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This view is not inconsistent with but is supported by the judgment of this Court in *Maganlal* v. *Doshi Mulji*(1), which is relied upon by the lower appellate Court as warranting its conclusion. In that case the question was simply between the judgment-debtor and the auction-purchaser; and therefore it was held that the question could be tried in a separate suit and that section 244 was no bar. But the judgment in that case explains the Privy Council decision in *Prosunno Kumar Sanyal* v. *Kalidas Sanyal*(2), as applying where the question is virtually between the parties to a suit and the auction-purchaser is affected by its determination.

For these reasons the decrees of the Courts below must be reversed and the claim of the appellant allowed with costs throughout on the respondents.

Appeal allowed.

R. R.

(1) (1901) 25 Bom. 631. (2) (1892) 19 Cal. 683.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

JAGANNATH RAGHUNATH (ORIGINAL PLAINTIFF), APPELLANT, *v.* NARAYAN L. SHETHE (ORIGINAL DEFENDANT), RESPONDENT.*

1910. *March* 29.

Hindu Law—Mitakshara—Mayukha—Kamathis—Law governing Kamathis who live in Bombay—Succession—Anvadheya Stridhan—Preference between husband and son born of adulterous intercourse—Shudras—Forms of marriage—Presumption as to form.

The Kamathis, settled in Bombay, are governed for the purposes of inheritance by the law of the Mitakshara and the Mayukha, where they agree: but where they differ, the Mayukha law must prevail.

The *stridhan* of a female devolves on her death upon her husband in preference to the son born of her by adulterous intercourse.

The law will, even among Shudras, presume the marriage to have been according to the approved forms if the parties belonged to a respectable family.

APPEAL from the decision of Gulabdas Laldas, First Class Subordinate Judge at Thana.*

* First Appeal No. 91 of 1906.

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Suit for declaration.

The property in dispute belonged originally to one Laxmibai, who had obtained it after marriage by way of gift from her husband in 1894. Laxmibai died in 1896, leaving a son Elshetti and a daughter Narsubai.

Narsubai was married to one Narsinga; but she did not live with him. She lived with Laxman (defendant No. 2) and had a son born of her by him. Narsubai died in 1903: and a few months after her son also died.

In 1904, Narsinga sold the property in dispute to Jagannath (plaintiff).

The plaintiff filed this suit to establish his title to the property and to recover possession of the same.

Elshetti having died, his son Narayan was sued as defendant No. 1 and Laxman as defendant No. 2.

It was contended for the defence that on Laxmibai's death the property devolved equally on her son Elshetti and her daughter Narsubai; that Narsubai's moiety descended on her death to her son: and from him to defendant No. 2.

The Subordinate Judge held that the deed of sale by Narsing to plaintiff was proved; but he found that Narsing did not acquire any title to the property, which on Narsubai's death devolved upon her son. He, therefore, dismissed the suit.

The plaintiff appealed.

The appeal was heard by Chandavarkar and Knight, JJ., on the 30th September 1907. Their Lordships referred certain issues to the lower Court for trial; and in doing so delivered the following interlocutory judgment.

CHANDAVARKAR, J.:—The important point in this case is what is the law by which the community called Kamathis—to which the parties belong—are governed.

In the Court below the pleadings appear to have been framed upon the basis that according to the plaintiff the law governing the parties was that of the Mitakshara. According to the defendants it was the law of the Mayukha. But at the trial it

appears that reliance was placed by the defendants apparently upon the law of the Andhra School in Southern India, because the Kamathis had originally migrated from that part of the country where the Smriti Chandrika is the prevailing authority on Hindu Law. But whether this case was specifically made by the defendants is not quite clear from either the evidence or the judgment. And it appears from the judgment of the Subordinate Judge that he has relied upon the law of the Smriti Chandrika as being applicable to the parties. But no issue was raised to try that particular case and accordingly the evidence led as to it is so meagre that we cannot come to any satisfactory decision upon it as it stands. It is conceded here as it was in the Court below that the Kamathis who have settled in Bombay and other parts of this Presidency originally came about 70 years ago from some part of Deccan Hyderabad. That being common ground between the parties the question is:—What is the Hindu Law by which they were governed in the place from whence they have migrated? And whether since their settlement here and in other parts of the Presidency they have adhered to it or adopted the law of the Mitakshara or Mayukha School prevailing in this Presidency.

According to the decisions of the Privy Council, when any community or family of Hindus migrate from one place to another, they must be held to have adhered to the law of their original place if they have not changed their original manners, habits and customs and religious observances. We think therefore that distinct issues must be raised to try these important points and that additional evidence should be taken. The issues will be as follows:—

(1) Whether the Kamathis settled in this Presidency have abandoned the manners and customs and usages of the place of their origin?

(2) Whether they have adopted the law of the Mitakshara and the Mayukha since their settlement in this Presidency?

The Subordinate Judge should record the evidence that might be adduced by the parties and return it to this Court within 3 months with his findings thereon.

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The Subordinate Judge will be at liberty to allow any of the witnesses to be examined on commission. We have thought it necessary to allow this additional evidence because it affects a large class of the people in this Presidency and our decision will become a precedent as to the law of succession governing them.

The lower Court recorded its findings in the negative on the issues.

The appeal was again heard and the following issues were again remanded to the lower Court for finding :—

1. From what part of the Nizam's territories did the deceased Shetiba Venkati or his ancestors migrate to Bombay ?

2. By what school of Hindu Law are the Hindus in general and the Kamathis in particular of the class to which the family of the deceased belong, governed ?

And it is further ordered that in finding on these issues the lower Court do determine the language which is spoken in their homes by the members of the family of the deceased and the community to which they belong amongst other considerations.

The following findings were recorded : (1) from a place called Bodhan in the Indur District of the Nizam's territories ; (2) no evidence ; (3) Telagu.

The appeal came on for final hearing before Chandavarkar and Heaton, JJ.

G. S. Rao and *K. A. Padhye*, for the appellant :—The parties to this case are Kamathis, who are governed by the Mayukha. The lower Court has erred in applying to them the law contained in the Smriti Chandrika.

The Kamathis originally resided in the Deccan Hyderabad, which is divided into two parts, known as Maratha Wadi and Telangan Wadi. The Kamathis belong to the former, where the Hindu Law prevalent in Bombay is followed. See H. H. The Nizam's Gazetteer of Hyderabad, p. 81. See also 14 Ain-i-Dekhan, pp. 3, 11 ; Ain-a-Dekhan, Civil, p. 3.

W. B. Pradhan, for respondents Nos. 1 and 2 :—The Kamathis came from the Southern India; they are of the old Dravidian stock and speak Telagu language (see the Bombay Gazetteer,

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Vol. XXI, p. 108, foot-note; Thana, Vol. XIII, Pt. I, p. 119; Mackintosh (1836), Transactions of the Bombay Geographical Society, Pt. I, p. 202; Dharwar, Vol. XXII, pp. 136, 137; Poona, Vol. XVIII, Pt. II, p. 1, and Pt. I, pp. 395—397. They are, therefore, governed by the Smriti Chandrika, which prevails in the country from which they have migrated.

Under the law contained in the Smriti Chandrika, the Anvadheya Stridhan (which is the kind of Stridhan in dispute in this case) descends to the children, male and female, alike. See also *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar*[1], *Sengamalathammmal Valayanda Mudali*[2], *Venkatarama Krishna Rau* v. *Bhujanga Rau*[3]. If, however, the Mitakshara is held applicable to the parties, then the view adopted in *Lal Sheo Pertab Bahadur* v. *Allahabad Bank Ltd.*[4] ought to be followed here; and if the Mayukha is held to apply, then the marriage of Narsubai having been in an unapproved form and the parties Shudras, her property goes not to her husband but to the heirs of her mother. See *Janglubai Shivappa* v. *Jetha Appaji Marwadi*[5].

Even treating Narsubai as the kept mistress of the defendant No. 2, the successor to her property would be not her husband but those who have fallen with her. See *In the goods of Kamineymoney Bewah*[6], *Sivasangu* v. *Minal*[7], *Sarna Moyee Bewa* v. *Secretary of State for India in Council*[8]. Narsubai's son by defendant No. 2 should, as her illegitimate son, succeed to her property. See also *Pandaiya Telaver* v. *Puli Telaver*[9], *Mayna Bai* v. *Uttaram*[10], *Myna Boyee* v. *Ootaram*[11], *Venku* v. *Mahalinga*[12], *Arunagiri Mudali* v. *Ranganayaki Ammal*[13] and *Jogendro Bhuputi* v. *Nittyanud*[14].

CHANDAVARKAR, J.:—Upon the evidence adduced in this case we are of opinion that the parties, who are Kamathis, settled in

(1) (1881) 3 Mad. 290.
(2) (1867) 3 M. H. C. 312, 313, 316.
(3) (1895) 19 Mad. 107.
(4) (1903) L. R. 30 I. A. 209 at p. 218.
(5) (1908) 10 Bom. L. R. 522.
(6) (1894) 21 Cal. 697, 701.
(7) (1889) 12 Mad. 277.
(8) (1897) 25 Cal. 254.
(9) (1867) 1 Mad. H. C. 478.
(10) (1864) 2 Mad. H. C. 196.
(11) (1861) 8 M. I. A. 400.
(12) (1888) 11 Mad. 393, 397.
(13) (1897) 21 Mad. 40.
(14) (1885) 11 Cal. 702, 714.

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Bombay, are governed for the purposes of inheritance by the law of the Mitakshara and the Mayukha, where these agree; where they differ, the Mayukha law must prevail.

The property in dispute belonged originally to one Laxmibai. She had obtained it after marriage by way of gift from her husband on the 11th of January 1894. Therefore it became her *stridhan* of the kind designated in Hindu Law as *anvadheya* or gift subsequent to marriage. Laxmibai died in 1896, leaving a son by name Elshetti and a daughter named Narsubai. As was held by this Court in *Dayaldas Laldas* v. *Savitribai*[1], the *anvadheya stridhan* of a woman descends on her death to her sons and daughters jointly, not to the daughters alone. Accordingly, the property in dispute was inherited by Narsubai and her brother Elshetti in equal shares. Narsubai died in 1903, and the question is, who inherited her moiety of the property? It is proved from the evidence in the case that, although Narsubai was married to one Narsinga, yet she lived in adultery with respondent No. 2 and gave birth to a son. When she died, she left her surviving her husband and the son. The husband sold the property in dispute to the plaintiff on the 10th of June 1904. Respondent No. 2's case in the Court below was that Narsubai became his lawful wife by marriage after she had obtained a divorce from Narsinga. The Subordinate Judge has held the divorce not proved, and we agree with him. The evidence to prove it is of an unsatisfactory character and establishes no more than that Narsubai lived with respondent No. 2 and had a son by him.

Now the question is, whether her moiety descended on her death to the son born of her in adultery or to her husband Narsinga?

It is contended before us that the son inherited, because the law as to *stridhan* is that a woman's son is heir to it before her husband. But that law applies to a married woman, that is, one whose marriage was celebrated according to one of the recognised forms. When the text-writers say that the *stridhan* of a married woman, who has died "without issue", goes to her husband, if she was married in one of the approved forms, the words

(1) (1909) see *ante* p. 385.

"woman," "issue" and "husband" were intended to be used as correlative, or, as Vijnaneshwara in another part of the Mitakshara terms it, in the *prati yougika* sense, to show that the issue contemplated was issue of the woman by her husband and none else. Therefore, where a woman was married according to the approved form, the term "dies without any issue" means issue of that marriage. There is no authority whatever in the Hindu Law for the proposition, which is contended for by Mr. Pradhan, that, when the competition is between the husband and a son born of the woman by adulterous intercourse, that son supersedes the husband as heir to the stridhan.

It is next contended by Mr. Pradhan that we must presume under the circumstances of this case that the marriage of Narsubai with Narsinga was according to the unapproved form. That, however, is not the law. See *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram*[1], *Gojabai* v. *Shreemant Shahojirao Maloji Raje Bhosle*[2]. Even among Shudras, the law will presume the marriage to have been according to the approved form, if the parties belong to a respectable family. The Kamathis are an intelligent and respectable section of the Hindu community. We must, therefore, act upon the presumption that the marriage of Narsubai was according to one of the approved forms. Under these circumstances, the plaintiff obtained a valid title from the sale of the property to him by Narsubai's husband, and, therefore, he is entitled to half a share in the property in dispute.

We reverse the decree and allow the plaintiff's claim to the extent of a moiety of the property.

Costs throughout in proportion.

We also direct an inquiry as to mesne profits of a moiety of the property from the institution of the suit until—

(i) The delivery of possession to the decree-holder, or

(ii) The relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) The expiration of three years from the date of the decree, whichever event first occurs.

R. R.

(1) (1866) 11 M. I. A. 139.

(2) (1892) 17 Bom. 414.