law would have said so instead of using the word "demand." And this is in accordance with *Kunhi* v. *Moidin*[1], where it is said:—"The Muhammadan matrimonial contract involves separate and independent contracts by the husband and wife. The wife is by contract bound to submit herself to her husband and he is bound to pay the prompt or other dower according to the contract, or if no sum agreed on, according to the provision of the law. Each has a separate remedy against the other for non-performance of the contract." In *Ranee Khejoorunissa* v. *Ranee Ryeesunissa*[2], it was held that, under Mahomedan law, it is only by payment of the prompt dower that the husband is entitled to consummate the marriage or enforce his conjugal rights and that "unless delay is stipulated for and agreed to, it should be paid at the time of the marriage." It follows that the right to restitution, so far from being a condition precedent to the payment of prompt dower, arises only after the dower has been paid.

The decree must, therefore, be confirmed with costs.

Decree confirmed.

R. R.

(1) (1888) 11 Mad. 327. (2) (1870) 13 W. R. 371 (Civ.).

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

KASHIBAI, WIDOW OF GANESH (ORIGINAL OPPONENT 2), APPELLANT, *v.* MORESHVAR RAGHUNATH, A MINOR, BY HIS GUARDIAN MOTHER SITABAI (ORIGINAL PETITIONER), RESPONDENT.*

1911. *April* 10.

Hindu Law—Mitakshara—Inheritance—Paternal uncle's grandson—Paternal uncle's widow.

Among Hindus in the Bombay Presidency governed by the law of the Mitakshara, a paternal uncle's grandson is to be preferred as an heir to a paternal uncle's widow.

* Appeal No. 158 of 1910.

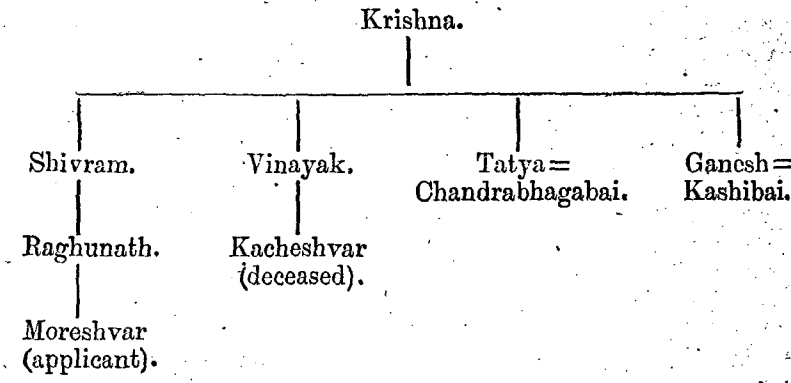
1911.

KASHIBAI v. MORESHVAR RAGHUNATH.

APPEAL against the decision of K. Barlee, Assistant Judge of Poona, in the matter of an application for Letters of Administration.

Question of inheritance according to Hindu Law.

The following table shows the relationship of the parties :—



Kacheshvar died on the 27th October 1908. Thereupon the applicant Moreshvar, a minor, represented by his certified guardian his mother Sitabai, applied for the Letters of Administration to the estate of the deceased. The application was opposed by Chandrabhagabai and Kashibai claiming as widows of the *gotraja sapindas* of the deceased. The Assistant Judge relying on the decision in *Rachava* v. *Kalingapa*[1] passed an order granting Letters of Administration to the applicant on his furnishing security.

Opponent 2 Kashibai appealed.

J. R. Gharpure for the appellant (opponent 2).

P. D. Bhide with *L. B. Petkar* for the respondent (applicant).

SCOTT, C. J. :—The question which we have to decide is whether among Hindus in this presidency governed by the law of the Mitakshara a paternal uncle's widow or a paternal uncle's grandson is to be preferred as an heir for the purpose of grant of Letters of Administration. That the paternal uncle's widow is a *gotraja sapinda* eligible for inheritance results from the decision in *Lallubhai Bapubhai* v. *Mankuvarbai*[2], which was

(1) (1892) 16 Bom. 716. (2) (1876) 2 Bom. 388.

affirmed by the Judicial Committee. The question which now comes before the Court was anticipated by Mr. Justice West in his judgment in that case in the following passage :—

"The recognition of the widows of *gotraja-sapindas* as themselves *gotraja-sapindas*, however slender the basis on which it originally rested so far as collaterals are concerned, has become a part of the customary law wherever the doctrines of the Mitakshara prevail, and the Courts must give effect to it accordingly. Whether, indeed, the widow of a collateral should take before the son or grandson of the same man, may admit of question. The mother of the *propositus* takes before her son or grandson, and a like precedence is assigned to his grandmother and great-grandmother; but brothers' wives, on the other hand, are not mentioned between brothers and their sons in Yajnavalkaya's text, nor has Vijnyanesvara found a special place for them or for a descendant's widow as he has for the daughter's son. Although, therefore, a woman, become a member of her husband's family, takes the benefit of a rule resembling that of the Roman Law ... yet as in that law the widow's right of inheritance was limited and of late introduction, the 'gradus' applying, in strictness, only to blood relations, so analogy may be thought to lean somewhat to the preference of the eldest surviving male as representative of any branch to the widow of any collateral in the same line; but the point cannot be finally decided until it arises in the proper form. It is enough for the purposes of the present case to say that a widow in a nearer collateral line has precedence, according to the Mitakshara, over a male in a remoter line" (pp. 414, 445).

In a subsequent passage he states that—

"If the foundation of the rights of widows of *gotrajas* under the Mitakshara is slender, under the Mayukha it may be called almost shadowy" (p. 447).

In *Rachava* v. *Kalingapa*[1], the Court gave effect to the opinion thus expressed by West, J., by holding that a paternal uncle's son was to be preferred to the widow of another paternal uncle of the propositus. Mr. Justice Telang expressed the conclusion of the Court in these words:—

"When it is remembered that the widows of collaterals among the *gotrajas* are not specifically mentioned, even in those works like the Mitakshara where collateral males, like uncle's sons, etc., are expressly named ... it seems to be the fairer interpretation of the law to hold, that a female *gotraja-sapinda* in any one line cannot exclude any male properly belonging to that line" (p. 720).

The question then is whether the paternal uncle's grandson can be said to be a male properly belonging to the line to which a paternal uncle's widow belongs within the meaning of that

(1) (1892) 16 Bom. 716.

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judgment. In dealing with the question of lines of descent Mr. Justice Telang makes the following observations :—

"In the Mitakshara, Chapter II, Sec. 5, Pl. 4—5, it is laid down, that the propinquity of *gotrajas* is to be determined by lines of descent—that is to say, the inheritance is to go first in the line (the word in the original is *santana*, literally, 'continuation') of the paternal grandfather, then, in default of any one in that line, of the paternal great-grandfather, then of the paternal great-great-grandfather, and so forth. Now ordinarily there can be no doubt that each of these lines must be treated as represented, or "continued", by any male member belonging to that line in preference to any female. As in an undivided family no female member of the family would be ordinarily regarded as representing the family while any male member was alive, so it should be in the case of the 'lines' to which the Mitakshara refers" (p. 719).

It has been laid down by the Judicial Committee that the line of *sapindas* includes descendants in the 6th degree: *Bhyah Ram Singh* v. *Bhyah Ugur Singh*[1]. The respondent as uncle's grandson of the propositus is third in descent from the grandfather from whom the line of collaterals springs, and therefore well within the line. This is not disputed, but it is argued that the lines of collaterals are, according to the better opinion interrupted after the second in descent from the ancestor from whom they spring and that the third in descent is postponed both to the first and second in descent in more remote collateral lines and also to the last four in descent in all earlier collateral lines. The argument is supported by reference to *Suraya* v. *Lakshminarasamma*[2], and to the article on *sapinda* relationship in Appendix III of Mandlik's Hindu Law. The views expressed in these authorities have by no means obtained universal acceptance; the arguments in favour of an uninterrupted line of six descendant *gotraja-sapindas* from each of six male ancestors are to be found in West and Buhler's Hindu Law (3rd Edn. pp. 114—123) and *Kalian Rai* v. *Ram Chandar*[3]. We do not think it necessary in this case to discuss the arguments on either side in connection with this difficult question as the decisions of this Court to which reference has been made would not in our opinion justify the preference of the widow of a *gotraja-sapinda* to any male *sapinda*

(1) (1870) 13 Moo. I. A. 373 at p. 394. (2) (1882) 5 Mad. 291.
(3) (1901) 24 All. 128.

within the six degrees of the same line for the purpose of inheritance among collaterals.

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The grandson of the uncle is, therefore, to be preferred to the widows of other uncles of the propositus.

We affirm the order of the lower Court. The parties may have their costs out of the estate.

Decree affirmed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

LAKHMICHAND REWACHAND (ORIGINAL PETITIONER), APPELLANT, *v.* KACHUBHAI GULABCHAND AND OTHERS (ORIGINAL OPPONENTS), RESPONDENTS.*

1911. *April* 10.

Civil Procedure Code (Act V of 1908), Order I, Rule 10—Limitation Act (IX of 1908), Article 171—Partition suit—Death of a party—Abatement—Application to set aside the abatement—Limitation of sixty days—In a partition suit all parties should be before the Court—Inherent power of the Court to add a party at any stage of the suit for the ends of justice.

On the 5th April 1892 the plaintiff obtained a decree for partition and died in October 1893, leaving him surviving a minor son, who attained majority in February 1907. At a very late stage of the execution-proceedings, the son made an application on the 16th April 1910 for the issue of a commission to effect partition according to the rights declared in the partition decree.

Held, that as soon as the Civil Procedure Code (Act V of 1908) came into force the suit abated so far as regarded the applicant's father who was a party, and the application to set aside the abatement by adding the applicant as the legal representative of the deceased not having been made within sixty days under Article 171 of the Limitation Act (IX of 1908), the application was time-barred.

Held, further, that in a partition suit all the parties should be before the Court, and that there was nothing in the Civil Procedure Code (Act V of 1908) limiting or affecting the inherent power of the Court to make such orders as might be necessary for the ends of justice.

* Appeal No. 51 of 1910 from order.