

Before Mr. Justice Sulaiman, Acting Chief Justice and  
Mr. Justice Weir.

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May, 29.

SHER SINGH AND OTHERS (DEFENDANTS) v. BASDEO  
SINGH (PLAINTIFF).\*

*Hindu law—Succession—Mitakshara—Sapindas—Exclusion  
of grand-nephew by nephew.*

According to the Hindu law of succession of the Mitakshara school, as between a nephew and a grand-nephew (son of the nephew's brother) there is no representation, but the nephew will take the whole of the uncle's property to the exclusion of the grand-nephew.

*Buddha Singh v. Lattu Singh* (1), *Khetitir Gopal, Chatterjee v. Poorno Chunder Chatterjee* (2) *Muttuvaduganatha Tevar v. Periasmi* (3) and *Marundayi v. Doraisami Karambian* (4) referred to.

THE facts of this case sufficiently appear from the judgement of WEIR, J.

Munshi *Panna Lal*, for the appellants.

Pandit *Shiam Krishna Dar*, for the respondent.

WEIR, J.:—This is a defendant's appeal in a suit brought to recover one half of the property of one Durjansal Singh. On the death of the survivor of Durjansal Singh's widow and daughters his two nearest relations were a nephew, the plaintiff, son of Maharaj Singh, (who was the elder brother of Durjansal Singh) and a grand-nephew, the defendant, son of Pokhpal Singh (a younger son of Maharaj Singh). The plaintiff and defendant are entered in the *khewat* as equal owners of Durjansal Singh's zamindari property. The plaintiff claims to be entitled to the whole

\*First Appeal No. 370 of 1925, from a decree of Mirza Nadir Husain, Second Additional Subordinate Judge of Aligarh, dated the 24th of July, 1925.

(1) (1915) I. L. R., 37 All., 604. (2) (1871) 15 W. R., C. R., 482.  
(3) (1892) I. L. R., 16 Mad., 11. (4) (1907) I. L. R., 30 Mad., 348.

of Durjansal Singh's property as the nearer *sapinda*, but counsel for the defendant contends that since the plaintiff and the defendant are in the same group, or class, of *sapinda*—see *Buddha Singh v. Lattu Singh* (1),—the principle of representation applies, and the defendant is entitled to the share which would have gone to his father Pokhpal Singh, if the latter had been alive when the inheritance opened.

Counsel for the plaintiff relies on the well-known text of Manu,—“To the nearest *sapinda* the inheritance next belongs.” Taken literally these words would clearly exclude the defendant from claiming any share of the inheritance as long as a nearer relation, such as the plaintiff, is alive, and this view of the effect of the text has been accepted by all modern text writers on Hindu law. Thus, for example, in the latest edition of Mayne's Hindu law, on page 838, it is said that “he”, that is the grand-nephew, “cannot succeed as long as any nephew is alive, except by special custom”; and another text writer, namely Trevelyan (see Hindu Law, pages 349-350) lays down a similar rule, citing as an illustration of it chapter 2, section 4, placitum 8 of the *Mitakshara*:—“In case of competition between brothers and nephews, the nephews have no title to the succession; for their right of inheritance is declared to be on failure of brothers.” Counsel for the defendant contends that this is merely an exception to a general rule, i.e., that the principle of representation applies to any class or group of *sapindas*; and that the text of Manu should be construed as meaning that the nearer class of *sapindas* excludes the more remote class. If there were such a rule, there would almost certainly be decisions interpreting or giving effect to it; but no such decision has been quoted to us;

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and there are certain cases which show that the text of Manu has not been construed in that way. In case No. 2 of section 5 of Macnaghten's Hindu Law, at page 67 of the precedents, it is stated that "on the death of the widow of the second brother the property left by her will be equally shared by the sons of her husband's brothers. The grandson of her husband's elder brother is excluded by them." The same principle was laid down by the officiating CHIEF JUSTICE of the Calcutta High Court in the following terms in *Khettur Gopal Chatterjee v. Poorno Chunder Chatterji* (1):—"My learned colleague, Mr. Justice MUKERJEE, has stated that which I have always understood to be the rule in such cases, in a clear and concise form by saying that amongst *sapindas* the nearest *sapinda* excludes those more remote." The reason for this rule was explained by Sir MUTTUSAMI AYYAR in *Mutturaduganatha Tevar v. Periasami* (2), where he says:—"The distinction" (between obstructed and unobstructed inheritance) "is material only to the extent that in the one case" (that is in the case of cognate or collateral relations) "the nearest male heir excludes the more remote, whilst in the other" (the case of sons and grandsons) "the doctrine of representation excludes this rule of preference. It is founded upon the theory that the spiritual benefit derivable from the three lineal male descendants is the same, though among collateral male heirs the *quantum* of such benefit varies in proportion to the remoteness of the male heir from the deceased male owner. . . . Thus the rule, that to the nearest *sapinda* the inheritance belongs, applies alike whether the inheritance is obstructed or unobstructed, with this difference, viz., that where the last male owner leaves sons, grandsons and great-grandsons,

(1) (1871) 15 W. R., C. R., 482.

(2) (1892) I. L. R., 16 Mad., 11.

their *sapinda* relationship confers equal spiritual benefit on him, though their blood relationship is not the same, and that they are all co-heirs within the meaning of the rule." This *dictum* of the learned Judge was accepted as correct by the Madras High Court in *Marudayi v. Doraisami Karambian* (1). Since there does not appear to us to be any reason why the text of Manu should not be given its literal meaning; and since no text from any of his commentators has been cited to us which would show that the words should be given any other meaning; and since the literal meaning appears to have been accepted by all the leading modern text-writers on Hindu law, we think that we ought to apply it in preference to an interpretation for which no authority has been cited. We, therefore, hold that the defendant is not entitled to any share in the property of Durjansal Singh.

There is only one other question at issue between the plaintiff and the defendant in this appeal.

[The rest of the judgement is not material for the purpose of this report.] The appeal should be dismissed with costs.

SULAIMAN, A. C. J. :—I have read the judgement of my learned brother, who has referred to the various authorities. I concur in his view, and would only like to add a few words on the scheme laid down in the *Mitakshara* determining the order of succession.

In part II, chapter II, section I, placitum 1, it is stated that the order of succession among all, on failure of them, is next declared. The passage of *Yajnavalka* gives the order: "Brothers likewise and their sons. . . . On failure of the first among these, the next in order is indeed heir to the estate." It

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is thus clear that brothers' sons come in only on failure of brothers. This is made fully clear in section 4, placita 7 and 8, which provide that "on failure of brothers also, their sons share the heritage . . ." "In the case of competition between brothers and nephews, the nephews have no title to the succession: for their right of inheritance is declared to be on failure of brothers."

In the case of *Buddha Singh v. Lattu Singh* (1) their Lordships of the Privy Council, affirming the view of this Court, held that brothers' grandsons are included in the expression "brothers' sons", and that they also are heirs. In that case the point did not arise and it was not decided what the rights *inter se* are between brothers' sons and brothers' grandsons.

Section 4, placitum 5 quotes the general rule laid down by Manu: "To the nearest *sapinda*, the inheritance next belongs." It would follow on principle that brothers' sons would exclude brothers' grandsons. Placitum 9, which gives brothers' sons a title through their deceased father, applies to the case where death occurs before a partition of the estate, and is not applicable to this case.

The learned advocate for the appellants contends that just as there is representation among sons and grandsons, in the same way there ought to be a representation among the brothers' sons and brothers' grandsons. His contention is that brothers' sons and brothers' grandsons fall within a single category designated by the expression "brothers' sons," and that there should therefore be no preference *inter se* between members of the same class. He therefore argues that the general rule laid down by Manu should not be applied to brothers' grandsons.

(1) (1915) I. L. R., 37 All., 604.

As regards remoter relations, the learned advocate has to concede that remoteness involves an exclusion. In section 5 the heirs who are successively entitled are defined.

If we were to accept the contention on behalf of the appellants, we would have the anomaly of having representation among sons and grandsons, then exclusion of brothers' sons by brothers, then again representation among brothers' sons and brothers' grandsons, and lastly exclusion of remoter heirs by nearer heirs.

Having regard to the order of succession laid down in the Mitakshara, it seems only logical not to extend the principle of representation beyond the sons and grandsons. In the absence of any express provision to the contrary, the rule laid down by Manu should apply to brothers' sons, just as it admittedly applies to more distant collaterals.

By THE COURT. :—The appeal is dismissed with costs.

*Appeal dismissed.*

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*Before Mr. Justice Sulaiman, Acting Chief Justice, Mr. Justice Boys, Mr. Justice Banerji, Mr. Justice Kendall and Mr. Justice Weir.*

EMPEROR v. PHUCHAI AND ANOTHER.\*

*Criminal Procedure Code, section 109 (a) and (b)—Application of the section, more particularly sub-section (a).*

Section 109 (a) of the Code of Criminal Procedure is applicable to a person who, being or coming within the local limits of the jurisdiction of a certain magistrate, takes precautions to conceal his presence with a view to committing an offence. It is not limited to the more restricted case of a person who, with a similar object, takes precautions to conceal the fact of his presence within the local limits of the jurisdiction of a certain magistrate.

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