

proviso to section 22 of the Indian Councils Act, 1861. That view would appear to have been accepted in the subsequent case of *Empress v. Burah and Book Singh*⁽¹⁾ by the Full Bench of the Calcutta High Court but not to have been brought to the notice of the learned Judges in the latest case of *Mathura Sundari Dasi v Haran Chandra Saha*⁽²⁾ before the Calcutta High Court. It would appear to me that the views expressed by Markby J. would require further and particular investigation, should further conflict arise between the provisions of the Letters Patent and enactments of the Legislative Council of the Government of India.

J. G. R.

⁽¹⁾ (1877) 3 Cal. 63 at p. 79.

⁽²⁾ (1915) 43 Cal. 857.

APPELLATE CIVIL.

Before Mr. Justice Shah.

JANA KOM APPA SUTAR (ORIGINAL DEFENDANT NO. 1), APPELLANT *v.* RAKHMA, FATHER NARAYAN AMBAJI BADIGAR AND ANOTHER (ORIGINAL PLAINTIFF NO. 1 AND DEFENDANT NO. 2), RESPONDENTS.*

1918.

September

24.

Hindu Law—Mitakshara—Succession—Competition between full sister and half-sister—Full sister entitled to priority.

According to the Mitakshara School of Hindu law, a full sister is entitled to succeed in priority to the half-sister.

SECOND appeal from the decision of L. C. Crump, District Judge of Belgaum, confirming the decree passed by C. G. Kharkar, Subordinate Judge at Chikodi.

Suit to recover possession of property.

One Gyanu owned the property in dispute. On his death, the property was claimed by Rakhma (plaintiff), who was his full sister. Her claim was resisted by defendant No. 1, who was half-sister of the deceased.

* Second Appeal No. 17 of 1916.

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The plaintiff having filed a suit to recover possession of property, her claim was decreed by both lower Courts on the ground that as full sister the plaintiff was entitled to succeed in preference to defendant No. 1 who was half-sister of the deceased.

Defendant No. 1 appealed to the High Court.

S. Y. Abhyankar (for *S. R. Gokhle*), for the appellant.

Nilkanth Atmaram, for the respondents.

SHAH J. :—The question of law arising in this second appeal is whether as between a full sister and a half-sister the former is the preferential heir or both of them are heirs to their deceased brother under the Mitakshara. Both the lower Courts have answered it in favour of the full sister.

In support of the case for the half-sister it is urged that neither in the Mitakshara nor in the Vyavahara Mayukha is any preference shown to the full sister over the half-sister, and that the preference of the whole to the half-blood under the Mitakshara is confined to brothers and nephews as pointed out in *Samat v. Amra*⁽¹⁾ and *Vithalrao v. Ramrao*.⁽²⁾

There is apparently no decided case in this Presidency directly bearing on the point. The position of the sister as an heir has been considered in several cases; and it is not disputed before me that under the Mitakshara as under the Mayukha the sisters would be heirs, and that they would come in after the grandmother. The ground upon which the sister has been assigned this place as an heir under the Mitakshara has been a matter of some controversy and difference of

⁽¹⁾ (1882) 6 Bom. 394.

⁽²⁾ (1899) 24 Bom. 317.

opinion, as the judgments in *Sakharam Sadashiv Adhikari v. Sitabai*⁽¹⁾, *Kesserbai v. Valab Raoji*⁽²⁾, *Mulji Purshotum v. Cursandas Natha*⁽³⁾ and *Bhagwan v. Warubai*⁽⁴⁾ would show. The question, which I have to consider, relates to the preference of the whole to the half-blood, whatever the position of sisters as heirs may be in competition with other relations.

It is clear that Vijnanesvara does not refer to sisters in his commentary relating to the order of succession; and the ground upon which her position as an heir is determined may have some bearing upon the present question. I do not think, however, that it is necessary to discuss these grounds. It is clear that if the word "brothers" (भ्रातरः) used in Yajnavalkya's text and in the commentary is interpreted as including sisters, the half-sister will have no case. In that case she will come in after the full sister as the half-brother comes in after the full brother. I do not think that that interpretation can be pressed against the half-sister since it has been practically rejected in determining the sister's position as an heir under the Mitakshara.

Quite independently of this interpretation, Vijnanesvara gives a clear indication that the question of preference arising in this appeal must be determined by the test of propinquity; and according to that test the sister is the preferential heir. In dealing with the case of parents, Vijnanesvara applies the test of propinquity and it is significant that he treats the mother's propinquity as of a specially high order, and gives her a place before the father in the list of heirs (see Mitakshara, Ch. II, section 3 paras. 3, 4 and 5, Stokes' Hindu Law-Books, pp. 442-443). In dealing with the case of brothers he gives preference to brothers of the whole

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(1) (1879) 3 Bom. 353.

(2) (1900) 24 Bom. 563.

(3) (1879) 4 Bom. 188.

(4) (1908) 32 Bom. 300.

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blood on the strength of the text, which he cites in discussing the case of the mother, viz., "To the nearest Sapinda the inheritance ... belongs." He prefers the brothers of the whole blood, "since those of the half-blood are remote through the difference of the mothers" (see Mitakshara, Ch. II, section 4, para. 5, Stokes' Hindu Law-Books, p. 445). There is no reason whatever why the same reasoning should not apply to the case of sisters. It is also clear that according to Vijnanesvara's definition of *Sapindaship* given in his Commentary on verse No. 52, Acharadhyaya, the full sister would be the nearer heir; and his specific application of it to the case of brothers shows that the same view should prevail in the case of sisters.

In the Vyavahara Mayukha there is no reference in terms to the case of a half-sister, though the case of 'sister' is specifically dealt with. Nilkantha does not accept Vijnanesvara's view as to the preference to be given to the mother over the father. But his preference of the whole to the half-blood is more marked than Vijnanesvara's in the case of brothers, as he assigns a much lower position to half-brothers in the list of heirs. Thus Nilkantha's view, so far as it goes, supports the conclusion in favour of the full sister based on the Mitakshara. No doubt under the Mayukha the anomaly of preferring her as an heir to the half-brother might arise, if her position as an heir is determined by treating her as included in the word 'sister' used by Nilkantha in discussing the sister's place as an heir. That consideration, however, is not relevant to the present point.

It is hardly necessary to go beyond these two books to justify the conclusion in favour of the full sister. As the Nirnaya Sindhu and the Dharma Sindhu are

works which may be referred to, I may point out that in determining the order of persons entitled to perform the Shraddhas both Kamalakara Bhatta and Kashinath, the respective authors of the two treatises, mention the full and half-sisters and give preference to the full sister. I have quoted the relevant passages* from these books for easy reference in a footnote. I do not wish to lay undue emphasis on these opinions. But they are valuable as referring specifically to the relative position of full and half-sisters in the matter of performing the Shraddhas. I have not been able to find any reference to the full and half-sisters elsewhere.

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In *Kesserbai v. Valab Raoji* (1) at page 207 of the report Sir Michael Westropp C. J. has observed that "The Nirnaya Sindhu, which specially names the half-sister as entitled to rank (in the performance of ceremonies, whence her heirship may be inferred,) places her after, not on a level with, the sister."

Looking at the question from the point of view of the recognition of the rights of the sister as an heir, on the

* (1) Nirnaya Sindhu (published by the Nirnaya Sagar Press, 2nd Edition, p. 273, or the Edition published by the same Press with the Gujarati translation at p. 563).

"भ्रातृपुत्राभावे क्रमेण पितृमातृस्त्रुषास्वसृतत्पुत्रादयः धनहारित्वात् ।

भगिनी तत्सुतयोर्विशेषमाह मदनरत्ने कात्यायनः—'अनुजाग्रजावापि भ्रातुः कुर्वीत संस्क्रियाम् । ततस्त्वसोदरातद्वत्क्रमेण तनयस्तयोः ॥"

(2) Dharma Sindhu (published by Janardhan Mahadev Gurjar, in the same Press, 2nd Edition, p. 282, or the Edition published by the same Press with the Gujarati translation, p. 485).

"× × तत्र सोदरासोदर समवाये सोदर एव × × सोदरभ्रातुरभावे सापत्न भ्राता × × भ्रातुरभावे भ्रातृपुत्रः × × × तत्र अपि सोदरभ्रातृपुत्रो मुद्ध्यः तदभावे सापत्न भ्रातृपुत्रः तदभावे पिता × × × तदभावे भगिनी तत्रानुजाग्रजसोदरासोदराणां समवाये भ्रातृवत्"॥

(1) (1879) 4 Bom. 188 at p. 207.

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ground of positive acceptance and usage after Vijnanesvara wrote his commentary, there is no reason to suppose that there has been any positive acceptance or usage in favour of ignoring the distinction which exists between sisters of the whole and the half-blood. There is nothing in the reported decisions to countenance such a view, and the fact that the distinction is undoubtedly recognised in the case of brothers and nephews and that it is referred to specifically in relation to sisters in such modern works as the *Nirnaya Sindhu* and the *Dharma Sindhu* is undoubtedly against the possible suggestion that the distinction between the whole and the half-blood is not recognised in practice by the Hindu community as regards the sisters.

Lastly, it is urged on the strength of the observations in *Samat v. Amra*⁽¹⁾ and *Vithalrao v. Ramrao*,⁽²⁾ that the preference of the whole over the half-blood is confined to brothers and nephews. In neither of these decisions is the case of sisters referred to; and the decisions relate to male relations who come in as heirs after the sisters. The case of sisters is really indistinguishable from that of brothers so far as the test of propinquity is concerned. Westropp C. J. in dealing with the point that arose in *Samat's case*⁽¹⁾ observes that in the *Mitakshara* and the *Mayukha* there is no distinction made on the basis of the full and half-blood relationship except in the case of brothers and brothers' sons. I cannot believe that in making the above observation in *Samat's case*⁽¹⁾ Sir Michael Westropp had any intention to express a dissent from the opinion which he had expressed in *Kesserbai's case*⁽³⁾ as to the full and half-sisters, and to which I have referred above. Besides in that case the question of preference among Sapindas of the same degree of descent from the common ancestor

(1) (1882) 6 Bom. 394.

(2) (1899) 24 Bom. 317.

(3) (1879) 4 Bom. 188.

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did not arise. Even according to the test adopted in *Samal's case* ⁽¹⁾ that the nearest Gotraja Sapinda succeeds, the full sister would be the nearer heir. It is hardly necessary to refer to the grounds mentioned by Nilkantha in determining the sister's place as an heir next after the grandmother, relating to her having both *Sapindaship* and *Gotrajatva*, though there may be no community of *Gotra* (*Sagotrata*). But I prefer to distinguish the case on the ground that the present point is not decided there and the *ratio decidendi* does not involve the result that there is no distinction to be made between the full and half-sisters. As regards *Vithalrao's case* ⁽²⁾, it is not possible to treat it as deciding or expressing any opinion as to the present point. Sir Lawrence Jenkins C. J. has based his decision on the principle of *stare decisis*; and Mr. Justice Ranade's observations have reference to relations, who according to decided cases come in after the sisters. His observations relating to different kinds of propinquity have no application to the case of sisters, which as I have already stated, is not distinguishable from that of brothers so far as the difference between the whole and the half-blood is concerned.

In the view I take of these two decisions, it is not necessary to consider the argument urged on behalf of the first respondent (*i.e.*, the full sister) that the decisions in *Gangā Sahai v. Kesri* ⁽³⁾, *Sham Singh v. Kishun Sahai* ⁽⁴⁾ and *Nachiappa Gounden v. Rangasami Gounden* ⁽⁵⁾, require that the view taken in *Vithalrao v. Ramrao* ⁽²⁾ should be reconsidered. The argument is that, as pointed in *Ganga Sahai's case* ⁽³⁾, "the preference of the whole blood...is confined to

⁽¹⁾ (1882) 6 Bom. 394.⁽³⁾ (1915) E.R. 42 I. A. 177.⁽²⁾ (1899) 24 Bom. 317.⁽⁴⁾ (1907) 6 C. L. J. 190.⁽⁵⁾ (1914) 28 M. L. J. 1.

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members of the same class, or, to use the language of the Judges of the High Court in *Suba Singh v. Sarafraz Kunwar* ⁽¹⁾, to 'Sapindas of the same degrees of descent from the common ancestor.' " If it had been necessary to examine this argument and to reconsider the decision in *Vithalrao's case* ⁽²⁾, I should have referred this appeal to a Division Court. As it is I feel no difficulty in deciding the point in favour of the full sister. I need hardly add that if *Ganga Sahaï's case* ⁽³⁾ is to be accepted as overruling *Vithalrao v. Ramrao* ⁽²⁾, as to which I express no opinion, I should not consider any independent examination of this point necessary at all, as in that event *Ganga Sahaï's case* ⁽³⁾ would settle it in favour of the full sisters. I have thought it necessary to examine the point with reference to the sister's position as heir in this Presidency, in consequence of the decisions in *Samat v. Amra* ⁽⁴⁾ and *Vithalrao v. Ramrao* ⁽²⁾, quite apart from *Ganga Sahaï's case* ⁽³⁾.

I, therefore, confirm the decree of the lower appellate Court and dismiss the appeal with costs.

Decree confirmed.

R. R.

⁽¹⁾ (1896) 19 All. 215.

⁽²⁾ (1899) 24 Bom. 317.

⁽³⁾ (1915) L. R. 42 I. A. 177.

⁽⁴⁾ (1882) 6 Bom. 394.