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pointed out at p. 479 that the real difficulty seems to be that, in construing the words of art. 62 of the Indian Limitation Act, the Courts in some of the cases have apparently considered that that article refers to all cases where an action for money had and received would lie at common law in England, and then the learned Judges point out that the common law form of action for money had and received grew out of the circumstance that at common law in England an action *in personam* is maintainable only on contract or on tort. The learned Judges held that the plaintiffs in that case were equitably entitled to the money as the profits of the lands, which one of the owners of the lands withdrew honestly believing that he was entitled to it, and therefore according to the learned Judges the claim was an equitable claim against the defendants. In my opinion, here too, although defendant No. 1 did not receive the money for the use of the plaintiff and defendant No. 2 and although the State of Sangli did not pay the money to defendant No. 1 for the use of the plaintiff and defendant No. 2, as soon as the plaintiff establishes that he has a share in equity he has a claim to it, and if it is an equitable claim and not a contractual claim, then the article that would apply is art. 120 and not art. 62. On the whole, in my opinion, the learned Judge below was right in the view that he took that art. 120 applied and that the suit was within time.

The result is that the application fails. Rule discharged with costs.

Rule discharged.

K. B. S.

APPELLATE CIVIL

Before Mr. Justice Rajadhyaksha and Mr. Justice Chainani.

SHIVPRASAD DEVIDAS AGRAWAL (HEIR OF ORIGINAL DEFENDANT), APPELLANT *v.* JANKIBAI JUGALKISHORE AGRAWAL (ORIGINAL PLAINTIFF), RESPONDENT.*

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Hindu law—Succession—Contest to father's property between two married daughters, both in good financial circumstances—Whether the daughter who is comparatively richer excluded.

* First Appeal No. 173 of 1951.

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Where the contest as to succession to the father's estate is between two married daughters, both of whom are possessed of wealth and in good financial circumstances, both share equally, although one of them may be comparatively richer than the other.

According to the texts, it is only the unendowed or the *nirdhana* daughter who has a prior right of inheritance and can succeed to the father's estate to the exclusion of her sisters. When there is no such daughter, that is, one who can be called *apratishthita* or *nirdhana*, then the succession devolves on the endowed or enriched daughters in equal shares.

Vedachela v. *Subramania*,[1] *Bakubhai* v. *Manchhabai*,[2] *Poli, widow* v. *Narotam Bapu and Lala Keshavshet*[3] *Shrimati Uma Devi* v. *Gokoolanand Das Mahapatra*,[4] *Audh Kumari* v. *Chandra Dai*,[5] *Danno* v. *Darbo*,[6] *Totawa* v. *Basawa*,[7] *Manki Kunwar* v. *Kundan Kunwar*,[8] *Parvatibai* v. *Maruti*,[9] and *Savitribai* v. *Sidu*,[10] referred to.

FIRST APPEAL from the decision of R. M. Kulkarni, Civil Judge, S. D. at Dhulia.

One Ganpatlal died in 1929 leaving a widow Devakibai and two married daughters, Jankibai (the plaintiff) and Sitabai (the defendant). Ganpatlal left behind him a large estate consisting of lands, houses and moveable properties. Devakibai died in 1943. On October 29, 1946, Jankibai filed the present suit against Sitabai in which she prayed, *inter alia*, for a declaration that she was the sole owner of the properties left behind by Ganpatlal.

The suit was resisted by the defendant, the principal contention being that the plaintiff was also well-placed in life, that the plaintiff was not poor or indigent and that she (viz. the plaintiff) was not the sole heir of Ganpatlal. Pending the suit, the defendant died and her legal representative was brought on the record.

The trial Court held that compared to the defendant the plaintiff was less well settled in life and that consequently she was the sole heir of Ganpatlal.

The defendant's legal representative preferred an appeal to the High Court.

R. B. Kotwal, for the appellant.

V. H. Kamat, for the respondent.

(1) (1921) L. R. 48, I. A. 349.
(2) (1864) 2 B. H. C. R. 5.
(3) (1869) 6 B. H. C. R. A.C. J. 183.
(4) (1878) L. R. 5 I. A. 40.
(5) (1879) 2 All. 561.
(6) (1882) 4 All. 243.
(7) (1889) 23 Bom. 229.
(8) (1925) 47 All. 403.
(9) (1944) 46 Bom. L. R. 704.
(10) [1945] Nag. 871.

CHAINANI J. The dispute in this appeal relates to properties, which originally belonged to one Ganpatlal Parasharam of Shirpur in the West Khandesh District. Ganpatlal died in 1929 leaving behind two married daughters, the plaintiff Jankibai and the original defendant Sitabai and a widow Devakibai. Ganpatlal left behind him a large estate, consisting of lands and houses valued in the plaint at Rs. 1,00,000 and movable properties worth about Rs. 8,400. Devakibai died on October 29, 1943. The movable properties of Ganpatlal were then divided equally between Jankibai and Sitabai. They also made applications to the revenue authorities stating that they were the joint heirs of their father Ganpatlal and that the names of both of them should be entered in the revenue records. The lands were accordingly entered in the names of both of them in the revenue records. It appears that all the houses and the lands, except a hall in a bungalow at Shirpur, were in the possession of tenants. The defendant looked after the properties and realised the rents for some time. According to the plaintiff Jankibai, all the tenants attorned to her after the present suit was filed. Sitabai's husband is very much more wealthy than Jankibai's husband. Some time in 1945 the plaintiff was advised that as she was not as well off as her sister Sitabai, she was entitled to succeed to all the properties left behind by Ganpatlal to the exclusion of Sitabai. In October 1946, the plaintiff gave a notice to the defendant in which she claimed to be the sole heir of Ganpatlal. She demanded an account of the income realised by the defendant and the return of the movables, which had been given to the defendant after the death of Devakibai. The defendant replied to this notice and denied that the plaintiff was the only heir of Ganpatlal. The plaintiff, then filed the present suit, in which she prayed for a declaration that she was the sole owner of the properties left behind by Ganpatlal and that the defendant had no right to them. She asked for the return of the moveables, which had been handed over to the defendant, or for Rs. 4,200 as their value. She also prayed that the defendant should be directed to render an account of the income of the suit properties received by her during the time she was in management thereof. By an amendment made in the plaint subsequently, the plaintiff asked for possession of the hall of the bungalow at Shirpur, which was in the possession of the defendant. This suit was resisted by the defendant, who raised various contentions. The principal contention raised by her, with which we are concerned in this

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appeal, was that the plaintiff was also well placed in life, that she was not poor or indigent and that she was therefore not the sole heir of Ganpatlal. The original defendant, Sitabai, the sister of the plaintiff, died during the pendency of the suit. Her husband was then brought on record as her legal representative. The learned trial Judge held that as compared to the defendant, the plaintiff was less well placed in life and that consequently she was the sole heir of Ganpatlal. He accordingly granted the plaintiff a declaration that she was the sole owner of the estate left by her deceased father Ganpatlal. He also directed the defendant to hand over to the plaintiff the possession of the hall of the bungalow at Shirpur and the moveables received by her or their value Rs. 4,200. The defendant was also directed to render an account of all the expenses incurred over and the income derived from the immoveable properties from the date of the death of Devakibai up to the dates on which the tenants had attorned to the plaintiff. The plaintiff was also awarded her costs of the suit. Against these orders passed by the trial Judge, the defendant has come in appeal.

The plaintiff's husband has stated in his evidence that in 1943 he owned lands at Chopda, Biroda, Shahapur Bori and other places, assessed at Rs. 200 to Rs. 250 from which he got an income of about Rs. 600 per year. According to him, their value was about Rs. 25,000 to Rs. 30,000. He also possessed two houses, which he valued at Rs. 5,000 to Rs. 6,000 and ornaments worth about Rs. 8,000 to Rs. 10,000. He has also stated that he was then working as an agent of the Dhulia Cotton Mills and earned a commission of about Rs. 4,500. It is, therefore, clear that at the time when the plaintiff's mother died and when succession opened to the estate of her father Ganpatlal, the plaintiff was well settled in life and could perhaps also be called rich. The evidence shows that Sitabai's husband is very much more rich than the plaintiff's husband. During the course of arguments in the trial Court, the defendant's advocate conceded that his client was 8 times richer than the plaintiff's husband. According to the plaintiff, that is an underestimate of the defendant's wealth. There can, however, be no doubt that there is a marked difference between the wealth of the plaintiff and that of the defendant.

The question, therefore, arises whether in these circumstances the plaintiff is entitled to succeed to the whole of the estate of her father Ganpatlal to the exclusion of her sister. The rele-

vant text of Hindu law is contained in paragraph 11 in s. III in Chapter I of the Mitakshara, which is as follows:—

"On the subject of (daughters) a special rule is propounded by Gautama: 'A woman's property goes to her daughters, unmarried, or unprovided.' His meaning is this: if there be competition of married and unmarried daughters, the woman's separate property belongs to such of them as are unmarried; or, among the married, if there be competition of endowed and unendowed daughters, it belongs exclusively to such as are unendowed;*and this term signifies 'destitute of wealth'*". (*See* page 384 of Whitley Stokes' Translation of Mitakshara, 1865 Edition).

The original Sanskrit words used in the Mitakshara for the words *endowed* and *unendowed* or unprovided are *pratishthita* and *apratishthita*. In Balambhatta's commentary, these words have been translated as *sadhan* (with wealth) and *nirdhan* (without wealth). Stokes in his annotations on the above text has observed, "Endowed signifies supplied with wealth, unendowed, unfurnished with property". This text is equally applicable to inheritance to the property left by a father. This will be clear from paragraphs 1, 3 and 4 in s. II in Chapter II of the Mitakshara, which are as follows (page 440 in the above volume):—

1. After a wife a daughter inherits: whatever be her tribe.	"1. On failure of her, the daughters inherit. They are named in the plural number (Sections 1 and 2) to suggest the equal or unequal participation of daughters alike or dissimilar by class.
3. First the unmarried daughter inherits.	3. If there be competition between a married and an unmarried daughter, the unmarried one takes the succession under the specific provisions of the text above cited (in default of her, let the daughter inherit, if unmarried).
4. Next a married but unprovided one.	4. If the competition be between an unprovided and an enriched daughter, the unprovided one inherits; but, on failure of such, the enriched one succeeds; for the text of Gautama is equally applicable to the paternal, as to the maternal, estate. 'A woman's separate property goes to her daughters, unmarried and unprovided'."
And lastly an enriched one.	

In Viramitrodaya, the position has been stated as follows:—

"Amongst the daughters also, first let the unmarried daughters take the paternal property; in their default, the married daughters; amongst these also, first the unprovided ones, and on failure of them the provided ones; all in the same predicament, however, take the property dividing it equally. This rule is settled. Accordingly Katyayana says,—'The wife who is not unchaste, gets the wealth of the husband; in her default, the daughter if she be then unmarried.' Gautama ordains,—"Woman's

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property goes to daughters unmarried and unprovided.'—'*Unprovided*' means indigent. Although 'Woman's property' is here mentioned, still the reason being the same, the text is applicable to paternal property also. . . . Thus in default of the wife, when there are daughters provided as well as unprovided, married as well as maiden, then first, the maiden daughter alone succeeds, for the father was bound to maintain her: in her default, a married daughter who is unprovided (succeeds), for though the husband is bound to maintain her, still she is unprovided by reason of the husband's inability to maintain her; on failure of her even a provided daughter qualified by the attributes 'equal', etc., takes the property agreeably to the propinquity previously mentioned".

(*See* pages 181-192 in Law of Inheritance as in the Viramitrodaya translated by Shastri, 1879 Edition).

In *Vedachela Mudaliar* v. *Subramania Mudaliar*[1] the Privy Council has observed (p. 362):

"In Western India Viramitrodaya holds a high position and it supplements many gaps and omissions in the earlier commentaries, and illustrates and elucidates with logical preciseness the meaning of doubtful prescription."

According to this commentary, the reason why an unprovided married daughter is preferred to the other married daughters is that her husband is unable to maintain her. Her need is the greatest and evidently therefore it is laid down that the father's property should first go to her. One daughter cannot, however, be preferred to the other on this ground, when both the daughters are endowed or provided for or to use the words of Stokes, supplied with wealth. Under the text, the question of preference arises only when one daughter is unendowed or unprovided (*nirdhan*), while the other daughter is endowed or provided (*sadhan*). The expression *apratishthita* translated as unprovided or unendowed has been interpreted in the Mitakshara as signifying destitute of wealth and in Viramitrodaya as indigent. According to the text, therefore, the rule about one married daughter excluding the other married daughter will come into operation only if one daughter is indigent or poor and needy, while the other one is possessed of wealth. It will not apply where both the daughters are financially well off and well placed in life.

This being the position according to the texts, I will proceed to consider whether a different view has been taken in any decided cases. In *Bakubai* v. *Manchhabai*[2] the contest was

[1] (1921) L. R. 48 I. A. 349 [2] (1864) 2 B. H. C. R. 5.

between two sisters, Bakubai and Manchhabai. Their Lordships observed that as between the married daughters (p.*10):

"...The test of sonship is not applicable on this side of India, and must, therefore, be disregarded.

and that (p. 10):

"...succession to their father's estate must be regulated by their comparative endowment (sadhan) or non-endowment (nirdhan).

The following issue was then framed and sent to the lower Court for trial:

"Whether the pecuniary circumstances of Bakubai, widow of Ramdas, and Manchhabhai, wife of Motilal, are so far different, as to give Bakubai a prior right of inheritance under Hindu law as compared with Manchhabai, on the ground that she is an unprovided (nirdhan) daughter ?"

Bakubai could, therefore, get a prior right of inheritance to the estate of her father, only if it was found that she was unprovided (*nirdhan*) daughter. According to this decision, therefore, only an unprovided (*nirdhan*) daughter can exclude her sisters from inheritance to their father's estate.

Bakubai v. *Manchhabai* was followed in *Poli Widow* v. *Narotam Bapu and Lala Keshavshet*.[1] In that case the dispute was between the plaintiff Poli and the defendants who claimed the property through the plaintiff's sister. The lower appellate Court held that the plaintiff's sister, who had a son, had a preferential claim to succeed as heir to her father over the plaintiff, who was a childless widow. It was held that "the circumstance of having male issue does not, on this side of India, determine the right to inherit and that comparative poverty is the only criterion for settling the claims of daughters among themselves" and that "an unendowed (nirdhan) daughter has preference over an endowed (sadhan) daughter". The decision of the lower Court was, therefore, set aside and the suit was remanded for retrial. According to this decision, therefore, the comparative poverty of the two daughters and not their comparative wealth or riches is the criterion for determining whether one daughter can exclude the other from inheritance to the property of their father. In other words, where both the daughters are poor, the one who is poorer than the other will be the preferential heir. The question how the property left by the father should be divided when both the daughters are *sadhan* or possessed of wealth and when neither of them can be

[1] (1839) 6 B. H. C. R. A. C. J. 183.

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said to be *nirdhan* or poor or unprovided for, was not considered in either of these cases.

In *Srimati Uma Deyi* v. *Gokoolanand Das Mahapatra*,[1] at page 46 their Lordships of the Privy Council quoted the following passage from Sir William Macnaghten's Principles and Precedents of Hindu Law as being the correct proposition of law:

> "...But there is a difference in the law as it obtains in *Benares* on this point, that school holding that a maiden is in the first instance entitled to the property; failing her, that the succession devolves on the married daughters who are *indigent*, to the exclusion of the wealthy daughters; that in default of indigent daughters, the wealthy daughters are competent to inherit, *but no preference is given to a daughter who has, or is likely to have, male issue, over a daughter who is barren or a childless widow.*"

According to this statement of law, only the indigent married daughter can exclude the other married daughters from inheritance to the property of their father.

Bakubai v. *Manchhabai* and *Poli* v. *Narotam* were followed by the Allahabad High Court in *Audh Kumari* v. *Chandra Dai*[2] in which it was held that comparative poverty is the only creterion for settling the claims of daughters on their father's estate. In that case the suit was brought by two out of the four daughters claiming each a moiety of their father's estate to the exclusion of the two remaining daughters. It was found that the defendants were, as compared with their sisters, the plaintiffs, poor and needy. The plaintiffs' suit was therefore dismissed. The same view was taken in *Danno* v. *Darbo*,[3] in which it was observed that the expression "unprovided for", which was used in the Mitakshara in contradistinction to the term "enriched", must be construed in the sense of "indigent" as opposed to "possessed of means". In that case the contest was between two sisters, the plaintiff who was well off and possessed of property and the defendant who was in poor circumstances. The plaintiff contended that she was entitled to a share in her father's estate as no provision had been made for her by her father. It was held that the fact that no property had been given to the plaintiff by her father was immaterial and that as the defendant was poor and indigent, the plaintiff was not entitled to succeed. In these cases also the daughter, who was held

[1] (1878) L R. 5 I. A. 40.
[2] (1879) 2 All. 561.
[3] (1882) 4 All. 243.

entitled to inherit her father's estate, was the daughter who was poor and indigent.

The question again arose for consideration in *Totawa* v. *Basawa*.[1] The dispute in this case was between four sisters Two of them, the plaintiffs, sued their two other sisters, who were the first two defendants, for a partition of their father's property. The evidence showed that the plaintiffs were possessed of lands and houses, that the husband of defendant No. 1 was also in comfortable circumstances but that defendant No. 2, who was a widow, was possessed of neither land nor a house, that she had moveable property worth Rs. 700 to Rs. 800, and that she earned her living by selling butter. Both the lower Courts held that as defendant No. 2 was the poorest of the four sisters, while the plaintiffs were clearly well to do, defendant No. 2 alone was entitled to the whole of her father's property. This decision was confirmed in second appeal by the High Court. In his judgment Mr. Justice Ranade observed (p. 232):

"...The lower appellate Court appears to us to have correctly laid down the principle of law when it stated that, though the Courts ought not to go minutely into the question of comparative poverty, yet where the difference in wealth is marked, the law requires that the whole property should pass to the poorest sister."

In this case the sister, who was held to have prior right of inheritance to her father's property, was the one who, in the words of the lower appellate Court, was "almost, if not quite destitute". The decision in this case therefore was that where one daughter is poor, whilst the others are well-to-do, the poor daughter alone is entitled to the whole of her father's estate. The question whether all the daughters should share their father's property equally, when all of them are possessed of means and none of them is poor or indigent, or whether in such cases the daughter, who is less wealthy than her sisters, is alone entitled to inherit her father's property, was not considered in this case.

This case was followed in *Manki Kunwar* v. *Kundan Kunwar*.[2] In this case the suit was between two sisters and the plaintiff claimed that she was entitled to a share to the extent of one-half of the entire property left by her father. The defendant set up the plea that the plaintiff was a wealthy woman, whilst she, the defendant, was very poor. It was found that while the plaintiff was a rich woman, the defendant was very

[1] (1898) 23 Bom. 229.

[2] (1925) 47 All. 403.

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poor. It was held that the defendant alone had a right to succeed to the father's estate and the plaintiff's suit was therefore dismissed. In the course of the judgment it was observed (p. 405):

"...That case (*Totawa* v. *Basawa*, I. L. R. 23 Bom. 229) is a definite authority, which shows that all that has to be regarded is this. If you find a marked difference in the financial position of the sisters, and one of those sisters in straitened circumstances, that is sufficient to bring into operation the authority of the Mitakshara. This case, as all the other ones, has to be looked at from the point of view of comparative poverty of the plaintiff and defendant, and it is not essential that the poor sister should be bound to point to some definite acquisition of property by the rich sister. It is sufficient to say that her surroundings are such that she would be regarded as a rich woman."

The same view was taken in *Parvatibai Gopal* v. *Maruti*,[1] in which it was held that under the Hindu law as between the indigent daughters, the daughter who is comparatively more indigent is entitled to succeed. Mr. Justice Sen, who decided this case, found that neither of the two sisters Kashibai and Rahibai could be described as being in affluent circumstances, but that Kashibai's income was markedly different from that of Rahibai and her husband, the probability being that while Kashibai subsisted by agricultural labour alone, Rahibai and her family lived mainly on the proceeds of their lands. He, therefore, held that Kashibai could be regarded as a daughter who was unprovided for and that consequently she was entitled to succeed to the whole property of her father.

All these cases were reviewed in *Savitribai* v. *Sidu*,[2] in which it was observed at p. 875 that

"....In judging the respective claims of married daughters their pecuniary condition is not to be examined minutely so as to find out if there is any shade of difference in the financial circumstances but it is only to be seen whether there is any marked degree of difference in such condition so as to give one daughter prior right of inheritance."

and that

"If one of them is in straitened circumstances and the other in more affluent circumstances the first is entitled to succeed in preference to the other, who would be regarded as rich."

In this case, it was found that the husband of one of the sisters Sunderabai had fields, while the other sister Savitribai or her husband had none, that there was a marked difference in their

[1] (1944) 46 Bom. L. R. 704. [2] [1945] Nag. 871.

financial position, and that Savitribai was *apratishthita* (indigent). Savitribai was, therefore, held to be entitled to succeed to the property of her father in preference to Sunderabai.

It will be seen that in all these cases the daughter, who was found to be poor or indigent or in straitened circumstances or without means, was held to be the sole heir to the estate of her father, to the exclusion of her sisters. No authority has been cited before us, nor have we been able to discover any, in which it has been held that where the contest is between two daughters, who are both possessed of wealth and in good financial circumstances, the daughter who is less rich is entitled to succeed in preference to her richer sister. According to the text only the unendowed or *nirdhan* daughter has a prior right of inheritance. It is only such a daughter who can succeed to the father's estate to the exclusion of her sisters. Where there is no such daughter, that is one who can be called *apratishthita* or *nirdhan,* then succession devolves on the endowed or enriched daughters, i. e., those who are possessed of wealth. Such daughters, being heirs of the same class, must share equally their father's property.

In this case while it is true that the plaintiff is not as rich as her deceased sister, the original defendant, she is also well off financially. In any case the expression *apratishthita* or *nirdhan* cannot certainly be applied to her. She is, therefore, not entitled to the whole of her father's property. Both the plaintiff and her sister have an equal claim to it and are therefore each entitled to a half share.

The appeal will, therefore, be allowed. The decree passed by the lower Court is set aside and the plaintiff's suit is dismissed with costs throughout.

The rule issued in Civil Application No. 840 will be discharged. There will be no order as to costs of this application.

Appeal allowed.

R. B. S.