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"If the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings." The ambiguity in the certificate of sale in the present case is precisely the same as in *Nanomi's case* (1). But the Court has to look at the substance of the transaction—*Bissessur Lal Sahoo v. Luchmessur Singh* (2), *Jeo Lal Singh v. Gunga Pershad* (3). Applying these principles to the fact that the first defendant represented the plaintiffs who were equitably liable to pay the amount of the decree, I am of opinion that the plaintiffs cannot succeed.

*Order reversed.*

14 B. 605.

[605] APPELLATE CIVIL.

*Before Mr. Justice Birdwood and Mr. Justice Jardine.*

BALKRISHNA BAPUJI APTE AND ANOTHER (*Original Defendants*),  
*Appellants v. LAKSHMAN DINKAR* (*Original Plaintiff*), *Respondent*.  
[22nd April, 1890.]

*Hindu law—Inheritance—Mitakshara—Mayuka—Mother's right to succeed to a childless son's property—Priority of the mother over the father—Mitakshara paramount in Ratnagiri.*

In the Ratnagiri District the Mitakshara is the paramount authority on Hindu law.

Under the Mitakshara the mother of a childless separated Hindu comes in the order of succession next after his widow and before his father.

The rule of the Mayuka, that the father is to be preferred to the mother, being directly opposed to the rule of the Mitakshara, cannot prevail in the Ratnagiri District.

[R., 24 B. 367 (373) ; 11 Bom. L.R. 641.]

SECOND appeal from the decision of R. S. Tipnis, Acting Assistant Judge of Ratnagiri, in appeal No. 631 of 1888.

The plaintiff separated from his son Vasudev in 1880.

Vasudev died in 1882, leaving a childless widow. The widow died soon afterwards. The persons who survived her were Vasudev's mother Saguna and his father, the present plaintiff.

In 1883 the defendant No. 1 obtained a decree against Saguna as the heir and legal representative of Vasudev, deceased, and in execution put up to auction Vasudev's property. Defendant No. 3 became the auction-purchaser, and was put into possession by the Court.

In 1886 the plaintiff filed the present suit to set aside the decree obtained by defendant No. 1 against Saguna and the proceedings held in execution, and for recovering possession of the property in dispute. The plaintiff alleged that he became the owner, on Vasudev's death, of the property in dispute, and that the decree against Saguna was obtained by fraud and collusion.

\* Second Appeal No. 631 of 1888.

(1) 13 I.A. 1 = 13 C. 21.

(2) 6 I.A. 233.

(3) 10 C. 996.

The defence was that, according to the Mitakshara, the mother came before the father among the heirs of the deceased; that the plaintiff had no title to the property; and that the decree was not fraudulent or collusive.

[606] The parties were Brahmins and residents in the Ratnagiri District.

The Court of first instance dismissed the suit, holding that under the Mitakshara the mother had priority over the father in the order of succession, and that, therefore, the plaintiff had no title to the property in dispute.

On appeal the Acting Assistant Judge held, on the authority of the Mayukha, that the father had priority over the mother, and that, in the absence of any local usage to the contrary, the plaintiff was the heir of the deceased Vasudev, and, as such entitled to succeed to his estate. He found that the decree in execution of which the property in dispute was sold, was not tainted with fraud or collusion; but, as the plaintiff was not a party to the decree or the execution proceedings, he was not bound by them.

The decree of the Court of first instance was, therefore, reversed, and the plaintiff was declared entitled to recover possession of the property in suit.

Against this decree the defendants 1 and 3 appealed to the High Court.

*Vasudev Gopal Bhandarkar*, for appellants (defendants).—This case is governed by the Mitakshara and not by the Mayukha. The Mitakshara expressly gives the priority to the mother over the father. The Mayukha, on the other hand, gives the preference to the father. Where the two commentators thus differ, the Mitakshara, as the paramount authority, should be followed. The Mayukha illustrates and supports the Mitakshara, but must not be used to contradict—West and Bühler, p. 10 (3rd ed.); *Narayan Babaji v. Nana Manohar* (1); *Krishnaji Vyanktesh v. Pandurang* (2); *Rahi v. Govind* (3); *The Collector of Madura v. Motto Ramalinga Sathupathy* (4); *Bhagirhibai v. Kahnurirav* (5); Mitakshara, Ch. 2, s. 3, pl. 1—4; Mayukha, Ch. 4, s. 8, pl. 14 and 15; Mandlik's Hindu Law, 80; West and Bühler, p. 447 (3rd ed.),

*Mahadev Chimnaji Apte*, for the respondent (plaintiff):—There is no authority which lays down that, in a case like this, the [607] Mayukha is not to be preferred to the Mitakshara. In *Khodabhai Mahiji v. Bahdar Dala* (6) it is expressly ruled that the father succeeds to the son's property in preference to the mother. The original text of Yajnavalkya says: "Both parents succeed." He does not prefer either. Vijnaneshvar himself expresses doubts as to the precise meaning to be attached to the text: see Stokes' Hindu Law, p. 441. Where the Mitakshara leaves the question in doubt, we should look to other authorities, particularly to the Mayukha. In *Lallubhai Bapubhai v. Mankuvarbai* (7) West, J., says that the reason assigned by the Mitakshara for giving preference to the mother seems to be a very artificial one. In former times the right of inheritance depended on the capacity to benefit the deceased by the performance of the funeral rites. Has the mother

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(1) 7 B.H.C.R. A.C.J. 153.

(4) 12 M.I.A. 397 (483).

(7) 2 B. 388 (438).

(2) 12 B.H.C.R. 65.

(5) 11 B., 285.

(3) 1 B. 97 (106).

(6) 6 B. 54 1.

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this capacity? It is the father who performs the ceremonies on the death of a son who leaves no issue. Moreover, there is no authority that the Mayukha is not to be followed in Ratnagiri. The Mayukha is later in time than the Mitakshara. It is essentially a Maratha authority. It is written by a Maratha Brahmin. I, therefore, contend that the Mayukha should be followed in this case.

#### JUDGMENT.

JARDINE, J.—Some of the questions argued in this appeal were also argued in appeal 612 (1) of 1888 which we have decided to-day. Both cases arose in the district of Ratnagiri.

The reasons which we have given in appeal 612 for holding that the Mitakshara is in force in that district, and the views we have expressed as to its interpretation by the light of the Mayukha apply to this appeal also.

The question to be determined in this appeal is one of inheritance. It is found below that one Vasudev, a Maratha Brahmin, died childless, leaving a widow, who succeeded to his estate and died soon after. The property in suit was Vasudev's divided property. The persons who survived his widow were his father Lakshman, the plaintiff, and his mother Saguna, the second defendant. A question arose in this suit whether in an earlier suit the estate was properly represented by Saguna; and, therefore, it [608] became necessary to determine whether Vasudev's father or his mother became entitled, as heir, under the law of the Mitakshara on the death of Vasudev's widow. The Subordinate Judge found that the mother was heir. The Assistant Judge, in appeal, in his learned judgment came to the conclusion that the rule to apply is that of the Mayukha, which gives priority to the father.

There can be no doubt about the meaning of the Mitakshara in the placita dealing with the subject: C. II, s. 3. I quote from Colebrooke's translation: see Stokes' Hindu Law Books, p. 441.

"1. On failure of those heirs, the two parents, meaning the mother and the father, are successors to the property.

"2. Although the order in which parents succeed to the estate does not clearly appear (from the tenor of the text s. 1, § 2) since a conjunctive compound is declared to present the meaning of its several terms at once, and the omission of one term and retention of the other constitute an exception to that (complex expression); yet, as the word 'mother' stands first in the phrase into which that is resolvable, and is first in the regular compound (*matapitarau*) 'mother and father,' when not reduced (to the simpler form *pitarau* 'parents') by the omission of one term and retention of the other; it follows from the order of the terms and that of the sense which is thence deduced, and according to the series thus presented in answer to an inquiry concerning the order of succession, that the mother takes the estate in the first instance; and, on failure of her, the father.

"3. Besides the father is a common parent to other sons, but the mother is not so; and since her propinquity is consequently greatest, it is fit, that she should take the estate in the first instance, conformably with the text 'to the nearest *sapinda*, the inheritance next belongs.'

"4. Nor is the claim in virtue of propinquity restricted to (*sapindas*) kinsmen allied by funeral oblations; but on the contrary, it appears from

(1) See 14 B. 612.

this very text, (§ 3) that the rule of propinquity is effectual, without any exception, in the case of (*samanodakas*) kindred connected by libations of water, as well as other relatives, when they appear to have a claim to the succession.

[609] " 5. Therefore, since the mother is the nearest of the two parents it is most fit, that she should take the estate. But on failure of her, the father is successor to the property."

It is beyond question that Vijnaneshvara was of opinion, for the several reasons given above, that the childless son's property went to the mother.

The Vyavahara Mayukha disputes the above reasoning, and in equally clear language gives a preference to the father in ch. IV, s. 8, pl. 14 and 15. I quote Borradaile's Translation: see Stokes' Hindu Law Books, p. 87:—

" 14. In default of the daughter's son, comes the father; in default of him, the mother; even as Katyayana says: 'The widow being a woman of honest family, or the daughters, or on failure of them, the father, or the mother, or the brother, or his sons are pronounced to be the heirs of one who leaves no male issue' and likewise Vishnū: 'The wealth of him who leaves no male issue, goes to his wife; on failure of her, it devolves on daughters; in default of daughters, it devolves on the daughters' sons; if there be none, it belongs to the father; if he be dead, it appertains to the mother; on failure of her, it goes to the brothers; after them it descends to the brother's sons; if none exist, it goes to the relations [*sakulya*].'

" 15. As for the opinion of Vijnaneshvara: 'that in the complex term 'parents' the omission of one term and retention of the other (*ekasheca*) constitutes an exception to the regular compound (*dvandva*), and although the order (of construction) be not certainly defined, yet the meaning (in favour of the mother's priority) may be understood, because the word 'mother' stands first in the proper form of the compound; also from the consecutive order of the particular compound ('mother and father') being the rule, of which the omission of one term and retention of the other ('parents') is the exception, and since the father is a common parent to many sons, whilst the mother is not so; therefore, of the two, the mother in the first instance takes the estate, and on failure of her the father, it must be set aside as contrary to those texts: for the word 'mother' being placed first, in the [610] proper form of the compound is an exception to the general rule, in regard to the option allowed for the omission of one term and retention of the other; and, further, there is a want of proof, in fixing the proper order according to the diffusion of condensation (of the parental power)."

The Assistant Judge following the course adopted by this Court in *Khodabhai Mahiji v. Bahddar Dala* (1) framed an issue about the usage of the district in regard to the priority of the father or the mother, but no evidence was offered, nor precedents cited.

There being absolute contradiction between the two authorities, we must apply the principles stated in our judgment in appeal 612 of 1888, and decide that the mother succeeded under the law of the Mitakshara.

The learned Assistant Judge has, however, given a variety of reasons for not following the Mitakshara; and to these we will briefly allude in

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their order. He points out that there are differences of opinion among the authorities on the Hindu law. He says: "This interpretation of the Mitakshara is approved by Vachaspati Misra in the Vivadachintamani and by Kamalkar in Nirnaya Sindhu. But Jimutavahana, Apararka and the Mayukha differ, and place the father before the mother. Similarly, Smritichandrika, Madanaratna, Kalpataru, Ratnakar and Parijata approve of this view." He takes notice of Mr. Mandlik's Note 4 to the 135th and 136th verses of Yajnavalkya at p. 221 of his work on Hindu law. But he does not weigh the value of each of these authorities as a guide to the law of this part of India, or take notice of the list of eight authorities mentioned by the learned editors of West and Bühler (pp. 9 and 12) as those which hold the first rank among the legal works used in Bombay. Other observations of Mr. Mandlik depreciating the pre-eminence of the Mitakshara which the Assistant Judge has referred to, are controverted in the Note at p. 12 of West and Bühler. These arguments of the Court below were not much relied on in this Court. They appear to be met by the observation of Dr. Jolly at p. 204 of his Tagore Law Lectures, that if the Courts in Western India follow the Mayukha in preference to the Mitakshara on this point, "they [611] would have against themselves not only the Mitakshara, but the Viramitrodaya, Vivadatandava and Subodhini, which works though inferior to the Mayukha, are still considered as subsidiary authorities in that part of India."

The Assistant Judge points out that in *Lallubhai Babubhai v. Mankubarbai* (1), Westropp, C. J. (pages 438, 439) observes in giving the judgment of the Full Bench: "The reason assigned for the preference given to the mother seems a very artificial one." The Assistant Judge also notices *Khodabhai Mahiji v. Bahdhar Dala* (2), where the two competing rules are discussed by Westropp, C. J. It has been argued that this case showed a general inclination of opinion in favour of the father. But it appears sufficiently that because the case was from Gujarat, the Court gave weight to the Mayukha. In Sir M. R. Westropp's judgment it is mentioned that the Mitakshara in distinct terms assigns the priority to the mother.

We have been asked to determine the question whether Vijnaneshvara or the commentators who differ from his view of the meaning of Yajnavalkya are correct, and then to adopt the correct interpretation even to the extent of overruling the Mitakshara. But no precedent for such a decision has been shown us. Such inquiries would lead the Courts into barren researches into philology and questions about the superior efficacy of the father's *shraddh* and the pre-eminence of the mother—Jolly's Tagore Law Lectures, 203. The only result would be uncertainty and confusion of the law. We have the authority of West and Bühler for regarding the Mitakshara from a different point of view (pp. 14, 15). "The discussion and amplifications, added by Vijnaneshvara to Yajnavalkya's text, make the Mitakshara rather a new and original work based on Yajnavalkya, than a mere gloss, and one more fit to serve as a code of law than the original." If the artificial reasoning of Vijnaneshvara tends to show that the rule which prefers the mother was an innovation in his own time, it may have been founded on actual usage, as Dr. Jolly remarks (p. 204). "Vijnaneshvara's opinion is as much an authority now," says Dr. Bannerjee, "as the text he comments upon"—[612] Tagore Law Lectures, 1878, 286. We have in *The Collector of*

(1) 2 B. 388.

(2) 6 B. 541.

*Madura v. Mutta Ramalinga* (1) authority for holding that, in a case like the present, no duty is imposed on the Court to determine whether a great commentary rightly interprets the Rishi, or whether what it declares is deducible from the earliest authorities.

We are of opinion that Ratnagiri being a district where the Mitakshara is pre-eminent, and the rule laid down in the Mitakshara being distinct, and that of the Mayukha being in direct opposition thereto, the Mitakshara rule must be preferred, and the mother held to be the heir, and not the father. This ruling suffices for the disposal of the appeal. We must reverse the decree of the District Court and restore that of the Subordinate Judge. Plaintiff to pay the costs of both appeals.

BIRDWOOD, J.—I concur; and am clearly of opinion that this appeal must be decided in accordance with the rule of succession laid down in the Mitakshara, under which the mother of a childless separated Hindu comes in the order of succession next after, his widow and before his father. (See West and Bühler, 3rd ed., p. 448.) The rule of the Mayukha, that the father is to be preferred to the mother, being directly opposed to the rule of the Mitakshara, cannot be allowed to prevail in the Ratnagiri District. The decree of the lower appellate Court must, therefore, be reversed and that of the Subordinate Judge restored, and the claim rejected with costs.

*Decree reversed.*

14 B. 612.

APPELLATE CIVIL.

*Before Mr. Justice Birdwood and Mr. Justice Jardine.*

JANKIBAI (*Original Defendant*), Appellant v. SUNDRA (*Original Plaintiff*), Respondent.\* [22nd April, 1890.]

*Hindu law—Inheritance—Devolution of daughter's estate—Comparative authority of the Mitakshara and the Mayukha in the Ratnagiri District.*

The Ratnagiri District forms part of the Maratha country where the doctrines of the Mitakshara are paramount, and where the Mayukha, notwithstanding the eminent position it has gained, is still a secondary authority.

[613] According to the Mitakshara, the daughter takes an absolute estate which classes as her *stridhan*, and descends to her own heirs, *i.e.*, to her daughters to the exclusion of her sons.

The plaintiff sued, as the heir of her mother Varuna, to recover certain property which Varuna had inherited from her father. The defence was that plaintiff's brothers excluded her title.

*Held*, that the case being governed by the Mitakshara, the property in dispute descended to Varuna's daughter (the plaintiff), and not to Varuna's sons.

[*Appr.*, 2 S.L.R. 59 (63); R., 21 B. 739 (745); 24 B. 192=1 Bom.L.R. 574; 31 B. 453=9 Bom.L.R. 834; 1 Ind. Cas. 243=5 N.L.R., 13.]

SECOND appeal from the decision of R. S. Tipnis, Acting Assistant Judge of Ratnagiri, in appeal No. 234 of 1884.

The plaintiff Sundrabai sued to recover possession of a half share in certain property, alleging that the whole property belonged to her maternal grandfather Vishram, who died in 1870, leaving him surviving two

\* Second Appeal, No. 612 of 1888.

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