

1879

LAKSHMI

v.

DA'DA' NA'.
NA'JI AND
RA'DHA'BA'I.

Charles Sargent and myself, we, following a case in West and Bühler⁽¹⁾, have held that even a half-sister is to be preferred in this Presidency to a step-mother, in which ruling my brother Kemball concurs. It follows, *à fortiori*, that the full-sister, such as Rádhábái is, must be preferred to the step-mother. It is unnecessary to repeat here the authorities and reasons given in *Kesserbái v. Valab Ráoji*.

We affirm the decree of the Senior Assistant Judge, and direct the plaintiff Lakshmi to pay the costs of this appeal.

Decree affirmed.

(1) West and Bühler (2nd ed.), pp. 185, 186 ; 1 West and Bühler (1st ed.), 154, 155.

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

September 16.

BIRU (ORIGINAL DEFENDANT No. 2), APPELLANT, v. KHANDU (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Sister's right of succession.

Under the Hindu law, a sister succeeds as heir to the estate of her deceased brother, in preference to his cousin on the paternal side one degree removed.

Krishnáji v. Pándurang (12 Bom. H. C. Rep. 65) referred to and distinguished.

THIS was a special appeal from the decision of H. J. Parsons, Senior Assistant Judge at Sholápur, reversing the decree of G. A. Mánkar, Subordinate Judge at Mádhe.

Khandu brought this suit against (1) Jivubái, (2) Biru Sadu Padvalkar, and (3) Gopálá, in the Court of the Second Class Subordinate Judge at Mádhe, and sought to recover, among other things, possession of half of two fields (Survey Nos. 82 and 95) situated in the village of Avandi, in the District of Sholápur. He stated in his plaint that he and one Kushába were cousins-german ; that Kushába died, leaving a son by name Genu, who succeeded to his father's share in the fields in dispute, and held it till his death ; that Genu's widow, Jivubái,

* Special Appeal, No. 345 of 1875.

succeeded to the property of her husband after his death, but that she lost her right to it in consequence of her marriage with Rámá Tarange, and that thus he was entitled to succeed to the immovable property of Genu, according to the Hindu law. The other allegations in the plaint are immaterial.

(1) Jivubái answered, among other things, that the property belonged to her husband, and came to her after his death by right of inheritance; that she transferred it to one Sadu Padvalkar (father of the defendant Biru) for the benefit of the four minor sisters of her deceased husband, who were rightfully entitled to it. (2) Biru answered that Jivubái had entrusted the four minor sisters of her husband to the care of his father Sadu Padvalkar, and transferred the property to his name; that, since his father's death, the minors had been under his protection, and that he held the property on their behalf. (3) Gopálá answered that he was never in possession of the property, and laid no claim to it.

The Subordinate Judge laid down two issues, the second of which was whether the plaintiff was entitled to the disputed property, according to the Hindu law. The following is his finding on it:—

“My finding upon the second issue is in the negative, and against the plaintiff. It is proved in evidence that the deceased Genu, whose property the plaintiff claims as his heir, was the son of his separated cousin-german. When Genu died, leaving no male issue, his widow, the defendant Jivu, succeeded to his property, taking an absolute interest in the moveable and a life-interest in the immoveable estate. By marrying again, Jivu, according to section 2, Act XV of 1856, became divested of whatever interest she had in the property of her deceased husband, and the property devolved upon the next of kin, *i. e.*, the *sapindas* of Genu. And as Genu does not appear to have left any other relatives than four sisters and a separated cousin of his father, (*i. e.*, the plaintiff,) his next heirs are his sisters, according to the *Vyavahara Mayukha* (ch. iv, sec. 8), to the Bombay construction of the passage in the first paragraph of ch. ii, sec. 4, of the *Mitákshara*, relating to the succession of brethren, and to the ruling of the late Supreme Court in *Vináyak A'nandráv v. Lakshmibái*, confirmed by the Privy Council (1 Bombay High Court Reports, pp. 117, 129).

1879

 BIRU
 v.
 KHANDU.

1879

BIRU
v.
KHANDU.

The four sisters of the deceased Genu, then, the eldest of whom is married to the defendant Biru and the others under his protection according to his allegation, are entitled to the disputed estate, and not the plaintiff, who is only a remote male paternal relative of the deceased.”

In appeal, the Assistant Judge reversed the decree of the first Court, on the ground that, as ruled in *Krishnáji v. Pándurang*⁽¹⁾, the Mitákshara prevailed in the Southern Marátha Country as the paramount authority, and that, according to it, the plaintiff Khandu was the preferable heir.

Máneksháh Jehángirsháh for the appellant.—The sisters' claim as heir to their deceased brother Genu is supported by the ruling of the late Supreme Court in *Vináyak A'nandráv v. Laksh-mibái*⁽²⁾. That ruling was affirmed on appeal by the Privy Council.⁽³⁾ The question of the sisters' right of succession was fully discussed in both the Courts. The decision of the Supreme Court is based not only on the Mayukha but on the Mitákshara. The Assistant Judge was wrong in supposing that the sisters' right was not supported by the Mitákshara. The learned pleader referred to Mitákshara, ch. ii, sec. 4, pl. 1 (Stokes' H. L. Books, 443); Vyahara Mayukha, ch. iv, sec. 8, pl. 19 (Stokes' H. L. Books, 89); *Bháskar Trimbak Achárya v. Mahádeo Rámji*⁽⁴⁾.

Ghanashám Nilkanth Nádkarní for the respondent.—This case comes from the Southern Marátha Country, and is, therefore, governed by the Mitákshara, as ruled in *Krishnáji v. Pándurang*⁽⁵⁾. The text in the Mitákshara, ch. ii, sec. 4, pl. 1 (Stokes' H. L. Books 443), does not mention sisters as heirs. The word used in the original text is *brethren*. It is the ingenuity of commentators and other writers on Hindu law which has interpreted the word as including “brothers and sisters”. If sisters, therefore, have no place in the list of *sapinda* heirs, as none is given to them by the Mitákshara, the plaintiff is entitled to succeed to the property in dispute as a *sapinda* relation of the deceased Genu.

(1) 12 Bom. H. C. Rep, 65,

(2) 1 Bom. H. C. Rep., 117, 129.

(3) 9 Moore's Ind. App. 516; S. C. 3 Cal. W. R. P. C. 41.

(4) 6 Bom. H. C. Rep. 1.

(5) 12 Bom. H. C. Rep. 65.

1879

BIRU
v.
KHANDU.

WESTROPP, C.J.—Genu Kushába died in or about the year 1867, leaving surviving him his widow Jivubái and four sisters, but no issue. The only point in dispute before this Court (there had been another in dispute in the Court of first instance which has not been raised here) was the right to succession to half of two fields (Nos. 82 and 95) situate in the village of Avandi, in the Sholápur District, which had belonged to Genu at the time of his death, and which his widow Jivubái subsequently had held until her re-marriage to Rámá Tarange. She then (having, under Act XV of 1856, section 2; and the Hindu law, lost her estate in the lands as the widow of Genu) transferred them to one Sadu Padvalkar to hold on behalf of the four sisters of Genu who were minors. Sadu having died, the second defendant Biru, his son, continued to hold them on behalf of the four minors. The plaintiff Khandu, as first cousin on the paternal side of Kushába, the father of Genu, and, consequently, as first cousin on the same side once removed of Genu, instituted this suit to recover (besides a share of land not now in dispute) the moieties of survey numbers 82 and 95 held by Genu and subsequently by Jivubái until her re-marriage. He made her and Biru and Gopálá Padvalkar defendants in the suit. Jivubái made no claim on her own behalf, but asserted the title of Genu's four sisters. Biru also asserted their title, and Gopálá disclaimed any interest in the lands or suit. The Subordinate Judge, while making a decree in favour of the plaintiff on the other matter in suit, held, on the authority of *Vinayák Anandráv v. Lakshmibái*⁽¹⁾, that the title of the four sisters of Genu was preferable to that of the plaintiff as paternal first cousin once removed of Genu. The Senior Assistant Judge, on appeal, being of opinion that the case above quoted did not apply to the South Marátha Country, where the property in dispute is situated, and, referring to *Krishnáji v. Pándurang*⁽²⁾, reversed so much of the Subordinate Judge's decree as related to Genu's moieties of the fields Nos. 82 and 95.

In *Krishnáji v. Pándurang* the question of succession was whether the half-brother or the paternal nephew of the deceased proprietor of lands, &c., at Bágalkot, in the District of Belgaum,

(1) 1 Bom. H. C. Rep. 117; S. C. 9 Moore's Ind. App. 516.

(2) 12 Bom. H. C. Rep. 65.

1879

BIRU
v.
KHANDU.

in the South Marátha Country, had the better title; and a Division Bench of this Court, taking the Mitákshara as its guide in preference to the Mayukha, gave the priority to the half-brother. There was not any question there as to the right of a sister.

In *Sakhárám v. Sitábái*⁽¹⁾ the full-sister of a deceased proprietor of immoveable property situated at the Island of Karanja, in the Northern Konkan, was preferred to his half-brother; and it was in that case held that the decision in *Vináyak A'nandráv v. Lakshmibái*⁽²⁾ is applicable to the whole of this Presidency, except where there may be an ancient and invariable special custom to the contrary established in proof. The reasons for that ruling are so fully stated in the judgment delivered in *Sakhárám v. Sitábái*, that we do not propose to repeat them here. In *Mahantápá v. Nilgawá*⁽³⁾, a case from Kaládgi, in the District of Belgaum, in the South Marátha Country, the sister of the deceased was preferred to his uncle's widow on the principles laid down in the two last-mentioned cases. *Dhondú v. Gangá*⁽⁴⁾ was an instance of a sister being preferred, on the same authorities, to a more remote male relative of the *propositus*. The present plaintiff Khandu, being a paternal first cousin once removed of the deceased Genu, is one degree more remote from the *propositus* than the unsuccessful claimants in *Vináyak A'nandráv v. Lakshmibái*, who were male paternal first cousins of Gajánan, which case is, therefore, *a fortiori*, an authority against the plaintiff. And both the Privy Council and the Supreme Court there acted as well on the Mitákshara, as interpreted by Nanda Pandita and Bálambhatta, as on the Mayukha. We must hold that the four sisters of Genu became his heirs on the re-marriage of Jivubái. In a Surat case, *Bháiji Girdhur v. Báí Kushál*⁽⁵⁾, there was a similar decision by Melvill and West, JJ. The decree of the Senior Assistant Judge is reversed, and the decree of the Subordinate Judge is restored. The plaintiff Khandu must pay to the defendant Biru his costs of both appeals.

Decree reversed.

(1) Ind. L. R., 3 Bom. p. 353.

(2) 1 Bom. H. C. Rep. 117, 126; S. C. 9 Moore's Ind. App. 516.

(3) See note to *Sakhárám v. Sitábái*, I. L. R., 3 Bom. at 368. (4) I. L. R., 3 Bom. 369.

(5) No. 63 of the Printed Judgments of 1873, and West and Bühler (2nd ed.) 182, Note a.