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The learned Sessions Judge considered that the ground for revision was well founded, and he has accordingly referred the matter to this Court. We think that the view taken by the learned Sessions Judge is correct. Section 137 expressly provides that if a person served with a conditional order under section 133 appears and shows cause, the Magistrate "shall take evidence in the matter as in a summons case." This certainly cannot mean that the person showing cause is to start the proceedings and produce evidence to meet a case which he has never heard. He is not supposed to know the substance of the Police report made to the Magistrate, or "other information" on which the Magistrate acted. He is entitled to hear the evidence, taken as in a summons case, and cross-examine; and then he may produce his own evidence if so advised. When this has been done, but not before, the Magistrate can make the conditional order absolute if he finds sufficient reason for doing so. This view is supported by the ruling in *Srinath Roy* v. *Ainaddi Halder* (1). We accordingly set aside the order of the Magistrate, dated 4th March 1909, in which he made absolute the conditional order, and we refer the matter back to him to proceed according to law, having regard to what we have said above.

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May 12.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Tudball.

AJUDHIA AND ANOTHER (DEFENDANTS) *v.* RAM SUMER MISIR (PLAINTIFF.)*

Hindu law—Mitakshara—Daughter's daughter's son—Bhinna gotra Sapinda—Bandhu—Alienation by Hindu widow—Legal necessity—Burden of proof.

A daughter's daughter's son is a *bandhu*, and in the absence of any other heir he is entitled to succeed to the estate of the last owner.

A mere recital in a mortgage-deed executed by a Hindu widow with a qualified interest as to the existence of necessities is not enough. It is for the creditor to show either that there was legal necessity or at least that he was led on reasonable grounds to believe that there was necessity for the alienation.

THE facts of this case are as follows:—

One Sheo Narain died leaving him surviving a widow, Sugandha and a daughter Chaura. The plaintiff, Ram Sumer

* Second Appeal No. 581 of 1908 from a decree of Saiyid Muhammad Ali, District Judge of Mirzapur, dated the 9th of March 1908, confirming a decree of Shah Amjad-ul-lah, Subordinate Judge of Mirzapur, dated the 4th of December 1907.

(1) (1897) I. L. R., 24 Calc., 395.

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Misir, is Chaura's daughter's son. Upon Sheo Narain's death his widow Sugandha came into possession of his property. Sugandha mortgaged the property in 1860 to Hanuman Misir, the grandfather of the defendants. On Sugandha's death her daughter Chaura came into possession of the property in 1883. Chaura also executed a mortgage in favour of the defendant Ajudhia. Chaura died in 1905. Ram Sumer Misir brought this suit as daughter's daughter's son of Sheo Narain for a declaration that the mortgages executed by the two females respectively were not made for legal necessity and were not binding upon him, and for possession of the property. The defence was that the plaintiff was not a legal heir of Sheo Narain and as such was not entitled to possession. Both the lower courts decreed the plaintiff's claim. The defendants appealed to the High Court.

Mr. *A. H. C. Hamilton*, (for whom Mr. *M. L. Agarwala*) for the appellants contended that the plaintiff being a daughter's daughter's son of Sheo Narain, was not under the Hindu law his legal heir, and consequently was not entitled to get possession of the property mortgaged to the appellants. There is no decision in which it has been held that where two females have intervened the descendant of the last has succeeded as *bhinna gotra sapinda*. The list of *bandhus* is no doubt not exhaustive, but it stops where it comes to a son of a daughter. *Bandhus* are persons related to the propositus through a female born in or belonging to the family of the propositus. *Muttusami* v. *Muttukumarasami* (1). If daughter's daughter's son be taken as an heir, from the religious point of view he would be giving *pinda* to his mother's mother's father. Religious efficacy may be taken as a test in determining whether a particular person is an heir under the *Mitakshara* law. If he confers religious benefit then he is in the possible class of heirs. The rule of propinquity comes only to determine the position of a particular heir.

Munshi *Govind Prasad*, for the respondent, was not called upon.

BANERJI and TUDBALL, JJ.—This appeal arises out of a suit brought by Ram Sumer Misir, respondent, for possession of property which once belonged to one Sheo Narain. He also

(1) (1892) I. L. R., 16 Mad., 23.

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asks for a declaration that two mortgages, one effected by the widow of Sheo Narain, and the other by his daughter, be declared ineffectual as against his rights, being mortgages without legal necessity. He further claims mesne profits. Sheo Narain died many years ago and his property came into the possession of his widow, Musammat Sughanda. He had a daughter, Musammat Chaura, and the plaintiff Ram Sumer Misir is the son of Musammat Chaura's daughter. Musammat Sughanda made a mortgage in 1860 in favour of Hanuman Misir, the grandfather of the defendants appellants. In 1883, after Sughanda's death, Musammat Chaura, who succeeded to the property, executed another mortgage in favour of Ajudhia, the defendant. Chaura died on the 20th of April, 1905, and thereupon the suit out of which this appeal arises was brought by the plaintiff as mentioned above.

The court of first instance decreed the claim and that decree has been affirmed by the lower appellate court.

It is contended that the plaintiff is not entitled to possession of the property of Sheo Narain and that he is not his legal heir. This contention is in our judgment not well founded. As we have said above the plaintiff is the son of Sheo Narain's daughter's daughter. He is clearly a *sapinda* of Sheo Narain within the meaning of the *Mitakshara* and being a *Bhinna gotra sapinda*, who claims through a female belonging to the family of Sheo Narain, namely his daughter Chaura, he is Sheo Narain's *bandhu*. In the absence of any other heir he is entitled to succeed to the estate of Sheo Narain. It is urged that he being the son of Sheo Narain's daughter's daughter, cannot be regarded as a *bandhu*. In the Tagore Law Lectures for 1882 the descendant of a daughter's daughter of the same family to which the deceased belonged is specifically mentioned as a *bandhu* of the deceased (see page 688) and on page 707 the daughter's daughter's son is specified in the list of the man's own *bandhus*. Having regard to the definition of a *bandhu* as understood in the *Mitakshara* we must hold that the plaintiff, who is the daughter's daughter's son of Sheo Narain, the last owner, is his *bandhu* and as such the heir to his estate.

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It is next urged that the mortgages made by Sughanda, the widow of Sheo Narain, and Chaura, his daughter, must be held to have been for legal necessity as necessity for the loans incurred by them is specified in the mortgage deeds. As regards the mortgage made by Chaura, it has been found that there was no necessity for it and that finding is conclusive. As regards the other mortgage, no doubt certain necessities are mentioned in the mortgage deed itself but that is not enough. It was for the defendants, who claim under a Hindu widow who had a limited interest, to show either that there was legal necessity for the mortgage, or at least that the mortgagee "was led on reasonable grounds to believe that there was necessity for the alienation." This according to the findings of the court below the defendants have failed to do. Therefore the mortgages made by the widow of Sheo Narain and by his daughter cannot enure beyond their life. Both the ladies being dead the property will now pass to the plaintiff and he is entitled to possession. As the defendants kept him out of possession he is entitled to mesne profits of which he was deprived by the defendants.

These are the only matters which were pressed before us. The other pleas mentioned in the memorandum of appeal were abandoned, they being untenable. We dismiss the appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C.
March 26, 30, 31,
April 1,
May 13.

PARBATI KUNWAR (PLAINTIFF) *v.* CHANDARPAL KUNWAR AND OTHERS (DEFENDANTS).

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow].

Evidence—Custom, proof of—Custom excluding daughters—Wajib-ul-arz—Evidence of custom of succession to impartible estates whether admissible in proving custom of succession to partible estates—Oudh Estates Act (I of 1869), sections 22, 23—Concurrent findings as to custom being established, effect of—Declarations by kanungo—Replies by taluqdars to Government inquiries as to succession—Oudh Land Revenue Act (XVII of 1876), section 17.

In a suit by the appellant claiming as daughter of a Hindu taluqdar whose name was entered in lists 1 and 4 prepared under the Oudh Estates Act (I of

Present:—Lord ATKINSON, Lord COLLINS, Lord GORELL and Sir ARTHUR WILSON.