1914.

UMABAI v. AMRITRAO ANANT.

to show cause why the order of 1895 should not now be discharged on the ground of full and complete satisfaction of the plaintiff's debts. As matters stand no such satisfaction appears to have been pleaded before the learned Judge, and ordinarily it would be for the defendant, whose money was thus being appropriated, to take the first step and raise the first objection, if he really believed that his debt to the plaintiff was satisfied.

With these observations we think that the order complained of must be reversed, and that the darkhast of 1894 must still be considered to be alive and operative until it shall be brought to an end in the manner we have suggested, should the investigation thus set on foot prove that there is no need to continue further this garnishee order. In the circumstances we think that each party should bear his own costs of this appeal.

Order reversed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, on reference from Mr. Justice Beaman and Mr. Justice Hayward.

1914.

August 19.

BASANGAVDA BIN NAGANGAVDA (ORIGINAL DEFENDANT 1), APPELLANT, *v.* BASANGAVDA BIN DODANGAVDA AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 2 TO 4 AND 6), RESPONDENTS.*

Hindu Law—Mitakshara, Ch. II, sec. 5, pl. 4 and 5—Mayukha, Ch. VIII, pl. 18—Compact series of heirs—Brother's widow—Sapinda—*Uncle's sons—Brother's widow nearer heir.*

The widow of a brother of the deceased is, as a *sapinda*, a nearer heir of the deceased than his paternal uncle's sons.

SECOND appeal against the decision of D. S. Sapre, First Class Subordinate Judge of Bijapur with appellate

* Second Appeal No. 525 of 1913.

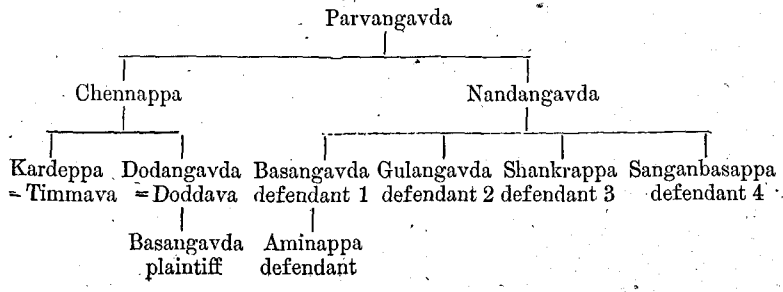
1914.

BASANGAVDA v. BASANGAVDA.

powers, varying the decree of D. V. Yennemadi, Subordinate Judge of Bagalkot.

The plaintiff sued to recover from the defendants possession of the property in suit with future mesne profits. The plaint alleged as follows:—The property in suit along with some other property originally belonged to plaintiff's adoptive father Dodangavda and his elder brother Kardeppa; Kardeppa predeceased Dodangavda, leaving a widow Timmava; after the death of Kardeppa, Dodangavda became the owner of the whole property by right of survivorship, and after his death his widow Doddava became the owner thereof; subsequently to avoid a friction in the family, the two widows Doddava and Timmava divided the property among themselves; after the division, defendant 1, who and his brothers defendants 2-4 were plaintiff's cousins, being the sons of his paternal uncle Nandangavda, by fraudulent misrepresentation got a *malakipatra* (deed of ownership) executed by Doddava in respect of the plaint-property in the year 1883; the plaintiff was adopted by Doddava on the 7th October 1909; the alienation made by the plaintiff's adoptive mother was not binding on him; defendant 5 was the son of defendant 1 and defendant 6 was added as he was said to be a purchaser of a portion of the property from defendants 1-5; and the cause of action arose on the 7th October 1909.

The following is the genealogical tree:—



Defendant 1 denied the plaintiff's adoption by Doddava and contended that Doddava had surrendered her estate to him, he being the nearest reversionary heir, that the plaintiff could not question the alienation made by his adoptive mother before the adoption and that the allegations of fraud and misrepresentation made in the plaint were false.

The other defendants were absent though duly served.

The Subordinate Judge found that the plaintiff was the legally adopted son of Dodangavda, that the *malakipatra* relied on by the defendant was not void on account of the alleged fraud and misrepresentation, that defendants 1-4 were the nearest reversionary heirs of *watan* lands, survey Nos. 29 and 30 in suit, and Timmava, widow of Kardeppa, was the next reversioner in respect of the *jirayat* property described in the plaint, that in respect of the *malakipatra* the consent of defendants 1-4 was obtained but not that of Timmava, that the *malakipatra* was binding upon the plaintiff so far as the *watan* property was concerned, and that the plaintiff was entitled to recover possession of all property described in the plaint except the *watan* property. The Subordinate Judge, therefore, passed a decree awarding the plaintfff possession of the *non-watan* property in the suit and allowing the defendants to retain the *watan* property.

On appeal by the plaintiff, the appellate Judge found that the *malakipatra* of 1883 did not evidence an absolute surrender of the whole of Doddava's estate as Hindu widow in favour of the next reversioner or reversioners, that the plaintiff was not bound by the *malakipatra* and that the plaintiff's adoption by Doddava as son to her husband was proved. The appellate Court, therefore, varied the decree in the following terms :—

1914.

BASANGAVDA v. BASANGAVDA.

I direct that the defendants (respondents) do deliver all the property—*watan* and *non-watan*—in dispute to the plaintiff-appellant. An inquiry is directed regarding the mesne profits for the property due to the plaintiff-appellant from the defendant-respondents from the date of the suit to that of delivery of possession, subject to the provisions of clauses (i), (ii) and (iii) of part (*c*) of rule 12 (1) of Order XX. The respondents to bear their costs in both the Courts and to pay those of the appellant in both the Courts.

As to the surrender of her rights by Doddava under the *mattipatra* the appellate Judge remarked :—

But it is of the essence of absolute surrender or acceleration as it is called that it should comprise the whole of the widow's estate and that it should be in favour of the next reversioner (*see* I. L. R. Cal. XIX 236; I. L. R. All. XXX 1, and I. L. R. Bom. XXXIV 165). Let us see if these conditions are fulfilled here. It is admitted before me that Doddava was in enjoyment of rights to officiate as patel as part of the inheritance that had come to her from her deceased husband. It is also admitted that these rights were not surrendered by the deed under consideration. These rights must beyond doubt constitute some sort of property. Mr. Desai for the contending respondent says that these rights were not surrendered by the deed because their alienation is forbidden by sections 5 and 7 of the Bombay Watan Act (No. III of 1874). But what section 5 of the Act prohibits is an alienation. I do not think that acceleration as such should be considered as an alienation. It only accelerates, that is, quickens the motion of what is to take place in future and is, therefore, not, I should believe, an alienation in the proper sense of the word. Assuming that acceleration is an alienation, section 5 of the Watan Act does not absolutely forbid an alienation of rights to officiate as patil, but what it does is that it renders the sanction of Government necessary for the purpose. It is not shown that Doddava made any attempts to obtain the sanction and that her attempts were unfruitful. It may, therefore, be taken as established that these rights were intentionally reserved. If this is so, it is evident that Doddava did not surrender to defendant 1, that is, to defendants 1-4, all of her widow's estate in her deceased husband's property. The surrender under consideration does not thus amount to an absolute surrender of the whole of Doddava's estate as a Hindu widow, and is, therefore, not an acceleration in the technical sense of the word.

When law says that acceleration must be in favour of the presumptive reversioner, this, I think, means that if there are more than one such presumptive reversioners, it must be in favour of them all. I have already pointed out that at the date of the deed under consideration Timmava was the presumptive reversioner of the deceased Dodangavda in respect of his *non-watan* property, but admittedly she was not one of those to whom Doddava is

said to have surrendered her widow's estate. If a valid surrender were intended, Timmava ought certainly to have been one of those to whom it was made. As I have pointed out already, she was not even a consenting party to it. The surrender or acceleration would seem to be invalid on this ground also.

Defendant 1 preferred a second appeal which was heard by the Division Bench composed of Beaman and Hayward, JJ., who, on the 26th June 1914, delivered the following interlocutory judgments :—

BEAMAN, J. :—The point of greatest importance and difficulty in this appeal is whether Timmava, widow of Kardeppa, or the first cousins of the deceased Dodangavda stand nearest in the reversion.

Dodangavda and Kardeppa were undivided brothers. Kardeppa died leaving him surviving his widow Timmava. Then Dodangavda died and his widow Doddava took her life estate. She professed to give away the whole of it in 1883 to her deceased husband's first cousins, the defendants. Twenty-six years later she adopted the plaintiff. Timmava, the widow of Kardeppa, is still alive.

The defendants rely on the doctrine of acceleration which may now be taken to be established law. I shall have to say a few words upon that later. Here it is sufficient to state that true acceleration can only occur between the tenant of the life estate and the nearest reversioner. Therefore, if Timmava was the nearest reversioner in 1883, there could have been no acceleration in that year in favour of the defendants, and the plaintiff would, in the absence of any other defence, be entitled to succeed.

It may be noted here, though this fact falls more properly to be considered in discussing the doctrine of acceleration, that the life estate comprised certain *watan* property as well as other *non-watan* immovable property. It is not disputed that under the law of

1914.

BASANGAVDA v. BASANGAVDA.

watans the defendants were the nearest reversioners to the *watan* lands. So that in respect to so much of the claim, if the acceleration be otherwise good, there can be no doubt but that the plaintiff must fail. The larger portion of the life estate, however, is not *watan* land; and the decisions of both Courts below are based on the assumption that Timmava, and not the defendants, was the nearest reversioner. In my opinion, although two learned Judges below appear to have taken it for granted that she was, and early in the argument here pleaders on both sides were disposed to support that view, she is not.

It is contended for the plaintiff that the decision in *Lallubhai Bapubhai* v. *Mankuvarbai*[1] concludes the point. That case was confirmed by the Judicial Committee, and undoubtedly settled the law it professed to lay down. The question is, whether that or any other authority goes the length of holding that the widow of a brother is nearer in the reversion than first cousins? It can only be by an extension of any actual decision, in other words by taking the supposed principle of such a case as that of *Mankuvarbai*[1], and extending it to the case before us, that this can be affirmed. It is, therefore, necessary to be sure that we are rightly apprehending the principle underlying the decision in *Mankuvarbai's case*[1], before saying that it not only can, but must, be extended to cover this case.

What was decided in *Mankuvarbai's case*[1]? This and this only. Where there is a competition between reversioners after the extinction of all designated heirs, the widow of a *gotraja sapinda* excludes male *gotraja sapindas* in a remoter line. I can accept that at once as undoubtedly the law of this Presidency, whether really good Hindu law or not, and yet hold, for reasons

[1] (1876) 2 Bom. 388.

which will be fully stated, that the case before us is not necessarily governed by that decision or by the principle upon which it is based. In a much later case decided by Telang, J., probably the greatest Hindu Judge who has sat on this bench, it was held that, where there is a competition between reversioners after the exhaustion of all designated heirs, the widow of a *gotraja sapinda* is postponed to any male in the same line. And that decision was followed and explained in a very recent case (*Kashibai* v. *Moreshvar*[1]) decided by the present learned Chief Justice. Almost synchronously a bench of this Court consisting of my brother Hayward and myself decided a similar case (*Khandacharya* v. *Govindacharya*[2]) on exactly the same principle and professedly following *Rachava* v. *Kalingapa*[3] and *Kashibai* v. *Moreshvar*[1].

I rely upon those three cases. I say that so far as the law permitted after the decision in *Mankuvarbai's case*[4], they correctly lay down the Hindu law applicable to such facts as those before us, and that the principle of those cases is the principle which ought always to be applied.

That principle does not in any way conflict with the actual decision in *Mankuvarbai's case*[4], though it is open to argument whether there are not *dicta* in the judgment of West, J., and afterwards in the judgment of the Judicial Committee, which imply the extension of the reason of that case as far as the plaintiff would have it extended in the case before us.

The point really lies in a very narrow compass. I do not propose to attempt any elaborate examination of the Hindu law books, or any nice criticism of the textual commentaries with which the subject has been encumbered. But a careful critical study of West, J.'s

(1) (1911) 35 Bom. 389.
(2) (1911) 13 Bom. L. R. 1005.
(3) (1892) 16 Bom. 716.
(4) (1876) 2 Bom. 388.

1914.

BASANGAVDA v. BASANGAVDA.

judgment in *Mankuvarbai's case*[1], and of the judgment of the Judicial Committee confirming it, shows that in spite of the extraordinarily learned and exhaustive examination of the whole available Hindu law, the conclusion rested finally on what was held to be an established custom, rather than any authoritative deduction from the words of the Hindu law givers and commentators.

The latter were found to be so nebulous, contradictory, inconsistent and unconvincing as to afford but little solid ground upon which to base a decision either way. I understand that the custom was made out from the answers of local Shastris to questions propounded to them by the authors of West and Buhler. It is possible that such answers may have truly represented established local customs; but in strictness they can hardly amount to what the law ordinarily requires as proof of custom. They are in reality no more than the dogmatic interpretation by a body of unknown persons of certain ancient writings with which they were supposed to be familiar. In dealing with this point their Lordships of the Judicial Committee say, *obiter*, that the Shastris have gone so far as to declare that a sister-in-law excludes first cousins. As that is precisely the case before us, the plaintiff naturally relies most strongly on this passage. It is, however, as I have just said, purely *obiter*. And it is noteworthy that in fact the Shastris consulted were not unanimous on this point. One decided that the sister-in-law did, another that she did not, exclude a first cousin. And apart from that there is, as far as I know, no authority whatever, either in the accredited law books or in decided cases for the proposition on which the plaintiff's success in this case must depend. So far from it being a proved custom in this Presidency that

[1] (1876) 2 Bom. 388

a sister-in-law excludes a first cousin, I am moderately confident that no such rule of succession has ever been alleged, much less proved, in our Courts. The textual basis of the rule laid down in *Mankuvarbai's case*[1] appears to have been chiefly a passage in Brihaspati. The reason contained in the passage is so childish and fanciful, and would lead, if pushed to its logical conclusion, to such absurdities, that it is no wonder Telang, J. declined to adopt it, saying that it looked, as indeed it does, like proving too much. The rule in *Mankuvarbai's case*[1], which must, I think, be regarded as something of a judge-made innovation, could hardly be made good by any mere collation of the recognised sources of Hindu law. But in applying that law, it was held that a custom had grown up in the Bombay Presidency, which warranted laying down the broad rule, that, as between competing reversioners, the widow of a *gotraja sapinda* took in preference to a male *gotraja sapinda* in a remoter line. Had the point needed decision at the time, it is possible that West, J. would have extended the rule so as to give preference to the widow of a nearer male *gotraja sapinda* over a remoter male *sapinda* in the same line. But Telang, J. refused to do this, holding that, where the competitors were in the same line, sex and not mere proximity was the determining consideration, and that any male in the same line excluded the widow of any other male, although the latter, had he been living, would have been nearer to the *propositus*, and so the next reversioner. It is only by taking the reasoning or parts of the reasoning in West, J.'s judgment, by saying that it in effect establishes this proposition, that the widow of a deceased *gotraja sapinda* fills her husband's place in all heirship competitions, that the plaintiff can hope to succeed in his contention that Timmava was a nearer

[1] (1876) 2 Bom. 388.

1914.

BASANGAVDA v. BASANGAVDA.

reversioner than the defendants. But that is not the law. Since *Rachava's case*[1] it cannot be argued that greater propinquity in the same line makes a widow nearer in reversion than a male in the same line. So that the only real question arising on the cases is what is meant by "the line"? In my opinion all the cases are here in agreement. There is not one in which, where the question was, which of two persons claiming to be reversioners is entitled to the estate, the line was started within the group of designated heirs, or as it is often called the "compact series".

No support is to be found anywhere for such a method, except the conflicting replies of the local Shastris, unsupported by reason or text.

It appears to me to be too clear to admit of doubt that where we have to look for the next reversioner, we must start the line outside the group of designated heirs. Within that group there could, of course, never be any conflict between the widow of a designated heir, and a designated heir. It is only after the exhaustion of the designated heirs that the search for the nearest reversioner begins. The plaintiff's contention appears to be, that although the statement just made is self-evident, yet where the compact series is exhausted, the first line must be started from the father, not from the grandfather of the *propositus*. If that were done here, the line would begin with the father of Kardeppa and Dodangavda, himself one of the designated heirs within the compact series, and of course the widow of either of his sons would be in the line, while his nephews would not. It will be seen that, whether by mere accident or because the learned Judges responsible for those judgments rejected any such method, this has never once been done. The language of Telang, J. is particularly

[1] (1892) 16 Bom. 716.

clear on the point. The line is to start in the first instance from the paternal grandfather. When that line is exhausted, without yielding a reversioner, a fresh line is to be started from the paternal great-grandfather and so on. In the case which Hayward, J. and I decided, we followed this rule, and, speaking for myself, I am sure I did so because it did not occur to me as arguable that a line laid out for the purpose of finding a reversioner could properly be started within the compact series. This too was what was done, and I cannot believe by pure accident, in all the other cases. But it might be said of them that there was no surviving widow of any male within the compact series, while in *Khandacharya's case*[1] there was. Still in that case the Court started the line, not from the father of Venkatesh the deceased *propositus*, but from his paternal grandfather Venkatesh 1. Even so the widow of his brother came nearer in the reversion than second cousins. But had there been first cousins in the competition it is plain upon the principle stated in the judgment that the result would have been different and that the widow would then have been postponed. If in the present case the line be started from the paternal grandfather it is clear that Timmava is not only in the same line as the defendants but in precisely the same degree of propinquity. The latter fact is unimportant now. If she represents a deceased male *gotraja sapinda* in the same line, then she comes last of that line, and any male, found in it, excludes her. The defendants are in the line, and, in my opinion, they clearly exclude her. Nothing in the decided cases compels me to extend the rule, as I am asked to extend it here, so as to exclude the first cousins in favour of the sister-in-law. I think that doing so would be entirely opposed to the sense of the Hindus of this Presidency and the spirit of the old

[1] (1911) 13 Bom. L. R. 1005.

1914.

BASANGAVDA v. BASANGAVDA.

Hindu law. Women are probably much more favoured already in this Presidency under the liberal decisions of this High Court than elsewhere in India; but I find it difficult to believe that there is really anything in the recognized Hindu scriptures or the authoritative commentaries on them to warrant the proposition for which the plaintiff is now contending. If the rule really rested on the extravagant texts of Brihaspati, then there would be no need to search along any line for the next reversioner, for neither of the brothers Kardeppa or Dodangavda are dead, each is only half dead, and no reversion has opened.

But if there is a question of reversion to be investigated, it pre-supposes the complete exhaustion of the compact series, and places the starting point of the search outside that series invariably, as Telang, J. states, first at the paternal grandfather. Let that be done here and it will be seen at once that Timmava was not the next reversioner in 1883 while the defendants were.

The doctrine of acceleration, very clearly stated in the judgment of Lord Morris in *Behari Lal* v. *Madho Lal Ahir Gayawal*[1], would seem to have been almost invariably entangled in subsequent decisions of the Indian Courts, with the altogether different doctrine of alienation. Briefly, Hindu widows in enjoyment of life estates may not alienate any part of the immovable property, except for legal necessity. Analysis will show that this is the single recognized justification, although the language of Judges often obscures it, and suggests that pious motives may be substituted for necessity, and may validate even larger alienations, and freer powers to alienate than could be seriously considered on a narrow ground of mere secular necessity. Yet, whether the necessity be temporal or spiritual, so sought for as

[1] (1891) 19 Cal. 236 at p. 241.

legal justification for these alienations, it will always be seen on close examination to be necessity and nothing else. Long ago the legal notion got abroad and soon received judicial sanction, that the consent of all the nearest (in order) reversioners was good proof of the necessity for the alienation. If there had been no necessity, it was argued, the reversioners would never have consented to lose their expectant rights. Here it is to be observed that in applying this doctrine it is not the consent of the reversioners, *per se*, which makes good what would otherwise be a bad alienation by a life tenant, but the presumed, though undiscovered, necessity, of which that consent is good proof. If there are on the date of the alienation three reversioners in this order, A, B, C, and the alienation be made to B, A consenting, then it may be presumed that in A's judgment there was a true necessity for the alienation. In a less degree too, of course, if C consents; for, although C is last in the reversion, it is quite possible that, but for the alienation to B, he might have been the nearest reversioner at the termination of the life estate. But no inference of this kind could reasonably be drawn from the consent of B to an alienation to himself. Most men will consent to receiving a benefit, and in those cases giving this "consent" (which in this connexion hardly has any meaning) would not in fact or at the bar of reason and common sense point towards the existence of any necessity. A great majority of cases falling under this doctrine are, however, cases of alienations to outsiders. If the consent of all reversioners be obtained to such an alienation, it is probably true in fact, as assumed by law, that that consent indicates the existence of some necessity for the alienation. I have laboured this extremely elementary proposition more than its intrinsic content would seem to need, because I have found in so many decided cases recurring confusion between the principles governing this kind of alienation

1914.

BASANGAVDA v. BASANGAVDA.

and a proper case of acceleration. The only essentials of a good legal acceleration are that it should be to the next in reversion, and that it should cover the whole life estate. But the consent of the reversioner in whose favour the reversion is accelerated, or of any other more distant reversioner, is obviously immaterial. Nor does any question of necessity arise. The reason why the two conditions I have stated are essential is, and I think always ought to be, obvious. By accelerating (as the word implies) the tenant of the life estate may be said figuratively to commit legal suicide. She brings about exactly the same legal results as would follow by operation of law upon her natural death. If at the date of the acceleration the widow with the life estate were to die, the next reversioner in whose favour the acceleration is made would, of course, take the whole life estate accelerated.

But no acceleration can be made in favour of any one but the next reversioner, for that would be more than committing legal suicide : it would be making a will as well. And this the widow has no power to do, as far as the immovable property in which she has the life estate is concerned.

It is, therefore, absurd to talk of accelerating in favour of, say, the reversioner third in order of proximity, with the consent of the two who stand nearer. That is not acceleration but alienation. Similarly it would be absurd to talk of accelerating four-fifths of the life estate. For, since the validity (in theory) of the acceleration depends upon the result corresponding exactly with the result which would follow the natural death of the widow accelerating, there can never be any question of deliberate reservation in her own favour. It does not, however, follow from this, as indicated in an earlier passage of this judgment, that the life estate may not be composite and that there may not be different

reversioners to its parts. Thus, where the life estate in immovables comprises *watan* and other property, it is quite possible that the nearest reversioner to the *watan* may not be the nearest reversioner to the rest of the immovable property. This, I believe, to be the only real exception to the general rule that a true acceleration must pass the whole life estate. And in strictness it is not an exception. For, so far as the *watan* property accelerated is concerned, the acceleration does bring about exactly the same legal result as the death of the life tenant would have done.

Theoretically, acceleration is not an alienation at all but a mere renunciation, the obliterating of a bar. The life estate is withdrawn in its entirety, it is voluntarily extinguished, and it is not the tenant of the life estate, but the law which does the rest. It will, therefore, become apparent that no consent of the reversioners or any one else can be needed to validate a true acceleration. Still less any proof of necessity. The condition that the acceleration must comprise the whole life estate is essential to its theoretical perfection. So that a widow with a life estate in twenty fields cannot accelerate ten of them and retain ten, and this applies universally and irrespective of the proportion of what is alienated to what is reserved. But I should doubt whether niggling objections on this score, such as have been raised here and been acceded to by the Courts below, can fairly be said to arise under a commonsense and rational application of the general principles. For example, it is contended for the plaintiff that because the widow with the life estate did not specifically accelerate the right she had to nominate an officiating *watandar*, when she accelerated the *watan* lands, that was a reservation which invalidates the acceleration. I think that is going too far. In the first place, I believe, it was merely an unintentional omission, the right being of no value that I can see to the widow. I have

1914.

BASANGAVDA v. BASANGAVDA.

not the least doubt that, had she thought of it and been competent to accelerate it, she would have done so. But the real answer perhaps is, that without the sanction of Government she was not competent to alienate this right. And it may, of course, have been that neither she nor the next reversioner in whose favour she accelerated cared to raise the question before the revenue authorities as long as the widow lived. In point of fact we were told during the argument that she never attempted to exercise this right for many years after the acceleration of 1883. She has asserted it recently, but probably under legal advice for the sole purpose of taking this objection. Now, small and unintentional omissions of that sort might occur in the acceleration of every large life estate in immovable property. I think in this country, where such transactions are often effected without professional assistance, all such *casus omissi* ought to be neglected.

What is to be looked at is the intention of the tenant of the life estate, and that is not to be defeated, if on the whole plain, merely because she has failed to enumerate every tree or shed or right of way, or other unimportant right annexed to or inherent in the property.

I am of opinion that the failure to mention this *watan* right specifically in the acceleration of 1883 does not invalidate it, as being a conscious and intentional reservation to the accelerating tenant of the life estate, of any part of it in her own favour.

In my opinion, therefore, the plaintiff fails on every point and his suit ought to be dismissed with all costs throughout. In the event, however, of my being wrong in holding that Timmava was not the next reversioner, I should entirely concur with the order proposed by my brother Hayward. The only point of law, therefore, upon which we differ is whether in 1883 Timmava or the defendants stood next in the reversion. That point

1914.

BASANGAVDA v. BASANGAVDA.

must be referred under section 98 of the Civil Procedure Code.

HAYWARD, J.:—Plaintiff sued as the adopted son to recover certain property, *non-watan* and *watan*, transferred twenty-six years before his adoption by his adoptive mother to the first cousins of his adoptive father.

The original Court held that the transfer was ineffectual as an acceleration or surrender by the adoptive mother of the *non-watan* property as there was in existence a widow of a brother who was the next reversioner in preference to the first cousins of the adoptive father. But that the transfer was effectual as an acceleration or surrender by the adoptive mother of the *watan* property as the widow of the brother was excluded from inheritance to *watan* property and the first cousins were the next reversioners under the Watan Act.

The first appeal Court held that the transfer was not even effectual as an acceleration or surrender by the adoptive mother of the *watan* property as it did not include the right to appoint an officiating patil and was consequently not a surrender of the whole of the *watan* property under the Watan Act.

The second appeal to this Court has resulted in the suggestion towards the close of arguments that the widow of a brother would not be the next reversioner in preference to the first cousins as assumed up to that stage of the proceedings by all parties. The suggestion has been that a special rule would govern the order of succession of widows of brothers excluding them from their place at the end of the first collateral lines of the brothers descending through the father and postponing them to the end of the second collateral lines of the first cousins descending through the grandfather and that

1914.

BASANGAVDA v. BASANGAVDA.

the general rule placing widows of collateral *gotraja sapindas* at the end of the collateral lines of their husbands and preferring them to males of remoter collateral lines would only come into operation in respect of the second collateral lines of the first cousins descending through the grandfather and apply to those lines and the subsequent lines descending through the great-grandfather, the great-great-grandfather and other remoter grandfathers.

The suggestion has not, in my opinion and with deference to my learned brother, been shown to be based on any solid foundation. The Mitakshara has laid down the rules of succession as follows in Ch. II, sec. IV, pl. 1 and 7: "On failure of the father brothers share . . . . . , on failure of brothers also, their sons share . . . . . ", and in Ch. II, sec. V, pl. 4: "On failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons", and in Ch. II, sec. V, pl. 5: "On failure of the paternal grandfather's descendants, the paternal great-grandmother, the great-grandfather, his sons and their sons inherit. In this manner must be understood the succession of kindred belonging to the same general family" (Setlur's Collection of Hindu Law Books on Inheritance). The Mitakshara thus dealt with the first collateral lines of *gotraja sapinda* descending from the father, the second collateral lines descending from the grandfather and the remoter collateral lines descending from the remoter grandfathers. The Mitakshara made no specific mention, however, of the widows of collateral *gotraja sapindas*, but it was decided in the case of *Lakshmibai* v. *Jayram Hari*[1] by Melvill, J., that the general rule was "the

[1] (1869) 6 Bom. H. C. R., A. C. J. 152 at p. 156.

wives of all *sapindas* . . . . must be held to have rights of inheritance co-extensive with those of their husbands" in view of the mention of the grandmother and the great-grandmothers, following the opinion expressed by West and Buhler in their work on Hindu Law. This decision was developed in the subsequent case of *Lallubhai Bapubhai* v. *Mankuvarbai*[1]. West, J., criticized a case in which a sister-in-law had been postponed to a first cousin and quoted another in which a sister-in-law had been preferred to a first cousin (p. 442), and after referring to other cases of widows of *gotraja sapindas* laid down the general rule that "the widow of the *gotraja sapinda* of a nearer collateral line appears entitled to precedence over the male *gotraja* in a more remote line" (p. 449). The Privy Council referred to the case in which the sister-in-law had been preferred even to first cousins and confirmed the general rule, as a matter of custom in the Bombay Presidency, in the appeal entitled *Lallubhai Bapubhai* v. *Cassibai*[2]. In the case of *Kesserbai* v. *Valab Raoji*[3], Westropp, C. J., remarked that "The rule laid down . . . . (that the widows of *gotraja sapindas* stand in the same places as their husbands, if living, would respectively have occupied) was intended to be subject to the right of any person whose place is so specially fixed on that roll (as amongst others) that of the sisters", whose place he had indicated as being next after the grandmother, that is to say, before the grandfather (pp. 197 and 209). In the case of *Nahalchand Harakchand* v. *Hemchand*[4] West, J. further emphasized the right of persons whose place was specially fixed to precede widows of *gotraja sapindas* by saying "The members of the 'compact series' of heirs specifically enu-

(1) (1876) 2 Bom. 388.
(2) (1880) 5 Bom. 110 at pp. 125, 126.
(3) (1879) 4 Bom. 188 at p. 209.
(4) (1884) 9 Bom. 31.

1914.

BASANGAVDA v. BASANGAVDA.

merated take in the order in which they are enumerated... preferably to those lower in the list and to the widows of any relatives whether near or remote, though where the group of specified heirs has been exhausted, the right of the widow is recognised to take her husband's place in competition with the representative of a remoter line" (p. 34). The compact series of heirs has been referred to as the series ending with the brother's son in both the Mitakshara and Mayukha (Mitak., Ch. II, sec. V, pl. 2; and Mayukha, Ch. IV, sec. VIII, pl. 18. Setlur's Collection of Hindu Law Books of Inheritance). The particular privileges reserved by these two cases did not, therefore, extend to members of the second collateral lines descended from the grandfather. In the case of *Rachava* v. *Kalingapa*[1] Telang, J. did not refer to all the rules of succession quoted above from the Mitakshara. It was not necessary to do so, as the case before him related only to succession among members of the second collateral line descending from the grandfather. He did not even quote *verbatim* the rules relating to succession among members of the second collateral lines descending from the grandfather or of the remoter collateral lines descending from remoter grandfathers. But he stated without qualification that "The decision in *Lallubhai* v. *Mankuvarbai* having been affirmed by the Privy Council, the eligibility for inheritance of female *gotraja sapindas*, who have become such by marriage, is no longer open to dispute. And it also must be taken to be the result of that decision, that where the contest lies between a female *gotraja* representing a nearer line, and a male *gotraja* representing a remoter line of *gotraja sapindas*, the former inherits by preference over the latter" (pp. 718-719). Similar remarks apply to the cases of *Kashibai* v. *Moreshvar*[2] decided by a Bench including the

(1) (1892) 16 Bom. 716.

(2) (1911) 35 Bom. 389

present Chief Justice and *Khandacharya* v. *Govindacharya*[1] decided by the present Bench. It appears, therefore, to me that the general rule in favour of widows of *gotraja sapindas* of nearer collateral lines excluding male *gotrajas* of remoter lines has been laid down as a general rule having application to all collateral lines and not merely to the second and subsequent collateral lines descending from the grandfather and remoter grandfathers by a long series of decisions of this Court.

The result of that view, if correct, would be that the brother's widow was the next reversioner to the *non-watan* property in preference to the first cousins of the adoptive father. The brother's widow has been found not to have given her consent to the transfer of the *non-watan* property. That finding proceeded on the view that there was no evidence of such consent, overlooking the twenty-six years' acquiescence which might well have been regarded as good evidence of implied consent. If it had been a case of alienation to third parties it might have been necessary to consider whether that finding could not be challenged as consequently wrong in law and whether in any case the consent was necessary of the female next reversioner in addition to the consent of the subsequent male reversioners in view of the remarks in the cases of *Vinayak* v. *Govind*[2] and *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*[3]. But it was not a case of alienation to third parties. It was a gift to the subsequent reversioners and the doctrine of consent indicating legal propriety or necessity could not be extended to gifts to reversioners as pointed out in the case of *Pilu* v. *Babaji*[4]. The transfer, moreover, could

(1) (1911) 13 Bom. L. R. 1005.
(2) (1900) 25 Bom. 129 at pp. 135, 136.
(3) (1907) 30 All. 1 at p. 21.
(4) (1909) 34 Bom. 165.

1914.

BASANGAVDA v. BASANGAVDA.

not be held effectual as an acceleration or surrender, because it did not pass the estate to the next but to the subsequent reversioners. It could only have been held effectual as a joint acceleration or surrender of the estates both of the holder and the next reversioner to the subsequent reversioners. But something more than mere implied consent of the next reversioner would have been necessary to constitute that reversioner a party to the acceleration or surrender in favour of the subsequent reversioners.

The result of my view, even if correct, would not, however, affect the validity of the transfer of the *watan* property. The brother's widow would, in any case, be excluded from the inheritance by the special provisions of the Watan Act and the transfer would *primâ facie* be valid as an acceleration or surrender in favour of the next reversioners and not merely of subsequent reversioners. It has, however, been contended that it was invalid as it related merely to the *watan* property and as it did not include the right to appoint an officiating patil under the Watan Act and as it was not, therefore, an acceleration or surrender of the whole estate vested in the watandar. But it does not appear to me to be contrary to the general principle that the whole estate must be surrendered as laid down by the Privy Council in the case of *Behari Lal* v. *Madho Lal Ahir Gayawal*[1] to regard the *watan* property with its special rules of succession as a separate estate vested in the watandar and to hold that the rule has no application to property like the right to appoint an officiating patil which, at most, would be property inalienable under the Watan Act without the special sanction of Government.

The first appeal Court's decision decreeing the claim would, therefore, in my view of the case, have to be

[1] (1891) 19 Cal. 236 at p. 241.

confirmed as regards the *non-watan* property, but reversed and the claim dismissed as regards the *watan* property and the parties ordered to bear their own costs throughout including the costs in this Court.

The case being thus referred it was argued before Scott, C. J.

P. D. Bhide, for the appellant (defendant 1):—Timmava was not the nearest reversioner, as on the death of Dodangavda, in the absence of heirs as far as brother's sons, the inheritance would go to the grandfather's line. The rule of the Mitakshara and the Mayukha is that on the exhaustion of the owner's line, we go to the father's line and on the exhaustion of the latter, we go to the grandfather's line and the grandfather heads this line. We cannot descend again to the father's line after once the grandfather's line is reached: Mayne's Hindu Law, paragraph 573. Both Timmava and the defendant come in the grandfather's line, and hence according to the ruling in *Rachava* v. *Kalingapa*[1], the male in the same line excludes the female belonging to that line. In *Kashibai* v. *Moreshvar*[2] and *Khandacharya* v. *Govindacharya*[3], the line is made to begin with the grandfather. Even in *Rachava* v. *Kalingapa*[1], Telang, J. starts with grandfather's line, and that is what he has expressed in his judgment. The cases in *Kesserbai* v. *Valab Raoji*[4], *Nahalchand Harakchand* v. *Hemchand*[5] and *Russoobai* v. *Zoolekhabai*[6] do not apply as the point and the heirship question there were altogether different and are mere *obiter dicta* so far as the present question is concerned. The decision in *Trikam Purshottam* v. *Natha Daji*[7] does not apply as there

(1) (1892) 16 Bom. 716.
(2) (1911) 35 Bom. 389.
(3) (1911) 13 Bom. L. R 1005.
(4) (1879) 4 Bom. 188.
(5) (1884) 9 Bom. 31.
(6) (1895) 19 Bom. 707.
(7) (1911) 36 Bom. 120

1914.

BASANGAVDA v. BASANGAVDA.

the competition was not as in the present case between brother's widow and paternal uncle's sons. Moreover, the Bombay rulings have already introduced female heirs and the scope of this introduction should not be widened but their rights should be restricted within strict limits and should not be allowed to preponderate over those of males.

The acceleration in the present case is of the whole property which Doddava possessed and the mere right to officiate or appoint a deputy not being surrendered cannot make it a partial acceleration. The case of *Behari Lal* v. *Madho Lal Ahir Gayawal*[1] is the leading case, and all that it says is that the widow should surrender all that she has in the property and should not reserve her widow's estate or any interest in the property surrendered. Thus *Pilu* v. *Babaji*[2] does not apply. The brother's widow Timmava acquiesced for over twenty-five years and thus it should be considered that she had assented to the acceleration. Timmava was also a female reversioner and as such her consent would not be very material: *Vinayak* v. *Govind*[3].

K. H. Kelkar, for the respondent (plaintiff):—Timmava being in the father's line was the nearest reversioner and as such should be preferred to the paternal cousins. The father's line should be first exhausted after the compact series. The grandfather is given a special place but after him the widows of the males in the compact series and the father's line would be preferred to males coming in the grandfather's line: *Nahalchand Harakchand* v. *Hemchand*[4], *Rachava* v. *Kalingapa*[5], *Lallubhai Bapubhai* v. *Mankuvarbai*[6], *Kesserbai* v. *Valab Raoji*[7], *Vithaldas Manickdas* v.

(1) (1891) 19 Cal. 236.
(2) (1909) 34 Bom. 165.
(3) (1900) 25 Bom. 129 at p. 135.
(4) (1884) 9 Bom. 31.
(5) (1892) 16 Bom. 716.
(6) (1876) 2 Bom. 388.
(7) (1879) 4 Bom. 188.

Jeshubai[1] and *Rakhmabai* v. *Tukaram*[2]. There the step-mother and the son's widow came before the grandfather, even apart from the case of the sister who comes after the grandmother. In the cases of *Khandacharya* v. *Govindacharya*[3] and *Kashibai* v. *Moreshvar*[4], it was not necessary to decide whether the line begins with that of the grandfather and whether the father's line was or was not to be preferred.

There was only a partial acceleration—the whole property was not given to the reversioner—and thus according to *Pilu* v. *Babaji*[5] it was inoperative as an acceleration. Timmava's consent was not taken; therefore it cannot be said that there was any acceleration, as the nearest heir Timmava had not assented. The ruling in *Behari Lal* v. *Madho Lal Ahir Gayawal*[6] lays down that the whole of the widow's estate should be surrendered.

SCOTT, C. J. :—In my opinion Timmava, the widow of Kardeppa, Dodangavda's brother, is a nearer heir of Dodangavda than his uncle's sons, the defendants.

I entirely agree with the reasoning and conclusion of Hayward J. upon the point. The compact series of heirs ends with the brother's son (Mitakshara, Ch. II, sec. V, pl. 2 ; Mayukha, sec. VIII, pl. 18).

The grandmother's place is specially fixed, and this alone gives her preference over unspecified *sapindas* in the line of the father. I can find no reason for treating the brother's widow as a *sapinda* to be postponed to all males capable of inheriting in the line of the grandfather. On the contrary the position that brothers' wives are *sapindas* in the line of the father for all purposes results

(1) (1879) 4 Bom. 219.
(2) (1886) 11 Bom. 47.
(3) (1911) 13 Bom. L. R. 1005.
(4) (1911) 35 Bom. 389.
(5) 1909) 34 Bom. 165.
(6) (1891) 19 Cal. 236.

1914.

BASANGAVDA v. BASANGAVDA.

clearly from the following passage in the Acharakanda of Vijnaneshvara which was discussed in *Lallubhai Bapubhai* v. *Mankuvarbai*[1], and very recently by the Judicial Committee in *Ramchandra* v. *Vinayak*[2]. "In like manner brothers' wives also are (*sapinda* relations to each other), because they produce one body (the son), with those (severally) who have sprung up from one body (*i. e.*, because they bring forth sons by their union with the offspring of one person, and thus their husbands' father is the common bond which connects them)." Mr. Justice Hayward has referred to *Kesserbai* v. *Valab Raoji*[3] and *Nahalchand Harakchand* v. *Hemchand*[4]. I will only add in support of his conclusion reference to *Russoobai* v. *Zoolekhabai*[5] and *Trikam Purshottam* v. *Natha Daji*[6]. In the first of these cases the judgment was delivered by Sir Charles Sargent, one of the Judges who decided *Ramchandra* v. *Krishnaji*[7] referred to in *Rachava* v. *Kalingapa*[8]. He said of a step-mother: "it is a necessary inference from... *Lallubhai Bapubhai* v. *Mankuvarbai*[1] that she is entitled to inherit as a *gotraja sapinda*. The latter case as explained by the judgment in *Rachava* v. *Kalingapa*[8] must be taken as deciding that the widows of *gotraja sapindas* in the case of collaterals are to be preferred to the male *gotrajas* in a more remote line, and *à fortiori* the widow of a male *gotraja* in the ascending line... will have that preference over such collateral. ... The uncle's sons are indeed mentioned in pl. 4 of Ch. II, sec. 5 of the Mitakshara ... but they cannot be regarded as specially mentioned in the succession so as to exclude the operation of the above rule." In *Trikam Purshottam* v. *Natha Daji*[6],

(1) (1876) 2 Bom. 388.
(2) (1914) 16 Bom. L. R. 863.
(3) (1879) 4 Bom. 188.
(4) (1884) 9 Bom. 31.
(5) (1895) 19 Bom. 707.
(6) (1911) 36 Bom. 120.
(7) S. A. No. 624 of 1888 (Un. Rep.).
(8) (1892) 16 Bom. 716 at p. 720.

1914.

BASANGAVDA v. BASANGAVDA

Chandavarkar, J. said: "If once it is conceded that a half-sister is a *gotraja sapinda* she stands nearer to the propositus in the line of heirs than a paternal uncle."

Order accordingly.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

1914.

August 20.

BHAGWAT BHASKAR KORANNE (ORIGINAL PLAINTIFF), APPELLANT, *v.* NIVRATTI SAKHARAM BHADULE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu Law—Debts—Widow—Duty of widow to pay her husband's debts even though time-barred—Widow not bound to pay debts repudiated by her husband in his life-time.

Under Hindu Law, a widow is under a pious obligation to pay her deceased husband's debts, even though they may be time-barred; but she is not bound to pay debts which her deceased husband had repudiated before his death.

SECOND appeal from the decision of G. K. Kanekar, First Class Subordinate Judge with appellate powers at Sholapur, confirming the decree passed by L. K. Nulkar, Second Class Subordinate Judge at Pandharpur.

Suit to recover possession of land.

One Appa was the original owner of the land. He sold it to Ramchandra in 1869. At the same time, the latter passed a *kararpatra* that if Appa repaid Rs. 600 in six annual instalments of Rs. 100 each, he would reconvey the land to Appa.

In 1883, Appa's heirs sued Ramchandra's son Dattatraya to redeem the land, alleging that the *kararpatra* was a mortgage. Dattatraya contested the suit which was dismissed.

* Second Appeal No. 504 of 1913.