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SHIVÁPA v. SHIVPANCH LINGAPA.

SARGENT, C. J.:—We are of opinion that it was not the intention of the Legislature that an application of this nature should be governed by any limitation. The Court, of its own motion, is to amend the decree whenever it becomes aware of the variance with the judgment or of the clerical or arithmetical error. When the parties move the Court they are only bringing the variance or error to the notice of the Court, and there is no application properly so called. We are unable to agree with the view taken by the Allahabad High Court in the case of *Gaya Prasad* v. *Sikri Prasad*[1], where we do not find any reasons given for holding that such motions are to be treated as "applications" within the purview of article 178 of the Limitation Act.

(1) I. L. R., 4 All., 23.

FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice West, and Mr. Justice Birdwood.

1886. *October* 6.

1, BHA'GIRTHIBA'I, (ORIGINAL DEFENDANT), APPELLANT, *v.* KA'HNUJIRA'V, (ORIGINAL PLAINTIFF), RESPONDENT; 2, RA'JA'RA'M, (ORIGINAL DEFENDANT), APPELLANT, *v.* KA'HNUJIRA'V, (ORIGINAL PLAINTIFF), RESPONDENT; 3, ANANDRA'V AND OTHERS, (ORIGINAL DEFENDANTS), APPELLANTS, *v.* KA'HNUJIRAV, (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Inheritance in Presidency of Bombay—Daughter, interest of, in Bombay in property inherited from her parents—Usage, the law of inheritance in India—Mitákshara and Mayúkha, authority of—Right of females in Bombay taking by inheritance.

Under the Hindu law as prevailing in the Presidency of Bombay, a daughter inheriting from a mother or a father takes an absolute estate, which passes on her death to her own heirs, and not to those of the preceding owner.

No statute law exists regulating the devolution of property amongst Hindus. The law, therefore, to be applied in case of inheritance is the usage of the country in which the suit arises: see Bombay Regulation II of 1827, sec. 26.

The commentaries and text books embody, in many instances, the rules formed and enforced by custom, but custom even on Hindu principles may and must have power without their aid. They do not govern the usage of the country, save by a reflex process; it is the usage which adopts them, and they are law only because of this adoption, in the sense and within the limits according to which their rules are accepted. Not merely the reception, but the exact extent of the reception, of any law book is governed by usage.

* Appeals, Nos. 79, 81 and 82 of 1883.

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In the Marátha country the Mitákshara is the principal authority upon Hindu law; but in doubtful cases it may properly be construed by the light of the Mayúkha, the usage of the country having adopted the latter as well as the former. This course was followed in *Vinâyak Anandrâv* v. *Lakshmibai*(1), where a different construction of the Mitákshara was allowed to prevail in Bombay from that which had been adopted for Bengal,

In Bombay, if not in other provinces in India a female may take by inheritance, from a male, an absolute as opposed to a life estate, and one excluding any interest of the next heir, as such, of the *propositus*.

THIS was a reference to a Full Bench by a Division Bench consisting of Sargent, C.J., and Birdwood, J.

One Jayavantráv died on the 15th April, 1869, and his property devolved on his widow, Gangábái, who remained in possession until her death in January, 1872. She left two daughters, *viz.*, Bhágirthibái, who was then married, and Rangubái, who was then unmarried. Rangubái succeeded to her mother's estate—her right to succeed being declared by the High Court. See the case of *Rangubái* v. *Bhágirthibái*(2).

Rangubái was subsequently married to the plaintiff, Káhnujiráv, and she died in October, 1877. The plaintiff, as her husband, claimed to succeed as heir to her property. The other claimants were Bhágirthibái, the sister of Rangubái; one Anandráv, who claimed as the descendant of a former owner, and who denied Rangubái's title; and one Rájárám, who claimed as the nearest relation of Jayavantráv after Gangábái. The case came, on appeal, before a Division Bench of the High Court, who referred it to a Full Bench.

The reference was as follows:—

"The plaintiff sues for a declaration that he is the heir of his deceased wife, Rangubái, and, as such, entitled to the estate inherited by her from her mother, Gangábái, who succeeded to it as widow of Jayavantráv, the adopted son of Bhavanráv Ráje Nimbálkar, *jághírdár* and *patel mukádam* of Mirajgáon. The adoption of Jayavantráv was upheld by the High Court in Regular Appeal No. 15 of 1866, decided on the 4th September, 1867—*Ráje Vyankatráv Anandráv Nimbálkar* v. *Jayavantráv*(3).

(1) 1 Bom. H. C. Rep., 118. (2) I. L. R., 2 Bom., 377.
(3) 4 Bom. H. C. Rep., A.C.J., 191.

Jayavantráv died on the 15th April, 1869, and the property then devolved on Gangábái, who continued in possession till her death on the 25th January, 1872, leaving two daughters, *viz.*, the defendant No. 1, Bhágirthibái, who was married, and the deceased Rangubái, who was then unmarried. The right of Rangubái to succeed to the estate was affirmed, as against Bhágirthibái, by the High Court in Regular Appeal No. 26 of 1877 decided on the 10th October, 1877—*Rangubái* v. *Bhágirthibái*[1]. Rangubái died on the day on which the appeal was decided.

"The plaintiff is opposed, in the present suit, by the defendant, Bhágirthibái, on the ground that she was entitled to the estate on the death of Rangubái. The defendant, Anandráv, claims the estate as the descendant of Sultánráv, who originally acquired it, and he says, in his written statement, that neither the plaintiff nor Bhágirthibái has any interest in it, and that Rangubái had no interest in it; and that, further, it includes a *pátilki vatan* and *inám* lands, which cannot go out of the family by which the *vatan* was acquired. The defendant, Rájárám, claims the estate as nearest relation of Jayavantráv after Gangabái. He further says that the property is the joint ancestral property of Jayavantráv, Anandráv, and himself, and that the *pátilki vatan* must remain with the '*bháubands*.'

"The Subordinate Judge (First Class) found that the plaintiff was entitled to succeed to the whole estate as the heir of his deceased wife, Rangubái, and that the three defendants were not her heirs, and he decreed accordingly.

"Separate appeals are preferred by the three defendants, for all of whom Mr. Telang appears in this Court. Though they set up conflicting claims, as against each other, in their written statements, Mr. Telang explains that, in these appeals, no decision is necessary as between the defendants; that his contention is that Rangubái, as daughter of Jayavantráv, took only a restricted interest; and that, on her death, the heir is to be looked for among the heirs of Jayavantráv; and that, then, Bhágirthibái comes in. She, he contends, would be entitled to the general

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estate, the defendants Anandráv and Rájárám being entitled to the *vatan* property, to which the plaintiff could not succeed, as he does not belong to Jayavantráv's family.

"At the trial, a question was raised as to the form of Rangubái's marriage with the plaintiff. The Subordinate Judge found that it was according to the approved *Brâhma* form, and not according to the *Asura* form, as alleged by the defendant Bhágirthibái's pleader in exhibit No. 11.

"In this Court, Mr. Telang has admitted that the evidence, to show that the marriage was not in one of the approved forms, is not satisfactory. The question for decision, then, in these appeals is as to the nature of the estate taken by Rangubái, as daughter of Jayavantráv, in succession to his widow, Gangábái. Mr. Shántárám, for the plaintiff, in contending that it was an absolute and several estate, relies on *Haribhat* v. *Dámodarbhat*(1), and the cases there cited, and also on the analogy of the cases by which the position of a sister has been secured, in this Presidency, on the authority, not solely of the Mitákshara or the Mayûkha, but of both taken conjointly; and he has referred us to *Kessarbái* v. *Valab Ráoji*(2), *Bái Jivkore* v. *Hargovan Narotam* (3), *Bulákhidás* v. *Keshavlál*(4), *Advyapa* v. *Rudrava*(5), *Chotay Lál* v. *Chunnoo Lál*(6), *Jamiyatrám and Uttamrám* v. *Bái Jamna* (7), and *Bháskar Trimbak A'chárya* v. *Mahádev Rámji*(8). There can be no question that, hitherto, even in parts of the Presidency where the authority of the Mayûkha does not specially prevail—as, for instance, in the case of *Haribhat* v. *Dámodarbhat*(9), which was a Dhárwár case—it has been held that the daughter's estate was superior to that of the widow, as she could freely dispose of the property inherited from the father; nor have daughters been regarded as mere life tenants (see West and Bühler, 3rd ed., pp. 105, 106). For the defendants, however, it is contended that, since the decision of the Privy Council in the Madras case, *Mutta Vadu Ganadha Tevar* v.

(1) I. L. R., 3 Bom., 171.
(2) I. L. R., 4 Bom., 188.
(3) Printed Judgments for 1884, p. 192.
(4) I. L. R., 6 Bom., 85.
(5) I. L. R., 4 Bom., at p. 121.
(6) L. R., 6 I. A., 15.
(7) 2 Bom. H. C. Rep., 11.
(8) 6 Bom. H. C. Rep., O. C. J., 1.
(9) I. L. R., 3 Bom., 171.

Dorasinga Tevar[1], the view hitherto prevalent in this Presidency can be enforced only in cases governed by the Mayûkha, Ch. IV, sec. 13, para. 25, 26 ss; and that, in cases depending on Mitákshara only, the heritage of the daughter must be regarded as a life interest, the Judicial Committee having distinctly said that the Mitákshara is not to be construed as conferring on any 'woman taking by inheritance, from a male, a *stridhan* estate transmissible to her own heirs.' And the learned authors of the Digest seem also to be of opinion that this must be the effect of the Privy Council's decision (West and Bühler, 3rd ed., pp. 431,432). The present case is from the Ahmednagar District, which is not one of the districts generally held to be subject to the Mayûkha. The question, therefore, now arises, which, in the recent case of *Dalpat Narotam* v. *Bhagwán*[2], was left unsettled, as that case, though subsequent to the decision of the Privy Council, was governed by the Mayûkha. The question is of sufficient importance to be referred to a Full Bench."

Káshináth Trimbak Telang (*Dáji Abáji Khare* with him) for the appellant:—After the death of Rangubái, the heir to be looked for is from the heirs of her father, Jayavántráv. Under the Mitákshara, a daughter takes only a life estate: see the Privy Council decision in the case of *Mutta Vadu Ganadha Tevar* v. *Dorasinga Tevar*[3] followed in the case of *Dalpat Narotam* v. *Bhagwán*[4]. This case comes from Nagar, where the Mitákshara prevails, and, therefore, the husband of Rangubái cannot claim his wife's property, she having only a life interest therein.

Shántárám Náráyan for the respondent:—It has been the invariable law in this Presidency that a daughter takes an absolute estate in the property inherited by her from her parents, and such property descends to her heirs, and not to those of her father. After Rangubái, her husband is entitled to her property. It is not the Mitákshara purely that applies to this Presidency, but the Mitákshara and the Mayûkha conjointly: see *Krishnáji* v. *Pándurang*[5]. The Privy Council makes a distinction in the application of the Mitákshara to the several presidencies: see

(1) L. R., 8 I. A., 99.
(2) I. L. R., 9 Bom., 301.
(3) L. R., 8 I. A., 108.
(4) I. L. R., 9 Bom., 301.
(5) 12 Bom. H. C. Rep., 65.

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Cholay Lal v. *Ohunnoo Lal*[1]. In the case of a sister inheriting from her brother, the Mitákshara and the Mayûkha have been held to apply conjointly—*a fortiori*, they should so apply in the case of a daughter inheriting from her father. It has not been particularly held that a daughter takes an absolute estate only where the Mayûkha alone governs. Nor is it in Gujarát and Bombay alone that the daughter's right to such estate has been recognized. It has been for a long time recognized that, throughout the Presidency of Bombay, the estate which the daughter takes is an absolute estate. The following cases were cited:—*Vináyak Anandráv* v. *Lakshmibái*[2]; *Haribhat* v. *Dámodarbhat*[3]; *Kessarbái* v. *Valab Ráojí*[4]; *Bái Jivákore* v. *Hargovan Narotam*[5]; *Bulákhidás* v. *Keshavlál*[6]; *Advyapa* v. *Rudrava*[7]; *Jamyatrám* v. *Bái Jamna*[8]; *Bháskar Trimbak* v. *Máhadev Rámji*[9].

WEST, J.:—The question for decision, as stated in the reference to the Full Bench, is as to the nature of the estate taken by Rangubái (deceased) as daughter of Jayavantráv in succession to his widow, Gangábái. On the part of the appellants it is contended that it was but a life estate, at the close of which their several rights, whether mutually consistent or not, arose as against Rangubái's heir. On the part of the plaintiff, Káhnujiráv, it is urged that the deceased Rangubái, his wife, took, as daughter to Jayavantráv and Gangábái, an absolute estate, which on her death devolved on him, she having left no children.

The law by which civil cases arising in the districts of the Bombay Presidency must be governed, is prescribed in Bombay Regulation II of 1827, sec. 26[10]. "The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose," and so on. It is not pretended that any statute

(1) L. R., 6 I. A., at p. 31.
(2) 1 Bom. H. C. Rep., observations at pp. 124, 133 and 209.
(3) I. L. R., 3 Bom., 171.
(4) I. L. R., 4 Bom., 188.
(5) Printed Judgments for 1884, p. 192.
(6) I. L. R., 6 Bom., 85.
(7) I. L. R., 4 Bom., at p. 121.
(8) 2 Bom. H. C. Rep., 11.
(9) 6 Bom. H. C. Rep., O. C. J., 1.
(10) West & Bühler, p. 7.

law exists regulating the devolution of property amongst Hindus, or the nature of the estates that can be taken in it. The law to be applied, therefore, is the usage of the country in which the suit arose. In the present instance the suit has arisen in the District of Ahmednagar, and it is by the usage of that district that the question of law, which it presents, must be determined.

It is usual to dispose of cases of inheritance coming before the Courts of this Presidency by reference to the Mitákshara and the Vyavahára Mayûkha as the proximate authorities[1]. This does not trench upon the sacred and indisputable character attributed to the Vedas and to the various acknowledged Smritis, especially the one ascribed to Manu[2]; but "when the texts or their constructions differ, usage settles the rule"—*Bháu Nanáji Utpat* v. *Sundrábái*[3]. Nay, "the reason of the law has more authority in judicial proceedings than the letter of express ordinances" [4]. On this rests the doctrinal authority of the commentaries and text books. Such books embody, in many instances, the rules formed and enforced by custom, but custom even on Hindu principles may and must have power without their aid[5]. Custom adopts the ancient law, modifies it, or rejects and supersedes it[6]. Its relation to the text books is similar. They do not govern the usage of the country, save by a reflex process; it is the usage which adopts them, and they are law only because of this adoption in the sense and with the limits according to which their rules are accepted. In the words of Sir E. Perry, *Hirbái* v. *Sonábai*[7], even in the case of "a law believed to be divine by any peculiar caste, the true inquiry for a Court of Justice is how far that law has been recognized, or sanctioned, or adopted by the ruling power," which he regarded as alone capable of making a law, as it alone could supply the requisite sanction, and which had formally recognized native usage as law in the charters of the late Supreme Courts. The Judicial Committee have dwelt, in several cases, on the relation between the law books and actual

(1) West & Bühler, p. 9.

(2) West & Bühler, 41, 56, 869; *Bháu Nánáji Utpat* v. *Sundrábái*, 11 Bom. H. C. Rep., 264.

(3) 11 Bom. H. C. Rep., at p. 267.

(4) 11 Bom. H. C. Rep., at p. 266.

(5) Vyavahára Mayûkha, Ch. I, s. 1, para. 13.

(6) West & Bühler, 2, 159, 550, 867.

(7) Perry's Or. Cas., 123.

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usage. Thus they say in *The Collector of Madura* v. *Mootoo Rama Linga Sathu Pathy*(1): "The duty, therefore, of a European Judge, who is to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has then to deal, and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law." See, too, *Bhyah Rám Singh* v. *Bhyah Ugur Singh*(2).

A striking application of these principles is to be found in the case of *Lalloobhoy Bápoobhoy* v. *Cássibái* (3). In that case it was acknowledged that the law prevailing in Bengal and Southern India, based on the same original sacred texts as that of Bombay, was opposed to the right claimed by the widow. Nevertheless, this Court, having arrived at the conclusion that a different interpretation of the law had been accepted in Western India, decided in favour of the widow's right. The rule of succession, to which the Court gave effect, "is but dimly enunciated in those passages of Manu, Mitákshara and Mayûkha which had to be relied on, but the Judges considered that the interpretation which had been given to them in Western India, evidenced by decisions and the opinions of Shástris, had fixed and determined the law for this part of India"(4). The decision was affirmed by the Judicial Committee, who assented to the conclusion arrived at upon consideration of the authorities, "by the law of the Mitákshara as interpreted and accepted in Western India." In the course of the judgment, Sir M. Smith says, p. 236: "Perhaps the most that can be said is, that the text of the Mitákshara 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 Mitákshara 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

(1) 12 M. I. A., 397, at p. 436.
(2) 13 M. I. A., 373.
(3) L. R., 7 I. A., at p. 237.
(4) *Ibid.*, 230; West & Bühler, 866.

of law." And, again, "it is obvious that the right of the widow must be mainly rested on the ground of positive acceptance and usage," p. 237.

There can be no doubt, then, but that not merely the reception, but the exact extent of the reception, of any law book is governed by usage. In *Vináyek Anandráo* v. *Lakshmibái*[1], Sausse, C.J., observes that "where the *quantum* of estate has been cut down to a life interest when the inheritance descends upon a female the restriction must be ascribed to the influence of usage, as it is not to be found in the early canons of inheritance. In *Devkuvarbái's case*[2] this Court held that the widow of an intestate, childless, and separated brother takes the moveable property absolutely, and the immoveable for life only, with remainder to the heirs of the intestate. That decision was very much based upon the principle of allowing the law of usage to control the letter of that portion of the written law which was in favour of the widow." There are, in fact, one or two Smriti passages, on a rather forced interpretation of which some Hindu lawyers[3] have founded a restriction of the whole estate given to a widow by Vijnánesvara, as shown in the judgment just quoted. The adoption of their views in the customary law must be regarded as a limiting construction of the Mitákshara by usage.

The relative position of the Mitákshara and the Vyavahára Mayukha, as well as of the other works accepted as authorities in the Bombay Presidency, is discussed in several decided cases which are collected in West and Bühler's Hindu Law, (3rd ed.), pp. 9, 10. The pre-eminence of the Mitákshara is generally admitted, but its doctrines have, in several instances, been set aside in favour of those put forward in the Vyavahára Mayûkha; and such books as the Samskára, Kaustubha are frequently quoted by the shástris on the subjects to which they relate[4]. The value of the shástris' opinions, as evidence of the living law, has been recognized by the Privy Council in several cases. Thus in *The Collector*

(1) 1 Bom. H. C. Rep., at p. 121. (2) 1 Bom. H. C. Rep., 130.

(3) West & Bühler, 306.

(4) *The Collector of Madura* v. *Mootoo Rámálingá*, 12 M. I. A., 438; West & Bühler, 9, 862; *Huebut Ráo* v. *Govindráv*, 2 Borr. R., at pp. 104, 105.

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of Madura v. *Mootoo Ráma*[1] they say: "The opinion of a pandit, which is found to be in conflict with the translated works of authority, may reasonably be rejected, but those which are consistent with such works should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the country....." In *Lalloobhoy* v. *Cássibái*[2], the Judicial Committee rely on the general effect of the replies of the shástris collected in West and Bühler's Hindu Law as establishing a right of a widow to inherit as a *gotraja-sapinda* peculiar to Bombay.

If we now look to the replies of the shástris in the Ahmednagar Zilla, and especially to those relating to the daughter's right of inheritance, in the collection lately referred to, we find that the references to the Vyavahára Mayukha are quite as frequent as those to the Mitákshara. The same appears with respect to the neighbouring zillás of Poona and Khándesh. In two cases[3], the Ahmednagar shástri quotes the Vyavahára Mayûkha alone for his response in favour of a sister. As the doctrine of the Vyavahára Mayûkha on this point is peculiar, the reference shows that the work cited was supposed to be of authority, if not of special authority, in the zilla in question. At page 469, the shástri of the Sadar Court relies on the Vyavahára Mayûkha and the Nirnayasindhu for a response in favour of a half-sister, but it does not appear in what zilla the question had arisen. On the whole, Colebrooke's opinion[4] is borne out that "in the West of India, and particularly amongst the Maráthás, the greatest authority after the Mitákshara is Nilakantha, author of the Vyavahára Mayûkha and of other treatises bearing a similar title"[5].

The special and almost paramount authority which the Vyavahára Mayûkha has gained in Gujarát and in the city of Bombay is not recognized in other parts of this Presidency. Yet it must not be supposed that the Vyavahára Mayûkha presents a development of the Hindu law connected in any peculiar way with the religious or social system of the Gujarátis. Before the

(1) 12 M. I. A., at p. 436.
(2) L. R., 7 I. A., 212.
(3) West & Bühler, 468.
(4) 1 Str. H. L., 318.
(5) West & Bühler, p. 19.

Marátha conquest of Gujarát in the middle of the last century it had long been under Mahomedan rule. The customary law of the Hindus had almost dwindled away into mere rude caste usages, and the Bráhminical influence had almost perished. The Vyavahára Mayukha was one of the latest products of the Marátha school, and had gained the eminent position which it has retained in the Deccan. The Marátha Bráhmins, following the Marátha chiefs into the newly conquered country, naturally took their law books with them. And of these, the Vyavahára Mayukha was the most comprehensive and characteristic. In Gujarát it had virtually no rival; and, as a Hindu polity was revived there, it took a place analogous to that of the Roman law in mediæval Europe(1), with the Marátha Bráhmins as its expositors. Hence arose the somewhat strange consequence that the Marátha doctrines of the Mayûkha gained a more undivided sway over Gujarát than amongst the Maráthás themselves, who had men of wide learning and copious sources of information at hand. Both in Gujarát and in the Marátha country the doctrines of the Vyavahára Mayukha and the Mitákshara are largely tempered by caste custom, especially amongst the lower orders, as may be learned from the collections of Steele and Borradaile, the latter now in course of publication by Sir Munguldas Nathubhoy.

It follows, from what has been said, that, without in any way assailing the position of the Mitákshara as the principal authority in the Marátha country, we may properly construe it in doubtful cases by the light of the Vyavahára Mayûkha. The usage of the country has adopted the latter as well as the former, (*Bhugwandeen Doobey* v. *Myna Bái*(2)), and if it sheds an additional ray of light on any point which the Mitákshara has left obscure, we may thankfully avail ourselves of the aid it affords us. This is precisely the course taken in *Vináyek Anandráo* v. *Lakshmibái*(3), and adopted, in appeal, by the Judicial Committee. Without controverting the construction placed on the Mitákshara in Bengal for the purposes of that province, their Lordships allowed a different construction to prevail in Bombay, supported as it was

(1) Sav. Geschichte des R. R., Ch. XXVI ss.

(2) 11 M. I. A., 487.

(3) 1 Bom. H. C. Rep., 118.

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by a rule of the Mayûkha strongly favouring the sister whose rights were in question, though on a ground different from the particular interpretation given by other commentaries to the Mitákshara and the Smriti passage cited by it, which interpretation the Vyavahára Mayûkha rejects[1].

In the case just referred to, the Judicial Committee say that, as against male cousins, "the sisters are the heirs of the brother. The consequence is that * * * the entire interest in the property * * * must be viewed as vested in the widow and her daughters, (*i. e.*, the deceased's sisters), or some or one of them, and that, therefore, the appellants here, the sons of the brother of the testator, (cousins of his deceased son, the *propositus*) are suing in a matter in which they have not shown the slightest interest, nor with which they have any concern"[2]. The question raised by the pleadings was: "In whom is the absolute interest in the property now vested[3]?" Sausse, C. J., determined that, if the mother took less than the absolute interest, the sisters, at any rate, took absolutely, *i.e.*, without any ulterior right of other persons to be satisfied out of the property. He contrasts the absolute with the life estate; the Judicial Committee in affirming his judgment adopt (for Bombay) his reasoning, and thus arrive at the conclusion that the male cousins have not "the slightest interest" in the estate. But the reasoning, by which the sisters are given an absolute estate, is that their right is like that of daughters. "But the daughters * * * take absolutely, and so, therefore, do the sisters." In declaring, then, that the cousins had no interest at all, the Judicial Committee, equally with the Supreme Court, decided that the sisters, and *a fortiori* the daughters, take a complete estate by inheritance. The *quantum* of the estate of the sisters is measured in no other way than by reference to that of the daughters.

We thus have it, on the authority of the Judicial Committee itself, that, in Bombay, if not in other provinces of India, a female may take by inheritance from a male an absolute as opposed to a life estate, and one excluding any interest of the next heirs, as such, of the *propositus*. This is important with

(1) 1 Bom. H. C. Rep., 128. (2) 1 Bom. H. C. Rep., 129.
(3) 1 Bom. H. C. Rep., 121.

reference to the *dictum* in *Mutta Vadu Ganadha Tevar* v. *Dorasinga Tevar*[1]. It is true that, in all the cases there relied on, "it was held that the woman took only a restricted interest, and that, on her death, the property devolved on the heir of the last male owner;" but two of those cases were instances of a widow's succession, and all three were from parts of India remote from Bombay. In one of them, *Bhagvándeen Doobey* v. *Myná Bái*[2], the widow's absolute right to moveable property inherited from her husband was denied, a right which has never been seriously questioned in Bombay[3]. In the third case, *Cholay Lal* v. *Chunnoo Lal*[4], which alone was that of a daughter's inheritance, their Lordships say: "No decision of this tribunal has been referred to with regard to the estate taken by a daughter inheriting from her father"[5]. Probably, there was none that could be referred to directly on the point; and then the only judgment bearing on the subject was the one already considered, which decided in favour of the daughters taking an "absolute," not a "restricted," estate; but not expressly, only by implication and only for Bombay, on a construction of the law pronounced peculiar to this Presidency. "No doubt," their Lordships say, "in the Courts of Bombay there have been rulings[6] and *dicta* in favour of the view that she takes the entire property." These rulings, having been so far confirmed, as we have seen, by the Judicial Committee itself, cannot be deemed to have been overruled by a decision on a case from another province subject admittedly to a law or a construction of the law different from that by which such questions are governed in Bombay.

The general comparative leaning of the Hindu law of Bombay in favour of women's proprietary capacity has been recognized in *Lalloobhoy* v. *Cássibái* and in several other cases[7]. The

(1) L. R., 8 I. A., 108.

(2) 11 M. I. A., 487.

(3) *Dámodar Mádhowji* v. *Parmanandás Jivandás*, I. L. R., 7 Bom., 155, 163; West & Bühler, 777.

(4) L. R., 6 I. A., 15.

(5) *Ibid.*, p. 31.

(6) See, for example, *Gangárám* v. *Bália*, Printed Judgments for 1876, p. 31; West & Bühler, 331.

(7) West & Bühler, 123, 295; *Vijiárangam* v. *Lakshman*, 8 Bom. H. C. Rep., 259, O. C. J.

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restrictions on the widow's full ownership of what she inherits from her husband, cannot now be questioned[1]; but, so far as Bombay is concerned, they have been imposed against the general opinion of the Native lawyers. In *Deo Báee* v. *Wan Bái*[2] the shástris of the Appeal Court declared that a widow was entitled to the whole estate of a testator as against his will in favour of his brother. They add that the "widow has full right and power over her late husband's property"[3]. This is plainly not a restricted estate. The succession to what remains after the widow's death is given, by the same shástris, to the two daughters in equal shares. In *Kupoor Bhuwáni* v. *Sevukrám*[4], the right of a widow to give away the property was upheld as against the husband's nephew (sister's son), though it was said she could not thus have disinherited her own son or other near heir[5]. In *Chooneelál* v. *Jussoo Mull Deveedás*[6], this interest of an heir was held to extend to the widow of the nephew of a deceased husband. In *Mádhowaráo* v. *Yuswuda Báee*[7], the Sadar shástris say that a widow on her husband's death, sonless, takes the whole estate, and the only restriction they allow on her free disposal of it is that arising from the familiar text of the Mitákshara[8], which prohibits the alienation of the immoveable property to the detriment of the family, and which applies equally to a male *pater familias*. Similarly, in the case of *Doe* v. *Ganpat*[9], one in which the parties evidently were Maráthás, the Sadar shástri says: "Though the deed of gift has been executed without the consent of the sons of A B's brother, this is not sufficient to invalidate it, because the injunction of the law to take the consent of the kindred in the case of giving away immoveable property is intended to impart that formality to the transac-

(1) West & Bühler, 98, 782.

(2) 1 Borr., 29.

(3) *Ibid.*, p. 34. Compare Jaggannatha in Colebrooke's Digest, Bk. V, Tit. 399, Comm., where he says that the restriction on alienation by a widow is only a moral one, though elsewhere he regards it as strictly legal.

(4) 1 Borr., 448.

(5) See *Vijiárangam* v. *Lakshman*, 8 Bom. H. C. Rep., 265; West & Bühler, 305.

(6) 1 Borr., 61.

(7) 2 Borr., 460, at p. 468.

(8) Ch. I, s. i, p. 27. As to the caste customs in the Deccan, see Steele L. C., 236, 373; West & Bühler, 783 (*n*).

(9) Perry's Or. Cas., 133, 136.

tions which will leave no doubt as to whether the persons concerned in it belong to a divided or undivided family; when kindred are separate in interest, gifts, &c., made without their consent, are valid according to Mitákshara and other works on law[1]. . . . . ."

The opinions of the Native lawyers, just referred to, must, of course, be regarded as overruled[2] so far as the estate of a widow is concerned[3]. But they are pertinent to the present discussion, as showing the tendency of local interpretation, on this side of India, to assign to a female taking by inheritance as full and complete an estate as to a male[4]. The stride from *Mynábái's case*[5] to the inferences deduced from it is longer and more difficult when that case itself rests on a construction of the law hardly admitted in the Bombay Presidency, and opposed to the sense in which the Mitákshara has been understood by the chief rival commentaries[6].

The estate taken by a mother in succession to her son has been assimilated to that taken by a widow in succession to her husband[7], contrary to the express rule on the subject given by the Smriti Chandrika[8] and other authorities[9]. In the

(1) In *Mussamat Thakoor Deyhee* v. *Rai Baluk Ram*, 11 M. I. A. at p. 150, the shástri consulted by the Sadar Court of the North-West Provinces thought that, where a separation had taken place, the share of the patrimony taken by a coparcener retained its character as family estate, and could not even after a descent be aliened by the widow of a late owner, but that the lands acquired by her husband were at the widow's free disposal.—See West & Bühler, 196, 731, 783, 715, 717.

(2) West & Bühler, 95, 98, 102.

(3) The Viváda Chintámani, page 261, says that the principal text admits of two interpretations, one being in favour of the widow's complete estate.

(4) See Mitákshara, I, 1-2; II, 1-39; II, XI, 2, 3, 30; I, VI, 2

(5) 11 M. I. A., 487.

(6) West & Bühler, 272; Dr. Jolly's Tágore Lectures, 1883, pp. 248 ss.

(7) West & Bühler, 449, 451, 465; *P. Bachiráji* v. *V. Venkatappadu*, 2 Mad. H. C. Rep., 402; *Narsappa Lingappa* v. *Sákhárám Krishna*, 6 Bom. H. C. Rep., 215; *Punchanund Ojhab* v. *Lalshan Misser*, 3 Calc. W. R., 140.

(8) Ch. XI, s. iii, pa. 8.

(9) See West & Bühler, 328, 465; Jagannatha (Cole. Dig., Bk. V, T. 422) shows that it is a rule peculiar to Jimuta and his followers of the Bengal school. The Viváda Chintámani, pp. 262, 263, says that a woman cannot dispose of immoveable property inherited by her as a widow or a mother.

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one case, as in the other, the power of disposition has been narrowly restricted, and, on the death of the female proprietress, her heir for this particular purpose has been identified with the heir of the last male owner[1]. In the case of the succession of a widow as the next *gotraja sapinda* after her own deceased husband, a similar limitation has been enforced—*Bharmangavda* v. *Rudrapgavda*[2]. The females taking by inheritance in these cases, however, are, at any rate, widows—*The Collector of Masulipatam* v. *Cavaly Vencata Narainapah*[3], *Dhondo Rámchandra* v. *Bálkrishna Govind*[4]; and Katyayana's text may be extended to them by an analogy somewhat less strained than in the cases of daughters or sisters. The principal commentators on the Mitákshara, it is true, make the paternal grandmother inheriting from her grandson take the estate as *stridhan*[5], but that is only a single application of a principle rejected by the Courts. From the mass of decisions, Sir M. Westropp deduced the general rule that all widows, inheriting in their family of marriage, take only *durante viduitate*—*Tuljárám Morárji* v. *Mathurádás Bhagvándás*[6]. The logical cogency of the learned Judge's argument cannot be denied, though it leads to a conclusion unrecognized by the Native jurists of the Western school.

Still the doctrine of the widow's inheritance of the entire estate, which yet descends on her death to a line of heirs not her own, but her husband's, is quite anomalous, and is recognized as anomalous by the Hindu lawyers, even by those who join in maintaining Jimuta's doctrine. Thus the Viramitrodaya[7] admits the difficulty of a succession of the husband's heirs after the estate has vested in the widow. Mitramisra overcomes it by saying that "the heirs," who are to take under Katyáyana's text[8], can mean no other than the husband's heirs, because the general heirs to a woman's property had been already provided for by a previous text of the same Smriti. Mitramisra may seem to draw a very large induction from the supposed impro-

(1) West & Bühler, 464, 465.
(2) I. L. R., 4 Bom., 181.
(3) 8 M. I. A., 529.
(4) I. L. R., 8 Bom., 190.
(5) Mit., Ch. II, s. iv, p. 2, note.
(6) I. L. R., 5 Bom., 662.
(7) Ch. III, Pt. I, s. 4.
(8) Cole. Dig., Bk. V, Tit. 477.

bability of tautology [1] in the Smriti; but, at any rate, he does not carry it further than to the case of the widow. As to other female successors, and especially daughters, he expressly rejects the doctrine of a reversion to the heirs of the father, or other last male owner, as involving a complete subversion of principle. Jagannátha, though a Bengal lawyer, is of much the same opinion[2].

The text of Katyayana[3], on which the restrictions on the widow's estate have been founded[4], applies primarily, as is obvious, only to a husband's gifts—*Dámodar Madhowji* v. *Parmánandás Jivandás* [5], whence it has necessarily been extended to bequests [6]. A strong objection to its application to an estate taken by succession to the husband arises, according to the Hindu system of interpretation, from the injunction in the first branch of it having no sense in such a case. A woman cannot preserve, during her husband's life, what she does not get until after his death; and duplicity of meaning in one connected precept is to be avoided. The objection is discussed by Jagannatha[7], who concludes by deducing the restrictions on an estate inherited *a fortiori* from one given. He admits that this does not apply to any other inheritance [8]. But a gift to a wife has, in many cases, been pronounced to confer an absolute estate. An early one may be found in *Kishen Govind* v. *Ladlee Mokun Thakoor*[9]; a recent one (of bequest) in *Mussamut Kellanukooer* v. *Luchmi Pershad*[10]. At Allahabad and in Bombay the right of the husband to give his wife a complete estate has been recognized—*Seth Mulchand Badharsha* v. *Bái Mancha* [11], where the intention was clear; and Colebrooke said

(1) Cole. Dig., Bk. V, Tit. 402, Comm.; Dáya Bhága, Ch. XI, s. i, 58.

(2) Viram., Ch. III, Pt. I, s. 4; do. Pt. II; do. Ch. V, Pt. II, s. 7; West & Bühler, 332; Cole. Dig., Bk. V, Tit. 420, Comm.

(3) Cole. Dig., B. V, Tit. 475, 477; Vivádа Chintámani, pp. 262, 263.

(4) West & Bühler, 305.

(5) I. L. R., 7 Bom., 155.

(6) West & Bühler, 190, 217, 293.

(7) Cole. Dig., Bk. V, Tit. 402, Comm.; W. & B., 320.

(8) *Ibid.*, Tit. 399, Comm.; nor to a donation by a maternal grandfather; *Kaseerám Kripárám* v. *Ichhá and Sheo*, 2 Borr., 548.

(9) 2 Calc. S. D. Adaw. Rep., 309.

(10) 24 Calc. W. R., 395.

(11) I. L. R., 7 Bom., 491; West & Bühler, 806.

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that a husband in Madras could give his wife land as *stridhan* (1). The mere gift, in general terms, to a widow will not, in Bengal, confer more than the widow's ordinary estate—*Punchoo Mony Dossee* v. *Troylucko Mohiney Dossee* (2), but it may be enlarged to a complete estate (3). As the restrictions on the estate taken by a gift apply, in terms, only to a wife, they cannot, except by a forced construction, be applied to daughters, the completeness of whose estate is indeed expressly declared in the same context (4). Neither should they, therefore, to the estate taken by a daughter by inheritance. The restrictions themselves and the special descent evolved from them being unrecognised in the Mitákshara, the Bombay shástris naturally treated the daughter's acquisitions from her father as *stridhan* (5). In the Vyavahára Mayûkha they are ranked as *stridhan*, and distinguished from the gifts obtained from a husband (6).

The intimate relation between inheritance and partition under the Hindu law has often been observed (7). According to the Smriti Chandriká indeed (8) there can be no heritage, properly so called, except of what is partible; whence occasion is taken to censure the Mitákshara's notion that what a widow takes from her husband is heritage. This shows how Vijnánesvara was understood by one of his chief opponents as to the contents of "*stridhan*" (9). The Smriti Chandrika, however, assigns to a mother and to a sister portions, though not shares in a partition (10), without the rights adhering to them which belong to "*daya*," as property the object of concurrent rights. The Mitákshara (11) is so much simpler or more comprehensive in its view that it regards heritage or "*daya*" as including all,

(1) 2 Str. H. L., 19, but see West & Bühler, 402.

(2) I. L. R., 10 Calc., 342.

(3) I. L. R., 10 Calc., 342., and *Brij Indar Bahádur Singh* v. *Ránee Jánki Koer*, L. R., 5 I. A., 1.

(4) Cole. Dig., Bk. V, Tit. 475; *Prán-kishen Sing* v. *Mussummaut Bhagwutee*; 1 Calc. S. D. Adaw. Rep., 3; 2 Macn.'s H. L., 214; West & Bühler, 311.

(5) *Juggunath Rughoonathdás* v. *Sheo Shunkur Jussoomul*, 1 Borr., 102; *Ambawow* v. *Rutton Kristna*; Fr. and Bella., Bom. Sel. Rep. (ed. of 1862), p. 150; West & Bühler, 219; Cole. Dig., Bk. V, Ch. I, s. i, art. 1.

(6) Vyavahára Mayûkha, Ch. IV, s. x, pa. 8, 9.

(7) West & Bühler, 307 (*b*), 600.

(8) Ch. IV, pa. 10.

(9) So, too, Dáya Bhága, Ch. IV, s. ii, pa. 27.

(10) West & Bühler, 303.

(11) West & Bühler, 783.

property acquired through relation to an owner, and in Ch. 2, s. 11, para. 1, uses the word "partition" to indicate generally all that has been said on the subject of inheritance as well as division of property. On the inheritance to a woman's property, it speaks in the same way as a "partition" or "distribution"; the succession is conceived only as a kind of distribution amongst the daughters, if there be daughters to benefit by it (para. 12); and all they take either by inheritance or partition, is viewed as *stridhan*. The Viramitrodaya assigns shares in a partition to daughters (1). The Vyavahára Mayûkha lays no particular restriction on the estate taken by a wife, a mother, or a sister in the share assigned to her in a partition (2). As to the succession after her death, it directs that her sons and other heirs in order are to take it (3). Thus the Mitákshara's notion of an unfettered right attending the woman's ownership is, as to property thus acquired (4), very strongly supported. The Dáya Bhága of Jimuta Vahána treats the allotments given to mothers and daughters as finally parted with as portions of the family estate (5), though not as taken by way of inheritance. This latter view of the women's rights, says Raghunandana, is taken by the Mitákshara, but rejected by the Dáya Bhága (6). As the Mitákshara expressly provides (7) for the succession of a woman's own heirs to the share taken by her in a partition, the incidental statement of this rule is consistent with a similar intention as to inherited property, and with no other. Apararka, so often quoted by Colebrooke, repeats that the share taken by a female in a partition is *stridhan* (8) and under her own sole control. Even in Bengal, Jagannátha says (9) that the share given to a wife, mother, &c., is her separate estate; and the pandits of the Supreme Court (10) declared that what a widow took in a partition was her *stridhan*. Colebrooke held this view (11), as shown by his replies to Sir T. Strange. In recent times, no doubt, the share taken by a mother

(1) West & Bühler, 303.
(2) West & Bühler, 777, 781(*a*), 782(*d*).
(3) Vya. May., Ch. IV, s. x, pa. 26.
(4) West & Bühler, 298, 303.
(5) Dáya Bhága, III, II, 32, 37; see West & Bühler, 781 (*a*).
(6) West & Bühler, 78(*a*), note.
(7) Ch. I, s. vi, p. 2.
(8) West & Bühler, 780(*c*).
(9) West & Bühler, 304, 307.
(10) West & Bühler, 304(*c*).
(11) West & Bühler, 310.

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in a partition has, in Bengal, been pronounced not to be *stridhan* —*Jugomohun Haldar* v. *Sarodamoyee Dossee*(1), but this is an artificial development of an arbitrary rule which the Bengal shástris themselves would not admit(2).

The anomalous nature of the restricted estate allowed to a widow by inheritance becomes more conspicuous when it is contrasted with these parallel cases, as it ought apparently to be governed by the same principles(3). To make an exceptional case the foundation of a general principle, is opposed to all sound rules of legal construction and development(4), but this is exactly the process adopted by Jimuta Vahána and the lawyers of the Bengal school(5). As the heirs of the husband take after the widow, so, *a fortiori*, it is said, must the heirs of the father take after a daughter. The word "wife" is used with a general import, applicable to all cases of female succession(6). On this Jagannatha observes that the inference drawn by Jimuta is quite unfounded; and, in the particular case of a daughter succeeding to her father, he says that, on her death, her heirs, not his, must take the property, except where Jimuta's personal authority is accepted as supreme(7). In another place he puts it as unquestionable(8), that a daughter may dispose, as she pleases, of property inherited from her father. These conclusions agree with those arrived at by Westropp, C.J., and Nánábhái Haridás, J., in *Gangárám* v. *Bállia*(9). They say that property inherited by a woman from her father is her *stridhan* heritable by her heirs, not by his(10). How the doctrine of the Dáya Bhága came to be applied to the cases of daughters and mothers under the law of Mithila and of Benares, is shown by Dr. Bannerjee in the Tágore Lectures of

(1) I. L. R., 3 Calc., 149.

(2) West & Bühler, 304 (c), 780 (c); 2 Morl. Dig. at p. 217; see Cole. Dig., Bk. II, Ch. IV, T. 28, Comm.

(3) Mit., Ch. I, s. i, pa. 1—6; Ch. II, s. i, pa. 1, 39, s. xi, pa. 1—4.

(4) Dig. L. 17, 141; Sav. Syst., s. 16.

(5) Aided in their case by the doctrine of the general heritable incapacity of women; *Lallubhái Bápubhái* v. *Mánkuvarbái*, I. L. R., 2 Bom., at p. 438.

(6) Dáya Bhága, XI, I, 56, 65; XI, II, 30, 31.

(7) West & Bühler, 332.

(8) Cole. Dig., Bk. V, Tit. 399, Comm.

(9) West & Bühler, 327.

(10) *Navalrám Atmárám* v. *Nandkishor Shivnáráyan*, I Bom. H. C. Rep., 209; West & Bühler, 331.

1878, pages 306ss.[1]. When a course of decisions was entered on which applied the distinctive principles of the Bengal school to the interpretation of the Mitákshara, it led inevitably to the conclusions formulated in the cases of *Chotay Lal* v. *Chunnoo Lal*[2] and *Mutta Vadu Ganadha Tevar* v. *Dorasinga Tevar*[3]. But these conclusions are not contained in the text of the Mitákshara itself, which significantly omits even the text of Katyáyana[4], limiting, or supposed to limit, the widow's estate[5], and the authorities received as explanatory of the Mitákshara or concurrent with it in Bombay deal in such a way with the succession of daughters[6] and sisters[7] that the Mitákshara must be understood to have been accepted as law here on quite a different construction of it from that which has prevailed in the other provinces. As to Madras, the authority there of the Smriti Chandrika and the Mádhaviya, which reject the fundamental notion of the Mitákshara as to women's rights, prevent any identity between its law and that of Bombay[8].

If it could be shown that the customary law, in this instance, rested on a palpable error, on a demonstrable misreading, for example, of the text of the accepted authority, then, no doubt, it might be said that the popular consciousness, which had accepted its conviction of the law from a corrupt text, would much more accede to the corrected rule[9]. But, in fact, no such error or misconception has ever been pointed out with regard to the

(1) See also *Mussumamut Bijya Dibeh* v. *Mussummaut Unpoorna Dibeh*, 1 Calc. S. D. Adaw. Rep., 162; *Gunga Mya* v. *Kishen Kishore*, 3 *Ibid.*, 128; *Nufur Mitur* v. *Ram Koomar Chuttoorjya*, 4 *Ibid.*, 310; *Mussummaut Gyan Koowur* v. *Dookhurn Singh*, 4 *Ibid.*, 330; *Sheoburt Sing* v. *Musst. Ghosa and Sheo Sehai Singh* v. *Musst. Omed Koonwur*, 6 *Ibid.*, 301; West & Bühler, 330 (c); *Mussummaut Ramdan* v. *Behree Lall*, 1 N. W. P. H. C. Rep., 114.

(2) L. R., 6 I. A., 15, 31, 32.

(3) L. R., 8 I. A., 99, 109.

(4) See Cole. Dig., Bk. D., Tit. 475, 477; West & Bühler, 305.

(5) *Dámodar Mádhowji* v. *Parmanandás Jivandás*, I. L. R., 7 Bom., 166; Comp. *Bhagvándeen Doobey* v. *Myna Bái*, 11 M. I. A. at p. 511.

(6) West & Bühler, 105.

(7) *Ibid.*, 116.

(8) West & Bühler, 330; *Mutu Vadu Ganadha Tevar* v. *Dorasinga Tevar*, I. L. R., 3 Mad., 310, 313, 333; *Bhagvándeen Doobey* v. *Myna Bái*, 11 M. I. A. at p. 509.

(9) See Puchta Gewohnheitsrecht, B. I, p. 99; Sav. Syst. I, s. 25; Dig. Lib. I, Tit. III, L. 39.

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common acceptation of the Mitákshara as it bears on the estate of a daughter and the succession to that estate after her death. In Ch. II, s. 2 of that work, the daughter is declared heir to a man in default of his widow on account of her analogy to a son as insisted on by Brihaspati. But, further, the unmarried daughter is given a preference over the married one. This cannot arise from any supposition of greater spiritual benefit to be derived from the former, as she may possibly not be married so as to produce a legitimate son at all. The truth is, that the succession of daughters to their father having been admitted at a comparatively advanced stage in the development of the Hindu law, their rights had to be supported by rather strained analogies and forced applications of texts[1]. Thus the text of Gautama, the object of which was plainly to save daughters from destitution under a system which excluded them wholly from heirship to the paternal estate, by securing at least their mother's property for them, is laid hold of by Vijnánesvara to determine their relative rights of succession to their father[2]. The analogy that he sets up, implies both that the mother's estate, taken by the daughters, may be of a nature similar to that of the father, and that they take each estate with the same rights[3]. But as the daughters are thus made to succeed to the paternal estate after the analogy of sons, and yet with the same relations *inter se*, as if they had taken the property from their mother, how is it reconcileable with such a system that they hold but mere life interests interpolated in the regular line of male succession? The Bengal lawyers escape from the difficulty by boldly declaring that *stridhan* is not *stridhan* when it has been once inherited[4], and thus cutting down the daughter's estate, even in her mother's property, to a life interest, but no one hitherto has pretended to find such a doctrine in the Mitákshara.

On the contrary, in Ch. II, s. 11 of the work, Vijnánesvara after demonstrating, according to his method, that '*stridhan*' has

(1) West & Bühler, 95, 105; *Bhau Nánáji Utpat* v. *Sundrábái*, 11 Bom. H. C. Rep., 249, 273.

(2) Mit., Ch. II, s. ii, pa. 4.

(3) Where Yájnavalkya (II, 117) speaks of a "mother's property" generally, Vijnánesvara comments on as "*stridhan*."

(4) Macn. H. L., Ch. III, p. 44; Dáya Kr. Sanga, Ch. II, s. ii, pa. 12; s. iii, p. 6; Stoke's H. L. B., 489, 493; comp. Mit., Ch. I, s. i, pa. 2.

not any technical sense, but includes property that a woman may acquire by any of the usual modes, as by partition or inheritance, in the ways already described by him[1], proceeds to deal with the succession to such property[2]. He recognizes differences of succession according to the different kinds of marrige and certain special rules for particular kinds of property; but these latter exceptions really confirm the general rule for ordinary cases. Thus he says that the "*shulka*" or fee presented to a woman by her husband at her marriage is inherited by her brothers as an exception to the general rule of succession to her by her daughters and daughters' daughters. In paragraph 30, again, he says that when a betrothed damsel dies, her brothers are the first heirs to property inherited by her. This property, therefore, is included by Vijnánesvara in *stridhan*, and on the maiden's death it does not revert to her grandfather's or her uncle's heirs as such; it goes to her own heirs specially designated, by way of exception to the general rule, which assumes that a woman has been married. In that case the heirs must generally be her children, and, failing them, her husband, (paragraphs 11, 12)—*Mussumaut Thakoor Deyhee* v. *Rai Baluk Ram*[3], or if she was married by an inferior rite, her mother and her father in priority to more distant relatives. Such an order of succession is the natural accompaniment of the extended comprehension of "*stridhan.*" Other schools admit it only for the specific kinds of property which they allow to be *stridhan*: Vijnánesvara having enlarged the contents of *stridhan*[4] was forced, in consistency, to widen proportionally the operation of the general law applicable to it and thus the rules for particular kinds of *stridhan* appear in the Mitákshara only as special exceptions. There are several such exceptions, but there is none to the effect that property inherited by a woman, or, to be more specific, inherited by a daughter from her father, is to descend on her death to his heirs, or to any heirs but her own in the order indicated[5].

(1) West & Bühler, 272.
(2) *Ibid.*, 324.
(3) 11 M. I. A. at p. 175.
(4) Mit., Ch. II, s. xi; *Bhagvándeen Doobey* v. *Myna Bái*, 11 M. I. A., pp. 509, 510.
(5) Mit., Ch. II, s. xi.

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Vijnánesvara's doctrine of female succession and its consequences though often denied and combated, seems never to have been understood in a sense different from what his text has suggested to the Bombay shástris by any Native lawyer or scholar of any weight. The chief commentators, Vishveshvara and Bálambhatta, agree in this construction. So do Jimuta Vahána and Devannabhatta, though they controvert the doctrine[1]. The Sarasvativilasa accepts it. Kamalákára in the Vivadatandava, a great authority of the Benares school[2], ranks inherited property amongst *stridhan*, subject to its general rules. Nandapandita[3] deduces an equally wide comprehension of *stridhan* from Vishnu[4] as Vijnánesvara from Yájnavalkya. Apararka[5], in his great commentary on Yajnavalkya, written a couple of generations after the Mitákshara, attributes the same wide sense as his predecessor to the passage defining *stridhan*[6]. It is manifest, therefore, that the meaning assigned to the Mitákshara by the Western school is not only reasonable in itself, but has been widely received, and that it is supported by the views of the same Smriti text, and a parallel one arrived at by independent writers of high authority. In *Myna Bái's case*[7] the Judicial Committee say that the "Mitákshara, in the second para. of section 11 of Chapter 2, includes property which she may have acquired by inheritance in the enumeration of woman's peculiar property." There is no oddity, then, or isolation in the view that a daughter, inheriting from her father, may take as complete an estate as if she were a son[8]. If she does not take an estate as *stridhan*, the Mitákshara gives absolutely no rule for its descent on her death; but, as the Judicial Committee has pointed out, a *stridhan* estate is given, and the devolution of this to her heirs is prescribed[9]. Even in Bengal, Jagannátha recognizes[10] the daughter's absolute estate in property inherited from

(1) Smr. Chandr., Ch. IV, pa. 10; Dáya Bhága, Ch. IV, s. i, 7; West & Bühler, 272.

(2) Coleb. Preface to Treatise on Inheritance.

(3) *Ibid.*; Stoke's H. L. Bk., 177.

(4) Jolly. Tágore Lectures for 1883, p. 249.

(5) Coleb. Op. Cit., Stoke's H. L. Bk., p. 177.

(6) West & Bühler, 780.

(7) 11 M. I. A., 509, 510.

(8) Mit., Ch. I, s. i, pa. 3, 8; s. vii, pa. 14.

(9) Mit., Ch. II, s. xi.

(10) Cole. Dig., Bk. V, Tit. 399, Comm.; T. 515, Comm.

her father; and he admits that some lawyers contend for the succession to such property of the daughter's own heirs[1].

The completeness of a woman's estate in property taken by inheritance does not necessarily involve complete indpendence in dealing with it[2]. The Mitákshara is careful to demonstrate that dependence is as consistent with full ownership in the case of a woman[3] as of a child; and it seems likely that Vijnánesvara looked to this dependence[4] as a safeguard for the enlarged estate which he assigned to women[5]. The order of succession, which he prescribes or recognizes, fits into the same system. The wife inherits a full ownership from her husband, but after her death her heirs, failing her children, have generally to be sought amongst her husband's kindred—*Mussumaut Thakoor Deyhee* v. *Rai Baluk Ram*[6]. This brings the estate back to the family from which it was temporarily taken, and sometimes gives to it what the widow inherited from her father[7]. The Vyavahára Mayukha agreeing with the Viramitrodaya allows to a widow a considerable freedom in disposing of the estate inherited from her husband for religious purposes[8], but here again the exception may be held to confirm the rule. On daughters inheriting from their fathers[9], and on sisters inheriting from their brothers, Nilkantha has imposed no express restrictions[10], and the Bombay shástris have declined to invent them. Nilkantha, a shástri of Benares, the great centre of Hindu learning, was necessarily well acquainted with the law-writers of the Bengal school. His omission even to discuss Jimuta Vahana's doctrine as to the estate taken by females as heirs, marks sufficiently his intention of adhering to the teaching of the Mitákshara, which was his general guide[11], although in particular instances he departs from it for reasons

(1) Cole. Dig., C. T., 515, Comm.

(2) Mit., Ch. I, s. i, pa. 20; Dáya Bhága, Ch. XI, s. i, 641; West & Bühler, 317.

(3) Mit., Ch. II, s. i, 25.

(4) West & Bühler, 298; Mit., Ch. I, s. i, pa. 20.

(5) Dr. Jolly's Tag. Lec. for 1883, p. 251, and *Vijiárangam* v. *Lakshman*, 8 Bom. H. C. Rep., 244, O. C. J.; West & Bühler, 300 (*a*), 318.

(6) 11 M. I. A. at p. 175.

(7) West & Bühler, 517.

(8) Vya. May., Ch. IV, s. viii, pa. 4.

(9) *Ibid.*, p. 10.

(10) *Ibid.*, p. 19.

(11) Coleb. Preface to Treatises on Inheritance; Stoke's H. L. Bk., 173.

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usually stated by him. His statement of certain restrictions[1] on the widow's power of disposal makes his omission of them in the case of a daughter signify that for her he recognized no such restrictions[2].

Now, although the subjection of a woman to restrictions on alienation is quite consistent with a full ownership in her, passing on her death to her heirs, yet an unfettered power of disposition is hardly consistent with the succession of another line of heirs. The woman could, and often would, defeat it by a transaction during her life[3]. It was to be expected, therefore, that the Vyavahára Mayûkha should make property inherited by a woman descend to her heirs, and it does so. The technical *stridhan* falling under special texts it disposes of as they direct: the inherited *stridhan*, not thus provided for, it gives, on the woman's death, to her sons and other heirs as if she had been a male[4]. Such is the sense in which the shástris have generally understood the rule given by Nilkantha, and it is a perfectly reasonable one[5]. The rule rests on the passage of Yájnavalkya, (II, 118) which is the basis of the Mitákshara's rule for the distribution of a male's estate amongst his sons, (Mitákshara, Ch. II, sec. iii, 1,) and the Vyavahára Mayûkha assigns the same rights to the "sons or others" (taking their place in the distribution of the mother's estate)[6]. In Ch. 4, s. ii, Nilkantha says that "heritage" includes the property received through the mother, and in s. iii, that "sons includes grandsons and the rest." "Sons and the rest" in Ch. 4, s. x, para. 26, seems to have the similar sense of "sons, and those who, failing sons, take their place in relation to the deceased woman." Nilkantha here intends to mark his dissent from the Mitákshara's doctrine of daughters' succession to their mother's share reserved in partition[7]. This is the shástris' view, and as there is not the slightest indication, in the Vyavahára Mayûkha, of an intention

(1) Vya. May., Ch. IV, s. viii, pa. 4.
(2) *Ibid.*, pa. 10.
(3) Cole. Dig., Bk. V, Tit. 515, as to her power over property inherited from a father, &c.
(4) West & Bühler, 518; Mit., Ch. I, s. vi, 2, compd. with Vya. May., Ch. IV, s. x, 26, 24; Steele's L. C., 64.
(5) Jolly Tágore Lectures for 1883, p. 266.
(6) Vya. May., Ch. IV, s. x, pas. 26, 24.
(7) Mit., Ch. I, s. iii, I, 8; s. vi, 2.

to adopt the Bengal doctrine of reversion, who shall pronounce the shástris in error ?[1] As regards a widow, the matter is settled by authority, but Nilkantha distinguishes her case from that of the daughter by his special dissertation on it. A daughter takes, like a son, after her mother, and there is not a word to restrict her estate[2].

How the Vyavahára Mayûkha was understood by the most eminent shástris, appears from the case of *Doe* v. *Gunput*[3]. There it is declared that even a widow may make a gift of the property inherited from her husband to her daughter's son. Sir E. Perry says that the succession of that man's son may be rested on his descent, which does not seem correct, unless the descent be traced from the widow herself; but no great weight can be attached to this part of the judgment. It must be sustained on the opinion of the shástris[4]. From the review already taken, it is clear there was abundant authority for the opinion given as to the estate taken by a daughter succeeding her father by the Poona shástris as well as those in Bombay when consulted by Sausse, C. J., in *Devkuverbái's case*[5]. "The answer was that daughters so obtaining property could alienate it at their will and pleasure." Both groups of shástris referred to the Mayûkha as an authority; thus recognizing the position assigned to it by Colebrooke amongst the Maráthás[6]. In *Vináyak Anandrav* v. *Lakshmibái*[7], the absolute estate assigned to the daughter in *Devkuverbái's case* was, as we have seen, made the basis for an estate, equally absolute, assigned to a sister. This view agrees with that given by Sir T. Strange as the one approved by the Southern as contrasted with the Bengal authorities[8]. Sir T. Strange says that, according to the same author-

(1) The jurists "an actual part of the people in this order of thought represent the whole," Sav. Syst., s. 14.

(2) Vya. May., Ch. IV, s. viii, pa. 10.

(3) Perry's Or. Cas., 133.

(4) As to the weight of professional opinion, see *Smith* v. *Doe*, 2 Brod. & Bing. at p. 611; *Candler* v. *Candler*, Jac. R., 232; West & Bühler, 866; *Lallubhái Bápubhái* v. *Mánkuvarbái*, I. L. R., 2 Bom., 447; on the *Prudentum Auctoritas*, Sav. Syst., s. 14, 25.

(5) *Pránjivandás Tulsidás* v. *Devkuvarbái*, 1 Bom. H. C. Rep., 133.

(6) 1 Str. H. L., 318; see also *Bhagvándeen Doobey* v. *Myna Bái*, 11 M. I. A. at pp. 508, 510.

(7) 1 Bom. H. C. Rep., 118.

(8) 1 Str. H. L., 139; West & Bühler, 106.

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ities, a daughter's inheritance "classes as *stridhan* and descends accordingly." This has been the uniform doctrine of the High Court of Bombay from its institution down to the present day (1). If the daughter takes an absolute estate, it has been understood she must, in the absence of an express rule to the contrary, transmit it to her own heirs(2).

The principal cases bearing on the question before us, to be found in the reports, are cited in the reference. Some others, besides the ones already dwelt on, may be found in West and Bühler, (3rd ed.), pp. 106, 150, 151, 327, 336, 444, 451, 777, 782. A much larger number of cases not reported have been decided by this Court in a similar sense(3), and in the Courts of the mofussil such cases must number many hundreds(4). These ought now to be adhered to(5). Many transactions must have been entered into on the faith of these decisions(6). They seem to be justified by the local law as resting on the usage of the country; and even if they should be thought wrong or impolitic, the remedy ought to be applied by the Legislature(7). The decisions of the Courts not only attest the common law of the people(8), but blend with it(9); they enter into and become a part of the people's legal consciousness(10). Here they accord with the previous general convictions on the same subject(11). It may be inconvenient that a generally received authority, like the Mitákshara, should be received in different senses in different parts of India, but it is the acceptance and the acceptation, which, for each part, constitute its law. The Legislature may enact a wide and useful uniformity, accompanied

(1) West & Bühler, 514, 519, 530, 105, 327, 331, 336.

(2) West & Bühler, 331; Cole. Dig., Bk. V, Tit. 477; Viramitrodaya, Ch. III, p. 1, s. 4.

(3) Compare *Webster* v. *The Overseers of Ashton-under-Lyne*, L. R., 8 C. P. at p. 318; *Nicols* v. *Pitman*, L. R., 26 Ch. Div. at p. 381.

(4) West & Bühler, 870; *Chotay Lal* v. *Chunnoo Lall*, L. R., 6 I. A., 32.

(5) *Goodtitle* v. *Otway*, 7 T. R., 419; *Gee* v. *Pritchard*, 2 Swanst., 414, 422.

(6) *Hodgson* v. *Ambrose*, Dougl. 340(*a*); *Fox* v. *The Bishop of Chester*, 6 Bing., 24; *Morecock* v. *Dickens*, Ambl., 678-680.

(7) *Ellis* v. *Smith*, 1 Ves. Jun., 13.

(8) Sav. Syst., s. 25.

(9) Blackstone by Kerr., I, 47; Wilmot's Notes, 265; *R.* v. *Wilkes*; *Bibly* v. *Cuming*, 4 Burr. at p. 2465.

(10) Wilmot's Notes, 312; West & Bühler, 869; Sav. Syst., s. 12.

(11) Steele's L. C., 64, 66, 67; see Co. Lit., 110*b*, 115*b*.

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with the requisite safeguards, but the Courts have no right to usurp that function[1]. We must take the law as we find it; and in Bombay it says that a daughter, inheriting from a mother or a father, takes an absolute estate, passing on her death to her own heirs, not to those of the preceding owner[2].

(1) See *Doe.* v. *Bliss*, 4 Taunt., 735-736.

(2) *Navalrám Atmárám* v. *Nandkishor Shivnáráyan*, 1 Bom. H. C. Rep., 209; *The Eastern Financial Association, Limited*, v. *Pestonji Cursetji Shroff*, 3 *Ibid.*, 11; *Tuljárám Morárji* v. *Mathurádás*, I. L. R., 5 Bom., 662.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

ACHUT RA'MCHANDRA PAI, (ORIGINAL PLAINTIFF), APPELLANT, *v.* HARI KAMTI AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

1886. *November* 30.

Limitation Act XV of 1877, *Arts.* 99 *and* 132—*Suit to recover assessment paid by a co-owner of property from other co-owners.*

In 1868, the uncle of the plaintiff brought a suit, (No. 176 of 1868), against five members of the undivided family, to which the defendants in the present suit belonged, and obtained a money-decree. In execution of that decree, he attached and sold certain land, in which all the members of the defendants' family were interested. At the sale he purchased the land himself, and was put into possession. In 1873, he began to pay the assessment upon the whole property. Subsequent litigation took place between him and the defendants' family, pending which the plaintiff separated from his uncle, and obtained the property in question as his share. The result of that litigation was a decree by the High Court, on the 23rd September, 1879, declaring that the plaintiff's uncle was only entitled to the interest of the five members of the family who had been defendants in his suit (No. 176 of 1868) in execution of the decree in which the property had been sold. The plaintiff brought the present suit in 1883 against the other members of the family to recover their proportionate share of the assessment for the years 1875-1878, during which period he had paid the whole assessment. He prayed for a sale of their interest in the land. Both the lower Courts held that the payment of assessment did not create a charge on the property, and that the plaintiff having omitted to sue within three years from the date of the payments made by him, the present suit was barred. On appeal by the plaintiff to the High Court,

Held, confirming the lower Court's decree, that the suit was barred. The plaintiff paid the assessment as full owner of the property, and it was entirely by his own action that the defendants had been excluded from the property, and did not

* Second Appeal, No. 578 of 1884.