Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bai Kesserbai v. *Hunsraj Morarji and another, from the High Court of Judicature at Bombay; delivered the 9th May* 1906.

Present at the Hearing:

LORD DAVEY.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

The question in this Appeal relates to the succession to immoveable property in the Island of Bombay, of which a Hindoo lady named Kumari Bachubai died possessed. She was the widow of one Koreji Haridass, who died in February 1898. On the 24th November 1892 Koreji Dass executed an ante-nuptial settlement of the property now in dispute, whereby he conveyed it to Kumari Bachubai, her heirs, executors, administrators, and assigns, for ever, subject to the following conditions:—

"1. If the said Kumari Bachubai shall die before the said "intended marriage has been celebrated and completed then "the said house land and premises shall revert to and again "become the absolute property of the said Koreji Haridass his "heirs, executors, administrators, and assigns.

"2. If the said Kumari Bachubai shall die after the said "intended marriage has been celebrated and completed without "leaving issue of the said intended marriage who shall "succeed to a vested interest in the said house land and "premises then the said house land and premises shall be dealt "with as she may direct or declare by will or deed or failing "any will or deed then the same shall vest in her legal heirs "according to Hindu Law of the Bombay School."

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The marriage was celebrated in February 1893. Kumari Bachubai died on the 9th May 1899 without leaving any issue and without having made any appointment by deed or will. It is not disputed that the persons entitled to succeed to the property as heirs of Kumari Bachubai were the persons entitled to her ordinary stridhan. The rival claimants are the Appellant, Bai Kesserbai, who was the surviving co-widow of Koreji Haridass, the Respondent Bai Monghibai, who is the widow of Ranchordas Haridass, a brother of Koreji Haridass who survived Kumari Bachubai and died on the 17th June 1902 (it is presumed childless), and the Respondent Hunsraj Morarji, who was the son of another brother of Koreji Haridass, who predeceased Kumari Bachubai. The Appellant was the Plaintiff in the suit, which was commenced on the 4th August 1902, in the High Court of Bombay. Mr. Justice Batty decided that by the Hindoo law of the Bombay School the Appellant was the next heir to Kumari Bachubai, and entitled to succeed. This decision was reversed on Appeal by the Chief Justice and Mr. Justice Russell, and by their Decree dated the 11th December 1903 the suit was dismissed with costs.

It is stated in the Judgment on the Appeal that both sides abandoned the view taken by Mr. Justice Batty, that Kumari Bachubai under the deed of gift took an absolute interest in the property, and that it was conceded that she took a limited interest only, and her heirs took as purchasers. Both the learned Judges were also of that opinion, and their Judgments are, to a certain extent, based on it. Their Lordships are at a loss to understand on what grounds this opinion was arrived at. They have no doubt whatever that whether the deed is to be construed according to English law, as Mr.

Justice Russell thought, or by Indian law, Kumari Bachubai took under it an absolute estate of inheritance.

Questions on the Hindu law of inheritance to property in the Island of Bombay are to be determined in accordance with the Mitakshara, subject to the doctrine to be found in the Mayukha where the latter differs from it. But, as laid down by Mr. Justice Telang, "Our "general principle should be to construe the "Mitakshara and the Mayukha so as to "harmonize with one another wherever and so "far as that is reasonably possible." The point now under discussion is whether a co-widow is entitled to succeed to the property of a widow dying without issue in preference to her husband's brother or brother's son. There has been no judicial decision on this question, and their Lordships must decide it on the construction of the texts of Mitakshara and the Mayukha read together, with such assistance as may be afforded by other commentaries (though not recognised as authorities in Bombay) and by modern text books.

Gojabai v. *Shrimant Shahajirao Maloji Raje Bhosle* I.L.R. 17 Bomb. 114, at page 118.

If the case rested on the Mitakshara alone their Lordships are of opinion that the Appellant would be entitled to succeed. The material texts of the Mitakshara are Chapter II., Section XI., Placita 8, 9, and 11:—

Stokes, "Hindu Law Books," pp. 460, 461.

"8. A woman's property has been thus described. The "author next propounds the distribution of it: 'Her kinsmen "'take it if she die without issue.'

"9. If a woman die 'without issue,' that is, leaving no "progeny . . . . . the woman's property, as above "described, shall be taken by her kinsmen; namely, her "husband and the rest as will be [forthwith] explained.

"11. Of a woman dying without issue as before stated, "and who had become a wife by any of the four modes of "marriage denominated Brahma, &c. . . ., the [whole] property, "as before described, belongs in the first place to her husband. "On failure of him it goes to his nearest kinsmen [sapindas] "allied by funeral oblations. But in the other forms of "marriage, called Asura, &c. . . ., the property of a childless "woman goes to her parents, that is, to her father and "mother."

There can be no reasonable doubt that according to the Mitakshara definition of sapinda husband and wife are sapindas to each other. In the case of *Lallubhai Bapubhai* v. *Mankuvarbai* (I. L. R. 2 Bomb. 388) Sir Michael Westropp, after quoting a long passage from the Achara Kanda of the Mitakshara, said (at p. 423) :—

"This shows that Vijnyanesvara abandoned the doctrine "that the right to offer funeral oblations alone constituted "sapinda-ship, and adopted in lieu of it the theory that sapinda-"ship is based upon community of corporal particles, or, "in other words, upon consanguinity, and that he maintained "that there is such a community between the wives of "collaterals."

The learned Chief Justice then showed that the same theory had been adopted by Nikalantha, the author of the Mayukha, and that the doctrine applied to sapinda relationship, not only in its ceremonial aspect but for purposes of inheritance also. It was accordingly held in that case, which arose in the Island of Bombay, that under the law of the Mitakshara and Mayukha the widow of a deceased first cousin succeeded in her husband's place in preference to a male of a remoter degree. In *West* and *Bühler* it is stated that whether "nearness" in the rule given by the Mitakshara for succession to childless widows' property should be determined in accordance with the succession to the property of a male, or whether it means nearest by relationship, the co-widow has the first right of succession, but in the latter case concurrently with other kinsmen in the same degree. But, they say :—

"Digest of the Hindu Law of Inheritance," p. 518.

"The identity of the wife with her husband being ac-"cepted as a leading principle of the Mitakshara, the rule "seems, on the whole, most consonant to it whereby pre-"cedence in heritable relation to him gives a like precedence "and order of succession in relation to his widow."

And they add :—

"Such appears to be the rule, too, which custom has "preferred in this part of India."

In accordance with these views it has been recently decided in a case from the Satara district where the Mitakshara is the governing authority that a co-widow succeeds to a childless widow's stridhan in preference to her husband's brother's son (*Krishnabai Martand* v. *Shripati Pandu*, 8 Bomb. Law Reporter 12).

The grounds upon which it is said that the rule thus deducible from the Mitakshara is altered or superseded by the Mayukha are to be found in Ch. IV. Sec. X. of that treatise, Pl. 28 and 30, which are as follows :—

Stokes, *op. cit.*, page 105.

"'28. The property of a childless woman married in the "'form denominated Brahma, or in any of the other four "'[unblamed modes of marriage] goes to her husband; but if "'she leave progeny, it will go to her daughters; and in "'other forms of marriage [as the Asura, &c.] it goes to her "'father and mother on failure of her own issue.' [In the "one case] if there be no husband, then the nearest to her, "in his [tat] own family takes it; and [in the other case], "if her father do not exist, the nearest to her in [her] "father's family succeeds, [for the law that:] 'To the nearest "'sapinda, the inheritance next belongs,' as declared by Manu "denotes that the right of inheriting her wealth is derived "even from nearness of kin to the deceased [female] under "discussion—and, though the Mitakshara holds, 'that on "'failure of the husband, it goes to his [tat] nearest kinsmen "'[sapinda] allied by funeral oblations'; and 'on failure of "'the father then to his [tat] nearest sapindas'; yet, from "the context it may be demonstrated that her nearest relations "are his nearest relations; and [the pronoun *tat* being used "in the common gender] it allows of our expounding the "passage 'those nearest to him, through her, in his own "'family': for the expressions are of similar import."

"30. On failure of the husband of a deceased woman, if "married according to the Brahma or other [four] forms; "or of her parents, if married according to the Asura or other "two forms, the heirs to the woman's property, as expounded "above, are thus pointed out by Brihaspati: 'The mother's "'sister; the maternal uncle's wife; the paternal uncle's wife; "'the father's sister; the mother-in-law, and the wife of an "'elder brother, are pronounced similar to mothers. If they "'leave no son born in lawful wedlock, nor daughter's son, "'nor his son, then the sister's son, and the rest shall take their "'property.' Here must be understood, 'on failure both of the "'daughter, and also of her daughter,' because only on failure "of them does the right of inheritance pertain to the son "born in wedlock, or to the daughter's son."

The text of Brihaspati, quoted above, is thus paraphrased by Mr. Justice Banerjee in his Tagore Lectures (1878):— 2nd ed., pages 387 and 388.

"To a male the females related as the sister of his mother, "the wife of his maternal or of his paternal uncle, the sister "of his father, the mother of his wife, and the wife of his "elder brother are like his mother; and so to a female the "males related in the reciprocal way as her sister's son, her "husband's sister's son, her husband's brother's son, her "brother's son, her daughter's husband, and her husband's "younger brother are like her son. And these last-mentioned "relations of a female being like her sons inherit her *stridhana* "if she leave no male issue, nor son of a daughter, nor a "daughter."

You have, therefore, the following list of relations to the childless widow and deceased proprietress of the stridhan who are said to be like her sons, and have been called by some text writers secondary sons:—

(1.) Sister's son.
(2.) Husband's sister's son.
(3.) Husband's brother's son.
(4.) Brother's son.
(5.) Son-in-law, or daughter's husband.
(6.) Husband's younger brother.

The chief difficulty about the text of Brihaspati is that we do not know the context in which it occurs. It appears to give promiscuously the sapindas of the husband and those of the father without noticing the distinction in the devolution of the property depending upon the form of marriage of the deceased widow. No intelligible principle has been discovered for the order in which they are enumerated. It is at variance with the settled and universally recognised principles of the Hindoo law of inheritance, and the enumeration is obviously not exhaustive. Moreover, it is so expressed as to bring in the secondary sons immediately after the issue of the widow, for the words "if they leave no son," &c., are construed to refer to childless widows, and the description of the issue, upon failure of

whom Brihaspati's secondary sons are to take, is neither exhaustive nor accurately descriptive of the order in which such issue would be entitled to succeed. The important question, however, is, how the author of the Mayukha understood the quotation. In his comment at the end of Pl. 30 he partially supplies the gaps left in the enumeration of issue, but not fully. If the "son born in lawful wedlock," means or includes a son of a rival wife (as is said in the Daya Bhaga) he would take only after the husband and (if the order of succession be based on propinquity) concurrently with the rival wife (*see West and Bühler*, Digest, p. 518, already quoted).

Nikalantha, however, clearly intends to bring in Brihaspati's series of secondary sons on failure of the husband or father, but whether immediately on that event or in what order is another question. Three constructions have been offered on these points. First, it was argued before their Lordships that the words "on failure of "the husband of a deceased woman" should be read as meaning "on failure of the husband and "his line of sapindas," succeeding in accordance with Pl. 28. Secondly, that Brihaspati's series of secondary sons comes in between the husband and his nearest sapindas and in the order in which they are mentioned. Thirdly, that a distributive construction should be given to Brihaspati's text applying the husband's relatives named to the case of a woman married in one of the approved forms, and the father's relatives to the other case only, and the text should be read as illustrative only, and neither exhaustive nor intended to prescribe the order in which the enumerated heirs take.

It does not appear to their Lordships possible to adopt the first of these constructions without doing unnecessary violence to the language

and context. The words in Pl. 30 are: "On "failure of the husband . . . the heirs to the "woman's property as expounded above are "thus pointed out by Brihaspati." The quotation from Brihaspati, therefore, was intended to be used in the Mayukha as explanatory or expository of the class of heirs already pointed out in Pl. 28, and not as substitutive for them or as superseding them. Again, some of the husband's sapindas are included in Brihaspati's series, which seems decisive against this construction.

What may be described as a modified form of this construction is that adopted by Mr. Justice Batty. That learned Judge held that the point of bifurcation where the Mitakshara and Mayukha separate appears to be a point below the widow in the series of successive heirs, and that it is the recognised identity of the wife with her husband that entitles a co-widow's children and a co-widow herself to take precedence as sapindas to the wife herself or as representing the husband himself before resort is had to the husband's sapindas at all. The Chief Justice says that he is aware of no passage in the Mayukha that can be taken as a warrant for the identification of the wife with her husband. It seems, however, difficult to maintain this position in face of the learned Judgments of Sir Michael Westropp and Mr. Justice West in the case of *Lallubhai Bapubhai* v. *Mankuvarbai*, and the Judgment of Mr. Justice Telang in *Gojabai* v. *Shrimant Shahajirao Maloji Raje Bhosle*, I.L.R. 17 Bomb. 114.

According to the second construction the text of Brihaspati is read in what is no doubt its more obvious and literal sense apart from the context. It is that adopted by the Chief Justice and supported by the Respondents in the present Appeal, and it has considerable authority in its

favour, including the Daya Bhaga, the Viramitrodaya, and Vyavastha Chandrika, and, amongst modern text writers, West and Bühler, Mr. Justice Banerjee, and Mr. G. Sarkar. In the Daya Bhaga, however, it is said that if the order of succession were according to Brihaspati's text it would be contrary to the opinion and practice of venerable persons, and that the text is propounded "not as declaratory of the order "of inheritance but of the strength of the fact," whatever those words may mean. Notwithstanding the weight of the authority in its favour, their Lordships cannot bring themselves to think that the construction contended for by the Respondents is the one which they ought to adopt. So far from construing the Mitakshara and the Mayukha so as to harmonize with one another so far as that is reasonably possible, the Respondents place them in direct conflict, and not only so, but the Mayukha is also divided against itself. Placitum 30 deals as well with the case of a widow married in one of the approved forms as with that of a widow married in one of the lower forms, and is expressed to be expository of the rule laid down in Placitum 28. But some of the enumerated heirs are not blood relations of the husband at all, or members of his family, and others of them are not blood relations of the widow's father, or members of his family. Again, those who are nearest (both as regards degree of propinquity and in order of inheritance) are postponed in favour of those who are more remote in contradiction alike of the Mitakshara and Placitum 28 of the Mayukha.

The case of *Gojabai* v. *Shrimant Shahajirao Maloji Raje Bhosle* (I. L. R. 17 Bomb. 114), related to the succession to the stridhan of a childless Hindoo widow married in one of the approved forms, who left her surviving (1) a co-widow, (2) the grandson of another co-widow,

(3) a son of her husband's brother. The case fell to be decided in accordance with the Mitakshara, and the decision was in favour of the step-grandson, whether he was to be described as the husband's nearest sapinda or the wife's nearest sapinda in his family. But the texts of the Mayukha now under consideration had been relied on in argument, and the Judgment of Mr. Justice Telang contains a valuable disquisition on that commentary. "Construing the "Mitakshara in the sense which Nilakantha "places upon its language" (Pl. 28), the learned Judge says :—

"The wife having by her marriage been 'born again in the "'husband's family,' and having become 'half the body of the "'husband' the sapindas of the husband necessarily become her "sapindas, and their degrees of propinquity to the husband and "wife must be held to be identical unless some specific reason "to the contrary is shown."

The Judgment of the learned Judge also contains the following passages :—

"In truth even the rule which Nilakantha himself deduces "from Yajnavalkya's general text is not in harmony with the "enumeration of heirs contained in the text of Brihaspati "now under consideration. And yet the Mayukha does not "say how the two are to be made to stand together. The "learned authors of the Digest have placed the heirs "enumerated by Brihaspati after the husband and before the "woman's sapindas in her husband's family. This certainly "appears to be warranted by the express words of the "Mayukha contained in Placitum 30. Yet it is not quite "reconcileable with the previous declaration in Placitum 28 "that 'if there be no husband then the nearest to her in his "'family takes' the woman's property. It is quite plain that "some of the persons referred to in Brihaspati's text do not "answer to this description at all, while of those that do the "husband's brother's son is not obviously nearer than the "husband's younger brother, and yet according to Brihaspati's "text the former would stand before the latter. It cannot "therefore be assumed to be *quite* clear according to the view "of the Mayukha that Brihaspati's list states the true order "of succession as between the heirs enumerated or that all "those heirs take precedence over the ones included under the "designation 'nearest to her in her husband's family.'"

And again,—

"But Mr. Bhandarkar argued that the heirs specifically "named in Brihaspati's text ought to be given precedence

" over those who come in under the general designation, each " group of them taking precedence in the class (viz., that " of husband's kinsmen or parent's kinsmen) to which it " belonged. There is, however, no authority for this view. " In West and Bühler's Digest the precedence is given to the " whole of the enumerated heirs, and the ground for such " precedence has already been stated. If they are not treated " as one class there is apparently no other ground for the " preference than is indicated by the principle mentioned in the " Vyavahara Mayukha, Ch. IV., Sec. VIII., placitum 18. But " that principle, as there expressed, appears to be intended to " apply only where there is a 'compact series.' This Court in I.L.R., 3 Bomb., 597. " *Mohandas* v. *Krishnabai* declined to apply it in the case " of *bandhus* so as to give to the *bandhus* expressly named a " preference over those who come in under the general defi- " nition. I think this is the authority which would be more " applicable in the matter before us, and no such preference of " the designated persons can therefore be allowed in this case."

The case of *Bachha Jha* v. *Jugmon Jha* (I.L.R. 12 Calc. 348), on the other hand, was a judicial decision on the text of Brihaspati now under consideration. It was there held that the stridhan property of a widow governed by the Mithila law and married in one of the approved forms, goes to her husband's brother's son in preference to her sister's son. It appears from the Judgment of the Court that the vakeel for the Appellant had relied on that portion of Ratnakara which treats of stridhan. The learned Judges observe that that book is no doubt one of considerable authority in the Mithila School, and if the matter were clear upon what Ratnakara says on the subject, they should, perhaps, have no difficulty in deciding the matter. The author of Ratnakara (it appears) in the passage relied on cited the text of Brihaspati now under consideration, with the following commentary, viz., " The meaning is that in default of the son " and the rest, the sister's son, &c., shall take " the property of their mother's sister and " others." The learned Judges refer to other commentaries in which the same text of Brihaspati is cited, and they quote an opinion attributed to Mr. Colebrooke, in which it is stated,

that by some commentators a distributive construction of the text is adopted, the three relations in Brihaspati's enumerated heirs who are so through the husband taking the property in the one case, and the three who are so through the father taking the property in the other case. And after discussing the placita in the Mayukha dealing with the subject they say they are inclined to think that what the author meant to lay down was that the succession of the heirs mentioned in Brihaspati's text is to be taken to be subject to the rule of law laid down by him in accordance with the Mitakshara, as suggested in "Shama Churn's Vyavastha Chandrika," Vol. II., p. 539. Ultimately, the case was decided in accordance with the Mitakshara, on the ground that the meaning and effect of the text of Brihaspati quoted by Ratnakara was too ambiguous to control the plain meaning of that work.

The Chief Justice answers the argument that some of the persons enumerated in Brihaspati's text as heirs do not answer the description of being nearest in the husband's family by saying that this criticism loses sight of the fiction on which the text is based, which, he says, involves the consequence that the persons enumerated are equal to sons. With great respect, this is not what is said, or apparently intended, by the text. They do not take concurrently with sons, and no text writer has even suggested that they take concurrently with each other, as they would do if they were all equal to sons, or to be treated as sons. The analogy appears to their Lordships to be purely fanciful and not based on any discoverable principle. Nor is it in accordance with the fact. The kinship of the husband's brother's son is not derived through the wife of the husband's brother, but through the husband's brother himself.

It is apparent from the Judgments above quoted that the learned Judges did not treat the application of Brihaspati's text, or the meaning of the author of the Mayukha in quoting it, as settled by authority, either as regards the place in the succession of the enumerated heirs or the order in which they are to take. It would perhaps be sufficient for their Lordships to say, in accordance with a well settled principle of construction, that the unambiguous direction in Pl. 28 of the Mayukha is not controlled by a subsequent text the language of which is of such uncertain meaning as that contained in Pl. 30 of the same work. But following out the line of thought suggested in the judgments quoted above their Lordships think that a construction may be put on the language of Pl. 30 of the Mayukha which will bring it into harmony with the Mitakshara, and also reconcile it with the previous placitum of the Mayukha itself. They are of opinion that the text of Brihaspati should be read distributively as regards the property of women married according to one of the approved forms, and the property of those married in one of the lower forms. In the one case, those of the heirs enumerated by Brihaspati who are blood relations of the husband, viz., the husband's sister's son, the husband's brother's son, and the husband's brother, will succeed to the woman's property, and in the other case the relations of the father will succeed. In the diversity of opinion amongst the text writers whether Brihaspati's series of heirs take in the order in which they are enumerated, their Lordships think that the better opinion is that the order of succession is not indicated. There is no apparent reason for preferring the husband's sister's son to the husband's brother's son, or both, to the husband's brother. And their Lordships agree with the learned editor

of the Vyavastha Chandrika that the solution is to be found by reference to Pl. 28, in which the heirs are described as the nearest sapindas of the wife in the husband's family, or the nearest to her in her father's family, as the case may be. The list is not exhaustive, and neither a co-widow, nor any other sapinda of the husband, is excluded. The words "and the rest" therefore must mean, or include, the other relations of the husband or father. But if the text does not prescribe any new order of succession, and the co-widow is not excluded, it follows that she must take in her right place, or (in other words) the Appellant is entitled in preference to the Respondents. Their Lordships thus arrive at the same conclusion as Mr. Justice Batty, though by a somewhat different road.

If there were any construction of the text laid down by authority binding on the Courts of Bombay, or if there were any established practice or usage in the application of the text, their Lordships would follow it without hesitation, though it might not commend itself to their judgment. But no such authority has been referred to, and there is no evidence of any such practice or usage. Their Lordships therefore are at liberty, and are bound, to act on the opinion which they have formed, and will humbly advise His Majesty that the Appeal be allowed, and that the Order of the High Court of Bombay (Appeal side), dated the 11th December 1903, be discharged, and the Decree of Mr. Justice Batty, dated the 21st February 1903, be restored, and that the Respondents do pay to the Appellant the costs of their Appeal in the High Court. They will also pay the costs of this Appeal.