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With this claim, however, is included another claim personal to the first plaintiff herself. Nor does the case fall within the exception, for the one claim is to a portion of Haji Adam's estate; the other has no reference to that estate at all.

It appears to me, therefore, that there is a misjoinder in view of the provision of rule (b) of section 44, and that one of the claims made by the first plaintiff in this plaint must be struck out.

Attorneys for the plaintiffs.—Messrs. *Jefferson, Bhaishanker, and Dinsha.*

Attorneys for the defendant.—Messrs. *Macfarlane and Edgelow* and Messrs. *Payne and Gilbert.*

### APPELLATE CIVIL.

*Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.*

February 28.

SAMAT AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. AMRA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

*Hindu law—Inheritance—Rule of succession as between relatives of the whole-blood and half-blood—Brothers—Brothers' sons—Collaterals—Practice—Plaintiffs entitled to more than they claim in plaint.*

The plaintiffs (along with others not parties to the suit), were relations of the half-blood to the *propositus*, and the defendants were his relations of the whole blood; but, counting from the ancestor, the plaintiffs were sapindas of the fifth degree, and some of the defendants sapindas of the sixth, and the rest sapindas of the seventh degree of the *propositus*.

*Held* that there not being any special provision in the Mitakshara or the Mayukha in respect of persons of the half-blood other than brothers and their sons, the general rule applies, that the nearest sapinda succeeds in the absence of special local custom to the contrary, and, therefore, the plaintiffs were the heirs of the *propositus* to the exclusion of the defendants or any of them.

The plaintiffs having sued for a smaller share than they were entitled to, the High Court limited its decree to that amount only.

This was an appeal from the decision of A. L. P. Larken, Acting Assistant Judge of Ahmedabad, reversing the decree of the Subordinate Judge (Second Class) of Dhandhuka.

The plaintiffs and the defendants were descendants of one Chella, whose great-great-grandson Lakha Lunvir held a two-anna

\* Second Appeal, No. 91 of 1880.

share in the village of Sundariana. The plaintiffs alleged that they were entitled to a third of this share in preference to the defendants, who, they prayed, should be directed to pay to the plaintiffs Rs. 200, being the equivalent of the third claimed.

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The defendants, among other things, contended that the plaintiffs were descendants of the *propositus* of the half-blood, and they themselves descendants of the whole blood, and, as such, better entitled to succeed. They also contended that the suit was time-barred.

The Subordinate Judge decided both these contentions in favour of the plaintiffs, whose claim was consequently allowed. This decree was reversed, and the claim rejected by the Appellate Court. The plaintiffs appealed to the High Court.

*Nanabhai Haridas* for the appellants.

*Shantaram Narayan* for the respondents.

The second appeal was heard by Westropp, C. J., and F. D. Melvill, J., who directed the Appellate Court at Ahmedabad to prepare a full and detailed pedigree of the family, commencing from Chella, the common ancestor of the plaintiffs and the defendants, and to show in such pedigree whether the sons of the said Chella were by different wives, and which of them were so, and to set forth their names and the names of all the persons through whom the parties claimed title. The Appellate Court was also directed to show in the pedigree what members of the family were living at the time of the death of Lakha Lunvir, and what members had died since, and what members were now living. The Court was further directed to find whether the suit was barred by the law of limitation.

These directions were complied with by the Appellate Court, which supplied to the High Court the pedigree required, and found that the suit was not barred.

The second appeal was then re-heard by Westropp, C. J., and Pinhey, J., and the following judgment was delivered:—

WESTROPP, C. J.—This is an appeal from the decree of Mr. Larken, Acting Assistant Judge of Ahmedabad. On the 26th July, 1880, this Court directed the Acting Assistant Judge to prepare and submit to it a fuller pedigree than that originally

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furnished, and also to determine whether or not this suit was barred by the law of limitation. A fuller pedigree has been supplied by Mr. Unwin, the successor of Mr. Larken, as Acting Assistant Judge, and Mr. Unwin has also found that this suit is not barred by the law of limitation. On the 15th November last, being the second day of the hearing of this cause before us upon the new materials supplied by Mr. Unwin, we stated our opinion to be in accordance with that of Mr. Unwin on the question of limitation, viz., that while the property, the subject of dispute, was in the possession of the mortgagee, the defendants could not be considered as holding adversely to the plaintiffs; the possession of Lakha Lunvir's mortgagee being, after the death of Lakha Lunvir, a possession (subject to the mortgagee's rights) for the heirs of Lakha Lunvir whosoever they might be, and not a possession for the defendants in particular, unless they were exclusively such heirs. Lakha Lunvir died in A. D. 1857. The mortgage was not satisfied until Samvat 1931 (A.D. 1874-75), and this suit, having been commenced in A. D. 1876, was in time.

We reserved the question of succession for further consideration, and now proceed to dispose of it.

The suit is one to recover Rs. 200, being the third share of Rs. 600, which latter sum was the produce of the two-annas' share of Lakha Lunvir in the village of Sundariana. That two-annas' share the plaintiff treated as divisible into three shares, whereof the plaintiffs were entitled to one share, the defendants to another share, and one Vishaman Samla to the remaining third share. The plaintiff alleged that the defendants had, since the redemption of the mortgage, appropriated the whole of the produce of the two-annas' share. Such of the defendants as appeared, alleged that the plaintiffs being of the half-blood and the defendants of the whole-blood in relation to Lakha Lunvir, the plaintiffs were not entitled to succeed to any share of his property. The correctness of the pedigree, as found by Mr. Unwin, has not been disputed. It shows that the common ancestor of Lakha Lunvir (the deceased *propositus*) and of the plaintiffs and the defendants was Shelar (or Chelar) who had two wives, namely, Tolibai and Punamti. By Tolibai he had two sons Godad (whose great-grandson was Lakha Lunvir) and Chela, from whom the defendants

Khoda and Nathu are descended, as also Sura, their deceased brother, represented by his widow, the defendant Hirabai. The defendants Amra, Oghad, Desha, Lakha and Alegh (Alingh) are also descended from Chela. By Punamti, Shelar had two sons, Lakshman and Jiva. From Lakshman, the three plaintiffs are descended. From Jiva, Vishaman Samla above mentioned and his three brothers Jiva, Meram, and Surig appear to have been descended.

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These facts show that the plaintiffs and Vishaman Samla and his three brothers (none of whom are parties to this suit) are relations of the half-blood only to Lakha Lunvir, whereas all of the defendants are his relations of the whole-blood. But, counting inclusively from the common ancestor Shelar, the plaintiffs are sapindas of the fifth degree of Lakha Lunvir. Vishaman Samla and his three brothers and the defendants Khoda, Nathu, Amra and Oghad are sapindas of the sixth degree of Lakha Lunvir, and the defendants Desha, Lakha and Alegh (Alingh) are sapindas of the seventh degree of Lakha Lunvir.

Neither the Mitakshara nor the Mayukha takes any distinction between persons of the whole-blood and persons of the half-blood, except in the cases of brothers and sons of brothers. Legitimate sons by different mothers succeed equally to the property of their father<sup>(1)</sup>. The Mitakshara, in the succession of brothers, places uterine brothers—*i. e.*, brothers of the whole-blood—before brothers of the half-blood. It then brings in brothers of the half-blood next after brothers of the whole-blood (Mitakshara, Chap. II, sec. iv, pl. 5, 6,) and places the sons of brothers respectively in the same order as their respective fathers, pl. 7. The Mayukha also prefers brothers of the whole-blood to brothers of the half-blood, and next to brothers of the whole-blood brings in their sons (Mayukha, Chap. IV, sec. viii, pl. 16.) It names, as next in succession, the paternal grandmother, and after her the sister, and after the sister introduces together the paternal grandfather and the half-brother, and after them the paternal great-grandfather, the father's brother, and the sons of brothers of the half-blood (Mayukha, Chap. IV, sec. viii, pl. 18, 19, 20.)

(1) West and Buhler (2nd ed.), pp. 45, 386, 387.

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There not being any special provision in either of these two treatises of authority in this Presidency in respect of persons of the half-blood other than brothers and their sons, and there not being any allegation or proof of a special custom in the locality whence this case comes, or any precedents cited to show that further distinction is taken between the whole-blood and half-blood than the two classes already mentioned, we think that we must fall back on the general rule that the nearest gotraja sapinda succeeds<sup>(1)</sup>. That being so, and the plaintiffs having shown themselves to be one degree nearer to the common ancestor Shelar than some of the defendants and two degrees nearer than the other defendants, we think that the plaintiffs are the heirs of Lakha Lunvir ; but, as the plaintiffs have only sued for one-third of the produce of his share, we must limit our decree in their favour to that amount, as the Subordinate Judge also seems to have done. The objection, made in his Court by the defendants, that Vishaman Samla was not a party, has not been repeated in the District Court or here. We reverse the decree of the Acting Assistant Judge Mr. Larken, restore the decree of the Subordinate Judge, and direct such of the defendants as have resisted the claim of the plaintiffs to pay the costs of the suit and of both appeals.

*Decree reversed.*

(1) Mitak., Ch. II, s. v, pl. 1 ; Mayukha, Ch. IV, s. viii, pl. 21 ; Manu, Ch. IX, pl. 167 ; Colebrooke Dig., Bk. V, Ch. VIII, pl. 434.

### APPELLATE CIVIL.

March 15.

*Before Mr. Justice Melvill and Mr. Justice Kimball.*

ARDESIR JEHANGIR FRAMJI BANAJI, ELDEST SON AND MANAGER OF THE LATE JEHANGIR FRAMJI BANAJI (ORIGINAL PLAINTIFF), APPELLANT, v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT).\*

*Bombay Abkari Act V of 1878, Sections 14, 20, 64, 65, 66 and 67.—Tree—  
Toddy-producing tree.*

The words "any tree" in section 14 and "every toddy-producing tree" in section 20 of the Bombay Abkari Act V of 1878 mean all trees in the Bombay Presidency to which the Act applies, from which toddy is drawn or produced.

\* Regular Appeal, No. 83 of 1881.