APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

1914. *February* 24.

HARI ANNAJI DESHPANDE AND ANOTHER (ORIGINAL DEFENDANTS 1 AND 2), APPELLANTS, *v.* VASUDEV JANARDAN SATBHAI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 3 AND 4), RESPONDENTS.*

MAIBAI WIFE OF HARI ANNAJI (ORIGINAL PLAINTIFF 1), APPELLANT, *v.* BAGUBAI WIFE OF VITHALRAO DESHMUKH AND OTHERS (ORIGINAL PLAINTIFF 2 AND DEFENDANTS), RESPONDENTS.*

*Hindu Law—Mitakshara—Succession—Priority—Full sister—Son of a separated half-brother—Civil Procedure Code (Act V of 1908), section 11—*Res judicata *between co-defendants.*

Under the Mitakshara, the son of a separated half-brother is entitled to succeed in preference to a full sister of the propositus.

Bhagvan v. *Warubai*(1), followed.

Per Shah, J.:—In order that any decision between co-defendants might operate as *res judicata* in any subsequent suit between them, it is necessary to establish that there was a conflict of interests among the defendants, and that there was a judgment defining the real rights and obligations of the defendants *inter se.*

Ramchandra Narayan v. *Narayan Mahadev*(2), followed.

SECOND appeals from the decision of G. D. Madgavkar, District Judge of Ahmednagar, reversing the decree passed by M. K. Nadirshah, Joint Subordinate Judge at Ahmednagar.

Suit to recover possession of land.

One Martand owned the land in suit. He had two wives: by one wife he had one son Janardan; and by another wife he had three sons Ragho, Rangnath and Bhagwan, and three daughters Bagubai (plaintiff 2), Sitabai (defendant 4) and Maibai (plaintiff 1).

Janardan died in Martand's life-time, leaving a son him surviving, Vasudev (defendant 1). Martand died

* Second Appeals Nos. 705 and 706 of 1912.

(1) (1908) 32 Bom. 300. (2) (1886) 11 Bom. 216.

in 1891 ; and a week after, Ragho died. Rangnath died in 1892, leaving his widow Bhagirathi him surviving. Bhagwan died in 1899.

In 1904, Bhagirathi filed a suit (No. 51 of 1904) against Vasudev and the three sisters, Bagubai, Sitabai and Maibai, to recover her maintenance from them. The Court of first instance held that Vasudev was divided from Martand, and that the sisters were entitled to succeed to Bhagwan's property. The Court passed a decree against the three sisters and also against Vasudev on the ground that he was in possession of some of Bhagwan's property. Vasudev appealed against the decree, making only Bhagirathi a respondent. The appellate Court held that Vasudev was not liable as he was not in possession of Bhagwan's property.

In 1909, two of the sisters filed a suit against Vasudev to recover from him possession of Bhagwan's property. Vasudev also filed a suit against the sisters alleging that he was entitled to succeed to Bhagwan's property in their hands, as a preferential heir to Bhagwan.

The Subordinate Judge held that the question as to the priority to succeed to Bhagwan's property was *res judicata* by the decision in the first suit.

On appeal the District Judge held that the decision in the first suit was not *res judicata* in the present suit ; and further held that Vasudev was entitled to succeed to Bhagwan's property in preference to Bhagwan's full sisters.

The parties appealed to the High Court.

K. H. Kelkar, for the appellants.

D. R. Patwardhan, for the respondents.

SHAH, J. :—Two points of law have been urged in these second appeals, firstly that a full sister is a nearer heir than a son of a separated half-brother according to

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Hindu Law, and secondly that the question of heirship is *res judicata* in favour of the sisters.

As regards the first point, the competition is between the full sisters of the deceased Bhagwan and the son of his separated half-brother. The parties are admittedly governed by the Mitakshara and not by the Mayukha. The sister has been recognised as an heir under the Mitakshara by this Court in several cases, and it is beyond dispute that she is an heir under the Mayukha. The dispute really is about the position to be given to her in the list of heirs according to the Mitakshara.

This identical question has been fully considered and decided in *Bhagwan* v. *Warubai*[1]. We are bound by this decision, and in spite of an attempt made by the learned pleader for the appellant to question its correctness, I see no reason to doubt it. All the texts and the decided cases bearing on this question have been subjected to a critical examination in *Bhagwan's* case and in the earlier case of *Mulji Purshotum* v. *Cursandas Natha*[2], which was a case under the Mayukha. It is needless to discuss them here over again.

While expressing my concurrence with the conclusion arrived at in *Bhagwan's* case, I shall briefly deal with the argument, which has been pressed on behalf of the appellant on this occasion. Mr. Kelkar for the appellant concedes, and it must be conceded, that the sister has not been mentioned as an heir at all in the Mitakshara. He does not press for Balambhatta's interpretation of the word *bhratarah* in Yajnavalkya's text, as this Court has refused to accept Ballambhatta's view, as it involves a complete departure from the order of succession accepted and advocated by Vijnaneshwara, and as it has been repudiated by Nilkantha in the Vyava-

[1] (1908) 32 Bom. 300. [2] (1900) 24 Bom. 563.

hara Mayukha. But it is strenuously argued that the sister has been recognised as an heir under the Mitakshara as understood in this Presidency, mainly on account of her having been expressly mentioned as an heir by Nilkantha, and that, therefore, under the Mitakshara she should be given the same position in the order of succession, as has been given to her under the Mayukha. It is argued that as she comes before the half-brother under the Mayukha, she must come in before the half-brother under the Mitakshara, *i. e.*, before the brother's son, as the brother's son comes after the half-brother according to Vijnaneshwara. In my opinion this is a wholly untenable position. It is practically impossible to assign to the sister the same relative position in the list of heirs under the Mitakshara as has been assigned to her under the Mayukha. Nilkantha gives her a distinct and definite position and brings her in after the grandmother and before the half-brother. Vijnaneshwara, however, gives a much higher place to the half-brother in the order of succession, and in several respects his order of succession is different from that adopted by Nilkantha. It is, therefore, clear that the sister cannot be placed after the grandmother and before the half-brother or before the brother's son at the same time under the Mitakshara. In fact it is not reasonably possible to reconcile the Mitakshara and the Mayukha so far as the relative position of the sister in the compact series of heirs is concerned.

There is a further difficulty in accepting the appellant's argument. It is not possible to place the sister before the half-brother without disturbing the compact series of heirs laid down by Vijnaneshwara. It is not right to disturb this compact series by introducing an heir who is not expressly mentioned by Vijnaneshwara. Lastly it was urged that the sister cannot be included

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among the *gotrajas* as understood by Vijnaneshwara and, therefore, she cannot be appropriately brought in anywhere unless she is placed before the half-brother. But I do not see any force in this argument, as Nilkantha in bringing the sister in after the grandmother says that she has all the qualifications of a *gotraja*. After all the sister has been recognised as an heir under the Mitakshara even though not mentioned by Vijnaneshwara, mainly because Nilkantha has expressly assigned her a high place in the list of heirs. There is nothing to render Nilkantha's view that she has the qualifications of a *gotraja* inapplicable to the Mitakshara.

Quite apart from the consideration, however, whether under the Mitakshara the sister can be included among the *gotrajas* or not, it is clear that the sister cannot be placed higher than the grandmother. It has been held in *Rudrapa* v. *Irava*[1] that she cannot be ranked any lower. The result, therefore, is that under the Mitakshara she comes next after the grandmother and *a fortiori* after the half-brother's *son*.

The second point relates to *res judicata*. In the previous litigation one Bhagirathibai widow of Rangnath was the plaintiff. She had filed a suit to recover the arrears of maintenance and the possession of a part of the family house for residence from Vasudev, the separated brother's son, and the three full sisters of Bhagwan. Vasudev, defendant No. 1, and one of the sisters, defendant No. 3, did not appear in the suit. The second sister, defendant No. 2, did not put in any written statement. The claim was contested by the third sister, defendant No. 4, on the ground that defendant No. 1 was in possession of the property. Though it was assumed by the trial Court in that case that the sisters—and not the nephew—would inherit Bhagwan's property, the question of

[1] (1903) 28 Bom. 82.

heirship was neither raised nor decided. The present contesting parties were all arrayed as defendants in that suit. The defendant No. 1, Vasudev, appealed against the decree, and it is significant to find that the sisters, co-defendants, were not made parties to the appeal. The appellate Court passed a decree against the joint family estate of Martand without deciding any questions relating to the defendants *inter se*. It was made clear in the decree by the appellate Court that it would be open to defendants Nos. 2, 3 and 4 (*i. e.*, the sisters) to sue the first defendant in respect of any alleged wrongful possession during previous years. In order that any decision between co-defendants might operate as *res judicata* in any subsequent suit between them, it is necessary to establish that there was a conflict of interests among the defendants, and that there was a judgment defining the real rights and obligations of the defendants *inter se* (see *Ramchandra Narayan* v. *Narayan Mahader*[1]). On looking at the judgments in the previous litigation, it does not appear that the point as to who was Bhagwan's heir was really raised by the parties. At any rate the point was certainly not decided. Under these circumstances it is clear that the question of heirship is not *res judicata*.

In my opinion both the points fail, and the decree of the lower appellate Court in each case is confirmed with costs.

HEATON, J. :—I am quite satisfied on a perusal of the judgment in and on a consideration of the circumstances of the previous litigation that there is no *res judicata* here. Further I am prepared to follow as an authority the case of *Bhagwan* v. *Warubai*[2]. In the obscurity which lies around these matters where the Mitakshara and Mayukha are in conflict, it seems to me that when

[1] (1886) 11 Bom. 216. [2] (1908) 32 Bom. 300.

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a clear and definite decision has once been arrived at, that decision ought to be maintained and followed.

I therefore concur that both these appeals should be dismissed and the decrees of the lower appellate Court confirmed with costs.

Decrees confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

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KASHINATH RAMCHANDRA (ORIGINAL PLAINTIFF), APPELLANT, *v.* NATHOO KESHAV AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Order II, Rule 2—Landlord and tenant—Lease—Landlord to recover possession on tenants' failure to pay rent—Suit by landlord to recover possession on tenants' failure—Decree directing plaintiff to recover possession on tenants' failure to pay rent within three months—Defendants' failure and recovery of possession by plaintiff—Prayer in the plaint for reservation of leave to bring a suit for rent not granted—Subsequent suit by the plaintiff to recover rent—Subsequent suit barred.

A lease provided that on the tenants' failure to pay rent the landlord should be entitled to take possession of the lands. The tenants having failed to pay the rent of two years, the landlord sued them and obtained a decree which directed that on the defendants' default to pay all the arrears of rent and costs within three months, the plaintiff should take possession of the lands. In the said suit the plaintiff had asked for permission to bring a separate suit for the rent in arrears for two years, but none was given. Subsequently the plaintiff having brought a suit for the said rent of two years,

Held, that the suit was barred under Order II, Rule 2 of the Civil Procedure Code (Act V of 1908) as the claim in the suit for rent up to the date of forfeiture arose upon the same contract as did the landlord's right of forfeiture for non-payment of rent; that no necessity or reason existed for a separate suit for rent where there had been a forfeiture for non-payment and that the claim for possession and the claim for rent ought to be enforced in one suit, provided the cause of action was the same, unless the Court should give leave for the reservation of one of the remedies.

* Second Appeal No. 566 of 1913.