APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr Justice Shah.

DATTATRAYA BHIMRAO SABNIS (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* GANGABAI BHRATAR GANESHBHAT SHAMBHAT-NAVAR AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 3), RESPONDENTS*.

1921. *September* 16.

Hindu Law—Adoption—Competence to inherit property of adoptive mother's ancestors—Validity of adoption affecting devolution of estate inherited by widow as gotraja sapinda*—Succession—*Atma Bandhus*—Son's daughter's son—Sister's daughter—Sister's son's son—Determinative test of heirship—Propinquity.*

An adoptod son takes the place of a natural born son completely and is competent to inherit the property of his adoptive mother's ancestors.

Kali Komul Mozoomdar v. *Uma Shunkur Moitra*(1), relied on.

The ranking of *atma bandhus* discussed, and the relative positions of son's daughter's son, sister's daughter, and sister's son's son considered.

Per SHAH, J.:—"It may be that where the adoption has the effect of divesting any estate vested in a third person it might not be valid; but it does not follow that where it has no such effect the adoption is necessarily valid..... In the present case the daughter-in-law succeeded as a *gotraja sapinda* of the last male owner in the absence of any nearer heir. It is clear that she could not adopt to her husband so as to affect the devolution of the estate inherited by her as a *gotraja sapinda*."

"The only test to determine heirship [among *atma bandhus*] is propinquity to the propositus..... The difficulty arises in the application of the test of propinquity.....The test of religious efficacy or the right to offer oblations is regulated by somewhat different considerations, and it does not necessarily afford any safe guide or useful assistance in determining the nearness of blood relationship in the case of distant relations."

"I think, however, that in the case of *bandhus* equally removed from the propositus one in the direct line of descent should be preferred to one in a

* First Appeals Nos. 56 and 67 of 1919.

(1) (1883) L. R. 10 I. A. 138.

1921.

DATTATRAYA CHIMRAO v. GANGABAI.

collateral line. I do not desire to generalise beyond the strict requirements of this case, but the son's daughter's son can be preferred as being a nearer *bandhu* to the sister's daughter, though they are both equally removed from the propositus."

"As regards the ... question about ranking all female *bandhus* after the male *bandhus* it seems to me that the two decisions of this Court already referred to [sc. *Balkrishna* v. *Ramkrishna*(1) and *Girimallappa Channappa* v. *Kenchava*(2)] proceed upon a somewhat incomplete realization of the position of the female *bandhus* in Bombay Presidency, and do not give that effect to the test of propinquity which alone is determinative of the right to inherit in the case of distant blood relations.....I do not say that there is no preference of males over females at all in determining the rights of the *bandhus*. The extent of the preference is not easy to define....Speaking with some diffidence on a point of this difficulty, I think that, except in the two recent rulings, the preference has so far never been stated in this Presidency to go beyond this, that among *bandhus* of the same class and of the same degree of nearness to the propositus in the same branch the males are preferred to the females; for instance, in the case of sister's son and sister's daughter the son would be preferred to the daughter. But whether it is proper to go beyond that is a point which, in my opinion, requires consideration."

FIRST appeals against the decision of H. V. Chinmulgund, First Class Subordinate Judge at Dharwar.

The facts material for the purposes of this report are fully stated in the judgment of Shah J.

Nilkant Atmaram, for the appellant.

Coyajee with *R. A. Jahagirdar*, for respondent No. 1 in F. A. 56 of 1919.

Coyajee with *R. A. Jahagirdar*, for the appellant.

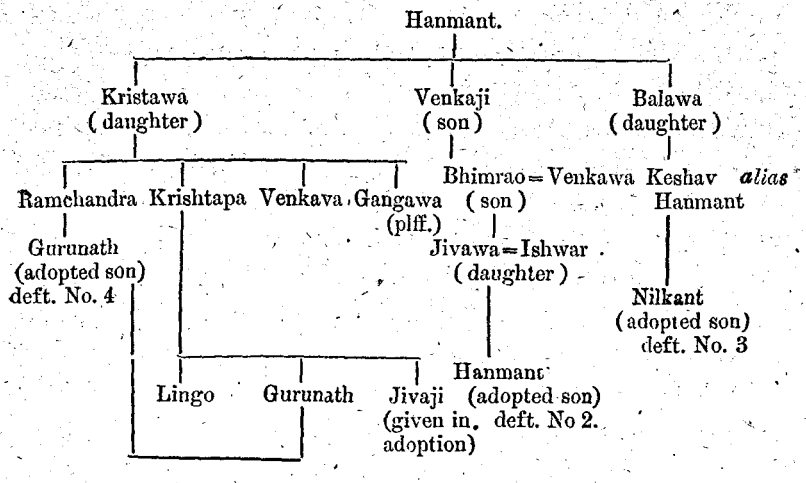
Nilkant Atmaram, for respondent No. 1.

A. G. Desai, for respondent No. 2 in F. A. 67 of 1919.

SHAH, J. :—Several questions of fact and law arise in these appeals.

(1) (1920) 45 Bom. 353. (2) (1920) 45 Bom. 768.

The following genealogical table indicates the relationship of the parties subject of course to their contentions as to certain facts :—



Gangawa, who claims to be the daughter of Kristawa, is the plaintiff in this case.

Defendant No. 1, Dattatraya, not shown in the above table, claims to have been adopted by Venkawa the widow of Bhimrao. Defendant No. 2 claims to be the adopted son of Jivawa, the daughter of Bhimrao.

Defendant No. 3 is the adopted grandson of Balawa.

Defendant No. 4 is the adopted son of Ramchandra son of Kristawa.

The last male owner of the property in suit was Venkaji. Bhimrao, son of Venkaji, predeceased Venkaji leaving a widow Venkawa, and a daughter Jivawa. He died in union with Venkaji. Venkaji died in 1880, and his widowed daughter-in-law Venkawa got the property; whether she got it as an heir or under the will said to have been made by Venkaji in her favour is a matter to be considered. Venkawa died on the 26th December 1907.

1921.

DATTATRAYA BHIMRAO v. GANGABAI.

The present suit was filed by Gangawa to recover possession of the property mentioned in the plaint with mesne profits. She claimed to be the heir of Venkaji as his sister's daughter. She claimed on the footing that Venkaji was the last male owner and that the inheritance was to be traced to him. She alleged that the adoption of defendant No. 1 did not take place in fact and that even if it took place it was invalid; that defendant No. 2 was not adopted by Jivawa; that he had no title to the property, which was said to have been wrongfully retained by him, and that defendants Nos. 3 and 4, who claimed to be entitled to the property, had no title to it.

Defendant No. 1 contended that he was validly adopted by Venkawa, that the plaintiff was not the daughter of Venkaji's sister Kristawa as alleged by her and that in any case defendants Nos. 2, 3 and 4 were nearer heirs to Venkaji than the plaintiff and that as he had settled with them he was entitled to retain the property as against the plaintiff. He further contended that certain property was the property of Venkawa and that at least so far as that property was concerned the plaintiff had no right to it.

Defendant No. 2 claimed to be the nearest heir of Venkaji as well as of Venkawa as the adopted son of Jivawa, and maintained that he was entitled to the whole property. He repudiated the settlement referred to by defendant No. 1.

Defendant No. 3 claimed to be a nearer heir as the sister's son's son than the plaintiff and repudiated the settlement relied upon by defendant No. 1.

Defendant No. 4 claimed to be a nearer heir than the plaintiff on the same ground as defendant No. 3 but admitted having relinquished his rights in favour of defendant No. 1 and conceded that the defendant No. 1 was the real owner of the property.

The trial Court held that the plaintiff was the daughter of Kristawa, sister of Venkaji, that the adoption of defendant No. 2 by Jivawa was proved, that the adoption of defendant No. 1 by Venkawa was neither proved nor valid, that the will of Venkaji set up by defendant No. 1 was not proved, that the plaintiff was a nearer heir than defendants Nos. 3 and 4 and that the plaintiff and defendant No. 2 were equally removed from the last male holder and that therefore they were equally entitled to the property. Accordingly a decree for partition was passed in favour of the plaintiff. As regards the land which was alleged to have been acquired by Venkawa on her own account, it was found that it was not shown to be her Stridhan, and it was held that in any case the property would go to the plaintiff and defendant No. 2.

Both the plaintiff and defendant No. 1 have preferred separate appeals to this Court: and practically all the points which were contested in the lower Court arise for our decision here.

It will be convenient to deal with the questions of fact first. [On a consideration of the evidence the learned Judge came to the following conclusions, agreeing with the lower Court :—

(*i*) that the plaintiff was the daughter of Venkaji's sister, Kristawa ;

(*ii*) that defendant No. 2 was the adopted son of Ishwar and Jiwava ;

(*iii*) that the will of Venkaji, relied on by defendant No. 1, was not proved, and that Venkawa must be taken to have inherited the estate of her father-in-law, according to Hindu law, as the widow of the nearest *gotraja sapinda* ;

1921.

DATTATRAYA BHIMRAO v. GANGABAI.

(*iv*) that the adoption of defendant No. 1 by Venkawa was not proved.

and thereafter proceeded :—]

Strictly speaking the question of the validity of the adoption of defendant No. 1 does not arise. But in view of the argument on the question it seems to me to be desirable to decide that question. And in any case its invalidity if established could afford an additional ground for ignoring the adoption. The will of Venkaji not having been proved, no question of his consent to an adoption by Venkawa could arise, the only consent suggested being that contained in the will.

According to the decision of this Court in *Lakshmibai* v. *Vishnu Vasudev*[1] the consent of the father-in-law would be operative only during his life-time. So the consent such as is contained in the will, even if proved, would not avail defendant No. 1.

It is urged, however, that Venkawa by adopting defendant No. 1 did not divest any estate vested in a third person, that the adoption had only the effect of divesting the estate vested in her, and that on that ground the adoption is valid. According to the decision of this Court that is not a conclusive test of the power to adopt. It may be that where the adoption has the effect of divesting any estate vested in a third person it might not be valid: but it does not follow that where it has no such effect the adoption is necessarily valid. That view has been accepted in *Ramkrishna* v. *Shamrao*[2]. The *ratio decidendi* of this case has been approved by the Privy Council in *Madana Mohana Deo* v. *Purushothama*[3]. It has been applied by this Court in *Datto Govind* v. *Pandurang Vinayak*[4], specifically to the case of a widow succeeding as a *gotraja sapinda* of the last male owner under the rule

(1) (1905) 29 Bom. 410.
(2) (1902) 26 Bom. 526 (F. B.)
(3) (1918) L. R. 45 I. A. 156.
(4) (1908) 32 Bom. 499.

established by *Lallubhai Bapubhai* v. *Mankuvarbai*[1] and approved by the Privy Council in *Lulloobhoy* v. *Cassibai*[2] in consequence of the absence of nearer heirs. In the present case the daughter-in-law succeeded as a *gotraja sapinda* of the last male owner in the absence of any nearer heir (see *Vithaldas Manickdas* v. *Jeshubai*[3]). It is clear that Venkawa could not adopt to her husband so as to affect the devolution of the estate inherited by her as a *gotraja sapinda*.

I may add that in the argument it has not been suggested that Venkawa could have adopted to her deceased husband during her father-in-law's life-time without his consent and that her power to adopt remained unaffected even after her father-in-law's death in spite of her having inherited the estate from her father-in-law: and in view of the decisions in *Ramji* v. *Ghamau*[4] and *Vithoba* v. *Bapu*[5] such a suggestion could not be made. The recent decision of the Privy Council in *Yadao* v. *Namdeo*[6] was not referred to in the argument, and its effect upon the view accepted by the Full Bench in *Ramji* v. *Ghamau*[4] may require to be considered hereafter. In the present case, however, the daughter-in-law inherited the property of her father-in-law and the question of her power to adopt thereafter stands on a different footing. The principle underlying the rulings in *Ramkrishna* v. *Shamrao*[7] and *Datto Govind* v. *Pandurang Vinayak*[8] is not in any way affected by the observations in *Yadao* v. *Namdeo*[6]. I think, therefore, that the adoption of defendant No. 1 by Venkawa would not be valid.

(1) (1876) 2 Bom. 388.
(2) (1880) L. R. 7 I. A. 212.
(3) (1879) 4 Bom. 219.
(4) (1879) 6 Bom. 498 F. B.
(5) (1890) 15 Bom. 110.
(6) (1921) L. R. 48 I. A. 513.
(7) (1902) 26 Bom. 526.
(8) (1906) 32 Bom. 499.

1921.

DATTATRAYA BHIMRAO v. GANGABAI.

It follows from these findings that defendant No. 1 has no title to the property in his own right.

It remains to consider the rights of the plaintiff, the defendant No. 2 and defendants Nos. 3 and 4 to this property. I may mention here that we are not concerned in this suit with the effect of the settlement said to have been effected by defendant No. 1 with defendants Nos. 3 and 4 and with defendant No. 2. Their rights *inter se* need not be considered here.

All these relations are undoubtedly *bandhus*: they are all within the limits specified in the Mitakshara beyond which the blood relationship cannot exist. A translation of the relevant passage is given in *Ramchandra* v. *Vinayak*[1]. They are all *atma bandhus*. None of them is specifically mentioned in the Mitakshara or the Mayukha: and the only test to determine the heirship is propinquity to the propositus. This is clear from the Mitakshara (see Mitakshara, ch. II, Sec. VI—Stokes' Hindu Law Books, pp. 448 and 449). Whatever doubt there may have been at one time it is now accepted that the list of *bandhus* given in the text is merely illustrative and not exhaustive; nor does the list necessarily indicate anything more than this, that the *atma bandhus* are to be preferred to the *pitri bandhus* and that the *pitri bandhus* are to be preferred to the *matri bandhus*. It has been held by this Court in *Mohandas* v. *Krishnabai*[2] and *Parot Bapalal Sevakram* v. *Mehta Harilal Surajram*[3] that propinquity is practically the sole test, and indeed in the first case the Court preferred an obviously nearer *atma bandhu*, not mentioned in the Mitakshara, to an *atma bandhu* specifically mentioned therein. The recent judgments of the Privy Council in *Adit Narayan Singh* v. *Mahabir Prasad Tiwari*[4] and *Vedachela Mudaliar*

(1) (1914) L. R. 41 I. A. 290.
(2) (1881) 5 Bom. 597.
(3) (1894) 19 Bom. 631.
(4) (1921) L. R. 48 I. A. 86.

v. *Subramania Mudliar*[1] (not yet reported) place this point beyond controversy. The difficulty arises in the application of the test of propinquity. I may also add here that the test of religious efficacy or the right to offer oblations is regulated by somewhat different considerations, and it does not necessarily afford any safe guide or useful assistance in determining the nearness of blood relationship in the case of distant relations such as we have in the present case.

It is strictly necessary to apply the test of propinquity, as best we can to the specific relationships we have in this case. Before dealing with this question, it will be convenient to deal with two general arguments that have been advanced in this case. It is contended on behalf of the plaintiff that defendant No. 2 is an adopted son, and cannot take the place of a natural son, so far as his right to inherit the property of his adoptive mother's ancestors is concerned, as it depends upon the blood relationship, and that the fiction by which the adopted son takes his position as a natural son in the family of his adoptive father has not been carried so far in this Presidency in any of the reported cases and ought not to be applied to that extent. The second argument urged on behalf of defendant No. 1 is that the plaintiff's suit must fail on the simple ground that as she is a female she is postponed to all male *bandhus* however remote, and the recent decisions of this Court in *Balkrishna* v. *Ramkrishna*[2] and *Girimallappa Channappa* v *Kenchava*[3] have been relied upon in support of this argument.

As regards the first point I do not think that the argument can be accepted. In view of the decisions in *Uma Sunker Moitra* v. *Kali Komul Mozumdar*[4] approved

(1) *Subsequently reported* (1921) L.R. 48 I. A. 349.
(2) (1920) 45 Bom. 353.
(3) (1920) 45 Bom. 768.
(4) (1880) 6 Cal. 256.

1921.

DATTATRAYA-BHIMRAO v. GANGABAI.

by the Privy Council in *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra*[1], it is hardly open to the plaintiff to rely upon the earlier decision of the Calcutta High Court in *Morun Moee* v. *Bejoy*[2] or of the Madras High Court in *Chinnàramakristna Ayyar* v. *Minatchi Ammal*[3]. It may be, as pointed out by Mr. Coyajee, that the point has not been decided by this Court or rather that there is no reported decision on the point; but the observations in *Nagindas Bhugwandas* v. *Bachoo Hurkissondas*[4], wherein the relevant passage from the Full Bench decision of the High Court at Calcutta is quoted, are sufficient to render the argument untenable. The criticism of this view in Ghose's Hindu Law, Vol. I, p. 655 (3rd Edn.), which purports to be based upon certain texts, has been relied upon by Mr. Coyajee. That criticism no doubt deserves to be considered: but it is hardly an open question now at least so far as this Court is concerned. At one stage of the argument I thought that there might be some force in the argument: but having regard to the clear decisions of the Privy Council to which I have referred, I do not think that it is permissible to us to treat it as an arguable point.

As regards the other question about ranking all female *bandhus* after the male *bandhus* it seems to me that the two decisions of this Court already referred to proceed upon a somewhat incomplete realisation of the position of the female *bandhus* in this Presidency, and do not give that effect to the test of propinquity which alone is to be determinative of the right to inherit in the case of distant blood relations. In Madras no doubt all female *bandhus* are postponed in favour of the male *bandhus*. But in this Presidency the position of the females has received a somewhat different treatment. For instance in the case of the

(1) (1883) L. R. 10 I. A. 138.
(2) (1863) W. R. F. B. 121.
(3) (1873) 7 Mad. H. C. 245.
(4) (1915) L. R. 43 I. A. 56 at p. 68.

widows of *sagotra sapindas* in this Presidency their right is recognised to an extent to which it is not recognised in any other part of India, governed by the Mitakshara law. That, however, is the case of *sagotra sapindas*; and may not be strictly relevant to the present point. The sister is given a place in this Presidency which has not been assigned to her in Madras or elsewhere: no doubt this is due to a large extent to the fact that she is expressly mentioned in the Vyavahara Mayukha and even though she is not mentioned in the Mitakshara she has been practically assigned by the decisions of this Court the same place after the grandmother as in the Vyavahara Mayukha. But the fact remains that a female in that position occupies such a high place among the heirs. Then the decision in *Saguna* v. *Sadashiv*[1] implies a negation of the general proposition that the female *bandhus* must come in after the male *bandhus*. The questions and answers in West and Buhler's Digest of Hindu Law, pp. 465, 466 (4th Edn.), relating to brother's daughter and sister's daughter do not support the general statement that the female *bandhus* can come in only after all male *bandhus* without any regard to the nearness of their relationship. In short that view appears to me to be opposed to a fair application of the doctrine of propinquity which has been so far applied in this Presidency without giving any such general preference to the male *bandhus* over the female *bandhus*. I do not say that there is no preference of males over the females at all in determining the rights of the *bandhus*. The extent of the preference is not easy to define and has not been defined. Speaking with some diffidence on a point of this difficulty, I think that except in the two recent rulings, the preference has so far never been stated in this Presidency to go beyond this, that among

(1) (1902) 26 Bom. 710.

1921.

DATTATRAYA BHIMRAO v. GANGABAI.

bandhus of the same class, and of the same degree of nearness to the propositus in the same branch the males are preferred to females; for instance in the case of sister's son and sister's daughter, the son would be preferred to the daughter. But whether it is proper to go beyond that is a point which, in my opinion, requires consideration. The basis of the rule enunciated in *Rajah Venkata Narasimha Appa Rao Bahadur* v. *Rajah Surenani Venkata Purushothama Jagannadha Gopala Row Bahadur*[1] may be found in *Lakshmanammal* v. *Tiruvengada*[2]. The view adopted in this decision has never been accepted in this Presidency as regards the relative position of the sister and her son. It is not necessary in this case to discuss the texts referred to in that case. The result of adopting this view about preferring the male *bandhus* to the female *bandhus* generally would be to postpone some of the nearest female *bandhus* in favour of very distant relations. Even the son's daughter, who would be so near to the propositus, would be relegated to a very subordinate and distant position among the *bandhus* if she is to be postponed to all males; in competition with her own son, she would be postponed. Of course, whether this state of law would be anomalous or not is a matter open to argument: but in this Presidency at any rate it would be considered anomalous. In *Mohandas* v. *Krishnabai*[3] Melvill J. observed as follows:—

"The plaintiff's mother, who is still alive, was a sister of Sunderlal's mother; and it may well be doubted whether the plaintiff would be entitled to succeed in preference to his own mother, through whom he claims."

This shows how this question has been looked at in this Presidency. No doubt if the rule as to giving preference to the male *bandhus* over female *bandhus* apart from any consideration of propinquity were adopted it would simplify matters considerably.

[1] (1908) 31 Mad. 321. [2] (1882) 5 Mad. 241.
[3] (1881) 5 Bom. 597 at p. 601.

But I am humbly of opinion that that would not be in accordance with the Hindu law as understood and administered in this Presidency.

Without deciding this question of general preference of the male *bandhus* over the female *bandhus* and without reference to it, we can determine the question as to who is the nearest heir among the *bandhus* in this case. As between the plaintiff and defendants Nos. 3 and 4, I am inclined to take the view that the plaintiff would be the preferential heir. The sister's daughter is nearer to the propositus than the sister's son's son. In West and Buhler's Hindu Law, in the questions and answers to which I have already referred, the opinion is expressed that a brother's daughter is to be preferred to the brother's daughter's son, and that the sister's daughter is nearer than sister's daughter's son. That, however, does not exactly meet the present case as the competition is with the sister's son's son. The case of the sister's son is mentioned in the same book at page 462. According to the opinion expressed there the sister's son comes after the sister but before the sister's daughter. It is based upon the old case of *Ichharam* v. *Prumanund*[1] and upon the fact that the sister's son is mentioned in the Nirnaya Sindhu. That leaves the question of the sister's son's son in relation to the sister's daughter open. If the sister's sons mentioned in the Nirnaya Sindhu can be interpreted as including the sister's son's son and not the sister's daughter, it may be said that the latter cannot be preferred to the former. But there is no justification for adopting such an interpretation. Applying the test of propinquity it would seem that the sister's daughter would be nearer than the sister's son's sons. I do not, however, decide this question as it is not necessary to do so.

[1] (1822) 2 Borr. 515.

1921.

DATTATRAYA BHIMRAO v. GANGABAI.

As between defendant No. 2 and defendants Nos. 3 and 4 the question presents no difficulty. The defendant No. 2 is nearer by one degree to the propositus and is in the line of descent. He is to be preferred to the defendants Nos. 3 and 4.

As between the plaintiff and defendant No. 2 the question is not easy. In order to appreciate the difficulty it is necessary to bear in mind not only the high position assigned to the sister as an heir in this Presidency but also the reasons for that view. In order to have a clear idea of those reasons the judgments in the following cases may be perused with advantage:—*Vinayak Anandrav* v. *Lakshmibai*[1], *Sakharam Sadashiv Adhikari* v. *Sitabai*[2], *Kesserbai* v. *Valab Raoji*[3], *Lakshmi* v. *Dada Nanaji*[4], *Mulji Pursholum* v. *Cursandas Natha*[5] and *Bhagwan* v. *Warubai*[6].

Apart from the references to the views expressed in the Commentary known as Balambhatti on the Mitakshara with which I shall deal separately as bearing on the point in question, it is clear that the position of the sister is largely due to the fact that the author of the Vyavahara Mayukha has assigned to her a special place, and the ground as stated by him when shorn of all technicalities is propinquity, as the texts of Manu and Brihaspati referred to by him go to show. (See Mandlik's Hindu Law, p. 81.) Under the Mitakshara though the sister is not mentioned by Vijnaneswara, practically the same position is assigned to her under the decisions of this Court. I may refer to the case of *Rudrapa* v. *Irava*[7], which, like the present case, came from the Dharwar District.

(1) (1861) 1 Bom. H. C. 117.
(2) (1879) 3 Bom. 353.
(3) (1879) 4 Bom. 188.
(4) (1879) 4 Bom. 210.
(5) (1900) 24 Bom. 563.
(6) (1908) 32 Bom. 300.
(7) (1903) 28 Bom. 82.

The sister's position being thus established it is clear that in this Presidency she would be preferred to a son's daughter. The son's daughter can come in only as a *bandhu* as the decisions in *Venilal* v. *Parjaram*[1] and *Mulji Prushotum* v. *Cursandas Natha*[2], already referred to on a different point, would show. I am not concerned with the merits of this position. But undoubtedly a sister is a preferential heir in relation to a son's daughter: and it may be argued that her issues should be preferred to the issues of the son's daughter. On the other hand, it may be urged that whatever the rights of the sister as against the son's daughter may be, the rights of these issues *inter se* should be determined solely with reference to their propinquity, that in the case of *bandhus* equally distant in degrees from the propositus those in the direct line of descent should be preferred to the *bandhus* among the collaterals in the ascending line, and that in the case of *bandhus* equally removed in degrees from the propositus a male may be preferred to a female. There is a third position which has been accepted by the lower Court, viz., that the propinquity must be determined merely with reference to the degrees by which the *bandhus* are removed from the propositus, and that as the sister's daughter and the son's daughter's son are equally distant in that way they should take the property equally. As regards this last view no doubt it is a recognised way of determining the nearness of relationship to see how far each is removed from the propositus, and in the absence of any other consideration justifying a differential treatment that would be the only means of determining it.

After a careful consideration of the position of the sister I do not think that the fact that she is preferred

[1] (1894) 20 Bom. 173. [2] (1900) 24 Bom. 563.

1921.

DATTATRAYA BHIMRAO v. GANGABAI.

to the son's daughter as an heir affords any ground for preferring the sister's daughter to the son's daughter's son, though at one time I thought that, other things being equal, perhaps this might afford a ground for preference. But it seems to me that the position of the *bandhus* with whom we are concerned must be considered with reference to the propositus without any regard to the relative rights of their respective mothers. I think, however, that in the case of *bandhus* equally removed from the propositus one in the direct line of descent should be preferred to one in a collateral line. I do not desire to generalise beyond the strict requirements of this case, but the son's daughter's son can be preferred as being a nearer *bandhu* to the sister's daughter, though they are both equally removed from the propositus. It is rather strange that there should be no precedent to guide us on a point of this character: at any rate I have not been able to find any, and none is cited to us. But I am satisfied that it affords a safe basis for differentiation between these *bandhus* as to their propinquity.

It is, therefore, not necessary to consider the question whether defendant No. 2 can be preferred to the plaintiff on the ground that he is a male and both being *atma bandhus* equally removed from the propositus. I think that out of all these *bandhus* the defendant No. 2 is the preferential heir.

I may add with reference to the Nirnaya Sindhu that so far as I have been able to ascertain none of the relations that we are concerned with is specifically mentioned as having any preferential right *inter se* to perform the *shraddhas*. The passage relating to the sister's son is to be found in Nirnaya Sindhu, p. 273 (Nirnaya Sagar Press 2nd Edition). I have already stated my opinion that the expression 'sister's son,'

when read in relation to the context, cannot be understood as including the sister's son's sons: while speaking of the Nirnaya Sindhu it may be mentioned that the test of religious efficacy cannot help us in the case of such distant relations as we have in the present case.

As regards the Balambhatti, no doubt if the interpretation put by Balambhatta upon the word "Bhratarah" in the well-known text of Yajnavalkya were accepted the sister's daughter would come in not only before all *bandhus* but even before all the *gotraja sapindas*. A translation of the relevant passage has been given at page 306 and the list of heirs according to the scheme adopted in the Balambhatti is stated at page 308 of the report in *Bhagwan* v. *Warubai*[1]. Though Westropp C. J. laid stress upon the Balambhatti as supporting the case for the sister in *Sakharam Sadashiv Adhikari* v. *Sitabai*[2], Jenkins C. J. in *Mulji Purshotum* v. *Cursandas Natha*[3] and Chandavarkar J. in *Bhagwan* v. *Warubai*[1] definitely rejected it as affording a basis for the sister's position in the list of specifically mentioned heirs: and that view was followed in *Hari Annaji* v. *Vasudev Janardan*[4].

Apart from these decisions there is another difficulty in following the scheme in the Balambhatti logically. It would not be easy to determine what place would be assigned according to the Balambhatti to the son's daughter's son. For instance, in dealing with the position of the daughter's son, as stated in the Mitakshara, the author has interpreted the word *dauhitra* (daughter's son) as including *dauhitri* (daughter's daughter) also; (see Gharpure's edition of Balambhatti, Vyavaharadhyaya, page 207) and he has given

(1) (1908) 32 Bom. 300.
(2) (1879) 3 Bom. 353.
(3) (1900) 24 Bom. 563.
(4) (1914) 38 Bom. 438.

1921.

DATTATRAYA BHIMRAO v. GANGABAI.

her a higher place than the sister and her issues. It may be said that the same author would logically assign a higher place to the son's daughter and probably to her son. I may state that I have not been able to find in the Balambhatti any express reference to the son's daughter, or to the son's daughter's son in connection with the relative positions of different heirs. So it is possible to argue that the sister's daughter occupies a higher position than the son's daughter's son according to the Balambhatti. The true view about this commentary on the particular point under consideration appears to me to be that the interpretation of the word *bhratarah* disturbs the settled series of heirs under the Mitakshara and it is difficult to base any inference upon that view unless we are prepared to accept the scheme in its entirety. Though this commentary is useful as aiding the interpretation of the Mitakshara the views propounded therein cannot be accepted without due caution and examination. I do not think that the position assigned to the sister's daughter in the Balambhatti can be properly accepted.

In the result I would set aside the decree of the lower Court and dismiss the plaintiff's suit.

Having regard, however, to the various contentions raised by the parties and the findings thereon and to all the circumstances, I would order each party to bear his or her own costs throughout. The plaintiff to pay to the Government the amount which she would have been required to pay as Court fees in the lower Court if she had not been allowed to sue as a pauper.

MACLEOD, C. J. :—I agree with the conclusions of my learned brother, but I should like to add a few remarks of my own. Once the questions of fact have been decided there remains the contest between rival

bandhus. It was first contended that the 2nd defendant could not inherit as a *bandhu* to the relations of his adoptive mother, but apart from the decisions in *Uma Sunker Moitro* v. *Kali Komul Mozundar*[1] and *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra*[2] it would seem strange if an adopted son having left his natural family were to be considered as the son of his adoptive father only and not of his adoptive mother. As the 2nd defendant then must be recognized as the son's daughter's son of Venkaji, it follows that the defendant No. 3 as sister's grandson is one more degree remote, and the interesting question whether he would be preferred to the sister's daughter need not be decided. There remains then the plaintiff, sister's daughter, and defendant No. 2, son's daughter's son, both *atma bandhus* three degrees removed from Venkaji. The learned Judge has decreed that they should take the suit property equally. Though some may think that this Court in deciding that all male *bandhus* should be preferred to female *bandhus* without regard to propinquity has gone too far, still there is no authority for the proposition that *bandhus* of different sex but of equal propinquity should take equally. It may be even noted that amongst those relations who have been held to be *bandhus* in decided cases as detailed in Mr. Gharpure's book on Hindu Law at p. 315 there is only one female, the father's sister who, it was held in *Saguna* v. *Sadashiv*[3], should be preferred to the mother's brother, and that decision must now be considered as virtually overruled by the decision of the Privy Council in *Vedachela Mudaliar* v. *Subramania Mudaliar*[4] (not yet reported), as their Lordships have expressed their disapproval of the preference given by the decisions of the Madras High

[1] (1880) 6 Cal. 256.
[2] (1883) L. R. 10 I. A. 138.
[3] (1902) 26 Bom. 710.
[4] *Subsequently reported* (1921) L. R. 48 I. A. 349.

1921.

DATTATRAYA BHIMRAO v. GANGABAI.

Court to *bandhus* on the father's side to *bandhus* on the mother's side. I think, therefore, the 2nd defendant should be preferred to the plaintiff. But apart from the question of sex there is another very interesting question which has not been considered, and which does not seem to have arisen in any reported case. The direct descendants of the propositus through daughters though they are *bandhus* are not cognates. Even if paternal cognates are not to be preferred to maternal cognates it might plausibly be argued that direct descendants should be preferred to both. I for one must regret that the principles with regard to the inheritance of *bandhus* cannot be laid down more definitely, instead of it being left to their being discovered by a process of exhaustion as occasion arises for a decision between rival claimants.

Decree set aside.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1921.

September 30.

GOTURAM RADHAKISON (ORIGINAL PLAINTIFF), APPELLANT *v.* BARKU WALLAD DODHU (ORIGINAL DEFENDANT), RESPONDENT*.

Civil Procedure Code (Act V of 1908), Order XXIII, Rule 3—Compromise—One of the parties an agriculturist—Admission of the whole of the claim—Court's power to go behind the transaction—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 12.

Where a compromise is entered into between parties one of whom is an agriculturist and the whole of the claim is admitted by him, the application of section 12 of the Dekkhan Agriculturists' Relief Act is not necessarily excluded, and the Court can go behind the transaction, even though an application is made to record an agreement under Orderr XXIII, Rule 3, Civil Procedure Code, 1908.

* Second Appeal No. 215 of 1921.