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and should have stayed further proceedings in the case. (The Code of Criminal Procedure, s. 423).

Under the provisions of s. 297 of the Code, this Court now quashes the conviction, and declares that the accused, Husen valad Bade Miya, is of unsound mind and incapable of making his defence; and the Court directs that the said Husen be released on sufficient security being given that he shall be properly taken [264] care of, and shall be prevented from doing injury to himself or to any other person, and for his appearance when required; and that, in default of such security being given, the case shall be reported by the Magistrate for the orders of Government.

Order accordingly.

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APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

BHAGIRTHIBAI (*Original Plaintiff* No. 1), *Appellant v.* BAYA (*Original Plaintiff* No. 2) AND OTHERS, *Respondents.**

[1st March, 1881.]

Hindu law—Inheritance—Right of sisters to succeed—Sisters endowed and unendowed, equal right of—Appeal against a co-plaintiff—Practice—Procedure.

Hindu sisters when they succeed take equally. An unendowed sister has no prior right of succession over an endowed sister, such as an unendowed daughter has over an endowed daughter.

By consent of parties the High Court allowed an appeal by one plaintiff against another plaintiff, and adjudicated upon their rights.

[R., 15 B. 145 (147); 15 B. 206 (209); 16 B. 119 (122); 21 B. 739 (744).]

THIS was a second appeal against the decision of J. L. Johnson, Acting Assistant Judge of Ratnagiri, modifying the decree of M. N. Nanavati, Subordinate Judge of Malvan.

The suit was originally brought by Bhagirthibai against Jandhuri and Nardhuri to eject them from a field, they having refused to pay her rent. She alleged in her plaint that the field belonged to her father, from whom her brother inherited it, and on his death his widow, Rukhmin, became the proprietor. Rukhmin died in November, 1871, and she, the plaintiff, claimed to be her heir.

Jandhuri and Nardhuri answered that the last proprietor Rukhmin mortgaged the field to one Yesu, and bequeathed all her property to her brother Sitaram, who was, consequently, the owner of the field, and that they were Sitaram's tenants.

The Subordinate Judge of Malvan, in whose Court the plaint was filed, added Yesu and Sitaram as defendants, and it appearing that Bhagirthibai had two sisters, Baya and Chevle, they were added as plaintiffs without any objection from Bhagirthibai. [265] Baya, however, did not appear in the Court of the Subordinate Judge; and Chevle, though she appeared, expressed a desire to give up her claim in favour of Bhagirthibai. The newly-added defendant answered that, under Rukhmin's will, the defendant Sitaram was the proprietor of the field, and not any of the plaintiffs. The Subordinate Judge made a decree, directing all the defendants to give up the field to the plaintiffs.

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* Second Appeal No. 367 of 1880.

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Against this decision two appeals were made to the District Court of Ratnagiri. The plaintiff Bhagirthibai appealed as against her two sisters, the newly-added plaintiffs; and the newly-added defendants, Yesu and Sitaram, appealed as against all the plaintiffs. The original defendants, the tenants in possession, did not appear. In disposing of the appeal the Acting Assistant Judge raised an additional issue, *viz.*, whether Baya (plaintiff No. 2) is poor, and Bhagirthibai (plaintiff No. 1) possessed of property, and, if so, whether by Hindu law plaintiff No. 2 has the right to inherit, and not plaintiff No. 1?" He disposed of that issue with the following remarks:—

"Baya is poor and Bhagirthi is possessed of property, and, by Hindu law, Baya, as being unendowed, has a prior right of inheritance as compared with Bhagirthi, who is endowed. In the case of *Bakubai* v. *Munchha Bai* (1) the suit was remanded for evidence on the following issue—'whether the pecuniary circumstances of the widows B and M are so far different as to give B a prior right of inheritance, under Hindu law, as compared with M, on the ground that she is an unendowed daughter.' The same criterion of comparative poverty was adopted as a rule in *Poli* v. *Narotam* (2). 'A *nirdhan* (unendowed) daughter has preference over a *sadhan* (dowered) daughter.' By Bhagirthibai's own admission she is rich, and Baya is poor."

The Assistant Judge accordingly modified the order of the Subordinate Judge, and decreed the Baya (plaintiff No. 2) should recover from the defendants possession of the field.

Bhagirthibai (plaintiff No. 1) alone appealed to the High Court, making the original and subsequently added parties respondents.

[266] *Ghansham Nilkanth Nadkarni*, for the appellant.—This is an appeal by one plaintiff against another, and is irregular; but to prevent litigation the appellant and respondent have agreed to submit their difference for adjudication by the High Court. The question is whether an unendowed sister has a prior right of inheritance over her endowed sister. There is no text of the Hindu law which gives such a preference, and no decision by any of the High Courts to that effect. The cases cited by the Assistant Judge refer to the daughter whose position is different from that of the sister: Stokes' Hindu Law Books, p. 89.

Jushvan and *Vasuder Athlye*, for the respondent Baya.—There is no express text to help the solution of the question, which should be determined by analogy. The case of daughter is analogous to that of sisters. The preference given to an unendowed sister is based upon a text of Gautama, which says: "A woman's property goes to her daughter's, unmarried or unprovided" (3). This text should also be resorted to in deciding the case of sisters. The analogy of male heirs, such as brothers, would be improper, for their succession stands on a different footing from the succession of female heirs (4). The daughters as well as the sisters are born in the family of the *propositus*, and the nature of their estate is to a certain extent held to be analogous in *Vinayak* v. *Lakshmibai* (5).

Ghanasham in reply.—The sister's right to succeed is based upon a specific text (6). The Mayukha, which provides for the case of competition among daughters by a specific rule, is silent in regard to sisters. Hence

(1) 2 B.H.C.R. A.C.J. 5. (2) 6 B.H.C.R. A.C.J. 183.
(3) Gautama 28, 22; Stokes' Hindu Law Books, pp. 86, 384, 440.
(4) Mayne's Hindu Law, 441-2-3. (5) 1 B.H.C.R. 117.
(6) Stokes' Hindu Law Books, p. 89, para. 19.

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it must be taken that, according to Nilkantha, the sisters take equally, irrespective of considerations of wealth or marriage.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—The Acting Assistant Judge ought not to have allowed one plaintiff to appeal against another, and ought to have declined to decide the rights of different plaintiffs *inter se*. Baya [267] had been joined as co-plaintiff with Bhagirthibai without any objection on the part of either; and, if successful, they were entitled to a joint decree, which would leave it open to them to adjust their respective claims subsequently.

The claim of the third sister, Chevle, was disallowed by the Acting Assistant Judge, and she has not appealed to this Court. It appears, moreover, that in the Court of first instance she expressed her readiness to resign any right which she might have in favour of Bhagirthi. The regular course for this Court to take would, therefore, be to reverse the Acting Assistant Judge's decree, to strike out Chevle's name from the Subordinate Judge's decree, but in other respects to confirm that decree. But the only parties before us are Bhagirthi and Baya, and the pleaders of both express a desire that we should determine the question between them, and decide, once for all, whether one only of the sisters, or both, are entitled to inherit the estate of their deceased brother. To prevent further litigation, we are willing to comply with this request.

The Acting Assistant Judge has held that Baya is poor, and Bhagirthi is possessed of property, and that, by Hindu law, Baya as being unendowed, has a prior right of inheritance as compared with Bhagirthi, who is endowed.

The rule of Hindu law, on which the Acting Assistant Judge's decision is based, is expressly applicable to daughters only, and no authority has been shown to us for making it applicable to sisters also. It depends upon a text of Gautama, quoted as authoritative both in the Mitakshara and the Mayukha. The rule as relating to daughters, is very clearly stated in both these commentaries; but no hint is given that it is to be applied to cases of inheritance by females other than daughters. It is true that the Mitakshara does not, in terms, refer to the question of inheritance by sisters; but the Mayukha deals with the subject in express terms, and within a very few paragraphs from that portion of the same chapter in which the inheritance by daughter is discussed, and the text of Gautama quoted and applied. It is not to be imagined that Nilkantha would not have expressly stated his opinion, if that opinion had been that the rule of [268] comparative wealth and poverty, which he had just been discussing, was applicable to sisters as well as to daughters.

It was suggested to us that, in the absence of authority, we should hold that sisters should be treated as daughters by analogy, and some observations by the Supreme Court in *Vinayak Lakshmibai* (1), at p. 124 of Vol. 1, Bombay H.C. Reports, were relied upon as supporting the suggestion. But we cannot see that the grounds, on which the succession of sisters depends, are such as would justify us in holding that a special rule regulating the inheritance of daughters ought, by analogy, to be applied to sisters. It would rather appear that analogies, if any, are to be sought in

(1) 1 B. H. C. R. 117.

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the rules applicable to brothers, or to *gotraja sapindas*, according as the Mitakshara or the Mayukha is taken to be the principal authority governing the case. We reverse the decree of the Acting Assistant Judge, and decree that Bhagirthi and Baya do recover the property in dispute, and hold the same as coparceners, until partition be effected between them. The original defendants to pay the costs of Bhagirthi and Baya in the Court of first instance and in appeal No. 74 of 1879. Bhagirthi and Baya to bear their own costs in cross appeal No. 81 of 1879 and in this second appeal.

Decree reversed.

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5 B. 268.

ORIGINAL CIVIL.

Before Mr. Justice West.

MERBAI, WIFE OF RATANJI JIVANJI, AND THE SAID RATANJI JIVANJI (*Plaintiffs*) *v.* PEROZBAI, WIDOW OF BURJORJI MERWANJI (*Defendant*).* [21st, 25th, 29th and 31st January, and 8th February, 1881.]

Gift—Necessity of endorsement of Government notes in order to complete gift—Donor constituting himself trustee for donee—Enforcement of trust by representative of donee—Trust—Trustee, liability of—Gift to sole and separate use among Parsis.

The plaintiffs Merbai and Ratanji were Parsis, and were married in the year 1851. The defendant was the widow of Burjorji Merwanji, who was the father of the plaintiff Ratanji. The plaintiffs sued to recover from the defendant [269] certain Government promissory notes which they alleged had been presented by Burjorji to Merbai at her marriage for her sole and separate use. They alleged that the said notes, then of the nominal value of Rs. 1,500 were endorsed in the name of the said Burjorji, and had been deposited by him for safe custody with Merbai's grandfather Jehangir; that the said Burjorji during his life used from time to time to receive the said notes from Jehangir, and draw the interest thereon for Merbai; that Burjorji died in 1864, and that after his death the defendant, who was his widow and executrix, used to draw interest for Merbai; that in 1869 she obtained possession of the said notes, and had ever since continued in possession thereof, informing the plaintiffs that she was duly keeping them and collecting the interest for Merbai; that the plaintiffs had been living with the defendant until shortly before the present suit, and having then separated from her, had called upon her to hand over the notes and the accumulated interest, which she refused to do. The defendant denied that her husband Burjorji had ever presented Merbai with Government notes for her separate use. She alleged that the notes, which had been deposited by Burjorji with Jehangir, were her own separate property, and not Merbai's; that she and her husband had dealt from time to time with them, and that no interest was ever paid to the plaintiffs, or either of them, or for their benefit. She further stated that some of the notes which had been deposited with Jehangir had been disposed of by Burjorji in his lifetime with her consent; that in 1869 she obtained the remaining notes from Jehangir, and sold them, and applied the proceeds to her own benefit. At the hearing it was proved that, on the occasion of the plaintiffs' marriage, presents were made to Merbai both by her own family and by that of the bridegroom, Ratanji. Two accounts were then opened in the books of the firm of J. N. & Co., of which Merbai's grandfather Jehangir was a partner, one of which showed her acquisitions from her own family and the other her acquisitions from the family of her husband. The latter account contained an entry (under date August, 1854), to the effect that Burjorji, the father-in-law of Merbai, had bought two Government notes for Rs. 1,500 in Merbai's name, and had obtained the interest on them, which was duly credited to her. Other documents were produced, proved to be in the handwriting of Burjorji and Jehangir, in which the said Government notes were alluded to as the property of Merbai, and as having been purchased with her moneys. In 1864 Burjorji died without

* Suit No. 267 of 1880.