

THE INDIAN LAW REPORTS. [VOL. XXXIII.
APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909.
April 14.

BHIMACHARYA BIN VENKAPPACHARYA (ORIGINAL PLAINTIFF),
APPELLANT, v. RAMACHARYA BIN BHIMACHARYA (ORIGINAL DEPEND-
ANT), RESPONDENT.*

*Hindu law—Mitakshara—Stridhan—Succession—Competition between hus-
band and step-son.*

Under the Mitakshara school of Hindu law, when a married Hindu woman dies, leaving no issue, her husband is entitled to succeed to her *stridhan* in preference to her husband's son by another wife.

SECOND appeal from the decision of Vishvanath V. Wagh, First Class Subordinate Judge with appellate powers at Bijapur, confirming the decree passed by D. A. Idgunji, Subordinate Judge at Bagalkot.

The property in dispute belonged originally to one Kristacharya, who died on the 14th December 1902 leaving him surviving a daughter Bagawa by name. Bagawa was married to Ramacharya (defendant No. 1). Ramacharya had a son by his first wife : he was Bhimacharya (the plaintiff).

Bagawa died on the 25th December 1902. At her death, the plaintiff (her step-son) claimed that he was entitled to succeed to the *Stridhan* of Bagawa which he inherited from Kristacharya. His claim was resisted by Ramacharya, father of plaintiff and husband of Bagawa.

The Subordinate Judge decided the suit in the defendants' favour on the following grounds :—

Assuming that the property is Bagawa's *Stridhan*, the question is whether, on her death without issue her next heir is her husband or the son of her husband by another wife.

The material tests of the Mitakshara are those given in chapter 2, section XI, placita 8, 9, 11.

" 9. If a woman die without issue, that is leaving no progeny ; in other words having no daughter nor daughter's daughter nor daughter's son, nor son, nor son's son, the woman's property as above described shall be taken by her kinsmen, namely, her husband and the rest as will be (forthwith) explained."

* Second Appeal No. 569 of 1908.

The rights of the progeny are shown in Manu IX, 192 "all uterine brothers should divide the maternal estate equally and so should sisters by the same mothers." The commentary expressly states :—"The whole blood is mentioned to exclude the half-blood. But, though springing from a different mother, the daughter of a rival wife, being superior by class shall take the property of a childless woman who belongs to an inferior tribe. On a failure of the step-daughter her issue shall succeed."

Then comes a citation of Manu, chapter IX, 198. "Step-children are not recognized by the Mitakshara as entitled, except in the single case, which has now become impossible, where the woman who has left the property was the wife of an inferior class" (*cf.* Mayne, Para, section 670, 6th edition).

The step-son may come after the husband by reason of placitum 11 (Mit. chapter II, section XI).

And of a woman dying without issue as before stated and who had become a wife by any of the four modes denominated Brahma, etc.—the (whole) property as before described, belongs in the first place to her husband. On failure of him it goes to his nearest kinsman (Sapindas) alive by funeral oblations.

It is thus clear that according to the Mitakshara in the case of a woman dying without issue as before stated when the marriage is in the Brahma form as in the present case, her property belongs to her husband "in the first place."

The Smriti Chandrika expressly lays down :—"He (step-son) takes the property on failure of offspring, husband, and the like." (Chapter IX, section 3, page 38) quoted by West and Bühler, page 522 (3rd edition).

These authorities would clearly show that the husband of Bagawa is the next heir to Bagawa's Stridhan and not the plaintiff who is the Bagawa's step-son.

The plaintiff's pleaders rely on Manu, chapter IX, Shlokas 182, 183. The latter lays down that the son of a man by one of his wives is as a son to all his wives.

If this is so, it is argued that the plaintiff is the son of Bagawa the next however refers in express terms to progeny of the full blood as shown above. The next argument is that after the full blood at any rate, the step-son will come in by reason of Shloka 183. The Mitakshara provides that in default of progeny, by which progeny of the full blood is indicated, the husband succeeds "in the first place." It would be clear that Shloka 183 cannot be allowed to override this express provision. Both these Shlokas were before their Lordships of the Privy Council, in their bearing on the aspect of inheritance. They observe :—"We must suppose that all take the spiritual benefits of male issue; but the law is clear that for the purposes of inheritance" (*cf. Annapurni Nachiar v. Forbes*(1)).

There an adopted son died leaving property and it was held that the mother who took part in the adoption succeeded in preference to the other mother.

(1) (1890) 23 Mad. 1 at p. 9.

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The title of a step-mother to rank as mother in matters of inheritance cannot be validly based on Shloka 183, as was laid down. The title of the step-son to come in before the husband's rights based on express provision, can hardly be substantiated by the same Shloka.

"If the son born in lawful wedlock" means or includes a son of a rival wife (as is said in the Dayabhaga) 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 Bühler's Digest, page 518)" (cf. *Bai Kesserbai v. Hunsraj Morarji* (1)).

Even assuming that the property is Bagawa's Stridhan I find that the plaintiff is not the next heir as Bagawa has left her husband surviving her. He does not come on the record even as the minor plaintiff's next friend and is probably unwilling to prejudice his own rights, by his appearance in a suit..... urged on behalf of his son.

On appeal, this decree was confirmed by the lower appellate Court.

The plaintiff appealed to the High Court.

K. H. Kelker for the appellant (plaintiff):—Under Hindu law admittedly a son is entitled to succeed to the *stridhan* of a woman in preference to her husband. We contend that a step-son also is entitled to the same preference. If the author of the *Mitakshara* had meant to give the husband a preference over the step-son, he would have expressly said so.

And Manu (IX, 183) has it that where one out of several co-wives gives birth to a son, all of them by that son become mothers of that son. This text shows that 'son' includes 'step-son'.

In the *Mitakshara*, there is a specific text which shows that if a woman dies without issue then the daughter (or failing her, her issue) born of a co-wife of a superior class takes her *stridhan* (*Mitakshara*, p. 211, Moghe's edition).

Mitra Misra expressly mentions step-son and places him above the husband in the line of succession. In discussing the text of Brihaspati, viz., मातुः स्वसा मातुलानी &c. (*Mātuh Swasa Mātulāni, &c.*) he says that औरस (*aurasa*) that is, issue of the body includes a step-son. The text in question lays down the line of succession to the *stridhan* of certain females in case of the

(1) (1903) 30 Bom. 431 at p. 446.

failure of the heirs mentioned therein. Mitra Misra is of opinion that the step-son and his issue become heirs because they are the giver of the Pinda (funeral cake) and the liquidators of debts (Viramitrodaya, Golapchandra Sarkar's edition, translation, p. 243, text p. 98).

Smriti Chandrika (ch. ix, s. 3, Iyer's translation, p. 135) is the only text against our contention. Other authors are silent on the point.

V. G. Ajinkya for the respondents:—In discussing the succession to the *stridhan* of a married female, Vijnaneshwara advisedly uses the word सहोदर (*Sahodara*) (uterine), and then adds सोदरग्रहणं भिनोदर निवृत्त्यर्थम्. (*Saudaragrahanam bhinnodara nivratyartham*) (Mitakshara, verse 145, pp. 210, 211, Moghe's edition). This shows clearly that step-son is expressly excluded.

As to Mitra Misra, it will be seen that he begins by saying "But when there is a failure of the abovementioned heirs the childless woman's property, Vrihaspati ordains 'the mother's sister, &c.'". Thus, when the above-mentioned heirs, that is to say, when the heirs which include the husband and which are mentioned in the foregoing part are exhausted, then only what he says about the text मातुः स्वसा &c. (*Matuh swasa, &c.*) is to be considered. This text, again, has been discarded by the Privy Council as unintelligible in *Bai Kesserbai v. Hunsraj Morarji* (1).

And, Smriti Chandrika (ch. 9, s. 3) specifically assigns preference to the husband.

CHANDAVARKAR, J.—The question of Hindu Law in this Second Appeal is, when a married Hindu woman dies, leaving no issue, and the competition for heirship to her *stridhan* is between her husband and a son by another wife of the latter, who is entitled to the property—the husband or the step-son of the woman?

The case is governed by the Mitakshara law.

Both the Courts below have decided the question in favour of the husband; and the step-son of the deceased woman has preferred this Second Appeal.

(1) (1906) 30 Bom. 431 at page 451.

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Yajnyavalkya's text regarding succession to the property of a woman, who dies leaving no issue, says:—"Her kinsmen take it, if she die without issue." [The Mit. Chap. II, Section XI, pl. 8, page 460, Stokes's Hindu Law Books].

Vijnaneshwara's gloss on the text is as follows:—

"If a woman die 'without issue' that is, leaving no progeny; in other words, having no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son; the woman's property, as above described, shall be taken by her kinsmen; namely, her husband and the rest as will be (forthwith) explained." [Do. pl. 9, page 460].

Further on, that is, in his gloss on the next text of Yajnyavalkya, Vijnaneshwara says, "in all forms of marriage, if the woman 'leave progeny,' that is, if she have issue, her property devolves on her daughters." [Pl. 12 Do. page 461].

The original for "have issue" is *prasuta*, i.e., a woman who has children born.

"In default of daughters, or their daughters, or their sons, the sons, if any, of the woman deceased, take her *stridhan*" says Vijnaneshwara on the authority of the text, "the (male) issue succeeds in their default" [pl. 19, page 462].

He further supports the right of the male issue by a text of Manu which runs as follows:—

"When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate." [pl. 19].

He explains this text to mean, not that the uterine brothers and sisters that is, the daughters and sons born of the woman, take the estate as joint heirs, but that the daughters inherit first, and, in default of them, the sons.

The original for "mother" in Manu's text is *janani*, which means, the woman who has given birth to children and left them surviving her. That word and the word "uterine" emphasise the rule that on her death it is her own daughters, and in default of them, her own sons who are her heirs. Hence Vijnaneshwara adds the explanation that step-children are excluded from this category of heirs. [pl. 19, page 462].

It is urged for the appellant that this exclusion means no more than that step-sons cannot inherit so long as the woman has left sons of her own to inherit her property; but that there is nothing in either Manu's text or Vijnaneshwara's gloss to prevent the step-sons coming in as heirs before her husband as her "sons" in the secondary sense of the word.

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But the right of the step-son so to come in, after he has once been expressly excluded from the primary sense of the word "sons" by Manu's text and Vijnaneshwara's explanation, must be founded on some authority discoverable in the Mitakshara. It is impossible to argue that Vijnaneshwara uses the word "sons" in his gloss in placitum 19 or the word "male issue" as including step-sons. Had he intended to include them, he would not have cited Manu's text in support of his meaning and added his gloss that it excludes step-children.

The argument for the appellant just stated comes in effect to this that Vijnaneshwara intends to use the word "sons" in its primary sense, that is, in the sense of sons born of the woman, where such sons are living at her death; but that he uses the same word in its secondary sense, meaning sons of a rival wife, if she has left no sons of her own. But we cannot ascribe to Vijnaneshwara this double interpretation of the word without charging him with the violation of a well known rule of *mimansa* or construction that "in the same passage a word occurring once cannot be taken in its primary and in its secondary sense." (1). Such construction of one and the same word occurring in a text or a rule, involving two interpretations at the same time, is condemned by the commentators on Hindu law as "illogical," as may be seen from the remarks of Nilakantha in the Vyavahara Mayukha in the chapter on "Determination of Heritage." (2).

No doubt "the more comprehensive interpretation may be adopted where it is supported by authority." (3).

The rule is: "सकृदुच्चरितः शब्दः सकृदेवार्थं गमयति". See Bhatta-
charya's Hindu Law, 2nd Edn., page 64.

Mardlik's Hindu Law, page 36, lines 11 to 13.

(3) Bhattacharya's Hindu Law, 2nd Edn., page 65, citing Dayabhaga XI. v. 9.

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But for our present purposes the authority must be found either in the Mitakshara itself or, where it is silent, in the Vyavahara Mayukha. None can be found in either.

On the other hand, both what Vijnaneshwara has omitted to say and what he has gone on to point out after explaining Manu's text as excluding step-sons from the category of "sons", show plainly that he did not intend step-sons to come in as heirs of the woman before her husband.

After having given his explanation of Manu's text, he studiously omits to say that in default of sons born of the woman, her step-sons (sons of a rival wife) come in. This omission is significant, because, in dealing with the compact series of heirs in a case of what is called "obstructed succession", wherever he is in favour of the admission of the half-blood immediately after the full-blood into the class of enumerated heirs, he says so and does not leave the matter to mere inference or conjecture. [see the Mit., Ch. II, Sec. IV. plac. 6 : Stokes's Hindu Law Books, page. 445].

The omission becomes all the more significant when we have regard to what Vijnaneshwara goes on to say after having given his explanation of Manu's text. On the authority of another text of Manu he declares the right of a step-daughter of the woman to inherit before the latter's husband, provided that the step-daughter is of a caste superior to that of the woman. [The Mit. Ch. II, Sec. XI, plac. 22; Stokes's Hindu Law Books, page 463.]

The express inclusion of this particular class of step-children in the class of heirs taking before the husband implies the exclusion from that class of all other step-children.

It is true that this rule as to the right of a step-daughter of a superior caste is supposed by some commentators to apply also where the step-daughter and the woman happen to be of the same, that is, "equal" caste. But Vijnaneshwara's remarks and the illustrations he gives are clearly opposed to the supposition; and Nilakantha in the Vyavahara Mayukha plainly says that the authority for the supposition is "questionable". [see Mandlik's Hindu Law : Vyav. Mayu. page 96, lines 25 and 26].

It follows then from all these considerations that, under the Mitakshara and the Mayukha law, where a married woman dies, leaving her husband and a son by a rival wife, the latter is entitled to inherit her property only after and in default of the former. This interpretation of the Mitakshara is confirmed by Kamalakara; the author of the *Nirnaya Sindhu* and the *Vivada Tandava*, quoted at page 580 of Bhattacharya's *Hindu Law*, 2nd Edition. Kamalakara says:—

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“In default of the husband, the daughter, sons, and daughter's sons of the rival wife; and, in their default, the mother-in-law, the father-in-law, the husband's brother, his sons, and other next of kin of the husband (succeed), according to the text: ‘The wife, and the daughters also, &c.’ This is the opinion of Vijnaneshwara and Apararka.”

But the learned Pleader for the appellant relies in support of his argument on certain remarks of Mitra Misra in the *Viramitrodaya*, which occur on page 243, plac. 14, of Mr. Golap-chandra Sarkar's Edition of that work.

The remarks in question, it will be noticed, refer at the very outset to certain heirs “to a childless woman's property” enumerated in a text of Brihaspati, and Mitra Misra begins by pointing out that those heirs come in “when there is a failure of the above mentioned heirs”, that is, the heirs mentioned in the preceding placita. Among these latter is the woman's husband, as placitum 13 shows.

No doubt in his gloss on Brihaspati's text, Mitra Misra says that by the term “son” used in that text is “intended the son of a co-wife” and he cites the following text of Manu in support of that:—

“If among all the wives of the same person, one be a mother of a son, then all of them become by that son mothers of male issue; this is ordained by Manu.”

But it does not follow from this that Mitra Misra intended the son of a co-wife to be heir to the woman's property in preference to her husband. It is true that he says in the placitum in question that in default of the *aurasa* (born) sons of

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the woman, their sons, and grandsons, "the son of a rival wife, his son, and grandson (become heirs in their order); by reason of their being, under the circumstances, the giver of the *pināa*, and the liquidator of debts, and by reason of the text of Manu, cited above." But he cannot have meant by that to bring in the son of a rival wife before the husband. For, he goes on to say, that "on failure of these," that is, the son of a rival wife, his son, and grandson, "the sister's son and the rest alone," that is, the secondary sons specified in Brihaspati's text, take the property "in spite of the *sapindas* such as the father-in-law". Does that mean that if there is no son of a rival wife, or his son, or grandson, the secondary sons enumerated in Brihaspati's text come in as heirs, ignoring the husband of the woman? Mitra Misra could not have meant that, because he begins his citation of Brihaspati's text by saying that the heirs mentioned therein come in after the husband.

Mitra Misra's remarks, therefore, must be understood as merely pointing out in a general way the heirs who fall under the category of the word 'son' in its more comprehensive sense, not as laying down the order of their succession so as to postpone the husband's right of heirship to that of a son of a rival wife. Had he intended to postpone the right in that way, and to bring in a step-son immediately on failure of a son born of the woman, his son, or grandson, he would have said so where he has discussed Manu's text in which the word 'uterine' occurs. He deals with that text much in the same way that Vijnaneshwara has dealt with it.

As to the text of Manu which Mitra Misra has cited in construing the word 'son' occurring in Brihaspati's text, and which is relied upon for the appellant as showing that a son of a co-wife of a woman becomes the latter's son also, it is to be remarked that the object of the text in question is explained by the more important of the commentators on Manu in such a way as to imply that its application is of a limited character, having no necessary reference to questions of inheritance. [See Mandlik's *Manava Dharma Shastra*: page 208.] For instance, Sarvajna Narayana, explains the text as meaning that the wife who has no son shall not resort to *niyoga*

(levirate), if her co-wife has a son born of her. Culluca Bhatta and Raghayananda explain that the text is intended to prohibit adoption by the wife who has no son born of her. And the context in which this text of Manu finds its place in his *Smṛiti* supports that view. It is immediately preceded by another text which declares; "If among brothers, sprung from one (father), one have a son, Manu has declared them all to have male offspring through that son." [Sacred Books of the East: Vol. XXV, Ch. IX, 182.] Vijnaneshwara in the *Mitakshara* quotes this text and explains that it "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". [The Mit. Ch. I. Sec. XI, plac. 36, Stokes's Hindu Law Books, page 424.] If this text has this limited meaning and scope, the other text relating to the son of a co-wife, must have its scope similarly narrowed, having regard to the fact that it occurs immediately after the former. And that is the view which has commended itself to their Lordships of the Privy Council as to the scope of both these texts of Manu. See *Annapurni Nachiar v. Forbes*⁽¹⁾ where their Lordships say:—"Reference has been made to the text of Manu (Book IX, Shloka 183), in which he declares that if of several wives one brings forth a male child, all shall by means of that child be mothers of male issue. In the preceding Shloka he declares that if among several brothers of the whole blood one have a son born, they are all made fathers of a male child by means of that son. We must suppose that all take the spiritual benefits of male issue: but the law is clear that for the purposes of inheritance the natural mothers and fathers respectively are preferred."

Certain commentaries such as the *Madana Parijata* and the *Vivadarnava Setu* no doubt assert the right of the son of a rival wife of a woman to inherit the *stridhan* of the latter before her husband; but for the reasons we have given in this judgment, their view must be held to find no support from either the *Mitakshara* or the *Vyavahara Mayukha* or the author of the *Smṛiti Chandrika*. The last says: "The issue of a rival wife

(1) (1899) L. R. 26 I. A. 246 at p. 253.

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takes the property of the step-mother, where the latter leaves no progeny, husband, or the like". [Smriti Chandrika, Krishna-sawmy Iyer's Ed. 2nd, page 135, section 58.]

That the husband of a childless woman is entitled to inherit her *stridhan* before a son by another wife of his seems to us to follow as a necessary corollary to certain decisions of this Court. In *Kesserbai v. Valab Raoji*⁽¹⁾ it was held that a step-mother could not inherit her step-son's property under the term "mother" but that she could come in only as a *gotraja sapinda* on the authority of the decisions in *Lakshnibai v. Jayram Hari*⁽²⁾ and *Lallubhai v. Mankuvarbai*⁽³⁾. If a step-mother cannot come in as "mother" in the line of heirs to her step-son but can only come in as a *gotraja sapinda*, it follows, from the same reasoning, that the step-son cannot come in as "son" but can inherit only as a *gotraja sapinda* of his step-mother.

For these reasons the decree appealed from must be confirmed with costs.

Decree confirmed.

R. R.

(1) (1879) 4 Bom. 188 at p. 208. (2) (1869) 6 Bom. H. C. Rep. 152 (A. C. J.).

(3) (1876) 2 Bom. 388.

ORIGINAL CIVIL.

Before Mr. Justice Russell.

IN RE NAOROJI SORABJI TALATI *

1908.

July 22.

Indian Insolvency Act (11 and 12 Vict. c. 21), secs. 7, 26 and 36—Insolvent's property at Shanghai—Property of insolvents at Shanghai vests in Official Assignee of the Insolvent Debtor's Court at Bombay—Court can order insolvent at Shanghai to hand over property to Official Assignee in Bombay—Court can order commission to examine insolvent at Shanghai.

The firm of T. and Co. filed their petition in insolvency in Bombay on 29th April 1907 at which time one of the partners M. was at Shanghai. M. subsequently swore his petition at Shanghai on 16th October 1907.

On 16th March 1907 certain creditors of the firm obtained an order directing M. to appear before the Court of Insolvent Debtors at Bombay to be examined under section 33 of the Indian Insolvency Act.

* Nos. 197 and 200 of 1907.