
(1914) 02 BOM CK 0009

In the Bombay High Court

Case No : Second Appeal No's. 705 and 706 for 1912

Hari Annaji Deshpande and Maibai

APPELLANT

Vs

Vasudev Janardhan Satbhai and Bagubai

RESPONDENT

Date of Decision : 24-02-1914

Acts Referred:

Citation : AIR 1914 Bom 134 : (1914) 16 BOMLR 283

Hon'ble Judges : Shah, J;Heaton, J

Bench : Division Bench

Judgement

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

2. 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.

3. This identical question has been fully considered and decided in Bhagwan Vithoba Vs. Warubai Baburao Mudke, . 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 (1900) 2 Bom L.R. 721, ILR 24 Bom 563 which was a case under the Mayukha. It is needless to discuss them here over again.

4. 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 Balambhatta's view, as it involves a complete departure from the order of succession accepted and advocated by Vijnaneshvara, and as it has been repudiated by Nilkantha in the Vyavahara 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 Vijnaneshvara. 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 grand-mother and before the half-brother. Vijnaneshvara, 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 grand-mother 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.

5. 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 Vijnaneshvara. It is not right to disturb this compact series by introducing an heir who is not expressly mentioned by Vijnaneshvara.

6. Lastly it was urged that the sister cannot be included among the gotrajas as understood by Vijnaneshvara 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 grand-mother says that she has all the qualifications of a gotraja,(sic) After all the sister has been recognised as an heir under the Mitakshara even though not mentioned by Vijnaneshvara, 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.

7. 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 grand-mother. It has been held in *Rudrappa v. frawa* (1903) 5 Bom. L.R. 676; I. L. R. 28 Bom. 82 that she cannot be ranked any lower. The result, therefore, is that under the Mitakshara she comes next after the grand-mother and a fortiori after the half-brother's son.

8. The second point relates to *res judicata*. In the previous litigation one Bhagirthibai 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 Wasudeo, the separated brother's son, and the three full sisters of Bhagwan. Wasudeo 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 heirship was neither raised nor decided. The present contesting parties were all arrayed as defendants in that suit. The defendant No. 1, Wasudeo, 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 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 Mahadev* . 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*.

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

Heaton, J.

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

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