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relief he declined to accept it. That is what the Subordinate Judge says in express terms in his judgment. That means, so far as the relief claimed in respect of the two instalments was concerned, the decree-holder was unwilling to proceed with the darkhast and therefore it was dismissed without any adjudication on the merits. Under these circumstances, we think, having regard to the observations in *Hari Ganesh* v. *Yamunabai*(1), and having regard to the ruling of the Privy Council in *Delhi and London Bank* v. *Orchard* (2), that the present darkhast is not barred on the ground of *res judicata*. We must reverse the decree of the Court below and send back the darkhast to that Court for disposal according to law on the merits. Costs of this appeal on the respondent. Costs in the lower Courts to abide the result.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr Justice Knight.

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BHAGWAN VITHOBA (ORIGINAL APPLICANT), APPELLANT, *v.* WARU-BAI KOM BABURAO MUDKE (ORIGINAL APPELLANT), RESPONDENT.*

Hindu law—Succession—Competition between full sister and half-brother's son—Mitakshara—Sister's place in the line of heirs—Vyavahara Mayukha, views of, on the point—Value of the commentaries of Balambhatta and Nanda Pandita—Conflict between Mitakshara and Vyavahara Mayukha—Rule as to harmonising the difference.

In cases governed by the Mitakshara, a sister comes in as heir to a deceased Hindu immediately after the grandmother, so that, where the competition is between her and a half-brother's son, the latter, being higher in the line among heirs specifically mentioned in the Mitakshara, is entitled to preference over her as heir, though it would be otherwise in cases governed purely by the law of the Vyavahara Mayukha.

The interpretation put by Westropp, C. J., upon Balambhatta's texts in *Sakaram Sadashiv Adhikari* v. *Sitabai*(3) commented upon and dissented from except in cases where the Vyavahara Mayukha alone is applicable.

* First Appeal No. 73 of 1907.

(1)(1897) 23 Bom. 35. (2) (1877) L. R. 4 I. A. 1. 7.

(3) (1879)3 Bom. 353.

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Rudrapa v. *Irava*[1] explained.

Per CHANDAVARKAR, J.—The commentary of Balambhatta on the Mitakshara is not regarded in this Presidency as an authority to be accepted in the interpretation of the former work without question. These observations apply more or less to Nanda Pandita also.

It is a well established rule of the Bombay High Court that where the Mitakshara is silent or obscure, the Court must, generally speaking, invoke the aid of the Vyavahara Mayukha to interpret it, and harmonise both the works, so far as that is reasonably possible.

APPEAL from the decision of F. J. Varley, District Judge of Sholapur.

Application for a certificate of heirship under Regulation VIII of 1827.

One Shivappa died in 1901. At his death, his widow Prayagbai got the certificate of heirship and managed the property belonging to Shivappa till her death which took place in 1904.

After her death, Bhagwan, the son of a step-brother of Shivappa, applied for a certificate of heirship to the property. He was opposed by Warubai, a full sister of Shivappa, on the ground that she was a nearer relation to Shivappa.

The District Judge dismissed the application of Bhagwan on the following grounds:—

"The relationship being admitted, the only question is as to the right of the sister to succeed as against the son of a half-brother. I. L. R. 28 Bom. 82, following 4 *ibid.* 210, is the latest authority and on the strength of it, the application must be rejected."

The applicant appealed to the High Court.

G. S. Mulgaonkar, for the appellant:—The present case is governed by the Mitakshara. It gives the half-brother a place immediately after the full brother. (See Mitakshara II. iv. 5, 6: II. i. 5, 2-4.)

The decision in *Sakharam Sadashiv Adhikari* v. *Sitabai*[2] is opposed to my contention: but it is a case under the Vyavahara Mayukha The Mayukha indeed locates the half-brother after sister but with grandfather. And Balambhatta includes sister among "brethren": but this interpretation is not accepted in

(1) (1903) 28 Bom. 82. (2) (1879) 3 Bom. 353.

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this Presidency. See *Vinayek Anundrao* v. *Luxumeebaee*[1]; *Mulji Purshotum* v. *Cursandas Natha*[2]; *Parvati* v. *Ganpatrao Balal*[3]. The High Court of Bombay has accepted Balambhatta's view only so far as to admit sisters into the line of succession: and not with a view to fix their position in that line: *Kesserbai* v. *Valab Raoji*[4].

Priority of the whole over the half blood is limited to brothers and their sons; *Vithalrao* v. *Ramrao*[5]; *Samat* v. *Amra*[6]; *Kesserbai* v. *Valab Raoji*[4].

The case of *Rudrapa* v. *Irava*[7] does not help us. It is not a decision on the question at issue in this suit.

The position of the half-brother in this case should be decided in his favour in accordance with the express text of the Mitakshara.

K. H. Kelkar, for the respondent:—The exact place which a sister occupied in the line of succession under Hindu law was first considered in *Vinayek* v. *Luxumeebaee*[1]. It gave effect to Balambhatta's interpretation of Mitakshara text that the word "bhratara" included sisters also. It was affirmed in *Sakharam Sadashiv Adhikari* v. *Sitabari* [8] and *Lakshmi* v. *Dada Nanaji and Radhabai*[9]. According to Balambhatta's interpretation the half-brother's son would come after the brothers and sisters.

The Mayukha has a different scheme of succession and if the position of the sister is to be determined in accordance with that scheme the half-brother's son would be postponed to the sister because according to Nilkantha "bhrataraha" does not include the half-brother. It is decided in *Rudrapa* v. *Irava*[7] that the position of the sister cannot be lower than that which is assigned to her by the Mayukha. On either hypothesis, therefore, the sister is entitled to preference.

CHANDAVARKAR, J.—The question of Hindu Law in this appeal is, what is the exact place of the uterine sister of a deceased

(1) (1861) 1 B. H. C. R. 117 at p. 124.
(2) (1900) 24 Bom. 563.
(3) (1893) 18 Bom. 177 at p. 183.
(4) (1879) 4 Bom. 188.
(5) (1899) 24 Bom. 317 at p. 326.
(6) (1882) 6 Bom. 394.
(7) (1903) 28 Bom. 82.
(8) (1879) 3 Bom. 353.
(9) (1879) 4 Bom. 210.

Hindu in the line of heirs, according to the Mitakshara, and whether in those parts of this Presidency, where that authority prevails over the Vyavahara Mayukha, the sister must be preferred to a half brother's son as heir of the *propositus*.

The District Judge of Sholapur, whence this case comes, has held on the latter part of the question in favour of the sister, on the authority of *Rudrapa* v. *Irava*[1]. But that ruling is not decisive of the question which arises here. The competition there was between a sister and a brother's widow, whereas in the present case it is between the former and a half brother's son. That decision has no bearing, for the purposes of the present case, beyond repeating what had been already settled before, by a long series of decisions of this Court, that the sister of a deceased Hindu in this Presidency is in the line of heirs, whether according to the Mitakshara or the Mayukha.

It is urged before us by the learned pleader for the respondent in support of the decision in appeal that, under the Mitakshara as interpreted by Nanda Pandita and by Balambhatta, the term *brothers* in the compact series of heirs given in Yajnyavalkya's text relating to obstructed succession includes *sisters*; that the said interpretation has been held to be the law for this Presidency by the Judicial Committee of the Privy Council in *Venayeck Anundrow* v. *Luxumeebaee*[2]; by the late Supreme Court of Bombay in that same case[3]; and by this Court in *Sakharam Sadashiv Adhikari* v. *Sitabai*[4], and in *Kesserbai* v. *Valab Raoji*[5].

These decisions have been subjected to a critical examination by the learned Chief Justice of this Court in his judgment in *Mulji Purshotum* v. *Cursandas Natha*[6], and we entirely agree with the conclusions arrived at by him as to the legitimate scope and effect of the decisions in question. As to the case of *Vinayek Anundrao* v. *Luxumeebaee*[3], decided by the late Supreme Court of Bombay, he has pointed out that "though the learned Judges" (of the Court) "referred to the doctrine of Balambhatta, and with an apparent leaning towards it, they never state that this view had been generally adopted in this Presidency, either by

(1) (1903) 28 Bom. 82.
(2) (1864) 9 Moo. I. A. 520.
(3) (1861) 1 Bom. H. C. R. 117.
(4) (1879) 3 Bom. 353.
(5) (1879) 4 Bom. 188.
(6) (1900) 24 Bom. 563.

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the Shastris or by the Courts, and they are careful to make the passage in the Mayukha the ultimate basi of their decision." Of the same case as decided by the Privy Council, the learned Chief Justice has observed in *Mulji Purshotum* v. *Cursandas Natha*[1], that the Privy Council made "no certain pronouncement" on the question of Balambhatta's interpretation of the term "brothers" as including "sisters".

In the case of *Sakharam Sadashiv Adhikari* v. *Sitabai*[2] there is indeed a definite pronouncement in Westropp, C. J.'s judgment in favour of Balambhatta's interpretation. But, as has been pointed out by the learned Chief Justice in *Mulji Purshotum* v. *Cursandas Natha*[1], the case of *Sakharam Sadashiv Adhikari* v. *Sitabai*[2] came from the Thána District, where the law of the Mayukha prevails; and the pronouncement there made by Westropp, C. J., in favour of Balambhatta's interpretation was under a misapprehension of the points actually decided by the Supreme Court of Bombay and by the Privy Council in *Venayeck Anundr w* v *Luxumeebaee*[3] (see pp. 578 and 579 of the report of *Mulji Purshotum* v. *Cursandas Natha*[1]). After examining in his judgment in this last case all the decisions cited in support of the argument before him that Balambhatta's interpretation had been accepted by this Court as building law for this Presidency, the learned Chief Justice has summed up his conclusion as follows:—

"The conclusion, therefore, to which I come on a consideration of all the authorities is that there is no actual decision that Balambhatta's doctrine has been accepted here, though there are the opinions to which I have referred in favour of that view."

Those opinions wood indeed be entitled to the greatest weight, especially because amongst those, who held them and pronounced them in the most definite language as the correct law under the Mitakshara, was Westropp, C. J., whose authority on Hindu Law is and will long be deservedly among the highest, in this Court in particular, on account of the valuable services rendered by him to that law by his scholarly research and learned judgments.

(1) (1900) 24 Bom. 563. (2) (1879) 3 Bom. 353.
(3) (1864) 9 Moo. I. A. 520.

We should have, therefore, felt bound to follow Westropp, C.J.'s opinion in favour of Balambhatta's doctrine, even though it is an *obiter dictum*, were it not that a careful examination of what Balambhatta has actually said on the point in his commentary on the Mitakshara has led us to discover that the decision in *Sakharam Sadashiv Adhikari* v. *Sitabai* (1), so far as it proceeds on the law of the Mitakshara, rests upon a misapprehension of Balambhatta's doctrine.

It would seem that Westropp, C. J., had not before him the full passage in Balambhatta's commentary bearing on the question of a sister's right to inherit; and that he merely proceeded, as the Supreme Court of Bombay and afterwards the Privy Council had proceeded in *Venayeck Anunarow* v. *Luxumeebaee*, (2) upon the remarks as to Balambhatta's doctrine, given in a footnote by Colebrooke in his translation of the Mitakshara. The footnote is as follows:—

"I. Brethren.] The commentators, Nanda Pandita and Balambhatta, consider this as intending 'brothers and sisters' in the same manner in which 'parents' have been explained 'mother and father', (Section 3, § 2), and conformably with an express rule of grammer. (Panini 1, 2, 68). They observe, that the brother inherits first; and in his default, the sister. This opinion is controverted by Kamalakara and by the author of the Vyavahara Mayukha". [Stokes's Hindu Law Books, p. 443.]

Now, it is true that Balambhatta says that the term "brothers" includes "sisters" and that the brother inherits first; and after him the sister. But he has never said—what Westropp, C.J., has erroneously attributed to him in *Sakharam Sadashiv Adhikari* v. *Sitabai* (1)– that the term "brother" excludes the half-brother and brings in the uterine sister before the latter. On the other hand, according to Balambhatta, the full-brother of a *propositus* inherits first; in default of him, the half brother; and that because, the term "brothers" being general includes both those of the whole and of the half-blood. The sister comes in, according to Balambhatta, after the half-brother, and not before him.

(1) (1879) 3 Bom. 353. (2) 1864) 9 Moo. I.A. 520.

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This will be rendered clear from the passage in Balambhatta's commentary, a full translation of which into English, made by us, is as follows :—After stating that, among parents, the mother inherits first, and after her the father, Balambhatta proceeds : —

"Afterwards" (*i.e.* after the father), "brothers. The meaning of the term *tatha*" (in the compact series of heirs given in Yajnyavalkya's text relating to obstructed succession), "has been explained before. By repetition the second use of the term *tatha*", (in the same text), "is meant to point to the order (of succession) by nearness of blood. Therefore, where there is a combination of brothers of the whole and of the half-blood, those of the whole blood inherit first; in default of them, the brothers of the half-blood inherit. That is implied (by the term *tatha*). Here the term 'brothers' includes also sisters in virtue of the rule of the *ekashesha* compound. There also", (*i.e.* in the case of sisters also), "the order of succession must be understood like that of the brothers as stated before. The term *tatha* is meant to imply the order of succession, 'father' and so on. The word 'his' in the term 'his sons' is to be construed as referring both to 'brothers' and 'sisters' according to the principle or maxim of the central bead. *Tatsutaha*", (in Yajnyavalkya's text), "means 'their sons', that is, the sons of brothers and of sisters. The term *sutaha* (sons) includes the sons of brothers and of sisters It is to be understood that in the term *sutaha* (sons) daughters are also to be included as before."

It will be observed from this passage in Balambhatta's commentary that he says in so many words that "brothers" inherit before "sisters", and that among "brothers", those of the whole blood have priority over brothers of the half blood. He has nowhere said that the term "brothers" means those of the full blood only, or that of itself, that is, unless it is made into a compound of two words, *viz.*, "brothers and sisters", the word "brothers" of itself includes sisters so as to bring in a sister of the whole blood before a half brother, and immediately after a brother of the whole blood. Nor could Balambhatta have said it, because that would have been contrary to and inconsistent with the reasoning by means of which he has brought in the uterine sister after brothers, whether of the whole or half-blood. That

reasoning, which is founded on the rule of the *ekashesha* compound, may be amplified as follows.

The word "brothers", according to Balambhatta, is an elliptical expression, being a compound formed of two wards, "brothers and sisters", of which the second word "sisters" is, for the sake of abbreviation, dropped, following a rule in Panini's Grammar, and the first word, "brothers", is retained to signify "brothers and sisters". Therefore, when we use the word "brothers", it means two distinct *personæ*—a brother and his sister, of whom the "brother" comes in first and the "sister" after him. That is, it is not that the term brothers means one class consisting of brothers and sisters standing on the same footing; it signifies, when the compound is dissolved, two classes, "brothers", and "sisters", each class having two sub-divisions—the former, brothers of the whole blood and brothers of the half blood, and the latter sisters of the whole blood and sisters of the half blood. That being the case, we must exhaust the class called brothers, whether of the whole or half blood, before we bring in the sisters.

That being Balambhatta's doctrine, a sister of the *propositus*, even though she be of the whole blood, cannot inherit before his half brother, as was held by Westropp, C.J., in *Sakharam Sadashiv Adhikari* v. *Sitabai*[1]. That decision, so far as it proceeds upon Balambhatta's doctrine, must be pronounced to be unsound; and its authority as a binding decision, where the question is between a sister and a half brother, must be confined to cases to which the law of the Vyavahara Mayukha alone is applicable.

That, again, is not the only ground which discounts the value of Westropp, C.J.'s *dictum* that Balambhatta's interpretation of the term "brothers" as including "sisters" must be accepted as the law under the Mitakshara for this Presidency It will be observed from the passage of Balambhatta, which we have quoted in translation, that he carries his doctrine based on the *ekashesha* compound completely to its logical consequences by bringing in not only "sisters", whether of the whole or half blood, after brothers of the whole and of the half blood, but, what is more, by bringing in the sons of those sisters, and their daughters

(1) (1879) 3 Bom. 353

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also. According to Balambhatta, the order of succession, in default of parents, must be as follows:—

Brothers of the whole blood.
Brothers of the half blood.
Sisters of the whole blood.
Sisters of the half blood.
Sons of brothers of the whole blood.
Sons of brothers of the half blood.
Sons of sisters of the whole blood.
Sons of sisters of the half blood.
Daughters of sisters of the whole blood.
Daughters of sisters of the half blood.

This constitutes a sweeping change in the order given in Yajnyavalkya's text relating to obstructed succession and explained by Vijnaneshwara in his Mitakshara. Our Court has declined to give a sister's son the position which Balambhatta would assign to him in the line of heirs. The law is now established that a sister's son can only come in as a *bandhu* (cognate kindred); and the same is the law now definitely settled as to a sister's daughter. This is another reason why we should decline to accept Balambhatta's intrepretation of the term "brothers" as including "sisters".

But a far more important reason than even that is that in the Mitakshara itself there are clear indications that Vijnaneshwara did not think that the word "brothers" necessarily included "sisters".

This is a point which does not appear to have been brought to the notice of the learned Judges of the Supreme Court who decided the case of *Vinayek Anundrao* v. *Luxumeebaee*[1]; or of the Privy Council when that same case (IX Moore's Indian Appeals, 520) was in appeal before it; or of Westropp, C. J. and Xemball J., who decided the case of *Sukharam Sadashiv Adhikari* v. *Sitabai*[2], or the other cases where Westropp, C.J., repeated his opinion in favour of Balambhatta's interpretation.

(1) (1861) 1 Bom. H. C. R. 117.

(2) (1879) 3 Bom. 353.

The first passage in the Mitakshara to which we would refer is Vijnaneshwara's exposition of two texts of Yajnyavalkya (Nos. 157 and 158) given in the 6th Chapter of the Section on "Rituals" [page 45 of the 3rd Edition of Babu Shastri Moghe's publication of the Mitakshara]. That Chapter prescribes the duties of a *Snataka*, i.e., as explained by Prof. Monier Williams in his Sanskrit-English Dictionary, a Brahmin, who after performing the ceremonial lustrations required on his finishing his studentship as a *brahmacharin* (celibate) under a religious teacher, returns home and begins the second period of his life as a *grihastha* (house-holder). Among those duties is that such a Brahmin should avoid quarrels or disputes and should always live in peace with certain persons. Those persons are specified by Yajnyavalkya in the two texts in question. Among them are (1) a brother (*bhrata*), (2) female relations who, being married, have their husbands living—the Sanskrit word used to describe these relations being *jami;* and (3) uterine relations —the word used as to these being *sanabhayaha.* Now, the word *sanabhayaha* meaning uterine relations, includes both uterine brothers and sisters. If the term "brothers" is included in that word, why did Yajnyavalkya mention the term "brother" separately in the text? Addressing himself to that question, Vijnaneshwara answers as follows:—

"The reason of the separate mention of *sanabhayaha*, (which means) uterine relations, as distinguished from *bhrataraha* (brothers), is to bring in unmarried sisters."

That is, if the word *bhrataraha* (brothers) had alone been used, "unmarried sisters" would have been left out, because they are not included in that word. Hence the term *sanabhayaha* is used to mean "unmarried sisters", "married sisters" having been already brought in as being included in the word *jami*, i.e., female relations, who, being married, have their husbands living. This is Vijnaneshwara's explanation and from that it is clear that, according to him, because the word "brothers" does not include "sisters", Yajnyavalkya has had to use other words to bring the latter in.

The second passage in the Mitakshara material for our present purpose is in placitum 36 at p. 424 of Stokes's Hindu Law Books. It is as follows:—

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"The following passage of Manu: 'If among several brothers of the whole blood, one have a son born, Manu pronounces them all fathers of male issue by means of that son', is intended to forbid the adoption of others if a brother's son can possibly be adopted. It is not intended to declare him son of his uncle; for that is inconsistent with the subsequent text: 'Brothers likewise and their sons, gentiles, cognates, &c.'"

The meaning of this passage may be shortly explained. Manu says that if of several brothers only one has a son, and others are sonless, that son must be regarded as the son of all the brothers. Vijnaneshwara explains, however, that Manu's text does not mean that the brothers who are sonless become the fathers of that son like his own father, because, if that were the meaning, on the death of any of the sonless brothers, the son would become entitled to inherit the deceased's separate property as his son, in preference to his (the deceased's) brothers, contrary to the order given in Yajnyavalkya's text relating to obstructed succession, according to which the brothers of a deceased person rank as his heirs before their sons.

Therefore, says Vijnaneshwara, the proper meaning of Manu's text is, that where, there being several brothers, only one of them has sons, and the others are sonless, the latter should, if they make an adoption, adopt from among those sons in preference to other boys. Now, if Vijnaneshwara had intended to include "sisters" in the term "brothers" he would not have given this explanation of Manu's text. A sister's son cannot be adopted, according to the Hindu Shastras, but if the word brother includes a sister, a sister's son, must be, according to Vijnaneshwara's explanation, not only eligible for adoption but adopted in preference to any other boy.

Then a further point is this. If Vijnaneshwara was of opinion that in the term "brothers" must be included "sisters", for the purposes of succession, it is inconceivable that he would have left that opinion to speculation or inference instead of clearly expressing it. It is not that he was unaware of the fact that an *ekashesha* compound could be formed of the words brothers and sisters. That such a compound is possible under

particular circumstances, he seems to admit in another passage in the Mitakshara. [See placitum 20, Section XI, of the Mitakshara, Stokes's Hindu Law Books, page 463.] There he quotes a text of Manu, which says that uterine brothers and sisters are entitled to the property of their mother by equal division. Vijnaneshwara explains that the text in question does not mean that the brothers and sisters both become joint tenants or tenants-in-common so as to be entitled to divide the maternal property among them all as co-heirs. It means, says Vijnaneshwara, that the brothers form a separate class of co-heirs by themselves as distinguished from sisters and *vice versa* so that brothers take separately and divide *inter se*. And this explanation he supports on the ground that if by the text in question Manu had intended to constitute both brothers and sisters tenants in-common in respect of their mother's wealth, he (Manu) would have used the *ekashesha* compound to convey his meaning. That shows that the question of the term "sisters" being included in the term brothers was present to Vijnaneshwara's mind; but that, in his opinion, such inclusion would be possible not always but under particular circumstances—that is, where it was intended to give the brothers and sisters a *joint* right, as tenants-in-common. Balambhatta, however, makes the two words into an *ekashesha* compound so as to convey a different meaning and produce a result which is at variance with that attributed by Vijnaneshwara to the *ekashesha* compound in question. No commentator, not even Balambhatta, has maintained that the term "brothers" in Yajnyavalkya's text relating to obstructed succession must be construed to include sisters so as to entitle both brothers and sisters to inherit jointly.

These passages from the Mitakshara are, in our opinion, conclusive as showing that Balambhatta's interpretation is inconsistent with and contrary to Vijnaneshwara's meaning of the word "brothers." The *dicta* in the decisions of this Court, accepting that interpretation, must therefore be held to be erroneous and founded on a misapprehension of not only what Balambhatta has said in support of his doctrine but also of the Mitakshara itself. Valuable as is the commentary of

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Balambhatta on the Mitakshara, it is not regarded by Hindus in this Presidency as an authority to be accepted in the interpretation of the former work without question. His advocacy of the rights of women is thought by Hindus to be more or less extravagant.

The observations we have made more or less apply to Nanda Pandita also.

What, then, is the exact place to assign to the uterine sister of a deceased Hindu in the line of his heirs in cases governed by the Mitakshara? It is well settled now for this Presidency that she is an heir. The Mitakshara is silent as to her place, and it is an established rule of this Court that where the Mitakshara is silent or obscure, we must, generally speaking, invoke the aid of the Vyavahara Mayukha to interpret it, and harmonise both the works, so far as that is reasonably possible. The Vyavahara Mayukha brings the sister in immediately after the grandmother. Having regard to the rule just mentioned, that should be her place under the Mitakshara also. Such an arrangement would not be arbitrary, if we bear in mind two points emphasised by Vijnaneshwara in the Mitakshara.

In the first place, *sapinda* relationship being constituted, according to his doctrine, by blood, and not by the efficacy of funeral oblations, the sister is a *sapinda* of her brother. So far both the Mitakshara and the Vyavahara Mayukha agree.

The next question is whether she can be regarded as a *sagotra sapinda* of her brother, because Vijnaneshwara states that, after the grandmother, the *samanagotra* (which is the same as *sagotra*) *sapindas* of the deceased inherit—i. e., those who share the same *gotra* as the deceased.

According to the Hindu *Shastras*, a woman by marriage in the approved form loses the *gotra* of her birth and acquires that of her husband. Accepting this view, Nilakantha, the author of the Vyavahara Mayukha, observes that a sister, if she is married, cannot be treated as a *sagotra sapinda* of her brother, i. e., as being of the same *gotra* as his. But he brings

her in immediately after the grandmother in the line of heirs upon other grounds. One of those grounds is based on the text of Manu that "whoever is the nearest *sapinda*, his should be the property." This ground, as we have above pointed out, forms the doctrine of the Mitakshara also—in fact Nilakantha merely follows the Mitakshara in that respect. The second ground assigned by Nilakantha for the place assigned by him to a sister in the line of heirs is that under Yajnyavalkya's text giving the order of heirs as to obstructed succession, *gotrajas*—i. e., those born in the *gotra* of the *propositus*—inherit in default of brother's sons; and Nilakantha argues that a sister is a *gotraja* of her brothers, because she is born in her brother's *gotra*. Vijnaneshwara, on the other hand, in his exposition of Vajnyavalkya's text, explains that in default of brother's sons, *samana gotrajas*, i. e. those having the same *gotra* as that of the *propositus*, are entitled to inherit.

That being Vijnaneshwara's explanation, to warrant the introduction of the sister of a propositus in the line of heirs immediately after the paternal grandmother, under the Mitakshara law, we must make out that, in the opinion of Vijnaneshwara, she can be ranked among the *sagotra sapindas* of her brother—that is, that she possesses the same *gotra* as his, notwithstanding that by marriage she has acquired the *gotra* of her husband.

Vijnaneshwara points out in the 10th Chapter on "Funeral Ceremonies," (*Shraddha Prakaranam*) in the Section on "Rituals" (*Achara*) of the Mitakshara (page 76 of Bapu Shastri Moghe's publication: 3rd Edition) that there are texts to be found, some supporting the view that the death ceremonies of a married woman should be performed by the members of her husband's *gotra* and others maintaining that they should be performed by her relations in the *gotra* of her birth. He cites a text, upholding the former view. Translated into English, it is as follows:—

"By marriage, after the seven steps, a woman loses her own *gotra;* her funeral oblation and other ceremonies should be performed by the *gotra* of her husband."

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Then he cites a text to the contrary. It is as follows:—

"(The death ceremonies) should not be performed by the members of (her) husband's *gotra*, setting aside the *gotra* of her father; by birth and in death the family of a woman is her father's."

Vijnaneshwara reconciles these two apparently contrary views in this wise. Where a woman was married according to the *Asura* or the like inferior forms of marriage, or where she was married with the special object that a son born of her should be treated as the son of her father, her death ceremonies should be performed by her father's *gotra*, the reason being that, in the case of such marriages, there is no *giving away* of the girl by the parents to the husband, and the woman, notwithstanding her marriage, continues to belong to her father's *gotra* or family. Where the marriage was according to the approved form, that is, the Brahma or the like form, her death ceremonies may be performed either by her husband's *gotra* or her father's—it is left to option (*Vikalpa*). That is, she may be treated as if she were of her father's *gotra* and her death ceremonies may be performed by the members of his family. It would appear from this discussion by Vijnaneshwara that he did not think that a married woman was entirely deprived of her father's *gotra* by her marriage in the approved form. If that is so, it will not be inconsistent with his theory to hold that a *sister* shares in a way the *gotra* of her brother, even though she be married in the approved form; and it is not unreasonable, on Vijnaneshwara's showing, to infer that she may be deemed to be a *sagotra sapinda* of her brother.

Vijnaneshwara cannot, therefore, be regarded as being opposed to Nilakantha's doctrine as to the right of a sister to inherit to her brother as a *gotraja sapinda;* on the other hand, the sidelights of the Mitakshara, to which we have referred in this judgment, bring about a harmony between the two and warrant our assigning to her the same place in the line of heirs under the Mitakshara which is given to her in the Vyavahara Mayukha.

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For these reasons we hold that in cases governed by the Mitakshara, a sister comes in as heir to a deceased Hindu immediately after the grandmother, so that, where the competition is, as in the present case, between her and a half brother's son, the latter, being higher in the line among heirs specifically mentioned in the Mitakshara, is entitled to preference over her as heir, though it would be otherwise in cases governed purely by the law of the Vyavahara Mayukha.

The order, therefore, under appeal must be reversed and the application of the appellant for a certificate of heirship under Regulation VIII of 1827 must be granted. As the point of Hindu law which is settled by this judgment was open to doubt, we pass no order as to the costs in this Court or the Court below.

Order reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

1908. *January* 27.

ABDULLAKHAN VALAD USMANKHAN ADHIKARI (ORIGINAL PLAINTIFF), APPELLANT, *v.* KHANMIA VALAD ARABKHAN ADHIKARI (ORIGINAL DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sec. 13, explanation II—Res judicata—*Property not included in the former suit—Right as heir decided in the former suit with respect to other property—The decision does not bar the second suit.*

K. brought a suit against A. and others to recover some property as heir of one S., praying for a partition of the properties specified in the plaint and for allotment to him of S.'s shares therein. A. denied K.'s heirship and asserted himself to be heir of S. It was decided that A. was the heir of S. and the suit was dismissed.

A. then brought another suit against K. to establish his right as S.'s heir to property not included in the plaint in the first suit The lower appellate Court negatived the claim upon the ground that as A. failed to make the omission by K. to include the property in dispute in the previous suit for

* Second Appeal No. 509 of 1907.