki, commenced a suit in this Court against Bhaskar Trimbak Acharya, to remove him from his office of taking care of the temple, on several alleged grounds of misconduct. In the second pragraph of her plaint in this suit Lakshmi, after setting forth, the grant of probate of Janki's Will to Sadoba Yesoba and herself, and the subsequent death of Sadoba, describes herself as left, on Sadoba's death, "*sole executrix and trustee under the saim Will*," of the trust of which she (Lakshmi), as such surviving trustee undertook the execution.

In the 4th paragaph of that plaint Lakshmi alleges " that in pursuance of the terms of the said Will (*i.e.*, the will of Janki) a portion of Mugbhat was sold, and on the moiety thereof remaining unsold a temple was built and dedicated to Shri Vithoba Rakhmai, and the said temple was placed under the care of the defendant (Bhasker Trimbak) by the plaintiff (Lakshmi) as such surviving trustee as aforesaid.

While this suit was still pending, Lakshmi, in November 1863, died; attempts were made by her represtatives to revive the suit, but without success; and on the 2nd of November 1864, the suit was abated by order of the Court, with costs to the defendant out of the estate. On the 11th of December 1865, a house on Novroji Hill was accordingly attached at the suit of Bhaskar for his costs but he did not proceed to sell, owing to that house having been already mortgaged in October 1865, to the fourth defendant.

1869

Bhaskar Trimbak Acharya v. Mahadev Ramji *et al.*

The house in which Lakshmi died and which she had principally resided during her life was not the charity house (No. 167), but a house which had come to her from husband, No. 105, Novroji hill. In this latter house Lakshmi occupied the ground-floor, letting the upper part to tenants and here she lived with her son Ramji Krishnaji during his life' her daughter Hiru, and her son's son, Mahadev Ramji. The two latter appear still to occupy rooms in the house No. 105.

After Janki's death, the charity house on Novroji Hill had been let to tenants, only one room on the ground-floor having been reserved for Lakshmi; in this room were placed the silver images of Vithal Palaji's gods, and *shradh* ceremonies for the benefit of his soul were occasionally performed there by Lakshmi.

On the 29th of December 1864, the house, No. 105, Novroji Hill, had been mortgaged by Mahadev Ramji alone to Vandravandas Virjlal for Rs. 3,000, and on the 10th of October 1865, both 105, Novreji Hill, and also the charity house, No. 167, were mortgaged by Mahadev Ramji, Lakshuman, and Hiru, to Pranjivandas Mathuradas the 4th defendants, for Rs.7,000.

I am quite satisfied that this mortgage was, as regards the fourth defendant, completely *bona fide*

On the 6th of April 1867, Mahadev Ramji, nominally for the consideration of Rs. 2,000, mortgaged to Musa Abdul, Rahim, the fifth defendant, a piece of ground with cocoanut trees and a hut upon it containing a little over 555 square yards, situated within the temple enclosure in Mughbat *cart*.

I am satisfied on the evidence, that before the execution this mortgage, defendants No. 5 had full notice that this was ground given in *dharm*. (His lordship reviewed the evidence on this point as well as the evidence relating to an alleged sale, on the 8th June 1868, of the mortgaged premises to the sixth defendant, under a power of sale contained in the indenture of mortgage, which alleged sale he found was not a *bona fide* sale and proceeded.)

1869

Bhaskar Trimbak Acharya v. Mahadev Ramji et al.

This alleged sale of the 8th of June 1868 was followed almost immediately by the commencement of the present suit, the plaint in which was filed on the 15th of the same month. Having thus therefore stated the result of the evidence as to all the material facts in the case, the next step is to consider the various questions of law that were raised in the argument and discussed with much research and ability by Mr. White for the plaintiff and Mr. Marriott for the first defendant.

The first question of law that presents itself for decision is whether Janki (her *status* being such as has been already described) had a right by Hindu law to dispose by Will or religious gift the whole of her late husband's immoveable property in *Krishnarpan*.

The answer to this question must be, I think, in the negative. The nature of the Hindu widow's estate over immovable property inherited from her husband has been much discussed of late and must now be considered authoritatively settled by the recent decisions in the Privy Council. In the first of these in point of date, decided on the 1st of February 1867; *Mussumat Thakoor Dayhee v. Rai Balack Ram* (*b*), the Privy Council determined that, though according to the Mitakshara a Hindu widow may dispose of moveable property inherited from her husband—a power she does not possess under the law of Bengal,—yet by both laws she is restricted from alienating any immoveable property *whether ancestral or self acquired* so inherited—On her death the immoveable and the undisposed of moveable property pass to the next heirs of her husband.

The next, I believe the last, case on the point before the Privy Council, was decided on the 14th March 1868; *Bhugwandeen Doobey v. Myna Baee* (*c*). In this case their Lordship (*d*) treat it as "settled" (*i.e.* in all the schools) beyond all question that the immoveable property which a woman inherits from her husband cannot be disposed of by her, and does not pass as her *stridhan*, but passes upon her death to

(*b*) 10 Calc. W. Rep. P. C. C. 3. (*c*) 9 Calc. W. Rep. P. C. C. 23, (*d*) p. 30 ibid.

1869

Bhaskar Trimbak Acharya v. Mahadev Ramji *et al.*

the next of kin of her husband. Their Lordships further held that according to the law of the Benares school the same rule applies to moveable property inherited by a widow from her husband as to immoveable.

It was not probably the intention of their Lordships in laying down the rule so absolutely in restriction of any alienation by the widow of immoveable estate inherited from her husband to exclude her right to alienate portions of such estate for necessary purposes or for spiritual uses. All the books seem to concur in giving her such powers to a certain limited, though nowhere clearly defined, extent : but to hold that such powers extend to a gift in *dharm or krishnarpan*, as in this case, whether by Will or by religious ceremony, of the whole or all but the whole of the immoveable property inherited by a widow from her husband would be a position inconsistent both with the letter and spirit of the recent decisions which have defined the limits and the nature of the Hindu widow's estate.

On these grounds neither Janki's *dharm* writing nor her Will nor her religious gift in *krishnarpan* could in my opinion be supported, if they stood alone, as binding upon the heir or heirs of her husband and the only question therefore is whether the heir or heirs of her husband, has or have not so far adopted, ratified, and acted upon them as to have estopped himself or themselves and privies in estate from now contesting their validity.

This leads to the inquiry, who at Janki's death was the heir or who were the heirs of Vithal Pilaji. That the death of the widow is the true point of time to fix on in order to ascertain who are to take as heirs of the deceased husband must now be regarded as a clearly established rule. "It is settled," says Sir Bardes Peacock in delivering the judgmens of a full Bench Court at Calcutta, "that the widow does take as heir to her husband in default of issue and that upon her death those persons succeed as reversionary heirs who would have been the heirs of her husband if he had died at that time (*e*)."

(*e* 9 Calc. W. Rep. Civ. R. 503.

1869

Bhaskar Trimbak Acharya v. Mahadev Ramji *et al.*

Now, from the statement already made as to the members of Vithal's family alive at Janki's death, clearly results that at that point of time the heir and the only heir of Vithal Pilaji was his sister, Lakshmi ; Pusu Lakshuman, as son of a sister of Vithal Pilaji, who had died before his widow, had, according to the law prevailing at this side of India, no claim in my opinion as agaist Lakshmi the surviving sister to be reversionary heir of Vithal Pilaji on Janki's death. It has recently been held by the Privy Council that according to the Mitakshara law (which, speaking generally, regulates us here) a sister's son cannot inherit, *Thokoorain Sahiba* v. *Mohun Lall* (*f*).

As though to show the uncertainty of almost all points in Hindu law, the Full Bench in Calcutta, in a still more recent decision, have held that the Privy Council in the above case only decided that a sister's son could not inherit as a *sapinda* or heir of the first class, and they further held that a sister's son under the Mitakshara law may inherit as a *bandhu* (*i. e.*) as a kinsman sprung from a separate family but allied by funeral oblations : *Omrit Koomaree Dabee* v. *Luckhee Narain Chuckerbutty* (*g*) Even assuming this decision to be well founded, still Pusu, as sister's son to Vithal Pilaji and claiming as *bandhu*, could only come in after Lakshmi, his (Vithal Pilaji's,) surviving sister who took as a *sapinda*, nor would he have any claim till the failure of Lakshmi's nearer heirs : but even if Pusu had any vested claim to the inheritance on Janki's death, as I think he had not, he must be held to have abandoned it by the release of the 25th of September 1850. This release coupled with the facts already stated must be taken as completely estopping the second defendant from setting up any claim whatever to any part of the property in question in the present suit.

Lakshmi, therefore, having been entitled on the death of Janki to succeed as sole reversionary heiress to the property of Vithal Pilaji, the next question is what was the *quantum* and nature of the estate she so took.

(*f*) 7 Calc. W. Rep. P. C. C. 25. (*g*) 10 Calc. W. Rep. F. B. R. 76.

1869

Bhaskar Trimbak Acharya v. Mahadev Ramji et al.

The answer is that Lakshmi taking as sister took absolutely.

This appears clear from the decision of the late Supreme Court of Bombay in *Venayak Anandrav* v. *Lakshmibai* (*h*) which was confirmed on appeal by the Privy Council (*i*). It is there distinctly laid down that sisters, like daughters, take absolutely.

The next question is, what was the course of the descent of the estate that Lakshmi thus took absolutely, (*i. e.*) supposing her not to have disposed of it as she might in her lifetime to whom would it go on her death. Mr. Marriott's position that upon the estate vesting in Lakshmi, as sister of Vithal, her son Ramji Krishnaji and his son Mahadev Ramji thereupon become jointly interested therein as coparceners with Lakshmi must, in my opinion, be regarded as untenable it seems opposed to the principles established in Hindu law regarding property coming by inheritance to women, and is inconsistent with the position already adverted to as established by the case of *Venayak Anandrav* v. *Lakshmibai* (viz.) that the sister takes absolutely. My view is that Lakshmi, taking the property as heir to her brother Vithal, would take it as *woman's property* ; and that the course of descent from Lakshmi would be first in the female line, the male line not being resorted to till the female was exhausted. It appears to me that the well known text in the section of the Mitakshara which treats of woman's property (*j*) must be regarded as law on this side of India, except so far as regards the widow's estate in property inherited from her husband, which estate has been taken out of the text of the Mitakshar on the strength of other texts inconsistent with it—such especially as that of Katyayana cited by the Privy Council in the decision already adverted to as the latest in date on the subject of widows' estate (*k*). "The childless widow, &c., may frugally enjoy the estate or property of her late husband until she die ; after her death the legal heirs shall take in."

(*h*) I. Bom. H. C. Rep. 117

(*i*) Ibid 126 ; S. C. 9 Moo. Ind. App. 532.

(*j*) Mitak, Ch. II. Sec. II para 2. (*k*) 9 Calc. W. Rep. P. C. 23 and 30.

1869

Bhaskar Trimbak Acharya v. Mahadev Ramji et al.

These and similar texts are inconsistent with the notion that the estate (at all events the immoveable estate) which a Hindu widow inherits from her husband is to be ranked as woman's property; as property in which the woman takes an absolute interest and over which she has an absolute control; and accordingly it has been, as already intimated, conclusively decided by the Privy Council that immoveable property (and on the other side of India moveable estate also) so inherited by a Hindu widow from her husband is not woman's property or *stridhan*. To this extent (to the extent namely of the widow's estate) an exception has been introduced into the text of the Mitakshara by an authority binding on all courts in India. An authority was cited from Madras (*l*) which goes a great deal further and indeed, according to the marginal note, must be taken as establishing that according to Hindu law, property acquired by a woman by inheritance is not to be classed as *stridhan*. Strictly speaking, this would be convertible into the proposition that no property acquired by a woman by inheritance is to be classed as *stridhan*; but after carefully reading the judgment I am let to doubt (notwithstanding some strong expressions at page 316) whether the Court meant to go to that length or whether the judgment can be taken as affirming more than the position that some property acquired by woman by inheritance is not to be classed as *stridhan*. The facts of the case did not make it necessary to go even to that extent: they were simply these: a mother left property (which must be taken as the Court finds at page 313 to have been her *stridhan*) and two undivided daughters of whom one survived the other: the question was between the rights of the husband of the sister who had died first and the surviving sister. The District Munsif held that, the sisters being undivided, the surviving sister succeeded to the *whole property* left by her mother whether the other sister predeceased her mother or not. The Court affirmed the District Munsif's decision intimating at p. 317 that even if the sisters had been divided they would have come to the same conclusion. "Whether

(*l*) *Sengamalathammal Valaynda Mudali.* 3 Mad. H.C. Rep. 312.

1869

Bhaskar Trimbak Acharya v. Mahadev Ramji *et al.*

the sisters were divided or not divided it seems to us that so long as there was a daughter living she was entitled to the mother's estate in preference to any other claimant; for it is only on failure of daughters that other claimants can come in."

In this case it clearly appears that the Court decided on the principle that daughters taking woman's property by inheritance from their mother take it according to the rules that regulate the devolution of *stridhan*, and I am at a loss therefore to see how the case (apart from certain *obiter dicta* of the Court) can be cited as an authority for the position that property acquired by a woman by inheritance is not to be classed as *stridhan*.

The Bengal authorities, indeed, as the Court remarks in the case under discussion, (*m*) favour the supposition that *stridhan* which has once devolved according to the law of succession, which governs the descent of this peculiar species of property, ceases to be ranked as such and is ever afterwards governed by the ordinary rules of inheritance.

This may be sound doctrine, but it does not touch the facts of the case now before us and in course of decision. Here the brother's estate first became woman's property or *stridhan* (if it became so at all) in the hands of Lakshmi, and the first descent of it as woman's property was on the death of Lakshmi when, according to the ordinary rules of devolution in woman's property, it would go to Hiru, the daughter of Lakshmi, in exclusion of all other claimants whatever. It would not be till the death of Hiru, on its becoming necessary to inquire on whom the property would then devolve, that the position adverted to as established by the Bengal authorities of a change in the order of devolution would become applicable.

It seems to me on the best opinion I can form on the matter that Lakshmi taking by inheritance from her brother would take his estate as woman's property.

(*m*) 3 Mad. H. C. Rep. pp. 314, 315.

1869

Bhaskar Trimbak Acharya v. Mahadev Ramji *et al.*

If that be so, then I think it also follows on the authorities that Hiru, the daughter of Lakshmi, would take her sole heir in the first instance, males being disregarded until failure of the female branch. In other words Ramji Krishnaji who died in the lifetime of his sister Hiru was no heir to Lakshmi, and his son, Mahadev Ramji, has as yet no share in the inheritance, whatever he may have on the death of Hiru, who is a childless widow.

The Mitakshara seems to lay down the law as to this matter very clearly. In the section relating to woman's property (Ch. II. Sec. 11) in which occurs the much litigated text already referred to we find the following para 9:—"If a woman (seized of women's property) die 'without issue' that is, leaving 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." Here the course of descent is clearly traced, first to the daughter, secondly to the daughters daughter, thirdly to the daughter's son &c. ; and only in failure of lineal descendants of the daughter then to the son, son's son, &c.

Again in para 12, " In all forms of marriage if a woman leave progeny" that is, if she have issue, her property devolves on her daughters," para. 13 "Hence, if the mother be dead, daughters take the property in the first instance."

In para 19 a text indeed is cited from Manu to this effect "when the mother is dead let all the uterine brothers and the uterine sisters equally divide the materral estate," but, as pointed out in para 20, this does not mean that if a woman seized of women's property, dies leaving both sons and daughters that the brothers and sisters are to *share together*, it merely means that if she die leaving only sons then all the sons share equally ; if she die leaving only daughters all the daughters share equally; if she die leaving both sons and daughters the daughters take to the exclusion of the sons.

Lakshmi, then, according to any view, was, on Janki's death, sole residuary heir of her brother Vithal Pilaji, and Hiru on Lakshmi's death became the heir of Lakshmi.

1869

Bhaskar Trimbak Acharya v. Mahadev Ramji et al.

It now remains to consider how far Lakshmi by her conduct has not estopped herself and her privies in estate from contesting the *dharm* writing or gift in *Krisnarpan* by Janki. Now, as to Lakshmi it seems difficult to conceive a more complete course of concurrence with, and assent to, the validity of Janki's Will and gift in charity then was throughout shown by Lakshmi. As appears by the facts already found as the result of the evidence, Lakshmi, before Janki's death, joined at her request in the *sankalpa* ceremony and the gift in *krishnarpan* and expressed in words her entire assent to such gift. After Janki's death Lakshmi with Sadoba Yesoba took out probate of Janki's Will, sold one-half of the *oart*, and commenced building the temple on the other half. After Sadoba's death Lakshmi completed the building of the temple, installed Bhasker Acharya as manager, and put him in possession ; took an active part in the dedication of the temple, caused the slab to be put up which records among other things that Lakshmi, *after Janki's death*, carried out Janki's intention by building the temple according to the *dharm* writing. Finally, in 1860, Lakshmi brings a suit in the High Court as sole surviving trustee of Janki's Will in order more fully to carry out her intention as founder of the charity, and, while that suit is still pending, Lakshmi dies. From first to last we find Lakshmi upholding Janki's *dharm* writing and gift in *krisnarpan* and assuming to act as trustee for carrying out the same.

The extracts from Hiru's evidence already given show that Hiru personally assisted at and assented to the dedication of the temple, and has all along considered and still considers that the trust of Janki's *dharm* writing ought to be carried out.

Applying the conclusions above arrived at to the case of the first, second, and third defendants it appears to me that Mahadev Ramji has no right of inheritance vested in him in regard to the property in dispute, and therefore that all his dealings with such property have been wrongful and unlawful dealings. If intended he can be considered as during Hiru's lifetime, and I do not think he can, as in any sense an heir of Lakshmi

possessing a vested right, then I think, as privy in estate to Lakshmi, he would be estopped by her conduct from disputing Janki's will and gift in *dharm*. I feel clear, however, for the reasons above stated, that Mahadev has not now in him any vested right of inheritance in this property. I come clearly to the same conclusion with regard to Pusu Lakshman, the third defendant, for the reason formerly stated; and this defendant, moreover, even if he had any claim to the inheritance, as I am of opinion he had not, has as already intimated, lost all his right by the release of the 25th of September 1850.

As to Hiru, the second defendant, she is estopped from disputing Janki's will and gift in *dharm* both by Lakshmi's conduct and by her own.

With regard to the other defendants, (No. 4) Pranjivandas Mathuradas for the reasons already set forth must be regarded as a *bona fide* mortgagee for valuable consideration without notice. His mortgage therefore must be sustained, and his costs paid by the plaintiff, with liberty to the plaintiff to recover such costs over from the first, second, and third defendants.

As to the fifth and sixth defendants the mortgage to the one and the sele to the other must be respectively declared invalid and set aside, and the plaintiff must have his costs against these defendants.

As to the seventh defendant, Her Majesty's Advocate General having been joined as co-defendant by the plaintiff the plaintiff must pay him his costs.

The issues were found by the Court, in accordance with the above judgment and the minutes of decree were drawn up accordingly.

Attorneys for the plaintiff,—*Acland, Prentis, and Bishop.*

Attorney for the 1st defendant.—*Pestonji Dinshaw.*

Attorneys for the 4th defendant,—*Rimington, Hore, and Langley.*