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case, by the sub-tenant of an occupancy tenant or by the occupancy tenant himself. This is the view that was taken by this Court in the case of *Geetum Singh* v. *Buldeo Kahar* (1) and in the observations of the late Chief Justice in the case of *Fatima Begam* v. *Hansi* (2). A similar rule has has been adopted by the Board of Revenue. It may be that the wording of section 56 is open to some possible argument, but I am of opinion that that question is now covered by authority. I would allow this appeal, and, setting aside the order of the lower appellate Court, restore the decree of the Court of first instance with costs in all three Courts.

CHAMIER, J.—I concur on the ground that the question has been settled by the authorities to which my learned colleague has referred.

BY THE COURT.—The order of the Court is that the appeal be allowed, that the remand order of the lower appellate Court is set aside, and the decree of the Court of first instance restored, with costs in all Courts.

Appeal decreed.

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August 15.

Before Mr. Justice Burkitt and Mr. Justice Chamier.

KALIAN RAI (PLAINTIFF) *v.* RAM CHANDAR (DEFENDANT).*

Hindu Law—Mitakshara—Succession—Question of priority between the son of the paternal uncle of the deceased and his brother's grandson.

Held that according to the Hindu law of the Mitakshara school the grandson of a brother is a nearer *sapinda* than the son of a paternal uncle. *Sambhoo Dutt Singh* v. *Jhootee Singh* (3), *Rutcheputty Dutt Iha* v. *Rajunder Narain Rae* (4), *Kureem Chand Gurain* v. *Oodung Gurain* (5), *Oorhya Koeer* v *Rajoo Nye* (6), *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (7) and *Suba Singh v. Sarfaraz Kunwar* (8) referred to. *Suraya Bhukta* v. *Lakshminarasomma* (9) dissented from.

THIS appeal arose out of a suit in which the plaintiff, Kalian Rai, laid claim to the estate of one Rai Singh, the son of the

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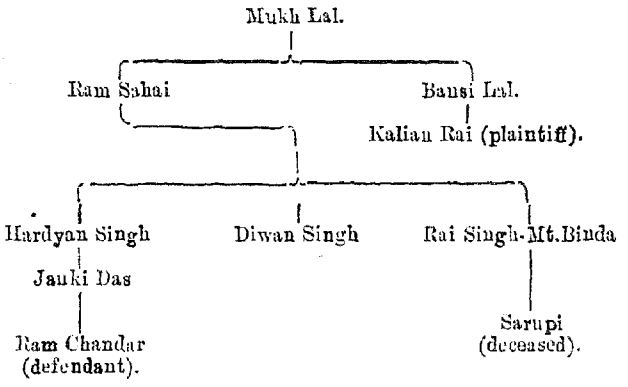
* Second Appeal No. 267 of 1899, from a decree of Babu Prag Das, Subordinate Judge of Saharanpur, dated the 6th January, 1899, reversing a decree of Pandit Kunwar Bahadur, Munsif of Muzaffarnagar, dated the 7th February, 1898.

(1) (1872) 4 N.-W. P., H. C. Rep, 76.
(2) (1887) I. L. R., 9 All, 244; at p. 247.
(3) S. D. A., L. P., 1855, p. 382.
(4) (1839) 2 Moo., I. A., 133.
(5) (1866) 6 W. R., C. R., 158.
(6) (1870) 14 W. R., C. R., 208.
(7) (1870) 13 Moo. I. A., 373.
(8) (1896) I. L. R., 19 All., 215.
(9) (1881) I. L. R., 5 Mad., 201.

plaintiff's uncle. The pedigree of the family, so far as it concerns the present suit, was as follows:—



The defendant Ram Chandar was thus the grandson of one of the brothers of Rai Singh. The plaintiff alleged that Ram Chandar having been adopted by one Jawahri had no claim whatever to the estate of Rai Singh, to the whole of which he asserted that he himself was entitled. The defendant denied that he had been adopted by Jawahri and contended that he was entitled to the entire property of Rai Singh, of which he said he had been in possession since the death of Musammat Sarupi, the daughter of Rai Singh.

The Court of first instance (Munsif of Muzaffarnagar) held that the plaintiff had failed to prove Ram Chandar's adoption by Jawahri; but relying on the rule of law laid down in *Suraya Bukku* v. *Lakshminarasamma* (1), gave the plaintiff a decree, holding that "grandsons" not being included in the word "sons" the defendant as grandson of the brother of the propositus was not entitled to succeed in preference to the plaintiff, who was the son of the paternal uncle of the propositus.

The defendant appealed. The lower appellate Court (Subordinate Judge of Saharanpur) held that the defendant had a preferential right to succeed as against the plaintiff, and set aside the decree of the Munsif and dismissed the plaintiff's suit. The Subordinate Judge referred to the ruling in *Suba Singh* v. *Sarfaraz Kunwar* (2).

From this decree the plaintiff appealed to the High Court.

(1) (1881) I. L. R., 5 Mad., 291. (2) (1896) I. L. R., 19 All., 215.

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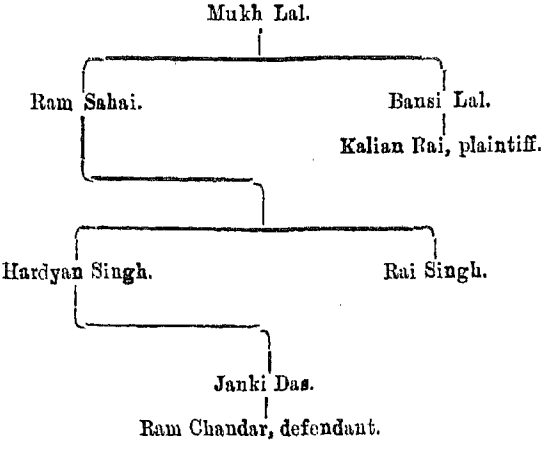
KALIAN RAI v. RAM CHANDAR.

Munshi *Jang Bahadur Lal*, for the appellant.

Mr. *S. S. Sinha*, for the respondent.

BURKITT and CHAMIER, JJ.—This appeal arises out of a suit brought by the appellant Kalian Rai against the respondent Ram Chandar for possession of the immovable property of one Rai Singh, deceased.

The following genealogical table shows the relationship of the parties to the deceased :—



The parties are admittedly governed by the Hindu law of the Mitakshara school. The question which we have to decide is which of the parties (who are both equally near in degree to the propositus) has a preferential right to succeed—the plaintiff as the uncle's son of the deceased, or the defendant as the brother's grandson of the deceased.

The Munsif decided in favour of the plaintiff; but on appeal his decree was reversed by the Officiating Subordinate Judge. Hence this appeal by the plaintiff.

The Mitakshara provides that—

"On failure of the father, brethren share the estate." Chapter II, section IV, verse 1.

"On failure of the brothers also, their sons share the heritage."—*Ib.*, verse 7.

"If there be not even brothers' sons, gentiles *(gotraja)* share the estate: gentiles are the paternal grandmother and *sapindas* and *samanodacas*."—Section V, verse 1.

"On failure of the paternal grandmother, the *gotraja sapindas*, namely, the paternal grandfather and the rest, inherit the estate."—Section V, verse 3.

"Here on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons."—Section V, verse 4.

"On failure of the paternal grandfather's line, paternal great-grandmother, the great-grandfather, his sons and their issue inherit. In this manner must be understood the succession of (other) *gotraja sapindas*."—Section V, verse 5.

"If there be none such, the succession devolves on *samanodacas*."—Section V, verse 6.

There has been considerable conflict of opinion as to whether the brother's grandson is entitled to succeed immediately after, and in default of the brother's son, and if not, what place should be assigned to him.

The Viramitrodaya does not actually mention the brother's grandson; but inasmuch as the author considers that the degree of spiritual benefit conferred upon the deceased proprietor should determine the preferential right of claimants to inheritance, who are in the same degree, it may be supposed that he would have preferred the brother's grandson to the paternal uncle's son, for the former offers an undivided oblation to the father of the deceased. As to how far this view of the author of the Viramitrodaya can be accepted, see the judgment of Knox, J., in *Suba Singh* v. *Sarfaraz Kunwar* (1) and the judgment in *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (2).

Apararka in his commentary (as to which see West and Buhler on Hindu Law, 3rd ed., Vol. I., p. 18) takes the same view. According to him it would seem that the brother's grandson should come in immediately after the brother's son (see Tagore's Law Lectures, 1880, pp. 426, 428). Balam Bhatta does not appear to have dealt with the question specifically.

Nanda Pandita places the brother's grandson just before the paternal grandfather (see Sacred Books, Vol. VII, p. 68, and Tagore Law Lectures, 1880, p. 503).

(1) (1896) I. L. R., 19 All., 215; at pp. 224, 225, 226.

(2) (1870) 13 Moo., I. A., 373.

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It would not be of any use to examine the commentaries which are not accepted as authorities in the Benares school; but, as far as we are aware, one of them only, the Smriti Chandrika, denies the right of the brother's grandson, while all writers of the Bengal school, of course, agree that he comes in immediately after the brother's son, and the Vyavahara Mayukha propounds a doctrine, according to which the parties to the present case might share the inheritance half and half.

Turning to reported cases in the Indian Courts, we find that the earliest case in which the question is mentioned is that of *Sambhoo Dutt Singh* v. *Jhootee Singh* (1). That was a case from Tirhoot, where the Mithila law prevails; but it does not appear that there is any difference between the Mithila and Benares schools on this question. The learned Judges say in their judgment "the right of succession only ascends on failure of brothers, nephews, and grandnephews."

In the case of *Rutcheputty Dutt Iha* v. *Rajunder Narain Rae* (2) Mr. Harrington expressed the opinion that the words in Mitakshara translated "sons" and "issue" in verses 4 and 5 of sec. 5 of chap. II mean sons and other descendants of the sons and grandsons; that this was shown by the words "on failure of the father's descendants" in verse 4, and by the words "on failure of the paternal grandfather's line" in verse 5, and that to adopt the literal and stricter construction would be to cut off all the descendants below the grandson of the father, which would be inconsistent with other provisions of the Mitakshara.

In the case of *Kureem Chand Gurain* v. *Oodung Gurain* (3), Jackson J., quotes the above opinion of Mr. Harrington with approval, and infers that he would have construed "brother's sons" as including brother's grandsons, and proceeds to state his own opinion that the word "sons" in the Mitakshara does, as a general rule, include all descendants in the male line who can offer funeral oblations.

In the case of *Oorhya Kooer* v. *Rajoo Nye* (4), the Court seems to have been of opinion that a brother's grandson was entitled to succeed in preference to the great-grandfather's great-grandson.

(1) S. D. A., L. P., 1855, p. 382.
(2) (1839) 2 Moo., I. A., 133.
(3) (1866) 6 W. R. C. R., 158.
(4) (1870) 14 W. R. C. R., 208.

The question was discussed at length in *Suraya Bhukta* v. *Lakshminarasamma* (1) by Sir Charles Turner, C. J., and Kindersley, J., who held that according to the Hindu law current in the Madras Presidency, a brother's grandson did not exclude a paternal uncle's son. They took the view that the word "sons" in the Mitakshara, chap. II., sec. IV, verse 7, and sec. V, verse 1, should be construed literally and did not include grandsons. The learned Judges considered the opinion of Mr. Harrington quoted above to be an *obiter dictum*. They do not refer to the opinion expressed in the other cases cited above, and they seem to have been influenced to a considerable degree by the writings of commentators, whose works are not, as far as we are aware, accepted as authoritative in these provinces. Some passages in the judgment suggest that, in their opinion, no grandsons of collaterals are entitled to inherit. Such a rule would be inconsistent with the decision of the Privy Council in *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (2) and *Ratchoputty Dutt Iha* v. *Rajunder Narain Rae* (3) where the successful claimants were respectively fifth and sixth in descent from the common ancestor. Lastly, the judgment of the Madras High Court does not indicate what place should be assigned to the brother's grandsons if they do not come in immediately after brother's sons. Mr. Raj Kumar Sarvadhikari, in his work on the Hindu law, comes to the conclusion that brother's grandsons should come in immediately after the brother's sons and before the paternal grandmother (Tagore Law Lectures, 1880, pp. 648—651). Messrs. West and Buhler, Vol. I., p. 124, 3rd edition, dealing with the question of the order in which *gotraja sapindas* not mentioned by the Mitakshara are to be placed, observed that the principle suggested by Mr. Harrington of continuing each line of heirs down to the seventh person could easily be carried out in the case of the paternal uncle's line and those descended from the sons of remoter ancestors, but that it could not be carried out in the case of the father's line because the brother's grandsons could not be allowed to inherit before the maternal grandmother, whose right to succeed immediately after the brother's sons was

(1) (1881) I. L. R., 5 Mad., 201. (2) (1870) 13 Moo., I. A., 373.
(3) (1889) 2 Moo., I. A., 132.

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clearly settled, and because the brother's grandsons would thereby take precedence of the remoter descendants of the deceased himself, such as the great-grandsons. The learned authors suggest that in order to meet the difficulty the brother's grandsons should either be considered co-heirs with the paternal uncle's son, or placed just before the paternal grandfather.

Shama Charan Sircar in his Vyavastha Chandrika, Vol. I., p. 178, finds a place for brother's grandsons immediately after brother's sons.

It is admitted on all hands that the brother's grandson is a near *sapinda* of the deceased. He is therefore certainly entitled to inherit, and the only question is where he should come in.

Mr. A. C. Mittra and Mr. Golap Chanda Sirkar in their works on the Hindu law express the opinion that the brother's grandsons come in after the grandsons of the great-great-great-great-grandfather of the deceased. Such a reading of the Mitakshara brings about a result completely at variance with its leading principle that the inheritance is to go to the nearest *sapinda*.

Messrs. West and Buhler seem rather to beg the question, where they say that the paternal grandmother must inherit in preference to the brother's grandsons. If the word "sons" and "brother's sons" in the verses last referred to are read as including grandsons, the latter will exclude the paternal grandmother.

Considering that the words "sons" and "issue" in other parts of the same chapter have been read as including "grandsons" and that "grandson" has been interpreted as including great-grandson in order to give effect to the rule that the inheritance shall go to the nearest *sapinda*, and that in other respects the chapters on succession in the Mitakshara have been held to have been intended rather as an outline than as an exhaustive enumeration of heirs, we think that we shall not be doing violence to the text if we follow the opinions of Mr. Harrington and other Judges, and construe the words "sons" and "brother's sons" as including grandsons. But even if that is not permissible, we see no reason why the brother's grandsons should not come in as the first *gotraja sapindas* entitled to succeed after the paternal grandmother under verse 3 of section V.

With regard to Messrs. West and Buhler's objection that this will let the brother's grandsons in before the great-great-grandsons of the deceased, we would observe that according to Mr. Harrington's view a great-great-grandson of the deceased would take immediately after the great-grandson; and even if that view is not correct, the remote descendants of the proprietor might well be regarded as less nearly akin than the grandnephews. (See opinion of Mr. Mayne in his work on Hindu Law, p. 679, 6th edition.) The fact is that it is almost impossible for a single family to contain more than four generations in direct descent, so that it is scarcely necessary to consider the great-great-grandson of the proprietor. We think that the verses of the Mitakshara quoted at the beginning of this judgment show sufficiently clearly that near *sapindas* must be exhausted before the estate can go to remote *sapindas*. It seems to us that whatever test of propinquity be applied, the brother's grandson is a nearer *sapinda* of the deceased than the paternal uncle's son. It may be that the line of each ancestor of the deceased should be continued down to the seventh person; but in the present case it is not necessary to go as far as that. All that we hold is that the father's line, as far down as his great-grandson, must be exhausted before the grandfather or his line can come in. There is also, as shown above, considerable authority for the view that "brother's sons" should be read as "brother's grandsons."

We are of opinion that no ground has been shown for disturbing the decree of the lower appellate Court, and we therefore dismiss this appeal with costs.

Appeal dismissed.