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for maintenance which would enable them on application to set aside or modify their orders as circumstances might require. The corollary is that when no such right to apply is reserved in the decree, the remedy appropriate being a fresh suit, no application in execution can be made for such purpose. Indeed, it seems sufficiently obvious that no modification of a decree can be allowed in execution thereof, on grounds not recognised in the decree itself as giving a right to such modification. And the same rule must apply whether the modification is claimed in applying for or in resisting execution.

In this view of the case it becomes unnecessary to consider whether the circumstances alleged by appellant as grounds for modification have or have not arisen in this particular case. If such grounds have arisen, they are not grounds which were declared in the decree as constituting any right to modify its terms.

We must therefore reject the appeal with costs throughout.

Appeal rejected.

APPELLATE CIVIL.

Before Sir J. H. Jenkins, Chief Justice, and Mr. Justice Aston.

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July 8.

SAGUNA (ORIGINAL PLAINTIFF), APPELLANT, v. SADASHIV PANDU
MORE (ORIGINAL DEFENDANT), RESPONDENT.*

*Hindu Law--Inheritance--Succession--Father's half-sister--Mother's
brother.*

In the Bombay Presidency the father's half-sister succeeds in priority to the mother's brother.

SECOND appeal from the decision of T. Walker, District Judge of Ratnágiri, confirming the decree of Ráo Sáheb G. D. Deshmukh, Second Class Subordinate Judge of Dápóli.

One Shankar, a Hindu, died on the 26th December, 1896; leaving him surviving the plaintiff who was his paternal aunt

* Second Appeal No. 595 of 1901.

(his father's step-sister) and the defendant who was his maternal uncle (mother's brother).

On Shankar's death the latter took possession of his estate, and the plaintiff filed the present suit to recover it claiming that she was Shankar's heir.

Both the lower Courts dismissed the suit. The lower Appellate Court, relying on the decision in *Narasimma v. Mangammal*,⁽¹⁾ held that the defendant was Shankar's nearest heir and was entitled to succeed to his property.

The plaintiff preferred a second appeal.

Narayan V. Gokhal for the appellant (plaintiff):—A paternal aunt is at least a *bandhu* if not a *gotraja sapinda*. The enumeration of *bandhus* in the Mitakshara is illustrative and not exhaustive: Mayne's Hindu Law, pages 667, 762; Bhattacharya's Hindu Law, page 465; *Girdhari Lal v. The Government of Bengal*⁽²⁾; *Muthusami Mudaliyar v. Simambedu*.⁽³⁾ The omission, therefore, of the paternal aunt in the list of specified *bandhus* does not show that she is not a *bandhu*. Even according to the ruling in *Narasimma v. Mangammal*, which gives preference to the maternal uncle over the paternal aunt and which is relied on by the lower Court, she is a *bandhu*: see also West and Bühler, pages 131 (b), 488-9. If the son of a paternal aunt is a *bandhu*, his mother must likewise be a *bandhu*: *Muthusami Mudaliyar v. Simambedu*. The ruling in *Narasimma v. Mangammal* is inapplicable to this Presidency. Under the Mitakshara as understood in Southern India, the Madras High Court recognizes no females who are not mentioned in special texts: Mayne's Hindu Law, pages 708-10. The above decision follows *Lakshmanammal v. Tiruvengada*,⁽⁴⁾ which gives priority to the sister's son over the sister. But their position is reversed in Western India: Mayne's Hindu Law, pages 699, 757. Therefore the Madras cases on this point are of no authority here. The order of precedence underlying the classification of the three classes of *atma-bandhus*, *pitri-bandhus* and *matri-bandhus* who are specifically enumerated by the Mitakshara is that the paternal

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(1) (1889) 13 Mad. 10.

(2) (1868) 12 Moore's I. A., 448, 465.

(3) (1896) 19 Mad. 405, 409.

(4) (1882) 5 Mad. 241.

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relations should come before the maternal relations. The same principle of priority regulates the order in which the members of each group succeed as heirs. In the first group the first place is assigned to the son of the paternal aunt, and then the sons of the maternal aunt and the maternal uncle come in as heirs. The same rule governs the order of precedence in the case of the members of the remaining two groups. The Mitakshara prefers the male line to the female line—kinsmen *ex parte paterna* to kinsmen *ex parte materna*: see Rajkumar Sarvadikari's Tagore Law Lectures for 1880, page 726; Bhattacharya's Hindu Law, page 458; *Rachava v. Kalingapa*.⁽¹⁾ The *gotraja sapindas* take preference over *bhinna gotra sapindas* or *bandhus*; therefore the plaintiff, who is a paternal aunt, whether regarded as a *gotraja sapinda* or a *bandhu*, is entitled to succeed as against the defendant who is a maternal uncle.

Daji A. Khare for the respondent (defendant):—According to the Mitakshara the mother comes in before the father. Therefore amongst one's own *bandhus* a maternal uncle should have preference over a paternal aunt. Moreover, in the present case the paternal aunt is a step aunt, therefore she cannot claim the rights of an aunt of the whole blood. Further, the father's sister is his *sagotra sapinda* according to the Mayukha, whilst all *bandhus* are *sagotra sapindas* of the prepositus. The paternal aunt, therefore, cannot come in amongst *bandhus*: *Nallanna v. Ponnal*⁽²⁾; *Chinnammal v. Venkatchala*⁽³⁾; *Muttusami v. Muttukumarsami*.⁽⁴⁾

Gokhale in reply:—The position assigned to the mother is peculiar to the Mitakshara and anomalous, but the ground on which she ranks prior to the father is not to be extended: *Rachava v. Kalingapa*. In the more distant relationship there is no preference of whole blood over half blood under the Mitakshara and the Mayukha: Mayne's Hindu Law, page 755; *Vithalrao Krishna Vinchurkar v. Ramrao Krishna Vinchurkar*⁽⁵⁾; *Muthusami Mudaliyar v. Simambedu*.⁽⁶⁾ If the paternal aunt is a *sagotra sapinda*, then she evidently ranks prior to the maternal uncle who

(1) (1892) 16 Bom. 716.

(4) (1892) 16 Mad. 23.

(2) (1890) 14 Mad. 149.

(5) (1899) 24 Bom. 317.

(3) (1891) 15 Mad. 421.

(6) (1896) 19 Mad. 405.

is only a *bandhu*. The Madras decisions relied on are opposed to the usage and authority in Western India: Mayne's Hindu Law, page 710.

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JENKINS, C.J.:—The question for decision on this appeal is whether the father's half-sister or the mother's brother is the preferential heir for the purpose of succession to the estate of a deceased Hindu in this Presidency.

The District Judge has decided in favour of the mother's brother in reliance on *Narasimma v. Mangammal*,⁽¹⁾ where it was decided that according to the Hindu Law current in the Madras Presidency the father's sister is not entitled to inherit in preference to the mother's brother.

Before us it has been urged that, whatever the rule of inheritance may be in Madras, in this Presidency the father's sister is to be preferred.

It is clear that the maternal uncle is a *bandhu*: he is so recognized in the *Viramitrodaya* (see page 200 of Mr. Golap Chandra Sarkar's translation) and in *Visvarupa's Commentary* (page 13 of Mr. S. Sitarama Shastri's translation). We also think the paternal aunt must in this Presidency be reckoned not lower than the *bandhus*, notwithstanding Mr. Khare's ingenious, though perilous, argument, whereby he seeks to exclude her from the category of *bhinnagotra sapindas*. According to the *Mitakshara*, chap. II, section V, plac. (3): "After the paternal grandmother the *sapindas* of the same *gotra*, such as the paternal grandfathers, become heirs, for the *sapindas* belonging to a different *gotra* are included by the term *bandhus*." We take this translation from page 168 of Mr. Golap Chandra Sarkar's work on Hindu Law. We think there can be no doubt that the paternal aunt is a *sapinda*; the only question is, whether she is of the same or of a different *gotra*. The reasoning of Mr. Justice West in *Vijiarangam v. Lakshuman*⁽²⁾ would place the paternal aunt among the *gotraja sapindas* according to Nilakanth's doctrine; but in the view we take it is unnecessary to consider whether, under the *Mitakshara*, as interpreted in Bombay, the paternal aunt is to be regarded as a *sagotra* or as a *bhinnagotra*

(1) 1889) 13 Mad. 10.

(2) (1871) 8 Bom. H. C., O. C. J., 244.

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sapinda: it is enough to say that she is not more remote than a *bandhu*.

Starting then with this hypothesis, is the father's sister or the mother's brother to be preferred? Mr. Khare in the first place relies on the authority of *Narasimma v. Mangammal*,⁽¹⁾ which is apparently based on the rule that, except where females are specially mentioned, priority is given to male heirs.

Mr. Gokhale concedes that as between heirs of the same line preference is given to males, but he maintains that as between different lines of heirs sex has no place as a determining factor, at any rate in this Presidency where the claims of females are viewed with greater favour.

Mr. Khare claims that, even if that test be applied, the mother's brother is to be preferred, and in support of this he points to the preference over the father yielded to the mother in heirship to the son: that, he says, is based on propinquity which is the governing test under the Mitakshara. But this preference of the mother stands alone: it does not influence succession when the contest lies between those claiming through the father and those claiming through the mother. Thus the *pitri-bandhus* take precedence over the *matri-bandhus* in obedience to the text of the Mitakshara II, s. 6: "Here by reason of near affinity the cognate kindred of the deceased himself are his successors in the first instance; on failure of them his father's cognate kindred; or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended." This does not expressly determine the order of succession as between the several lines within each of their series of *bandhus*, so we have to consider whether of the deceased's own *bandhus* those connected through the father have precedence over those connected through the mother. If we have to choose between the analogy furnished by the order of succession as between father and mother directly on the one hand, and by the order of succession as between *pitri-bandhus* and *matri-bandhus* on the other, our choice would fall on the latter as being in every sense closer, and, for what it may be worth, the conclusion to which this leads is in correspondence with the

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order in which these internal lines are enumerated in the text cited by Vijnaneshwar: "The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle must be considered as his own cognate kindred." In confirmation of this choice we would also cite an opinion attributed to Balambhatta, who contends that the father should have precedence over the mother "upon the analogy of more distant kindred, where the paternal line has invariably the preference before the maternal kindred" (Stoke's Hindu Law Books, page 443; Sarvadhikari's Hindu Law of Inheritance, 482).

It is instructive also to note how the point is dealt with in the Dayabhaga of the Saraswativilasa. In reference to the text we have read, it is there said (597): "There also the order to be recognized is that a man's own *bandhavas* first take the property on account of their nearer relationship; if there are none, the father's *bandhavas* take the property; if there are none, the mother's *bandhavas* (598). It must not be said here that because of the greater eligibility of the mother than of the father, the enjoyment of the property belongs to her *bandhavas* before the father's *bandhavas*. We perceive it to be right that the enjoyment of the property should belong to the mother's *bandhavas* after the father's *bandhavas*, because by the text 'of them the mother is more venerable than the father' the greater eligibility belongs to the mother alone and not to the mother's *bandhavas*."

We, therefore, hold that as between the deceased's own *bandhus*, those connected through the father are to be preferred to those connected through the mother.

But then it is said that the appellant must be postponed because she is only a half-sister of the deceased's father; but the answer to this is to be found in the judgment of Ranade, J., in *Vithalrao v. Ramrao*,⁽¹⁾ from which it is apparent that the distinction of whole and half blood does not extend to relationships so distant as those with which we are now concerned.

For these reasons we reverse the decree of the District Judge and remand the case that the Court may determine what the lands are in respect of which the plaintiff is entitled to recover

(1) (1899) 24 Bom. 317.

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possession and also the amount of mesne profits since suit to which the plaintiff is entitled, and pass a decree accordingly. No order as to costs in the lower Court. Appellant to get her costs of the appeal to this Court.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Batty.

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July 15.

NARAYAN SHRIDHAR DHARNE (ORIGINAL OPPONENT No. 1), APPELLANT, v. RAMCHANDRA KONDDEV BELHE AND ANOTHER (ORIGINAL PETITIONER AND OPPONENT No. 2), RESPONDENTS.*

Guardian and Wards Act (VIII of 1890), sections 7, 11, 13, 46—District Judge—Application for appointment of guardian—Reference to a Subordinate Judge to record evidence and submit report—Decision based upon the report—Procedure—Irregularity—Practice—Minor—Guardian.

A District Judge, upon receiving an application for the appointment of guardians to the persons and property of minors, fixed a day for hearing the same before the Subordinate Judge, and directed that Court to take evidence and report on the case. The Subordinate Judge recorded the whole evidence and submitted a report, upon the strength of which the District Judge disposed of the application.

Held, that the procedure adopted by the District Judge was illegal and vitiated the whole inquiry.

Ganesh v. Kusbai⁽¹⁾ followed.

APPEAL from an order passed by H. F. Aston, District Judge of Poona, under the Guardian and Wards Act (VIII of 1890).

Ramchandra, the petitioner, applied, under section 7 of Act VIII of 1890, to the District Judge of Poona to be appointed guardian of the person and property of his two minor nephews, Keshav and Bhagirathibai.

This application was opposed by three persons, viz., Narayan Shridhar, Rango Jayram and Raoji Narayan Chobe.

* Appeal No. 125 of 1901 from order.

⁽¹⁾ (1899) 23 Bom. 698.