I do not place much stress upon that circumstance, but I find that in the case of *Monypenny* v. *Dering* (1) an order as to costs, on the understanding that it was made for the purpose of preventing further litigation, was regarded as a circumstance to be taken into consideration in determining whether or not a decree adverse to an infant should be attacked subsequently.

The conclusion, therefore, to which I come is that in the exercise of our discretion under section 5 of the Limitation Act, we ought not to permit this appeal after the prescribed period, and we accordingly dismiss this application with costs.

Costs of both the respondents must be paid by the applicant.

Application dismissed.

R. R.

(1) (1859) 4 De G. & J. 175.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Russell.

KRISHNAI KOM MARTAND (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHRIPATI BIN PANDU AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1905 *December* 1.

Mitakshara—Co-widows—Deceased co-widow—Stridhan property of the deceased—Surviving co-widow entitled to succeed—Nearest surviving Sapinda of the husband.

According to the Mitakshara a surviving co-widow is entitled to succeed to the *Stridhan* property of her deceased co-widow as the nearest surviving *Sapinda* of the husband.

SECOND appeal from the decision of A. Lucas, District Judge of Sátára, reversing the decree of S. N. Sathaye, Joint Subordinate Judge of Karád.

One Mahadu had two sons, namely, Bhika and Kusha, who were divided in interest and in separate enjoyment of their properties. Bhika had a son Martand, who pre-deceased his father, leaving behind two widows, Kasai and Krishnai, the plaintiff. After Bhika's death, his widowed daughter-in-law

* Second Appeal No. 326 of 1905.

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Kasai continued in possession of his property for more than twenty years. Kusha had three sons, Pandu, Khandu and Maruti. Maruti left three sons, Ganu, Shripati and Malu, defendants 1—3. Khandu left a son Balu, defendant 4, and Maruti left a son Krishna, defendant 5. After Kasai's death, which took place in or about the year 1900, her co-widow Krishnai brought the present suit in the year 1903 against the defendants to recover the property which was in Kasai's possession, alleging that the defendants forcibly dispossessed her in July 1902.

Defendants 1—4 did not contest the suit.

Defendant 5 answered, *inter alia*, that the plaintiff was not the owner of the property and she did not state how she was interested therein and that the defendant had inherited it and was its full owner.

The Subordinate Judge found that the plaintiff's ownership was proved and that the defendant dispossessed her while she was in possession of the property. He, therefore, decreed the claim.

On appeal by defendants 2, 4 and 5 the Judge reversed the decree and dismissed the suit on the ground that as Kasai was in exclusive possession of the property for more than twelve years, she had acquired a title by adverse possession ; therefore, the property would, on her death, pass to her husband's heirs, the defendants, and not to the plaintiff who could not come in as Kasai's heir.

The plaintiff preferred a second appeal.

S. R. Bakhle for the appellant (plaintiff) :—The Judge has found as a fact that Kasai acquired title to the lands in dispute by adverse possession. The lands, therefore, became her *Stridhan*. According to the special line of succession for *Stridhan* property, the plaintiff being a co-widow of Kasai, is entitled to succeed to her property in preference to the defendants who are the nephews of her husband. This is deducible from the Mitakshara which lays down that in the case of *Stridhan* the property goes, in the absence of descendants, to a woman's husband, and, in the absence of husband, "to his nearest *Sapindas*" (*tatpratyásannáh sapindáh*), that is, the next-of-kin. The present case comes from the Sátára District where the Mitakshara is the governing authority. The

next-of-kin after the husband is, obviously, his widow. The Mitakshara is, no doubt, silent as to the specified heirs after the husband, but according to the author's well-known rule of succession, it is clear that the co-widow is the preferential heir: see West and Bühler, 3rd edition, pp. 517, 518; Banerji on Hindu Stridhan, pp. 362-3; Gharpure's Hindu Law, p. 205.

B. N. Bhajekar for respondents (defendants):—It is admitted that the Mitakshara is silent on the point involved and that it does not specifically mention the heirs after the husband to a woman's *Stridhan*. The omission cannot be said to be unintentional because the rival widow is mentioned in other places. Further with reference to *Shulka Stridhan*, for which a pretty full list of heirs is given, the rival wife is again conspicuous by her absence, although her daughter finds a specific mention.

The principle of *Sapindaship* in the sense of capacity to offer *Pindas* to ancestors cannot apply to the Mitakshara school because the Mitakshara interprets *Sapindaship* as meaning propinquity. But if propinquity be held as the principle for determining succession to *Stridhan*, then the Mitakshara would not be consistent with itself because it provides a list of specified heirs to *Stridhan* and excludes the son in favour of the grand-daughter. This anomaly should not be carried further and should not be imported in the unspecified heirs that may come to be included in the expression "his next-of-kin" (*tatpratyásannáh sapindáh*).

JENKINS, C. J.:—This case comes from the Sátára District and it raises the question whether a lady is entitled to succeed as heir to her deceased co-widow.

The property became the *Stridhan* of the deceased co-widow by the operation of the law of limitation; and the rival claimants are the grand-children of the brother of the co-widow's father-in-law.

Now, for the decision of this case, we must look at the Mitakshara. On the death of a woman without issue, which is the position with which we have to deal, it is said in paragraph 11 of section 11 of Chapter II, that the property of such a lady, if married by any of the four modes of marriage denominated

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Brahma, Daiva, Arsha, Prajapatya—belongs, in the first place, to her husband.

The lady in this case was married in one of these four modes, and the husband is dead. For this contingency provision is made in the following sentence, which says that "on failure of him, it goes to his nearest *Sapindas*."

Now, there can be no question that the plaintiff, as the widow of the deceased husband, is his *Sapinda*, and according to the order prescribed in the Mitakshara, she is his nearest surviving *Sapinda*.

Why, then, are we not to give effect to this apparently simple provision of the law? We can see no adequate reason.

This view is accepted by such eminent text-writers as West and Bühler, and Sir Gooroodass Banerjee (see the first named authors at pages 517 and 518 of their work on Hindu Law(1), and the last named at pages 362 and following of his book on Hindu Law of Marriage and Stridhan(2)). In West and Bühler it is stated, though no authority is cited for the proposition, that a course of succession entitling the co-widow to succeed is in accordance with the custom on this side of India.

We, therefore, are of opinion that the widow can claim at least to be as against the parties to this litigation "the nearest *Sapinda*"; whether she may possibly have any higher right we are not now concerned to decide.

The decree of the lower appellate Court must, therefore, be reversed and that of the first Court restored, with costs throughout.

G. B. R. *Decree reversed.*

(1) 3rd Edn. (2) 2nd Edn.