

5 B. 110 (P.C.) = 7 I.A. 212 = 4 Sar. P.C.J. 164 = 3 Suth. P.C.J. 795 = 4 Ind. Jur. 533 = 3 Shome L.R. 245 = 7 C.L.R. 445.

[110] PRIVY COUNCIL.

PRESENT:

*Sir James W. Colvile, Sir B. Peacock, Sir M. E. Smith
and Sir R. P. Collier.*

[*On appeal from the High Court of Bombay.*]

LALLUBHAI BAPUBHAI AND OTHERS (*Plaintiffs*) v. CASSIBAI AND OTHERS (*Defendants*). [27th, 29th and 30th April, 1880.]

Hindu law—Inheritance—Order of succession to inheritance by the Hindu law of Western India—Gotraja sapinda—Right of widow of collateral relation.

By the Hindu law in force in Western India the widow of a collateral relation, although she is not specified in the texts among the heirs to members of her husband's family, may come into the succession, as one of the classes of gotraja sapindas of that family.

According to the law of the Mitakshara, as accepted in Western India, the right to inherit in the classes of gotraja sapinda is to be determined by family relationship, or the community of corporal particles, and not only by the capacity of performing funeral rites.

The High Court having affirmed as a right, according to the law actually prevalent in Western India, the claim of a widow of a first cousin, on the father's side, of the deceased to inherit his estate, as a gotraja sapinda, it was held that there was no reason for withholding from that doctrine the force of law; the right of the widow being mainly rested on the ground of positive acceptance and usage. In this case the widow of a first cousin of the deceased, on the father's side, was held to have become by her marriage gotraja sapinda of her husband's cousin's family, and to have a title to succeed to the estate of that cousin on his decease, in priority to male collateral gotraja sapindas, who were seventh in descent from an ancestor common to them and to the deceased, who was sixth from that common ancestor.

[N.F., 37 C. 214 = 11 C.L.J. 588 = 14 C.W.N. 443 = 5 Ind. Cas. 135; 8 M. 107 (127); 100 P.R. 1901; R., 32 B. 499 = 10 Bom. L. R. 692; 33 M. 439 = 5 Ind. Cas. 280 = 20 M.L.J. 275 = 7 M.L.T. 203 = (1910) M.W.N. 44; 5 Ind. Cas. 748 = 6 N.L.R. 39; 7 N.L.R. 116 (121) = 10 M.L.T. 226 (229); 11 Ind. Cas. 885 = 21 M. L. T. 856; 11 Ind. Cas. 907.]

APPEAL from a decree of the High Court of Bombay (April 29th, 1876),* reversing a decree of a Division Court (April 20th, 1872), except as to costs.

This appeal related to the succession to the estate of Mulji Nandlal, a Hindu resident in Bombay, who died in 1840 without male issue, but leaving a widow, Sarasvatibai, and a daughter, Jethibai, to whom he had made certain bequests by his will. The daughter died in 1841, and the widow in 1861.

Mulji Nandlal appointed his nearest male relation, Gangadas Vizbhukandas, his first cousin by the father's side, and one Trikamlal Avechuldas to be the executors of his will. Trikamlal died in 1842, and Gangadas in 1861; the latter having appointed [111] his widow and heiress Mankuvarbai to be his sole executrix, who dying during these proceedings, was then represented by the respondent Cassibai.

The facts of the case are stated, and the will is set forth, in the judgment of the Chief Justice, Sir Michael Westropp, reported, with that of Mr. Justice West, in the second volume of the *Indian Law Reports*,

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1880 Bombay Series, pp. 395 and 435; where also is a pedigree table showing the relationships of the parties. The suit out of which this appeal arose was brought, more than nine years after the death of Sarasvatibai, by the first and second appellants, alleging themselves to be the nearest male heirs of Mulji Nandlal, and next in succession to his widow. The other appellants were joined as assignees from them of part of the estate. They claimed against Mankuvarbai, as widow and executrix of Gangadas, that the trusts of the will of Mulji Nandlal should be carried out; that accounts should be taken; and that his estate being administered under an order of Court, the residue thereof should be handed over to them.

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Mankuvarbai, among other defences, denied that the first and second plaintiffs were the next heirs to the estate of Mulji Nandlal, alleging her own title as widow of his cousin Gangadas Vizbhukandas. A statement of an adoption by her caused an addition of parties who were, however, afterwards by consent dismissed from the suit. The Court of first instance, having decided the case in favour of the defendant, on the strength of the judgment in *Lakshmbai v. Jayram Hari* (1), afterwards, on a remand from the High Court in its appellate jurisdiction, decreed for the plaintiffs, recording its opinion as follows:—

"Lallubhai Bapubhai and Casidas Mulchand (the former being the great, great, great grandson of Motilal Casidas, who was the great, great, great grandfather of Mulji Nandlal, and the latter being one degree further distant) are now entitled, as the next heirs to Mulji Nandlal, to succeed to his estate from the death of his widow Sarasvatibai, which took place in March 1862." On appeal this last decision was reversed by the High Court, on the ground that by the law and usage of [112] Western India the widow Mankuvarbai, being a gotraja sapinda of a collateral relation, nearer than the two collaterals who claimed, had become entitled. The Court held that the doctrine, that a widow might be a gotraja sapinda in her husband's family for the purpose of inheriting, accorded with the Achara Kanda, the Mitakshara and the Mayukha. That the recognition of the widows of gotraja sapindas as themselves gotraja sapindas, however slender the basis on which it originally rested (so far as collaterals were concerned), had become a part of the customary law, wherever the doctrines of the Mitakshara prevailed, and the Courts must give effect to it accordingly (2).

On this appeal,

Cowie, Q.C., and *Graham, Q.C.*, appeared for the appellants.

Leith, Q.C., *Scoble, Q.C.*, and *Mayne*, for the respondents.

For the appellants it was argued that Mankuvarbai did not succeed to the estate of Mulji Nandlal as a gotraja sapinda in the family of Gangadas Vizbhukandas, her deceased husband. No text in Menu, or in the Mitakshara, or the Mayukha, showed affirmatively that the widow of a collateral relation was among the heirs. Although by marriage the wife entered the husband's gotra, the right construction of the relation of sapinda prevented the inference that she became, for all purposes, a gotraja sapinda, and entitled to inherit as an heir, in her husband's family. Even if she became a gotraja sapinda by community of corporal particles, or consanguinity (as being one with her husband; Menu, chap. IX, s. 8 and s. 45); she nevertheless remained, save as regarded that husband, without

(1) 6 B.H.C.R.A.C.J. 152.

(2) See judgment of West, J., at p. 444 of 2 Indian Law Reports, Bombay Series.

that main characteristic of the sapinda relationship which was the basis of the claim to inherit, viz., the capacity to perform with efficacy certain obsequial rites.

The widow could not present the oblations of food at the shradha of any of her husband's family, except at his. She, therefore, could not come into the succession, independently of him, for whom alone she could, with efficacy, perform the requisite funeral rites; and she could not inherit that which her husband had never inherited.

[113] The right of succession did not depend only on the theory of the community of corporal particles. The word "sapinda" must be read with, and construed in reference to, its surroundings in the texts; wherein its meaning was connected with the offering made by the surviving relation, regarded as heir of the deceased, for the spiritual benefit of the latter. The meaning of the word sapinda as applied in the rules of affinity, or of the degrees within which marriage was prohibited, was not identical with that applicable in the law of inheritance.

The ancient Hindu law excluded females generally from the succession, admitting them only in the specified cases given by the authorities. And although in Western India the exclusion of women from inheriting was not as general as it was in other parts of Hindustan, nevertheless their capacity to inherit had not been so fully recognized as that a main principle of the law of inheritance could be said to have been long disregarded, and in effect abolished. The main principle was that the right to inherit depended on the capacity to offer oblations for the spiritual benefit of the deceased.

To contest the application of this principle in this case, little, if anything, had been brought forward beyond the authority of the "shastris"; whose "replies," collected in Messrs. West and Buhler's Digest, were not in all cases well founded, and did not always agree. The authority of the shastris was insufficient to warrant the admission of the widow of a collateral relation; a step far beyond the permitting the widow in the direct line to succeed. Reference was made to Menu, ch. ix, sl. 185, 186, 187, 142; ch. v, sl. 60; Dattaka Mimamsa, s. 6, sl. 12; Annotation 10, sl. 32; Dayabhaga, ch. xi, s. 1, sl. 31-43; s. 6, sl. 17, 21; Dayakrama Sangraha, ch. i, s. 10, sl. 24, 25; s. 3, sl. 4; ss. 5 and 8; Mitakshara, ch. i, s. 10, sl. 1; s. 11, sl. 21, 22, 31; ch. ii, s. 1, sl. 18; s. 2, sl. 6; s. 3, sl. 2, 5; Vyavahara Mayukha, ch. iv, s. 5, sl. 18, 21, edition by Stokes, p. 64; Hindu Law of Inheritance, West and Buhler, Vol. II, s. 2; *Rutcheputty Dutt Jha v. Rajunder Narain Rao* (1); *Bhyah Bam Singh v. Bhyah Ugur Singh* (2); *Bar Amrit v. Bai Manik* (3); [114] *Peddammattu Viramani v. Appa Rau and others* (4); *Pranshunker v. Prankoonwar* (5); *Massamat Ayabutee v. Rajkissen Sahoo* (6); *Soorendronath Roy v. Mussamat Heeramonee Burmoneah* (7); *Girdhari v. The Bengal Government* (8).

For the respondents it was argued (without any admission that the widow of a first cousin could not, by offering at the shradha, confer spiritual benefit on his relations) that the connection of gotraja sapinda was established, according to the law of Western India, by constructive consanguinity, or the theory of the community of corporal particles. Although the Mitakshara did not expressly include the widow as an heir, its language

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(1) 2 M.I.A. 132 (149, 158).

(3) 12 B.H.C.R. 79.

(5) 1 Borradaile S.D.A. 42. In 2nd ed., p. 471.

(6) 3 Beng. S.D.A. (Sel. Dec.) 28 (I.D.O.S., Vol. VI, p. 708).

(7) 12 M.I.A. 81.

(2) 13 M.I.A. 373 (392).

(4) 2 M.H.C.R. 117.

(8) 12 M.I.A. 448.

1880 was not inconsistent with her being one. On its being conceded that
 APRIL 30. the widow was under no general incapacity;—and this had been
 affirmed in the law and usage of Western India;—there remained no
 PRIVY obstacle in the way of her right to take her place in the order of succession.
 COUNCIL. The questions to be decided were: 1st.—What was the gotra of a wife?
 5 B. 110 2nd.—Becoming gotra sapinda of her husband, did she not become also
 (P.C.)= gortaja sapinda in his family? The latter question had been answered
 7 I.A. 212= in the affirmative in the Bombay Presidency, where the consanguinity of
 4 Sar. P.C.J. the wife had been recognized by the Courts, as was shown by cases in the
 164=3 Supreme Court as far back as 1813. Upon this question of the widow's
 8uth. P.C.J. right to inherit, the replies of the shastris, collected by Messrs. West
 795=4 and Buhler, were not cited as authority for the purpose of wresting the
 Ind. Jur. texts of the Mitakshara or the Mayukha. Those replies, and they were
 533=3 numerous, were cited to show a recognized usage existing among the
 Hindus governed by the Mitakshara and the Mayukha; and, in fact,
 Shome. L.R. received by the particular school prevailing in the district referred to. It
 245=7 was requisite to ascertain the latter, according to the principle expressed
 C.L.R. 445. in the judgment in *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (1), becoming gotraja in her husband's gotra, the wife became
 sapinda in his family, not in reference to the observance connected
 with the "pinda," but by a community [115] assumed in law
 to exist, of corporal particles. The wife was "born again" on mar-
 riage, and became identified with her husband's family, on whom fell the
 duty of performing her shradha when she was left a widow. If,
 however, the widow's right of inheritance must be referred to the efficiency
 of her funeral oblations, the widow of the first cousin, even then, would
 inherit before sapindas so distant as the appellants. The widow's perform-
 ance of the requisite ceremony, at her husband's shradha, would, in the
 theory to the ceremonial law, benefit three generations of his progenitors;
 and she was entitled to a place in the order of succession, even on this
 ground; although the other was the stronger ground, and the proper
 reason for her admission. Reference was made to Menu, ch. ix, sl. 28,
 187, 15; Mitakshara, sh. i, ch. ii; s. 11, sl. 9, 11, 25; ch. ii, text
 7; Colebrooke's Digest, V, ch. viii, text 399; Viramitrodaya, ch. iii,
 s. 4; Vayavahara Mayukha, ch. iv, s. 8; Dayabhaga, s. 6, sl. 1;
 Smriti Chandrika, ch. xi, s. 5; Achari Kanda 1 West and Buhler;
 Mayne's Hindu Law and Usage, paras. 430, 436, 453, 455; West and
 Buhler, Hindu Law of Inheritance, 145; Steele's Law and Customs
 of Hindu Castes, 27, 34, 225, 231; Stoke's Preface to Hindu Law Books, 8;
 Goldshuker's illustrations of Hindu Law; Colebrooke's Essays; *Amrita
 Kumari Debi v. Lakhinarayan Chackerbutty* (2); *Guru Gobind Shaha
 Mandal v. Anand Lal Ghose Mazumdar* (3); *Srimuttu Muttu Vizia v.
 Dorasinga Thevar* (4); *Dhoolubh Bae v. Jeevee* (5); *Muha Lukmee v. Three
 Grandsons of Kripashookal* (6); *Mussamut Jethee and others v. Mussamut
 Sheo Bae* (7); *Roopchand Talukchand v. Phoolchand Dhurmchand* (8);
Bhyah Ram Singh v. Bhayah Agur Singh (9); *Lakshmibai v. Jayram
 Hari* (10).

Cowie, Q.C., replied.

(1) 12 M. I. A. 397.

(3) 5 B.L.R. 15.

(5) 1 Borr. S.D. 67. In 2nd ed., p. 75.

(7) 2 Borradaile, Bom. S. D. A. 588.

(8) 2 Borradaile, Bom. S. D. A. 616. In 2nd ed., p. 670.

(9) 13 M.I.A. 373 (394).

(2) 2 B.L.R. F. B. 28.

(4) 6 M.H.C.R. 310.

(6) 2 Borradaile, Bom. S.D.A. 510.

(10) 6 B.H.C.R.A.C.J. 152.

JUDGMENT.

The judgment of their Lordships was delivered by
 SIR MONTAGUE E. SMITH.—The question which arises in this appeal relates to the succession to the estate of Mulji Nandlai [116] a Hindu inhabitant of Bombay, which opened on the death of his widow Sarasvatibai. Mulji died in 1840, leaving as his only child a daughter, who died childless in the lifetime of his widow. The widow died in 1862.

At the time of Mulji's death, his paternal first cousin, Gangadas Vizbhukandas, was his nearest male relative. He died in the lifetime of Mulji's widow, leaving no son, but leaving a widow, Mankuvarbai, the original defendant in this suit, and two daughters, who all survived Mulji's widow. Mankuvarbai died during the progress of the suit, and the respondent, Cassibai, is her executrix.

The first and second plaintiffs in the suit claim to be entitled to the estate of Mulji as being his nearest male heirs when the succession opened on the death of his widow.

Their relationship is clearly stated in the following passage of the judgment of Chief Justice Westropp:—

"It has not been denied that, according to the law, which under the Mitakshara and Mayukha prevails in the presidency. Lallubhai and Mulchand (the father of Casidas the second plaintiff) were gotraja sapindas of Mulji; the common ancestor of them and of Mulji was Motilal who, counting inclusively, was sixth in ascent from Mulji, and the brothers Lallubhai and Mulchand were seventh in descent, from Motilal. They are, therefore, on the extreme verge of sapinda relationship."

The other plaintiffs are purchasers from the first two plaintiffs.

Several of the issues raised in the suit have been finally disposed of by the Courts in India, and the single question to be now decided is, whether, by the Hindu law of inheritance prevailing in Western India, Mankuvarbai, the widow of Gangadas, who as paternal first cousin was related in the third degree to Mulji, became by her marriage with Gangadas a gotraja sapinda of Mulji, and, as such, entitled to succeed to his estate in preference to the first and second plaintiffs, who were related to him only in the remote degree above indicated.

Mr. Justice Bayley, sitting as a Judge exercising the original jurisdiction of the High Court, on his first hearing of the cause, [117] decided in favour of the right of the widow, following the decision of a Division Bench in the case of *Lakshmbai v. Jayram Hari* (1). Upon a remand of the case on other points, Mr. Justice Bayley, acting on his own opinion, came to an opposite conclusion upon the question of the widow's right from that arrived at in the decision he had before followed, and gave a decree in favour of the plaintiffs. On appeal, this last decree was reversed by the unanimous judgment of a Full Bench of the Bombay High Court, and Mr. Justice Bayley's original judgment was restored.

It is fully acknowledged by the learned Judges of the High Court that the law prevailing in Bengal and Southern India is opposed to the right claimed by the widow; but they arrived at the conclusion that a different interpretation of the law has been accepted in Western India, and the elaborate judgments of the Chief Justice (in which Mr. Justice Sargent concurred) and of Mr. Justice West are directed to elucidate the grounds on which the distinction rests.

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The books whose authority is principally followed in Western India are Manu, the Mitakshara and the Mayukha. These are stated by the Chief Justice, and, no doubt, correctly, to be "the reigning authorities" in the Presidency of Bombay. The learned Judges have sought to support their decision in favour of the widow from passages found in these works. It is acknowledged that the rule of succession to which they have given effect is but dimly enunciated in these passages, but the Judges have considered that the interpretation which has been given to them in Western India, evidenced by decisions and the opinion of shastris, has fixed and determined the law for that part of India.

A text of Manu was cited, which is supposed to affirm the right of women to inherit :—"To the nearest sapinda, male or female, after him in the third degree, the inheritance next belongs; then, on failure of sapindas and their issue, samanodaka or distant kinsmen shall be the heir" (chap. xi, pl. 187). The words "male or female" appear to have been imported into the text by Sir W. Jones and Mr. Colebrooke on the authority of a commentator, Kalluka Bhatta. Even if it be assumed that these [118] words are rightly introduced, the text, though it sanctions the principle that women may inherit as sapindas, and so is consistent with the right of the widow to inherit as a sapinda of her husband's family, does not affirm that right.

According to the received doctrine of the Bengal and Madras schools, women are held to be incompetent to inherit, unless named and specified as heirs by special texts. This exclusion seems to be founded on a short text of Bhandhayana which declares that "women are devoid of the senses, and incompetent to inherit." The same doctrine prevails in Benares; the author of the Viramitrodaya yields, though apparently with reluctance, to this text. (Chap. 3, Part 7).

The principle of the general incapacity of women for inheritance, founded on the text just referred to, has not been adopted in Western India, where, for example, sisters are competent to inherit. That principle, therefore, does not stand in the way of the widow's claim in the present case. She still, however, has to establish that she is a gotraja sapinda of her husband's family, and as such entitled, by the law prevailing in Bombay, to inherit the estate of one of its members.

It is not disputed that on her marriage the wife enters the gotra of her husband, and it can scarcely be doubted that in some sense she becomes a sapinda of his family. It is not necessary to cite authorities on this point. But a statement of the doctrine in a note by Mr. Borradaile to his reports may be referred to. He says: "Because a woman on her marriage enters the gotra of her husband, so respondents, being sagotras of Pitambar, are sagotras of his wife also" (1 Borr. 70, n. 2) (1). Whether the right to inherit follows as a consequence of this sapinda relationship is the question to be considered.

The following passage from the Achara Kanda of the Mitakshara was cited to show that sapinda relationship depends on having the particles of the body of some ancestor in common, and not on the connection derived from the capacity of making [119] funeral offerings. It was also cited for the declaration that husband and wife, brother's wives are sapindas to each other :—

(1) See note 2 to Case No. 15 *Dhoolubh. Bae Jeevee*, 1 Borradaile, S.D.A. 67. In 2nd ed., p. 75.

“(He should marry a girl) who is non-sapinda, *i.e.*, (1) a sapinda (with himself). She is called his sapinda who has (particles of the body) (of some ancestor) in common (with him). Non-sapinda means not his sapinda. Such a one (he should marry). Sapinda relationship arises between two people through their being connected by particles of one body. Thus the son stands in sapinda relationship to his father, because of particles of his father's body having entered (his). In like (manner stands the grandson in sapinda relationship) to his paternal grandfather and the rest, because, through his father, particles of his (grandfather's) body have entered into (his own). Just so is (the son a sapinda relation) of his mother, because particles of his mother's body have entered (into his). Likewise (the grandson stands in sapinda relationship) to his maternal grandfather, and the rest through his mother. So also (is the nephew) a sapinda relation of his maternal aunts and uncles and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs); likewise (does he stand in sapinda relationship) with paternal uncles and aunts and the rest. So also the wife and the husband are sapinda relations to each other, because they together beget one body (the son). In like manner brothers' wives also are (sapinda relation to each other) because they produce one body (the son), with those (severally) who have sprung from one body (*i.e.*, because they bring forth sons by their union with the offspring of one person, and thus their husband's father is the common bond which connects them. Therefore, one ought to know that wherever the word sapinda is used, there exists (between the persons to whom it is applied) a connection with one body, either immediately or by descent.”

A translation of some passages in the Sankara Mayukha to the same effect will be found in the judgment of Chief Justice Westropp, of which following is an extract:

“Therefore (to explain the different parts in the formation of the word ‘a sapinda’ by dissolving the compound ‘a sapinda,’) [120] she is sapinda who has one and the same pinda (body) (*i.e.*, dehavayava (constituent atoms) *na* (not) *sapinda* is a sapinda. Thus, therefore, the father's constituent atoms, *viz.*, blood, fat, &c., directly enter into the body of the son, and (the constituent atoms) of the paternal grandfather (enter the son's body) through the medium of the father. In the same manner with reference to (the constituent atoms of) the paternal great grandfather, &c., also somehow the transmission of constituent atoms mediately exists. So with the mother, &c., also so the wife has sapindya from the husband, because they are the generators of one body. In some instances, sapindya exists by reason of being the holders of the same constituent atoms. Thus, the wives of brothers are sapindas to each other, for they hold the constituent particles of the same father-in-law through the media of their husbands. In this way somehow the sapindya in other cases also should be inferred.”

Vijnanesvara and Nilakantha were, no doubt, treating in these passages of sapinda relationship in connection with marriage; but no further definition of sapindas is given in those parts of their respective books, which treat of inheritance. The learned Judges below have inferred, in the absence of any indication to the contrary, that the above-mentioned definitions were intended by the authors of the Mitakshara and the Mayukha to apply wherever in those books sapindaship was treated of, and consequently where it was treated of in relation to the right to inherit.

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In addition to the above-mentioned authorities, the Chief Justice refers to the Dattaka Mimamsa as strongly maintaining the doctrine that sapindaship depends upon community of corporal particles, and not upon the presentation of funeral offerings to the pitris.

It was contended by the learned counsel for the respondents that, even if sapindaship for the purpose of inheritance had to be determined by the efficacy of funeral oblations, the widow would be entitled as a gotraja to succeed, because her offerings would benefit the manes of her husband's grandfather Kisoredass, the common ancestor (in the third degree) of her husband and Mulji. Their Lordships do not think it necessary to consider [121] the authorities on which this contention was supported, though they may observe that a judgment of Mr. Justice Mitter (1) affirming that a sister's son is, under the Mitakshara as interpreted in Benares, entitled to succeed, throws great light on the subject, since they are prepared to assent to the conclusion to which the Judges of the High Court upon consideration of the authorities, arrived, that by the law of the Mitakshara, as interpreted and accepted in Western India, the preferential right to inherit in the classes of sapindas is to be determined by family relationship or the community of corporal particles, and not alone by the capacity of performing funeral rites. It may happen that, in some instances, the same person would be the preferential heir, whichever of these tests was adopted.

If then, as already pointed out, the wife upon her marriage enters the gotra of her husband, and thus becomes constructively in consanguinity or relationship with him, and through him, with his family, there would appear to be nothing incongruous in her being allowed to inherit as a member of that family under a scheme of inheritance which did not adopt the principle of the general incapacity of women to inherit. But, though it may be consistent with this theory of sapinda relationship to admit the widow so to inherit, the existence of the right has still to be established.

It is acknowledged that the widow of a collateral relative is nowhere specified and named as heir to members of her husband's family; she must therefore come into the succession, if at all as one of the class of gotraja sapindas, and it is in this way that her claim has been put forward at the bar.

The author of the Mitakshara, after discussing in detail the series of heirs first entitled to inherit down to brother's sons, proceeds in cap. 2, s. 5, to treat of the succession of Gentiles. Extracts from this section are given in the judgment of the Chief Justice (2), the translation of Mr. Colebrooke being amended by substituting for the English rendering of the names of the [122] various classes of kindred, the Sanskrit names given in the original.

The first six slokas are thus rendered :—

" 1. If there be not brother's sons, gotrajas (3) share the estate. Gotrajas are the paternal grandmother and sapindas (4) and samonodaka (5)."

" 2. In the first place the paternal grandmother takes the inheritance. The paternal grandmother's succession immediately after the

(1) See *Amrita Kumari Devi v. Lakhinnarayan Chuckerbutty*, 2 B.L.R. (F.B.) 28.

(2) 2 B. 431.

(3) Trans. by Colebrooke, "Gentiles."

(4) Trans. by Colebrooke, "relation connected by funeral oblations of food."

(5) Trans. by Colebrooke, "relations connected by libations of water."

mother was seemingly suggested by the text before (1) cited. And the mother also being dead, the father's mother shall take the heritage (2). No place, however, is found for her in the compact series of heirs from the father to the nephew, and that text ('the father's mother shall take the heritage') is intended only to indicate her general competency for inheritance; she must, therefore, of course succeed immediately after the nephew, and thus there is no contradiction.

"3. On failure of the paternal grandmother, gotraja sapindas (3)—namely, the paternal grandfather and the rest—inheriting the estate.

"For binnagotra-sapindas (4) are indicated by the term bundhu (5).

"4. Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons.

"5. On failure of the paternal grandfather's line, the paternal great-grandmother, the great grandfather, his sons and their issue inherit. In this manner must be understood the succession of samangotra sapindas (6).

[123] "6. If there be none such, the succession devolves on samanodakas (7), and they must be understood to reach the seven degrees beyond sapindas (8) or else as far as the limit of knowledge and name extend. Accordingly Vhrat Manu says, 'the relation of the sapindas ceases with the seventh person, and that of samanodakas (9) extends to the fourteenth degree, or, as some affirm, it reaches as far as the memory of birth and name extends. (This is signified by gotra (10)).'

It cannot be said that these passages contain direct authority for the admission of a widow of a collateral relative to inherit as a sapinda to a member of her husband's family; but they were cited to show that women are entitled to inherit as sapindas, the paternal grandmother being named as the first sapinda for this purpose. There is a passage also to this effect in the *Mayukha*, c. 4, s. 8, pl. 18.

That the mention of certain members of the family as gotraja sapindas is not exhaustive and that others than those expressly mentioned may be included in the class, may be inferred from the following passage in pl. 3 of c. 2, s. 5 of the *Mitakshara* cited above:—"On failure of the paternal grandmother, gotraja sapindas, namely, grandfather and the rest, inherit the estate." It would seem, also, though the grandmother and great-grandmother are alone expressly mentioned, that the wives of the remoter ancestors in the direct ascending line up to the seventh degree would likewise succeed to their descendants as sapindas. Moreover, it has been decided by this Board that the enumeration of bundhus contained in the *Mitakshara* is not exhaustive: *Girdhari Lall v. The Bengal Government* (11). The reasons for so holding are applicable to the enumeration of sapindas, though, as Mr. Graham observed, the step from the wives of paternal ancestors to the wives of collaterals is a long one:

(1) *Mitak.*, ch. ii, s. 1, pl. 7.

(2) *Manu*, ch. ix, pl. 217.

(3) *Trans.* by Colebrooke, "kinsmen sprung from the same family with the deceased, and connected by funeral oblations."

(4) *Trans.* by Colebrooke, "kinsmen sprung from a different family, but connected by funeral oblations."

(5) *Trans.* by Colebrooke, "cognate."

(6) *Trans.* by Colebrooke "kindred belonging to the same general family and connected by funeral oblations of food."

(7) *Trans.* by Colebrooke, "kindred connected by libations of water."

(8) *Trans.* by Colebrooke "kindred connected by funeral oblations."

(9) *Trans.* by Colebrooke "those connected by a common libation of water."

(10) *Trans.* by Colebrooke "the relation of family name."

(11) 12 M.I.A. 448.

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5 B. 110.
(P.C.)=
7 I.A. 212=
3 Sar. P.C.J.
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Mr. Justice West, after discussing the Mitakshara and some of its commentators, came to the conclusion that "upon the [124] whole it would appear more probable than not, upon the text of the Mitakshara and its recognized exponents, that it did intend widows to be included among the gotrajas." Perhaps the most that can be said is, that the text of the Mitakshara is not inconsistent with the claim of the widow, and allows of an interpretation favourable to her right to inherit. The important point for consideration remains, namely, whether such an interpretation has been given to the Mitakshara by its expounders and the lawyers of the Bombay school, and has been so sanctioned by usage and decisions as to have acquired the force of law.

The Mayukha is also very fully discussed in the judgment of Mr. Justice West, and his consideration of it led him to the conclusion that, "if the foundation of the rights of widows of gotrajas under the Mitakshara is slender, under the Mayukha it may be called almost shadowy." After this appreciation of the two leading authorities by a Judge who has much studied them, it is obvious that the right of the widow must be mainly rested on the ground of positive acceptance and usage.

Commentators on the Mitakshara are referred to in the judgments below who have interpreted its text in a sense highly favourable to women. Two of them, whose opinions are closely applicable to the point under discussion, are thus referred to by Mr. Justice West:—

"Visvesvara, the author of the Subodhini, the chief commentary on the Mitakshara, says that 'gotraja' may properly be taken to include both males and females; and *Balambhatta*, insisting on the same view, applies it to the determination of the right of a predeceased son's widow whom he places next after the paternal grandmother."

The author of the *Vaijayanti*, a commentary on *Vishnu*, appears to have held that the son's widow would succeed in preference to the daughter. This opinion is referred to in the remarks of Mr. Colebrooke upon a case in the Appendix to *Strange's Hindu law* (2 Vol., 234). Mr. Colebrooke thinks that it is opposed to the prevalent doctrine of the school of the Mitakshara, which is that the daughter inherits in preference to the son's widow. He does not appear to question the right of the widow to inherit as [125] a sapinda, though no doubt it was unnecessary to do so in discussing the question of preference.

Their Lordships will now pass to the recorded answers of the shastris and the decision of the Courts, bearing on the question.

The answers of the shastris, which have been referred to at the bar, will be found in a digest of the Hindu law of inheritance by Messrs. West and Buhler, compiled from the replies of the shastris recorded in the Courts of the Bombay Presidency. Mr. West is the Judge of the High Court whose judgment has been already adverted to. These replies are in many cases unsatisfactory and in correct, but they are numerous, and the series taken as a whole undoubtedly recognizes and affirms the right of the widow to inherit as a gotraja sapinda to members of her husband's family. It is not necessary to refer to these answers in detail. Many of them are cited and commented upon in the judgment of Mr. Justice West and among these are answers which affirm that a sister-in-law inherits in preference to distant cousins, and even to first cousins, of the propositus.

Some early decisions of the Sadar Adalat, reported by *Borradaile*, are to the same effect. In the case of *Dhoolubh Bhaee and others v. Jeevee*

(A.D. 1813) (1), it was held that Jeevee, the widow of the son of a brother of Pitamber, the propositus, was entitled (on the death of Pitamber's widow) to succeed to his estate, and to hold it for her life in preference to a great grandson of another brother of Pitamber. It is not, however, stated in the report when Jeevee's husband died.

In another of the cases cited from Borradaile (*Mahalukmee v. The Grandsons of Kripastrookul* (2)), the Sadar Court held that a predeceased son's widow was entitled to succeed in preference to the sons of a daughter. This case, however, seems to have been decided upon a custom of the caste of Oudeech Brahmins. As a decision on the general law, apart from custom, it may not be capable of support, a sister's son being specially provided for by the Mitakshara (c. 2, s. 3, pl. 6).

In a later case, reported in Borradaile (1824), it was held that the widow of a predeceased son was entitled to inherit in preference [126] to the brother of the propositus: *Roopkund Tilukchand v. Phoolekund Dhurmchand and another* (3). This seems to be a direct decision on the right of the widow to inherit, though, whether in the order of heirs, the preference was rightly accorded to her in this case may be questioned.

In the case of *Lakshmibai v. Jayram Hari* (4) the High Court of Bombay (Justices Lloyd and Melvill) gave a clear and unqualified judgment in favour of the right of the widow of a predeceased collateral relative to succeed in preference to a more remote collateral male relative of the propositus. The High Court expressly found that this order of succession was in accordance with the law of inheritance prevailing on the Bombay side of India.

The High Court in the present case, after an exhaustive review of the authorities and precedents bearing on the question, have unanimously arrived at the same conclusion. Great weight is undoubtedly due to this decision, not only from the learning and research displayed in the judgments separately delivered by Chief Justice Westropp and Mr. Justice West, but also from the circumstance that both these learned Judges have had great and peculiar opportunities of becoming acquainted with the law of inheritance prevailing in Western India. The Chief Justice has passed a long judicial career in the Courts of Bombay, and Mr. Justice West is one of the compilers of the digest of the law of inheritance to which reference has already been made. Their Lordships do not find any satisfactory grounds which should induce them to dissent from the conclusion of the High Court that the doctrine which has actually prevailed in Bombay is in favour of the right of the widow; nor any sufficient reason for holding that the doctrine which has so prevailed should not have the force of law. They will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court, with costs.

Solicitors for appellants.—Messrs. *Ashurst, Morris, Crisp & Co.*

Solicitors for respondents.—Messrs. *Gregory, Rowclifes & Co.*

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(1) 1 Borradaile (Case No. 15) 67. In 2nd ed., p. 75.

(3) 2 Borradaile 616. In 2nd ed., p. 670.

(2) 2 Borradaile 510.

(4) 6 B. H. C. R. 152.