

sion can be questioned by virtue of anything said or decided in the Privy Council.

We therefore think that the learned Judge was not entitled to make the reference in this case as the point on which he professes to entertain a reasonable doubt is completely covered by *Ganesh Lala v. Bapu*.⁽¹⁾

Costs will be costs in the case.

Order accordingly.

G. B. R.

(1) (1895) 21 Bom. 198.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Aston.*

BHAU BIN ABAJI GURAV (ORIGINAL DEFENDANT), APPELLANT, v.
RAGHUNATH KRISHNA GURAV AND ANOTHER (ORIGINAL PLAINTIFFS),
RESPONDENTS.*

*Stridhan—Saudayik—Bequest by will—Power of disposal subject to
husband's consent—Gurav Service—Vritti.*

Saudayik Stridhan is that which is obtained by a married woman or by a virgin in the house of her husband or of her father, from her brother or parents.

Except in the kind known as Saudayik, a woman's power of disposal over her Stridhan is during coverture subject to her husband's consent, and without such consent she cannot bequeath it by will when she is survived by her husband, who is not shown ever to have consented to the will.

SECOND appeal from the decision of J. J. Heaton, District Judge of Násik, amending the decree of P. J. Taleyarkhan, Joint Subordinate Judge.

The right to render Gurav Vritti (office) for 2½ months each year in certain temples at Násik belonged to one Gangabai who had inherited it from her deceased husband. Before her death she made a gift of the right to her daughter and her granddaughter Krishnabai, wife of the defendant. After Gangabai's death her daughter died and Krishnabai was the sole survivor. Krishnabai made a will on the 9th and died on the 26th

* Second appeal No. 218 of 1905.

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June 1899. Under the will she bequeathed the right to one Raghunath, who managed her affairs during her lifetime, and her two maternal aunts Avdi and Parvati. The devisees applied for probate of the will and the probate was granted to only two of them, namely, Raghunath and Avdi, Parvati having died in the meanwhile. The defendant, however, forcibly prevented them from officiating as Gurav and himself officiated and took the emoluments of the Vritti. Raghunath and Avdi, therefore, brought the present suit to (1) obtain a declaration of their right to perform the Gurav service, (2) for possession of Krishnabai's turn of service from the defendant, and (3) for an injunction to restrain the defendant from obstructing them from officiating and receiving the income.

The defendant pleaded that the will set up by the plaintiffs was not genuine, that Krishnabai had no power to bequeath the right of service, that he was not affected by the grant of the probate, that Krishnabai was not empowered to alienate the right of service, and that he had become owner of the right by adverse possession extending over more than twelve years.

The Subordinate Judge found that the will relied on by the plaintiffs was proved, that Krishnabai had power to make it, and that the defendant had not acquired title to the Gurav Vritti by adverse possession. He, therefore, passed a decree allowing the claim.

On appeal by the defendant the Judge confirmed the decree with a slight amendment as to the plaintiffs' rights *inter se*.

The defendant preferred a second appeal.

M. V. Bhat for the appellant (defendant) :—The first question is whether in the Gurav Vritti Krishnabai took an absolute estate transmissible to her heirs. We submit that she took only a restricted estate and had no right to devise it according to the rulings of the Privy Council in *Sheo Shankar Lal v. Devi Sahai*⁽¹⁾, and *Sheo Partab Bahadur Singh v. The Allahabad Bank*⁽²⁾. In the first case the question was as to the descent of property inherited from a female and in the second the question was whether the property inherited from a female was the absolute

(1) (1903) 25 All. 468.

(2) (1903) 25 All. 476.

property of the last holder so that she could alienate it beyond her lifetime. The solution of this question depends upon the consideration of another question whether the literal interpretation of the text of the Mitakshara defining stridhan should be accepted. That interpretation apparently makes all property inherited by a woman her stridhan in the strict sense of the term with all the incidents of such property including the free power of alienation. The Privy Council answer the question by holding that the literal interpretation of the Mitakshara should not be accepted as a correct exposition of the primitive text of Yajnyavalkya, which restricts stridhan to particular kinds of gifts only. Mr. Mayne has clearly pointed out that the interpretation put by Vijnaneshvar on the word "Adi" so as to include all kinds of property howsoever acquired did not mean that females got absolute estates. The author must be taken to have meant simply that partition, inheritance and such other modes of acquiring property which were open to males were also open to females. Apparently the Privy Council accepted this argument, Mayne's Hindu Law, 6th edition, sections 607—610. The ruling in *Sheo Partab Bahadur Singh v. The Allahabad Bank*⁽¹⁾ simply followed the current of the Privy Council rulings on the point. The first Privy Council case on the point is *Bhugwandeem Doobey v. Myna Bace*⁽²⁾. That decision referred to the texts of the Mayukha, Katyayana and Narad. It was, therefore, not a decision confined only to the Benares School. The next case is *Chotay Lall v. Chunno Lall*⁽³⁾. It treated the opinion of West, J., on the text of the Mitakshara relating to stridhan in *Vijjarangam et al v. Lakshuman et al*⁽⁴⁾ as *obiter dictum* opposed to the decisions of the Privy Council. This is clearly pointed out by Jardine, J., in *Gadadhar Bhat v. Chandrabhagabai*⁽⁵⁾. The next case is *Mutta Vaduganadha Tevar v. Dorasinga Tevar*,⁽⁶⁾ which was followed in *Dalpat Narotam v. Bhagvan Khushal*.⁽⁷⁾

As to Bombay cases:—There are three classes of cases. Those which are governed solely by the Mitakshara, those which are

(1) (1903) 25 All. 476.

(2) (1867) 11 Moo. I. A. 487.

(3) (1878) L. R. 6 I. A. 15.

(4) (1871) 8 Bom. H. C. R. (O. C. J.) 244.

(5) (1892) 17 Bom. 690 at p. 700.

(6) (1881) L. R. 8 I. A. 99.

(7) (1885) 9 Bom. 301.

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governed solely by the Mayukha, and those which are governed by these two read together. The Bombay decisions begin with *Pranjivandas Tulsidas et al v. Devkuvarbai et al*⁽¹⁾ and they lay down that reading the Mitakshara by the light of the Mayukha, it must be held that females born in the family take an absolute estate and those entering the family by marriage take a restricted estate. The decision of the Full Bench in *Bhagirthibai v. Kahnujirav*⁽²⁾ has reviewed all the cases on the point. The examination of the cases shows that the text which is the foundation of the absolute and several estate given to a daughter in Bombay is placitum 10, Chapter IV, Section VIII, Vyavaharmayukha; Stoke's Hindu Law, page 86. This consists of a quotation from Manu, Chapter IX, verse 130. This verse deals with the status of an appointed daughter under old Smriti Law. Nilkantha adds to it by way of comment that "if there be more daughters than one they are to divide (the estate) and take (each a share)." But the text speaks absolutely nothing as to what kind of estate the daughter is to take, nor does it say anything as to her power of disposition over such inherited property. The text points out that the question there discussed is whether a daughter should be recognized as an heir after the widow, and Nilkanth adds that she is to be recognized as heir after the widow because she is just like a son according to Manu. The text does not warrant the absolute and several estate given by the Bombay High Court to females born in the family. The Full Bench case *Bhagirthibai v. Kahnujirav*⁽²⁾ was the case of a female taking from a male, while in the present case we are concerned with a female taking from a female. The placitum from the Vyavaharmayukha deals with the inheritance taken by a daughter from the father and it does not relate to property inherited by a female from a female. The nature and extent of the estate so taken is to be determined by reference to the texts relating to Stridhan in the Mitakshara and the Mayukha. If those texts be examined the result is this:—The text of the Mitakshara adds to Yajnya-alkya's description of six kinds of Stridhan the word "Adi," and thereby includes in Stridhan all kinds of property howsoever

(1) (1859) 1 Bom. H. C. R. 130.

(2) (1886) 11 Bom. 285.

acquired by females. But the Privy Council have laid down that this is an unwarranted interference with the Smriti law by Vijnaneshvar, therefore, his addition should be disregarded. Besides this the Mitakshara is absolutely silent on the point of a woman's power of disposition. We, therefore, submit that there being no express text of the Mitakshara which deals with the subject of the estate taken by a daughter, the question should be decided on general principles which govern female property and succession. The interpretation by the Privy Council of the original text of Yajnyavalkya should be accepted and not the unwarranted addition of Vijnaneshvar.

The rulings of the Bombay High Court lay down that the Mitakshara should be interpreted by the light of the Mayukha and when this is done females born in the family get an absolute estate. As to this we submit that in cases solely governed by the Mitakshara reference is to be made to the Mayukha only when the Mitakshara is doubtful, *Lallubhai v. Mankuvarbai*⁽¹⁾, *Balkrishna Bapuji v. Lakshman Dinkar*⁽²⁾, *Jankibai v. Sundra*⁽³⁾. The Privy Council have laid down how the primitive text of Yajnyavalkya is to be interpreted. No doubt was, therefore, left on the point after the decisions of the Privy Council. We cannot, therefore, resort to the Mayukha. But even the Mayukha does not give absolute estate to females born in the family, placitum 24. On the contrary there is a passage in the Mayukha, the correct translation of which shows, that a woman shall not expend even her own wealth without the assent of her husband, Mandlik's Translation of the Vyavaharmayukha, page 93. Therefore Krishnabai did not take an absolute estate.

Our next point is that Krishnabai, being a married woman, had no power to make a bequest without her husband's consent, see Mandlik, page 93. Dr. Jolly in his work on Hindu Law, page 253, after discussing the texts of the Mitakshara and the Mayukha deduces that a woman may not alienate any part of her stridhan, except Saudayik property, without her husband's assent, see also Dr. Banerjee's Lectures on Marriage and Law of Stridhan, page 299. The general spirit of Hindu Law is not to

(1) (1876) 2 Bom. 358 at p. 445.

(2) (1890) 14 Bom. 605.

(3) (1890) 14 Bom. 612 at pp. 623, 624.

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allow women independence as regards disposition of property. In the case of female property ownership means right of possession and right of enjoyment. The third element of ownership, namely, the power of disposition, is not recognized by Hindu Lawyers. The right of absolute disposal did not enter into Vijnyaneshvar's conception of the essentials of ownership, *Vijjarangam et al v. Lakshuman et al*⁽¹⁾. Even the decision of the Full Bench in *Bhagirthibai v. Kahnujirav*⁽²⁾ confirms this view, see also West and Bühler (3rd Edn.), pages 318-320; Mandlik's Hindu Law, pages 365-367; Dr. Jolly's Hindu Law, pages 251, 252; Sarvadhikari's Hindu Law, pages 271-9; Manu, Chapter V, verses 147-149; Chapter IX, verses 1 and 2; Narad, Sacred Books of the East, page 49.

Our third point is that the bequest in favour of Raghunath, a stranger, is invalid. The ruling in *Rajaram v. Ganesh*⁽³⁾ clearly points out the distinction between the Vritti of a Pujari in virtue of which certain religious services are performed on behalf of pilgrims to a Tirth (holy place) who pay fees to the holders of the Vritti for performance of those services, and the right of hereditary service in a temple, and the alienation to strangers and alienation to members of the family. The general rule laid down by the text law is that religious offices are not alienable. The only exception is the alienation to a member in the line of succession, *Sitarambhat v. Sitaram Ganesh*⁽⁴⁾, *Mancharam v. Pranshankar*⁽⁵⁾, *Kuppa v. Dorasami*⁽⁶⁾.

The plaintiffs can succeed only on showing that there is a general custom and practice recognizing alienation of the Vritti in dispute and of the service in the temple in favour of strangers. They have not done so. Besides such custom would militate against the Hindu text law. The effect, however, of recognizing such custom would be to frustrate the very object of the institution of the office which involves the performance of religious service.

D. A. Khare for the respondents (plaintiffs):—The two recent Privy Council rulings, no doubt, curtail the absolute power of

(1) (1871) 8 Bom. H. C. R., (O. C. J.) 244

at p. 264.

(2) (1886) 111 Bom. 285 at p. 309.

(3) (1898) 23 Bom. 131.

(4) (1869) 6 Bom. H. C. R. (A. C. J.) 250.

(5) (1882) 6 Bom. 298.

(6) (1882) 6 Mad. 76.

females over their stridhan property, but they are in conflict with the current of decisions of this Court and they do not affect those parts of Bombay which are governed by the Mayukha, which applies to all districts in this Presidency, *Sheo Partab Bahadur Singh v. The Allahabad Bank*⁽¹⁾, *Gadadhar Bhat v. Chandrabhagabai*⁽²⁾.

As regards the devolution of stridhan property the text of the Mitakshara lays down that it goes to the woman's kinsmen. If she possessed no property then it cannot go to her kinsmen. This circumstance clearly points to the conclusion that Vijnaneshvar was of opinion that females had absolute right over their stridhan property, see Mayne's Hindu Law (6th Edn.), sections 607-610; Stoke's Hindu Law, page 460; *Bhugwandeon Doobey v. Myna Bacc*⁽³⁾; Golapchandra Sarkar's Hindu Law, page 291.

Yajnyavalkya gives no rules of inheritance. We must therefore accept the interpretation put upon his words by the commentators who are themselves authorities on the point, Dr. Banerjee's Lectures on Marriage and Law of Stridhan, page 292.

[JENKINS, C. J.:—The question is how far a woman has power to devise non-technical stridhan during her husband's lifetime?]

We rely on *Gandhi Maganlal v. Bai Jadab*⁽⁴⁾ in support of our contention that the estate taken by Krishnabai was absolute and not restricted.

As to the point whether she could will away in favour of a stranger, the Judge has referred to the evidence in the case which shows that the alienation of such Vritti to a stranger is valid.

JENKINS, C. J.:—The plaintiffs sue for a declaration of their right to perform Gurav service in certain temples, for possession, and for an injunction, alleging forcible prevention by the defendant.

The right of service, or Vritti, became vested in Gangabai as widow and heiress of her deceased husband, and shortly before

(1) (1903) 25 All. 476 at p. 492.

(2) (1892) 17 Bom. 690 at p. 699.

(3) (1867) 11 M. I. A. 437 at pp. 509, 511.

(4) (1899) 24 Bom. 192.

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her death she purported to make a gift thereof to her daughter and her grand-daughter Krishnabai.

Gangabai died, and then her daughter. Krishnabai survived them.

The case has been argued before us on the assumption (1) that Gangabai's only child was this daughter, (2) that Krishnabai was her only grand-child, and (3) that the Vritti vested in Krishnabai.

As Gangabai had only a widow's interest her gift could not pass a larger estate, and so on her death her gift was exhausted. The Vritti, therefore, devolved by inheritance on Krishnabai. She is now dead. She purported to bequeath it by will to the plaintiffs, but the validity of her bequest is contested by the defendant, her husband.

The lower Appellate Court, however, decreed the plaintiffs' claim, and so the defendant has preferred this appeal.

Three points have been urged before us :—

(1) That Krishnabai did not take an absolute interest in the Vritti; (2) that if she did, still she had no power of bequest without her husband's consent; and (3) that a Vritti cannot be bequeathed, at any rate, to a stranger.

The first point rests on the contention that the Bombay view as to the absolute character of a daughter's Stridhan is annulled by the recent decisions of the Privy Council in *Sheo Shankar Lal v. Debi Sahai*⁽¹⁾ and *Sheo Partab Bahadur Singh v. The Allahabad Bank*.⁽²⁾

The effect of these decisions runs counter to the law of Stridhan as understood in Bombay and to decisions which date back at least as far as 1859. In *Pranjivandas Tulcidas v. Devkuvarbai*⁽³⁾ it was determined by the Supreme Court that a daughter took an absolute interest, and though the case apparently arose in the Island of Bombay, still the decision was expressly based on a reading of Manu, the Mitākshāra, and the Mayukha, and was in accordance with the opinions of the shāstris both of the Sadar Adalat of Bombay and of Poona.

In *Vinayak Anandrav v. Lakshuibai*⁽⁴⁾ it was said: "In Devkuvarbai's case⁽³⁾ this Court, in 1859, after lengthened con-

(1) (1903) 25 All. 468.

(2) (1903) 25 All. 476.

(3) (1859) 1 Bom. H. C. R. 130.

(4) (1859) 1 Bom. H. C. R. 117 at p. 124.

sideration of all the accessible authorities, and after consulting the shástris both in Poona and in the Sadar Adalat of Bombay, held that daughters, on this side of India taking by inheritance, take the estate absolutely In the case of Devkuvarbai, each shástri rested his opinion as to the inheritability of the daughters on this same passage of the Mayukha, referring to it as a work of high and generally received authority, not only in Gujarát, but in Bombay and the Dekhan, that is to say, over the larger and more important portion of this Presidency. Of the general authority of the Mitákshâra on this side of India, there cannot be, and in fact, never has been, any doubt, and on this point the Mitákshâra is not less clear and explicit than the treatise already cited." It is true the question that directly arose in that case was as to the nature of the estate inherited by a sister; but it was decided by reference to the character of a daughter's estate: the reasoning was "the daughters of the man himself take absolutely, and so, therefore, do the sisters."

That the sisters took absolutely was determined on appeal by the Privy Council—*Vinayak Anandray v. Lakshmbai*⁽¹⁾—and this result was apparently reached by the same train of thought.

This view has ever since been followed, and it has now come to be recognized as the rule in Bombay that female heirs, except those who come into the family of the *propositus* by marriage, take absolute interests.

To throw a doubt on this rule might be productive of great mischief; and both the decisions in I. L. R. 25 All. make a saving reservation in favour of those parts of Bombay where the Mayukha is accepted or governs. And though in Násik the Mayukha is not commonly regarded as the paramount authority, still it is not without its distinct influence. Our opinion on another point of the case makes it unnecessary for us to decide the point, and we, therefore, refrain from so deciding; but we think it right to express the view that the arguments advanced by Mr. Bhat with much ability and after much research have failed to convince us that the decisions in I. L. R. 25 All. involve in Bombay the change in the law for which he contends. We

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(1) (1859) 1 Bom. H. C. R. p. 129.

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will, therefore, deal with the case on the assumption that no such change has taken place.

The point on which the appellant must (in our opinion) succeed is Krishnabai's intestability in the absence of her husband's consent.

In the Mayukha (Chapter IV, section X, page 93 of Mr. Mandlik's edition) it is said :—" As for the text—' A wife, a son, and a slave are all incapable of property. Whatever they earn, belongs to him to whom they belong,' that too has reference to wealth acquired by mechanical arts and the like. It is also proper [to interpret the text as showing] the absence of absolute dominion even in the *adhivedanika* or other [species of *stridhan*]. Hence, says Manu [Ch. IX, v. 199] :—' A woman should never make [any] expenditure out of the family [property] belonging to several or even [out of] her own wealth without the assent of her husband.' In a certain [kind of] property, Katyana declares [their] absolute dominion. 'That which is obtained by a married woman, or by a virgin in the house of her husband, or of her father, from her brother, or her parents, is termed *saudayika*. The independence of women who have received the *saudayika* wealth is desirable [in regard to it], for it was given [by their kindred] for their maintenance out of affection. The power of women over *saudayika* at all times is celebrated both in respect of gift and sale, according to their pleasure, even in [the case of] immoveables.' "

This passage clearly indicates that, except as to the kind known as *Saudayika*, a woman's power of disposal over her *Stridhan* is during coverture subject to her husband's consent.

This view is not peculiar to Nilakantha, but was shared by Mitra Misra, who in the *Viramitrodaya* (Chapter V, Part I, paragraph 5, Sarkar on *Viramitrodaya*, page 224) says :—" In the disposal of woman's property, however, females have not independence without the permission of their husband." He then proceeds to cite the text of Katyana which prescribes a different rule as to *Saudayika*.

The *Smriti Chandrika*, Chapter IX, section 2, is to the same effect.

Vijnaneśvara is apparently-silent on the point, but in reference to this it is said in *Vijjarangam v. Lakshuman*⁽¹⁾ :—

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‘He lays down no rule as to the extent of the woman’s own power over the property. The natural conclusion would seem to be that he considered this already sufficiently provided for as to his immediate subject, inheritance, by other lawyers, and by the analogies to be drawn from his rules as to the estate of a male proprietor. Now in Ch. I, sec. 1, pl. 27, 28, it is laid down that a man is ‘subject to the control of his sons and the rest (of those interested) in regard to the immoveable estate, whether acquired by himself or inherited,’ though he may make a gift or sale of it for the relief of family necessities or for pious purposes. It is clear, therefore, that a right of absolute disposal did not enter into Vijnaneśvara’s conception of the essentials of ownership. He admits (*Mitak.*, Ch. II, sec. 1, pl. 25) the genuineness and the authority of the text of Narada, which, with so many others, proclaims the dependence of women, which he says does not disqualify them for proprietorship. He allows a husband, as we have seen, in some cases to dispose of his wife’s property. The inference to be gathered from these passages is strengthened if we look into his chief authorities. Manu allows women no independence. The verse denying it occurs in Yajnavalkya also (Ch. I). Katyayana, so frequently quoted in the *Mitakshāra*, says that the widow is to enjoy the estate frugally till she die, and after her the heirs (*Colebrooke’s Digest*, Bk. V, T. 477), consistently with that passage of the *Mahābhārata* (T. 402) which limits the widow to simple enjoyment. Jagannatha (T. 402), referring to texts 476 and 477, observes that as a woman is not allowed to make away with immoveable property given to her by her husband, much less can she dispose at her will of such property inherited from him. Even Brhaspati, who, as we have seen, insists emphatically on a widow’s right of inheritance, is equally emphatic in restraining her power of dealing with it (*Vyav. M.*, Ch. IV, sec. 8, pl. 3). His somewhat ambiguous expression cannot at any rate mean less than this. It seems a reasonable inference from these and other authorities that, as to immoveable

(1) (1871) 8 Bom. H. C. R. (O. C. J.) 244 at p. 274.

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property at any rate—and with immoveable property, according to the Hindu law, is classed every kind of property producing a periodical income—the woman's ownership is subject to the control of her husband, and of the other persons interested in the preservation of the estate, and that it cannot be needlessly dissipated at her mere caprice.”

It is to be noted that Vijnanesvara cites the text on which Nilakantha relies, and apparently with approval (see Mitâkshâra, Chapter I, section 1, pl. 20 and 25).

In West and Bühler's Hindu Law⁽¹⁾ it is said:—“Her full ownership of her Stridhan is subject to the qualification that her husband may dispose of it in case of distress, and that her own power to alienate it is subject to control by him with the exception of the so-called Saudayakam, the gifts of affectionate kinsmen.”

This restriction, as far as we can learn, agrees with the sense of the community.

If, as we hold, a woman cannot alien her Stridhan, other than Saudayika, during coverture without her husband's consent, then it follows that her testamentary power of disposition is subject to the like restriction where, as in this case, she is survived by her husband, who is not shown ever to have assented to the will (see Succession Act, section 46, Expl. 1).

The Vritti in this case does not come within the exemption in favour of Saudayika; no consent by the defendant has been proved; therefore (in our opinion) the plaintiffs' title has not been established.

The decree, therefore, of the District Court must be reversed, and the suit dismissed with costs throughout.

Decree reversed and suit dismissed.

G. B. R.

(1) 3rd Edn., p. 92.