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QUEEN-EMPRESS v. ABDUL KADIR.

But I do not wish to conclude without saying that I have considered it my duty to deal with this case at such elaborate length, because I feel that the discretionary powers conferred by the law upon Magistrates, in the interests of preserving the public peace, must not be exercised without care and caution, and certainly never in derogation of the rights of liberty and security to which the people are entitled under the British rule.

Application granted.

APPELLATE CIVIL.

1886
December 7.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

NARAINI KUAR (DEFENDANT) *v.* CHANDI DIN AND ANOTHER (PLAINTIFFS)*.

Evidence—Statement by deceased person as to relationship—Act I of 1872 *(Evidence Act), s.* 32 (5)*—Hindu Law—Mitakshara—Inheritance—Sister's son.*

S. 32 (5) of the Evidence Act (I of 1872) does not apply to statements made by interested parties in denial, in the course of litigation, of pedigrees set up by their opponents.

According to the Mitakshara, a sister's son, who is a *bandhu* and not a *sapinda* similar to a daughter's son, cannot inherit until the direct male line down to and including the last *samanadaca, i.e.*, fourteen degrees of the direct male line, has been exhausted. *Kooer Golab Sing* v. *Rao. Kurun Sing* (1), *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (2), and *Lakshmanammal* v. *Tiruvengada Mudali* (3) referred to.

THIS was a suit brought by Chandi Din, with Nawab Mashuk Mahal, to whom he had transferred his interest in a portion of the property in dispute, for possession, by right of inheritance, of the ancestral estate of his maternal uncle Chaudhri Naubat Ram. The defendant, Rani Naraini Kuar, was the widow of Raghunandan Prasad, who, she alleged, had been adopted by Chaudhri Naubat Ram, who had died without natural issue. After the death of Chaudhri Naubat Ram (who was a separated Hindu) in February, 1867, his widow, Rani Ganesh Kuar, entered into possession of his estate, and continued in possession until her death in August, 1878. After her death the defendant obtained mutation of names

* First Appeal, No. 128 of 1881, from a decree of W. Young, Esq., District Judge of Bareilly, dated the 20th June, 1881.

(1) 10 B. L. R., 1. (2) 13 Moo. I. A. 373.
(3) I. L. R., 5 Mad. 241.

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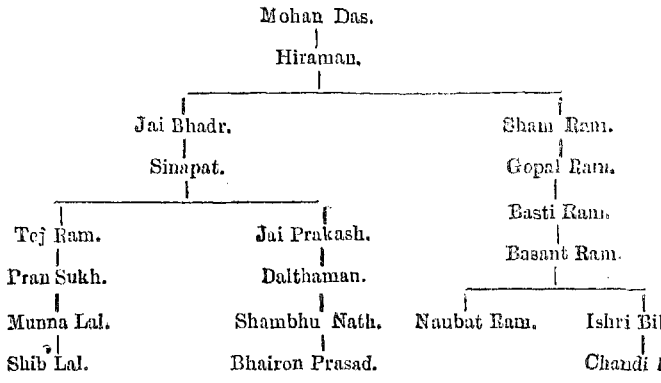
in her favour as the widow of Raghunandan Prasad, and entered into possession.

The Court of first instance (District Judge of Bareilly) decreed the claim. The only issue to which it is necessary to refer was whether the plaintiff Chandi Din was or was not, according to the Hindu law, the nearest heir to the estate of Naubat Ram. This issue was remitted by the High Court under s. 566 of the Civil Procedure Code to the District Judge, who returned a finding to the effect that two persons, named Shib Lal and Bhairon Prasad, stood nearer than Chandi Din in point of heirship to Naubat Ram. Objections were taken to this finding under s. 567 of the Civil Procedure Code, on behalf of the plaintiffs-respondents, and the appeal and the objections came on for hearing together. It was contended on behalf of the respondents that, upon the evidence and according to the rules of Hindu law, Chandi Din was proved to be the heir of Naubat Ram, that the alleged relationship of Shib Lal and Bhairon Prasad with Naubat Ram was not established, and that, even assuming it to be established, Chandi Din was the heir of Naubat Ram, and, as such, was entitled to possession of his ancestral estate on the death of Rani Ganesh Kuar.

On behalf of the respondents, certain documents were tendered in evidence, which were objected to by counsel for the appellant. One of these documents was a written statement of defence filed on behalf of Ganesh Kuar on the 5th January, 1875, in an action brought against her and Raghunandan Prasad by Bhairon Prasad and one Piare Lal in 1874. In that suit the plaintiffs prayed for a declaration of their right, as heirs of Naubat Ram, to succeed to his estate after Ganesh Kuar's death, alleging as their cause of action a statement made by Ganesh Kuar in a written defence in a previous suit brought against her by Chandi Din, to the effect that her husband Raghunandan had been adopted by Naubat Ram. In defence to the suit of Bhairon Prasad and Piare Lal, Ganesh Kuar replied, in her written statement, that the plaintiffs had no cause of action, and that Raghunandan Prasad had, in fact, been adopted by Naubat Ram. She added:—"The plaintiffs do not belong to the family of Chaudhri Naubat Ram, deceased. The pedigree produced by them is incorrect."

In a condensed form, the pedigree alleged by the defendant-appellant in the present case, was as follows :—



The only points in the case to which reference is necessary for the purposes of this report are, first, the question whether Ganesh Kuar's written statement of defence in the suit of 1875 was relevant under s. 32, cl. (5) of the Evidence Act, as showing that Bhairon Prasad was not related to Naubat Ram ; and secondly, the question whether, assuming the pedigree put forward by the appellant to be proved, the plaintiff Chandi Din, as the sister's son of Naubat Ram, would inherit in priority to Shib Lal or Bhairon Prasad.

Mr. *C. H. Hill*, Kunwar *Shivanath Sinha*, the Hon. Pandit *Ajudhia Nath* and Pandit *Nand Lal*, for the appellant.

Mr. *W. M. Colvin*, Munshi *Hanuman Prasad*, Munshi *Kashi Prasad*, and Pandit *Sundar Lal*, for the respondents.

EDGE, C. J., and STRAIGHT, J., upon the question whether Ganesh Kuar's written statement of the 5th January, 1875, was admissible in evidence, said :—The next document was the written statement of Rani Ganesh Kuar, filed in an action brought against her and Babu Raghunandan Prasad by Piare Lal and Bhairon Prasad. This document was tendered in evidence with the object of showing that Rani Ganesh Kuar denied that Piare Lal and Bhairon Prasad were of the family of Chaudhri Naubat Ram. Pandit *Sundar Lal* contended that it was a statement within the meaning of sub-section 5 of s. 32 of the Indian Evidence Act of 1872, and, as such, was admissible. We rejected this state-

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ment, being of opinion that sub-section 5 does not relate to statements made by interested parties in denial, in the course of litigation, of pedigrees set up by the opposite parties.

[After referring to the evidence in detail, their Lordships came to the conclusion that the pedigree asserted by the appellant was proved. Their judgment continued thus :—]

As has been already mentioned, Pandit *Sundar Lal* and Munshi *Kashi Prasad* contended that, even assuming the appellant's family tree to be established, their client Chandi Din, as the sister's son of Chaudhri Naubat Ram, would inherit in priority to Shib Lal or Bhairon Prasad. They relied on *Umaid Bahadur* v. *Udoi Chand* (1), and the judgment of Mitter, J., in *Amrita Kumari Debi* v. *Lakhinarayan Chuckerbutty* (2). All that these authorities, as it appears to us, establish is that, according to the Mitakshara, which is the law prevailing in these Provinces as to inheritance amongst Hindus, a sister's son may be the heir of his mother's brother,—a proposition which appears at one time to have been doubted. They contended that although a sister's son was not a *gotraja sapinda* of his mother's brother, he was a *sapinda* similar to a daughter's son, and as a daughter's son would inherit in case of there being no son, grandson, great-grandson, widow or daughter living of the last owner, so similarly a sister's son would inherit before the more remote relations of his uncle's family.

On the other side, Pandit *Ajudhia Nath* contended that the sister's son, who was a *bandhu*, could not, according to the Mitakshara, take until the direct male line, down to and including the last *samonadaca*, that is, fourteen degrees of the direct male line, had been exhausted. In support of his contention, he referred to the Mitakshara, to Vijnanesvara, and to Mayne's *Hindu Law and Usage*, ss. 436 and 490. He also referred to *Kooer Golab Singh* v. *Rao Kurun Singh* (3), *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (4) and to *Lakshmanammal* v. *Tiruvengada Mudali* (5). As Pandit *Sundar Lal* and Munshi *Kashi Prasad* failed to produce any authority showing that the view as to the rule of the Mitakshara, which has hitherto been accepted and is that contended for by Pandit *Ajudhia*

(1) I. L. R., 6 Calc. 119.
(2) 2 B. L. R., F. B. 28.
(3) 10 B. L. R., 1.
(4) 13 Moo. I. A. 373.
(5) I. L. R., 5 Mad., 241.

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Nath, is not correct, we dismiss the contention with the observation that we see no ground for departing from the construction of the Mitakshara which has hitherto been accepted. We accordingly find that the respondents have failed to show that Chandi Din was the heir of Chaudri Naubat Ram ; and we find, in fact, that Chandi Din was not the heir of Chaudhri Naubat Ram, and consequently the respondents have failed to prove that they are entitled to maintain this action. Under these circumstances, it is not necessary for us to express any opinion on the various questions of limitation and estoppel which have been argued in this case. We decree the appeal with costs against the respondents and the estate of the deceased plaintiff Nawab Mashuk Mahal. The suit will stand dismissed.

Appeal allowed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

1887
February 23.

AGAR SINGH (DEFENDANT) *v.* RAGHURAJ SINGH AND ANOTHER (PLAINTIFFS). *

Pre-emption—Concealment by vendor and vendee of actual price—Evidence—Market-value of property sold.

In suits for pre-emption, where the Court has come to the conclusion that the price alleged in the deed of sale is not the true contract price, and where it cannot ascertain the true price by reason either that the vendor and vendee refuse to disclose the same by their own evidence, or their evidence cannot be believed, the Court should ascertain, if possible, what was the market-price of the property in dispute at the time of the sale, and accept that market-price as the probable price agreed upon between the parties. It is for the plaintiff either to show what was the actual contract price, or to give substantial evidence on which the Court can act, showing what was the market-value at the time of the sale.

THIS was a suit to enforce a right of pre-emption based on the *wajib-ul-arz* of a village. The facts of the case are stated in the judgment of Edge, C. J.

Lala *Lalta Prasad*, for the appellant.

Lala *Juala Prasad*, for the respondents.

EDGE, C. J.—This is an appeal in a pre-emption suit against the judgment of the Subordinate Judge of Gorakhpur, by which he decreed the plaintiff's claim, and found that Rs. 475 was the

* Second Appeal, No. 371 of 1886, from a decree of Maulvi Shah Ahmadullah, Subordinate Judge of Gorakhpur, dated the 5th May, 1885, confirming a decree of Maulvi Abdurrazzak, Munsif of Bansi, dated the 8th January, 1885.