1892
JUNE 22.

APPEL-
LATE
CIVIL.

17 B. 303.

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APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

NAGESH (*Original Defendant* 1), *Appellant v.* GURURAO (*Original Plaintiff*), *Respondent.** [22nd June, 1892.]

Hindu law—Inheritance—Succession—Succession among the remoter gotraj sapindas—Gotraj sapindas—*Succession* per capita—*Practice—Second appeal—New point raised in second appeal.*

Among the remoter *gotraj sapindas* the inheritance goes *per capita* and not *per stirpes.*

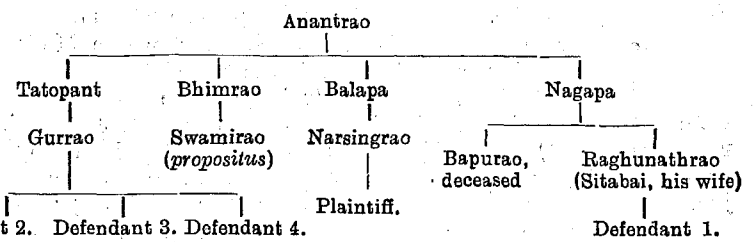
The High Court will allow, on second appeal, a new point to be raised for the first time, provided it is purely a question of law, arising on the findings of the Courts below, and not affected by any facts outside those findings.

[R., 18 B. 679 (683); 27 B. 452 (466); 1 N.L.R. 1 (2).]

SECOND appeal from the decision of T. Hart-Davies, Assistant Judge of Dharwar, in Appeal No. 72 of 1890 of the District File.

The plaintiff sued as one of the heirs of one Swamirao Bhimrao, deceased, to recover one-third share of certain property belonging to the deceased.

[304] The following pedigree shows the relationship of the parties:—



Defendants pleaded (*inter alia*) that plaintiff was not the heir of the deceased Swamirao.

The Subordinate Judge held that defendant No. 1's mother, Sitabai, was the nearest *gotraj sapinda* of the deceased, and as such excluded the plaintiff. He, therefore, rejected the plaintiff's claim with costs.

On appeal, the Assistant Judge held that Sitabai, not being a childless widow, could not inherit in preference to her son, the defendant No. 1, and as all the parties stood in the same degree of relationship to the deceased, they took the property *per stirpes.* He therefore awarded to the plaintiff one-third share of the property in suit.

Against this decision the defendant No. 1 appealed to the High Court.

Balaji A. Bhagvat, for appellant.—All the parties stand in the same degree of propinquity to the *propositus.* They take *per capita,* not *per stirpes.* Nephews take *per capita*: see Mayne's Hindu Law, s. 526: so, too, daughter's sons take *per capita.* I contend that by analogy sons of nephews take similarly. The principle is that those who take on their own right take *per capita*: see West and Bühler, 459, 445, and Mandlik's Translation of Vyavahar Mayuk, 81.

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N. G. Chandavarkar, for respondent.—The point is not covered by any text or authority. Succession by *stirpes* is the common rule.

JUDGMENT.

TELANG, J.—The point which is discussed by the Assistant Judge in this case, as to a female member of a family excluding her own son from inheriting to a distant relation, is now covered by authority (1), and was properly abandoned by the pleader for the [305] appellant. He has, however, argued that the Assistant Judge was wrong in giving the plaintiff a third share of the estate, seeing that the plaintiff is one of six members of the family all equally distant in relationship from the *propositus* Swamirao. At the hearing, we intimated our opinion, that as the question was purely a question of law, which arose on the findings of the Court below, and could not be affected by any facts outside those findings, we ought to allow (2) the appellant to argue it although it was not raised in either of the Courts below. And we think that the question must be decided in favour of the appellant's contention. The Assistant Judge has held that the inheritance must go *per stirpes*, and that as the plaintiff represents one *stirpes* out of the three into which the family is now divided, he must get one-third of the estate. There is, however, no authority for this view. Succession *per stirpes* is laid down expressly in the case of a partition among the male descendants of a deceased person. But that is distinctly stated to be a special rule (3) based on a special text. The similar rule in relation to the distribution of *stridhan* is also based in the Mitakshara (4) on a special text. It is not, therefore, a matter of course to apply that rule in a case to which no express text extends it. On the other hand, it is to be remarked, that the remoter heirs succeed in their own right, and directly to the *propositus*. According to the Mitakshara, no doubt, they succeed as belonging to the "line" of this or that ancestor of the *propositus*. But that is not material on the present point. In this case, for instance, it is true that the remoter heirs succeed as representing the line of Anantrao, the grandfather of Swamirao, but all the members of the family shown in the genealogy belong in common to that same "line", and the subdivisions of that line into the branches of Tatopant, Balapa and Nagappa are irrelevant on the present inquiry. Among them all, an heir nearer in degree would exclude a remoter one, and no regard would be paid to the fact of their respectively representing two co-ordinate *stirpes* of the family of the *propositus*. There is thus no positive [306] reason in favour of applying the rule of succession *per stirpes* to the case of the remote *gotraja sapindas*; while there are certain important considerations pointing the other way; and the rule itself is laid down as an exceptional rule in the cases in which the authorities show that it must be applied. It follows from this that it is not a rule which should be applied in the present case. And this conclusion derives some support from the analogies which were relied upon in argument. As regards daughter's sons, it has always been held that they succeed not *per stirpes* but *per capita*, and this Court has recently so decided (*Pandurang Gopal* v. *Ramchandra Damodar and another* decided on 27th January, 1892). So in the case of brother's sons, the same rule has been laid down. In both cases the succession is direct, the nephews being entitled to claim as nephews,

(1) *Rachava* v. *Kalingapa*, 16 B. 716. (2) Cf. *Girriapa* v. *Ningapa*, 17 B. 100.
(3) See Stokes H. L. Books, p. 391; *cf.* Smriti Chandrika, VIII, para. 5.
(4) See Stokes H. L. Books, p. 462.

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and being liable to be excluded by any uncle or aunt, as the case may be, if one happens to survive the *propositus*. The similarity between the succession of these nephews with that of the remoter *gotraja sapindas* is more complete than that between the succession of the latter and that of lineal descendants. And this is a consideration which supports the application of the rule of succession *per capita*, in preference to that of *succession per stirpes*, to the case of the remoter *gotraja sapindas*.

We must, therefore, vary the decree of the Court below by substituting, in lieu of the third share awarded therein, a sixth share, which is admitted to be what the plaintiff is entitled to, according to the genealogy held proved by the Assistant Judge and to the opinion above expressed. But as this point was made for the first time in this Court, the appellant cannot be allowed the costs of this appeal.

Decree varied.

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17 B. 307.

[307] ORIGINAL CIVIL.

Before Mr. Justice Parsons.

DHONDIBA KRISHNAJI AND OTHERS (*Plaintiffs*) *v.* THE MUNICIPAL COMMISSIONER OF THE CITY OF BOMBAY (*Defendant*).*

[5th March, 1892.]

Negligence—Easement—Right of support of house by adjoining soil—Principal and agent or contractor—Liability of principal for acts of contractor—Bombay Municipal Act (III of 1888), s. 527—Notice of suit—What is sufficient notice.

The plaintiffs were owners of a house consisting of a ground floor and upper storey and measuring 77 feet in length. On the south side of the house was a gully, 3 feet 6 inches wide, separating it from another upper-storied house. The plaintiffs in this suit complained that in January, 1891, the defendant by his servants dug a trench, 8 feet deep, along the whole length of the gully for the purpose of laying a drain pipe, and that the work was done so negligently that the plaintiffs' house was injured and became in such a dangerous condition that it had to be pulled down. The plaintiffs claimed Rs. 3,996 as damages. The defendant denied the negligence, and alleged that the work was not done by his servants or agents, but by a contractor.

Held, that the defendant was liable for the act of his contractor. The work was necessarily attended with risk, and the defendant could not free himself from liability by employing a contractor. The defendant, as well as the contractor, was liable to the plaintiffs.

For the defendant it was contended that the notice of action given by the plaintiffs under s. 527 of the Bombay Municipal Act (III of 1888) was insufficient. The notice stated "that one S. L., a contractor under you, and as such being your agent and servant, excavated a trench, &c." It was argued that this was not a good notice, as it only alleged a cause of action arising out of the acts of the defendant's servants and agents, and not out of the acts of a contractor.

Held, that the notice was sufficient. The section only required the notice to state with reasonable particularity the cause of action, and this was done. The individual by whom the damage was done was specified, and the acts which caused the damage were clearly set forth.

SUIT to recover Rs. 3,996-13-0 as damages for loss caused to the plaintiffs by the negligence of the defendant.

The plaint set forth that the plaintiffs were owners of a chawl situate in Haines Road in Bombay, consisting of a ground floor and upper storey and measuring 77 feet in length and 19 feet and 6 inches in breadth ;

* Suit No. 241 of 1891.