

(1918) 09 BOM CK 0015

Bombay High Court

Case No: Second Appeal No. 17 of 1916

Jana Appa Sutar

APPELLANT

Vs

Rakhma Narayan Badiger

RESPONDENT

Date of Decision: Sept. 24, 1918**Citation:** (1919) 21 BOMLR 208**Hon'ble Judges:** Shah, J**Bench:** Single Bench**Final Decision:** Dismissed

Judgement

Shah, J.

The question of law arising in this second appeal is whether as between a full sister and a half-sister the former is the preferential heir or both of them are heirs to their deceased brother under the Mitakshara. Both the lower Courts have answered it in favour of the full sister.

2. In support of the case for the half-sister it is urged that neither in the Mitakshara nor in the Vyavahara Mayukha is any preference shown to the full sister over the half-sister and that the preference of the whole to the half-blood under the Mitakshara is confined to brothers and nephews as pointed out in Samat v. Amra I.L.R.(1882) 6 Bom. 394 and Vithalrao v. Ramrao I.L.R.(1899) 24 Bom. 317

3. There is apparently no decided case in this Presidency directly bearing on the point. The position of the sister as an heir has been considered in several cases : and it is not disputed before me that under the Mitakshara as under the Mayukha the sisters would be heirs, and that they would come in after the grand-mother. The ground upon which the sister has been assigned this place as an heir under the Mitakshara has been a matter of some controversy and difference of opinion, as the judgments in Sakharam Sadashiv Adhikari v. Sitabai I.L.R.(1879) 3 Bom. 383; Kesserbai v. Valab Raoji (1879) ILR 4 Bom. 188; Mulji Purshotum v. Cursandas Natha (1900) ILR 24 Bom. 563; 2 Bom. L.R. 721 and Bhagwan v. Warubai I.L.R.(1908) 32

Bom. 300; 10 Bom. L.R. 389 would show. The question, which I have to consider, relates to the preference of the whole to the half-blood, whatever the position of sisters as heirs may be in competition with other relations.

4. It is clear that Vijnanusvara does not refer to sisters in his Commentary relating to the order of succession; and the ground upon which her position as an heir is determined may have some bearing upon the present question. I do not think, however, that it is necessary to discuss these grounds. It is clear that if the word "brothers" used in Yajnavalkya's text and in the Commentary is interpreted as including sisters, the half-sister will have no case. In that case she will come in after the full sister as the half-brother comes in after the full brother. I do not think that that interpretation can be pressed against the half-sister since it has been practically rejected in determining the sister's position as an heir under the Mitakshara.

5. Quite independently of this interpretation, Vijnanesvara gives a clear indication that the question of preference arising in this appeal must be determined by the test of propinquity: and according to that test the sister is the preferential heir. In dealing with the case of parents, Vijnanesvara applies the test of propinquity and it is significant that he treats the mother's propinquity as of a specially high order, and gives her a place before the father in the list of heirs (See Mitakshara, Ch. II, Section 3, paras 8, 4 and 5; Stokes' Hindu Law-Books, Pages 442-443). In dealing with the case of brothers he gives preference to brothers of the whole blood on the strength of the text, which he cites in discussing the case of the mother, viz., "to the nearest Sapinda the inheritance belongs". He prefers the brothers of the whole blood, "since those of the half-blood are remote through the difference of the mothers" (See Mitakshara, Ch. II, Section 4, paragraph 5; Stokes' Hindu Law-Books, Page 445). There is no reason whatever why the same reasoning should not apply to the case of sisters. It is also clear that according to Vijnanesvara's definition of sapindaship given in his Commentary on verse No. 52, Acharadhyaya, the full sister would be the nearer heir : and his specific application of it to the case of brothers shows that the same view should prevail in the case of sisters.

6. In the Vyavahara Mayukha there is no reference in terms to the case of a half-sister, though the case of "sister" is specifically dealt with. Nilkantha does not accept Vijnanesvara's view as to the preference to be given to the mother over the father. But his preference of the whole to the half-blood is more marked than Vijnanesvara's in the case of brothers, as he assigns a much lower position to half-brothers in the list of heirs. Thus Nilkantha's view, so far as it goes, supports the conclusion in favour of the full sister based on the Mitakshara. No doubt under the Mayukha the anomaly of preferring her as an heir to a half-brother might arise, if her position as an heir is determined by treating her as included in the word "sister" used by Nilkantha in discussing the sister's place as an heir. That consideration, however, is not relevant to the present point.

7. It is hardly necessary to go beyond these two books to justify the conclusion in favour of the full sister. As the Nirnaya Sindhu and the Dharma Sindhu are works which may be referred to, I may point out that in determining the order of persons entitled to perform the Shraddhas both Kamalakara Bhatta and Kashinath, the respective authors of the two treatises, mention the full and half-sisters and give preference to the full sister. I have quoted the relevant passages⁽¹⁾ from (1) Nirnaya Sindhu (published by the Nirnaya Sagar Press, 2nd Edn., Page 273, or the edition published by the same press with the Gujarati translation at Page 563). same press, 2nd Edn., Page 282, or the edition published by the same press with the Gujarati translation at Page 435).

8. these books for easy reference in a foot-note. I do not wish to lay undue emphasis on these opinions. But they are valuable as referring specifically to the relative position of full and half-sisters in the matter of performing the Shraddhas. I have not been able to find any reference to the full and half-sisters elsewhere.

9. In Kesserbai v. Valab Raoji (I.L.R.1879). 4 Bom. 188 of the report Sir Michael Westropp C. J. has observed that "The Nirnaya Sindhu, which specially names the half-sister as entitled to rank (in the performance of ceremonies, whence her heirship may be inferred), places her after, not on a level with, the sister."

10. Looking at the question from the point of view of the recognition of the rights of the sister as an heir, on the ground of positive acceptance and usage after Vijnanesvara wrote his commentary there is no reason to suppose that there has been any positive acceptance or usage in favour of ignoring the distinction which exists between sisters of the whole and the half-blood. There is nothing in the reported decisions to countenance such a view, and the fact that the distinction is undoubtedly recognized in the case of brothers and nephews and that it is referred to specifically in relation to sisters in such modern works as the Nirnaya Sindhu and the Dharma Sindhu is undoubtedly against the possible suggestion that the distinction between the whole and the half-blood is not recognized in practice by the Hindu community as regards the sisters.

11. Lastly, it is urged on the strength of the observations in Samat v. Amra and Vithalrao v. Ramrao, that the preference of the whole over the half-blood is confined to brothers and nephews. In neither of these decisions is the case of sisters referred to; and the decisions relate to male relations who come in as heirs after the sisters. The case of sisters is really indistinguishable from that of brothers so far as the test of propinquity is concerned. Westropp C. J. in dealing with the point that arose in Samat's case observes that in the Mitakshara and the Mayukha there is no distinction made on the basis of the full and half-blood relationship except in the case of brothers and brothers' sons. I cannot believe that in making the above observation in Samat's case Sir Michael Westropp had any intention to express a dissent from the opinion which he had expressed in Kesserbai's case as to the full and half-sisters, and to which I have referred above.

12. Besides in that case the question of preference among Sapindas of the same degree of descent from the common ancestor did not arise. Even according to the test adopted in Samat's case that the nearest Gotraja Sapinda succeeds, the full sister would be the nearer heir, It is hardly necessary to refer to the grounds mentioned by Nilkantha in determining the sister's place as an heir next after the grand-mother, relating to her having both sapindaship and gotrajatva, though there may be no community of gotra (sagotrata). But I prefer to distinguish the case on the ground that the present point is not decided there and the ratio decidendi does not involve the result that there is no distinction to be made between the full and half-sisters. As regards Vithalrao's case, it is not possible to treat it as deciding or expressing any opinion as to the present point. Sir Lawrence Jenkins C. J. has based his decision on the principle of stare decisis; and Mr. Justice Ranade's observations have reference to relations, who according to decided cases come in after the sisters. His observations relating to different kinds of propinquity have no application to the case of sisters, which, as I have already stated, is not distinguishable from that of brothers so far as the difference between the whole and the half-blood is concerned.

13. In the view I take of these two decisions, it is not necessary to consider the argument urged on behalf of the first respondent (i. o., the full sister) that the decisions in (1915) ILR 37 545 (P.C.) (Privy Council) ; Sham Singh v. Kishun Sahai (1907) 6 C.L.J. 100 and Nachiappa Gounden v. Rangasami Gounden (1914) 28 M.L.J.I. require that the view taken in Vithalrao v. Ramrao should be reconsidered. The argument is that, as pointed in Ganga Sahai's case, "the preference of the whole blood...is confined to members of the same class, or, to use the language of the Judges of the High Court in Suba Singh v. Sarafraz Kunwar I.L.R.(1896) All. 215., to "sapindas of the same degrees of descent from the common ancestor."" If it had been necessary to examine this argument and to reconsider the decision in Vithalrao's case, I should have referred this appeal to a Division Court. As it is I feel no difficulty in deciding the point in favour of the full sister. I need hardly add that if Ganga Sahai's case is to be accepted as overruling Vithalrao v. Ramrao, as to which I express no opinion, I should not consider any independent examination of this point necessary at all, as in that event Ganga Sahai's case would settle it in favour of the full sisters. I have thought it necessary to examine the point with reference to the sister's position as an heir in this Presidency, in consequence of the decisions in Samat v. Amra and Viihalrao v. Ramrao, quite apart from Ganga Sahai's case.

14. I, therefore, confirm the decree of the lower appellate Court and dismiss the appeal with costs.