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which she can dispose of by will after her death. And if it were necessary to consider the question, it would, we think, be still less a reasonable proposition that a widow of a collateral who had never been seized of the estate could will it away.

We, therefore, hold that Kenchowa could not have left the property in suit by will to plaintiff, even if the will be genuine, and, therefore, we are of opinion that the decree of the District Court should be confirmed with costs.

Decree confirmed.

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[188] ORIGINAL CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Sir Charles Sargent, Justice.

KESSERBAI (*Original Plaintiff*), *Appellant v.* VALAB RAOJI AND OTHERS (*Original Defendants*), *Respondents.**

[16th September, 1879.]

Hindu law—Inheritance—Priority of sister and half-sister—Step-mother—Brother's widow—Paternal uncle's widow.

In the Presidency of Bombay the sister and half-sister inherit in priority to the step-mother and the paternal uncle's widow.

The law as to the succession of a full-sister in the Presidency of Bombay does not rest solely upon either the Mitakshara or the Mayukha, but is built upon both taken conjointly.

The case of *Vinayak* v. *Lakshmibai* (1) decided that in the Presidency of Bombay the term 'brothers' occurring in the Mitakshara (ch. ii, sec. 14, pl. i), should be taken to include sisters. As the term 'brothers' while including sisters introduces them after brothers, so the term 'half-brothers' must be regarded as including half-sisters and as bringing them in after half-brothers.

The step-mother is not included by the Mitakshara within the term 'mother.' But, although a step-mother cannot in the Presidency of Bombay be introduced as an heir under the term 'mother,' yet, as the widow of *gotraja sapinda* of the *propositus*, and, therefore, according to the doctrine of the Mitakshara and the Mayukha a *gotraja sapinda* herself, she cannot be regarded as altogether excluded from the succession to a step-son.

Quære—At what points in the list of heirs the step-mother of the *propositus*, the widow of his brother and the widow of his paternal uncle succeed in the Presidency of Bombay?

[N.F., 37 C. 214=11 C.L.J. 588=14 C.W.N. 443=5 Ind. Cas. 135; F., 8 M. 107 (F.B.); Appr., 4 B. 210; R., 16 A. 221; 4 B. 219; 19 B. 707; 24 B. 563; 32 B. 300=10 Bom.L.R. 389; 33 B. 452=11 Bom.L.R. 654=3 Ind. Cas. 750; 36 B. 120=13 Bom.L.R. 863=12 Ind. Cas. 359; 36 B. 339 (343)=14 Bom.L.R. 89=14 Ind. Cas. 438; 47 P.R. 1914=23 Ind. Cas. 536.]

THIS was an appeal by the plaintiff against the decree of Atkinson, J.

The plaintiff was the widow of one Sunderdas Harikarson. The first four defendants were the executors of the will of one Hassibai, the widow of Jaitha Harikarson, who was a younger brother of Sunderdas. The fifth defendant was a lessee of Hassibai.

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* Suit 291 of 1877.

(1) 1 B.H.C.R. 117=9 M.I.A. 516.

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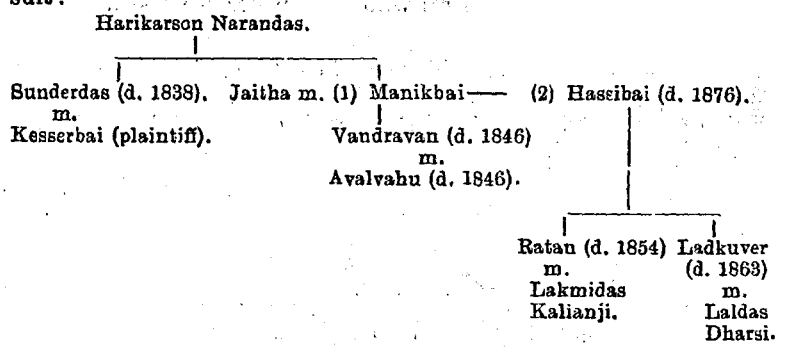
The following table shows the relationship of the persons alleged to be interested in the property which was the subject-[189]matter of the suit:—



Sunderdas and Jaitha were the sons of one Harikarson Narandas, and in their life-time had held, as tenants-in-fee-in-common, a house in the Fort of Bombay in equal moieties.

Sunderdas died on the 19th February 1838 without issue, but leaving his widow, the plaintiff, surviving. He devised his moiety of the house to the plaintiff for her life, with remainder to his brother Jaitha and his heirs, and he directed his executors (his brother Jaitha and one Ladha Bhanji) to lay out a certain sum of money in the purchase of land for his nephew Vandravan (son of Jaitha). In accordance with his direction an estate, called the Girgaum estate, was subsequently bought.

Jaitha died in 1845, and by his will he devised the whole of the Fort house (subject to the plaintiff's life-estate in a moiety of it, and subject to a sum of Rs. 1,500 to be paid to Hassibai) to his son Vandravan in fee.

Jaitha was survived by (1) Vandravan, his son by his first wife (Manikbai), who predeceased Jaitha; (2) Hassibai, his second wife; (3) his two daughters, Ratan and Ladkuver, by his wife Hassibai.

In 1846, Vandravan died without issue, leaving his widow Avalvahu, his half-sisters Ratan and Ladkuver, and his step-mother Hassibai, him surviving.

Ratan died in 1854 and Ladkuver in 1863. Neither of them left any issue, but both were survived by their husbands, Lakmidas Kalianji and Laldas Dharsi, who were living at the date of this suit.

Avalvahu died shortly after the death of her husband Vandravan, and after her death Hassibai entered into possession of [190] Vandravan's estate. On 22nd June 1876 she granted a lease of the Girgaum property to the fifth defendant, Inderji Narsi, for two years at a rent of Rs. 1,250 per annum, the whole of which rent (Rs. 2,500) he paid to Hassibai in advance. On the same day Hassibai made her will, by which she directed this sum to be expended in the performance of her funeral ceremonies, and she affected also to dispose of the house in the Fort (subject to the plaintiff's life-estate in one moiety of it) and the Girgaum estate. Hassibai died a few days after making the above will, *viz.*, on the 16th July 1876.

In 1877, the plaintiff Kesserbai brought this suit against the executors of Hassibai's will and against the lessee, Inderji Narsi. She contended that, in the events that had happened, she was entitled to the whole of the above-mentioned two properties of Vandravan; that the lease by Hassibai to the defendant Inderji Narsi was *ultra vires* and void as

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against her (Kesserbai), and that the will of Hassibai was inoperative and void so far as it affected to dispose of those properties. She prayed for a declaration of her title to those properties on account of the rents and profits—a declaration that the lease was void as against the plaintiff, &c.

The defendant Valab Raoji, one of the executors of Hassibai, contended that on the death of Avalvahu, the widow of Vandravan, his estate, including the two properties (the Fort house and the Girgaum estate) mentioned in the plaint, devolved either upon Hassibai as her *stridhan* with full power of disposition over the same, or upon Ratan and Ladkuver, the half-sisters of Vandravan, subject to the right of Hassibai to be maintained thereout. He also submitted that, assuming the said estate did not devolve upon Hassibai, she held the same during her lifetime adversely to the plaintiff, that the plaintiff's claim was barred, and that the lease to Inderji Narsi and the will of Hassibai were valid.

The other defendants also filed written statements.

The learned Judge, by his decree, declared that the lease by Hassibai to Inderji Narsi was inoperative as against the plaintiff, but gave to the latter no further relief, and ordered her to pay the [191] costs of her suit. The learned Judge seemed to be of opinion that the plaintiff had not made out her title to the lands, but this was not stated in the decree. She now appealed against his decree.

Latham and *Telang* appeared for the appellant.

Farran, at the request of the Court, argued the case on behalf of the respondents.

Latham and *Telang*, for the appellant.—The plantiff here is the widow of the uncle of Vandravan, the last male holder of the property. The question of succession arose on the death of Avalvahu, the widow of Vandravan. The estate then devolved either on Hassibai as Vandravan's step-mother or upon her daughters Rattan and Ladkuver as his half-sisters. If it devolved on the latter, then, at their death, the property went to their husbands. We say Hassibai succeeded, and at her death in 1876, as her daughters were then dead, the estate devolved on the plaintiff Kesserbai. Except under the Mayukha, sisters have no place in the line of succession; but the word "sister" in the Mayukha means full-sister, and does not include a sister of the half-blood. If the half-sister is not included in the term "sister," the question is, does she take in her own right as *gotraja sapinda*? There is no general principle laid down in the Mayukha on which she may be admitted. The author simply names her. He says she was born in the *gotra*, but that reason would bring in also the aunts and grand-aunts and many others. In the Hindu law books the term "sister" does not include the half-sister. The author of the Mayukha says (ch. iv, s. viii, para. 16) that the word 'brother' means 'whole brother,' and his observations on that point would apply to the case of sister and half-sister. Again, the half-brother is by the Mayukha (ch. iv, s. viii, paras. 19 and 20) postponed to the sister. If we suppose the half-sister to be included in the word 'sister,' we would place her before the half-brother, which is improbable. Counsel referred to 1 West and Bühler (ed. 1867), pp. 148, 149, 151, 154. There is a question as to the estate taken by Hassibai. The Court below held that she took only a limited estate.

The cases as to the succession of the paternal uncle's widow are given in 1 West and Buhler (ed. 1867), p. 172. As to the estate [192] taken by Hassibai, if she succeeded at all, we say she did not take a greater

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estate than would be taken by the widow of the *propositus* himself: *Narsappa* v. *Sakharam* (1). If she only took a life-estate, she had no power to make a will, and the plaintiff Kesserbai succeeds as next heir.

Farran, for the respondents,—According to the Mitakshara, as it has been interpreted in the Bombay Presidency, sisters inherit, as being included in the expression "*bhrata*" (brethren) used in Mitakshara, ch. ii, s. 4, pl. i. : *Vinayak Anandrav* v. *Lakshmibai* (2). For the same reason, half-sisters should inherit as being included in the expression '*asodara*' (by different mothers) in Mitakshara, ch. ii, s, 4, pl. 6. Thus the decision of the Court below is in accordance with the doctrine of the Mitakshara, as stated by the Privy Council, to be not improperly interpreted on this side of India. The step-mother, as such, has no place in the line of heirs given in the Mitakshara : *Lala Joti Lal* v. *Mussamat Durani Kower* (3), She can only come in as the widow of the father, and as being, therefore, a *gotraja*. The Vyavahara Mayukha breaks in upon the more logical system of the Mitakshara by giving greater weight to the natural family ties, and it admits the sister as heir to her brother, because she is a child of the same father (Vyav. Mayukha, ch. iv, sec. 8, pl. 19). The same reasoning would admit the half-sister, whose logical position would be next after the half-brother, as the sister comes next after the brother. The enumeration of heirs given in the Mayukha is not exhaustive : *Lallubhai* v. *Mankuverbai* (4). The half-sister being thus admissible as an heir, and her logical place being after the half-brother and before the step-mother that place is assigned to her by the case cited at p. 154 of 1 West and Buhler (1st ed.), which decision, I submit, this Court ought to follow. The decision in *Lallubhai* v. *Mankuverbai* is not inconsistent with it. An entirely different question was there before the Court. As to the estate taken by Hassibai, counsel referred to *Vijiarangam* [193] v. *Lakshman*(5), *Vinayak* v. *Lakshmibai*(2), *Mussamat Thakoor Deyhee* v. *Rai Baluk Ram* (6), *Bhugwandeen Doobey* v. *Myna Bai* (7).

WESTROPP, C.J.—Harikarson Narandas died, leaving two sons, Sunderdas and Jaitha. These two sons were separate in estate, but held, as tenants-in-fee-in-common, a house in the Fort of Bombay in equal moieties. Sunderdas died on the 19th February 1838, leaving a widow, the plaintiff Kesserbai, but no issue. By his will, made on the 5th of the same month, he devised his moiety of the Fort house to the plaintiff for her life, with remainder over to his brother Jaitha and his heirs, and directed his executors (his brother Jaitha and Ladha Bhanji) to lay out a certain sum of money in the purchase of an estate in land for his nephew Vandravan (son of Jaitha). Ladha Bhanji dying shortly afterwards, Jaitha invested a portion of that sum in the purchase of land, called Kurvad, near Gaumdavi, hereinafter styled the Girgaum estates.

Jaitha made a will, dated 4th May 1844, whereby, after reciting the devise, in the will of his brother Sunderdas, of the latter's moiety of the Fort house to the plaintiff for her life, with remainder over to Jaitha in fee, he (Jaitha) devised the whole of that house (subject to the plaintiff's life-estate in a moiety of it, and further subject to a sum of Rs. 1,500 to be paid to his, Jaitha's, second wife Hassibai) to his son Vandravan in fee.

Jaitha died in September 1845, and was survived by the following four persons, *viz.*, (1) Vandravan, his son by his first wife Manikbai, who

(1) 6. B. H. C. R. A. C. J. 215.
(2) 1 B. H. C. R. 117 (128 and 129).
(3) Beng. Full Bench Rul. (1862) 68.
(4) 2 B. 433.
(5) 8 B. H. C. R. O. C. J. 245.
(6) 11 M. I. A. 139.
(7) *Ibid*, 487.

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predeceased Jaitha; (2) his second wife Hassibai; (3) his daughter Ratan by Hassibai; (4) his daughter Ladkuver, also by Hassibai.

Vandravan died on the 2nd July 1846, without issue, but leaving a widow, Avalvahu, his half-sisters Ratan and Ladkuver, and his step-mother Hassibai, surviving him.

Avalvahu died shortly afterwards.

Subsequently Ratan died, in June 1854, without issue, but survived by her husband Lakmidas Kalianji, who is still living.

[194] Ladkuver died in September 1863 without issue, but survived by her husband Laldas Dharsi, who is still living.

On the 12th February 1855, letters of administration *ad colligenda bona et solvenda debita* were granted by the Supreme Court of the estate of Vandravan to his step-mother Hassibai until Tulsidas Purshotumdas should bring in and prove a certain alleged will of Vandravan. That alleged will has, by mutual consent of the parties in this cause, been treated as non-existent or invalid, and has never been brought in or proved. The plaintiff Kesserbai and Udhowji Bhanji, the first cousin, once removed, of Vandravan, had entered a *caveat* to Hassibai's application for the above-mentioned letters of administration; but their *caveat* was dismissed, and the letters granted as already stated. Neither Hassibai, nor Kesserbai, nor Udhowji Bhanji seems to have brought to the notice of the Court that Vandravan had left two half-sisters, who survived both him and his widow Avalvahu.

On the 22nd June 1876, Hassibai, who had been in possession of the two above-mentioned properties of Vandravan from the time of the death of his widow Avalvahu, demised by lease the Girgaum property to Inderji Narsi for two years, at Rs. 1,250 per annum; the whole of which rent (Rs. 2,500) he paid to Hassibai in advance; and she, by her will, next to be mentioned, directed those moneys to be applied in the performance of her funeral ceremonies. She died on the 16th of July 1876, *i.e.*, twenty-four days after the execution of the lease. She made a will, bearing the same date as that of the lease (22nd June 1876), which will, it was agreed between the parties at the trial, should, for the purposes of this suit, be regarded as proved, but without prejudice to any proceedings which the plaintiff might be advised to take with regard to it at the testamentary side of this Court. Of that will she appointed her brother Valab Raoji and three other persons to be the executors, and by it she affected to dispose of the house in the Fort (subject to the plaintiff's life estate in what had been her deceased husband Sunderdas' moiety in it) and the Girgaum estate.

In 1877, Kesserbai instituted the present suit against the executors of Hassibai and against the lessee, Inderji Narsi, stating [195] in her plaint most of the above-mentioned facts with the exception that Jaitha left two daughters. She neither alluded to them, nor to the fact that they left husbands surviving them. Kesserbai submitted that, in the events which had happened, she was entitled to the whole of the above-mentioned property of Vandravan, that the lease by Hassibai to the defendant Inderji Narsi was *ultra vires*, and void as against her (Kesserbai), and that the will of Hassibai was inoperative and void in so far as it affected to dispose of those properties. She prayed for a declaration of her title to those properties, an account of the rents and profits—a declaration that the lease was void as against the plaintiff, &c.

Valab Raoji, one of the executors of Hassibai, filed a written statement in defence, mentioning such of the above-stated facts as relate to the

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daughters of Jaitha and their husbands, and submitting that, "on the death of Avalvahu, the widow of Vandravan, his estate, including the properties mentioned in the plaint, devolved either upon Hassibai as her *stridhan* with full power of disposition over the same, or upon Ratan and Ladkuver, the half-sisters of Vandravan, subject to the right of Hassibai to be maintained out of the same;" and he further submitted that, assuming that "the said estate and premises did not devolve upon the said Hassibai, she held the same during her lifetime adversely to the plaintiff, and that the plaintiff's claim thereto has been long since barred," and that the lease to Inderji Narsi and the will of Hassibai were and are valid.

The other defendants also filed written statements, to which further reference is unnecessary.

The issues in the Court of first instance were :—

1st.—Whether the plaintiff is entitled to recover the properties in the plaint mentioned, or either of them?

2nd.—Whether the lease to Inderji Narsi is operative as against the plaintiff?

3rd.—Whether the plaintiff is entitled to the relief prayed for, or any part thereof?

By the decree of the learned Judge the lease by Hassibai to Inderji Narsi was declared inoperative as against the plaintiff, [196] but it was ordered that the plaintiff should pay the costs of the suit.

It may be true that Hassibai neither under the letters *ad colligenda*, nor as heir of Vandravan, if, as his step-mother, she were his heir, would have had any authority to grant such a lease to Inderji Narsi, inasmuch as, if a step-mother take at all, it is not to be supposed that her power of dealing with the estate would exceed that of a widow or mother (1). But, assuming that to be so, if the plaintiff Kesserbai be not now heir to Vandravan, she has no claim to a declaration that the lease to Inderji Narsi or the will of Hassibai was *ultra vires*. Only the person or persons now entitled as heir or heirs of Vandravan can properly sue for such relief, no matter how invalid the lease may be.

The learned Judge seems to have been under a misapprehension as to Kesserbai's relationship to Vandravan. Throughout his judgment he has treated her as the step-mother of Vandravan, whereas she was the widow of his uncle Sunderdas, Hassibai being step-mother of Vandravan.

It was as we have stated, Valab Raoji, the executor of Hassibai, who, to defeat the claim of the plaintiff Kesserbai, set up the title of persons outside this suit, namely, that of the husbands of Ratan and Ladkuver, the half-sisters of Vandravan, as preferable to that of the plaintiff. And an objection on the part of Kesserbai, that Valab Raoji was estopped from taking that course by reason of the suppression by Hassibai, his testatrix, of any allusion to the existence of her daughters in the previous testamentary proceedings, was overruled by us during the hearing of this appeal.

In the argument before us it was rightly admitted that, if the half-sisters of Vandravan were entitled to succeed to his property on the death of his widow Avalvahu in preference to his step-mother Hassibai, or his uncle's widow (the plaintiff), those half-sisters would have taken

(1) *Narsappa* v. *Sakharam*, 6 B. H. C. R. A. C. J. 215, *Bachiraju* v. *Venkatappadu*, 2 M. H. C. R. 402.

that property absolutely (*Vinayak Anandrav* v. *Lakshmibai* (1), *Bhaskar Trimbak Acharya* [197] v. *Mahadev Ramji* (2), and that, inasmuch as they died without leaving issue, and there is nought to show that their marriages were not celebrated in an approved form, their husbands inherited that property from them, and, being still alive, would rank before the plaintiff and Hassibai or her executors: Yajnyavalkya (by Roer and Montriou), ii, 145; Narada (by Jully), ch. xiii, pl. 9; *Gangaram* v. *Ballia*(3); *Mussamat Thakoor Deyhee* v. *Rai Baluk Ram* (4); West and Buhler (2nd ed), pp. 69, 221, 470, 475, 493, 515, 522, 551, 554.

In the order of succession to the property of a *separated* Hindu, who dies without leaving issue or a widow, neither the Mitakshara nor the Mayukha names the step-mother.

The Mitakshara does not name the sister; but, as we shall presently see certain commentators of repute say that in the term "brothers," whom the Mitakshara does name, sisters are included.

The Mayukha(5), while declining to accept that extended meaning of the term "brothers," expressly names the sister as an heir next after the paternal grandmother who is placed both by the Mitakshara and Mayukha as the first of the *gotraja sapindas*.

Although this is so, the paternal grandmother is by two degrees further removed from the *propositus* (who has died without leaving issue) in the order of succession given by the Mitakshara than in that given by the Mayukha. This is caused by the placing of brothers of the half-blood and their sons in the Mitakshara before the paternal grandmother. In the Mayukha, brother of the half-blood and their sons are postponed both to the paternal grandmother and to the sister.

The order for the performance of *sraddhas* for a deceased Hindu, as laid down in the Nirnaya Sindhu, differs considerably [198] from the order of succession to his property as propounded either by the Mitakshara or the Mayukha, and places the half-sister on the paternal side next to the sister, then the sons of the sister, and next the sons of the half-sister, although it had previously placed brother's sons before half brothers(6). It is as well here to observe that the MS. copy of the Nirnaya Sindhu in the library of the High Court is in this and other passages very inaccurate. Some corrections in pencilling have been made in the margin by, we believe, the late Mr. Vinayak Shastri, of the Sadr Adalat. His correction of the passage now referred to, is supported by other MSS. as well as by two lithographed copies with which we have had it compared. The result of the passage so corrected is as already stated.

In the leading case on the rights of a sister in this presidency, *Vinayak Anandrav* v. *Lakshmibai*(1), sisters were held, both by the Supreme Court and on appeal by the Privy Council, to take absolutely the immoveable property of their brother (who died without leaving issue) in preference to first cousins, who were the sons of his separated paternal uncle, deceased.

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(1) 1 B.H.C. R. 117 (126)=9 M.I.A. 516.

(2) 6 B. H. C. R. 1, and see *Haribhat* v. *Damodharbhat*, 3 B. 171, where the right of a daughter to devise immoveable property inherited from her father was recognized. In 1 B. H.C.R. 124, Sausse, C.J., treats daughters and sisters as being on the same level as to the extent of the estate which they take.

(3) Printed Judgments for 1876, p. 31.

(4) 11 M. I. A. 129; *vide per* Sir. J. Colvile, 175.

(5) Ch. iv, sec. viii, pl. 16, 19. (6) Nirnaya Sindhu III fol. 98, l. 26.

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In *Sakharam* v. *Sitabai*(1) a full-sister was preferred to a half-brother. In *Mahantapa* v. *Nilgangawa*(2) a full-sister was preferred to a paternal uncle's widow. In a case, however, given at pp. 197-198 of Messrs. West and Buhler's work (2nd ed.) the shastri placed the paternal uncle's widow before the sister. His *vyavastha* is unsustainable, as being at variance not only with the Mayukha (ch. iv, s. viii, pl. 19-20), which places the paternal uncle himself below the sister, and with the interpretation of the term "brethren" in the Mitakshara as including sisters accepted by the Supreme Court and Privy Council in *Vinayak Anandrav* v. *Lakshmibai*(3) (to which case we shall revert), but also with the first case given by Messrs. West and Buhler, at p. 182, where the sister was rightly preferred even to the widow of the brother of the *propositus*, who would necessarily enter the order of succession [199] at a higher point than the paternal uncle's widow. In *Dhondu* v. *Ganga*(4) a full-sister was preferred to a more remote paternal male relative. Messrs. West and Buhler place both the full-sister and the half-sister before the paternal uncle in the order of heirs (5). They give a case in the Sadr Adalat in 1844 (6) where the half-sister (there styled step-sister) was preferred to the step-mother. That case is directly in point, and never seems to have been overruled. The shastri, in reply to the question, "Is a step-mother or a step-sister the heir of a deceased man?" said: "The right of a full-mother is recognized by the Sastra, but that of a step-mother is nowhere defined. The right of a brother is likewise recognized by the Sastra, and it is stated that, on failure of a brother, a step-brother has the right of inheritance." (Here he evidently had the Mitakshara (ch. ii, s. iv, pl. 6 (in view, not the Mayukha, ch. iv, s. viii, pl. 19, 20). He continues: "The right of a sister is also admitted by the Sastra, and by inference a step-sister may be considered as heir. A step-sister is born in the *gotra*, and she will, therefore, have a better right than the step-mother to inherit the deceased's property." As authorities for his *vyavastha* in that case the shastri referred to the Mayukha, p. 140, l. i, (*i.e.*, ch. iv, s. viii, pl. 17 of the translation) and to the Nirnaya Sindhu (III, f. 98, l. 26), above mentioned, which places the half-sister next to the sister. Upon that case Messrs. West and Buhler say; "The shastri appears to have followed the Mayukha, which places the sister immediately after the paternal grandmother; at the same time he must have understood the term '*bhagini*' (sister) to include the sister both of the full and the half-blood. This interpretation, is from a philological point of view, admissible. According to the Mayukha's interpretation of the term '*gotraja*' as born in the same family as the deceased, the step-mother could not inherit before the step-sister, she (*i.e.*, the step-mother) being necessarily descended from a different stock; but that Nilkantha does not confine '*gotraja*' to this sense, is plain from his calling the grandmother the first of the *gotrajas* (*i.e.*, of the persons expressly named as such) in the order of succession. Custom, however, seems to have given to natural birth in the family of the [200] *propositus* precedence over the second birth by marriage, though the latter also is a source of heritable right." A further and stronger instance of the precedence in practice given to natural birth spoken of by the learned commentators, will be found at a subsequent page of their work(7), where

(1) 3 B. 353.
(2) 3 B. 368, note.
(3) 1 B. H. C. R. 117, (126) = 9 M.I.A. 516.
(4) 3 B. 369.
(5) West and Buhler (2nd ed.), 182—188.
(6) *Ibid.* pp. 185, 186.
(7) West and Buhler, p. 189, Q. 2.

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the paternal uncle of the *propositus* was preferred to his step-mother, by sastri, in a case arising at Dharwar, and she was held to be entitled to maintenance only. We offer no opinion whether that *vyavastha* can be sustained.

The passage in the Mayukha at ch. iv, s. vii, pl. 19, has been considered in *Vinayak Anandrav* v. *Lakshmibai* (1), *Lallubhai* v. *Mankuverbai* (2), and *Sakharam* v. *Sitabai* (3). The improved translation of that passage, given in the two latter cases, is as follows:—"In case of the non-existence of that (the paternal grandmother) the sister (takes) according to the *dictum* of Manu(4), that whoever is the nearest *sapinda*, his should be the property; and according to the text of Brihaspati(5), that 'where there are many *jnati*, *sakulyas* and *bandhavas*, among them whoever is the nearest he should take the property of the childless; she, the sister, also being born in the brother's *gotra*, and so there being no difference of *gotrajatva* (the state of being born in the same *gotra*). But (says, an objector) there is no *sagotrata* (state of being in the same *gotra*). True, but neither is that stated here as a reason for taking property."

The first reason given in that passage by Nilakantha for bringing the sister, *viz.*, that she is a *sapinda*, is equally true in the case of a half-sister on the paternal side. The second reason which he assigns, namely,—that the sister was born in the same *gotra* as that of her brother, is, as was remarked by the shastri of the Sadar Adalat in the case of the half-sister above cited from West and Buhler (6), true of the paternal half-sister also. It was [201] said by a member of the present Bench in *Lallubhai* v. *Mankuverbai* (2), that Nilakantha's argument, that there is no difference of *gotrajatva* between the brother and sister, is substantially only a re-assertion of her *sapinda*-ship. But that remark requires, as was lately said in *Sakharam* v. *Sitabai* (3), some modification; for though, no doubt, it is a re-assertion that the sister is a *sapinda*, it means also that she is a *sapinda* of a peculiar kind, *viz.*, that she is a *sapinda* by birth, or natural *sapinda* as distinguished from women born in other families, but who enter the family of the *propositus* by marriage, and, under the special doctrine of the Mitakshara(7), the Mayukha(8), and Nanda Pandita (9), become *sapindas* by community of particles, and may be called theoretical *sapindas*. The quality of *gotrajatva*, *i.e.*, of being born in the same *gotra* as the *propositus*, is one which the step-mother cannot possess, and, therefore, she cannot, on the reasoning of Nilakantha for introducing the sister, compete in succession with the latter, who does possess it.

The text of Brihaspati (5) on which Nilakantha relies in the passage above extracted from the Mayukha, (ch. iv, s. viii, pl. 19), no more than that of Manu (4), on which he also relies, specifies the sister. In treating of her case in that passage he (Nilakantha) refrains from calling in aid another text of Brihaspati given in 3 Dig., Bk. V, ch viii, pl. 407, in which the sister is expressly designated. This omission is due

(1) 1 B. H. C. R. 117 (126) = 9 M.I.A. 516.
(2) 2 B. 388 (420 to 422, 445, 448).
(3) 3 B. 353 (361) = Printed Judgments for 1879, p. 355.
(4) Ch. ix. pl. 187; 3 Dig., Bk. V, ch. viii. pl. 434.
(5) 3 Dig., Bk. V, ch. viii, pl. 437. (6) West and Buhler (2nd ed.) 185, 186.
(7) See extract from the Achara Khanda in 2 B. 423.
(8) See the extract from the Sanskara Mayukha, 2 B. 425.
(9) Datt. Mim., sec. vi, pl. 6 to pl. 39.

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probably to two reasons: 1, that the text relates to partition after reunion; 2, that it omits to mention the paternal grandmother. After the death of the uterine brother, the text in question says: "But she who is his sister is next entitled to take the share: this law concerns him who leaves no issue, nor wife, nor father nor mother." The words "nor mother" have been supplied by Mr. Colebrooke in conformity with another text of Brihaspati (1) and with the opinion [202] of Kaluka Bhatta (2). The text just quoted (3 Dig., Bk. V, ch. viii, pl. 407) is, however, important, for, though it appertains to partition after reunion, it does so apparently after all of the reunited parceners are dead. That text is quoted by Nilakantha in pl. 25 of a subsequent section on Reunion after Partition (3). The preceding *placitum* tends to show that in pl. 25 he was speaking of a descent after the decease of all of the reunited co-parceners. Both the text of Brihaspati and Nilakantha's comment on it are valuable as showing that the sister was regarded, for the purpose of such succession, as a *sapinda*, and thus affording to us an argument from analogy in the present case, but not more than that. The passage in Manu (ch. ix, pl. 212), does not, it would seem, apply exclusively to partition after reunion. It classes together uterine brothers and sisters "and such brothers as were reunited after a separation," meaning such brothers, if any, as were so reunited.

In the present case of a half-sister it is important to remember that the law in this Presidency on the succession of the full-sister does not rest solely upon either one of the two great authorities here, the Mitakshara and the Mayukha, but is built upon them both taken conjointly. An examination of the cases as to the succession of a sister in West and Buhler's work (4) shows that both of those authorities are quoted by the shastris in support of their opinions in favour of the sister. Their standing reference to the Mayukha is p. 140, line 1, corresponding with ch. iv, sec. viii, pl. 19, in Borrodaile's translation. One of them also refers to p. 134, l. 4, corresponding with ch. iv, sec. viii, pl. 1 of Borrodaile's translation, which is merely a transcript of the text Yajnyavalkya, to which we are now about to refer. The only relevant reference of the shastris to the Mitakshara is fol. 55, p. 2, line 1, which corresponds with ch. ii, sec. 1, pl. 2 of Colebrooke's translation. That passage, so translated, furnishes the order of succession on the failure of sons, principal and secondary, and runs thus: "The wife, and the daughters also, both parents, brothers likewise, and their sons, geptiles (*gotrajas*) cognates [203] (*bhandavas*), a pupil and fellow-student: on failure of the first among these, the next in order is, indeed, heir to the estate of one who departed for heaven leaving no male issue. This rule extends to all (persons and) classes." This is only an echo of the texts 135, 136 in II Yajnyavalkya (by Roer and Montriou), which are as follows:—

"If a man depart this life without male issue; (i) his wife, (ii) his daughters, (iii) his parents, (iv) his brothers, (v) the sons of brothers, (vi) others of the same *gotra*, (vii) kindred more remote, (viii) a pupil, (ix) a fellow-student,—these succeed to the inheritance; each class upon failure of the one preceding. This rule applies to all the castes." Amongst none of these nine classes is the sister expressly mentioned; but, inasmuch as the shastris have referred to this passage in the Mitakshara in support of her right to inherit and her place in the order

(1) 3 Dig., Bk. V, ch. viii, pl. 423.
(2) 3 Dig., Bk. V, ch. viii, pl. 407, Comm. (3) Mayukha, ch. iv, sec. ix, pl. 25.
(4) 2nd ed. 182 to 185.

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of heirs, they must have understood that she was included in one of these nine classes. Looking at the place which they have generally assigned to her, it appears to us that they must have intended to refer either to class iv, *viz.*, the brothers, or to class vi, the *gotrajas* (gentiles); but bearing in mind the meaning in which the term '*gotraja*' is used by the Mitakshara, *viz.*, "belonging to the same family" (1), it is difficult to suppose that the shastris meant to refer to that class as found in the Mitakshara. Sisters, when married, belong to the *gotra* of their husband, not of their father or brother. There would remain, then, only the fourth class, 'brothers,' as explained by the commentators on the Mitakshara, Balambhatta and Nanda Pandita; those observations are confined to the *vyavasthas* of the shastris so far as they call the Mitakshara to their aid. Some of them, indeed, style the sister a *gotraja* (2). That, however, must be in relation to the Mayukha's doctrine as to her, and in the sense that she was born in the *gotra*, not that she belongs to it after marriage.

The leading Bombay case, *Vinayak Anandrav* v. *Lakshmibai* (3) on the question of the sister's claim to succession, fully upholds **[204]** the view that her right has been rested on the Mitakshara as well as upon the Mayukha, though perhaps mainly upon the latter. In saying that it has been based upon the Mitakshara, we mean, upon it as interpreted by Balambhatta and Nanda Pandita. On the passage in the Mitakshara (ch. ii, s. iv, pl. 1), where it is stated that "brethren" rank next in succession after the father of the deceased *propositus*, Mr. Colebrooke's note as to the term "brethren" is: "The commentators, Nanda Pandita and Balambhatta, consider this as intending 'brothers and sisters,' in the same manner in which 'parents' have been explained 'mother and father' (sec. iii, 2) conformably with an express rule of grammar (Panini, 1, 2, 68). They observe that the brother inherits first, and, in his default, the sister. This opinion is controverted by Kamalakara and by the author of the Vyavahara Mayukha." The objection of the latter to this interpretation of the term "brethren" occurs in the Mayukha, ch. iv, s. viii, pl. 16, but this portion of Nilakantha's doctrine was not accepted either by the Supreme Court or by the Privy Council in *Vinayak Anandrav* v. *Lakshmibai*.

The Supreme Court (Saussee, C. J., and Arnould, J.), after referring, in its Judgment, to the note of Mr. Colebrooke, just quoted, with respect to the interpretation of the term "brethren" as including sisters, says: "This opinion, Mr. Colebrooke states, is controverted by Kamalakara and by the author of the Vyavahara Mayukha. It certainly is so in para. 16 of ch. iv, sec. viii, of the Mayukha; but it should be observed that, in para. 15 of the same chapter and section, the doctrine of the Mitakshara, now generally regarded as established, as to the word 'parents' including both 'mother and father,' is controverted, and on precisely the same grammatical grounds. Sir Thomas Strange, after stating generally that the sister is excluded from succession, adds: 'Such appears to be the law of the Bengal provinces, but is not to be taken as universal, opinions existing that the term 'brethren,' in the enumeration of heirs in the Mitakshara, includes sisters, as 'parents' have been seen to do 'father and mother;' but, observes Sir Thomas Strange, 'they stand controverted.' For this position he refers to the appendix in his second volume to ch. vi, pp. 243

(1) West and Buhler, p. 179 (2nd ed.).
(2) West and Buhler (2nd ed.), pp. 183, Q. 2; 184, Q. 4; and see p. 185, Q. 7 and p. 186.
(3) 1 B.H.C.R. 117 (126)=9 M. I. A. 516.

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[205] 244, and especially to the remark of Mr. Colebrooke there printed. In the passage thus referred to, Mr. Colebrooke observes: "Commentators on the Mitakshara allow the sister to come in on failure of brothers. This opinion, however, is controverted, and, to show that this is so, Mr. Colebrooke refers to the very passage already cited from the Mitakshara, from Mr. Colebrooke's note to which it appears that one of the two authorities cited as controverting the position is the Mayukha. It further appears that the opinion, that the generic word 'brethren' including 'sisters' is controverted there on precisely the same grammatical grounds on which the same authority had controverted the opinion that the generic word 'parents' includes the mother, which latter opinion Sir Thomas Strange regarded as well established. The expression, therefore, in Sir T. Strange's first volume, that the opinion in question stands controverted (if by such an expression be meant 'is conclusively or finally controverted') must be regarded as too strong. A similar construction should apparently be given to the words 'parents' and 'brethren.' He no doubt adds, on the authority of Mr. Colebrooke, that Jagganatha observes it is nowhere seen that sisters inherit the property of their brothers; but Jagganatha, whatever the case may be on the other side of India, is not of binding authority on this." Upon the appeal in that case the Privy Council, after referring to the different views of the law as to the capacity of sisters to inherit, and stating that "a general leaning in favour of excluding the sisters in such a case appears to prevail in Bengal, but appears not to prevail in the territories of Bombay," and that "it is a point upon which probably it may be said that a reasonable difference of opinion may be entertained," quoted largely from the judgment of the Supreme Court, including a considerable part of the above quotation as to the doctrine of Balambhatta and Nanda Pandita, and must be regarded as having adopted, for this Presidency, the views of the Supreme Court upon that point. Lord Justice Knight Bruce on behalf of Her Majesty's Privy Council, said; "Their Lordships desire not to be understood as expressing an opinion that the general course said to be taken in Bengal upon this subject or upon the construction of the word 'brethren' is wrong; but certainly neither are they satisfied that the [206] construction put on the passage in the Mitakshara, which has been mentioned, and generally adopted as it seems in Bombay, is wrong. Their Lordships come to the conclusion that the general rule in Bombay has long been, and is, to treat the sisters as heirs to the brother, rather than the paternal relatives of the description of the present plaintiff. Accordingly, their Lordships think that they may safely and properly adopt or accept that rule. They consider that, in Bombay at least, the sisters in such a case as this are the heirs of the brother." This construction of the word "brothers" as including sisters is in accordance with the general favour shown to the succession of women to property which especially characterizes the Hindu law prevalent in this Presidency. The expression used by Nanda Pandita is of particular value in the present case. He says: "The daughters of the father and other ancestors must be admitted like the daughter of the man himself (1)." A half-sister on the paternal side comes as fully within the term "daughter of the father" as a full-sister, and must, we think, be regarded as a *persona designata* by Nanda Pandita, as she still more directly is in relation to the ceremonial law by the Nirnaya Sindhu.

(1) Mitak., ch. ii, sec. v. pl. 5, note 5, by Mr. Colebrooke.

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Mr. Justice Holloway has said: (1). "It is satisfactory to find it at last recognized that the rule of law is not to be derived merely from the positive words of a commentator, and still less from his omissions. It is a still more curious fact that, grammatically, there does not appear to be any such omission. Two of the most eminent commentators, one of them one of the great jurists of Southern India, have distinctly told us that, in accordance with an express ruleof Panini the infallible, the word 'brothers' means 'brothers and sisters.' That the word in the dual has that meaning, there can be no doubt; any dictionary shows it. There does not appear any reason why the plural should have a different signification, and these commentators evidently thought so." Messrs. West and Buhler (2) mention that Mr. Justice Collett in another Madras case gave an opinion different from that of [207] Mr. Justice Holloway. Be that as it may, *Vinayak Anandrav* v. *Lakshmibai* (3)seems to settle for this Presidency that the term "brethren" occurring in the Mitak., ch ii, sec. iv, pl. 1, includes sisters.

It seems to us that as the term "brothers," while including sisters, introduces them after brothers; so the term "half-brothers" must be regarded as including half-sisters and as bringing them in after half-brothers. The shastri of the Sadar Adalat in the case quoted from West and Buhler (pp. 185, 186) treated the half-sister as an heir by inference from the fact that the sister is so, and as Messrs. West and Buhler say, because he must have understood the term 'sister' as including the half-sister. We do not thence infer, however, that he or they would have dealt differently with the half-sister from the mode in which Balambhatta and Nanda Pandita, while including the sisters in the term "brethren" have dealt with sisters. We conclude that the half-sisters would be brought in, not upon a level with, but after, the half-brothers, in the same manner as Balambhatta and Nanda Pandita have marshalled the sisters, not on a level with, but after, the brothers. The Nirnaya Sindhu, which specially names the half-sister as entitled to rank (in the performance of ceremonies whence her heirship may be inferred), places her after, not on a level with, the sister.

We have not called in aid what was attributed in *Srinarain Rai* v. *Bhya Jha* (4) to the shastri there consulted, because his *vyavastha* that "the authorities current in Mithila warrant the construction that the term 'sister' includes also the half-sisters," was expressly made by him dependent on the hypothesis that the usage in Mithila was in unison with that construction, and he did not pretend to know whether or not it was so. The marginal note at p. 28 of that case is expressed in too positive terms.

Both the Mitakshara (5) and the Mayukha (6) agree in postponing half-brothers to full-brothers; but the Mayukha brings in the [208]paternal grandfather in co-parcenary with the half-brother, a provision which has never been known to be enforced, and postpones the latter to the sons of full-brothers, whom it also places before the paternal grandmother and the sister. Vandravan not having left any brother or brother's son, it is unnecessary to decide in this case whether a full-brother's son should be placed, according to the Mitakshara, *i.e.*, after half-brothers (5), or, according to the Mayukha, *i.e.*, before both the paternal grandmother, the full sister and the half-brother, although possibly the decision in the present

(1) 6 M.H.C.R. 285. (2) West and Buhler (2nd ed.) 181 note.
(3) 1 B. H. C. R. 117 (126)=9 M. I. A. 516.
(4) Sud. Dew Ad. (Calc) 28; 1 Morley's Dig., 325, pl. 150.
(5) Mitak., ch. ii, sec. iv, pl. 6. (6) Mayukha, ch. iv, sec. viii, pl. 20.

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case may affect that question. It has been decided that the full-sister ranks in this Presidency before the half-brother (*Sakharam* v. *Sitabai*) (1) on the authority of the Mayukha and of the Mitakshara as interpreted by Balambhatta and Nanda Pandita.

It is clear that the step-mother is not included by the Mitakshara within the term "mother." The reasoning in ch. ii, sec. iii, pl. 3 (see also Colebrooke's note 3 thereon) of the Mitakshara establishes this to be so; *Lala Joti Lal* v. *Mussamat Durani Kower*(2); West and Buhler (2nd ed.), 52, 187. A case in Sir William Macnaghten's Hindu Law(3) rules that, according to Bengal law, she cannot inherit from her step-son. Sir Thomas Strange also excludes her from the line of heirs (4), but his text and the authorities quoted in his note show that he was dealing with Bengal law. Although she cannot, in the Presidency of Bombay, be introduced as an heir under the term "mother," we think that, as the wife of a *gotraja sapinda* (using that term in its larger sense of the *propositus*) and, therefore, according to the doctrine of the Mitakshara(5) and the Mayukha (6), a *gotraja sapinda* herself, she cannot be regarded as excluded altogether here from succession to a step-son. This is a necessary inference from the cases of *Lakshmibai* v. *Jayaram Hari*(7) and *Lallubhai* v. *Mankuverbai* (8) but it is not necessary for us, and would be extra-judicial, now to consider or determine at what points in the list of heirs in this [209] Presidency the step-mother of the *propositus*, the widow of his brother and the paternal uncle's widow enter. It is, for the purposes of the present case, sufficient to say that, compounded as the law of this Presidency on the subject of the sister's and half sister's succession is from the Mayukha and the Mitakshara as specially construed here by Balambhatta and Nanda Pandita, the latter of whom specially designates "the daughter of the father" as an heir, as does the Nirnaya Sindhu, (which has also been called in aid), the "half-sister," we think that the sister and half-sister both have precedence over the step-mother as well as over the brother's wife (9) and the paternal uncle's widow on this side of India. There was not any intention, on the part of the Court which decided *Lallubhai* v. *Mankuverbai*, to displace a person so specially introduced as the sister (including in that term the half-sister) from her position on the roll of heirs (10). The rule laid down in that case (that the widows of *gotraja sapindas* stand in the same places as their husbands, if living, would respectively have occupied) was intended to be subject to the right of any person whose place is so specially fixed on that roll, as (amongst others) that of the sisters(11). If this were not so, the widow of a deceased Hindu would rank before his son, inasmuch as the father is nearer to himself than the son is to him. In arriving at our decision in this case we have not overlooked either the second portion of Messrs. West and Buhler's note (the first part of which we have quoted at length) at pp. 186 to 188 of their second edition, which discusses the step-mother's claims, or the recent Madras case, *Kutti Ammal* v. *Radakrishna Aiyan* (12), or the criticism of it by Mr. Mayne in his valuable work on Hindu law (13). We, for

(1) 3 B. 353.
(2) Beng. Full Bench Rul. (1862) 67.
(3) Vol. II, p. 62.
(4) Vol. I, p. 144.
(5) Achar Khanda; West and Buhler, p. 174 (2nd ed.); 2 B. 423.
(6) Sanskara Mayukha, p. 45; 2 B. 425.
(7) 6 B.H.C.R.A.C.J. 152.
(8) 2 B. 388.
(9) Acc. West & Buhler (2nd ed.), p. 182, Q. 1.
(10) 2 B 421 (422, 445, 448).
(11) See the Viramitrodaya 671. As to the son of a daughter, see 2 B. 443.
(12) 8 M.H.C.R. 88.
(13) Mayne H.L., plac. 457, *et seq.*

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the reasons already given, see no sufficient ground for departing from the case above cited from West and Buhler, pp. 185, 186, (2nd ed.), in so far as it gave to the half-sister precedence over the step-mother.

[210] From what has been said it follows that, on the death of Avalvahu, the widow of Vandravan, his sisters Ratan and Ladkuver, and not his step-mother Hassibai or his uncle's widow, the plaintiff, succeeded to the immoveable property, the subject of this suit; and that, on the deaths of Ratan and Ladkuver, they were respectively succeeded by their respective husbands, Lakmidas Kalianji and Laldas Dharsi. The plaintiff, therefore, did not, on the death of Hassibai, acquire any right to the immoveable property of Vandravan, and, therefore, has not any right to maintain this suit. Having regard, however, to the suppression, by all of the parties to the proceedings at the testamentary and intestate side of the Supreme Court, of the existence of the sisters of Vandravan and their husbands, and to the very peculiar circumstances of the lease taken by Inderji Narsi, we, while reversing the decree of the Court of first instance, direct the parties to this suit respectively to bear their own costs of the suit and of this appeal.

Decree reversed.

Attorneys for the appellant.—Messrs. *Mulji* and *Bomanji*.
Attorneys for the respondents.—Messrs. *Balkrishna* and *Bhagwandas*.

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4 B. 210.

APPELLATE CIVIL.

Before Sir Michael Roberts, Westropp, Kt., Chief Justice and Mr. Justice Kemball.

LAKSHMI (*Original Plaintiff*), *Appellant v.* DADANANAJI AND RADHABAI (*Original Defendants*), *Respondents.**
[16th September, 1879.]

Hindu law—Sister's right of succession in preference to step-mother or paternal first cousin.

Under the Hindu law, as prevailing in this Presidency, a full sister is the heir of her deceased brother, in preference either to his step-mother or paternal first cousin.

Vinayak Anandrav v. *Lakshmibai* (1) and *Sakharam* v. *Sitabai* (2) followed.

[F., 28 B. 82=5 Bom. L.R. 676; R., 4 B. 219.]

THIS was a special appeal from the decision of H. J. Parsons, Senior Assistant Judge of Sholapur, reversing the decree of Lalshankar Umiashankar, Subordinate Judge at Pandharpur.

[211] The plaintiff Lakshmi brought this suit for a declaration that she was the heir of her step daughter-in-law Janki, and, as such, was entitled to her property. The plaint stated that the cause of action arose on the 11th October 1873, when Janki died.

The facts of the case are briefly these: The plaintiff's husband Ramchandra and Nana were full-brothers, but divided in interest and separate from each other. Ramchandra died in 1860, leaving behind a

* Special Appeal No. 344 of 1875.

(1) 1 B. H. C. R. 117=9 M. I. A. 516=3 W. R. P.C. 41. (2) 3 B. 353.