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that when several executors are appointed probate may be granted to all simultaneously or at different times. If the applicant is an executor named by the will and is under no legal incapacity to act, the Court has no option but to grant him probate. Section 85 of the Act enacts that it is within the discretion of the Court to refuse to grant an application for letters of administration, but no such discretion is given in regard to an application for probate by a person selected by a testator for the administration of his estate. The case of *Heera Coomar Sircar* v. *Doorgamoni Dasi* (1) is in point. I decree the appeal, with costs here and in the Court below, and direct the District Judge to grant the application.

Appeal decreed.

Before Mr. Justice Blair and Mr. Justice Aikman.

RAGHUNATH KUARI AND ANOTHER (DEFENDANTS) *v.* MUNNAN MISR (PLAINTIFF).*

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Hindu law—Mitakshara—Succession—Sister's son.

Held that in the absence of nearer relatives a man may be heir to his mother's brother as regards property which is governed by the Mitakshara law of inheritance. *Thakoorain Sahiba* v. *Mohun Lall* (2) ; *Rao Kurun Singh* v. *Nawab Mahomed Fyz Ali Khan* (3) ; *Amrita Kumari Debi* v. *Lakee Narain Chakrabutty* (4) ; *Girdhari Lall Roy* v. *The Bengal Government* (5) ; *Naraini Kuar* v. *Chandi Din* (6) and *Umaid Bahadur* v. *Udoi Chand* (7) referred to.

THIS was a suit to set aside a deed of gift. The plaintiff was the nephew—sister's son—of one Nand Gopal Pande. Nand Gopal died some twenty years before suit and his widow Raghunath Kuari succeeded to the property left by him. On the 29th of April 1894 the widow executed a deed of gift of the property left by Nand Gopal in favour of one Hub Lal, a stranger to the family. The plaintiff thereupon sued to have the deed of gift

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*Second Appeal No. 863 of 1895 from a decree of Kuar Juala Prasad, District Judge of Mirzapur, dated the 2nd May 1895, confirming a decree of Rai Pandit Indar Narain, Subordinate Judge of Mirzapur, dated the 20th September 1894.

(1) I. L. R., 21 Calc., 195.
(2) 11 Moo. I. A., 386.
(3) 14 Moo. I. A., 187.
(4) 10 W. R., F. B., 76.
(5) 12 Moo. I. A., 448.
(6) I. L. R., 9 All., 467.
(7) I. L. R., 6 Calc., 119.

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executed by the widow set aside on the grounds that the property with which it dealt was ancestral and that he (this plaintiff) was the reversioner to the estate of Nand Gopal. The Court of first instance (Subordinate Judge of Mirzapur) gave the plaintiff a decree so far as the immovable property dealt with by the deed of gift was concerned, but dismissed the suit in respect of the movable property entered in the deed. The defendants appealed. The lower appellate Court (Officiating District Judge of Mirzapur) dismissed the appeal.

The defendants thereupon appealed to the High Court.

Mr. *W. Wallach*, for the appellants.

Munshi *Ram Prasad* and Babu *Bishnu Chandar*, for the respondent.

BLAIR and AIKMAN, JJ.—The appellant Musammat Raghunath Kuari is the widow of one Nand Gopal, who died upwards of twenty years ago leaving certain immovable property. Naud Gopal died without any issue. On the 29th of April 1892, Musammat Raghunath Kuari executed a deed, in which, after a recital that she is in sole and exclusive possession of the above-mentioned immovable property, she declares that after her death one Hub Lal, a minor, who is unconnected with the family, shall be full owner of this property and of certain movable property. This deed was registered on the 6th of May 1892. The plaintiff, who is respondent in this appeal, is the son of Nand Gopal's sister. He came into Court on the allegation that the above deed was invalid, inasmuch as Musammat Raghunath Kuari, a childless widow, had no power to make a transfer of the property. He prayed for the cancellation of the deed. He obtained a decree from the Subordinate Judge declaring that the deed, so far as it related to the immovable property, should be of no effect after the death of Musammat Raghunath Kuari. The deed, so far as it related to the movable property, was upheld. On appeal this decree was affirmed by the learned District Judge. This second appeal has been brought by Musammat Raghunath Kuari and the minor Hub Lal, who was made a defendant to the suit.

The learned counsel who argued the case on behalf of the appellants put forward two contentions. The first of these was that the execution of the deed in question gave the plaintiff no right of action. We are of opinion that this contention cannot be sustained. We consider that it is immaterial whether the deed be regarded as a deed of gift or as a will. In this deed Musammat Raghunath Kuari undoubtedly asserts a full ownership to the property to which the plaintiff claims he is entitled to succeed on her death. The deed was registered by her in a public office. We consider that there is no doubt that the action of Musammat Raghunath Kuari threw a cloud upon the plaintiff's title, and that it is open to the Court under the provisions of section 42 of the Specific Relief Act, 1877, to make the decree which it did made as against Musammat Raghunath Kuari. But we are so far with the learned counsel in that we hold that the plaintiff had no cause of action against the minor Hub Lal, inasmuch as the latter had done nothing to assert any title or claim under the deed in his favour. We think that the decree of the lower Court must be modified by dismissing the minor from the suit.

The next contention upon which the learned counsel for the appellant relied in assailing the decree of the Courts below was that a sister's son is no heir according to the Mitakshara law, by which the parties are governed. It is found by the lower Courts that the deceased Nand Gopal left no nearer heirs than the plaintiff. The learned counsel for the appellant contends on the authority of two rulings of the Privy Council, namely, *Thakoorain Sahiba* v. *Mohun Lall* (1) and *Rao Kurun Sing* v. *Nawab Mahomed Fyz Ali Khan* (2), that a sister's son is no heir according to the Hindu law. The former of these rulings was considered by a Full Bench of the Calcutta High Court in the case of *Amrita Kumari Debi* v. *Lakee Narain Chakrabutty* (3) and it was held that it could not be looked on as an authoritative

(1) 11 Moo. I. A., 386. (2) 14 Moo. I. A., 178.
(3) 10 W. R., F. B., 76.

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decision against the rights of the sister's son. We entirely concur in the view which was taken by the Calcutta High Court as to the effect of the decision of their Lordships of the Privy Council. In the second case relied on by the learned counsel, it is true that their Lordships observed, at page 196 of the judgment:—"It is clear that the sister and her descendants find no place in the tables of succession according to the law of the Mitakshara." But it is clear from the judgment that it was not necessary for the Privy Council in this case to decide as to the rights of a sister's son, inasmuch as the point had not been taken in the lower Court. This cannot, in our opinion, be looked on as an authoritative decision binding upon us adverse to the rights of the sister's son. It is true that the sister's son is not mentioned in the Mitakshara amongst other relatives capable of taking by inheritance the property of a deceased Hindu in preference to the king. But, as was held by their Lordships of the Privy Council, in the case *Grihari Lal Roy* v. *The Bengal Government*, (1) the text of the Mitakshara "does not purport to be an exhaustive enumeration of all Bandhus who are capable of inheriting, nor was it cited as such, or for that purpose by the author of the Mitakshara; it is used simply as proof or illustration of his proposition, that there are three kinds of classes of Bandhus." In the case just referred to it was held that a maternal uncle is an heir. Their Lordships observed that such an inference, *i.e.*, that a maternal uncle was incapable of taking the property of a deceased Hindu "in the teeth of the passages which say that the king can take only if there be no relatives to the deceased, seems to be violent and unsound." We are of opinion that this observation applies with equal force to the case of the sister's son. In the judgment just quoted their Lordships referred, if not with approval, at all events without disapproval, to the Full Bench decision of the Calcutta High Court which has been mentioned above. In the case *Naraini Kuar* v. *Chandi Din* (2) this Court, referring to the Full Bench case of the Calcutta

(1) 12 Moo. I. A., 448 at p. 465. (2) I. L. R., 9 All., 467.

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High Court, and to another case—*Umaid Bahadur* v. *Udoi Chand* (1)—observed:—"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 among Hindus, a sister's son may be heir to his mother's brother, a proposition which appears at one time to have been doubted."

On a review of all the authorities we have no hesitation in coming to the conclusion that, in the absence of nearer relatives, a man may be heir to his mother's brother as regards property which is governed by the Mitakshara law of inheritance. This disposes of the second contention of the learned counsel for the appellant. The result is that we modify the decree of the lower appellate Court by dismissing the suit as against the minor Hub Lal. As the appeal has substantially failed, the respondent will have his costs in this Court.

Decree modified.

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

1897
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SHANKAR DAT DUBE (APPLICANT) v. RADHA KRISHNA (DECREE-HOLDER).*

Civil Procedure Code, section 108—*Decree ex parte—Appearance—Pleader retained in suit but not instructed.*

A party defendant retained a pleader to defend the suit against him, and the pleader filed a vakalatnamah and did certain acts for the defendant. However, when the suit came on for hearing the pleader came into Court and stated that he had no instructions and could not go on with the case, practically, that he had retired from the case. The Court proceeded with the suit and made a decree in favour of the plaintiff.

Held that this decree was a decree *ex parte* within the meaning of section 108 of the Code of Civil Procedure. *Bhagwan Dai* v. *Hira* (2) and *Jonardan Dobey* v. *Ramdhone Singh* (3) referred to. *Sahibzada Zein-ul-abdin Khan* v. *Ahmad Raza Khan* (4) distinguished.

THE facts of this case are fully stated in the judgment of the Court.

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* First Appeal No. 2 of 1897, from an order of Munshi Mata Prasad, Subordinate Judge of Benares, dated the 8th October 1896.

(1) I. L. R., 6 Calc., 119.
(2) I. L. R., 19 All., 355
(3) I. L. R., 23 Calc., 738.
(4) L. R., 5 I. A., 233.