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carefully perused the depositions of these witnesses; but we find that they are of too vague a character to enable us to say with any certainty that the plaintiffs are, or have been, in possession of any particular articles which are liable to partition, or, if such articles exist, to determine their nature and value. It is clear that, until the present suit was brought, the defendant never thought of claiming a share in the moveable property in the hands of the plaintiffs; and it is not likely that he would have acquiesced, from Venkatrav's death in 1863 until this suit was brought in 1872, in such a very unequal apportionment of the family jewels, &c., as he now alleges to have been made. On the whole, therefore, we are of opinion that the Subordinate Judge properly declined to make a decree in regard to the moveable property in favour of either party.

We amend the decree of the Subordinate Judge, and direct that the defendant do deliver to the plaintiffs two-thirds of the property in the village of Kameri which is mentioned in the plaint, and that the plaintiffs do deliver to the defendant one-third of the house and other property at Poona mentioned in the plaint. The rest of the plaintiffs' claim is, for the reasons stated in this judgment, disallowed.

The plaintiffs must bear all costs throughout.

Decree varied.

APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice Pinhey.

June 29.

BAPUJI LAKSHMAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* PANDURANG AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Inheritance—Divesting—Son of excluded person—Deaf and dumb from birth.

One Bapuji, a Hindu, died, leaving him surviving Lakshman, his undivided son, born deaf and dumb and the defendant, Pandurang, his (Bapuji's) brother's son. Lakshman being disqualified from inheriting, the defendant, Pandurang, at Bapuji's death succeeded to the entire family estate, and subsequently sold a part of it. Lakshman subsequently married and had a son, the plaintiff, who sued to recover his half share in a certain village.

* Second Appeal, No. 217 of 1881.

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Held, that, according to Hindu law obtaining in Western India, the family estate vested in the defendant, Pandurang, at the death of Bapuji to the exclusion of his deaf and dumb son; and the subsequent birth of the plaintiff did not divest the defendant of the inheritance which had solely vested in him.

Kalidas Das and others v. *Krishna Chandra Das* (1) followed.

THIS was a second appeal from the decision of C. E. G. Crawford, Assistant Judge of Thana, reversing the decree of the Subordinate Judge of Mahad.

The facts proved or admitted, in so far as they are material, are as follows:—

One Bapuji, the grandfather of the plaintiff, and his nephew, Pandurang, the defendant Ramchand's father, were members of an undivided family. Bapuji had a son named Lakshman, who was deaf and dumb from birth, and, therefore, according to Hindu law, disqualified from inheritance and entitled only to maintenance. Bapuji died, and Pandurang inherited the whole of the property, and his son sold some of it to his co-defendant. The disqualified son, Lakshman, subsequently married and had a son, the plaintiff, who brought this suit to recover his half share of the khoti village of Varangi in taluka Mahad of the Thana District.

The defendant, Pandurang, did not appear to defend the suit. His vendee appeared and answered, among other things, that his vendor became sole owner of the family property at the death of the plaintiff's grandfather, Bapuji. The inheritance having then vested in his father, the subsequent birth of the plaintiff did not divest him of it. Pandurang, therefore, had full authority to sell. The Subordinate Judge awarded the plaintiff's claim. The Assistant Judge rejected it. The plaintiff appealed to the High Court.

Hon. *V. N. Mandlik* for the appellant.—The Judge was not right in finding that the plaintiff was born after the death of his grandfather. [KEMBALL, J.—That is a finding of fact, and this Court is bound by it.] The defendant has admitted that the father of the plaintiff, although deaf and dumb, was in a position to effect partition, and did, in fact, effect partition and he is estopped from saying otherwise. The defendant's father,

(1) 2 B. L. R. F. B., 103; 11 Calc. W. R. Appeals from Orig. Jur. 11.

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as manager and senior male member of the family, must have been instrumental in getting the plaintiff's father married, and he is, therefore, equally estopped from saying that the son born of the marriage should not inherit. Hindu law does not recognize the doctrine of vesting and divesting, and, according to the doctrines prevalent in Western India, the plaintiff is entitled to succeed. The District Court has rested its decision upon the case of *Kalidas Das* v. *Krishna Chandra Das*(1); but this is a Bengal case, decided according to the doctrines of the Dayabhaga, the paramount authority on Hindu law in Bengal: (Burnell's Dayabhaga 13). The text of Manu, which excludes disqualified persons from inheritance, is as follows: "Eunuchs, and outcasts, persons born blind, or deaf, madmen, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage"(2). But the son of a disqualified person, if he be free from disqualifying defects, is capable of inheriting: (Vivad Chintamani by Prosonno Coomar Tagore, pp. 244, 245, 246 and 247). The power of the son, the grandson, and the great-grandson to claim division exists in the case of an undivided family, and it is only when the proper occasion arises for a division that a capacity is exercised: Vyavahar Mayukh, ch. 4, sec. 1(3). Yajnavalkya says: "An impotent person, an outcast and his issue; one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others (similarly disqualified) must be maintained, excluding them, however, from participation"(4). This passage must be construed to mean that the share of an excluded person will remain unallotted or held as it were in abeyance, and will not pass to the other heirs. There is no provision that the son who is to be capable of inheriting is to be born within the life-time of the ancestor as heir of whom he will take. If the disqualification of the excluded person be removed even after partition, notwithstanding such partition, a share must be given to him: Vyavahar Mayukh, ch. iv, sec. xi, para. 2(5). See also Mitakshara, ch. ii, sec. 9, para. 9(6). Narada also enjoins similarly

(1) 2 Beng. L. R., F. B., 103.
(2) Manu, ch. ix, v. 201.
(3) Stokes H. L. Books 42 *et seq.*
(4) Stokes H. L. Books 107.
(5) Stokes H. L. Books 107.
(6) Stokes H. L. Books 110.

in favour of the inheritance of disqualified persons(1). See also West and Buhler, 2nd ed., pp. 71 and 272(2); Macnaghten's Principles and Precedents of Hindu Law (3rd ed.), page 130(3). See also the judgment of Norman, J., in the Bengal case. The general rule is that a son, grandson, and a great-grandson succeed to the father, grandfather, and great-grandfather from the moment of birth, and, unless some exceptional rule excludes them, they must be held entitled to succeed. According to the doctrine of the Mitakshara, which is of paramount authority in Western India (except Gujarat), birth is the one thing which gives to the son, the grandson, and the great-grandson, his right to inherit. That is not so in Bengal, where a Hindu can do what he likes with his property. The Bengal case, therefore, is no authority in Bombay.

Ganesh Ramchandra Kirloskar as *amicus curiæ* for the respondent.—The case of *Kalidas Das* v. *Krishna Chandra Das* and that of *Pareshmani Dasi* v. *Dinanath Das* (4) are conclusive on the question raised. The authorities which Sir Barnes Peacock cites in support of his decision in the former case apply to Bombay as well as Bengal. The Dayabhaga is undoubtedly of paramount authority in Bengal and the Mitakshara in Bombay; but on this point they both agree. It is a principle of universal law that the heir must be living (in the womb or otherwise) at the death of the propositus. According to Hindu law, heritage is defined to be wealth in which property dependent on relation to the propositus arises on his death. When inheritance descends from father to son or grandfather to grandson and so on, it is *apratibandh* or unobstructed. It extinguishes property in the last owner when his heir or heirs succeed: Mitakshara, ch. 1, sec. 1 (5). There is a text of Gautama (6) which says: "An idiot and an eunuch must be supplied with food and raiment, but the offspring of an idiot may claim a share"; and the commentary upon it runs thus: "From the use of this term, *claim*, it must be understood as made evident, that, if he is the heir, on the death of the paternal grandfather, then only

(1) Stoke's H. L. Books 457.
(2) Morley's Digest 1338.
(3) 2 Colebrooke's Hindu Law, 425.
(4) 1 Beng. L. R., A. C., 117.
(5) Stoke's H. L. Books, 364 and 365.
(6) 2 Colebrooke's H. L. 439.

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shall he take a share." The great canon of succession which applies to others than sons, grandsons, and great-grandsons, illustrates and supports the proposition that the heir must be living at the time of the death of the person to whom the heir succeeds. The rules as to the succession of brothers (1) and of *bandhus*(2) also support it. The Hindu law does not, in so many words, recognize the doctrine of vesting and divesting, but some of its rules undoubtedly tacitly recognize it. For instance, the rule propounded by Manu, that a son, born after a division, shall alone take the paternal wealth (3) and the rules which follow it (4). There is also the case of the adulterous woman. Adultery is a disqualifying defect, but when an inheritance is once vested in a woman, her subsequent adultery does not divest her of it(5). Lastly, there is the case of an adoption. The result of the authorities would, therefore, seem to be that if this incapable son should have a son born afterwards, that son, if capable, would stand in his father's place, and inherit that property which his father would have inherited, if capable, if the son be in existence at the time of his grandfather's death, and not otherwise.

KEMBALL, J.—The case before us may be shortly stated as follows:—

Pandurang Dadaji, the father of defendant No. 2, and one Bapuji were the joint proprietors of a family estate. Bapuji died, leaving him surviving, one son Lakshman, born deaf and dumb, and his co-parcener Pandurang aforesaid; and, some time subsequent to Bapuji's death, Lakshman had a son, the minor plaintiff, who was born without any disqualifying defects.

This suit was brought on the plaintiff's behalf to recover, in right of inheritance, certain of the admittedly ancestral property, and the Assistant Judge, upon the facts above stated, which we must take as conclusively proved, held, on the authority of *Kalidas Das and others* v. *Krishna Chandra Das*(6) decided by the Full Bench of the Bengal High Court, that, on the death of Bapuji, Pandurang became absolute owner of the family estate,

(1) Stoke's H. L. Books, 445.
(2) *Ibid.* 449.
(3) *Ibid.* 394.
(4) Stoke's H. L. Books, 445.
(5) West and Buhler, pp. 49 and 282.
(6) 2 Beng. L. R., F. B. Rulings 103.

Lakshman being excluded by Hindu law from inheriting, and that the property having once vested in Pandurang could not be divested in favour of the son subsequently born to Lakshman.

It is not pretended that the plaintiff was begotten and in the womb at the time of his grandfather's death, and it is, moreover, admitted in argument to be settled law in this Presidency that a congenital defect, such as Lakshman's, excludes from inheritance, and that the son of an excluded person, if free from disqualifying defects himself, is entitled under ordinary circumstances to inherit. The case, however, attempted to be made in appeal is that the Full Bench decision relied on by the Assistant Judge, though containing good law as regards Bengal, is opposed to the Hindu law as administered on this side of India, and in the course of the argument various texts were cited from the Hindu law books, some of authority here and others applicable to Bengal alone. Admittedly not one of the books referred to lays down anything with respect to the rights of inheritance of after-born qualified sons of excluded persons where an estate has already vested in a member of the family by right of survivorship, and the argument which the learned pleader for the appellant wished to found on one text relating to the rights of faultless sons of disqualified persons born after partition (the only case cited in which any analogy was possible) was pressed upon the Bengal Full Bench, and was fully considered and disposed of upon authorities clearly applicable to this side of India. A rule, according to the view of Vidnyanesvaracharya, "ought to be restricted (in its effects) by virtue of a text only that admits of no other explanation (*i. e.*, no explanation that brings it into harmony with the first)."—*Vide* West and Buhler, page 517, para. 23. We think that the judgment of the learned Chief Justice of Bengal proceeds upon principles common alike to this Presidency and to Bengal. We must take it that, on the death of plaintiff's grandfather, Pandurang became sole proprietor, and that the estate of Pandurang having once vested in possession could not be defeated and divested by the subsequent birth of plaintiff, and holding as we do that the law in these respects is the same here as in Bengal, we shall follow the rulings of the Bengal High Court. We say rulings, as prior to the Full Bench

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ruling there had been a similar decision by a Division Bench, *Pareshmani Das* v. *Dinanath Das*(1), though the judgment was exceedingly short.

We are indebted to Mr. Kirloskar, who obligingly argued the case for the respondent who was not represented here.

We affirm the decree of the lower Court.

Decree affirmed.

(1) 1 Beng. L. R., A. C., 117.

APPELLATE CRIMINAL.

Before Mr. Justice Kemball and Mr. Justice Pinhey.

June 29.

EMPRESS *v.* MAGANLAL.*

Jurisdiction—Offence in foreign territory—Extradition—Acts XXI of 1879 *and XI of* 1872*—Native Indian subject.*

A Native Indian subject of Her Majesty committed an offence (viz., theft in a dwelling-house,) in the territory of a Native State in alliance with Her Majesty, and was discovered in the territory of another Native State in alliance with Her Majesty, and from there brought down or came of his own accord to Ahmedabad. A certificate was granted by the Political Agent that the offence ought, in his opinion, to be inquired into in British India. At Ahmedabad a preliminary inquiry was held by a Magistrate, who committed the accused for trial by the Court of Session.

Held that the Session Court at Ahmedabad was competent to try the offence committed in foreign territory as if it had been committed in the Ahmedabad District under section 9 of the Foreign Jurisdiction and Extradition Act XXI of 1879, for when the accused was brought from foreign territory to Ahmedabad he was "found" at a place in British India within the meaning of the section. The expression "was found" used in this section must be taken to mean not where a person is discovered, but where he is actually present.

THIS was an appeal against a sentence modified, under section 18 of the Code of Criminal Procedure (X of 1872), by S. H. Phillpotts, Session Judge of Ahmedabad.

The accused Maganlal was arrested without warrant by a member of the Ahmedabad District Police at the village of Kharedi, in the Native State of Sirohi, Rajputana Agency, on a

* Appeal, No. 78 of 1882.