

it is presumed that the tenancy is co-extensive with the duration of the tenure of the landlord. So we think the decision of the lower Court is right.

The appeal must be dismissed with costs.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Fawcett.

BALKRISHNA BHIMAJI MOKASHI AND ANOTHER (ORIGINAL DEFENDANTS NOS. 3 AND 4), APPELLANTS v. RAMKRISHNA GANGADHAR DIXIT INAMDAR AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS^o.

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July 21.

Hindu Law—Mitakshara—Succession—Bandhus—Male Bandhu entitled to preference over a female Bandhu though the latter be nearer in degree.

Under the Mitakshara Hindu law a male Bandhu is entitled to preference over a female Bandhu even though the latter is nearer in degree.

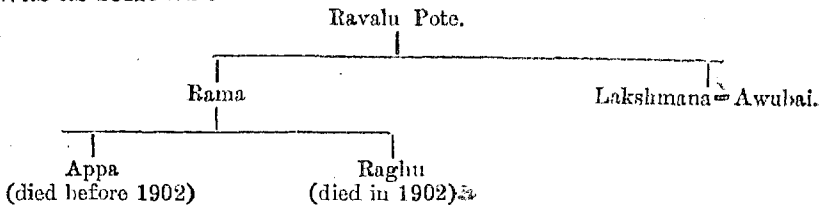
Held, accordingly, a mother's sister's son is entitled to succeed in preference to a brother's daughter.

Rajah Venkata Narasimha v. Raja Surenani⁽¹⁾, followed.

SECOND appeal against the decision of A. Montgomerie, Assistant Judge at Belgaum, modifying the decree passed by A. K. Asundi, Subordinate Judge at Gokak.

Suit to recover possession.

The lands in suit were originally held by the family of one Ravalu Pote. The relationship of that family was as follows :—



Janki, Defendant No. 1.

^o Second Appeal No. 893 of 1918.

⁽¹⁾ (1908) 31 Mad. 321.

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The plaintiff who was the Inamdar of the village in which the lands were situated, claimed to hold them under registered Rajinamas and Kabulayats passed by Awubai and Janki (defendant No. 1) in 1905 and 1914.

The defendants Nos. 3 and 4 claimed to maintain the possession of the lands as purchasers from the sons of Raghu's mother's sister.

The plaintiff filed the suit to recover possession alleging that defendant No. 1 was his annual tenant and the other defendants had interest in the property.

The defendants Nos. 1 and 2 remained absent.

Defendants Nos. 3 and 4 contended that the property in suit was held by the family of defendant No. 1 in permanent tenancy, that they were never in possession of defendant No. 1 but of her uncle Raghu and that as purchasers from the sons of Raghu's mother's sister, they had better title.

The Subordinate Judge dismissed the suit on the ground that the lands were held by defendant No. 1 and her predecessors as permanent tenants and that the Rajinamas and Kabulayats relied on by the plaintiffs were suspicious documents.

On appeal the Assistant Judge held that the defendant No. 1 through whom the plaintiff claimed, was one degree nearer to Raghu than the vendors of defendants Nos. 3 and 4 who were sons of Raghu's mother's sister; that the Rajinamas relied on by the plaintiff were valid documents and had the effect of transferring the ownership of the lands to the plaintiff. He, therefore, passed a decree in favour of the plaintiff subject to the mortgage rights of defendants Nos. 3 and 4.

The defendants Nos. 3 and 4 appealed to the High Court.

Nadkarni with *A. G. Desai*, for the appellant :—The question is whether a brother's daughter is entitled to succeed in preference to a mother's sister's son who is one of the nine specified *bandhus*. This raises a further question whether a female *bandhu* can claim precedence over a male *bandhu*. All commentators are agreed that no female can come in as heir unless expressly mentioned in the "Texts": see Sarvadhikari's Hindu Law of Inheritance, pp. 660 and 672. The right of a female Gotraja Sapinda (*bandhu*) is negatived in the Mitakshara: see West and Buhler, 3rd Ed. pp. 130-131 where the learned authors point out that even in the Bombay Presidency the rule that a female is excluded unless expressly mentioned in the "texts" is adhered to where the female is a *bhinna-gotra sapinda* (*bandhu*) although it is relaxed where she claims as an agnate or a *gotraja-sapinda*. According to the scheme of the Mitakshara as revealed in the classification and enumeration of *bandhus*, male *bandhus* alone can inherit. It was mainly owing to the opinion of Messrs. West and Buhler that females first came to be admitted into the list of heirs in the Bombay Presidency; but this inclusion was not meant and did not *ipso facto* entitle females to set up a right of precedence over the nine specified *bandhus*: see West and Buhler, 3rd Ed. page 491 and Vyavahara Mayukha, IV, 8; Mayne's Hindu Law, pp. 821-822; Trevelyan's Hindu Law, page 411 where the learned author says: "In the absence of custom they should be placed, it is submitted, after all the *bandhus* who have been enumerated." The only females admitted as heirs in the Bombay Presidency are (1) sister (2) father's sister (3) widows of gotraja-sapinda and (4) daughters of collaterals. The right of sister is based upon express texts. The right of father's sister is based upon the opinion of Nilkantha in Vyavahar Mayukha and upon

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the well-known maxim that the Mitakshara and Mayukha should be harmonised. The right of widows of gotraja-sapindas is based by Westropp C. J. on custom, acting on the opinion of West and Buhler. But this right is denied to the widows of *bandhus* or *bhinna gotraja-sapindas*. The right of daughters of collaterals is recognised in Bombay and Madras ; but as in Madras these females come in the absence of male *bandhus*, it is submitted that the same rule should be observed in the Bombay Presidency, in the absence of custom.

Moreover, if priority is to be determined with reference to the principle of propinquity or nearness of relationship, it is submitted that "propinquity" according to Vijaneshwar had a technical meaning as stated by Mitra Misra, author of *Virmitrodaya* the foremost commentary on the Mitakshara. According to *Virmitrodaya* : "Propinquity is measured by the spiritual benefits conferred on the deceased proprietor. Spiritual benefits furnish the great test of consanguinous propinquity. Spiritual benefit determines with precision the preferable right of gotraja sapindas *and other heirs*": see Sarvadhikari's *Law of Inheritance*, pp. 647-648 and see also page 726 where the learned author says : "The Mitakshara system of inheritance is based on affinity and the order of succession is regulated by the principle of propinquity. *The degrees of propinquity are tested by religious merit.*" I submit that this pronouncement on the Mitakshara Law of *bandhus* puts the female out of Court, she being incapable according to *Nirnaya Sindhu* and *Samskara-Kaustubha* to offer a funeral cake or to participate in religious rites. This view is borne out by the Privy Council decisions : see *Soorendronath Roy v. Missamut Heeramonee Burmoneah*⁽¹⁾ at pp. 96 and 97 of the report,

(1) (1868) 12 Moo. I. A. 81 at pp. 96 and 97.

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Bhyah Ram Singh v. Bhyah Ugur Singh⁽¹⁾ at pp. 373 and 392 of the report and *Buddha Singh v. Lattu Singh*⁽²⁾ at page 217, where their Lordships say "The Mitakshara, whilst holding that the right to inherit does not spring from the right to offer oblations, does not exclude it from consideration as a test of propinquity or nearness of blood;" see also Ghose's Hindu Law, pp. 151-152 and Bhattacharya's Hindu Law, both the authors expressly placing male *bandhus* over female *bandhus*.

Lastly, I submit, that among *bandhus* a claimant in order to succeed as heir must establish that the propositus was in the line of the maternal grand-father of the claimant, his father, or mother: see *Umaid Bahadur v. Udoi Chand*⁽³⁾; *Lowji v. Mithabai*⁽⁴⁾ and *Parot Bapalal Sevaleram v. Mehta Harilal Surajram*⁽⁵⁾. Under this rule, many males are excluded though otherwise they would be *bandhus*. The right of a brother's daughter to come in as heir, therefore, falls to the ground. Even if the right be conceded to her as a matter of grace on account of her relationship to the deceased it cannot have priority over the claim of a male *bandhu* and especially one of the nine specified *bandhus*. The case of *Rajah Venkata Narasimha v. Rajah Surenani Venkata*⁽⁶⁾ is in point and should be followed especially as it is in accordance with the opinion of the commentators and text writers on the subject.

Bahadurji with *S. R. Bakhale*, for the respondents:—The opinion of Messrs. West and Buhler, relied on by the other side, is based upon the principle mentioned in the *Mayukha* that "incidental persons are

(1) (1870) 13 Moo. I. A. 373 at p. 392.

(4) (1900) 2 Bom. L. R. 842.

(2) (1915) L. R. 42 I. A. 208 at p. 217.

(5) (1894) 19 Bom. 631 at p. 634.

(3) (1880) 6 Cal. 119.

(6) (1908) 31 Mad. 321.

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placed last." But the principle of "nearness to the deceased" was held to prevail over the rule as to incidental persons even in the case of *bandhus*: *Mohandas v. Krishnabai*⁽¹⁾; West and Buhler, pp. 496 and 498.

[MACLEOD, C. J.:—That is what is called Anglo-Indian law: but see *Rajah Venkata Narsimha v. Rajah Surenani Venkata*⁽²⁾.]

I submit that is the Mitakshara law prevailing in the Presidency; *Rajah Venkata Narasimha v. Rajah Surenani Venkata*⁽²⁾ lays down the principle of Mitakshara law prevailing in the Madras Presidency.

If Mitakshara is silent on the point it cannot be imagined that it negatives the right of a female to come in as a *bandhu* and claim priority on the ground of propinquity. The doctrine of propinquity applies in the case of *bandhus*: Mayne's Hindu Law, page 810. The preference of the father's kindred to that of the mother is in accordance with the general preference of the male line to the female. The enumeration in the Mitakshara is not exhaustive. The Mitakshara includes by implication both males and females not mentioned.

Strictly speaking on the analogy of a sister a daughter of a collateral may claim to be an agnate. Before her marriage she is evidently an agnate. If after her marriage she is reduced to the position of a *bandhu*, at any rate she traces her relationship through an agnate and on the father's side whereas a mother's sister's son traces his relationship through a female and on the mother's side of the propositus.

MACLEOD, C. J.:—The plaintiff sued to recover possession of the plaint property and his claim was resisted

⁽¹⁾(1881) 5 Bom. 597.

⁽²⁾ (1908) 31 Mad. 321.

by the defendants Nos. 3 and 4 who denied that the plaintiff was the owner. In the trial Court the plaintiff's suit was dismissed. In appeal the plaintiff's claim was allowed and he was held entitled to recover possession of the plaint property with the exception of what was mortgaged to the defendants Nos. 3 and 4. The learned Judge decided in the plaintiff's favour on the ground that defendant No. 1, through whom the plaintiff claims, was a nearer heir to Raghu than the vendors of defendants Nos. 3 and 4 who were the sons of Raghu's mother's sister. The learned Judge says: "It is now settled law that the suggestion in West and Buhler, page 491, as to the postponement of all other *bandhus* to the nine specially mentioned in the Mitakshara is not correct and that the only principle governing the order of succession among *bandhus* is that of propinquity." Unfortunately the learned Judge has not cited any authority for that opinion which, if correct, would mean this, that the female *bandhus* are placed in a position of equality with male *bandhus*. Now the nine *bandhus* specially mentioned in the Mitakshara are male *bandhus*, and although other male *bandhus* have been held by various decisions entitled to rank with those *bandhus*, there is not a word said in any of those decisions about female *bandhus* being placed in equality with the male *bandhus*. On the other hand there is a direct decision of the Madras High Court—*Rajah Venkata Narasimha Appa Rao Bahadur v. Rajah Surenani Venkata Purushothama Jagannadha Gopala Roo Bahadur*⁽¹⁾—that under the Mitakshara a male *bandhu* is entitled to preference over a female *bandhu* even though the latter is nearer in degree. In the absence of any authority to the contrary of the opinion expressed by West and Buhler we are of opinion that female *bandhus* are excluded by

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⁽¹⁾ (1908) 31 M.d. 321.

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the nine classes of *bandhus* mentioned in the *Mitakshara*. Mr. Mulla also in his work on Hindu Law cannot point to any authority to support the learned Judge's conclusion. We may take it then as settled law, as far as the present case is concerned, that female *bandhus* are still excluded from being treated on an equality with male *bandhus*.

The result is that the appeal is allowed and the plaintiff can only be entitled to the half share of Appa in the plaint property subject to the mortgage of the defendants Nos. 3 and 4.

It is true that he sues for possession although the properties are in the possession of the mortgagees until the mortgages are paid off. But it is just as well that in order that there should be no dispute in the future we should hold him entitled to that half share of Appa subject to his having to pay off the mortgages together with the costs and further charges if any before he gets possession.

Plaintiff to pay costs throughout.

The cross-objections are dismissed with costs.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

1920.

July 22.

VISHNU DHONDDEV PALKAR (ORIGINAL PLAINTIFF), APPLICANT v.
RAMPRATAP DAULATRAM MARWADI (ORIGINAL DEFENDANT),
OPPONENT *.

Civil Procedure Code (Act V of 1908), section 115—Attachment before judgment at the instance of petitioner—Sale proceeds paid into Court—Opponent withdrawing the proceeds in execution of a decree—Notice of payment not given to the petitioner—Petitioner's suit for rateable distribution—Dismissal of suit—No material irregularity.

* Civil Application No. 279 of 1919 under Extraordinary Jurisdiction.