Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bhyah Ram Sing and another v. *Bhyah Ugur Sing and another, from the late Sudder Dewanny Adawlut at Agra, North-West Province, Bengal; delivered 28th June,* 1870.

Present:

SIR JAMES W. COLVILE.
JUDGE OF THE HIGH COURT OF ADMIRALTY.
LORD JUSTICE GIFFARD.

SIR LAWRENCE PEEL.

THE suit out of which this Appeal arose was brought in the Court of the Principal Sudder Ameen, of Goruckpore, by the Plaintiffs, as heirs, after the death of his widow, who survived him, of one Jaskurun Singh, to recover certain moveable and immoveable estate, the property of the deceased, at his death.

The title as heirs was described generally in the Plaint, but the course in which it was derived appeared by a pedigree exhibited by the Plaintiffs and filed with the Plaint. It thus appeared that the Plaintiffs claimed as kindred of the deceased, connected with him by descent from their common ancestor, Chuttur Bainee Singh.

By the pedigree it appeared that the Plaintiffs and the deceased were in an equal degree removed from the common ancestor, being his great-great-great-grandsons. The Appellants contended that the Plaintiffs were too remote in descent from the common ancestor to be capable of succeeding to the deceased.

At the widow's death the heirs of the husband, at that time alive, were the legal heirs. The property

claimed was at that time in the possession of the Defendants, under alleged alienations by the widow. Into the validity of their titles, respectively, no inquiry could be made by the Appellate Court in India, from the mode in which the case was submitted to it; and the Appellants may be treated simply as parties who had a right to put the Plaintiffs to proof of their title. It was conceded on the argument that they were not descendants of the common ancestor.

The Defendants denied the Plaintiff's title. Admitting the pedigree to be correct as far as it went, and assuming, for the purpose of raising their objection to the title, all that the pedigree stated to be true, they contended by their answer that the Plaintiffs were not within the line of heirs. They raised, also, two other objections in bar of any inquiry into their own title, viz., that the suit was barred by limitation of time, and that the matter of the Plaintiff's title was *res judicata*, and had been adjudged against parties in privity of title with the Plaintiffs. As these two objections were not insisted upon on the argument of this Appeal, it is unnecessary to state the facts as pleaded on which they rested.

The suit did not proceed in the Zillah Court beyond the framing of issues, at which stage the Judge framed three issues in bar, involving the three points above stated. Deciding all three against the Plaintiffs he dismissed their suit. On the title he took the opinion of the Pundit of the Court, whose Bywustha was to the effect that the Plaintiffs were beyond the line of heirs, and was in direct affirmance of the objection raised by the answer.

From this decision the Plaintiffs appealed to the late Sudder Court of the North Western Provinces, which reversed the decision of the Court below on all the three issues in bar, and remanded the case to the Court below for trial. The correctness of this decision on the second and third issues in bar admits of no dispute, and it is unnecessary to notice them further.

As no decision was given in the suit below except on the issues in bar, as the Sudder Court remanded the suit for trial, and as the appeal to Her Majesty is limited necessarily to the decree reversing that of the Court below on the s ues

in bar, their Lordships will be careful to limit their observations as well as their decision in this case, strictly to the matter on which the decree under appeal proceeded.

The decision in the Sudder Court, as well as that in the Court below, may be viewed as in the nature of a demurrer, on which any consideration of possible title on other assumed states of facts would have been irregular. The decision of this case involves the consideration of a most important part of that vexed and difficult subject—the Hindu law of succession. It must be limited to the validity of the title pleaded.

The title pleaded is that of some in the class termed Gentiles, asserting priority in that class. The derivation of title to the succession of the deceased opening on the death of his widow who survived him, is made necessarily from a common ancestor, who is named, and from whom the lines of the deceased and the claimants are respectively traced. The pedigree, if it be full and true, establishes community of family, kindred, and priority, unless the objection of the Defendants be sustained; and nothing more is needed to be pleaded or proved, in support of that title if valid. If it be not a good title of inheritance by the Hindu Law, the Plaintiffs' suit must fail. The issue in bar submits the objection to decision. The pedigree for the purpose of the Appeal must be taken to be both full and true.

No objection founded on alleged facts not apparent on the face of the pedigree can be urged against a decree which did not proceed upon, and could not have proceeded upon, grounds not raised by the issue in bar. The question, then, is reduced to this, whether the Plaintiffs, being great-great-great-grandsons of the common ancestor, were too remote in degree to be heritable as Gentiles.

The subject is important: it is beset by difficulties raised by varying opinions, decisions, and comments on a text clear enough, if interpreted by the principles of the Hindu Law according to the Benares school, which is the most orthodox of the different schools. The governing authority of that school is the Mitacshara. The compiler of the Mitacshara is said to have been an ascetic, or devotee, and from that source nothing at variance

with the religion of the Hindus is likely to have flowed. The Hindu Law contains in itself the principles of its own exposition. The digest subordinates in more than one place the language of texts to custom and approved usage. Nothing from any foreign source should be introduced into it, nor should Courts interpret the text by the application to the language of strained analogies. Approaching this somewhat delicate subject with an unfeigned desire to decide it in harmony with the religious feeling of Hindus, their Lordships observe that the case furnishes no evidence whatever that the decision under appeal disturbs that harmony. On the contrary, the Judges of Appeal overrule a former decision given in their own Court which, in their opinion, had disturbed it.

The Mitacshara, in the 5th and 6th sections of the 2nd chapter, recognizes two successive classes of heirs: first, "Gentiles;" next, bandhoos; after them it places certain special persons, and after these last the State, the *ultimus hæres*.

Whatever descent prevails, and even where the State takes by escheat, the duty of some ceremonial performance to the deceased is still enjoined.

The "family" is the cherished institution of Hindus. Individual separate ownership is less the subject of the general remarks of commentators on the Hindu Law than the associated aggregate community, the family. In this respect an analogy is observed between family ownership and that of the old village community. Consequently, family union or connexion derived from a common head, the founder of the family, may reasonably be regarded, amongst a patriarchal people, as the source of the entire class from which a succession of heirs may be derived. Again, as males are preferred to females in succession, from religious reasons, this same class may be reasonably subject to the condition that the descent be generally derived from males, who, for the same reason, may obtain a constant preference. The text of the whole of the 5th and 6th sections of the 2nd chapter of the Mitacshara is in the strictest conformity to these principles. The Gentiles, or gotraja, from the gotra, are described as descending from one common stock a male, and derived generally through males, as forming a family, though embracing, possibly, many families, and such original

bond of union is regarded as necessary to the constitution of the gotra. These conditions are all that are stated as necessary to the constitution of the class of Gentiles.

As regulating preference of succession amongst them, the law of succession amongst Gentiles classifies them further, as sapindas and samanoducas; the first it treats as prior to the second, but excludes neither, within limits wide enough to include the present Plaintiffs. As the Plaintiffs then in this case show a common ancestor, a Gotra, a community of family, a descent which extended to the deceased and themselves, they appear to satisfy every condition of the text, and as the decision appealed from proceeds upon the above grounds, and strictly conforms to the language of the Mitacshara, it follows that it must be affirmed, unless it can be shown, that the plain language of the Mitacshara has received some qualification by usage or judicial construction.

The decision of the present case does not require that the Court should distinguish sapinda from sapinda, nor define where sapindas cease and samonaducas begin. This is not a case of priority between two persons claiming as heirs, or between two classes of heirs, it is one of asserted exclusion from inheritance, raised by persons not competitors in the prescribed degrees of heirs.

The question of preference is distinct from that of entire exclusion. When a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty. It obtains properly when a succession opens to a deceased, when the question mooted is a real one (at least in the contemplation of pious Hindus), viz., who best can confer on the deceased and his ancestors not fully benefited, the benefits which the grades of oblations offer in differing degrees. Where no sexual or personal incapacity exists, no ground of entire exclusion from inheritance exists if the opposing parties confer inferior benefits, or benefits in equal degree only. In such a case what reason could justify a sentence of exclusion from inheritance on a claim to put a limitation on language which declares the whole class heritable, and not simply some persons found in it? Where all the contending kindred are in an equal degree remote, and

where the benefits conferred are equal, though slight, the principle of selection founded on superior efficacy, is inapplicable to the solution of that question of precedence.

Had a course of decisions, or had the actual practice of Hindus confirmed the view, which some framers of genealogical tables appear to have taken of this subject, it would have been the duty of the Courts of Justice to interpret the language of the Mitacshara by the aid of this modern light: but such is not the case, the weight of opinion and of decision is against the Appeal.

The Sudder Court observed that the Judgment below had followed a case which had been overruled in two succeeding cases in the same Court. It treated the overruled case as one which broke in upon the uniformity of the law. The Sudder further supported its opinion by the authority of two cases decided in the Privy Council. The case in the 4 Moore, p. 292, was governed by the law of the Mitacshara, but the point as to the calculation of the degrees for which it was cited as an authority was rather assumed than decided, for the decision proceeded on the ground that the Bengal School was the one to be followed in that case. In the case in 2 Moore, p. 132, the very passages of the Mitacshara and that from Menu, which has been relied on in this case and in the Court of Appeal in India, referring to the "seventh person," and the limits of the line of sapindas, received an authoritative exposition. That case, it is true, was one to which the doctrine of the Mithila School was applicable, but the interpretation of the text was unaffected by that distinction.

If this last case be attentively considered, and the learned and elaborate opinion of Mr. Harrington be carefully studied, it will clearly appear that the preponderance of the opinions of the various Pundits then consulted, was greatly on the side of the literal construction of the Mitacshara. The Judgment of the Privy Council concludes, that the Bandhoos do not inherit "till those on the father's side to the seventh degree have been exhausted." As the Judgment is founded in a great degree on that of Mr. Harrington, and expresses no dissent from his method of arriving at the seventh person, by taking ix degrees in the descending or ascending line,

the Sudder Court was justified in treating this point as settled by authority, and the Plaintiffs, as Gentiles within the degrees, and so entitled to inherit. The Pundits may be taken as fair exponents of the views of the Hindu people on such subjects, and as the great majority of them supported the inclusive construction which ranks the descendants to the sixth degree amongst the class of sapindas, there is no reason for supposing that the plain construction of the language of the text of Menu, and of its authoritative comment, will clash with the religious feeling of Hindus.

Their Lordships are of opinion that the decision appealed from, on the materials before the Court, on the issues in bar was correct, and they will humbly advise Her Majesty that the Appeal be dismissed with costs.

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