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APPELLATE CIVIL.

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APPELLATE CIVIL.

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

BIRU (*Original Defendant No.* 2), *Appellant v.* KHANDU, (*Original Plaintiff*), *Respondent.** [16th September, 1879.]

Hindu Law—Sister's right of succession.

Under the Hindu law, a sister succeeds as heir to the estate of her deceased brother, in preference to his cousin on the paternal side—one degree removed.

Krishnaji v. *Pandurang* (12 B. H. C. R. 65) referred to and distinguished.

[F., 28 B. 82=5 Bom.L.R. 676; R., 21 B. 739 (745).]

THIS was a special appeal from the decision of H. J. Parsons, Senior Assistant Judge at Sholapur, reversing the decree of G. A. Mankar, Subordinate Judge at Madhe.

Khandu brought this suit against (1) Jivubai, (2) Biru Sadu Padvalkar, and (3) Gopala, in the Court of the Second Class Subordinate Judge at Madhe, and sought to recover, among other things, possession of half of two fields (Survey Nos. 82 and 95) situated in the village of Avandi, in the District of Sholapur. He stated in his plaint that he and one Kushaba were cousins-german; that Kushaba died, leaving a son by name Genu, who succeeded to his father's share in the fields in dispute, and held it till his death; that Genu's widow, Jivubai, [215] succeeded to the property of her husband after his death, but that she lost her right to it in consequence of her marriage with Rama Tarange, and that thus he was entitled to succeed to the immoveable property of Genu, according to the Hindu law. The other allegations in the plaint are immaterial.

(1) Jivubai answered, among other things, that the property belonged to her husband, and came to her after his death by right of inheritance; that she transferred it to one Sadu Padvalkar (father of the defendant Biru) for the benefit of the four minor sisters of her deceased husband, who were rightfully entitled to it. (2) Biru answered that Jivubai had entrusted the four minor sisters of her husband to the care of his father Sadu Padvalkar, and transferred the property to his name; that, since his father's death, the minors had been under his protection, and that he held the property on their behalf. (3) Gopala answered that he was never in possession of the property, and laid no claim to it.

The Subordinate Judge laid down two issues, the second of which was whether the plaintiff was entitled to the disputed property, according to the Hindu law. The following is his finding on it:—

"My finding upon the second issue is in the negative, and against the plaintiff. It is proved in evidence that the deceased Genu, whose property the plaintiff claims as his heir, was the son of his separated cousin-german. When Genu died, leaving no male issue, his widow, the defendant Jivu, succeeded to his property, taking an absolute interest in the moveable and a life-interest in the immoveable estate. By marrying again, Jivu, according to s. 2, Act XV of 1856, became divested of whatever interest she had in the property of her deceased husband, and the property devolved upon the next of kin, *i.e.*, the *sapindas* of Genu. And as Genu

* Special Appeal No. 345 of 1875.

does not appear to have left any other relatives than four sisters and a separated cousin of his father, (*i.e.*, the plaintiff), his next heirs are his sisters, according to the Vyavahara Mayukha (ch. iv, s. 8), to the Bombay construction of the passage in the first paragraph of ch. ii, s. 4, of the Mitakshara, relating to the succession of brethern, and to the ruling of the late Supreme Court in *Vinayak Anandrav* v. *Lakshmibai*, confirmed by the Privy Council (1 Bombay High Court Reports, pp. 117, 129). [216] The four sisters of the deceased Genu, then, the eldest of whom is married to the defendant Biru and the others under his protection according to his allegation, are entitled to the disputed estate, and not the plaintiff who is only a remote male paternal relative of the deceased."

In appeal, the Assistant Judge reversed the decree of the first Court, on the ground that, as ruled in *Krishnaji* v. *Pandurang* (1), the Mitakshara prevailed in the Southern Maratha Country as the paramount authority, and that, according to it, the plaintiff Khandu was the preferable heir.

Manekshah Jehangirshah, for the appellant.—The sisters' claim as heir to their deceased brother Genu is supported by the ruling of the late Supreme Court in *Vinayak Anandrav* v. *Lakshmibai* (2). That ruling was affirmed on appeal by the Privy Council (3). The question of the sisters' right of succession was fully discussed in both the Courts. The decision of the Supreme Court is based not only on the Mayukha but on the Mitakshara. The Assistant Judge was wrong in supposing that the sisters' right was not supported by the Mitakshara. The learned pleader referred to Mitakshara, ch. ii, s. 4, pl. 1 (Stokes' H. L. Books 443); Vyavahara Mayukha, ch. iv, s. 8, pl. 19 (Stokes' H. L. Books, 89); *Bhaskar Trimbak Acharya* v. *Mahadeo Ramji* (4).

Ghanasham Nilkanth Nadkarni, for the respondent.—This case comes from the Southern Maratha Country, and is, therefore, governed by the Mitakshara, as ruled in *Krishnaji* v. *Pundurang*(1). The text in the Mitakshara, ch. ii, s. 4, pl. 1 (Stokes' H. L. Books 443), does not mention sisters as heirs. The word used in the original text is *brethren*. It is the ingenuity of commentators and other writers on Hindu law which has interpreted the word as including "brothers and sisters." If sisters, therefore, have no place in the list of *sapinda* heirs, as none is given to them by the Mitakshara, the plaintiff is entitled to succeed to the property in dispute as a *sapinda* relation of the deceased Genu.

JUDGMENT.

[217] WESTROPP, C.J.—Genu Kushaba died in or about the year 1867, leaving surviving him his widow Jivubai and four sisters, but no issue. The only point in dispute before this Court (there had been another in dispute in the Court of first instance which has not been raised here) was the right to succession to half of two fields (Nos. 82 and 95) situate in the village of Avandi, in the Sholapur District, which had belonged to Genu at the time of his death, and which his widow Jivubai subsequently had held until her re-marriage to Rama Tarange. She then (having, under Act XV of 1856, s. 2, and the Hindu law, lost her estate in the lands as the widow of Genu) transferred them to one Sadu Padvalkar to hold on behalf of the four sisters of Genu who were minors. Sadu having died, the second defendant Biru, his son, continued to hold them on behalf

(1) 12. B.H.C.R. 65.
(2) 1 B. H. C.R. 117 (129).
(3) 9 M.I.A. 516=3 W.R.P. C 41.
(4) 6 B H. C. R. 1.

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of the four minors. The plaintiff Khandu, as first cousin on the paternal side of Kushaba, the father of Genu, and, consequently, as first cousin on the same side once removed of Genu, instituted this suit to recover (besides a share of land not now in dispute) the moieties of survey numbers 82 and 95 held by Genu and subsequently by Jivubai until her re-marriage. He made her and Biru and Gopala Padvalkar defendants in the suit. Jivubai made no claim on her own behalf, but asserted the title of Genu's four sisters. Biru also asserted their title, and Gopala disclaimed any interest in the lands or suit. The Subordinate Judge, while making a decree in favour of the plaintiff on the other matter in suit, held, on the authority of *Vinayak Anandraav Lakshmibai* (1), that the title of the four sisters of Genu was preferable to that of the plaintiff as paternal first cousin once removed of Genu. The Senior Assistant Judge, on appeal, being of opinion that the case above quoted did not apply to the South Maratha Country, where the property in dispute is situated, and, referring to *Krishnaji* v. *Pandurang* (2), reversed so much of the Subordinate Judge's decree as related to Genu's moieties of the fields Nos. 82 and 95.

In *Krishnaji* v. *Pandurang*, the question of succession was whether the half-brother or the paternal nephew of the deceased proprietor of lands, &c., at Bagalkot, in the District of Belgaum, [218] in the South Maratha Country, had the better title; and a Division Bench of this Court, taking the Mitakshara as its guide in preference to the Mayukha, gave the priority to the half-brother. There was not any question there as to the right of a sister.

In *Sakharam* v. *Sitabai* (3) the full-sister of a deceassd proprietor of immoveable property situated at the Island of Karanja, in the Northern Konkan, was preferred to his half-brother; and it was in that case held that the decision in *Vinayak Anandrav* v. *Lakshmibai* (1) is applicable to the whole of this Presidency, except where there may be an ancient and invariable special custom to the contrary established in proof. The reasons for that ruling are so fully stated in the judgment delivered in *Sakharam* v. *Sitabai*, that we do not propose to repeat them here. In *Mahantapa* v. *Nilgamgawa* (4), a case from Kaladgi, in the District of Belgaum, in the South Maratha Country, the sister of the deceased was preferred to his uncle's widow on the principles laid down in the two last mentioned cases. *Dhondu* v. *Ganga* (5) was an instance of a sister being preferred, on the same authorities, to a more remote male relative of the *propositus*. The present plaintiff Khandu, being a paternal first cousin once removed of the deceased Genu, is one degree more remote from the *propositus* than the unsuccessful claimants in *Vinayak Anandrav* v. *Lakshmibai*, who were male paternal first cousins of Gajanan, which case is, therefore, *a fortiori*, an authority against the plaintiff. And both the Privy Council and the Supreme Court there acted as well on the Mitakshara, as interpreted by Nanda Pandita and Balambhatta, as on the Mayukha. We must hold that the four sisters of Genu became his heirs on the re-marriage of Jivubai. In a Surat case, *Bhaiji Girdhur* v. *Bai Kushal* (6), there was a similar decision by Melvill and West, JJ. The decree of the Senior

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(1) 1 B. H. C. R. 117=9 M.I.A. 516. (2) 12 B.H.C.R. 65. (3) 3 B. 353.
(4) See note to *Sakharam* v. *Sitabai*, 3 B. 353 (368). (5) 3 B. 369.
(6) No. 63 of the Printed Judgments of 1873, and West and Buhler (2nd ed.) 182, Note *a*.

Assistant Judge is reversed, and the decree of the Subordinate Judge is restored. The plaintiff Khandu must pay to the defendant Biru his costs of both appeals.

Decree reversed.

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[219] APPELLATE CIVIL.

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

VITHALDAS MANICKDAS (*Original Defendant*), *Appellant v.* JESHUBAI (*Original Plaintiff*), *Respondent.** [17th October, 1879.]

Hindu law—Inheritance—Daughter-in-law, right of succession of, in priority to a paternal first cousin.

A Hindu widow who had inherited the estate of her separated husband, died leaving her surviving a widowed daughter-in-law and a first cousin of her deceased husband, *i.e.*, his paternal uncle's son. In a suit brought by the daughter-in-law to recover possession of certain immoveable property left by the deceased widow:

Held, that in the Presidency of Bombay the daughter-in-law was entitled to succeed to the property in priority to the paternal first cousin of her deceased husband.

[R., 12 B. 505; 21 B. 739 (744).]

THIS was a special appeal from the decision of S. Tagore, Acting Senior Assistant Judge at Kaladgi, in the District of Belgaum, affirming the decree of Krishnarav Pandurang, Subordinate Judge at Bijapur.

The plaintiff brought this suit against the defendant to establish her right to, and to recover possession of, certain immoveable property left by her mother-in-law Sarasvatibai, and to set aside a deed of gift executed by her (Sarasvatibai) in favour of the defendant. Sarasvatibai died on the 15th January 1874.

The defendant Vithaldas answered that as the plaintiff's husband Baladas died during the lifetime of his father Parsotumdas, she (the plaintiff) had no claim to the property in dispute; that he (defendant) was entitled to succeed to it as the next heir of Sarasvatibai's husband; that the plaintiff had no right to question the validity of the deed of gift made by Sarasvatibai in his favour.

The Subordinate Judge made a decree in favour of the plaintiff.

In appeal the Senior Assistant Judge affirmed the decree of the first Court, holding that the plaintiff was entitled in priority to [220] the defendant under the Mitakshara, and that the deed of gift was invalid as against the plaintiff, inasmuch as Sarasvatibai, having had only a life-interest in the property, was not competent to alienate it by gift.

The defendant thereupon preferred a special appeal to the High Court.

Nagindas Tulsidas, for the appellant.—A daughter-in-law is not mentioned in the series of heirs given in the Hindu law books. As held in *Venkapa* v. *Holyava* (S. A. No. 60 of 1873, decided by Melvill and West, JJ., on the 21st July 1873), the enumerated heirs take before all other heirs. That case also decided that the brother of a separated Hindu

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* Special Appeal No. 474 of 1874.