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not render a confession admissible. Judging by this test, it cannot be said in the present case that the Magistrate made no attempt to comply with the provisions of the law. He made a memorandum in English. He put the questions and answers which were taken down in his presence by the clerk, and these were read to the accused, and admitted by him to be correct. The memorandum and certificate are all in proper form. The failure of the kulkarni to make the mark of the accused was apparently not noticed through inadvertence. It does not appear that there is any room for presuming, as the Sessions Judge has apparently done, that the accused might have changed his mind, and that admitting the oral evidence of the Magistrate and of the kulkarni under section 533 would prejudice the defence on the merits. It must be admitted that the clerk's evidence by itself was insufficient for the purposes for which it was given. The prosecution should have given the evidence of the Magistrate himself who put the question, and recorded the answer. It is also not clear how the prosecution could not find out the whereabouts of the kulkarni, who was asked by the clerk to make the mark for accused. Such further evidence appears to me to be clearly admissible under section 533, and in such a case as this, where the confession is the only reliable evidence, it seems to be necessary, in the interests of justice, that this evidence should be received, and the case retried. I would accordingly reverse the order of acquittal and direct such retrial under section 423.

APPELLATE CIVIL

Before Mr. Justice Parsons and Mr. Justice Ranade.

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March 21.

TOTAWA AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* BASAWA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Inheritance—Daughters—Succession among daughters—The poorest daughter entitled to inherit the whole estate—Comparative poverty.

In the Presidency of Bombay, the principle of law which governs the succession of daughters *inter se* as heirs to their father's estate is, that though the Courts ought not to go minutely into the question of comparative poverty, yet where the difference in wealth is marked, the whole property passes to the poorest daughter.

* Second Appeal, No. 1177 of 1897.

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SECOND appeal from the decision of A. Butterworth, District Judge of Dhárwár.

Suit for partition. The two plaintiffs were the sisters of the first two defendants, and they sued for a partition of their father's property consisting of three fields and a dwelling-house.

They alleged that he had died without male issue; that their mother had died two years before suit; and they claimed that on her death they and their sisters (defendants Nos. 1 and 2) were entitled to succeed to their father's property in four equal shares.

The third defendant was the son of defendant No. 1, and as he was in possession, he was made a party to the suit.

Defendants Nos. 1 and 2 pleaded (*inter alia*) that they were the poorest of the four sisters and were, therefore, entitled to inherit their father's estate to the exclusion of the plaintiffs, who were in affluent circumstances.

The Court of first instance found that all the sisters were married; that the respective husbands of the plaintiffs were possessed of lands and houses; that the husband of the first defendant was also in comfortable circumstances; that defendant No. 2 was a widow possessed of neither land nor house, and was the poorest of the four sisters. The Court, therefore, held that she alone was entitled to succeed to the property. Plaintiffs' claim was, therefore, rejected.

On appeal this decision was upheld by the District Judge. His reasons were as follows:—

"3r There is no doubt, I think, that the second defendant is much poorer than the plaintiffs. All the sisters were married before their mother's death, and it is admitted by the husbands of plaintiffs Nos. 1 and 2 that they own respectively (1) 59 acres of land and a house and (2) 36 acres of land and a house. The 36 acres belonging to the second plaintiff's husband were, however, it appears, under mortgage with possession (for a period of nine years) at the time of her mother-in-law's death. On the other hand, the second defendant seems to have been almost, if not quite, destitute at that time. The second plaintiff's husband admits that the second defendant's husband, who died three or four years before suit, had no land or house in the village; that she herself owns neither; and that she is the poorest of the sisters. The witness added that defendant No. 2 lives by selling butter; that she has moveable property worth Rs. 700 or 800; that he himself is as poor as she is; and that her husband

traded in cotton with a small capital of Rs. 300 or Rs. 400. Another witness says defendants Nos. 1 and 2 are the poorest of the sisters; that defendant No. 2 owns no house or land, and that her husband also was a poor man; but he adds that defendant No. 1 is as poor as defendant No. 2 Another witness gives similar evidence. The first defendant, too, declares that defendant No. 2 is poor and that because she is so poor, and has no house or lands, she (the first defendant) gave her a portion of the suit property. One of the plaintiffs' own witnesses has added his testimony to prove that the second defendant is the poorest of the sisters.

"4. As against the plaintiffs I think that the Subordinate Judge's finding, that the second defendant is entitled to the whole of the property, is justified by the evidence. The first plaintiff is clearly well-to-do, and although the second plaintiff's husband's land is mortgaged, there is little doubt that she is considerably better off than the second defendant.

"5. The respective titles of the first and second defendants are not actually in suit now, but the evidence shows that the first defendant is much better off than the second defendant. The statements of certain witnesses to the effect that the first and the second defendants are on an equal footing as regards wealth, are obviously untrustworthy.

"6. The contention that, even if the second defendant is the poorest, the plaintiffs still have a right to demand a share, cannot be admitted in view of the circumstances of the case. No doubt, the Courts ought not to go minutely into questions of comparative poverty; but where the difference in the wealth is marked, as, I think, it is in this case, then the law, as it has been interpreted by authority, requires that the whole property shall pass to the poorer sister."

Against this decision the plaintiffs preferred a second appeal to the High Court.

M. B. Chaubal, for appellants (plaintiffs):—The general rule is that all daughters succeed to their father's property in equal shares. The only exception to this rule is that, if any of the daughters is absolutely indigent or destitute, she alone inherits the property to the exclusion of the others. The texts bearing on this subject show this beyond dispute: see Mayne's Hindu Law, para. 514. But, if all the daughters are more or less provided for, the Courts cannot inquire into the question of their comparative indigence or poverty, and must distribute the inheritance equally among all the daughters.

Daji Abaji Khare, for respondents (defendants):—It is found as a fact that defendant No. 2 is not only the poorest of all the sisters, but is absolutely without any property at all. She has

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no lands and no houses. She earns her living by selling milk, whilst her sisters own each between 60 and 40 acres of land and besides several houses. There can be no comparison between her condition and that of her sisters. That being the case, she alone is entitled to succeed to the whole of her father's estate—*Bakubai* v. *Manchhabai*[1]; *Poli* v. *Narotum*[2]; *Audh Kumari* v. *Chandra Dai*[3]; *Srimati Uma Deyi* v. *Gokoolanund*[4].

RANADE, J.:—In this case, the sole question for consideration is whether the Courts below have correctly laid down the principle of law which governs the succession of daughters *inter se* as heirs to their father's estate.

The two appellants and the first two respondents are full sisters, and all of them were married during their father's lifetime. The original claim was brought by the appellants to recover their half share in their father's lands and house, and the defence was that the first two respondents were entitled to their father's property in preference to the appellants, as they were the poorest among the sisters. Both the Courts below have found that respondent No. 2 was the poorest of the four sisters, and that she alone was entitled to succeed as heir to her father. The appellants' claim was accordingly rejected.

Mr. Chaubal, for the appellants, contended before us that it was only the absolutely indigent married daughter who had a preferential claim over her well-to-do sisters, and that when all the daughters are more or less provided for, there was no preference, and all shared equally. 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. The principle was first laid down in *Bakubai* v. *Manchhabai*[1], namely, that in this Presidency, as between married daughters, succession was regulated by their comparative endowment or non-endowment. The Sanskrit words used in the original texts for "endowed" and "unendowed" are "*sadhan*" (with wealth) and "*nirdhan*" (with-

(1) (1864) 2 Bom. H. C. Rep., 5 (A. C. J.)
(2) (1869) 6 Bom. H. C. Rep., 183 (A.C.J.)
(3) (1879) 2 All., 561.
(4) (1878) 5 I. A., 40.

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out wealth). It was accordingly ruled in *Poli* v. *Navotum*[1], that comparative poverty was the sole criterion for settling the claims of the daughters among themselves. It is true that in the *Mithila* country, no distinction is recognized between poor and rich sisters, and in the Bengal school the criterion is the actual or potential capacity of having male issue. This difference in the three schools is due to the diversity of the interpretation put upon the word "*apratishthita*," used in a text of Gautama, which has been translated "unprovided for" with wealth by some, and with children by other, commentators. In *Audh Kumari* v. *Chandra Dai*[2], a case which bears close resemblance to the present, this point was carefully considered. In that case, also, the dispute lay between four sisters, two of whom had brought separate suits, each for her half share of their father's property, against strangers who pleaded that there were two other sisters in indigent circumstances who were preferential heirs. These two sisters were subsequently joined as co-defendants. All the four sisters were married, and the Court held that as the plaintiffs were in much better circumstances than their sister-defendants, they were not entitled to succeed as heirs, and accordingly reversed the decree of the lower Court, which had ordered equal division as between the four sisters on the ground that none of them were absolutely indigent or beggars. In *Danno* v. *Darbo*[3] this same view was enforced in a contest between two married sisters, and it was further held that the words "provided for" did not necessarily mean provided for by the father, but that it was the equivalent of "possessed of means". Their Lordships of the Privy Council in *Srimati Uma Dayi* v. *Gokoolanund*[4] similarly held that the claim of the indigent or unprovided-for sister to maintain the suit was superior to that of her richer sister. The Courts below have thus correctly interpreted the law, and we see no ground to interfere. We accordingly confirm the decree of the lower Court and reject the appeal with costs.

Appeal dismissed.

(1) (1869) 6 Bom. H. C. Rep., 183.
(2) (1879) 2 All., 561.
(3) (1882) 4 All., 243.
(4) (1878) 5 I. A., 40.