APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

NAHALCHAND HARAKCHAND (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* HEMCHAND AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1884
August 20.

Hindu law—Inheritance—Vyavahara Mayukh, Ch. IV., Sec. 8 *—Sons of a separated brother—Widow of a united brother's son.*

The sons of a separated brother inherit in preference to the widow of the son of an undivided brother.

The members of the "compact series" of heirs specifically enumerated take in the order of enumeration, preferably to those lower in the list and to the widows of any relatives whether near or remote, but where the group of specified heirs has been exhausted, the right of the widow is recognized to take her husband's place in competition with the representative of a remoter line.

THIS was a second appeal from the decision of E. Cordeaux, District Judge of Poona.

One Bhaichand died leaving him surviving three sons, *viz.*, Harakchand, Virchand and Fatechand constituting an undivided family. In 1842 Harakchand separated from his brothers. Virchand and Fatechand still continued to live in union. Subsequently Virchand died and shortly after his death his son Lalu died leaving behind him a childless widow named Bhágubái. Fatechand survived Lalu, but like him died childless leaving behind him his widow Chunibái, who died on 9th October, 1877. The following table shows the relationship of the parties:—

Bhaichand.

Harakchand	Virchand.	Fatechand M. Chunibái (died 1877).
|	|	
Plaintiffs.	Lalu M. Bhágubái (died 1880).	

Bhágubái, the widow of Lalu, survived Chunibái and died on the 28th January, 1880, leaving a will by which she bequeathed all the property to Hemchand (the first defendant).

The plaintiffs, who were the sons of Harakchand the separated brother of the said Virchand and Fatechand, sought to recover from defendants possession of a house situate at Talegaon in the

* Second Appeal, No. 365 of 1883.

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Poona District as well as moveable property worth Rs. 3,021. They alleged that their paternal uncles Fatechand and Virchand carried on trade at Talegaon, that then Virchand died and his son Lalu continued to live and carry on business with his uncle Fatechand up to 18th June, 1871, when Lalu died and Fatechand became the owner of the whole of the property; that Lalu left a widow Bhágubái who used to live with Fatechand and was only entitled to maintenance, that in 1874 Fatechand died childless leaving him surviving his widow Chunibái who subsequently died in 1880, and that Bhágubái who survived Chunibái had no right whatever to any of the property, but that after the death of Chunibái the plaintiffs became entitled to the whole property of Fatechand. They further alleged that the house in question was leased in 1875 to the defendants by Chunibái ever since which time the defendants were in possession thereof, that Chunibái lived in the same house, that she gave defendants some of her property, that the defendants were indebted to her to a certain amount, that Bhágubái also owned some property and had certain ornaments of Chunibái all of which defendants appropriated when Bhágubái died, and that the defendants had no right to the property of Fatechand, but that the plaintiffs were the proper heirs of their uncle Fatechand and as such entitled to recover it from the defendants who had taken wrongful possession thereof.

In his written statement the first defendant admitted that Fatechand and Virchand lived in union, that the facts stated about the deaths of the various persons in the plaint were correct and he stated that Virchand and Fatechand were divided from the father of the plaintiffs. He alleged that he was the son of the sister of the plaintiffs, that he was brought up as a son by Bhágubái, that Bhágubái having inherited all the property of Fatechand executed a will in 1880 by which she devised all the property to him and he claimed to be entitled to it.

The second defendant who was a partner of the first defendant in his written statement denied possession of any property, did not lay any claim to it and stated that he was unnecessarily made a co-defendant.

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The Subordinate Judge of Vadgaon in the Poona District before whom the suit came for hearing was of opinion that Bhágubái as *gotraja sapinda* of her husband Lalu was preferable to the separated nephews (the plaintiffs), that the plaintiffs came after her in order of succession, and that as such *gotraja sapinda* she rightfully succeeded to the property and had full authority to dispose of the moveable property absolutely, but that her power over the immoveable property was limited. The Subordinate Judge accordingly directed that possession of the house in dispute should be given to the plaintiffs and rejected the rest of their claim.

The plaintiffs appealed to the District Judge of Poona who confirmed the decree of the lower Courts.

The plaintiffs appealed to the High Court.

K. T. Telang (*S. V. Bhandárkar* with him) for the appellants.—The appellants are the nephews of the last holder Fatechand and as such are preferable to the widow of their cousin Lalu of equal degree. On the death of Chunibái, the widow of the *propositus*, the appellants though they are the sons of a separated brother came in before Bhágubái, the widow of their cousin. See West and Bühler, p. 89. The case of *Lallubhái* v. *Mankuverbái* (1) relied on by the lower Courts has been misinterpreted. What it lays down is that after the enumerated male heirs have been exhausted, the widows of such heirs come in as *gotraja sapindas* of their husbands. So long as there is a brother's son alive, a sister-in-law does not succeed. See West and Bühler, 460, Q 4; see also *Ráni Padmavati* v. *Doolar Singh* (2), *Venkupa* v. *Holyawa* (3), *Vithal Raghunáth* v. *Haribayee*(4).

Jardine (*Mánekshá Jehángirshá* with him) for respondents.—The case of *Lalubhái* v. *Mankuverbái* (1) was rightly interpreted by the lower Courts. The appellants who are the sons of Harakchand a separated brother would come after Bhágubái, the widow of a united brother's son.

WEST, J.—Referring to the cases cited (5) and to *Lallubhái* v. *Bápubhái* (1), we hold that the nephews of Fatechand, sons of

(1) I. L. R., 2 Bom., 388.
(2) Moo. Ind. Ap. at p. 264.
(3) See note *infra*, p. 34
(4) See note *infra*, p. 34
(5) W. & B., p. 482.

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Harakchand, though separated, were his heirs in preference to the widow of another heir Lalu, though the latter was undivided in interest from Fatechand. The members of the "compact series" of heirs specifically enumerated take in the order in which they are enumerated—Vy. M., ch. iv, s. viii, 18—preferably to those lower in the list and to the widows of any relatives whether near or remote, though where the group of specified heirs has been exhausted, the right of the widow is recognized to take her husband's place in competition with the representative of a remoter line. We, therefore, reverse the decree of the District Court and remand the case for disposal on the other questions which arise in it. Costs of this appeal to be paid by respondents; the other costs to be dealt with in the final decision.

Decree reversed and case remanded.

NOTE.—The following are the judgments of the Court in the cases of *Venkapa* (original defendant) v. *Holyawa* (original plaintiff) (Sp. Ap., 60 of 1873), and *Vithal Raghunáth* v. *Haribayee* (Sp. Ap. No. 41 of 1871) cited at page 482 of West and Bühler (3rd ed).

Venkapa (original Defendant) v. *Holyawa* (original Plaintiff).

There were two brothers Sunkoorapa and Venkapa. Sunkoorapa had a son who was the husband of Holyawa the plaintiff. The plaintiff lost her husband when she was quite a minor. Subsequently Sunkoorapa died. The plaintiff sued the defendant Venkapa to recover possession of certain land which she alleged to have belonged to her father-in-law Sunkoorapa. The defendant denied her right to sue and alleged that the father-in-law of the plaintiff and he himself were reunited at the death of the former, and that he was the rightful heir to his brother's estate. The Court of first instance held the reunion proved, but the lower Appellate Court at Kaládgi to which an appeal was preferred by the parties, found that the defendant and the plaintiffs' father-in-law Sunkoorapa were divided, and that the plaintiff being the daughter-in-law of Sunkoorapa was his rightful heir.

The defendant appealed to the High Court. The appeal was heard and decided on 21st July, 1873, by Mr. Justice Melvill and Mr. Justice West.

MELVILL, J.—We think that the enumerated heirs take before all other heirs, and, therefore, that the brother of a separated Hindu inherits before the widow of his predeceased son.

Vithal Raghunáth (original Defendant) v. *Haribayee* (original Plaintiff) (S. A. 41 of 1871).

The plaintiff Haribayee sued the defendant to recover certain share of *vatan*. The plaintiff alleged that she was the widow of the son of Krishnáji, the

paternal uncle of the defendant, that the father of the defendant and Krishnáji were divided and that she was entitled to the property of Krishnáji.

The defendant alleged that Krishnáji was his father's brother, that Krishnáji's son, the husband of the plaintiff, had predeceased Krishnáji, that he held the subject-matter of the suit as his own property, and that Krishnáji gave his share to him by a will. Both the lower Courts held that the plaintiff was the heir of her father-in-law and preferable to the defendant who was the son of Krishnáji's separated brother. The defendant preferred an appeal to the High Court which was decided on 12th June, 1871, by Mr. Justice Melvill and Mr. Justice Kemball.

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MELVILL, J.—We think the decision of the Courts below must be reversed. The plaintiff's claim is by virtue of inheritance from her father-in-law Krishnáji. We think that the defendant who was the son of the brother of the deceased Krishnáji, is entitled to inherit before the daughter-in-law. The defendant had put forward a will made by Krishnáji, which was unnecessary, as he was heir-at-law, and this will contains a provision for plaintiff's maintenance. The validity of this will is disputed by the plaintiff, and we cannot now consider how far that provision is binding, nor can we make any award for maintenance for which, if so advised, the plaintiff can bring another action.

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kemball.

NILO PA'NDURANG (ORIGINAL PLAINTIFF), APPELLANT, *v.* RÁMÁ PA'TLOJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

July 31.

Mortgage—Money decree against mortgagor—Sale of equity of redemption by mortgagor—Mortgaged land attached and sold in execution—Claim by purchaser of equity of redemption.—Civil Procedure Code, Act VIII of 1859, *Sec.* 246—*Civil Procedure Code, Act XIV of* 1882, *Secs.* 278 *to* 283.

In 1870 B. mortgaged to N. with possession a certain piece of land. On 17th June, 1871, M. and T. obtained a money decree against B. On 9th March, 1872, the defendants bought from B. his equity of redemption. In July, 1872, M. and T. attached the land in execution of their decree. The defendants objected to the attachment under section 246 of the Civil Procedure Code, Act VIII of 1859, but on investigation of their claim an order was made disallowing their claim on the 23rd December, 1872. In June, 1873, the defendants paid off the mortgage debt and were put into possession by the mortgagee. In October, 1873, M. and T. put up the land for sale in execution of their decree and the plaintiff became the purchaser. On seeking to obtain possession the plaintiff was resisted by the defendants whose claim was allowed by the Subordinate Judge after inquiry. The plaintiff, therefore, brought this suit under section 335 of the Civil Procedure Code Act XIV of 1882. The lower Courts rejected his claim. On appeal to the High Court,

* Special Appeal, No. 195 of 1883.