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that the right to redeem still remains with them, leads us to express the hope that there may be early legislation which will enable the Courts, at least where an agriculturist is concerned, to investigate and determine the real nature of the transaction, unfettered by section 92 of the Evidence Act, and to award such relief as the justice of the case may require.

Issues sent down.

G. B. R.

PRIVY COUNCIL.

BAI KESSERBAI (PLAINTIFF) *v.* HUNSRAJ MORARJI AND ANOTHER (DEFENDANTS).

P. C.*
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February 23, 27, 28.
May 9.

[On appeal from the High Court of Judicature at Bombay.]

Hindu Law—Inheritance—Law of Bombay School—Mitakshara—Vyavahara Mayukha - Succession to Stridhan—Co-widow—Husband's brother—Husband's brother's son—Deed of gift, construction of—Absolute or limited estate of inheritance—Vyavahara Mayukha, chapter IV, section 10, placita *28 and 30, construction of.*

By the Hindu law of the Bombay School, *viz.*, the Mitakshara subject to the doctrine to be found in the Vyavahara Mayukha where the latter differs from it, a co-widow is entitled to succeed to the property of a woman dying without issue, in preference to her husband's brother or husband's brother's son.

A deed executed by a Hindu in favour of his future wife conveyed immoveable property to her, "her heirs, executors, administrators and assigns" on the condition that if she died "without leaving issue of the intended marriage who shall succeed to a vested interest" in the property, and without exercising a power of appointment given her by the deed, then "the property shall vest in her legal heirs according to the Hindu law of the Bombay School."

Held, that she took an absolute estate of inheritance in the property.

The true construction of *placitum* 30 of chapter IV, section 10, of the Vyavahara Mayukha, and one that brings it into harmony with the Mitakshara, and also reconciles it with *placitum* 28, is that it should be read distributively as regards the property of women married according to one of the approved forms and the property of those married in one of the lower forms. In the one case those of the heirs enumerated by Brihaspati who are blood relations of the husband, namely, the husband's sister's son, the husband's brother's son, and the husband's brother will succeed to the woman's property and in the other case the relations of the father will succeed.

* *Present*: Lord Davey, Sir Andrew Scoble and Sir Arthur Wilson.

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The order of succession is not indicated in the series of heirs enumerated by Brihaspati. The solution is to be found by reference to *placitum* 28 in which the heirs are described as the nearest sapindas of the wife in the husband's family, or the nearest to her in her father's family, as the case may be. The list is not exhaustive, and neither a co-widow nor any other sapinda of the husband is excluded. The words "and the rest" mean or include the other relations of the husband or father. The co-widow therefore takes in her right place and is a preferential heir to the husband's brother or husband's brother's son.

APPEAL from a judgment and decree (December 11th, 1903) of the High Court at Bombay in its Appellate Jurisdiction which reversed a judgment and decree (February 21st, 1903) of the same Court in its Original Civil Jurisdiction and dismissed the appellant's suit.

The facts necessary for the determination of this appeal were undisputed and were as follows:—One Koreji Haridass, who died in January 1898, had two wives, Bai Kesserbai the plaintiff-appellant and one Kumari Bachubai. In contemplation of his marriage with Bachubai and before it took place, Koreji Haridass settled the immoveable property in suit upon Bachubai by a deed, dated 24th November 1892. The material provisions of this deed (which are set out in their Lordships' judgment) were to the effect that on Bachubai's death without issue after the marriage had been celebrated the property should be dealt with as she might by will or deed direct, and in the absence of any such direction by her, should vest in her legal heirs according to the Hindu law of the Bombay School.

Bachubai was married according to one of the approved forms of marriage and died on 9th May 1899, without issue and without making any appointment either by will or deed, leaving her surviving the plaintiff, who was her co-widow and the two defendants-respondents, Bai Mooghibai who was the widow of one Ranchoredas Haridas who admittedly survived Bachubai and who was a separated brother of Koreji Haridass, the deceased husband of the plaintiff and Bachubai; and Hunsraj Morarji who was the son of another separated brother of Koreji Haridass.

The two defendants both claimed the property in suit, and the plaintiff sued for a declaration that she was entitled to the

property in question, and that neither of the defendants was entitled. The plaintiff also asked for an account of rents and profits received by the first defendant's husband and by the defendants themselves, and for possession of the property.

The issues were: (for the first defendant) (1) whether on the death of Bachubai, Ranchoredas Haridas was not the heir of Bachubai and succeeded to the property mentioned in the plaint; (2) whether the first defendant as widow of Ranchoredas is not entitled to the property, the subject-matter of this suit, as heir of Ranchoredas Haridas; (for the second defendant) (3) whether the second defendant is not the heir of Bachubai.

The Judge sitting in the Original Side of the High Court (BATTY, J.) decided these issues in favour of the plaintiff. In his judgment he said:—

"There can be no doubt, and it is not indeed very seriously disputed, that the deed of gift purported to confer on Bachubai an absolute estate in the property as stridhan. It conferred a power of appointment and in case of her intestacy provided for its passing to her heirs. It was made by the husband out of affection and was of the sub-class known as prittidatta, or certainly at least of the class of parabhasika stridhan, and therefore must devolve according to the rules governing stridhan proper.

"The plaintiff therefore claims it as the nearest heir in the husband's family. The decision in *Manilal Rewadat* v. *Bai Rewa*(1) is relied on for the plaintiff as showing that the heir to succeed is the nearest to the woman herself though in her husband's family. *Vijiarangam* v. *Lakshuman*(2) is relied on for the second defendant. A Privy Council case has also been cited, but appears to have no bearing on the case. The decision in *Vijiarangam* v. *Lakshuman*(2) is undoubtedly binding in this Court. It is cited by Banerjee (Hindu Law of Marriage and Stridhan, Tagore Law Lectures for 1878, 2nd Edition, page 364) as in accordance with Kamalakar's interpretation of Vijnyanesvara's rule that the successive heirs after the husband would be the step-son, the step-grandson, the rival wife, the step-daughter, her son, the husband's mother, his father, his brothers, their sons and the husband's other Gotraja sapindas and bandhus in the order in which they inherit his property. And this rule is as stated, page 362, that given in the Mitakshara for the devolution of the property of a male owner dying without issue.

"The Mayukha treating of parabhashika stridhan or stridhan proper of a widow when the marriage is in the Brahma, or other unblamed form, recognises the husband and his kinsmen as the heirs, basing his rule on the same text of

(1) (1892) 17 Bom. 758. (2) (1871) 8 Bom. H. C. R. (O. C. J.) 244 (260).

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Yajnavalkiya that is followed in the Mitakshara on the subject, and if there be no husband then the nearest to her in his own family takes it. The heirs being necessarily the sister's son, the husband's sister's son, the husband's brother's son, the brother's son, the son-in-law, and the husband's younger brother in succession. But the point of bifurcation where the Mitakshara and Mayukha separate appears to be a point (below the widow in the series of successive heirs) at which question arises as to the order of succession among the husband's kinsmen.

"In *Gojabai* v. *Shahajirao Maloji Raje Bhosle*[1], the wife is spoken of as having been born again in the husband's family, so that she having become half the body of her husband, the son of a man by one of his wives is the son of all his wives, and it is for this reason (pages 120, 121) that the stepson is treated, not as the husband's sapinda but as an actual son of a widow whose stridhan is in question. It is not as a sapinda, but as her own offspring that he takes precedence, and is the sapinda of his step-mother who is therefore not to be regarded as childless. It is thus that he is regarded as coming in before the husband himself, owing to the absolute identity of the widow with her husband. This identity of the widow with her husband appears to have been the ground of decision in the case of *Gojabai*, and is the reason why the stepson in that case was held to come in even before the co-widow who opposed his claims as he would apparently have done even before the husband. But when there are no children and the husband is next entitled, the widow of the husband being identified with his as half of his body, seems equally entitled to precedence before the question can arise as to who are the nearest heirs in default of the husband. The husband's kin are, I think, in view of this decision by which I am bound, excluded by the husband himself as represented by the co-widow who survived him. This seems to be in accordance with the passage in Mr. Justice Telang's judgment, in which he observes that 'according to the view of some writers the stepson or step-grandson comes in next after the offspring of the woman herself, and before her husband; and that according to the view of others he would come in after the husband, but before his other wives and such other wives' daughters, and *of course*, before other more distant heirs, including the brother's son.'

"The remarks that follow this passage indicate that it is the recognised identity of the wife with her husband that entitle a co-widow's children and a co-widow herself, to take precedence respectively as sapindas of the wife herself, or as representing the husband himself, before resort is had to the husbuand's sapindas at all. For the above reasons I think the plaintiff is entitled to the relief sought."

From this decision in favour of the plaintiff an appeal was brought which came before Sir Lawrence Jenkins, C. J., and Russell, J., who delivered separate judgments and concurred in

(1) (1892) 17 Bom. 114.

allowing the appeal. The material portions of their judgments were as follows :—

JENKINS, C. J :—"The first point is: What interest was taken by Bachubai under the deed of November 1892? Mr. Justice Batty held that she took an unlimited interest, but before us both sides have abandoned that view, and it is conceded that she took a limited interest and that her legal heirs took as purchasers. How then are these legal heirs to be ascertained? By reference to what class of stridhan is their identity to be fixed? For the descent of stridhan varies with its quality.

"Before us for the first time it has been argued that the legal heir of Bachubai must be determined by reference to the peculiar course of descent of the type of stridhan called Sulka: and this view has been supported before us by a very able argument advanced by Mr. Setlur. But there are many difficulties in the way of accepting this contention. In the first place the devolution of Sulka does not correspond with the course of succession delineated in the deed of the 24th November 1892. In the next place the interest of Bachubai was not (as Sulka is) hereditable; she took merely a limited interest, and her legal heirs do not take as such, but because they fall within the description of the donees under the terms of the deed. Then, again, even if it could be said that the limited interest taken by Bachubai under the deed was a modernised form of Sulka, it still would be a question whether the heirs to take under the gift should be ascertained by reference to that form of stridhan. The quality of the subject matter does not necessarily affect the meaning of the word 'heirs,' and in illustration of this I may refer to *Garland* v. *Beverley* (1) where it was held that in a gift of gavel-kind land to the right heir of a person, it was the right heir according to common law and not in reference to the descent of gavel-kind that took under the gift. So here it is at least an arguable point, even if Bachubai's limited interest could be regarded as Sulka, whether the effect of the gift to her heirs is or is not to be determined by reference to the exceptional course of descent peculiar to that particular class of stridhan. It would be undesirable to dispose of this appeal, on a point involving so much of doubt, which might have been cleared by evidence had it been raised at an earlier stage.

"The possibilities in this direction are exemplified by Sir Charles Sargent's decision in the P. J. for 1893 (2). Therefore I prefer to rest my opinion on the hypothesis (which I will assume for the purpose of this case) that the legal heirs indicated are those who would be entitled to Bachubai's ordinary stridhan. Now let me test the case in the first instance with reference to the descent of technical stridhan. Admittedly this case is governed by the Mayukha, which differs from the Mitakshara in its treatment of the descent of stridhan in that it imports the rule of devolution derived from the text of Brihaspati. This

(1) (1878) 9 Ch. D. 213. (2) *Chunilal* v. *Itchachand* (1893) P. J., p. 88.

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rule is not introduced absolutely, but with the qualification that it comes into effect on failure of the husband.

"In the course of his judgment Mr. Justice Batty refers to this rule, and in reference to it says: 'The point of bifurcation where the Mitakshara and Mayukha separate appears to be a point (below the widow in the series of successive heirs) at which question arises as to the order of succession among the husband's kinsmen.' From the succeeding passage of the judgment it would appear that the position there ascribed to the widow depends upon her identification with her husband in the sense there indicated. But I am aware of no passage in the Mayukha that can be taken as a warrant for this identification, or for the conclusion that when Nilkantha uses the word 'husband' as he does in reference to the passage of Brihaspati, he includes in it the wife. Mr. Justice Batty, in support of this view and as authority for it, relies on the judgment of Mr. Justice Telang in the case of *Gojabai* v. *Shahajirao Maloji Raje Bhosle*,(1) but that case turned upon the Mitakshara, and at pages 122 and 123 Mr. Justice Telang points this out. He there deals specifically with Brihaspati's text, and no doubt subjects it to a certain amount of criticism; he suggests a want of harmony between the rule deduced by Nilkantha from Yajnavalkya and the enumeration of heirs in Brihaspati's text, and contends that some of those named in the text would not answer the description of being nearest in the husband's family. But this criticism appears to me to lose sight of the fiction on which the text is based; this is how the passage runs in the Mayukha (*reads* Mandlik, p. 98, 'on failure of the husband,' to 'the daughter's son'). This involves the consequence that the sister's son, the husband's sister's son, the husband's brother's son, the brother's son, the son-in-law, and the husband's younger brother are equal to sons.

"They obviously are not sons in fact, but a fiction is here created whereby they stand in the position of sons, and were the facts in accordance with the fiction (as must be assumed) then there would be no inconsistency and no want of harmony.

"It will be noticed that the fiction only arises on failure of issue and of the husband, but in that I can find nothing that saves the right (if any) of the rival widow against these fictional heirs. At first sight the fiction no doubt appears capricious and unreasonable, but it would appear to be not without foundation. An interesting light is thrown on this subject by Mr. Golap Chundar Sarkar in his work on Hindu Law, pages 328, 329 where he says (*reads*). As far as I can learn what he there depicts presents a substantially accurate representation of relations in Bombay.

"The conclusion then to which I come is that, as at Bachubai's death she left surviving her a younger brother and a nephew of her husband, her riva widow cannot claim to have been her heir. Therefore I think the decree under appeal should be reversed and the suit dismissed."

(1) (1892) 17 Bom. 114.

RUSSELL, J. (after referring to the terms of the deed of 24th November 1892, continued) :—

"It appears to me to be clear that as between himself and his heirs and Bachubai the settler intended that she should be the owner of the property in question subject to the provisions in the indenture contained, and that at all events in the event of the marriage being performed he and his heirs should have no claim to the property.

"This being so the next question to consider is by what law is the indenture to be construed. It is in the English language, was evidently drawn up as it was attested, by an attorney, and therefore to ascertain the meaning of the words used you must apply the principles of English law. 'The meaning and effect of every contract depends upon the law by which the parties intended it to be governed, *i. e.*, the proper law, which means the law or laws by which the parties to a contract intended or may fairly be presumed to have intended the contract to be governed.' This general principle applies both to the interpretation or explanation of a contract and to the obligation of a contract, *i. e.*, the rights and obligations of the parties under it. *See* Dicey's Conflict of Laws, pp. 540, 564.

"What then according to English law and in the events which have happened is the effect of the said indenture?

"In my opinion it is that in the event of her having no issue, or not exercising the power of appointment Bachubai should have a limited interest in the property, *i. e.*, for her life, subject to which it should devolve upon 'her heirs,' using that word without reference to the nature of the property, on the authority of the case *Garland* v. *Beverley*(1) cited by the learned C. J. in his judgment. It was conceded on both sides that the word heirs was a word of purchase and not of limitation. Applying the words of Lindley, L. J., in *Evans* v. *Evans*, (2) her heirs here 'are *personæ designatæ* who are to form a new stock from which the succession in future is to be traced.'

"If this be so the heir of Bachubai, as has been shown in the judgment just pronounced, is to be sought for elsewhere than in the plaintiff, and her case accordingly must fail.

"The appeal must therefore be allowed."

On this appeal—

Cohen, K. C., and *DeGruyther* for the appellant contended that by the Hindu law of the Bombay school applicable to *stridhan* the appellant was entitled to succeed, on the death of Bachubai, to the property in suit. The law which governed the case was that prevailing generally in Western India, namely, the Mitakshara, except where it differed from the Vyavahara Mayukha. Reference was made to *Collector of Madura* v. *Mootoo Ramalinga*

(1) (1878) 9 Ch. D. 213.

(2) [1892] 2 Ch. 173 at p. 184.

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Sathupathy(1); *Lallubhai Bapubhai* v. *Mankuvarbai*(2); and *Krishnaji Vyanktesh* v. *Pandurang*(3). To show that Bachubai took an absolute estate, and not only a life estate, in the property, *Brij Indar Bahadur Singh* v. *Ranee Janki Koer*(4) was referred to. As to what the Mitakshara law was on the subject reference was made to the Mitakshara, chapter II, section 11, placita 1, 9, 11 and 25; Stoke's Hindu Law Books 458, 460; the Mitakshara, chapter II, section 1, placita 5 and 6; Stoke's Hindu Law Books 428; Golap Chunder Sarkar's Hindu Law, 34, 283; and to the interpretation put upon those texts in *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram*(5); *Gojabai* v. *Shahajirao Maloji Raje Bhosle*(6); and *Krishnai* v. *Shripati*(7). According to these texts from the Mitakshara, Bachubai having been married by one of the approved forms, the succession to her *stridhan* would go, on failure of her husband, to his nearest sapindas; a wife was a sapinda of her husband; and therefore on failure of the husband, the co-widow, the appellant, was his nearest sapinda and entitled to the property in suit. The Vyavahara Mayukha was said to differ from the Mitakshara on this point, but it was contended that on its true construction it did not do so, but led to the same conclusion as the Mitakshara. The Vyavahara Mayukha interpreted the Mitakshara as meaning not that the husband's nearest kinsmen (sapindas) inherited a woman's property, but the woman's nearest sapindas in the husband's family, and on that interpretation the co-widow being her nearest sapinda in the husband's family was entitled to succeed. Propinquity was the test. Reference was made to Vyavahara Mayukha, chapter IV, section 8, placitum 19; Stoke's Hindu Law Books 89; Vyavahara Mayukha, chapter IV, section 10, placita 27, 28, 30; Stoke's Hindu Law Books 105; *Bachha Jha* v. *Jugmon Jha*(8); *Lallubhai Bapubhai* v. *Mankuvarbai*(2) and the same case on appeal *Lulloobhoy Bappoobhoy* v. *Cassibai*(9); the Dayabhaga, chapter IV, section 3; Stoke's Hindu

(1) (1868) 12 Moore's I. A. 397 (435).
(2) (1876) 2 Bom. 388 (417).
(3) (1875) 12 Bom. H. C. R. 65 (67).
(4) (1877) L. R. 5 I. A. 1 (14).
(5) (1866) 11 Moore's I. A. 139.
(6) (1892) 17 Bom. 114 (117).
(7) (1905) 30 Bom. 333: 8 Bom. L. R. 12.
(8) (1885) 12 Cal. 343 (351).
(9) (1880) L. R. 7 I. A. 212 (231); 5 Bom. 110 (126).

Law Books 251; Mayne's Hindu Law, 6th edition, page 38 and paragraph 500, page 669; Shama Churn Sarkar's Vyavastha Chandrika, Vol. II, 538, 539; Mitakshara, chapter II, section 3, placitum 5: Stoke's Hindu Law Books 443; *Mohandas* v. *Krishnabai*[1]; Dayakrama Sangraha, chapter II, sections 6, 9 and 26; Stoke's Hindu Law Books 498; Banerjee on Marriage and Stridhan, Tagore Law Lectures for 1878, 375 (2nd edition, 364); West and Buhler's Digest of Hindu Law, 517; *Gojabai* v. *Shahajirao Maloji Raje Bhosle*[2]; and *Rahi* v. *Govinda*[3]. Brihaspati gives the heirs, but not in the order of their succession. According to the respondents' contention the Mitakshara and the Vyavahara Mayukha were irreconcileable on the point in dispute in this case; the construction put by the appellant on placitum 30 of chapter IV, section 10, of the latter treatise is a construction which renders the two treatises not inconsistent with one another. Under that construction the appellant was entitled to succeed in preference to the respondents. If Bachubai had only a limited estate under the deed of gift there was no valid disposal of the remainder, and in that case the appellant was also entitled to the property in suit.

Jardine, K. C., and *W. C. Bonnerjee*, for the respondent Hunsraj Morarji, contended that according to the Bombay school of Hindu law as expounded in the Vyavahara Mayukha this respondent, as the husband's younger brother, was a preferential heir to the appellant, the co-widow, with respect to the property in suit. It was not denied that Bachubai took an absolute estate, but had it been otherwise, and she had had only a life estate, the bequest would not have been void as to the remainder, for, under the ruling in the case of *Bai Motivahoo* v. *Bai Mamoobai*[4], it was validated by the power of appointment having been given to Bachubai. It was contended that placitum 28 of the Vyavahara Mayukha, chapter IV, section 10, was general, and that placitum 30 was special and defined the heirs and nearest kinsmen, and superseded placitum 28. The widow came in as sapinda of the husband only under placitum 28. What Telang, J., says contrary

(1) (1881) 5 Bom. 597.
(2) (1892) 17 Bom. 114 (121, 123).
(3) (1875) 1 Bom. 97 (106).
(4) (1897) L. R. 24 I. A. 93; 21 Bom. 705.

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to this in the case of *Gojabai* v. *Shahajirao Maloji Raje Bhosle*(1) was merely an *obiter dictum*. Reference was made to *Venkatasubramaniam Chetti* v. *Thayarammah*(2); Golap Chunder Sarkar's Hindu Law 328, 329; 1 Macnaghten's Hindu Law 39; Banerjee on Marriage and Stridhan (Tagore Law Lectures for 1878), 2nd edition, 386; Dayakrama Sangraha, chapter II, section 6; Stoke's Hindu Law Books 498; Dayabhaga, chapter, IV, section 3, placita 32, 33, 39; Stoke's Hindu Law Books 257; Mayne's Hindu Law, 6th edition, page 693, paragraph 529; *Rachava* v. *Kalingapa*(3); *Lulloobhoy Bappoobhoy* v. *Cassibai*(4); *Nahalchand Harakchand* v. *Hemchand*(5); Mitakshara, chapter II, section 1, "He who has no son, &c."; Stoke's Hindu Law Books 427; *Bachha Jha* v. *Jugmon Jha*(6); *Dasharathi Kundu* v. *Bipin Behari Kundu*(7); and *Hunsraj* v. *Bai Moghibai*(8). The succession of heirs was not the same as the succession of sapindas, for which was instanced the case of the daughter. The respondents came under "sister's sons and the rest." Under the Vyavahara Mayukha, or any other school of Hindu law, a widow could not be identified with her husband, as regarded inheritance, except in respect of property belonging to him at the time of his death.

G. E. A. Ross, for the respondent Bai Monghibai, made a similar contention to that for the respondent Hansraj Moorarji and submitted that under the law set forth in the Vyavahara Mayukha she was, through her husband, who was a nephew of Koreji Haridass, entitled to succeed to Bachubai's estate in preference to a co-widow. He cited *Venkatasubramaniam Chetti* v. *Thayarammah*(2); and *Hunsraj* v. *Bai Moghibai*(8).

Cohen, K. C., replied citing *Hunsraj* v. *Bai Moghibai*(9); *Lulloobhoy Bappoobhoy* v. *Cassibai*(10); and the case of *Lakshmibai* v. *Jayram Hari*(11) there referred to.

(1) (1892) 17 Bom. 114 (118).
(2) (1898) 21 Mad. 263 (267).
(3) (1892) 16 Bom. 716.
(4) (1880) L. R. 7 I. A. 212; 5 Bom. 110.
(5) (1884) 9 Bom. 31.
(6) (1885) 12 Cal. 342.
(7) (1904) 32 Cal. 261 at p. 262.
(8) (1904) 7 Bom. Law Rep. 622 (627).
(9) (1904) 7 Bom. Law Rep. 622 (630).
(10) (1880) L. R. 7 I. A. 212 (238); 5 Bom. 110 (126).
(11) (1869) 6 Bom. H. C. R. (A. C. J.) 152.

1906, May 9th:—The judgment of their Lordships was delivered by

LORD DAVEY:—The question in this appeal relates to the succession to immoveable property in the Island of Bombay, of which a Hindu lady named Kumari Bachubai died possessed. She was the widow of one Koreji Haridass, who died in February 1898. On the 24th November 1892 Koreji Dass executed an ante-nuptial settlement of the property now in dispute, whereby he conveyed it to Kumari Bachubai, her heirs, executors, administrators, and assigns, for ever, subject to the following conditions:—

"1. If the said Kumari Bachubai shall die before the said intended marriage has been celebrated and completed then the said house, land and premises shall revert to and again become the absolute property of the said Koreji Haridass, his heirs, executors, administrators, and assigns.

2. If the said Kumari Bachubai shall die after the said intended marriage has been celebrated and completed without leaving issue of the said intended marriage who shall succeed to a vested interest in the said house, land and premises then the said house, land and premises shall be dealt with as she may direct or declare by will or deed or failing any will or deed then the same shall vest in her legal heirs according to Hindu law of the Bombay School."

The marriage was celebrated in February 1893. Kumari Bachubai died on the 9th May 1899 without leaving any issue and without having made any appointment by deed or will. It is not disputed that the persons entitled to succeed to the property as heirs of Kumari Bachubai were the persons entitled to her ordinary stridhan. The rival claimants are the appellant, Bai Kesserbai, who was the surviving co-widow of Koreji Haridass, the respondent Bai Monghibai, who is the widow of Ranchordas Haridass, a brother of Koreji Haridass who survived Kumari Bachubai and died on the 17th June 1902 (it is presumed childless), and the respondent Hunsraj Morarji, who was the son of another brother of Koreji Haridass, who predeceased Kumari Bachubai. The appellant was the plaintiff in the suit, which was commenced on the 4th August 1902, in the High Court of Bombay. Mr. Justice Batty decided that by the Hindu law of the Bombay School the appellant was the next heir to Kumari Bachubai, and entitled to succeed. This decision was reversed on appeal by the Chief Justice and Mr. Justice Russell, and by

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their decree dated the 11th December 1903 the suit was dismissed with costs.

It is stated in the judgment on the appeal that both sides abandoned the view taken by Mr. Justice Batty, that Kumari Bachubai under the deed of gift took an absolute interest in the property, and that it was conceded that she took a limited interest only, and her heirs took as purchasers. Both the learned Judges were also of that opinion, and their judgments are, to a certain extent, based on it. Their Lordships are at a loss to understand on what grounds this opinion was arrived at. They have no doubt whatever that whether the deed is to be construed according to English law, as Mr. Justice Russell thought, or by Indian law, Kumari Bachubai took under it an absolute estate of inheritance.

Questions on the Hindu law of inheritance to property in the Island of Bombay are to be determined in accordance with the Mitakshara, subject to the doctrine to be found in the Mayukha where the latter differs from it. But as laid down by Mr. Justice Telang,[1] "Our general principle should be to construe the Mitakshara and the Mayukha so as to harmonize with one another, wherever and so far as that is reasonably possible." The point now under discussion is whether a co-widow is entitled to succeed to the property of a widow dying without issue in preference to her husband's brother or brother's son. There has been no judicial decision on this question, and their Lordships must decide it on the construction of the texts of Mitakshara and the Mayukha read together, with such assistance as may be afforded by other commentaries (though not recognised as authorities in Bombay) and by modern text books.

If the case rested on the Mitakshara alone their Lordships are of opinion that the appellant would be entitled to succeed. The material texts of the Mitakshara are Chapter II, Section XI, Placita 8, 9, and 11[2]:—

"8. A woman's property has been thus described. The author next propounds the distribution of it: 'Her kinsmen take it if she die without issue.'

(1) *Gojabai* v. *Shahajirao Maloji Raje Bhosle*, (1892) 17 Bom. 114 at page 118.

(2) Stokes' "Hindu Law Books," pp. 460 461.

"9. If a woman die 'without issue,' that is, leaving no progeny . . . . . the woman's property, as above described, shall be taken by her kinsmen; namely, her husband and the rest, 'as will be [forthwith] explained.

"11. Of a woman dying *without* issue as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma, &c. . . . . the [whole] property, as before described, belongs in the first place to her husband. On failure of him it goes to his nearest kinsmen [sapindas] allied by funeral oblations. But in the other forms of marriage, called Asura, &c. . . . , the property of a childless woman goes to her parents, that is, to her father and mother."

There can be no reasonable doubt that according to the Mitakshara definition of sapinda husband and wife are sapindas to each other. In the case of *Lallubhai Bapubhai* v. *Mankuvarbai*[1] Sir Michael Westropp, after quoting a long passage from the Achara Kanda of the Mitakshara, said (at p. 423):—

"This shows that Vijnyanesvara abandoned the doctrine that the right to offer funeral oblations alone constituted *sapinda-ship*, and adopted, in lieu of it, the theory that *sapinda-ship* is based upon community of corporal particles, or, in other words, upon consanguinity, and that he maintained that there is such a community between the wives of collaterals."

The learned Chief Justice then showed that the same theory had been adopted by Nilakantha, the author of the Mayukha, and that the doctrine applied to sapinda relationship, not only in its ceremonial aspect but for purposes of inheritance also. It was accordingly held in that case, which arose in the Island of Bombay, that under the law of the Mitakshara and Mayukha the widow of a deceased first cousin succeeded in her husband's place in preference to a male of a remoter degree. In *West and Bühler* [2] it is stated that whether "nearness" in the rule given by the Mitakshara for succession to childless widows' property should be determined in accordance with the succession to the property of a male, or whether it means nearest by relationship, the co-widow has the first right of succession, but in the latter case concurrently with other kinsmen in the same degree. But they say:—

(1) (1876) 2 Bom. 388.

(2) "Digest of the Hindu Law of Inheritance," (3rd Edn.) page 518.

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"The identity of the wife with her husband being accepted as a leading principle of the Mitakshara, the rule seems on the whole most consonant to it, whereby precedence, in heritable relation to him, gives a like precedence, and order of succession in relation to his widow."

And they add :—

"Such appears to be the rule too which custom has preferred in this part of India."

In accordance with these views it has been recently decided in a case from the Sátára district where the Mitakshara is the governing authority that a co-widow succeeds to a childless widow's stridhan in preference to her husband's brother's son (*Krishnai* v. *Shripati*[1]).

The grounds upon which it is said that the rule thus deducible from the Mitakshara is altered or superseded by the Mayukha are to be found in Chapter IV, section X[2] of that treatise, Placita 28 and 30, which are as follows :—

"'28. The property of a childless woman married in the form denominated Brahma, or in any of the other four [unblamed modes of marriage] goes to her husband ; but if she leave progeny, it will go to her daughters ; and in other forms of marriage [as the Asura, &c.,] it goes to her father and mother on failure of her own issue.' [In the one case] if there be no husband, then the nearest to her, in his [tat] own family takes it ; and [in the other case], if her father do not exist, the nearest to her in [her] father's family succeeds, [for the law that :] 'To the nearest sapinda, the inheritance next belongs,' as declared by Manu denotes that the right of inheriting her wealth is derived even from nearness of kin to the deceased [female] under discussion—and, though the Mitakshara holds, 'that on failure of the husband, it goes to his [tat] nearest kinsmen [sapinda] allied by funeral oblations' ; and 'on failure of the father, then to his [tat] nearest sapindas' ; yet, from the context it may be demonstrated, that her nearest relations are his nearest relations ; and [the pronoun *tat* being used in the common gender,] it allows of our expounding the passage 'those nearest to him, through her, in his own family' : for the expressions are of similar import."

"30. On failure of the husband of a deceased woman, if married according to the Brahma or other [four] forms ; or of her parents, if married according to the Asura or other two forms, the heirs to the woman's property, as expounded above, are thus pointed out by Brihaspati : 'The mother's sister ; the maternal uncle's wife ; the paternal uncle's wife ; the father's sister ; the mother-in-law, and the wife of an elder brother, are pronounced similar to

(1) (1905) 30 Bom. 333 : 8 Bom. L. R. 12. (2) Stokes', *op cit.*, p. 105.

mothers. If they leave no son born in lawful wedlock, nor daughter's son, nor his son, then the sister's son, and the rest shall take their property.' Here must be understood, 'on failure both of the daughter, and also of her daughter,' because only on failure of them does the right of inheritance pertain to the son born in wedlock, or to the daughter's son."

The text of Brihaspati, quoted above, is thus paraphrased by Mr. Justice Banerjee in his Tagore Lectures (1878)[1]:—

"To a male, the females related as the sister of his mother, the wife of his maternal or of his paternal uncle, the sister of his father, the mother of his wife, and the wife of his elder brother are like his mother; and so to a female the males related in the *reciprocal* way as her sister's son, her husband's sister's son, her husband's brother's son, her brother's son, her daughter's husband, and her husband's younger brother are like her son. And these last-mentioned relations of a female being like her sons, inherit her *stridhana* if she leave no male issue, nor son of a daughter, nor a daughter."

You have, therefore, the following list of relations to the childless widow and deceased proprietress of the stridhan who are said to be like her sons, and have been called by some text writers secondary sons :—

(1) Sister's son.
(2) Husband's sister's son.
(3) Husband's brother's son.
(4) Brother's son.
(5) Son-in-law, or daughter's husband.
(6) Husband's younger brother.

The chief difficulty about the text of Brihaspati is that we do not know the context in which it occurs. It appears to give promiscuously the sapindas of the husband and those of the father without noticing the distinction in the devolution of the property depending upon the form of marriage of the deceased widow. No intelligible principle has been discovered for the order in which they are enumerated. It is at variance with the settled and universally recognised principles of the Hindu law of inheritance, and the enumeration is obviously not exhaustive. Moreover, it is so expressed as to bring in the secondary sons immediately after the issue of the widow, for the words "if they leave no son," &c., are construed to refer to childless widows, and the description of the issue, upon failure of whom Brihaspati's secondary sons are to take, is neither exhaustive nor

(1) Banerjee on Marriage and Stridhan (2nd Edn.), pp. 387, 388.

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accurately descriptive of the order in which such issue would be entitled to succeed. The important question, however, is, how the author of the Mayukha understood the quotation. In his comment at the end of Placitum 30 he partially supplies the gaps left in the enumeration of issue, but not fully. If the "son born in lawful wedlock," means or includes a son of a rival wife (as is said in the Daya Bhaga) he would take only after the husband and (if the order of succession be based on propinquity) concurrently with the rival wife (see *West and Buhler*, Digest, p. 518, already quoted).

Nilakantha, however, clearly intends to bring in Brihaspati's series of secondary sons on failure of the husband or father, but whether immediately on that event or in what order is another question. Three constructions have been offered on these points. First, it was argued before their Lordships that the words "on failure of the husband of a deceased woman" should be read as meaning "on failure of the husband and his line of sapindas," succeeding in accordance with Placitum 28. Secondly, that Brihaspati's series of secondary sons comes in between the husband and his nearest sapindas and in the order in which they are mentioned. Thirdly, that a distributive construction should be given to Brihaspati's text applying the husband's relatives named to the case of a woman married in one of the approved forms, and the father's relatives to the other case only, and the text should be read as illustrative only, and neither exhaustive nor intended to prescribe the order in which the enumerated heirs take.

It does not appear to their Lordships possible to adopt the first of these constructions without doing unnecessary violence to the language and context. The words in Placitum 30 are: "On failure of the husband..... the heirs to the woman's property as expounded above are thus pointed out by Brihaspati." The quotation from Brihaspati, therefore, was intended to be used in the Mayukha as explanatory or expository of the class of heirs already pointed out in Placitum 28, and not as substitutive for them or as superseding them. Again, some of the husband's sapindas are included in Brihaspati's series, which seems decisive against this construction.

What may be described as a modified form of this construction is that adopted by Mr. Justice Batty. That learned Judge held that the point of bifurcation where the Mitakshara and Mayukha separate appears to be a point below the widow in the series of successive heirs, and that it is the recognised identity of the wife with her husband that entitles a co-widow's children and a co-widow herself to take precedence as sapindas to the wife herself or as representing the husband himself before resort is had to the husband's sapindas at all. The Chief Justice says that he is aware of no passage in the Mayukha that can be taken as a warrant for the identification of the wife with her husband. It seems, however, difficult to maintain this position in face of the learned judgments of Sir Michael Westropp and Mr. Justice West in the case of *Lallubhai Bapubhai* v. *Mankuvarbai* [1] and the judgment of Mr. Justice Telang in *Gojabai* v. *Shahájirao Maloji Raje Bhosle*[2].

According to the second construction the text of Brihaspati is read in what is no doubt its more obvious and literal sense apart from the context. It is that adopted by the Chief Justice and supported by the respondents in the present appeal, and it has considerable authority in its favour, including the Daya Bhaga, the Viramitrodaya, and Vyavastha Chandrika, and amongst modern text writers, West and Buhler, Mr. Justice Banerjee, and Mr. G. Sarkar. In the Daya Bhaga, however, it is said that if the order of succession were according to Brihaspati's text it would be contrary to the opinion and practice of venerable persons, and that the text is propounded "not as declaratory of the order of inheritance but of the strength of the fact," whatever those words may mean. Notwithstanding the weight of the authority in its favour, their Lordships cannot bring themselves to think that the construction contended for by the respondents is the one which they ought to adopt. So far from construing the Mitakshara and the Mayukha so as to harmonize with one another so far as that is reasonably possible, the respondents place them in direct conflict, and not only so, but the Mayukha is also divided against itself. Placitum 30 deals as well with the

(1) (1876) 2 Bom. 388. (2) (1892) 17 Bom. 114.

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case of a widow married in one of the approved forms as with that of a widow married in one of the lower forms, and is expressed to be expository of the rule laid down in Placitum 28. But some of the enumerated heirs are not blood relations of the husband at all, or members of his family, and others of them are not blood relations of the widow's father, or members of his family. Again, those who are nearest (both as regards degree of propinquity and in order of inheritance) are postponed in favour of those who are more remote in contradiction alike of the Mitakshara and Placitum 28 of the Mayukha.

The case of *Gojabai* v. *Shahajirao Maloji Raje Dhosle*(1) related to the succession to the stridhan of a childless Hindu widow married in one of the approved forms, who left her surviving (1) a co-widow, (2) the grandson of another co-widow, (3) a son of her husband's brother. The case fell to be decided in accordance with the Mitakshara, and the decision was in favour of the step-grandson, whether he was to be described as the husband's nearest sapinda or the wife's nearest sapinda in his family. But the texts of the Mayukha now under consideration had been relied on in argument, and the judgment of Mr. Justice Telang contains a valuable disquisition on that commentary. "Construing the Mitakshara in the sense which Nilakantha places upon its language" (Pl. 28), the learned Judge says:—

"The wife having, by her marriage, been 'born again in the husband's family,' and having become 'half the body of the husband,' the sapindas of the husband necessarily become her sapindas, and their degrees of propinquity to the husband and wife must be held to be identical, unless some specific reason to the contrary is shown."

The judgment of the learned Judge also contains the following passages:—

"In truth, even the rule which Nilakantha himself deduces from Yajnavalkya's general text is not in harmony with the enumeration of heirs contained in the text of Brihaspati now under consideration. And yet the Mayukha does not say how the two are to be made to stand together. The learned authors of the Digest have placed the heirs enumerated by Brihaspati after the husband, and before the woman's sapindas in her husband's family. This certainly appears to be warranted by the express words of the Mayukha contained in Placitum 30. Yet it is not quite reconcileable with the previous declaration in Placitum 28

(1) (1892) 17 Bom. 114.

that 'if there be no husband, then the nearest to her in his family takes' the woman's property. It is quite plain that some of the persons referred to in Brihaspati's text do not answer to this description at all; while of those that do, the husband's brother's son is not obviously nearer than the husband's younger brother, and yet according to Brihaspati's text the former would stand before the latter. It cannot, therefore, be assumed to be *quite* clear, according to the view of the Mayukha, that Brihaspati's list states the true order of succession as between the heirs enumerated, or that all those heirs take precedence over the ones included under the designation 'nearest to her in her husband's family'."

And again,—

'But Mr. Bhandarkar argued that the heirs specifically named in Brihaspati's text ought to be given precedence over those who come in under the general designation, each group of them taking precedence in the class (viz., that of husband's kinsmen or parent's kinsmen), to which it belonged. There is, however, no authority for this view. In West and Buhler's Digest the precedence is given to the whole of the enumerated heirs, and the ground for such precedence has already been stated. If they are not treated as one class, there is apparently no other ground for the preference than is indicated by the principle mentioned in the Vyavahara Mayukha, Chapter IV, section VIII, Placitum 18. But that principle, as there expressed, appears to be intended to apply only where there is a 'compact series.' This Court in *Mohandas* v. *Krishnabai*[1] declined to apply it in the case of *bandhus*, so as to give to the *bandhus* expressly named a preference over those who come in under the general definition. I think this is the authority which would be more applicable in the matter before us, and no such preference of the designated persons can, therefore, be allowed in this case."

The case of *Bachha Jha* v. *Jugmon Jha*[2] on the other hand, was a judicial decision on the text of Brihaspati now under consideration. It was there held that the stridhan property of a widow governed by the Mithila law and married in one of the approved forms, goes to her husband's brother's son in preference to her sister's son. It appears from the judgment of the Court that the Vakil for the appellant had relied on that portion of Ratnakara which treats of stridhan. The learned Judges observe that that book is no doubt one of considerable authority in the Mithila School, and if the matter were clear upon what Ratnakara says on the subject, they should, perhaps, have no difficulty in deciding the matter. The author of Ratnakara (it appears) in the passage relied on cited the text of Brihaspati now under consideration, with the following commentary, *viz.*,

(1) (1881) 5 Bom. 597. (2) (1885) 12 Cal. 348.

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"The meaning is that in default of the son and the rest, the sister's son, &c., shall take the property of their mother's sister and others." The learned Judges refer to other commentaries in which the same text of Brihaspati is cited, and they quote an opinion attributed to Mr. Colebrooke, in which it is stated, that by some commentators a distributive construction of the text is adopted, the three relations in Brihaspati's enumerated heirs who are so through the husband taking the property in the one case, and the three who are so through the father taking the property in the other case. And after discussing the placita in Mayukha dealing with the subject they say they are inclined to think that what the author meant to lay down was that the succession of the heirs mentioned in Brihaspati's text is to be taken to be subject to the rule of law laid down by him in accordance with the Mitakshara, as suggested in "Shama Churn's Vyavastha Chandrika," Vol. II., p. 539. Ultimately, the case was decided in accordance with the Mitakshara, on the ground that the meaning and effect of the text of Brihaspati quoted by Ratnakara was too ambiguous to control the plain meaning of that work.

The Chief Justice answers the argument that some of the persons enumerated in Brihaspati's text as heirs do not answer the description of being nearest in the husband's family by saying that this criticism loses sight of the fiction on which the text is based, which, he says, involves the consequence that the persons enumerated are equal to sons. With great respect, this is not what is said, or apparently intended, by the text. They do not take concurrently with sons, and no text writer has even suggested that they take concurrently with each other, as they would do if they were all equal to sons, or to be treated as sons. The analogy appears to their Lordships to be purely fanciful and not based on any discoverable principle. Nor is it in accordance with the fact. The kinship of the husband's brother's son is not derived through the wife of the husband's brother, but through the husband's brother himself.

It is apparent from the judgments above quoted that the learned Judges did not treat the application of Brihaspati's text, or the meaning of the author of the Mayukha in quoting it, as

settled by authority, either as regards the place in the succession of the enumerated heirs or the order in which they are to take. It would perhaps be sufficient for their Lordships to say, in accordance with a well settled principle of construction, that the unambiguous direction in Placitum 28 of the Mayukha is not controlled by a subsequent text the language of which is of such uncertain meaning as that contained in Placitum 30 of the same work. But following out the line of thought suggested in the judgments quoted above their Lordships think that a construction may be put on the language of Placitum 30 of the Mayukha which will bring it into harmony with the Mitakshara, and also reconcile it with the previous placitum of the Mayukha itself. They are of opinion that the text of Brihaspati should be read distributively as regards the property of women married according to one of the approved forms, and the property of those married in one of the lower forms. In the one case, those of the heirs enumerated by Brihaspati who are blood relations of the husband, *viz.*, the husband's sister's son, the husband's brother's son, and the husband's brother, will succeed to the woman's property, and in the other case the relations of the father will succeed. In the diversity of opinion amongst the text writers whether Brihaspati's series of heirs take in the order in which they are enumerated, their Lordships think that the better opinion is that the order of succession is not indicated. There is no apparent reason for preferring the husband's sister's son to the husband's brother's son, or both, to the husband's brother. And their Lordships agree with the learned editor of the Vyavastha Chandrika that the solution is to be found by reference to Placitum 28, in which the heirs are described as the nearest sapindas of the wife in the husband's family, or the nearest to her in her father's family, as the case may be. The list is not exhaustive, and neither a co-widow, nor any other sapinda of the husband, is excluded. The words "and the rest" therefore must mean, or include, the other relations of the husband or father. But if the text does not prescribe any new order of succession, and the co-widow is not excluded, it follows that she must take in her right place, or (in other words) the appellant is entitled in preference to the respondents. Their Lordships thus arrive at

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the same conclusion as Mr. Justice Batty, though by a somewhat different road.

If there were any construction of the text laid down by authority binding on the Courts of Bombay, or if there were any established practice or usage in the application of the text, their Lordships would follow it without hesitation, though it might not commend itself to their judgment. But no such authority has been referred to, and there is no evidence of any such practice or usage. Their Lordships therefore are at liberty, and are bound, to act on the opinion which they have formed, and will humbly advise His Majesty that the appeal be allowed, and that the order of the High Court of Bombay (Appeal side), dated the 11th December, 1903, be discharged, and the decree of Mr. Justice Batty, dated the 21st February, 1903, be restored, and that the respondents do pay to the appellant the costs of their appeal in the High Court. They will also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: *Messrs. Ashurst, Morris, Crisp & Co.*

Solicitors for the respondent Hunsraj Morarji: *Messrs. Payne* and *Lattey.*

Solicitors for the respondent Bai Monghibai: *Messrs. Rawle, Johnstone & Co.*

J. V. W.

REFERENCE FROM THE COURT OF SMALL CAUSES.

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

NUSSERWANJI COWASJI SHROFF (PLAINTIFF) *v.* LAXMAN BHIKAJI (DEFENDANT).*

1906. *January* 12.

Hindu Law—Interest—Damdupat—Interest accrued due not affected by the rule of damdupat.

Plaintiff advanced Rs. 714 to the defendant. The whole of this sum was repaid by the defendant. The plaintiff then sued to recover Rs. 33-9-2, being the amount of interest over the amount from the date of the loan to the date of

* Small Cause Court reference in Suit No. 16596 of 1905.