APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

VITHALDA'S MA'NICKDA'S (ORIGINAL DEFENDANT), APPELLANT, *v.* JESHUBA'I (ORIGINAL PLAINTIFF), RESPONDENT.*

1879
October 17

Hindu law—Inheritance—Daughter-in-law, right of succession of, in priority to a paternal first cousin.

A Hindu widow who had inherited the estate of her separated husband, died leaving her surviving a widowed daughter-in-law and a first cousin of her deceased husband, *i.e.*, his paternal uncle's son. In a suit brought by the daughter-in-law to recover possession of certain immoveable property left by the deceased widow,

Held that in the Presidency of Bombay the daughter-in-law was entitled to succeed to the property in priority to the paternal first cousin of her deceased husband.

THIS was a special appeal from the decision of S. Tagore, Acting Senior Assistant Judge at Kaládgi, in the District of Belgaum, affirming the decree of Krishnaráv Pándurang, Subordinate Judge at Bijápur.

The plaintiff brought this suit against the defendant to establish her right to, and to recover possession of, certain immoveable property left by her mother-in-law Sarasvatibái, and to set aside a deed of gift executed by her (Sarasvatibái) in favour of the defendant. Sarasvatibái died on the 15th January 1874.

The defendant Vithaldás answered that as the plaintiff's husband Báládás died during the life-time of his father Parsotumdás, she (the plaintiff) had no claim to the property in dispute; that he (defendant) was entitled to succeed to it as the next heir of Sarasvatibái's husband; that the plaintiff had no right to question the validity of the deed of gift made by Sarasvatibái in his favour.

The Subordinate Judge made a decree in favour of the plaintiff.

In appeal the Senior Assistant Judge affirmed the decree of the first Court, holding that the plaintiff was entitled in priority to

* Special Appeal, No. 474 of 1874.

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the defendant under the Mitákshara, and that the deed of gift was invalid as against the plaintiff, inasmuch as Sarasvatibái, having had only a life-interest in the property, was not competent to alienate it by gift.

The defendant thereupon preferred a special appeal to the High Court.

Nagindás Tulsidás for the appellant.—A daughter-in-law is not mentioned in the series of heirs given in the Hindu law books. As held in *Venkápá* v. *Holyava* (S. A. No. 60 of 1873, decided by Melvill and West, JJ., on the 21st July 1873), the enumerated heirs take before all other heirs. That case also decided that the brother of a separated Hindu inherited before the widow of his predeceased son. In *Vithal Raghunáth* v. *Haribái* (S. A. 41 of 1871) the High Court gave precedence to a brother's son over a daughter-in-law. The learned pleader also referred to the Mitákshara, ch. ii, sec. v (Stokes' Hindu Law Books, p. 446); 1 West and Bühler, p. 169 (1st ed.), p. 169 (2nd ed.)

Shivshankar Govindrám for the respondent.

WESTROPP, C.J.—In this case Sarasvatibái, having inherited from her separated husband his estate, died, leaving, her surviving, a widowed daughter-in-law and a first cousin of her deceased husband, *i.e.*, his paternal uncle's son; and the question is, which of these two is to be preferred as heir to Sarasvatibái's husband. Both the Courts below found in favour of the woman; the Senior Assistant Judge holding that, "according to the Mitákshara, the daughter-in-law would be the heir, since she is more nearly related than the cousin to the deceased widow's husband." Mr. Tagore has not deemed it necessary to refer to the portion of the Mitákshara on which he has rested his decision, and the very summary way in which he has disposed of the case leads us to doubt whether he has any clear idea as to the principle drawn from ch. ii, sec. v, of the Mitákshara read together with the Achara Kanda of the same work (as elucidated in *Lakshmibái* v. *Jayrám Hari* [1] and *Lallubhai Bápubhai* v. *Mán-*

[1] 6 Bom. H. C. Rep. 152, A.C.J.

kuverbái[1]) upon which the right of the daughter-in-law has been recognized in this Presidency, viz., that, as the widow of the son of the *propositus*, who was a *gotraja sapinda* nearer to the *propositus* than such a *gotraja sapinda* as the paternal uncle's son, the daughter-in-law is entitled in this Presidency to priority in order of succession over the paternal uncle's son. Upon that principle we are of opinion that the decrees of the lower Courts may be upheld.

No doubt, by the law of Bengal, Benares and Madras, no claim as heir can be set up on behalf of the widow of a son, but a different rule obtains in Bombay[2]; and, albeit the daughter-in-law is not one of the *gotraja sapindas* specially named in the Mitákshara, Bálambhatta, one of the commentators on the Mitákshara, expressly mentions the right of a predeceased son's widow, and places her immediately after the paternal grandmother, saying that "the word *sapinda* must be everywhere interpreted as including the males and females" (*vide* West and Bühler, Introductory Remarks, p. 179, 2nd ed.). If this doctrine be accepted, it follows that the daughter-in-law must be preferred to the first cousin—see Manu, ix, s. 217: "Of a son dying childless (and leaving no widow), the (father and) mother shall take the estate; and the mother also being dead, the paternal (grandfather and) grandmother shall take the heritage (on failure of brothers and nephews)"; and see also Stokes' H. L. B. 446, where the Mitákshara names the father's brother's sons as third in order of the *gotrajas* entitled to inherit after the paternal grandmother. The doctrine of Bálambhatta with regard to the proper position of the daughter-in-law and the general principle drawn from the Mitákshara and supported by the Sanskara Mayukha must be taken as subject to the rights of a sister and half-sister as specially established in this Presidency: *Vináyak A'nandráv* v. *Lakshmibái*[3], *Sakhárám* v. *Sitábái*[4], *Dhondu*

(1) I. L. R. 2 Bom. 388, 441, 443. And see 1 West and Bühler, p. 139 *et seq.* (1st ed.); p. 172 *et seq.* (2nd ed).

(2) See the remarks of Mr. Mayne at pp. 450-1 of his learned work on Hindu Law and Usage; and West and Bühler, Bk. I, ch. 2, sec. 14, Introductory Remarks.

(3) 1 Bom, H. C. Rep. 117, 126.

(4) I. L. R., 3 Bom. 353.

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v. *Gangábái* [1], *Mahantápá* v. *Nilgangawa*[2], *Kesserbái* v. *Valab Ráoji*[3].

Turning, then, to the decisions of this Court, the following cases cited by West and Bühler (2nd ed.), p. 196, and bearing directly on the question of the daughter-in-law's place in the order of succession, appear to have been decided precisely on the same principles. First, where the contest was between a daughter-in-law and a brother's son, the latter was given precedence—see *Vithal Raghunáth* v. *Haribai* [4]. The next case was a dispute with a separated brother, and there the brother was preferred—see *Venkápá* v. *Holyava*[5]. And in the last, *Bái Jetha* v. *Haribhai*[6], a claim was advanced by separated cousins, when the daughter-in-law was held to have a better title to inherit. Had the paternal grandmother been substituted in each case for the daughter-in-law, the same results would, we may assume, have followed.

We confirm the decrees of the Courts below, with costs on appellant.

Decree affirmed.

(1) I. L. R., 3 Bom. 369. (2) *Ibid.* 368, note.

(3) *Supra*, p. 188, and see also the cases reported *supra*, pp. 210 and 214.

(4) S. A. No. 41 of 1871, decided on 12th June 1871. Printed Judgments for 1871.

(5) S. A. No. 60 of 1873. Printed Judgments for 1873, No. 10.

(6) S. A. No. 304 of 1871, Printed Judgments for 1872, No. 38.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

September 22

KARIMBHAI (ORIGINAL PLAINTIFF), APPELLANT *v.* THE CONSERVATOR OF FORESTS, N. D. (ORIGINAL DEFENDANT), RESPONDENT.*

Partnership property attached in execution of a decree against one partner only—Form of a suit regarding such attached property—Civil Procedure Code (VIII of 1859), Sec. 246—Amendment of plaint.

Property belonging to a partnership cannot be seized in execution of a decree against one partner only. Accordingly, where a suit was brought against one partner only, and the decree made him alone liable,

* Regular Appeal, No. 12 of 1879.