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person to be his heir, that statement would be taken as meaning that the soldier intended to make an oral will disposing of property which would not come into the hands of the Military Authorities after his death. The Kindred Roll, therefore, in my opinion could only be used for a limited purpose. I do not think there is any evidence in this case that Bala made an oral will disposing of the suit property in favour of his heirs. The decree, therefore, of the District Judge dismissing the suit was correct and the appeal must be dismissed with costs.

*Decree confirmed.*

J. G. R.

### APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.*

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December 15.

GANGADHAR NARAYAN PANDIT JAMNIS (ORIGINAL PLAINTIFF),  
APPELLANT v. IBRAHIM VALAD BAVA NAKHAVA DINGANKAR  
(ORIGINAL DEFENDANT), RESPONDENT<sup>2</sup>.

*Hindu law—Succession—Right of divided sons and grandsons of last male owner to succeed to his divided property—Succession per stirpes.*

The right of divided sons, grandsons and great-grandsons of the last male owner to succeed to his divided property, is the same as in the case of undivided family property.

*Marudayi v. Doraisami Karambian*<sup>(1)</sup>, followed.

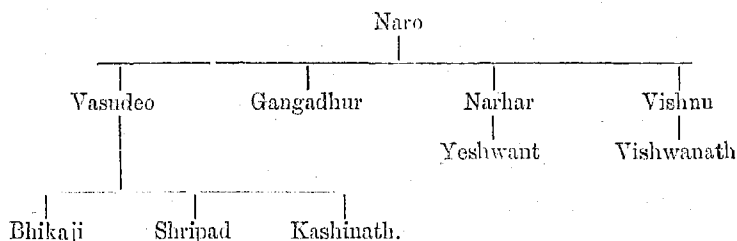
SECOND appeal against the decision of C. C. Dutt, Acting District Judge of Ratnagiri, modifying the decree passed by B. M. Butti, Subordinate Judge at Deorukh.

Suit to recover Inam dues and Khoti Faida.

<sup>2</sup> Second Appeal No. 875 of 1918.

<sup>(1)</sup> (1907) 30 Mad. 348.

One Naro had a four annas share in the Khoti of Dhamapur village in Deorukh Taluka. The pedigree of Naro's family was as follows :—



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In 1900 Naro died leaving him surviving his son Gangadhar and grandsons by other sons who had pre-deceased Naro.

In 1916 the plaintiff Gangadhar sued to recover two-fifths share in the Khoti Faida and Inam dues alleging that there had been a partition of Khoti Taxim during the life-time of Naro between Naro and his sons and, therefore, on Naro's death, his one-fifth devolved on the plaintiff.

Naro's grandsons also claimed rateably in Naro's one-fifth share and filed different suits for their shares.

The Subordinate Judge held that Khoti Taxim was divided during Naro's life-time, that Naro had one-fifth share at his death which went by survivorship to plaintiff Gangadhar alone and not to his grandsons. He, therefore, passed a decree in Gangadhar's favour for Rs. 382.

On appeal the District Judge held that, though Naro was separated from his sons, on his death his son Gangadhar alone was not entitled to his share to the exclusion of his grandsons. He, therefore, varied the the decree by awarding the grandsons their share in Naro's one-fifth. His reasons were as follows :—

"The general rule is that the nearer heir excludes the more remote. But as Mayne notes (p. 755 of the 8th edition, Hindu Law) there are exceptions and he goes on to quote I. L. R. 30 Mad. 348. Their Lordships of the

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Madras High Court laid down that 'the divided son will not, on the principle of the exclusion of remoter by nearer Sapindas, exclude the divided grandson in the succession to divided property of the ancestor'. In coming to this conclusion the learned Judges considered not only the Hindu text but also the opinion of such eminent authorities on Hindu law as Sir J. Muthusami Aiyar (I. L. R. 16 Mad. 11 at page 15) and Mr. Justice Telang (I. L. R. 16 Bom. 29 at page 56)."

The plaintiff Gangadhar appealed to the High Court.

*P. B. Shingne*, for the appellant.

No appearance for the respondent.

MACLEOD, C. J. :—The question in this appeal is whether Gangadhar as the surviving son of Naro succeeded to Naro's property to the exclusion of the sons of his deceased brothers. Naro and his four sons had become separated. Gangadhar contended that after the death of Naro he was entitled to one-fifth share in the Khoti which had come to Naro on the partition. The question was considered in *Marudayi v. Doraisami Karambian*<sup>(1)</sup>. It was there held that the right of divided sons, grandsons and great-grandsons of the last male owner to succeed to his divided property, is the same as in the case of undivided family property. Their Lordships said (p. 351) :—

"It must however be conceded that to allow a rule of succession *per stirpes* in a separated family is to admit an exception to the rule of Hindu law by which the inheritance devolves on the nearest Sapinda; but the exception is one which in our opinion necessarily follows from the exposition given by Vijnaneswara (Mit. 1-1-3) of the rights of sons and grandsons in the estate of the grandfather."

With respect I agree. Moreover, speaking for myself, I should not be inclined to differ from a decision, on a question such as the present one, by a Division Bench of another High Court, unless it could be established in argument before me that there were very good grounds for thinking that we are justified in

(1) (1907) 30 Mad. 348.

coming to a different conclusion. In this case the appellant's pleader has not been able to put before us any reasons why we should differ from the decision of the Madras High Court except that it would be against the interest of his client.

There is further reason why we should follow it, as this case is cited in the 8th edition of Mayne's Hindu law, para. 540, at page 755, and no exception whatever has been taken to the law as laid down therein. We, therefore, follow that decision and dismiss the appeal. As the respondent has not appeared, there will be no costs.

*Decree confirmed.*

J. G. R.

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### APPELLATE CIVIL.

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*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.*

KHIMCHAND NAROTAMDAS EHAVASAR (ORIGINAL DEFENDANT No. 1),  
 APPLICANT v. BHOGILAL HIRACHAND SHAH AND OTHERS (ORIGINAL  
 PLAINTIFFS AND DEFENDANT No. 2), OPONENTS<sup>a</sup>.

*Costs—Discretion to deprive successful defendant—Grounds.*

Question considered as to the discretion of the Court to refuse costs to a successful defendant, where the plaintiff's suit was based on a state of law which was subsequently altered.

*Ramasami Naiken v. Venkatasami Naiken* <sup>(1)</sup>, discussed.

APPLICATION under extraordinary jurisdiction against the order passed by M. N. Choksi, First Class Subordinate Judge at Ahmedabad.

The facts were as follows :—

The applicant (defendant No. 1) and opponents (plaintiffs and defendant No. 2) and others carried on business in partnership in Bombay and Ahmedabad.

<sup>a</sup>Civil Extraordinary Application No. 318 of 1920.

<sup>(1)</sup> (1919) 43 Mad. 61.

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