APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

PRANJIVAN HARGOVAN AND OTHERS (ORIGINAL HEIR No. 1 OF DEFENDANT No. 1 AND DEFENDANTS Nos. 2 AND 3), APPELLANTS *v.* *BAI BHIKHI, DAUGHTER OF KANJI VALLABH AND OTHERS (ORIGINAL PLAINTIFFS AND HEIRS Nos. 2 AND 3 OF DEFENDANT No. 1 AND DEFENDANTS Nos. 5 TO 8 AND 3 HEIRS OF DEFENDANT No. 4), RESPONDENTS.*

1921. *February* 2.

Hindu Widows' Remarriage Act (XV of 1856), sections 2 and 5—Hindu widow—Remarriage—Right of succession in the family of her first husband—Succession as a gotraja sapinda.

A Hindu widow who has remarried is not entitled to succeed as a *gotraja sapinda* in the family of her first husband.

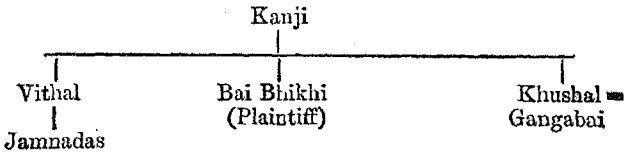
Under Hindu law, the father's sister is entitled to succeed in preference to the remarried widow of the paternal uncle.

Basappa v. *Rayava*[1], distinguished.

THIS was an appeal under the Letters Patent from the decision of Heaton J. in second appeal from the decision of M. M. Bhatt, Assistant Judge of Surat, confirming the decree passed by T. N. Desai, Subordinate Judge at Bulsar.

Suit to recover possession of a house.

One Jamnadas, who was a Kachchia (green-grocer), was the owner of the house. He had a paternal uncle Khushal, who died leaving a widow Gangabai. The plaintiff was Jamnadas' father's sister. The relationship between the parties is shown by the following genealogical tree :—



Shortly after Khushal's death Gangabai remarried.

* Letters Patent Appeal No. 37 of 1920.

(1) (1904) 29 Bom. 91.

1921.

PRANJIVAN HARGOVAN v. BAI BHIKHI.

Jamnadas died a minor and unmarried. On his death, both Bai Bhikhi and Gangabai put foward their claims to succeed to his property.

Bai Bhikhi sued to establish her right.

The Subordinate Judge decreed Bai Bhikhi's claim holding that whatever right Gangabai had to succeed to the property was lost to her on her re-marriage.

This decree was, on appeal, upheld by the Assistant Judge.

The defendants appealed to the High Court.

The appeal was summarily rejected by Heaton J. who delivered the following judgment.

HEATON, J.:—This appeal raises an interesting point but one that is so clear to my mind that I do not hesitate to dismiss the appeal. The suit relates to the succession to the property of one Jamnadas. Jamnadas' father Vithal had a sister, Bai Bhikhi, the plaintiff, and a brother Khushal. Khushal died leaving a widow. That widow subsequently married a second husband and this was prior to the death of Jamnadas. She, however, claims that in virtue of once having been the widow of Khushal she is entitled to the property of Jamnadas in preference to Khushal's sister Bai Bhikhi. This claim seems to me to be contrary to Hindu ideals, to logic, to common sense, and to the written law. We find the latter in section 5 of the Hindu Widows' Remarriage Act, XV of 1856, and there the position of a widow remarried in the matter of inheritance is this, that she shall have the same rights of inheritance as she would have had, had such marriage been her first marriage. Such rights of inheritance are, for example, those a daughter or mother would have. But the test to be applied is: the rights which she would have if her second marriage were supposed to be her first. Here her second

husband has no connection whatever with Jamnadas. He belongs to a different family altogether. So if that test be applied she as the wife of her second husband also has no connection with Jamnadas or his property; no more than she has in virtue of her being her father's daughter, her father being unrelated to Jamnadas. That seems to me to be quite decisive.

It has occurred to me that arguments are so extraordinarily ingenious that it might be said that adopting this test, supposing the widow's second husband to be her first, then this would preclude her from inheriting to her own son by her first husband, because the son would be the son of her first husband, not being the son of her second. That is ingenious enough. But arguments that totally ignore solid facts make little appeal to my mind. However often a lady married, it would not prevent her being the mother of her children that she had given birth to, whether they were children by her first or second or any other husband. In this case however she ceased to be the widow of Khushal. She ceased to have any connection with Khushal or his family when she married her second husband. She had never been related to that family by blood and never had more than a connection by her marriage with them. I think, therefore, this point appears to my mind to be so perfectly clear that I am justified in dismissing the appeal, as I accordingly do.

The defendants appealed under the Letters Patent.

B. J. Desai with *H. V. Divatia*, for the appellant :— We submit that Bai Ganga, the paternal aunt, has a preferential right to the plaintiff, who is the father's sister.

Bai Ganga does not forfeit her right of inheritance, by reason of her remarriage. Section 2 of the Hindu

1921.

PRANJIVAN HARGOVAN v. BAI BHIKHI.

Widows' Remarriage Act (XV of 1856) only deals with vested rights and in the direct line of the husband. In this case the rights came into existence after the remarriage and in the line of collateral succession.

This principle has been accepted by the Full Bench case in *Akora Suth* v. *Boreani* [1], and was followed by this High Court in a Full Bench case in *Basappa* v. *Rayava*[2]. It has been also followed in *Chamar Haru* v. *Kashi* [3] and *Lakshmana Sasamallo* v. *Siva Sasamallayani*[4].

Under section 5 of the Hindu Widows' Remarriage Act, this right is specially excepted. The widow cannot forfeit any right, not expressly taken away by section 2.

In *Lallubhai Bapubhai* v. *Mankuvarbai* [5] the right of the widow to succeed in place of her husband has been laid down.

The Hindu Widows' Remarriage Act must be strictly construed and no right should be taken away unless the Act specifically provides for its forfeiture.

Coyajee with *D. G. Dalvi*, for the respondents :— The policy of the Act is to treat the widow as civilly dead in the family of her first husband on her remarriage.

Section 2 says that "her right shall cease and determine as if she was then dead." The paternal *aunt* cannot inherit in place of her husband, as she ceases to be his *gotraja sapinda* by reason of her remarriage. She leaves the *gotra* of the first husband and adopts that of her second husband and hence by the latter part of section 5, her rights in the second husband's family

(1) (1868) 2 Beng. L. R. 199 (A. C.).
(2) (1904) 29 Bom. 91.
(3) (1902) 26 Bom. 388.
(4) (1905) 28 Mad. 425.
(5) (1876) 2 Bom. 388.

have been created in her favour. She ceases, on remarriage, to be the surviving half of her husband. This view is supported by the following authorities: *Matungini Gupta* v. *Ram Rutton Roy* [1]; *Rasul Jehan Begum* v. *Ram Surun Singh* [2] and *Murugayi* v. *Viramakali* [3]. On her remarriage the widow is so completely severed from the family of her first husband that ordinarily (1) she cannot give the son by her first husband in adoption: *Panchappa* v. *Sanganbasawa* [4] and *Putlabai* v. *Mahadu* [5]; (2) she cannot be the guardian of her children by the first husband: scetion 3 of the Act and *Ganga Pershad Sahu* v. *Jhalo*, [6] and *Khushali* v. *Rani* [7]; (3) she cannot claim maintenance in the first husband's family.

The principle of the case in *Akora Suth* v. *Boreani* [8] was hesitatingly accepted by this Court on the ground of *stare decisis* and ought not to be extended to the case of a paternal aunt.

Bai Ganga cannot maintain her right under the first part of section 5 of the Act. The right of the paternal aunt to succeed in place of her deceased husband was recognised in Western India by the decision in *Lallubhai Bapubhai's case* [9], long after the Act was passed in 1856. At that time this right of inheritance of the Hindu widow was not recognised in any part of the country and hence it cannot be argued that it was then covered by the language of section 5 "to which she would otherwise be entitled."

There is no difficulty in reconciling section 2 with the first part of section 5. We submit that section 5 refers only to the rights in the second husband's

[1] (1891) 19 Cal. 289.
[2] (1895) 22 Cal. 589 at p. 595.
[3] (1877) 1 Mad. 226 at p. 227.
[4] (1899) 24 Bom. 89.
[5] (1908) 33 Bom. 107.
[6] (1911) 38 Cal. 862 at p. 872.
[7] (1882) 4 All. 195.
[8] (1868) 2 Beng. L. R. 199 (A.C.).
[9] (1876) 2 Bom. 388.

1921.

PRANJIVAN HARGOVAN v. BAI BHIKHI.

family. But if it is considered that the first part of section 5 refers to her rights in the first husband's family, we suggest that section 2 and section 5 be reconciled on the lines suggested by Ranade J. in *Vithu* v. *Govinda* [1] where it is suggested the widow would forfeit rights of limited estate under section 2, as in the case of a paternal aunt and where she succeeds in her own right absolutely, as in the case of a daughter, she would not forfeit that right under the first part of section 5.

MACLEOD, C. J. :—The plaintiff in this case is the father's sister of one Jamnadas who died in 1915. Jamnadas and his uncle Khushal had been members of a joint Hindu family. Khushal predeceased Jamnadas leaving a widow Ganga. On the death of Jamnadas, the plaintiff claimed to succeed to his estate. Her claim being disputed, she had to file this suit against defendants Nos. 1 to 5 as the trustees under the will left by Khushal, and various other defendants as heirs of a deceased trustee.

The only question now in dispute is whether Ganga lost her right by her remarriage to take the place of her husband under the decision in *Lallubhai Bapubhai* v. *Mankuvarbai* [2], and consequently her right to succeed to the estate of Jamnadas in priority to the plaintiff. The plaintiff's suit has been decreed in the lower Courts and an appeal to this Court was dismissed by Heaton J. This is a Letters Patent appeal against that decision.

In the trial Court the only contesting defendants were defendants Nos. 1—4. The first issue was whether all the properties mentioned in the will were not the joint family properties of Khushal and his nephew Jamnadas. The second, whether Khushal was

[1] (1896) 22 Bom. 321 at p. 331. [2] (1876) 2 Bom. 388.

competent to make the will. It was found that the properties were joint, and it followed that Khushal was not competent to dispose of them by will. But the defendants disputed the plaintiff's right to succeed, and contended that Bai Divali, the mother's sister, was the nearest heir to Jamnadas and in her absence one Damodar. Ganga was not mentioned in the pleadings and her name was only added as a preferential heir at the instance of the defendants after the hearing had commenced. The 1st defendant died pending the suit and his heirs were added. Against the decree of the trial Court one of the heirs of defendant No. 1, and defendants Nos. 2 and 3 appealed, and they have contested the appeals throughout. It is difficult to see what interest they had in doing so, after the Court had decided in favour of the plaintiff, and none of the persons mentioned by the defendants as preferential heirs had chosen to question that decision.

It is not suggested now that Bai Divali or Damodar has a preferential right to the plaintiff.

The appellants rely on sections 2 to 5 of the Hindu Widows' Remarriage Act (XV of 1856). Briefly stated, they contend that though, but for the Act, Ganga on her remarriage would have no right to succeed as *gotraja sapinda* of her first husband, section 5 expressly gives her that right. That section says " Except as in the three preceding sections is provided, a widow shall not, by reason of her remarriage, forfeit any property or any right to which she would otherwise be entitled ;" Section 2 is as follows:—

" All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property, with no power of alienating the same, shall upon

1921.

PRANJIVAN HARGOVAN v. BAI BHIKHI.

her remarriage cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same."

The difficulty in this case in construing these sections is that at the time when Act XV of 1856 was passed, the question whether a widow in this presidency could succeed as *gotraja sapinda* of her first husband had never been thought of, and the appellants' contention amounts to this that on a proper construction of that Act the right which was established later by the decision in *Lallubhai Bapubhai* v. *Mankuvarbai* [1] was preserved in anticipation, so to speak, to a widow in spite of her remarriage. I would base my decision in this case certainly on the ground that section 5 was never intended to lay down any proposition with regard to the inheritance by a Hindu widow contrary to Hindu law, nor to allow a widow, though on her remarriage she would entirely leave her first husband's family, still in the case of certain events happening, to succeed as his *gotraja sapinda*. Reliance has been placed on the decision of a Full Bench in *Basappa* v. *Rayava* [2]. There the question was whether a remarried Hindu widow was entitled to succeed to the property left by her son by her first marriage, who died after she contracted a remarriage. That question had already been decided in the affirmative by the Calcutta High Court in *Akora Suth* v. *Boreani* [3]. Sir Lawrence Jenkins, while giving the judgment, said: "Whatever might have been my view had the matter been uncovered by authority, it would (in my opinion) be wrong to disregard a rule affecting rights of property established as far back as 1868 by the decision of a Full Bench of the Calcutta High Court in *Akora Suth* v. *Boreani* [3]." Therefore we must be

[1] (1876) 2 Bom. 388.
[2] (1904) 29 Bom. 91.
[3] (1868) 2 Beng. L. R. 199 (A. C.).

taken to be bound by that decision with regard to the right of a remarried Hindu widow to succeed to the property left by her son by her first husband, dying after her remarriage.

In *Akora Suth* v. *Boreani*[1] Peacock C. J. said : "The object of the Act was to remove all legal obstacles to the marriage of Hindu widows. Looking to the words of section 2, I am of opinion that it was not the intention of the Legislature to deprive a Hindu widow, upon her remarriage, of any right or interest which she had not at the time of her remarriage.* * * At the time of her remarriage, the property belonged to her son, and she had no right or interest in that property. It came to her by inheritance from her son, who died after her remarriage." In other words it was held that the deprivation of the rights and interests of a widow by inheritance to her first husband and to his lineal successors was confined to vested rights only. In the lower Court E. Jackson J. was of the opinion that the policy of the Act was that a widow on her remarriage was to be dead to all rights of inheritance to her deceased husband's property, not only dead at that moment to such rights as she had inherited, but dead then and for the future to all such rights.

I do not think we are barred by the decision in *Basappa* v. *Rayava*[2] from forming our own opinions on the facts of this case.

Admittedly, if the Act had not been passed, Ganga would have no right to bar the plaintiff's claim to inherit to Jamnadas. The sole object of the Act was to remove all legal obstacles to Hindu widow remarriages. Section 2 enunciated the consequences which would follow according to the principles of Hindu law upon such remarriage with regard to the forfeiture of

(1) (1868) 2 Beng. L. R. 199 (A. C.). (2) 1904) 29 Bom. 91.

1921.

PRANJIVAN HARGOVAN v. BAIJBHIKHI.

the widow's rights and interests in her first husband's family, while section 5 preserved her rights to inherit outside that family according to Hindu law. If we were to accede to the appellants' contention we should have to hold that the Act should be construed as creating rights in favour of a remarried widow unknown to Hindu law. With regard to her first husband Ganga is dead, she cannot now be resuscitated so as to be considered as his *gotraja sapinda* on the death of Jamnadas.

In my opinion the appeal should be dismissed with costs.

SHAH J. :—I entirely agree.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1921.
February 2.

SARDAR NOWROJI PUDAMJI (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* THE DECCAN BANK, LIMITED (IN LIQUIDATION), BY ITS LIQUIDATORS LAXMAN MORESWAR DESHPANDE AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS*.

Civil Procedure Code (Act V of 1908) Order XXXVIII, Rule 5—Attachment before judgment—A mere agreement to sell property—Not sufficient to prove intent to defraud—Court must be satisfied on additional circumstances.

Before an order for attachment before judgment can be made, the Court must be satisfied by an affidavit or otherwise, that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of the whole or any part of his property; but from a mere agreement to sell a portion of his property by the defendant it cannot be presumed that he actually had that intention. There must be additional circumstances before the Court can be satisfied that such an intention exists.

Appeal from Order No. 57 of 1920.