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the tenants assessment to the extent allowed as reasonable by the custom of the village. The special circumstances alleged in the present case have been urged by Mr. Rao as justifying the inference of an adverse right in favour of his clients, but the inference is an inference of fact which the lower Appellate Court has declined to draw, and we see no error of law in that Court's conclusion. As to the *savaisat* which is not allowed by that Court, it is clear that the contract as to it was conditional upon the continued existence of the measurements accepted by the parties at the time of the *kowls* as the basis of their mutual claims for the future These measurements ceasing to exist, the basis on which the right to *savaisat* rested fails. There is no error in the award of interest. We must, for these reasons, dismiss the appeal without costs.

JACOB, J. :—I entirely concur.

I would merely add to the judgment in Second Appeal No. 80 of 1902 that the introduction of the first branch of clause (*f*) of section 4 of Act X of 1870 affords another almost conclusive argument against the plaintiff's contention, since if that contention were sound the object expressly aimed at by the first branch of clause (*f*) is already fully covered by the provisions of clause (*b*).

Appeals dismissed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

1903.
August 6.

RUDRAPA AND ANOTHER, SONS AND HEIRS OF VIRBHADRAPPA BIN IRAPPA (ORIGINAL DEFENDANT 2), APPELLANT, *v.* IRAVA AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu Law—Dhárwár district—Succession—Sister—Brother's widow.

In the district of Dhárwár a sister is preferred as an heir to a brother's widow.

SECOND appeal from the decision of R. Knight, District Judge of Dhárwár, confirming the decree of R. Reuben, Subordinate Judge of Háveri.

* Second Appeal No. 4 of 1903.

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Suit by a sister to recover possession of the property of her deceased brother as his heir.

The property in suit belonged to one Malkapa bin Chenbasapa who died about the year 1880-81, leaving him surviving a widow Adveka and a sister Gangava. Adveka managed the property till the 8th April, 1887, when she died. Malkapa had a divided brother Nagapa, who died before Malkapa, leaving a widow San-Irava. On the 5th July, 1899, Gangava as the heir of her brother Malkapa brought the present suit to recover possession of Malkapa's property. After the suit was filed Gangava died and her daughters Irava and Puttava were joined as her legal representatives.

Defendant 1 was absent.

Defendant 2 contended that the deceased Gangava was not Malkapa's sister; that Malkapa's widow Adveka, for a legal necessity, sold the property in dispute to defendant 1 in 1883, and that defendant 1 sold it to him (defendant 2) on the 23rd November, 1892.

The Subordinate Judge found that Gangava was Malkapa's sister; that Adveka was not competent to sell the property to defendant 1 as there was no legal necessity for her to do so, and that though the sale-deed set up by defendant 2 was proved, that circumstance did not help him. He, therefore, allowed the claim.

On appeal by defendant 2 the Judge confirmed the decree.

Defendant 2 preferred a second appeal.

S. V. Bhandarkar (with *N. V. Gokhale*), for the appellant (defendant 2):—The first Court was wrong in stating that Nagapa's widow San-Irava was dead. She is alive. Malkapa and Nagapa were divided in interest. Therefore the question to be considered is whether Gangava, the sister of Malkapa, or San-Irava, the widow of Nagapa, are his heirs and who, out of the two, has the right to sue. The Mitakshara does not mention a sister as heir. She is treated as a *bandhu* and therefore cannot succeed in preference to the brother's widow who is a *sagotra sapinda*. The case has come from Dhárwár where the Mitakshara prevails and not the Mayukha. A female passes by her marriage into the *gotra* of her husband. According to the Mitakshara the

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test is that a female, in order that she may come in as heir, must belong to the family of the propositus. A sister owing to her marriage ceases to belong to the family of her brother. The Madras High Court in *Kutti Ammal* v. *Radakrishna Aiyan* (1) treats a sister as heir to her brother. But that decision has been commented upon: see Mayne's Hindu Law, Sixth Edition, section 537, page 705. Refers to *Lallubhai Bapubhai* v. *Mankuvarbai* (2), *Mulji* v. *Cursandas* (3), *Thakoorain Sahiba* v. *Mohun Lall* (4), *Rachava* v. *Kalingapa* (5), *Jullessur Koer* v. *Uggur Roy* (6), West and Buhler, Third Edition, pages 114, 131. The Mayukha treats a sister merely as a *gotraja* and assigns her a place between grandmother and grandfather.

We submit that the Mitakshara ought to govern the present case and according to that school a sister is not entitled to succeed to her deceased brother, she being not a *sagotra sapinda* of the propositus. She has no place in the line of heirs mentioned therein. Therefore Gangava had no right to institute the suit and her two daughters had no right to continue it.

Setlur, with *R. N. Inamdar*, for the respondents (plaintiffs) :— The term *gotraja* has two significations with respect to a sister. The term means 'born in the family.' The Mayukha accepts this interpretation, while the Mitakshara considers the term metaphorically and interprets it as *Samánagotra* (*i.e.*, of the same *gotra*). We do not contend that under the Mitakshara a sister is a *gotraja*, but we submit that in this Presidency the interpretation of the Mitakshara by Balambhatt and Nand Pandit is recognized as correct and according to that interpretation a sister is included in the term *bhrátarah* (brothers). The interpretation of Balambhatt is considered by usage to be the law in this Presidency: *Vinayak Anandrav* v. *Lakshmibai* (7), *Lakshmi* v. *Dada Nanaji* (8), *Ganesh Vaman* v. *Vaghu*. (9) These rulings support our contention. Balambhatt includes a sister in the term brother just as mother is included in the term father. The usage in this

(1) (1875) 8 Mad. H. C. R. 88.
(2) (1876) 2 Bom. 388.
(3) (1900) 24 Bom. 563.
(4) (1867) 7 W. R., P. C. 25.
(5) (1892) 16 Bom. 716.
(6) (1882) 9 Cal. 725.
(7) (1864) 1 Bom. H. C. R. 117, 128.
(8) (1870) 4 Bom. 210.
(9) (1903) 27 Bom. 610; (1903) 5 Bom. L. R. 581.

Presidency is that according to judicial tradition a sister is to be preferred according to Balambhatt. The ruling in *Bhagirthibai* v. *Kahnujirav* [1] sets out the meaning of the term usage and according to that usage the place of the sister in the line of inheritance is also fixed. She comes after brother. Even if our contention be not upheld, still according to the Mayukha the sister would come in after the grandmother. The Mayukha is strictly applicable to the Maratha country which does not include Dhárwár which forms part of Kánara. The Mayukha was compiled by a Poona Shastri, and when the Peshwas conquered Gujarát, they made it applicable to that part of the country.

The observations in Mayne's Hindu Law, section 537, page 705, were relied on. According to those observations a sister will never be the heir. Further those observations were directed to the ruling in *Kutti Ammal* v. *Radakrishna Aiyan* [2], therefore they cannot be relied on by way of argument. Under the authority of *Rakhava* v. *Kalingapa* [3] a brother's widow would be postponed to a sister. She would be postponed also on the ground that she is not mentioned in the compact series: *Jullessur Kooer* v. *Uggur Roy* [4] which was relied on accepts the interpretation of Balambhatt. *Kutti Ammal* v. *Radakrishna Aiyan* [2] correctly interprets the Mitakshara.

Bhandarkar, in reply:—Great reliance was placed on usage, but it is difficult to understand where it came from. Sir Michael Westropp, C. J., has expressly relied on the texts of Balambhatt and Nand Pandit in *Lallubhai Bapubhai* v. *Mankuvarbai* [5] for the exposition of the Mitakshara. With great respect we submit that Sir Michael Westropp, C. J., came to a wrong conclusion by accepting the interpretation of those two commentators. The question may be argued again.

JENKINS, C. J.:—The only legitimate subject for discussion in this second appeal is the bare point of law whether in the district of Dhárwár a sister or a brother's widow is to be preferred as an heir. These questions, in which the right of

(1) (1886) 11 Bom. 285.
(2) (1875) 8 Mad. H. C. R. 88.
(3) (1892) 16 Bom. 716.
(4) (1882) 9 Cal. 725.
(5) (1876) 2 Bom. 388.

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female heirs comes under debate, turn in Bombay, on considerations peculiar to this Presidency, and it is therefore useless to seek guidance in the decisions of the other High Courts. In Gujarát and the Island of Bombay the right of a sister to a high place in the order of succession has long been determined, and has the sanction of the Mayukha, whose author is said to have flourished about 250 years ago.

It has been urged before us that in the other districts of the Presidency the sister's succession is governed by the Mitakshara, which does not name the sister. As against this, reliance has been placed on the interpretation of the Mitakshara by Balambhatta and Nanda Pandita, who maintain that sisters are included in "brethern" according to the true rules of Sanskrit exegesis: and in support of its applicability in the Bombay Presidency reference has been made to the opinion of Sir Michael Westropp. It is further contended that for the purpose of a sister's succession the rule of the Mayukha is not limited to Gujarát and the Island of Bombay, but is also of authority in the other districts of the Presidency. That there is a usage, under which the sister succeeds as an heir when outside Gujarát and the Island of Bombay, is, we think, beyond doubt; the struggle has been to reconcile that usage with the Sanskrit commentaries, but in view of the decided cases it appears to us immaterial whether we invoke in support of it the rule of Nilkanth or the interpretation of Balambhatta or Nanda Panditta.

It has been decided by Sir Michael Westropp and Mr. Justice Kemball in *Lakshmi* v. *Dada Nanaji* [1] and *Biru* v. *Khandu* [2] that the sister, in the Sholápur district is not only an heir, but is entitled to preference even over some who are *gotraja sapindas*. It is therefore clear that even outside Gujarát and the Island of Bombay the sister must be conceded a position not lower than that given her by Nilkanth, so that she is entitled to preference over the brother's widow, who in this Presidency comes in as the wife of a *gotraja sapinda* after the sister.

It has been strenuously argued before us that Sir Michael Westropp's decision was erroneous and that we are not bound by it, or that we at any rate should refer the question to a Full

(1) (1879) 4 Bom. 210. (2) (1879) 4 Bom. 214.

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Bench. But we think it would be absolutely wrong for us to do anything to disturb a rule of inheritance established so far back as 1879.

In our opinion, therefore, on the strength of the authorities in *Lakshmi* v. *Dada Nanaji*[1] and *Biru* v. *Khandu*,[2] we must award preference to the sister and on that ground confirm the decree of the lower Appellate Court with costs.

Decree confirmed.

(1) (1879) 4 Bom. 210. (2) (1879) 4 Bom. 214.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

PURSHOTTAM KRISHNAJI (ORIGINAL DEFENDANT 2), APPELLANT, *v.* SAGAJI VALAD MALJI AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT 1), RESPONDENTS.*

1903. *August* 11.

Redemption suit—Mortgage by persons other than the real owner—Acquiescence of the real owner—Mortgagee's possession adverse to the real owner.

On the 24th October, 1873, one Durgan, widow of Govindji, mortgaged with possession certain land to Godaji, the husband of her daughter Rau. After Durgan's death in 1882, the plaintiffs, under a belief then prevalent, claimed as the nearest *Waras Bhaubands* of Govindji to have succeeded to the mortgaged property, to the exclusion of Govindji's daughter Rau, and disputed the validity of Durgan's mortgage. Godaji, thereupon, on the 22nd June, 1882, accepted a mortgage from the plaintiffs. Rau was aware of this transaction and acquiesced in it. In July, 1889, Rau sold her equity of redemption to one Savliaram who paid off Godaji's mortgage and recovered possession of the mortgaged property. The plaintiffs, in September, 1899, brought a suit against Godaji and Savliaram, defendants 1 and 2, to redeem the mortgage of the 22nd June, 1882.

Held, that the plaintiffs were entitled to redeem, Rau's claim to the equity of redemption having become time-barred. After the mortgage in suit Godaji held the property as plaintiffs' mortgagee and his possession must be attributed to a right derived from them, Rau being aware of what was being done and having acquiesced in it. Though Godaji's possession in its inception was not by virtue of a right derived from the plaintiffs, still his possession was from the 22nd June, 1882, under colour of a right derived from them and so adverse to

* Second Appeal No. 122 of 1903.