appear to have noticed the fact that in article 138, the judgment-debtor is in possession at the time of the sale, and he is not in possession under the two previous articles. This accounts for the difference in the wording of that section and the two previous sections. It is, however, not necessary to discuss this point further. While differing thus from the reasons given by the Courts below, we are satisfied that they have arrived at a correct decision as regards respondent-plaintiff's right to maintain the suit. We dismiss the appeal with costs.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Crowe; and on Appeal before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Tyabji.

VALLABHDAS JAMNADAS AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SAKARBAI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1900. *March* 25.

Hindu law—Inheritance—Brother's grandson preferred to widow of a daughter's son.

The widow of a daughter's son is not entitled to succeed to the estate of her husband's maternal grandfather in preference to the maternal grandfather's separated brother's grandson.

APPEAL from Crowe, J.

The question raised in the suit was one of succession to the estate of a deceased Hindu.

The property in dispute was the estate of one Narotamdas Narrondas, who died in 1872, leaving a widow (Dewkabai) and three grandsons (Mathuradas, Nensey and Jeewandas), the sons of a predeceased daughter (Deoli), him surviving.

The first plaintiff Sakarbai was the widow of Nensey, one of the said grandsons, and the second plaintiff was her father-in-law Lakhmidas Kimji, husband of the deceased Deoli.

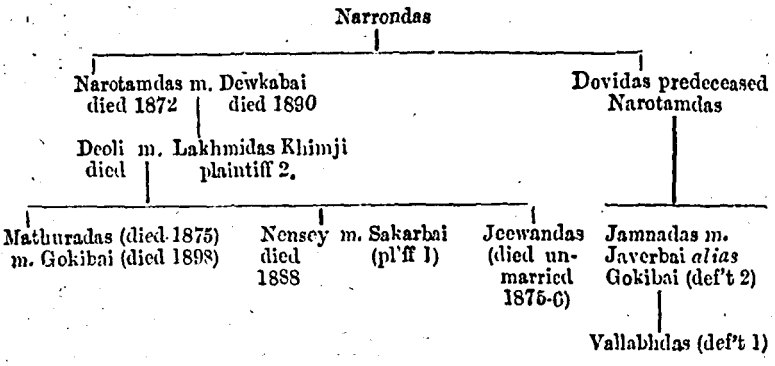
The first defendant Vallabhdas was the grandnephew of Narotamdas Narrondas, being the son of Jamnadas, who was the son of Devidas, the separated brother of Narotamdas Narrondas.

* Suit No. 384 of 1899; Appeal No. 1089.

1900.

VALLABHDAS v. SAKARBAI.

The following table shows the relationship of the parties:—



On the death of Narotamdas Narrondas in May 1872, his widow Dewkabai had succeeded to the estate and enjoyed it until her death in September, 1890. Her three grandsons (Mathuradas, Nensey and Jeewandas) had predeceased her. Two of them, *viz.* Mathuradas and Nensey, left widows.

The plaintiffs contended that on her death the estate descended to the widows (Gokibai and the plaintiff Sakarbai) of the two grandsons Mathuradas and Nensey as the heirs of Narotamdas Narrondas. Gokibai had died in 1898, and the plaintiffs claimed that her share passed either to the first plaintiff Sakarbai as heir of Narotamdas Narrondas or to the second plaintiff Lakhmidas Khimji, the father of Gokibai's husband.

The defendant Vallabhdas contended that on Dewkabai's death in 1890 either he or his mother (the second defendant Gokibai) became entitled to the whole estate of Narotamdas Narrondas which Dewkabai had held as his widow.

The question thus was as to whether the plaintiff Sakarbai, the widow of a daughter's son, succeeded to the estate of her husband's maternal grandfather in preference to his separated brother's grandson.

Crowe, J., held that the plaintiffs Sakarbai and Gokibai were entitled to succeed on the death of Dewkabai, and that on Gokibai's death in 1898 her share passed with the rest of the estate to Sakarbai. He therefore gave judgment for the plaintiffs.

The defendants appealed.

Lang (Advocate General), *Starling* and *Raikes* for Vallabhdas, the first appellant (original defendant No. 1). *Branson*,

C. H. Setalvad and *V. S. Bhandarkar* for the second appellant (defendant No. 2) :—The brother's grandson succeeds in preference to the widow of a daughter's son. The daughter's son takes for special reasons, namely, that he should perform the *shradh* of his grandfather, but this does not apply to his widow —*Lakshmibai* v. *Jayram*(1); *Lallubhai* v. *Mankuvarbai*(2); Mayne's Hindu Law, para. 518; West and Bühler, p. 123 *et seq.* The daughter's son has his father's name and belongs to his father's *gotra* and not to the *gotra* of his maternal grandfather. He is therefore only a *bandhu*. The fact that he is an enumerated heir does not make him a *gotraja sapinda*. His widow therefore would take his place as *bandhu, i.e.* subsequent to all the *gotraja sapindas*; she would not take his place as an enumerated heir; all *gotraja sapindas* come before *bandhus*. See West and Bühler, pp. 129, 130; Mandlik, p. 221; Sarvadhikari, p. 296; Bhattacharya, p. 460; *Kesserbai* v. *Valab Raoji*(3); *Vasudevan* v. *The Secretary of State for India*(4); *Sethurama* v. *Ponnammal*.(5) A claim by the widow of a daughter's son has never been made before. A "grandnephew" is included in the word "nephew."

Macpherson and *Jardine* for the respondents (plaintiffs) :—The widows of the daughter's sons are entitled. In Bombay widows take as *gotraja sapindas* of their husbands—*Lallubhai* v. *Mankuvarbai*.(6) The daughter's son is a *gotraja sapinda*. Nephew does not include grandnephew—*Suraya Bhukta* v. *Lakshminarasamma*.(7)

JENKINS, C.J. :—This is an appeal from the decision of Mr. Justice Crowe, which raises the question whether the widow of a daughter's son is entitled to succeed to the estate of her husband's maternal grandfather in preference to the deceased brother's grandson. It is only in this presidency that such a competition would be possible; for it is only here that females have been accorded such rights as would make a claim to inherit under such circumstances possible.

(1) (1869) 6 B. H. C. R. 152.
(2) (1876) 2 Bom. 388.
(3) (1879) 4 Bom. 188 at p. 203.
(4) (1887) 11 Mad. 157 at p. 187.
(5) (1888) 12 Mad. 155.
(6) (1876) 2 Bom. 388.
(7) (1882) 5 Mad. 291.

1900.

VALLABHDAS v. SAKARBAI.

The decisions of this Court have, contrary to the rules of inheritance obtaining in the other presidencies of India, admitted as heirs widows of deceased *gotraja sapindas*, and the point for our decision is whether this right is to be extended to the widows of those who do not fall within that category, for there can be no question that a daughter's son is not a *gotraja sapinda*. These rights of female heirs in Bombay are the result of case-made law, so that it becomes incumbent carefully to examine the cases to see on what they are based. Omitting some early cases it may be said that the decision in *Lakshmibai* v. *Jayram*[1] is the starting point of this new departure. That was a case in which the right of a *gotraja sapinda's* widow to succeed was established. The *ratio decidendi* is to be found at page 156, where it is said:

"From the mention of the great-grandfather's grandmother (*i.e.* the wife or widow of the most remote male *sapindas* in direct ascent) and of the kindred connected by a common libation of water (*i.e.* the *samanodakas* or collateral within thirteen degrees), it is clear that the commentator meant to convey that by a logical interpretation of the Mitakshara, the wives of all *sapindas* and *samanodakas* must be held to have rights of inheritance co-extensive with those of their husbands."

From what follows it is manifest this was intended to be an equivalent statement of the law as suggested in West and Bühler, pp. 52 and 53, of their introductory remarks to the Digest.

The next case is that of *Lallubhai* v. *Mankuvarbai*,[2] which was heard and decided by Sir Michael Westropp, Sir Charles Sargent and Mr. Justice West. The principle of that decision was that the female claimant was entitled to succeed, inasmuch as by marriage she became the *gotraja sapinda* of her husband and of his *gotraja sapindas*. That case afterwards went on appeal to the Privy Council, where the High Court's decision was affirmed (*Lallubhai* v. *Cassibai*).[3] The opinion of the Board was delivered by Sir Montague E. Smith, who thus formulates the proposition then under consideration:—

"If, then, as already pointed out, the wife upon her marriage enters the *gotra* of her husband, and thus becomes constructively in consanguinity or relationship with him, and through him with his family, there would appear to be

(1) (1869) 6 B. H. C. R. 152. (2) (1876) 2 Bom. 388.
(3) (1880) 5 Bom. 110.

nothing incongruous in her being allowed to inherit as a member of that family under a scheme of inheritance which did not adopt the principle of general incapacity of women to inherit. But though it may be consistent with this theory of *sapinda* relationship to admit the widow so to inherit, the existence of the right has still to be established. It is acknowledged that the widow of a collateral relation is nowhere specified and named as heir to members of her husband's family; she must therefore come into the succession, if at all, as one of the class of *gotraja sapindas*, and it is in this way that her claim has been put forward at the bar."

This passage makes clear the ground on which the collateral's widow succeeds: it is because she is a *gotraja sapinda* of her husband's family and so of the propositus, and is not excluded by the law of this presidency on the score of her sex. Therefore, to bring the widow of a daughter's son within the principle of the cases, it must be affirmed that she is a *gotraja sapinda* of her husband's maternal grandfather. But this clearly she is not; she no doubt is a *gotraja sapinda* of her husband and his agnates; the maternal grandfather is not one of his agnatic relations.

It only remains to consider whether on any other ground she is entitled to preference. It has been argued that not to accord to the plaintiff the priority she claims would involve the anomaly that though her husband would have preference over a brother of the deceased and all subsequent male heirs, she would be postponed to their widows; therefore it is urged we should extend to her the fiction or principle by which her husband is entitled to his preferential position as an heir. The argument that rests on the assertion of an anomaly overlooks the reason which justifies the inclusion of a brother's widow—a reason, as I have already shown, which has no application to the widow of a daughter's son. The fiction that we are invited to utilize is that which explains the inclusion of a daughter's son among the compact series of heirs by reference to the old and possibly obsolete doctrine as to an appointed daughter. But though the position of a daughter and a daughter's son in the order of inheritance, as now established, may be historically referable to this doctrine, in fact they now owe their rights to their being named as heirs in the governing commentaries. Nor does there appear to be any reason for extending to the widow of a daughter's son

1900.

VALLABHDAS v. SAKARBAI.

the fiction or principle which is alleged to be accountable for her husband's right. The widows of *gotraja sapindas* were admitted by this High Court as heirs in spite of the texts rather than because of them; the texts were bent to fit in with the established customs and conscience of the people. But I am unable to find that there was any such partiality in favour of the widow of a daughter's son; it certainly is not established by any evidence in this case, nor does it appear that any such claim has before this been advanced, though *Lakshmibai* v. *Jayram* was decided over thirty years ago. The distinction, moreover, in favour of the widows of the *gotraja sapindas* is not fanciful; on the contrary, one can well understand how that disposition to admit such widows should stop short when it was proposed to admit into the inheritance of property one who had not even by marriage come into the family to which that property belonged.

For these reasons I think we ought not to extend to the widow of a daughter's son the right to inherit which has been accorded to those who have become by marriage *gotraja sapindas*, and I would accordingly reverse the decree of Mr. Justice Crowe and dismiss the suit with costs here and in lower Courts.

Decree reversed and suit dismissed.

Attorneys for plaintiffs:—Messrs. *Little and Co.*

Attorneys for defendants:—Messrs. *Mansuklal, Damodar and Jamsetji.*