APPELLATE CIVIL.

Before Sir Stanley Batchelor, Kt., Acting Chief Justice and Mr. Justice Shah.

RAOJI BHIKAJI KONDKAR (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* ANANT LAXMAN KONDKAR (ORIGINAL PLAINTIFF), RESPONDENT.* 1918. *January* 30.

Hindu Law—Partition—Preliminary decree—Mother's share determined—Decree for plaintiff for his share—Mother's death before the final decree—No actual division by metes and bounds—Mother's share forming an integral part of the estate available for division—Application to amend the decree for increase of share—Whether a separate suit necessary—Civil Procedure Code (Act V of 1908), Order XXII, Rule 5.

One B died leaving a widow Y, a son R, and a grandson A. A brought a suit for partition and possession of his one-half share in B's estate, joining Y and R as defendants. A preliminary decree was passed holding that Y was entitled to one-third share and decreeing to the plaintiff a third share in the estate. Before any final decree could be passed, however, Y died and an application was made by A praying that owing to the removal of Y by death, his share should be held to have increased to one moiety and the decree should be amended accordingly. The Subordinate Judge granted the application. On appeal to the High Court, it was contended : (1) that the share assigned to Y became her *stridhan* and went to her special heirs and (2) that the remedy sought by the plaintiff could only be obtained by a separate suit and not by an application in the same suit.

Held, (1) that until the actual partition was effected no share in B's estate passed to the ownership of Y and therefore the share assigned to her remained an integral part of the estate available for division among the heirs of her husband.

Sheo Dyal Tewaree v. *Judoonath Tewaree*[1], *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*[2], followed.

(2) That there was no necessity to bring a separate suit as when Y died the cause of action survived and her heirs had to be brought on the record; the Court was bound under Order XXII, Rule 5 of the Civil Procedure Code, 1908, to make enquiry as to who those heirs were in case any dispute arose upon the subject.

FIRST Appeal against the decision of V. G. Kaduskâr, First Class Subordinate Judge at Thana, in Suit No. 154 of 1912.

* First Appeal No. 130 of 1916.

(1) (1868) 9 W. R. 61. (2) (1911) 34 All. 234.

1918.

RAOJI BHIKAJI v. ANANT LAXMAN.

Suit for partition and possession.

One Bhikaji Kondkar died leaving a widow, Yeshodabai, and two sons Raoji and Laxman. Laxman died in 1900 leaving a son, Anant. In 1912, Anant brought a suit for partition and possession of one-half share in the estate of Bhikaji consisting of moveable and immoveable properties. To this suit Raoji was joined as defendant No. 1 and Yeshodabai as defendant No. 2.

Defendant No. 1 contended *inter alia* that the plaintiff was not entitled to one-half share as defendant No. 2, his mother, was entitled to a share at the time of partition

Defendant No. 2 claimed her share on partition.

In the trial before the Subordinate Judge, Mr. R. B. Gogte, the following issue was raised :—"Is defendant No. 2 entitled to a third share in the family property?" He found on the issue in the affirmative and on the 27th October 1913, a preliminary decree was passed assigning one-third share in the properties to the plaintiff.

Before the final decree could be passed, Yeshodabai, the second defendant, died on 7th June 1914.

On January 19, 1915, the plaintiff made an application to the Court praying that, owing to the removal of Yeshodabai by death, his share should be held to have increased to one moiety, and the decree should be amended accordingly.

The Subordinate Judge, Mr. V. G. Kaduskar, granted the application by his order, dated 27th July 1915, observing as follows :—

"There had been a partition decree among the parties to the proceedings and a share was allotted to the deceased mother of some of the opponents. They are her sons and grandsons of her deceased sons. Before the partition

was completed the mother died and the question is what was her interest in the share so assigned. Does it become her *stridhan* so as to be inherited by her special heirs? The question has been definitely answered by the Ruling reported in 34 Allahabad where it is laid down that a share so assigned to the mother is by way of maintenance and that on her death it devolves on the heirs of her husband. I follow that ruling and find that the share assigned to the deceased should be distributed among the sons of the deceased and her grandsons of sons predeceased."

Defendant No. 1 appealed to the High Court.

Jayakar with *A. G. Desai*, for the appellant:—We submit (1) that the share awarded to the 2nd defendant Yeshodabai should be regarded as her *stridhan* property, and as such would pass to her *stridhan* heirs.

Stridhan is defined by Yajnavalkya as "what was given to a woman by the father, mother, husband or brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife as also *any other* (separate acquisition) is denominated a woman's property." According to Vijnaneswara the word 'any other' (आद्य) in the definition will include "property which she may have acquired by inheritance, purchase, partition (विभाग), seizure or finding," as *stridhan* property: see Mit. Ch. II, section XI, pl. 1 and 2; Stoke's Hindu Law Books, page 458. In placitum 3, Vijnaneswara, reconciling the six kinds of *stridhan*, says that *stridhan* should be interpreted in the ordinary sense rather than in the technical. He does not regard the enumeration of the specific kinds of *stridhan* in the old Smritis as exhaustive.

The Mayukha confirms the construction put on the word *stridhan* by the Mitakshara: see Mayukha, Ch. IV, section 10, pl. 26; Stokes' Hindu Law Books, page 105. According to both these commentators the property taken by a woman on partition is her *stridhan* property.

1918.

RAOJI BHIKAJI v. ANANT LAXMAN.

In the Mithila school the text of the Mitakshara is commented on by the Vivad Chintamani. This learned author does not recognise the peculium characterised by the Mitakshara and he cuts down the extension given to the word *stridhan* by the Mitakshara: see Gooroodass Banerjee's "Marriage and Stridhan" (4th edition), pp. 327-330.

In consequence of this narrow interpretation of *stridhan* by the Mithila school the trend of decisions in Bengal is contrary to the Bombay decisions. The decision of the Privy Council in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*[1] would not be an authority for the Bombay school where Mitakshara and Mayukha schools are supreme. The case went up to the Privy Council from the province of Bengal where a narrow interpretation has always been put on the texts governing women's rights, and therefore the effect of that decision is to be limited to the particular province and the principles there recognised in relation to women's rights. Maharashtra school has always been liberal in recognising the rights of females, e.g., daughters take absolutely here and a sister is recognised as an heir after the grand-mother. In other schools they have not been allowed these extended rights: see *Bhagirthibai* v. *Kahnujirav*[2]; *Manilal Rewadat* v. *Bai Rewa*[3]. In *Gulappa* v. *Tayawa*[4] Mr. Justice Chandavarker distinguished the Privy Council decisions of *Sheo Shankar Lal* v. *Debi Sahai*[5] and *Lal Sheo Pertab Bahadur Singh* v. *Allahabad Bank*[6] on this identical ground that these decisions related to the Benares school and would have no application to the Mitakshara school.

(1) (1911) 34 All. 234.
(2) (1886) 11 Bom. 285.
(3) (1892) 17 Bom. 758.
(4) (1907) 31 Bom. 453
(5) (1903) L. R. 30 I. A. 202
(6) (1903) L. R. 30 I. A. 209.

So the decision of *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*[1] cannot be regarded as an authority for deciding a case arising in the Bombay school.

Secondly, we submit, the relief asked for by the respondent could not be granted on an application in this suit. His right to the share of Yeshodabai must be determined by a separate suit. There was no final decree passed and a final determination of the shares of the parties has not been made. If the shares had been determined and if only a formal adjustment was required, the plaintiff could have got it made by an application in the same suit. In determining shares, however, many complicated questions of law will be involved which cannot be adjudicated upon by merely bringing the heirs on record. The rights of different persons, e.g., of daughters, if any, left by Yeshodabai, will have to be considered and this would necessitate a separate inquiry. The lower Court was wrong in allowing the relief against me only because I was a party to the suit.

Coyajee with *P. B. Shingne*, for the respondents:—The Privy Council decision of *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*[1] is an authority in our favour. It decides that the share obtained on partition by a Hindu woman is not her *stridhan* and is applicable to Hindus governed by Mitakshara law. There is nothing to show that their Lordships of the Judicial Committee intended to restrict the application of that ruling to the province from which the case came. Moreover, the Full Bench ruling of the Bombay High Court in *Bhagirthibai* v. *Kahnujirav*[2] was referred to in the case and therefore in deciding that case their Lordships had in view the peculiarities of the Bombay school. Even as

[1] (1911) 34 All. 234.

[2] (1886) 11 Bom. 285.

1918.

RAOJI BHIKAJI v. ANANT LAXMAN.

to these peculiarities our Court has held that those females only who are born in the family, e.g., daughter, sister, take absolute estate but those who come in the family take a restricted estate: *Bhau* v. *Raghunath*[1]; *Tuljaram Morarji* v. *Mathuradas*[2]. Mayne's Hindu Law, 8th edition, paras 621, 622, 623 and 624.

On the second point we submit the lower Court was right in allowing us the relief on an application in this suit. Yeshodabai died before a final decree was passed and for her share, which was not finally determined and partitioned, her heirs had to be brought on the record under Order V, Rule 22 of the Civil Procedure Code, 1918. The heirs were not formally brought on the record because the only heirs were our client and the respondent. So we applied that the share may be divided between the appellant and the respondent and our application amounted to an amendment of the plaint.

Further we say Yeshodabai was not the owner of a definite share which would pass to her heirs. It is only when a partition is actually effected a mother gets a share: *Sheo Dyal Tewaree* v. *Judoonath Tewaree*[3]; *Beti Kunwar* v. *Janki Kunwar*[4]. If she, however, dies before the date of actual partition the share which would have gone to her sinks back into original estate.

BATCHELOR, ACTING C. J.:—At some time before 1900 one Bhikaji died, leaving a widow Yeshodabai, the 2nd defendant in the suit. Bhikaji left also two sons, Raoji, the 1st defendant, and Laxman, who died in 1900. Laxman's son Anant was the plaintiff. The suit was brought for partition and possession of the plaintiff's one-half share in the estate of Bhikaji. The properties involved are partly moveable and partly immoveable.

(1) (1905) 30 Bom. 229 at p. 237.
(2) (1881) 5 Bom. 662.
(3) (1868) 9 W. R. 61.
(4) (1910) 33 All. 118.

1918.

RAOJI BHIKAJI v. ANANT LAXMAN.

Of the various defences raised, we are concerned only with that which was embodied in the fifth issue in the Court of trial. That issue raised the question whether the 2nd defendant, that is, the widow Yeshodabai, was entitled to a third share in the family property. The learned trial Judge answered that question in the affirmative, and accordingly he decreed to the plaintiff a one-third share only, and not a half. That decree was a preliminary decree, and was made on the 27th October 1913. Before any final decree could be passed, that is to say, on the 7th of June 1914, the 2nd defendant Yeshodabai died. On the 19th January 1915, the plaintiff applied to the Court praying that, owing to the removal of Yeshodabai by death, his share should be held to have increased to one moiety, and the decree should be amended. By an order, dated the 27th July 1915, this application was granted by the learned Subordinate Judge, who amended the decree accordingly.

From this amended decree the present appeal is brought by the 1st defendant, and the object of it is to obtain from this Court a declaration that the plaintiff is not entitled to so much as a half-share. We have had from the learned counsel engaged an interesting argument upon the question whether the share, which Yeshodabai is supposed to have taken in the circumstances of this litigation, should or should not be regarded as her technical *stridhan*, and it has been much debated whether this question is covered by the authority of the Privy Council decision in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* [1]. Upon this question, however, it is not necessary for us now to pronounce any opinion, and we consequently refrain from doing so.

(1) (1911) 34 All, 234.

1918.

RAOJI BHIKAJI v. ANANT LAXMAN.

With regard to the second point urged by Mr. Jayakar, namely, that the remedy which the plaintiff sought to get by his application of the 19th January 1915, could only be obtained by the institution of a separate suit, it appears to me that this contention ought not to prevail. It is clear that when Yeshodabai died, the cause of action survived, and her heirs would have to be brought on the record; the Court would, I think, be bound under Order XXII, Rule 5 to make inquiry as to who those heirs were in case any dispute arose upon the subject.

But the appeal, in my opinion, fails upon another ground. It is noteworthy, though the fact is not necessary for my decision, that the decree under appeal does not contain a provision assigning a separate share to Yeshodabai, and it is manifest from the manner in which the litigation was conducted that Yeshodabai was not pursuing any interest of her own, but was merely used by the 1st defendant as a convenient means of reducing the extent of the plaintiff's share. These are circumstances which I think are worth mentioning, though they are not essential to my decision, which I prefer to rest on the broad ground of the principle to be presently stated. That principle seems to me to be clear, intelligible, and, on the authorities to which I shall refer, established beyond question. Any particular case of hardship owing to exceptional delay between the decree and the actual partition may be left for decision when it arises, but this case certainly falls within the principle and, in my judgment, ought to be decided on that ground. I will assume, therefore, in Mr. Jayakar's favour that the suit and the preliminary decree made in it, effected a severance of interests between the plaintiff and the 1st defendant, and did, in substance, assign a third share to Yeshodabai. That, however, is not in my view enough to justify

the appellant's contention that she took that third share so as to transmit it to her heirs. Her right to a share, as I understand it, accrues only when a partition has actually been made. That is the view which, upon a consideration of the text of the Mitakshara, was adopted by Mr. Justice Dwarkanath Mitter and Mr. Justice Loch in *Sheo Dyal Tewaree* v. *Judoonath Tewaree* [1], where Mr. Justice Mitter in delivering the judgment of the Court, said: "The text of the Mitakshara that has been referred to merely says, 'of heirs dividing after the death of the father, let the mother also take a share,' or in other words, the mother or grand-mother, as the case might be, is entitled to a share, *when* sons or grand-sons divided the family estate between themselves. But the mother or the grand-mother can never be recognized as the owner of such a share, until the division has been *actually* made. She has no pre-existing vested right in the estate except a right of maintenance. She may acquire property by partition, for partition is one of the recognized modes of acquiring property under the Hindoo law. But partition, in her case, is the *sole* cause of her right to the property. It follows, therefore, that the effect cannot precede the cause".

Mr. Jayakar has called our attention to the circumstance that in the original text, the word used here for 'division,' namely 'Vibhag' (विभाग), is the same word as is used in the earlier placitum, where the author is speaking of the distribution made during the life of the father, and counsel has contended that, since, as between male members of the family, *vibhag* in the sense of a mere severance of interests would suffice to vest separate shares in the male coparceners, it should be held that, upon such severance, the mother also

[1] (1868) 9 W. R. 61 at p. 62.

1918.

RAOJI BHIKAJI v. ANANT LAXMAN.

would take her share in full proprietorship, As, however, the word occurs in this placitum, it appears to me, without making any pretention to Sanskrit scholarship, that it may well bear the other meaning, the meaning, that is to say, which is ascribed to it by that learned Hindu Judge, Mr. Justice Dwarkanath Mitter. It must be remembered also in this context that although, when a partition is made, the mother is entitled to claim her share, she is not entitled at any time to compel a partition. I see no reason, therefore, to infer from the actual words of the text, on which Mr. Jayakar has relied, that the view accepted by Mr. Justice Dwarkanath Mitter ought to be abandoned. In this opinion I am confirmed by the fact that the same view independently commended itself to Sir John Stanley and another Hindu Judge, Mr. Justice Banerji, in *Beti Kunwar* v. *Janki Kunwar* [1]. There the same interpretation was put upon the same text from the Mitakshara, though it so happened that *Sheo Dyal Tewaree* v. *Judoonath Tewaree* [2] was not cited to the learned Judges. In this Allahabad case the question that had to be considered was whether Duni Kunwar, the mother of Kalka Prasad and Gur Dayal, took a share on an alleged partition between these two sons. The learned Judges found that in fact there had been no actual partition between these two sons of Duni Kunwar, although by reason of an arrangement which they had made, there was a disruption of the joint family within the meaning of the rulings of their Lordships of the Privy Council, and in this state of the facts the learned Judges say: "No doubt under the Mitakshara upon a partition being made by sons after the death of their father the mother is entitled to a share equal to that of a son. But we are of opinion that she would obtain such share only if an actual partition took place

[1] (1910) 33 All. 118. [2] (1868) 9 W. R. 61.

between the sons. The text of Yajnavalkya on this point is this: 'Of heirs *dividing* after the death of the father, let the mother also take an equal share...' This, in our opinion, implies an actual division of the family property, that is, a completed partition under which there is a division of interest as well as separate possession. We do not think that a mere severance of interest where no actual division of the property takes place confers on the mother a right to a share equal to that of each of her sons...It is only when the sons actually divide the property and effect a complete partition that the mother can get a share. There is nothing in the Mitakshara from which we may infer that upon a mere severance of the joint status of a Hindu family a mother can claim a share."

It is plain that, unless we are prepared to depart from these weighty authorities, we must hold here that when Yeshodabai died she was not the owner of a share, and I can see no reason why we should not follow the judgments which I have cited. The earlier of them was pronounced so long ago as 1868, and it is not suggested that there has ever been any contrary decision by any of the High Courts. It follows, therefore, that no share in Bhikaji's estate ever passed to the ownership of Yeshodabai. In other words, the share which Yeshodabai would have taken, if an actual partition had been effected, was never severed from the estate of Bhikaji, and, consequently, remains now an integral part of that estate available for division. The result is that the properties must be divided half and half between the plaintiff and the 1st defendant. The appeal, therefore, must be dismissed with costs and a decree made as I have indicated. For purposes of pleader's fees the costs should be assessed on Rs. 4,000.

SHAH, J.:—I am of the same opinion.

1918.

RAOJI BHIKAJI v. ANANT LAXMAN.

I wish to add that on the facts of this case I am satisfied that Yeshodabai had not become owner of her share in the estate of Bhikaji at the time of her death.

The question, therefore, whether on her death it would go to her heirs as part of her *stridhan* or to her husband's heirs as if it was property inherited from her husband does not arise: and I express no opinion on that question, though it has been argued at some length.

In the present case there was no provision as to her share in the preliminary decree, the plaintiff had taken no steps to proceed with the division of the property by metes and bounds after the preliminary decree and before her death, and Yeshodabai had taken no steps after the preliminary decree to obtain her share. The estate of Bhikaji was, therefore, divisible between the plaintiff and the defendant No. 1 on her death without any reference to her share. This view is supported by the decisions in *Sheo Dyal Tewaree* v. *Judoonath Tewaree* [1] and *Beti Kunwar* v. *Janki Kunwar* [2]. With reference to these cases Mr. Jayakar has argued that the word '*vibhag*' in the original text (Mitakshara, Ch. I, section 7, placita 1 and 2) should be understood as meaning severance of interests and not necessarily actual division by metes and bounds, and has relied upon the case of *Girja Bai* v. *Sadashiv Dhundiraj* [3]. The point, however, to be considered in the case is whether Yeshodabai had taken her share before her death. The text undoubtedly gives her the right to take an equal share, when the sons divide the property. But in order that it may become part of her property, as distinguished from the estate of her husband, she must take her share. In this case the grand-son did proceed to divide the property by filing the suit, though no steps

[1] (1868) 9 W. R. 61. [2] (1910) 33 All. 118.
[3] (1916) L. R. 43 I. A. 151.

1918

RAOJI BHIKAJI v. ANANT LAXMAN.

were taken to have the property divided by metes and bounds after the preliminary decree and before her death. Yeshodabai, however, had not taken any effective steps to secure her share. She claimed it in the written statement, but did not press for it at the time of the preliminary decree. She did nothing subsequently during her lifetime to obtain her share. It is clear, therefore, that in fact she did not take her share, and that it was not severed from Bhikaji's estate.

It is not necessary to define precisely as to when the mother can be said to take her share, so as to make it part of her estate, quite apart from the question whether it would be non-technical *stridhan* in her hands or whether it would be property inherited from her husband. The question must be decided with reference to the facts of each case. Assuming, without deciding, that the actual division by metes and bounds may not be essential for this purpose, it is clear that in the present case Yeshodabai did not take her share as contemplated by the text, and that the property of Bhikaji became liable to division on her death in equal shares between the plaintiff and defendant No. 1.

Appeal dismissed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1918

February 8.

ADVI BIN FAKIRAPPA CHALWADI (ORIGINAL PLAINTIFF), APPELLANT *v.* FAKIRAPPA ADIVEPPA CHALWADI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.[°]

Hindu Law—Adoption—Adopted person having no son born but having one in conception—Such son passes into the adoptive family.

[°] Second Appeal No. 223 of 1917.