

some extent and on some occasions interfering with their freedom of action as private citizens.

On these grounds, in reference No. 23 of 1907, we answer both the questions referred by the Chief Presidency Magistrate in the affirmative. The Magistrate in sentencing the accused will, we have no doubt, take into account the fact that these are test cases, and that, as for the first time our judgment settles the law, a very light sentence of fine will be sufficient to meet the ends of justice. In Appeal No. 116 of 1907, we reverse the order of acquittal, convict the accused of the offence charged, and sentence him to pay a fine of rupee one; in default seven (7) days' rigorous imprisonment.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Beaman.

TARA, FATHER HARI SHINDE (ORIGINAL PLAINTIFF), APPELLANT, v. KRISHNA KOM BANDU AND OTHERS (ORIGINAL DEFENDANT 2 AND TWO OTHERS), RESPONDENTS.*

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Hindu Law—Murali—Married sisters—Exclusive right claimed by Murali as unmarried daughter to inherit her father's property—Kanya—Maiden—Mitakshara—Vyavaharmayukh—Act XXI of 1850.

A *Vaghya* (male dedicated to the god Khandoba) had three daughters, one of whom was a *Murali* (female dedicated to the god Khandoba) and two married. After the *Vaghya's* death his *Murali* daughter, who lived by prostitution and had children by promiscuous intercourse, claimed her father's property as heir to the exclusion of her sisters under the rule of Hindu Law that an unmarried daughter inherits to her father before his married daughter. The first Court allowed the claim.

On appeal by one of the defendants (married daughters) the Judge varied the decree by allowing the plaintiff a third share in the property.

On second appeal by the plaintiff the appellate decree was confirmed there being no appeal or cross-objection by the defendants against that portion of the decree whereby the plaintiff was allowed to share her father's property equally with her married sisters.

* Second Appeal No. 333 of 1906.

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Held, further, that a woman, who in her maiden condition becomes a prostitute, being neither a *kanya* (unmarried) nor a *kulastrī* (married), but being at the same time notwithstanding her prostitution a qualified heir as held in *Advaya v. Budrava*⁽¹⁾, would be entitled to succeed to her father's property only in default of either married or unmarried daughters.

SECOND appeal from the decision of F. X. DeSouza, District Judge of Sholapur, varying the decree of C. R. Karkare, Subordinate Judge of Pandharpur.

The plaintiff sued to recover possession of certain lands with mesne profits, alleging that the lands belonged to her deceased father Hari Shinde; that she being the unmarried daughter was the proper heir of her father to the exclusion of defendants 2 and 3 who were his married daughters; that Hari Shinde was a *Vaghya* (male dedicated to the god Khandoba) and she was a *Murali* (female dedicated to the same god) and that defendant 1, who was the son-in-law of Hari Shinde, that is, the husband of defendant 3, and tenant of the lands, having refused to deliver possession, the plaintiff brought the present suit for possession and mesne profits.

Defendant 1 denied the tenancy and setting up his own title as donee under Hari Shinde contended *inter alia* that the plaintiff being a *Murali* dedicated to the god Khandoba she was married to that god and cannot be said to be unmarried and that she was a prostitute by profession.

Defendant 2 replied that she, plaintiff and defendant 3 were full sisters, that as the plaintiff was by profession a prostitute, she was not the heir of their father under Hindu Law and that defendant 1 had no interest in the property he being simply a tenant of their deceased father Hari Shinde.

Defendant 3 answered that she, plaintiff and defendant 2 being the daughters of Hari Shinde were his proper heirs.

The Subordinate Judge found that the gift alleged in his favour by defendant 1 was not proved and that the plaintiff was entitled to inherit the property in suit in preference to defendants 2 and 3.

(1) (1879) 4 Bom. 104.

He, therefore, allowed the claim observing :—

But there is no doubt at all that under the Hindu Law, prevailing in the Bombay Presidency, plaintiff, who is an unmarried daughter, is entitled to inherit the property in suit, which admittedly belonged to her father deceased Hari Shinde, in preference to defendants 2 and 3, who are the married daughters (I. L. R. Bombay Vol. 14, pages 4 to 13). It is contended for the defendants that plaintiff being a *Murali* must have been married with the god "Khandoba" and that consequently she cannot be considered to be unmarried. I see no force in this contention. The alleged marriage with god (*Khandoba*) is no marriage at all under the Hindu Law. Plaintiff is still *titled* unmarried under the Hindu Law, though she may have been married with the god "Khandoba." The defendants further contend that plaintiff is a *Murali* and that consequently she is disqualified from inheriting the property of her father. This contention is also utterly untenable. The defendants have cited no authorities for holding that a *Murali* is disqualified from inheriting the property of her parents. *Muralis* and *Vaghys* do not relinquish their worldly affairs. They own property. In fact they lead their lives just like other people. I, therefore, hold that a *Murali* can inherit, just like other women. The defendants further contend that plaintiff is unchaste, that she maintains herself by prostitution, that she is an outcaste and that consequently she is disqualified from inheriting the property in suit. There is no satisfactory evidence on record to show that plaintiff is an outcaste. On the contrary the evidence satisfactorily shows that the *Maratha* or *Kunbi* people and even her relatives (plaintiff is of *Maratha* or *Kunbi* caste) mix and dine with plaintiff and that she is respected by the *Kunbi* people. It is, therefore, evident that plaintiff is not an outcaste. It is to be remarked here that loss of caste or degradation from caste is now no bar to inheritance. Plaintiff admits that she follows the profession of a prostitute. She has admittedly got children from prostitution. But there is no doubt at all that under the Hindu Law prevailing in the Bombay Presidency, a daughter is not excluded from inheritance by her unchastity or incontinence. The case reported at page 104 of I. L. R., Bombay, Vol. 4, satisfactorily shows that under the Hindu Law prevailing in this Presidency, a daughter is not debarred by incontinence from succession to the estate of her father. On the whole, I hold that plaintiff is entitled to inherit the property in suit in preference to the defendants 2 and 3.

On appeal by defendant 2 the Judge found that the plaintiff was not the heir of Hari Shinde in preference to defendants 2 and 3. His reasons were as follows :—

The facts of the case are peculiar. The plaintiff and defendants 2 and 3 are the daughters of one Hari Shinde who died in the year 1903 and defendant 1 is the husband of defendant 3. Hari Shinde was a *Vaghya* and the plaintiff is a *Murali*. The peculiar characteristics of the *Vaghys* and *Muralis* are described

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at page 189 of the Sholapur Gazetteer. Suffice it to say that they form well recognized classes of devotees dedicated to the service of the god Khandoba. The *Muralis* are, as a rule, young girls whose parents have vowed them to Khandoba's service; before they attain puberty, they are married to the god by rites of corrupt significance; and they are thereafter incapable of contracting a human union. They maintain themselves principally by prostitution which with them becomes a mode or incident of worship.

Plaintiff admits in her deposition (exhibit 34) that she lives by prostitution and has four children begotten by promiscuous intercourse. It is contended on her behalf that her mystic marriage with Khandoba is not a union recognized by Hindu law; that in the eye of that law she still remains unmarried; that as such she is entitled to inherit her father's estate in preference to her married sisters defendants 2 and 3; and that her incontinence is no bar to succession to her father. These contentions have found favour with the Sub-Judge.

The preference of the unmarried daughters over the married ones is founded on the text of Katyayna "Let the widow succeed to her husband's wealth, and in default of her the daughter inherits if unmarried or unprovided" *Mitakshara* ii 2, section 2. And the principle on which that preference is based was that before all a suitable provision for the marriage of daughters must be made. West and Buhler, 3rd Ed., Vol. I, p. 105.

But what claim for preference can be advanced by a woman like the plaintiff who *ex concessis* is incapable of contracting a legal marriage? In the absence of any authority covering the case, I would hold that the reason for the rule not subsisting the rule itself has no force.

If this is the correct view of the law plaintiff, defendant 2 and defendant 3 are entitled to equal shares in the lands in suit and though defendant 3 has not appealed a decree in her favour can be made under the provisions of section 544, Civil Procedure Code, as the grounds of decision are common to both defendants.

The Judge, therefore, varied the decree by directing that "plaintiff do recover possession by partition in execution proceedings of a third share in the lands in suit. Defendants 2 and 3 are each entitled to a third share and may recover possession of their respective shares on payment of the proper Court-fees. Plaintiff to bear the costs of this suit and appeal."

The plaintiff preferred a second appeal.

G. K. Dandekar for the appellant (plaintiff) :—The question is whether a daughter who is a *Murali* and as such leads the life of prostitution is entitled to succeed to her father's property in preference to her married sisters. The plaintiff, while she was a minor, was dedicated as a *Murali* by her father and she should

not be made to suffer for the act of her father. The fact that the plaintiff follows the profession of a prostitute should be kept out of mind because under the Hindu Law prevailing in this Presidency a daughter is not debarred by incontinence from succession to her father's estate: *Advya v. Rudrava*⁽¹⁾. In reply to the question No. 18 at p. 442 of West and Bühler (3rd Edn.), it is said that the Shastras are silent as to the practice of dedicating females as *Muralis* and that a *Murali* and her son would, according to the custom of the caste, succeed to the property left by her father.

In the passage on p. 201 of Yajnyavalkya *Smriti* with respect to the succession of an unmarried daughter, there is the term *anudhā* which means "an unmarried woman." We submit that the term should be construed in its strict sense and should be applied even to a woman who is of mature age but is unmarried irrespective of the life she may be leading. The expression used on p. 237 is *Kumārī*, that is, a maiden. See also Ghose on Hindu Law, pp. 92 and 148.

In referring to the passage on p. 105 of West and Bühler (3rd Edn.), the Judge seems inclined to the view that preference to the unmarried daughter is virtually for her marriage. The Judge has taken a narrow view of the term marriage. The provision for marriage implies maintenance and well-being. The preference should rest not only upon the fact whether she is married or otherwise, but also upon the circumstance whether she is *sadhan* (rich) or *nirdhan* (impecunious).

The passages on p. 75 of the *Virmitrodaya* show that a father has the obligation to maintain his daughter; that the obligation is shifted to her husband after her marriage; and that if the husband is poor and unable to maintain her then the obligation rests on the father as well. So it is the obligation to maintain that gives preference to an unmarried daughter. If the proposition be accepted that the test to determine the preference is the daughter's being *nirdhan* (impecunious), the case of an unmarried daughter follows as a corollary from the said proposition because an unmarried daughter is really *nirdhan* if her father's *dhan* (property) be not given to her. See also *Bakubai v.*

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Manchhabai⁽¹⁾, *Poli v. Narotum Bapu*⁽²⁾, *Audh Kumari v. Chandra Dai*⁽³⁾, *Totawa v. Basawa*⁽⁴⁾ and *Danno v. Darbo*⁽⁵⁾.

No doubt when an unmarried woman leads the life of a prostitute and thus maintains herself, it may be contended that she is *sadhan* and not *nirdhan*. But law will not compel her to continue to lead the life of a prostitute for her maintenance.

G. B. Rele for the respondent (defendant. 2):—With respect to daughter's succession, the text writers have given preference to unmarried daughters over those that are married. What the text writers meant was that married daughters having been married at the expense of their father, those that are unmarried at the time of his death should be properly provided for with respect to the expenses of their marriage and maintenance. Such preference given to unmarried daughters cannot, we submit, mean the total exclusion of married daughters from inheritance, but according to judicial decisions they are now so excluded. The text writers nowhere specifically say that they are to be wholly excluded.

The term "unmarried" means one who has the capacity to marry and one who is a *kumári*, that is, a virgin. If these two elements are absent, a woman is not entitled to be termed *anudha*, that is, unmarried, even though her marriage may not have actually taken place. What is a *Bhavin* in the Konkan, so is a *Murali* on the Ghauts.

A *Murali* is one dedicated to god Khandoba. Owing to her dedication she must renounce the world and must lead the life of an ascetic. The dedication brings about a change in her *status*. Therefore for the purpose of inheritance she cannot be recognized as the unmarried daughter of her father. She has no right to inherit at all, though the natural relationship for other purposes may remain unaffected.

The plaintiff's father died in the year 1903 and her father's estate vested in her at that time. In her deposition she says

(1) (1864) 2 Bom. H. C. R. 5. (3) (1879) 2 All. 561.
(2) (1869) 6 Bom. H. C. R. (A. C. J.) 183. (4) (1898) 23 Bom. 229.
(5) (1832) 4 All. 243.

that she has been all along leading the life of a prostitute and has got four children by prostitution. Such a *palit* (fallen) woman cannot claim the *status* of an unmarried daughter and claim her father's estate to the exclusion of her two sisters who are married.

CHANDAVARKAR, J.:—The appellant was plaintiff in the action out of which this second appeal has arisen. She sued to recover possession of the property of her father, Hari Shindhe, deceased, alleging in her plaint that he died, leaving three daughters, including herself; and that she was unmarried and the other two married. She claimed the property as heir to the exclusion of her sisters under the rule of Hindu law that an unmarried daughter inherits to her father before his married daughter.

The appellant's sisters as defendants resisted the claim upon several grounds, one of which, material for the purposes of this second appeal, was that she was a *Murali* prostitute, and that, therefore, she was not an *unmarried* daughter of her father to entitle her to the whole of his property.

The Subordinate Judge, who tried the suit, found that the appellant was a *Murali* dedicated to the service of the god Khandoba and lived by prostitution. But he held that, as she had never married, she was an unmarried daughter of her father. Accordingly, he awarded the appellant's claim.

Upon appeal preferred by the second defendant (one of the appellant's married sisters), the District Judge modified the Subordinate Judge's decree by awarding to her only a third share in the property.

The ground of the District Judge's judgment for disallowing her claim to the whole of the property is that she, being a prostitute, "having four children, begotten by promiscuous intercourse," could not be regarded as an *unmarried* woman, but that she was entitled to share the property equally with her *married* sisters.

The practical result of that judgment is that the appellant, who is found to be a prostitute, is given the *status*, which a *married* daughter occupies for the purposes of inheritance under

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the Hindu law. No reason is given or text cited by the District Judge in support of that conclusion.

The only question of law raised in this second appeal is whether the appellant, who has never married but who has led the life of a prostitute since her dedication as a *Murali* to the service of the god Khandoba, is an *unmarried* woman within the meaning of that term in the rule of Hindu law, which regulates the succession of daughters to their father's property.

It has been held by this Court in *Advaya v. Rudra*⁽¹⁾ that incontinence is no bar to a daughter's right of inheritance to her father and does not bring her within the class of "disqualified heirs" in Hindu law.

But the law that a daughter, who has become a prostitute, does not forfeit her right as heir to her father by reason of her unchastity, does not affect the question whether a woman, who in her maiden condition becomes a prostitute, is an *unmarried* daughter of the kind or description contemplated in the rule of Hindu law, according to which where a man dies leaving several daughters, some of whom are unmarried and the rest married, the former succeed to his property to the exclusion of the latter. When it is said that a person is a *disqualified heir*, what is meant is that the person is absolutely debarred from all rights of inheritance. It is a case then of exclusion from heirship in any event and under all conditions. But where a daughter claims priority of the right to inherit to her father as an *unmarried* as against his married daughter, the claim is under other texts of Hindu law and the question is one of *competition and preference* between heirs otherwise qualified.

The rule that an *unmarried* daughter succeeds to her father's property before her *married* sister is stated both in the *Mitakshara* and the *Vyavahara Mayukha* on the authority of three *Smritis* or texts—one is of *Katyayana*, the second of *Brihaspati*, and the third of *Gautama**. The Sanskrit word for "un-

(1) (1879) 4 Bom. 104.

* See page 202 of *Yajnyavalkya Smriti* or the Institutes of *Yajnyavalkya* with the commentary, *Mitakshara*, of *Vijnaneswara* by the late *Bapu Shastri Moghe*: 3rd Edition: see also *Rao Sahib Mandlik's* edition of the *Vyavahara Mayukha*, page 53.

married" used by the first two is *anudha*; that used by Gautama is *apratna*. The same rule is given by Parasara in his Institutes and by Devala. The former uses the word "*kumari*" and the latter the word *kanya* for "unmarried" and both terms stand for "virgin" or "maiden." Mitra Misra, the author of the *Viramitrodaya*, quotes the rule as given by Parasara and by Devala and in his comments on it uses the word *kanya* to signify "an unmarried daughter." (See Mr. Golap Chandra Sarcar Shastri's Edition of the *Viramitrodaya*, page 73, section 2, placitum 2). In a subsequent placitum [No. 4] Mitra Misra uses, like the Mitakshara and the *Vyavahara Mayukha*, the words "*anudha*" and "*apratna*."

When, therefore, some of the *Smriti* writers and some of their commentators, such as Vijnaneshwara in the *Mitakshara* and Nilakantha in the *Vyavahara Mayukha*, state that an *anudha* or *apratna* (unmarried) daughter succeeds to her father in preference to his married (*udha*) daughter, they mean by the former expression a daughter who is otherwise known and referred to in the Hindu law books as a *kanya* (maiden).

It is true that the word *kanya* is used in certain texts of the Hindu Shastras as being applicable only to a girl of 10 years of age and no other. But as pointed out by Madhavacharya* in his commentary on the Institutes of Parasara, that is not the popular (*lokaprasiddha*) but only a technical (*paribhashika*) sense of the term, employed specially for the purpose of recommending a girl's marriage at that age so as to enable the person giving her away to attain to Heaven. And both Vijnaneshwara in the *Mitakshara* and Nilakantha in the *Vyavahara Mayukha* use the

* *Vide* Chapter II of the *Achara Kanda* of Madhavacharya's commentary, page 81, Vol. I, part 2 of Parasara Dharma Sambita with the commentary of Jayana Madhavacharya, Bombay Sanskrit Series, No. XLVIII, where it is said:—The word "*kanya*" is established by popular acceptance and applied primarily to all unmarried women." Bhattoji Dikshit in his *Siddhanta Kaumudi* defines a *kanya* as an *anudha*. So also Culluca Bhat in his commentary on the Institutes of Manu. See the *Manava Dharma Shastra or the Institutes of Manu* published by the Hon'ble Rao Sahab Mandlik, Vol. II, page 1359, Chapter XI: *Smriti* No. 36. At page 1182, line 19 of the same is given Medhatithi's gloss on a text of Manu, where the former says that the primary meaning of the term *kanya* is "a woman unmarried and not enjoyed by any man."

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word *kanya* in its popular sense to signify an *anudha* (unmarried) daughter, without restriction as to age ⁽¹⁾.

As only one of several illustrations that could be given from both the Mitakshara and the Vyavahara Mayukha of that use of the word *kanya*, reference may be made to that portion of each of the works where it is pointed out that the sons of a deceased Hindu are bound to give away his unmarried daughter in marriage before effecting *inter se* a partition of his property and to allot to such daughter a fourth of the share of each son. There the unmarried daughter is mentioned as a *kanya*. (The Vyavahara Mayukha, Mandlik's Edition, page 38. The Mitakshara edited by Bapu Shastri Moghe : page 191).

Such a daughter has, under the Hindu law, a legal *status* of her own, with special rights attached to it. And that *status* is called *kanyavastha* (condition of maidenhood) to distinguish it from the status of marriage, which is called *bharyatwa* or *kulastritwa*, and from the status of a prostitute, which is designated *veshyatwa* or *sadharan stritwa*.

The rights attaching to the condition of maidenhood are those of protection and maintenance by the father. "Her father," says a text of Yajnyavalkya, "shall protect a *kanya*" ⁽²⁾. The Mitakshara's gloss on that is that "before marriage the father shall protect his *kanya* and prevent her from going wrong" ⁽³⁾.

(1) Vijnaneshwara expressly states in his gloss on Yajnyavalkya's text as to self-acquired property that all the words and texts used by him in the section of the Mitakshara on inheritance are generally used in the popular (*lokaprasiddha*) sense. Colebrooke's translation of Vijnaneshwara's statement is given at page 387 (placitum 14) by Stokes in his Hindu Law Books. It is not, in my opinion, quite accurate. It should be:—"The texts and terms in this (*Dayavibhaga*) part of the work (Mitakshara) are mostly recitals of the sense settled by popular acceptance."

In the chapter on "Impurity" (*Ashaucha prakarna*) of the section on Penance (*Prayaschitta*) of the Mitakshara, Vijnaneshwara quotes the first of half of the 24th *Smriti* of Yajnyavalkya and in his gloss says that the *sapindya* ceremony of a *kanya* (maiden) lasts for three generations and as an authority for that cites a text of Vashistha in which the term *aprutta* is used for *kanya* (pages 291 and 292 of Bapu Shastri Moghe's Edition of the Mitakshara).

(2) See Mitakshara, Achara Kanda : Smriti No. 85.

(3) Mitakshara, Achara Kanda : Smriti No. 63.

And it is because of her dependence on her father, while she is in her maiden condition, that on his death his sons, if any, are held bound to give her away in marriage and allot a fourth of the share of each son out of the paternal estate ⁽¹⁾. According to Cankha, "when partition of heritage takes place, the unmarried daughter takes the virgin trinkets, nuptial portion and the *Stridhan*" ⁽²⁾. And that is impliedly because of her virginhood.

Further, the reason of the rule that where a Hindu dies leaving as his heirs several daughters, some of whom are unmarried and the rest married, the former succeed to his property before the latter, is, according to some *Smṛiti* writers and some of the commentators, that the unmarried daughter, having been dependent on the father, has the first right to his property by way of maintenance. According to others, the right is given to her by way of provision for her marriage expenses ⁽³⁾. Which ever of these two views we adopt, the result is the same. An unmarried daughter succeeds to her father's property before her married sisters, because of her eligibility for marriage and her dependence on the father and his estate till she enters into the state of matrimony.

These two are the principal conditions of what the Hindu law-givers designate *kanyavastha* (maidenhood). And, according to them, the *status* of a *kanya* stands conspicuously dis-

(1) Stokes' Hindu Law Books : Page 398 : The Mitakshara, Chapter I, section 7, plac. 5 and 6.

(2) See *Smṛiti Chandrika* : Translated by T. Kristnasawmy Iyer : 2nd Edition, page 57, plac. 45.

(3) See on this point the *Smṛiti Chandrika* : Translated by T. Kristnasawmy Iyer, page 177, section 28. The *Viramitrodaya* : Translated by Golap Chandra Sarkar Shastri, page 182, section 5.

Balambhat in his *Lakshmi Vilas*, a Commentary on the Mitakshara, says that the right of priority given to the unmarried daughter is proper and is founded on the duty of her father to give her away in marriage and till then to maintain her. And in support of that he cites a text of Devala which is given by Mr. Mayne in his *Hindu Law and Usage* at page 686 (Sixth Edition). Balambhat also cites a text of Narada according to which the paternal inheritance belongs to the unmarried daughter for her maintenance and she is entitled to it until marriage. Our reference is from page 195 of a manuscript copy of Balambhat's commentary which is in the possession of this Court.

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tinguished from the *status* of a prostitute who is designated a *sadharan stri* (literally, a common woman).

If, according to Hindu law-givers, one essential test of *kanya-vastha* (maidenhood) is eligibility for marriage, which gives a maiden the right to her father's estate in preference to a married daughter, that test obviously does not exist in the case of a *sadharan stri* (prostitute), because, as Vijnaneshwara points out in the Mitakshara, in her case "there is an absence of any form of marriage with a particular man" (1). That is, a *kanya* (maiden) is one who is fit, according to the *shastras*, to be given in marriage in conformity with the prescribed rites, to one man, whereas a *sadharan stri* (prostitute) is a woman, who has cast herself away from all parental or other control and guardianship and the injunctions of the *shastras*, and, being a woman accessible to all men (*sarva purusha sadharanataya*), she has become ineligible for marriage. (See the Mitakshara, Vyavaharadhyaya or section on Judicature: Chapter on *Stri Sangrahanam* or Seduction of women). The reason of the rule, therefore, which gives an unmarried daughter the right of heirship to her father before her married sister, ceases to apply to such a woman. The result is that she is no longer a *kanya* (unmarried daughter) (2).

It is because of that result that the Hindu law-givers have in several ways sharply distinguished between the *status* of a *kanya* and that of a *sadharan stri*. For one thing, according to them, the latter has no caste, the former has. A *sadharan stri* is treated as a *patit* (outcaste). But apart from that, in the same chapter as that last cited from the Mitakshara, Vijnanesh-

(1) See Bapu Shastri Moghe's Edition of the Mitakshara: Pages 265 and 266.

(2) In this connection it is worth noting that in ancient times a son of an unmarried girl was recognized as one of the twelve kinds of sons known to Hindu Law and designated *kanina*, i.e., son of a *kanya*. It does not follow from that, however, that a girl who, in her maiden condition, has become a prostitute was still regarded as a *kanya*. It only shows that a casual act of incontinence on the part of a *kanya*, while living in her father's house and under his protection, was tolerated and a son born under such circumstances was, by a legal fiction, treated as the son of the *kanya*'s father and she still continued to be a *kanya*. This is obvious from the fact that a *kanya* is defined in a text of Manu, cited in the Mitakshara and other commentaries to be a son of a *kanya* born when the latter has been in her father's house; whereas a *sadharan stri* is one who is not subject to any parental or other control and openly becomes a common woman.

wara first quotes four texts of Yajnavalkya which provide punishment for seduction of married women, who are called *parastriyas* (wives). Next follow three texts of Yajnyavalkya, which relate to punishment for the seduction or defilement of maidens (*kanyas*). And then is given a *smriti* prescribing punishment in the case of a man cohabiting with a prostitute (*sadharan stri*) who is in the keeping of another man. Here is another distinction then in point of law between a *kanya* (unmarried woman) and a *sadharan stri* (prostitute). In dealing with this last, Vijnaneshwara states an objection as proceeding from a disputant who questions the existence of any such class of women as *sadharan stris* or prostitutes. The disputant's argument as stated by Vijnaneshwara need not be given here in full, as we are concerned with only that part of it which relates to the question of a *kanya* (maiden) becoming a *sadharan stri* (prostitute) and yet retaining or losing the legal *status* of *kanya* or unmarried woman.

The disputant argues that a life of prostitution is not possible or cannot exist in the case of a *kanya* (unmarried woman), because a *kanya* is one, who, according to the *shastras*, has to be given away in marriage by her father or the like, or who, if she has no father or the like to give her away, is at liberty to give herself away in marriage by the form of ceremony known as *Swyamvara* (self chosen marriage). Therefore, maintains the disputant, "the condition of a prostitute (*sadharana striya*) does not exist in the case of *kanyas* (maidens)," (1) which means that the words *kanya* and *sadharana stri* are mutually inconvertible terms, and that if a woman is a *maiden*, she is not a prostitute, and *vice versa*.

To that Vijnaneshwara's reply, translated into English, is as follows:—

"True this is so; but here from the absence of a worldly prohibition in the shape of fear from the parents and other guardians, or from punishment by the King and the like, the statement of (the woman) being eligible for intercourse (to all men) is proper."

(1) The original is:—नापि कन्यावस्थायाः साधारणत्वम्. See page 265 of Bapu Shastri Moghe's Edition of the Mitakshara.

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That is, Vijnaneshwara admits the force of the disputant's argument so far that, having regard to the *Shastras*, a woman cannot be in her maiden condition (*kanyavastha*), and at the same time be a *sadharan stri* or prostitute. But, he replies, it is not correct to argue from that, that a maiden cannot lapse from her maiden condition into a life of prostitution, because, although it is true that the *Shastras* enjoin marriage in the case of a *kanya*, yet there is nothing by way of worldly punishment to restrain her, if she disregards her parents or the like, has her own way, and takes to a life of vice. Her parents or other guardians cannot punish her; nor can the King. She can be punished only in the next world. Under these circumstances, it is a matter of observation in life that some maidens, disobeying the injunctions of the *Shastras*, turn out prostitutes. Hence, according to Vijnaneshwara, the necessity of making such a provision of law as Yajñayavalkya has made in the *Smṛiti* relating to *sadharan stris*.

This discussion in the *Mitakshara* is of value as showing that a prostitute is known to Hindu law as a *sadharan stri* (public woman), as distinguished from a *kanya* (maiden) and from a *kulastri* or *bharya* (married woman).

This is made more explicit still by Vijnaneshwara in another part of the *Mitakshara*.

In the 5th Chapter of the section relating to "Purification" (*Prayaschitta*) in the *Mitakshara*,⁽¹⁾ Vijnaneshwara deals with the question of penance in the case of a man who commits the sin called *guru talpatva*, that is, the sin committed by a pupil by defiling the bed of his religious preceptor. There he quotes with approval a *Smṛiti* of Vyaghra, which, rendered into English, is as follows:—

"In the case of *sadharana stris* (prostitutes), there is no (such thing as) adultery, which is (a term) applicable to (a married woman) of (recognized) caste; (or) the defilement of a *kanya* (maiden); (or) the defilement of one's preceptor's bed."

The meaning is this:—

The term "adultery" does not apply to sexual intercourse with a prostitute, because it is used only in the case of illicit connec-

(1) See page 331 of Bapu Shastri Moghe's Edition of the *Mitakshara*.

tion with a married woman, being a marital offence committed in violation of the *Shastras* and caste rules. Hence a prostitute has not the *status*, in law, of a married woman. Nor does a man having sexual intercourse with a prostitute commit the sin of *kanyadushana*, i. e., of deflowering a *kanya*. And why? Because a prostitute is not a *Kanya* or maiden, as that term is understood in the Hindu *Shastras* and law.

We have in this *Smriti* of Vyaghra, cited by Vijnaneshwara, a very clear enunciation of the Hindu law that a prostitute is not within either the legal or *Shastric* acceptation of the terms unmarried woman and married woman.

This *smriti* is also quoted by Madhavacharya in his Commentary on the Institutes of Parasara ⁽¹⁾, and by Nilakantha, the author of the Vyavahara Mayukha, in his Prayaschitta Mayukha. Both cite the *smriti* for the same purpose for which Vijnaneshwara has quoted it in the Mitakshara.

The conclusion at which I have arrived upon an examination of the texts and discussions in the Hindu law books is that a woman, who, having never married, becomes a prostitute, is not an unmarried daughter of her father entitled as heir to the whole of his property to the exclusion of his married daughters. I agree with the Madras High Court that "a prostitute is certainly not a maiden": *Sivasangu v. Minal* ⁽²⁾. Though the question there arose under another rule of law, *viz.*, the rule regulating the succession to the *stridhan* of a *kanya* (maiden), the Court had to decide whether the term maiden included a prostitute.

It was also held in this Madras case that a woman, who having never married, leads a life of prostitution, is not a married woman. This question does not arise before us in the present case, there being no appeal from or cross-objection to that portion of the District Judge's decree whereby he has allowed the appellant to share her father's property equally with her married sisters, thus practically treating an unmarried woman who is a prostitute as a married daughter of her father. Had we had to decide the question, it would have been impossible for us to accept as sound

(1) See Parasara Dharma Samhita, Vol. II, part I, page 324; Bombay Sanskrit Series No. LIX.

(2) (1889) 12 Mad. 277.

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the startling conclusion of the District Judge, having regard to the elementary principle of all law, to which the Hindu law is no exception, that a legal marriage is a pre-requisite of the status of a married woman. Moreover, from some of the texts of the *Smṛiti* writers and the *dicta* of the commentators, with which I have dealt in this judgment as bearing on the question of an unmarried daughter, it is clear that such a woman is not to be regarded as a married woman either, according to Hindu law.

If that is so, a woman, who in her maiden condition becomes a prostitute, being neither a *kanya* (unmarried) nor a *kulastrī* (married), but being at the same time, notwithstanding her prostitution, a qualified heir, as held in *Advya v. Rudrava* ⁽¹⁾, would be entitled to succeed to her father's property only in default of either unmarried or married sisters.

This arrangement seems no doubt at first sight to introduce a third class of daughters not mentioned in the rule about the succession of daughters as stated in the *Mitakshara* or the *Vyavahara Mayukha* or any other recognized commentaries. They have not mentioned the third class of daughter (*sadharaṇ strī*) for the simple reason that, according to them, such a daughter as any other woman lapsing into prostitution, became a disqualified heir as either a *patit* (outcaste) or *upapataki* (vicious woman) and forfeited absolutely all right of inheritance. But by Act XXI of 1850, her disability as an outcaste has been removed; and by usage, as pointed out in *Advya v. Rudrava* ⁽¹⁾ the bar arising from vice has ceased to be operative, both in the case of men and of women. An incontinent daughter, who has not married, being thus brought in among qualified heirs, can succeed to her father's property only in default of unmarried or married daughters of his, if, according to Hindu law, she does not come within the description of either of the latter two. The ground on which it has been held in *Advya v. Rudrava* ⁽¹⁾ that a daughter who has become a prostitute does not forfeit her right as heir to her father by reason of her prostitution, is inapplicable to the rule which gives a right of priority to the unmarried over the married. That ground is that chastity

(1). (1879) 4 Bom. 104.

is not made an express condition of her right to inherit as it is in the case of a widow succeeding to the property of her husband. But in the rule giving the right of priority it is made an express condition that an unmarried daughter shall take first; the married after her. That condition stands unaffected either by any Act of the Legislature or by any usage to the contrary, or by any decision of the Courts. There is no question of loss of caste or of immorality involved in that condition so as to attract to it the application of either Act XXI of 1850 or the principle of the decision in *Advya v. Rudrava*⁽¹⁾. When the Hindu law says that a maiden who has become a prostitute shall cease to be a maiden, and shall not be regarded as a married woman either, it means that she loses her *status* as a maiden, and acquires a new *status*—that of a *sadharan stri*, not that of a married woman, and that quite apart from any question of loss of caste or any question of vice being the result of prostitution. It involves a mere change of *status* just as much as if the *kanya* had ceased to be a maiden after marriage and become a wedded woman. The only difference is that, instead of ceasing to be a *kanya* by marrying, she ceases to be a *kanya* by becoming a *sadharan stri* or prostitute. Under these circumstances, the only place which such a daughter can take as heir in the line of daughters is in the absence of the unmarried or the married. That is the logical result and combined effect of Act XXI of 1850, of the decision of this Court in *Advya v. Rudrava*⁽¹⁾, and of the rule of Hindu law that where there are several daughters, some of whom are unmarried and the rest married, the unmarried succeed to their father's property before the married.

The result is that the appellant's claim to recover the whole of the property has been rightly disallowed and that portion of the District Judge's decree, which is the subject-matter of this second appeal, must be confirmed with costs.

BEAMAN, J. :—I entirely concur with the very instructive, learned and closely reasoned judgment just pronounced by my learned colleague.

Decree confirmed.

G. B. R.

(1) (1879) 4 Bom. 101.

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