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entitled to whatever relief the effect of the plaint and answer taken together will entitle him on the admission of defendant, subject of course to the decision upon the questions, which the defendant has raised, as to whether he has in fact, and the extent to which he has, failed in the performance of the admitted agreement. The decision of the Civil Judge upon this preliminary point will be reversed and the suit remitted for decision according to the principles here pointed out. The costs will be dealt with in the revised decree.

Suit remitted.

ORIGINAL APPELLATE JURISDICTION. (*a*)

Regular Appeal No. 5 *of* 1867.

K. KISSEN LALA.....*Appellant.*

JAVALLAH PRASAD LALA.....*Respondent.*

According to the law which prevails in Madras the sons of a grand daughter are excluded from the inheritance.

The plaintiff brought a suit for a moiety of the estate of his deceased second cousin who left no issue or nearer kindred, claiming through his maternal great-grand father.—*Held* : that the plaintiff was not entitled to inherit the estate of the deceased.

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THIS was a regular appeal from the decree of Mr. Justice Innes, in Original Suit No. 256 of 1867 dismissing the plaintiff's suit.

The *Acting Advocate General* and *Miller*, for the appellant.

Branson and *O'Sullivan*, for the respondents, the 2nd and 3rd defendants.

The facts sufficiently appear from the following judgment which was delivered by

SCOTLAND, C. J. :—The plaintiff in this suit, claiming as joint heir with his brother, the 4th defendant, of one Taik Chand deceased, prays for an account of the estate which has come to the hands of the 1st and 2nd defendants, that a sufficient sum out of the estate may be set apart for the maintenance of the 3rd defendant, and that the plaintiff may be declared

(*a*) Present : Scotland, C. J. and Holloway, J.

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entitled to payment of one moiety of the ascertained clear residue of the estate, after payment of debts and funeral expenses, and the 4th defendant to the other moiety.

The 1st and 2nd defendants are the brothers and executors of Chinnoo Beebee, the widow of Taik Chand, and they allege in their written statement that Taik Chand made a verbal testamentary disposition bequeathing the whole of his property, after payment of several legacies, to his widow since deceased, and that they are not in possession of more of the estate than moveable property to the value of 13,000 Rupees. The 3rd defendant is the maternal aunt of the plaintiff and 4th defendant. At the first hearing three issues were settled. The first raises the question whether Taik Chand made the alleged verbal testamentary disposition. The second is, whether a particular house formed part of the estate of Taik chand; and the third is, whether the 1st and 2nd defendants are in possession of any moveable property belonging to the estate of Taik Chand beyond the value of Rupees 13,000. On these issues the case was heard before Mr. Justice Innes, who decided against the alleged testamentary disposition on the 1st issue, but dismissed the suit on the ground that the plaintiff and the 4th defendant were not heirs to Taik Chand within the Hindu Law of Inheritance. The plaintiff appeals on two grounds :—First, that the heirship of the plaintiff and 4th defendant was not disputed by the defendants, nor was an issue raised on the point. Secondly, that on the facts admitted in the case the plaintiff and 4th defendant were the next heirs of Taik Chand entitled to succeed to his property on the death of his widow Chinnoo Beebee. The respondents resist these objections and further contend that the alleged verbal testamentary disposition was proved. But if not proved, and if the plaintiff and 4th defendant are the legal heirs of Taik Chand, that Chinnoo Beebee had an absolute power to alienate the moveable property left by her husband by will or other disposition.

With reference to the decision of the question of fact on the 1st issue, there is not, we think, the slightest reason to doubt that the Judge came to a right conclusion. Then as to the point of heirship :—it appears that it was not

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taken on the part of the defendants either on the first or final hearing of the case ; but the admisssions on the record do not go beyond the state of the family at the death of Chinnoo Beebee and the relationship to Taik Chand as claimed by the plaintiff. It was therefore within the power of the Judge to raise the question, if he thought it just to do so and it was necessary for the right determination of the claim in the suit ; but he certainly ought to have directed an issue to be recorded and given the parties an opportunity of being heard on it. This Court, however, has power to cure this omission under Section 37 of Act 23 of 1861 by now adding the proper issue. The record, therefore, will be amended by adding the issue:—"Whether the plaintiff and 4th defendant are entitled to inherit the property of Taik Chand," and having heard the case fully argued we may give judgment on the question.

The admitted facts are that the plaintiff and his brother are related to Taik Chand through their great-grandfather Bheem Sing. He had two sons, Jusnuth Roy and Nooncureem, who are both dead. The former left one son, Krisna Chand, and the latter two daughters, Rutana Coomar and Malhat Coomar, 3rd defendant. Krisna Chand died leaving Taik Chand his only son. The plaintiff and 4th defendant are the only sons of Rutana Coomar. Her sister Malhat Coomar is married, and has one child a daughter. Taik Chand left no issue, and Chinnoo Beebee was his only surviving widow; the plaintiff and his brother and Taik Chand are great-grandsons of Bheem Sing, the former materal and the latter paternal. They are consequently collateral kindred related in the sixth degree, and there appears to be no other living descendants of paternal ancestors.

The point for consideration is, whether they are within the kindred to whom the law limits the right of inheritance. According to every School of Hindu Law, the Preceptor and others who are not connected by ties of relationship to the deceased owner of the inheritance are placed in the order of succession; and though the schools differ as to the kindred who possess the preferable right to succeed, all appear to agree in confining such right to some only of the

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kindred. The general rule laid down is, that the right of inheritance is connected with and follows the capacity to offer funeral oblations, in the order of the essential benefits supposed to be thereby conferred. But it is not the capacity to offer oblations to the last possessor of the inheritance that alone gives the right. Lineal heirs and those in direct ascent do inherit on that ground : but collateral kindred succeed on the ground of their participating with the last possessor in the right to offer oblations to a common ancestor. Now the son of a daughter is clearly a near Sapinda and considered " in regard to the obsequies of ancestors as a son's son." Mitakshara, cap. 2, sec. 2, clause 6, the Daya Bhaga, chap. 11, sec. 2, and sec. 6, clauses 9-12. He is fully capacitated to offer the oblation of the funeral cake to his maternal grandfather. A text of Manu (chap. 9, Sl. 136 referred to in the same clause of the Mitakshara) declares, " By that male child whom a daughter, whether formally appointed or not, shall produce from a husband of an equal class, the maternal grandfather becomes the grandson of a son's son : let that son give the funeral oblations and possess the inheritance." (See also Sl: 140 of the same chapter). Having then all the efficacy of a son's son, he is necessarily also allied by funeral oblations to his maternal great grandfather : and, according to the School of Law current in Bengal, which gives very full effect to the general principle, the son of a grand-daughter is within the line of collateral heirs. The rule is thus stated in Mr. Wynch's Translation of the Daya Krama Sangraha, ch. I, sec. X, cl. 13 :—"Next after the paternal great-grandfather daughter's son, the succession devolves on the paternal grandfather's mother's daughter's son who presents an oblation in which the deceased owner participates ; namely, to the owner's paternal great-grandfather, *i. e.*, his maternal great-grandfather." This is the kinship of the plaintiff and the 4th defendant to the deceased Taik Chand and by the general rule of inheritance, if it be applicable to the same extent here, they are his legal collateral heirs.

We must consider, then, what is the effect of the authoritative texts of the law which prevails in Madras. If they positively define the order of collateral succession so as to

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exclude the sons of grand-daughters, the general rule can of course be of no avail in the plaintiff's favor.

In the Mitakshara, cap. 2, sec. 5, it is laid down that on failure of brothers' sons the inheritance passes to the Gotraja or Gentiles, kinsmen sprung from the same family as the deceased; namely, the paternal grandmother and relatives connected by oblations of food and libations of water, but that on failure of the father's descendants the heirs are successively the paternal grandmother and grandfather, the uncles and their sons. On failure of the paternal grandfather's line, the paternal great-grandfather, his sons and thier issue inherit. If there be none such the succession devolves on kindred by libations of water, and they must be understood to reach to seven degrees beyond the kindred connected by funeral oblations of food, or else as far as the limits of knowledge as to birth and name extend. Accordingly Vrodha Manu says, "the relation of Sapindas or kindred connected by the funeral oblation ceases with the seventh person, and that of Samanodakas, or those connected by a common libation of water, extends to the fourteenth degree, or as some affirm it reaches as far as the memory of birth and name extends. This is signified by *gotra* or the relation of family name."

The next section (sec. 6) treats of the succession of cognate kindred (bandhu) on failure of gentiles, and the kindred are declared to be, in order, the sons of the deceased's own paternal aunt and of his maternal uncle and aunt, and, in like order, the sons of first his father's and next his mother's paternal aunt and maternal uncle and aunt. Then follows section 7 in which the succession on failure of kindred is stated to pass to the preceptor, or, on failure of him, to the pupil.

If these passages and the primary text of Manu (chap. 9, Sl. 187) had been the whole of the law on the subject and it were *res integra*, we might and perhaps would have considered that the general rule was not expressly controlled so far as to exclude the son of a grand-daughter the Sapinda of a common paternal ancestor from succeeding as a collateral heir. But, looking first to the father's descendants, it has long been considered that the rule of succession

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as laid down in the Mitakshara, (cap. 2, sec. 4) on the text of Manu excludes a sister's son from the right to inherit (1 Strange Hindu Law 147) (Mac: Princ: of H. L. 28) and in the case of Kullammal v. Kuppa Pillai (1 Madras H. C. Reports, p. 99)the law was taken to be clearly so in Madras: this is direct and positive authority, based upon the Mitakshara itself, against the operation of the general rule in the present case, for no distinction in *principle* can be drawn between the son of the father's daughter and the son of the grand-daughter of the paternal grandfather or other more remote ancestor. It would be strange indeed if the latter could inherit and not the former ; but express law may nevertheless so provide.

The heirship of the plaintiff then can be upheld only by force of positive law, and that which governs in Madras appears to exclude collateral kindred claiming through females except in the class of bandhus who succeed immediately after collaterals related through the most remote of the samanodakas in direct ascent. A passage in Sir Thomas Strange's Hindu Law,(Vol.I, page 148,)it is true, does favour such a distinction as that first adverted to, but it is confined to the sons of daughters of a paternal ancestor and rests only as a reference generally to the Bengal authority Srikrishna Terkalankaro and the Daya Bhaga, Mitakshara, and Digest. But the authority of the Smruti Chandrica, which is second only to the Mitakshara, expressly excludes from the enumeration of the heirs the descendants of ancestors through females. In chapter XI (Sec Kristnaswamy Iyer's translation) the operation of the term " Gotraja " " Gentiles " in the texts of Yajnavalkya is discussed and declared to exclude female descendants of the grandfather and other ancestors ; and the order of succession pointed out after brother's sons is confined to male issue of ancestors to the extreme limits of the remote kindred, the samanodakas or sakulla, after whom the bandhus or kindred claiming through females succeed, and these are definitely indicated by a separate text as in the Mitakshara. This is clear and specific and prevents any more general application of the language of the Mitakshara. We find too that Mr. Sutherland in his Treatise on Inheritance (page 33) states the order of succession under the law current

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in Benares and in the south of India in accordance with the Smruti Chandrica. Against the weight of these authorities we have not found, nor have we been referred to, any text or commentary of the School of Law in force here which places the son of a grand-daughter within the heritable collateral kindred ; and it is further to be observed that the descent in the class of near sapindas does not pass lower than the son of a daughter. We are constrained to come to the conclusion that the law appears to be (as stated in Mr. Strange's Manual, sec. 304 &306) that only descendants of ancestors in the male line within a certain limit are collateral heirs, and that on failure of such heirs the inheritance passes for the first time to collateral kindred through females who are bandhus. The plaintiff and the 4th defendant therefore cannot be declared the heirs of Taik Chand.

The result is that the decree appealed against must be affirmed, but we think without costs, as the defendants did not question the plaintiff's heirship and the parties had no opportunity of being heard upon the point at the trial.

Appeal dismissed.

APPELLATE JURISDICTION (*a*)

Ex-parte MOONEE RANGAPPEN, *the Appellant in Regular Appeal Suit No.* 78 *of* 1866, *in the Civil Court of Salem.*

In cases where, for the purpose of stamping an appeal, it is impracticable to ascertain accurately what portion of permanent revenue has been assessed on the lands in dispute in a suit, the appellant should furnish to the Registrar a memorandum giving an estimate of the market value and the date on which it has been calculated. If the Registrar consider the estimate clearly insufficient the Court will issue a commission to ascertain the proper market value.

The provisions of Schedule B. of Act 26 of 1867 considered.

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THIS was an application for the admission of a Special Appeal against the decree of C. F. Chamier, the Civil Judge of Salem, in Regular Appeal No. 78 of 1866.

The Acting Advocate General, for the appellant, the first defendant.

(*a*) Present : Scotland, C. J. and Collett, J.