election to abide by the former accounts or within six calendar months after the Subordinate Judge shall have notified to the defendant, Naran, or his pleader the amount found due on such fresh account, as the case may be, the defendant, Naran, do not pay the amount due to the plaintiff on his *san*-mortgage, let the defendant, Naran, be for ever barred and foreclosed from redeeming the said house, and let the same be sold, and let the amount due to the plaintiff be paid to him out of the proceeds of sale, and the balance (if any) made over to the defendant, Naran. The decree of the District Judge must be varied in conformity with the above directions. The defendant, Naran, should pay to the plaintiff his costs of the suit. The parties respectively should bear their own costs of the appeals.

Decree varied.

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

KHODABHAI MAHIJI, PLAINTIFF, *v.* BAHDHAR DALA AND OTHERS, DEFENDANTS. *

March 13.

Hindu law—Inheritance in Gujarat—In Gujarat the father succeeds to the estate of a son, dying without issue or widow, in preference to the mother.

In Gujarat the right of succession to the estate of a Hindu who is separate in interest and who, at his death, leaves a father and mother, but no issue or widow, devolves upon the father, in preference to the mother.

THIS was a reference under section 617 of Act X of 1877 by Rao Saheb Madhuvachram Balvachram, Subordinate Judge of Borsad, in the District of Ahmedabad.

The following are the facts of the case as stated by the Subordinate Judge:—The plaintiff, Khodabhai, sued to recover Rs. 40, due on a bond, dated the 14th December, 1875, and payable on the 17th March, 1877. The bond was executed by Gabad Bahdhar (deceased) as principal and Kala Vahala as surety. Gabad died before the institution of the suit without issue or widow, but

* Civil Reference, No. 19 of 1880.

1882

KHODABHAI MARIJI v. BAHDHAR DALA

leaving his father, Bahdhar, his mother, Bai Amrit, and his two brothers, Phatha and Dhira, him surviving. As Gabad was dead, the plaintiff sued his father and brothers as his heirs and Kala Vahala, the surety. The defendant, Kala Vahala, denied the execution of the bond. The answer of the other defendants was that they had no knowledge of the transaction. The Subordinate Judge found that Gabad was separate in interest from his father and brothers, and held the bond proved; also that the brothers of Gabad were not his heirs. The question referred by the Subordinate Judge to the High Court was, whether Gabad's heir was his father, Bahdhar, or his mother, Bai Amrit. He was of opinion that the father was the heir.

Shantaram Narayan, as *amicus curiæ*, appeared in support of the mother's heirship, and referred to the following authorities :—Manu, ch. ix, pl. 185, 217(1); Colebrooke's Digest, Bk. V, ch. viii, pl. 403, 404, 407, 423, 424, 425(2); Vyav. May., ch. iv, sec. 8, pl. 41 (3); Mitak., ch. ii, sec. 1 pl. 2 and sec. 3, pl. 1 to 5(4); Dayabhag, ch. xi, sec. 1, pl. 5 and sec. 4, pl. 1 to 6(5); Dayakrama Sangraha, ch. i, sec. 5,pl. 1 and 2(6); Vir Mitrodaya (7); West and Buhler, pp. 52, 158, 163, 2nd ed.; Norton's Leading Cases, Part II, p. 556.

Manekshah Jehangirshah in support of the father's heirship.—The balance of authorities cited by the learned pleader on the other side is in favour of the father's right of succession. Moreover, the whole Hindu law of inheritance is based upon the theory that he who offers the funeral cake most efficaciously succeeds to the estate of the deceased. If this theory is good, then the father must be preferred to the mother. The learned pleader referred to West and Buhler, p. 551, and Mayne's Hindu Law, pp. 504, 505.

(1) The Institutes of Manu, translated by Sir William Jones, pp. 255, 259, Madras edition, 1863.

(2) Pp. 522, 534, 550, 552, Madras edition, 1865.

(3) Stoke's Hindu Law Books, p. 87.

(4) Stoke's Hindu Law Books, pp. 427, 441.

(5) Stoke's Hindu Law Books, pp. 304, 330, 331.

(6) Stoke's Hindu Law Books, pp. 477, 478.

(7) Gopalchandra Sarkar's Translation, pp. 190, 191.

1882

KHODABHAI MAHIJI v. BAHDHAR DALA.

The following is the judgment of the Court, delivered by

WESTROPP, C. J.—This reference by the Subordinate Judge of Borsad relates to a question which arose in a suit (No. 297 of 1880) pending in his Court. That suit was brought upon a money bond to recover Rs. 40, such bond being alleged to have been executed by the late Gabad Bahdhar as principal, and the defendant, Kala Vahala, as surety. The execution of the bond by these persons is held by the Subordinate Judge to be proved, and the question which he refers to us is, whether the heir of Gabad Bahdhar (who died separate in estate from his father and brothers and without leaving either issue or widow) is his father (the first defendant,) Bahdhar Dala, or his mother, Bai Amrit. He held that the brothers of the deceased (who had been joined with their father as defendants) were not such heirs, and, therefore, not rightly made defendants. No question as to them is before this Court. The Subordinate Judge, in an elaborate judgment, states his opinion to be in favour of the father.

The parties did not appear by pleaders in this Court. But with that public spirit and zeal for the administration of justice with which the pleaders of the High Court are inspired, Mr. Shantaram Narayan, as *amicus curiæ*, supported the heirship of the mother of the deceased, and Mr. Manekshah supported the heirship of the father.

As has been often stated here, the leading authorities in Hindu Law in this Presidency are Manu, the Mitakshara, and Vyavahar Mayukha(1), and of these the last mentioned is of especial authority in Gujarat, whence this reference comes(2). Manu (ch. ii, pl. 185,) says : " of him, who leaves no son, the father shall take the inheritance and the brothers." As amended by the great commentator, Kaluka Bhatta, that text runs thus : " of him, who leaves no son, *nor a wife, nor a daughter*, the father shall take the inheritance, and *if he leave neither father nor mother*, the brothers." Manu (ch. ix, pl. 217) says: " of a son dying childless, the mother shall take the estate, and the mother also being dead, the paternal grandmother shall take the heritage. " As amended by

(1) 1 Bom. H. C. Rep., 13.

(2) I. L. R. 2 Bom., 418; I. L. R. 3 Bom., 353 and 365 ; West and Buhler, 2nd ed., pp. 3, 172.

1882

KHODABHAI MANIJI v. BARDHAR DALA.

Kaluka Bhatta that text runs thus: " of a son dying childless and leaving no widow, *the father and mother shall take the estate,* and the mother also being dead, the paternal *grandfather and grandmother* shall take the heritage on failure of brothers and nephews." The amendments of Kaluka Bhatta in both texts tend to show that Kaluka Bhatta preferred the father to the mother.

The well-known text of Yajnyavalkya describing succession on the failure of sons, after naming the wife and daughter, next specifies "both parents"(1). Commenting upon this, Vijnyaneswara (the author of the Mitakshara) in distinct terms (Mitak., ch. ii, sec. 3) assigns the priority to the mother. Balambhatta, contrary to his (her ?) usual bias, prefers the father, as will be seen in Mr. Colebrooke's note 5 to ch. ii, sec. 3, of the Mitakshara. That note shows the diversity of opinion which has prevailed on the question. Mr. Colebrooke admits that "the great majority of writers of eminence" prefer the father to the mother. Amongst these writers, he places (*inter alia*) Apararka and Nilkantha, the author of the Vyavahara Mayukha, who, in ch. iv, sec. viii, pl. 15 of that work, combats the doctrine of the Mitakshara on this question, and denies the reason given for it by Vijnyaneswara. The compromise suggested by the Vir Mitrodaya and based on the principle of *deturdigniori* (2) is not within the pale of practicable law.

In the general order of succession for this Presidency, Messrs. West and Buhler (2nd ed., pp. 52, 158, 163) have, following the Mitakshara, placed the mother before the father; but this cannot be regarded as an indication that those learned authors thereby intended to close the question for the whole Presidency: inasmuch as in a previous part of their work (2nd ed., pp. 3, 172) they admit the leaning of Gujarat towards the Mayukha, and state that the extent of that preference remains to be determined judicially. In the only Vyavastha given by them in which the father and mother were clearly placed in competition, the Sastri preferred the father. That, too, was in the Deccan, being an opinion given in 1857 to the Adalat at Poona. As authorities for his view, the Sastri cited first the Mayukha and secondly

(1) Mitak., ch. ii, sec. 1, pl. 2.

(2) Vir Mitrodaya, translated by Gopalchandra Sarkar, pp. 190. 191.

the Mitakshara (West and Buhler, p. 159, q. 2). In these circumstances this Court inquired of the District Judge of Surat (Mr. Birdwood) and of the District Judge of Ahmedabad (Mr. Phillpotts) as to the existence of precedents in their respective districts. The latter said that, after search no precedents touching the succession of father and mother could be found in Ahmedabad. The District Judge of Surat, after consulting the 1st and 2nd Class Subordinate Judges of Surat, the Subordinate Judges of Bulsar, Jambusar, Anklesar, Olpad, Broach and Vagra and the Government pleaders of Surat and Broach, was only able to mention two instances in which the question as to priority of succession arose between the father and mother, both of which instances were furnished to him by the Subordinate Judge of Anklesar (previously of Borsad) and also mentioned by the Subordinate Judge of Olpad.

Of those two cases the first was in the Court of Small Causes at Surat. The suit was brought by the obligee of a money bond against the father of the obligor (the obligor being dead), the defendant objected that his wife, the mother of the deceased obligor, being still alive, was the heir of her son. To this view the Judge was at first disposed to accede, but, on hearing the arguments, arrived at the conclusion that the father was the heir and properly made the defendant. The suit was eventually compromised. Subsequently, the mother of the same deceased person brought a suit in the Court of the First Class Subordinate Judge at Surat to recover a debt due to the deceased, but it being objected on behalf of the defendant, that the father and not the mother of the deceased was his heir, the father was produced in Court by the plaintiff and then and there openly relinquished, in favour of the plaintiff, his wife, any right which he might have to the debt. Under these circumstances the First Class Subordinate Judge made a decree against the defendant. It must be admitted that these are not very satisfactory precedents. All the Subordinate Judges, however, consulted by Mr. Birdwood, (except the Subordinate Judge of Bulsar,) informed Mr. Birdwood that the tradition of their courts and of the pleaders belonging to them, was that, in Gujarat, the father and not the mother of a person who dies without leaving a widow or issue is deemed his

1882

KHODABHAI MAHIJI v. BAHDHAR DALA.

heir. Mr. Birdwood was similarly informed by the Government pleaders of Surat and Broach.

Looking to the preference generally, though not invariably, shown in Gujarat to the Mayukha, where it differs from the Mitakshara, to the fact testified by Mr. Colebrooke that the majority of eminent Hindu writers give the preference to the father over the mother, and to the information supplied by Mr. Birdwood, this Court is of opinion that the safest course will be to hold in this case that the father inherits from his son in priority to the mother, and, therefore, this Court concurs with the Subordinate Judge, who has made this reference, in ruling that the deceased alleged debtor, Gabad Bahdhar, is rightly represented on the record in this suit by his father Bahdhar Dala.

Our late colleague, Mr. Justice F. D. Melvill, we are aware, held the same opinion in this case as that at which we have arrived.

APPELLATE CIVIL.

FULL BENCH.

Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice Bayley, and Mr. Justice Kemball.

April 17.

THE COLLECTOR OF THANA (ORIGINAL DEFENDANT), APPELLANT, *v.* HARI SITARAM AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Limitation—Act XIV of 1859, *Section* 1, *Clauses* 12 *and* 16—*Grant by a Hindu sovereign to a Hindu temple—Hindu law to be applied to determine questions of limitation—Nibandha—What is immoveable property—Antastha Sadilvar—Kherij Jamabandi Parbhare Paiki—Religious penalty for resumption.*

The Peishwa, by a *sanad* dated 1790, granted to an ancestor of the plaintiffs, for the support of a Hindu temple, an annual cash allowance of Rs. 350 out of the "*Antastha Sadilvar*†" and three khandis of rice out of the "*Kherij Jamabandi Parbhare*", ‡ to be levied from certain mahals and forts mentioned in the *sanad*. The allowances were paid till the death of the plaintiff's father on the 26th,

* Appeal No. 1 of 1881 under the Letters Patent of 1865.

† "Antastha Sadilvar" means extra assessment levied to meet local charges analogous to the present local cess fund.

‡ "Kerij Jamabandi Parbhare" means extra assessment in kind upon land over the regular land assessment collected by local officers and paid by them direct.