4 B. 181=5 Ind. Jur. 84.

1879
DEC. 8.

APPELLATE CIVIL.

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Before Mr. Justice Pinhey and Mr. Justice F. D. Melvill.

BHARMANGAVDA (*Plaintiff*), *Appellant v.* RUDRAPGAVDA AND ANOTHER (*Defendants*), *Respondents.** [8th December, 1879.]

Hindu law—Inheritance—Widow's estate—Right of widow to dispose by will.

By Hindu law the widow of a collateral does not take an absolute estate in the property of her husband's *gotraja sapinda*, which she can dispose of by will after her death.

[F., 9 C. 315 (318); R., 11 B. 285 (300) (F.B.); 24 B. 192 (214)=1 Bom. L.R. 574 (603) (F.B).]

THIS was a second appeal from the decision of M. H. Scott, Judge of Dharwar, reversing the decree of Rao Bahadur G. G. Phatak, Subordinate Judge (First Class) of Dharwar.

[182] The plaintiff alleged that he was the adopted son of one Kenchowa, the widow of one Nilapgavda, who was the grandnephew of Rayangavda, the last male proprietor in his family; that on the death of Rayangavda the property devolved on his widow Balowa, on whose death in 1863 it passed—wrongfully as the plaintiff alleged—to the defendant; that Kenchowa was the rightful heir of Balowa, and that she (Kenchowa) had not only adopted the plaintiff, but had also made a will devising her property to him, and under both these titles he claimed to recover moveable and immoveable property now in the possession of the defendant. The defendant disputed the adoption as well as the will, and set up his own independent title.

The question of the alleged will was not discussed by the Judges of the Inferior Courts. The Subordinate Judge held the plaintiff's adoption proved; the District Judge that it was not. The former, therefore, allowed the claim, but the latter rejected it. The plaintiff appealed.

Macpherson, with him *Shamrav Vithal*, for the appellant.—The District Judge has recorded no distinct finding on the point of adoption, and the reasons he has given for an unfavourable opinion on the subject, are not sufficient. [PINHEY, J.—We are of opinion that he has found the adoption not proved, and that he was justified in arriving at that conclusion.] I will then rely on the point that Kenchowa, as the widow and *gotra sapinda* of Rayangavda, could devise his property to the plaintiff, as she has done. I submit that the rule of Hindu law is that a woman by inheritance takes not a qualified, but, an absolute, estate, the cases in which she takes a qualified estate being exceptions. In the present case Kenchowa should be regarded as taking, not as a widow, but as a *sapinda* taking an absolute estate: *Lakshmibai* v. *Jayram Hari and others* (1), *Bhaskar Trimbak Acharya* v. *Mahadev Ramji and others* (2), *Vijyarangam* v. *Lakshman* (3). The District Judge should be directed to find whether the will by Kenchowa, set up by the plaintiff, is proved.

Farran, with him *Ghanasham Nilkanth*.—The policy of the Hindu law is to exclude females from inheritance. They only [183] come in exceptionally under the authority of the Vyavahara Mayukha. It is unnecessary to direct any inquiry as to the genuineness of the will, for, even

* Second Appeal, No. 318 of 1879.

(1) 6 B. H. C. R. A. C. J. 152. (2) 6 B.H.C.R. O.C.J. 1.
(3) 8 B. H. C. R. O. C. J. 244.

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if genuine, it would be invalid. Kenchowa never had possession of the property which the plaintiff seeks to recover; but, even if she had, she could not devise it away to a stranger. It has been established beyond all doubt that a widow takes only a limited estate (*Narasappa Lingappa* v. *Sakharam Krishna* (1), and this is only the result of the more general rule excluding females from inheritance: *Bhau Nanaji Utpat* v. *Sundrabai* (2), *Lallubhai Bapubhai* v. *Mankuverbai* (3). No case has been cited, nor any reason assigned, why a widow should be superseded by the widow of a first cousin or any other collateral relative. In Bengal even a daughter takes a limited estate. Therefore, neither on the ground of adoption nor of the will is the plaintiff entitled to succeed.

JUDGMENT.

The judgment of the Court was delivered by

PINHEY, J.—This action was instituted by plaintiff to recover certain property, *viz.*, eighteen patals *judi inam* fields and a house at Baligati in the Dharwar District, two buffaloes and a cart, and mesne profits of the land for three years, of which the defendant Rudrapgavda in 1863 wrongfully took possession, on the death of Balowa, the widow of Rayangavda, the last surviving male member of the family. Plaintiff claimed as the adopted son of Kenchowa, widow of Nilapgavda, a collateral relative of Balowa's husband, who, moreover, had made plaintiff her heir by a will executed in his favour.

The defendant Rudrapgavda resisted the claim on the grounds that the plaintiff was not the adopted son of Kenchowa; that the property in suit did not belong to the persons through whom plaintiff claims, and that Balowa's husband held the *vatan* property as defendant's agent, and paid *judi* as such.

The First Class Subordinate Judge at Dharwar rejected the plaintiff's claim to mesne profits, and to the bullocks and cart, and from this part of his decree no appeal was preferred; but the [184] Subordinate Judge awarded plaintiff's claim to the lands and house in the plaint mentioned, on the grounds that the plaintiff was adopted by Kenchowa as the son of her deceased husband Nilapgavda; that this property belonged to Rayangavda, and was not held by his or defendant's agent, and that it was held by his widow Balowa until her death in 1863.

The defendant Rudrapa dying, his sons and heirs, the present respondents, appealed to the District Court at Dharwar, and that Court (M. H. Scott, District Judge) holding that, although it was proved that Rayangavda had undoubtedly held the property as *proprietor* and not as defendant's agent, it was not proved that plaintiff was the adopted son of Nilapgavda, reversed the decree of the Subordinate Court, and rejected the claim with costs.

In second appeal to this Court it has been argued for the plaintiff (1) that the District Court did not find with sufficient distinctness against the *factum* of plaintiff's adoption, and if such finding be sufficiently distinct, it is based on reasons which are bad in law; and (2) that, even if plaintiff's adoption by Kenchowa be held not proved, still he would be entitled to succeed in this suit under the will which is expressly mentioned in the plaint as a ground of action.

At the hearing of the appeal we orally informed the counsel for the parties that we had no hesitation in overruling the first of the above objections, as the District Judge had in his judgment distinctly recorded on the

(1) 6 B.H.C.R. A.C.J. 215. (2) 11 B.H.C.R. 272. (3) 2 B. 388 (438).

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second issue laid down (*viz.*, is plaintiff the adopted son of Nilapgavda, and is the adoption valid?) "I find on the second issue in the negative" and the reasons which he gave for arriving at this decision were undoubtedly good in law, *viz.*, that although the Subordinate Judge had found the plaintiff's adoption proved by the Ex. 31 and witnesses 27, 28, 38 and 39, he (the District Judge) could not hold the adoption proved by this evidence, because the recital, in the will, of the fact of plaintiff's adoption, by Kenchowa, seven or eight years before, does not prove the adoption, and the evidence as to the genuineness of the will was unsatisfactory; and the oral evidence as to the adoption, easily procured in such a case and difficult to contradict when the fact to be proved is placed so far back as in this case, ought not to be [185] allowed to outweigh the following facts, *viz.*, (1) no deed of adoption was executed, although the property was considerable; (2) although plaintiff is said to have been adopted in 1864, Kenchowa in a statement (Ex. 10) made by her before the Mamlatdar in that year, declared that her husband had left no heirs, and that she, as his widow, was his sole representative; she said nothing either of her having adopted the plaintiff or of her having received from her husband authority to adopt a son; (3) in 1867, when she filed a suit against the present defendant, she did not say that she had adopted a son, nor was this objection taken by the other side; and, lastly, (4) although the plaintiff's natural father is a patel, he took no care to have the property in suit entered in his son's name in the revenue accounts. The District Judge might well have held that the cumulative force of these objections was sufficient to prevent his holding the adoption of plaintiff proved by the evidence which had satisfied the Subordinate Judge, and we so informed the parties at the hearing.

On the second issue raised for the appellant, however, we reserved our judgment, *viz.*, whether the plaintiff is entitled to succeed in this suit by virtue of the will (Ex. 31) of Kenchowa.

Ordinarily, it would have been more regular to have had the genuineness of the will established (especially as the District Court, without recording a distinct finding on this point, seemed to be inclined to the opinion that the genuineness of the will was not established) before proceeding to determine the capacity of Kenchowa to pass the property in suit by will to the plaintiff; and it will still be necessary to have this issue of fact determined in the Court below, if we find that Kenchowa was clothed with such capacity. But as the counsel who appeared for the parties came ready prepared to argue the point, and were anxious that this Court should decide whether Kenchowa was or was not competent to will away the property in suit, we allowed the argument to proceed; and the point that we have now to decide, therefore, is—supposing the will to be a genuine will—does the property in suit pass under it to the plaintiff?

The family tree, agreed to by the parties, is as follows:—

[186] Nilapgavda (1)

Rayangavda (3) — Bafangavda (2) — Basangavda (4) — Nilapgavda (5)

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Nilapgavda (5) predeceased his father Basangavda (4), leaving as his widow Kenchowa, who is said to have executed the will; neither Nilapgavda (5) nor his father Basangavda (4) ever held possession of the property in suit. The last male member of the above family who held the property was Rayangavda (3). From Rayangavda it passed to his widow Balowa. On the death of Balowa it was taken possession of by the defendant Rudrapgavda, a distant member of the family, and it has remained in the possession of Rudrapgavda and his sons ever since. In 1867, Kenchowa commenced a suit for the recovery of the property from Rudrapgavda, but the suit never proceeded to trial, and was withdrawn by Kenchowa. The question to be determined may be, therefore, thus stated:—Could Kenchowa, the widow of a collateral relative of Rayangavda, and a widow who never was seized of the estate, pass the estate of Rayangavda, by her will, to the plaintiff, a stranger (albeit he is a distant relation of the family)? In our opinion she could not. We will leave out of consideration the fact that Kenchowa was never seized of the estate, not because we consider it by any means an unimportant fact, if its consideration was necessary for the determination of the question we are considering, but because we can decide the question the same way without considering it, and this point was not argued at the bar.

The original rule of Hindu law, we take it, is that women generally are excluded from inheritance: *Bhau Nanaii Utpat* v. *Sundrabai* (1) and *Sallubhai Bapubhai* v. *Mankuverbai* (2), and the reason for this will be obvious to those who know anything of the history of Hindu institutions. The first innovation on this rule was the admission of a daughter to inherit, and she was assigned only the last place in the line of succession, and this only to save escheat to the Sarkar or, as we call it, the [187] Crown. Further relaxations of the rule have been recognized by our Courts on the authority of texts in the Mitakshara and the Mayukha; but we are not prepared to go beyond the decisions. The last quoted case is an authority for the proposition that a wife is a *gotraja sapinda* of her husband, and on his death will take an estate, as his heir, in preference to certain more remote relations, that is, before the male representative of a remoter branch. The case of *Vijyarangam* v. *Lakshman* (3) is an authority for the proposition that all property acquired by a woman by inheritance becomes her *stridhan* and states the rules that regulate its subsequent devolution according to the texts of the Mitakshara and Mayukha respectively; and *Lakshmibai* v. *Jayram Hari* (4) is an authority for the proposition that the wives of all *gotraja sapindas* and *samanodagas* have rights of inheritance co-extensive with those of their husbands immediately after whom they succeed. But in none of the cases above cited do we find authority for the proposition that the estate inherited by a wife or widow is an absolute estate, alienable by will to a stranger. A sister, taking as heir to her brother, takes his property with an absolute power of disposition over it: *Bhaskar Trimbak Acharya* v. *Mahadev Ramji* (5); but a man's widow admittedly takes only a limited estate,—that is, an estate limited to her life, and so also a mother inheriting from her son: *Narsapa Lingapa* v. *Sakharam Krishna* (6).

There is, so far as we know, and we have been through the cases carefully, no authority for the proposition that the widow of a collateral takes an absolute estate in the property of her husband's *gotraja sapinda*,

(1) 11 B.H.C.R. 272.
(2) 2 B. 388 (438).
(3) 8 B.H.C.R. O.C.J. 244.
(4) 6 B.H.C.R. A.C.J. 152.
(5) 6 B. H. C. R. A. C. J. 215.
(6) 6 B. H. C. R. O. C. J. 1.

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which she can dispose of by will after her death. And if it were necessary to consider the question, it would, we think, be still less a reasonable proposition that a widow of a collateral who had never been seized of the estate could will it away.

We, therefore, hold that Kenchowa could not have left the property in suit by will to plaintiff, even if the will be genuine, and, therefore, we are of opinion that the decree of the District Court should be confirmed with costs.

Decree confirmed.

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4 B. 188.

[188] ORIGINAL CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Sir Charles Sargent, Justice.

KESSERBAI (*Original Plaintiff*), *Appellant v.* VALAB RAOJI AND OTHERS (*Original Defendants*), *Respondents.**

[16th September, 1879.]

Hindu law—Inheritance—Priority of sister and half-sister—Step-mother—Brother's widow—Paternal uncle's widow.

In the Presidency of Bombay the sister and half-sister inherit in priority to the step-mother and the paternal uncle's widow.

The law as to the succession of a full-sister in the Presidency of Bombay does not rest solely upon either the Mitakshara or the Mayukha, but is built upon both taken conjointly.

The case of *Vinayak* v. *Lakshmibai* (1) decided that in the Presidency of Bombay the term 'brothers' occurring in the Mitakshara (ch. ii, sec. 14, pl. i), should be taken to include sisters. As the term 'brothers' while including sisters introduces them after brothers, so the term 'half-brothers' must be regarded as including half-sisters and as bringing them in after half-brothers.

The step-mother is not included by the Mitakshara within the term 'mother.' But, although a step-mother cannot in the Presidency of Bombay be introduced as an heir under the term 'mother,' yet, as the widow of *gotraja sapinda* of the *propositus*, and, therefore, according to the doctrine of the Mitakshara and the Mayukha a *gotraja sapinda* herself, she cannot be regarded as altogether excluded from the succession to a step-son.

Quære—At what points in the list of heirs the step-mother of the *propositus*, the widow of his brother and the widow of his paternal uncle succeed in the Presidency of Bombay?

[N.F., 37 C. 214=11 C.L.J. 588=14 C.W.N. 443=5 Ind. Cas. 135; F., 8 M. 107 (F.B.); Appr., 4 B. 210; R., 16 A. 221; 4 B. 219; 19 B. 707; 24 B. 563; 32 B. 300=10 Bom.L.R. 389; 33 B. 452=11 Bom.L.R. 654=3 Ind. Cas. 750; 36 B. 120=13 Bom.L.R. 863=12 Ind. Cas. 359; 36 B. 339 (343)=14 Bom.L.R. 89=14 Ind. Cas. 438; 47 P.R. 1914=23 Ind. Cas. 536.]

THIS was an appeal by the plaintiff against the decree of Atkinson, J.

The plaintiff was the widow of one Sunderdas Harikarson. The first four defendants were the executors of the will of one Hassibai, the widow of Jaitha Harikarson, who was a younger brother of Sunderdas. The fifth defendant was a lessee of Hassibai.

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* Suit 291 of 1877.

(1) 1 B.H.C.R. 117=9 M.I.A. 516.