## APPELLATE CIVIL.

*Before Mr. Justice Parsons and Mr. Justice Ranade.*

1900.
*February* 19.

KRISHNAJI TAMAJI (ORIGINAL DEFENDANT), APPELLANT, *v.* TARAWA AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

*Vatan—Succession to a vatan—Bombay Act V of* 1886, *Sec.* 2—*Widow—Rights of succession of a widow other than the widow of the last holder—Adoption by such widow—Collateral male member.*

Under section 2 of Bombay Act V of 1886, if there is a male member of a vatandár family, the succession goes to him in preference to a female member, and on his death the succession will go to his heirs with a similar provision. Where there is a male member qualified to inherit vatan property he inherits, and a widow other than the widow of the last male member acquires no right to the vatan by succession or inheritance, and consequently she cannot create, transfer or revive any rights by adoption.

A kulkarni vatan was owned by two brothers A and B. B died first and A became the last male holder. A died in 1881 leaving a widow who held the vatan until her death in 1892. On her death, B's widow took a son in adoption. The adopted son filed a suit to establish his title to the vatan against the defendant, who was a male member of the family and had been registered by the revenue authorities as the vatandár on the death of A's widow.

*Held,* that the plaintiff could not succeed, the defendant having a better title to the vatan than the plaintiff or his adoptive mother, under section 2 of Bombay Act V of 1886.

SECOND appeal from the decision of B. C. Kennedy, Assistant Judge, F. P., at Bijápur.

Rango and Bhimaji were brothers belonging to a kulkarni vatandár's family of the villages of Gorinal and Tallikeri in the Bijápur District.

Bhimaji died first and Rango succeeded him in the kulkarni vatan.

Rango died in 1881, and his widow Lakshmibái held the vatan until her death, which took place in 1892.

On the death of Lakshmibai, Bhimaji's widow, Tarawa, applied to the revenue authorities to enter the vatan in her name. This application was opposed by the defendant, who was the nearest male member of the family.

Thereupon Tarawa adopted Krishnaji in 1893.

* Second Appeal, No. 610 of 1899.

In 1895 the revenue authorities ordered the vatan to be entered in defendant's name.

Thereupon Tarawa and her adopted son Krishnaji filed a suit for a declaration that defendant was not a member of the kulkarni vatandár's family and that he was not entitled to succeed to the vatan in preference to the plaintiffs.

Defendant pleaded that he was the nearest male member of the vatandár's family entitled to inherit the vatan; that as such he had been recognised by the Collector as a representative vatandár on the death of the last holder, and that neither Tarawa nor her adopted son had any right to the vatan.

The Court of first instance rejected plaintiff's claim, holding that the defendant was a member of the vatandar's family and as the nearest male member of the family he was entitled to succeed to the vatan in preference to the plaintiffs, under section 2(1) of Bombay Act V of 1886.

On appeal the Assistant Judge, F. P., reversed this decision, holding that Krishnaji (plaintiff No. 2) as the adopted son of Tarawa had a better title to the vatan than the defendant, who was a remoter heir.

He, therefore, awarded plaintiffs' claim.

His reasons were as follows :—

" Now, the first claim of the defendant is, that under section 2 of Act V of 1886 the vatan vested in him after the death of the last male holder, *viz.*, Rango; and that Lakshmibai had only a life interest, and that consequently his consent was necessary to validate an adoption by the plaintiff.

" This is a very plausible objection. In order to appreciate its value it is necessary to see what sort of vested interest is given

(1) Section 2 of Bombay Act V of 1886 provides as follows :—

" Every female member of a vatan family other than the widow of the last male owner, and every person claiming through a female, shall be postponed in the order of succession to any vatan, or part thereof, or interest therein devolving by inheritance after the date when this Act comes into force, to every male member of the family qualified to inherit such vatan, or part thereof, or interest therein."

" The interest of a widow in any vatan or part thereof shall be for the term of her life or until her marriage only."

1900.

KRISHNAJI v. TARAWA.

the male member, who is to be preferred to the female, and those claiming through them. The object of the section is to prevent vatans, when the vatan families were divided, passing into the hands of females, and so by marriage into alien families, foreign to the original grantees, and to the depriving Government of its rights of lapse. It is clear that for special reasons a departure was made from the ordinary rules of inheritance, and *cessante causa cessat ipsa lex.* If the inconvenience could be avoided in another way, the special divergence from the ordinary law would not be made. The ordinary law is only modified to a limited extent, just enough to prevent the arising of the said inconveniences. Now neither of these inconveniences arises when adoption is made. The vatan is preserved in the original family and no claim arises to the State for escheat.

"Accordingly, I hold that the interest that vests in the male members of the vatan family, is not of a nature that makes it necessary to obtain the consent of that male member in cases where, by the ordinary laws of inheritance, his consent would not be necessary.

"Accordingly, if I find that this was a case where, by the ordinary law, the plaintiff could adopt without any one's consent, and that she did so adopt, I shall find that her adoption was valid.

"The next point taken by the defendant, is that Tarawa could not adopt under the peculiar circumstances of the family. As the estate had, after the death of her husband, vested in the brother of Rango, she is precluded from adopting at all. In support of this opinion, I. L. R., 17 Bom., p. 164, is quoted, also 14 Bom., 463, and 19 Bom., 331.

"On a consideration of these authorities, I come to the conclusion that no such broad principle as is maintained can be deduced from them. What they appear to me to lay down, is that where a descendant could have adopted, and did not, an ascendant cannot adopt, and the reason of this is two-fold: to limit the number of adoptions, because if the grandson does not adopt without this rule, the father and grandfather might both adopt, and in order to prevent the confusion of heritages which would

1900.

KRISHNAJI v. TARAWA.

arise if adoptions could be made into previous generations; but neither of these inconveniences arise when one collateral adopts after another. I do not, therefore, think that the adoption by Tarawa is invalid, because she came into the property as a widow after it had already vested in two persons."

Against this decision defendant preferred a second appeal to the High Court.

*Setlur* (with *B. A. Bhagwat*) for appellant.

*Setalwad* (with *B. N. Bhajekar*) for respondents.

PARSONS, J.:—The vatan in question was owned by the brothers Rango and Bhimaji. Bhimaji died first and thus Rango became the last male holder. Rango died in 1881 leaving a widow Lakshmi, who held until her death in 1892. The widow of Bhimaji, Tarawa, who was still surviving, adopted the plaintiff No. 2 in 1893, and the latter claims the vatan as against the defendant, who is a male member of the family and had been registered by the revenue authorities as the vatandár on the death of Lakshmi. It was ingeniously argued by Mr. Setalwad for the plaintiff No. 2 that section 2 of Bombay Act V of 1886 only postpones the female members to the male members, and does not vest the inheritance in the latter, but that the inheritance is still vested in the female members and comes back to them when the male members are exhausted. We do not think that this argument is sound. The Act says distinctly that, if there is a male member, the succession goes to him in preference to a female member; and, on his death, the succession will go to his heirs with a similar provision. In a case where there is a male member qualified to inherit, he inherits, and a widow other than the widow of the last male owner acquires no rights by succession or inheritance, and consequently she cannot create, transfer or revive any by adoption.

We, therefore, reverse the decree of the lower Appellate Court and restore that of the Court of first instance with costs throughout on the respondents.

RANADE, J.:—The facts found in this case were that respondent No. 1, Tarawa, was admittedly not the widow of the last male owner, but was the widow of his predeceased brother. It has

1900.

KRISHNAJI v. TARAWA.

been also found that the appellant is the nearest male member of the family qualified to inherit the vatan on the death of Tarawa's brother-in-law, the last male owner. Under these circumstances, section 2 of Bombay Act V of 1886 applies to the case. That section provides that "every female member of a vatan family other than the widow of the last male owner, and every person claiming through a female, shall be postponed, in the order of succession to any vatan, * * devolving by inheritance, after the date when this Act comes into force, to every male member of the family qualified to inherit such vatan, &c." Respondent No. 1, Tarawa, and respondent No. 2, claiming through her by adoption, must, therefore, be postponed in the order of succession to the appellant, who is shown to be the nearest male member qualified to inherit. Respondents' counsel, however, urged that as section 2 only postponed respondents' rights, but did not take them away, those rights vested in Tarawa, and she could, therefore, transfer them by adoption to respondent No. 2. The only effect of the Act, according to this argument, was to prevent Tarawa and her adopted son from coming into possession till the extinction of the appellant's branch, or rather the male members of that branch. Such a construction appears to me to be untenable. Under the old Regulation XVI of 1827, as interpreted by the Sadar Diváni Adálat, a female heir was ineligible to hold any vatan. Under Bombay Act XI of 1843, section 10, a female was declared to be incapable of performing in person the duties of any hereditary office, but the subsequent section 11 permitted deputies to be appointed by female heirs, and the right of females to inherit under certain circumstances gradually obtained recognition in Civil Courts, and this right was expressly affirmed by section 51 of Bombay Act III of 1874. This freedom led to certain abuses by which vatans were diverted to the families of strangers, and it was to check these last abuses that Act V of 1886 was passed by the local Council. It appears from the proceedings of the Council that it was at first proposed that females should be altogether excluded from inheritance to vatan property. Later on, before the bill was finally passed, the proposal of total exclusion was modified, and female heirs other than the widow

1900.

KRISHNAJI
v.
TARAWA.

were only postponed in the order of inheritance to more distant males. The express object kept in view was to prefer even remote male heirs to females in the order of succession, and female heirs were allowed to come in as heirs with a view to avoid escheat. The effect of the Act is, therefore, obviously not a mere postponement in the order of time, but a preference of one set of heirs to others. There is, therefore, no vested right created as regards vatan property in the female heir other than the widow of the last owner. In her case, also, the Act provides expressly that her interest shall be for life or until marriage. The other female heirs could not, therefore, claim any interest of the kind claimed for the respondent Tarawa, who is not the widow of the last male owner. The Assistant Judge has been led to think that the object of the provision was only to prevent lapses to the State. The history of the previous legislation, however, shows that this was only a secondary object. The chief object was to ensure that vatan property should be in the hands of male heirs who can render personal service in preference to females. I would, therefore, reverse the decree of the lower Appellate Court, and restore that of the Court of first instance with costs throughout on the respondents.

*Decree reversed.*

## APPELLATE CIVIL.

*Before Mr. Justice Parsons and Mr. Justice Ranade.*

BAPUJIRAO AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* GANU AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1900.
*February* 23.

*Khoti Act (Bombay Act I of* 1880), *Sec.* 33—*Khot—Occupancy tenants—Thal—Thal to be determined by survey officer and not by Civil Court—Rent-suit.*

Under section 33 of the Bombay Khoti Act (Bom. Act I of 1880) it is the duty of the survey officer to determine the *thal* or customary rent payable to a khot by an occupancy tenant.

Until a new determination has been made by the survey officer, under section 33, of the rent payable to the khot, a Civil Court must award rent at the old rate legally fixed.

* Second Appeal, No. 641 of 1899.