(1869) 03 CAL CK 0007

Calcutta High Court

Case No: None

Krishan Chandra Das		APPELLANT
	Vs	
Kalidas Das and Others		RESPONDENT

Date of Decision: March 10, 1869

Judgement

Norman, J.
The question I have to consider is whether, under Hindu law, on the death of Pyari Mani, the estate of Deochandra vested absolutely in Gurudas, so as to exclude any after-born son of Bireswar; or whether Krishan Chandra, on his birth, became entitled to the share of Bireswar, as heir of his grandfather. The Advocate-General contended that, on the death of Pyari Mani, the estate of Deochandra became vested in Gurudas, and could not, subsequently, be divested; and he referred, in support of that position, to a recent case decided by the Privy Council-- Mussumat Bhoobun Moyee Debia . But the decision of the Privy Council does not proceed upon any rule of such wide application as that contended for by the Advocate-General. The case should be compared with that of Sham Chunder v. Narayni Dibeh (1 Sel. S.D.R., 209), with which it does not conflict, and in which the late Sudder Court decided that an estate which has descended to a collateral heir may be divested in favour of a son afterwards adopted.

2. The text of Manu is as follows, Chap. IX, sloka 201:--"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." Yajnavalkya says: "An outcast and his son, an eunuch, one lame, a madman, an idiot, one born blind, and he who is afflicted by an incurable disease must be maintained without any allotment of shares (Col. Dig., Book V. Art. CCCXXXI)."

3. Now the first question that occurs is, whether the share of the inheritance, which but for their defects such excluded persons would have taken, does vest absolutely in the heirs. The passage of Yajnavalkya is remarkable, and is certainly capable of bearing the construction that the share of an excluded person will remain unallotted, or as it were in abeyance, and will not pass to the other heirs. It certainly does not vest absolutely in

them. Yajnavalkya shows that not only is the excluded person to be maintained, but his wife is to receive maintenance. His daughters also are to be maintained until their marriage, and the expenses of their nuptials are to be defrayed. (As to this latter point, see Mitakshara, Chap. II, Section 10, verse 13). Manu says, Chap. IX, sloka 203. "If the eunuch and the rest should at any time desire to marry, and if the wife of the eunuch should raise up a son to him by a man legally appointed, that son and the issue of such as have children shall be capable of inheriting."

4. 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. Unless full force is given to the words "at any time," the result would follow that, although the wife and daughter of an excluded person would, under all circumstances, be entitled to maintenance, yet the son of such person born after the death of the ancestor, who could offer the funeral cakes, would be excluded from all participation in the ancestral property, and even from maintenance, because there is no provision that such a son is to receive maintenance. The son''s right to inherit is declared in the Dayabhaga, Chap. V, verses 11, 17, 19; Yajnavalkya, Colebrooke''s Digest, Book V, Art. 332; Gautama, ib., 335; Dayakrama Sangraha, Chap. III, verses 10, 13; Mitakshara on Inheritance, Chap. II, Section 10, verses 9, 10, 11.

5. If the disqualification of the excluded person be removed even after partition, notwithstanding such partition, a share must be given to him. In the Mitakshara, Chap. II, Section 10, verse 7, it is said: "If the defect be removed by medicaments or other means, as penance and atonement, at a period subsequent to partition, the right of participation takes effect, by analogy, to the case of a son born after separation. So in the Vyavahara Mayukha: "If after division virility or the other absent qualification be regained by medicine or other means, the person will then receive his share, like as a son born after partition does." It is true, that the Mitakshara and the Vyavahara Mayukha are not authorities in Bengal. But the comments explain passages in Manu and the Dayabhaga which are capable of bearing the construction which the authors of these commentaries have put upon them.

6. It appears then to be certain, that, according to rules admitted in all the Schools of Hindu law, on the death of a father leaving a disqualified son, that share of his property which such son but for his disqualification would have taken, does not at once vest absolutely and finally in the other heirs. I now come to a Bengal case, in which the opinion of the Law Officers is directly in point. In 2 Macnaghten''s Hindu Law is a report of a question put to the Hindu Law Officers of the Zilla Court of the 24-Pergunnas: Supposing an insane person to have a son born subsequently to the death of his (the insane person''s) father, which son is since dead; in this case was the grandson entitled to inherit immediately from his grandfather by reason of his father''s insanity; and if so, on his death, has his mother any title to succeed him? The answer is: "If after the death of the grandfather a son of the insane person have been born, and subsequently died, the original proprietor''s daughter-in-law will, as mother of the child, take the heritage in

succession to her child, and supply food and raiment to her mother-in-law and husband." The opinion of the Law Officers, as given in this case, seems fully borne out by Hindu law. In my opinion, on the birth of Krishan Chandra, he became entitled to the inheritance from which his father had been excluded. Krishan Chandra will be entitled to have the costs of this issue against the parties represented by the Advocate-General. The other parties will bear their own costs.

7. From this decision, the defendants appealed; and the case came before Peacock, C.J., and Macpherson, J. It being then found that there was a decision by Bayley and Macpherson, JJ., 1 B.L.R., A.C., 117, conflicting with that of Norman, J., the case was referred to a Full Bench, on the following question: "Whether, by Hindu law, an estate once vested can be divested in favour of the son of an excluded person born after the death of the ancestor, his grandfather?"

8. The Advocate-General (Mr. Woodroffe with him) for the appellants.--The principle I rely on is laid down by the Privy Council, in the case of Mussumat Bhoobun Moyee Debia . In Sham Chunder v. Narayni Dibeh (1 Sel. S.D.R., 209), it was only decided that Ramkishor, the adopted son of the younger widow of Krishnakishor, succeeded to Nandkishor, who was the previously adopted son of the elder widow; and Ramkishor is treated not as heir to his father, but as succeeding collaterally to his brother. The mere possibility of a person coming into existence, who might, if he had come into existence before, have inherited, will not affect an estate once vested. The Court below treats it as if the share were to remain in abeyance, but the words are "excluding them from participation."--Cole-brooke"s Dayabhaga, Chap. V, verse 10. The judgment assumes that the son of an unqualified person, born after the death of the ancestor, is the proper person to offer the funeral cakes. But he could not offer them, the only person who could properly do so was Gurudas. The issue of the unqualified persons mentioned in the Dayabhaga, Chap. V, verse 17, must be in existence at the time when the estate descends, that is, when the shares are allotted. The judgment then refers by analogy to the case of a son born after separation. In Karuna Mai v. Jaichandra Ghos (5 Sel. S.D.R., 42), it was held that such a son is preferable to the son of the paternal uncle of the deceased, and that the latter would be excluded by a sister likely to produce male issue holding the estate for such issue. But in a later case it was held, that the estate could not thus remain in abeyance in expectation of future issue, Lakhi Priya v. Bhairab Chandra Chaudhuri (5 Sel. S.D.R. 315). This was held also in Dukhina Dossee v. Rashbeharee Majoomdar (6 W.R., 221).

9. Then there was the case of Pareshmani Dasi v. Dinanath Das (1 B.L.R. A.C., 117), on which this case was referred to a Pull Bench, in which it was held that the heirs must be those who are in existence at the time the estate descends, and could not be divested from them, by one afterwards coming into existence. The principle I contend for is more consonant with the law in Bengal than that an estate should be divested, which had once vested. Any one now claiming must claim through Gurudas. [Peacock, C.J.--Do you contend that if Bireswar had, after the death of his father, recovered his sight, he could

not have taken the estate?] I contend he could not. [Peacock, C.J.--Suppose a son, who is alive in the womb at the time of the ancestor''s death, and is born shortly afterwards, he being unborn at the death, could not he take? And as the estate could not be in abeyance, would not the collateral heirs take subject to the estate divesting in favour of the after-born son?] The issue of the pregnancy must be awaited, Vyavastha Darpana, 280.

10. Mr. Kennedy for the respondents.--There is no limit laid down for those who are qualified coming in for inheritance; and, therefore, if the other side are right, they must be so by some principle not agreeable to all those passages throughout the Hindu law books, which lay down no period as a limit. Provision is made for the maintenance of all those who are not capable of inheriting.

11. The widow of a blind man, who died leaving a son, would not on such a principle be entitled to maintenance, though if she had been childless, she would have been so entitled. Dayabhaga, Chap. V, verse 19; Mitakshara, Chap. II, Section 10, verse 15. Thus it must be inferred that, as the widow cannot be maintained, the son must be intended to take a share in the inheritance so as to maintain her. The case of a son born after the ancestor''s death is analogous to the case of a coparcener returning from abroad, in which, though there seems to be a complete vesting in others, during his absence, his share is yet divested in his favour when he returns: Dayabhaga, Chap. VIII, Dayakrama, Chap. IX. Sons born after partition are to take their share, Vyavastha, 534, and in case any disqualification is removed after division, the person becoming qualified must have a share. Ruvee Bhudr Sheo Bhudr v. Roopshunker Shunkerjee (2 Borr., 656).

12. Another case of the divesting of an estate once vested, is adoption. In adoption, the consent of the widow is not necessary; for, suppose, there are two widows, and one of them exercises her power of adoption, that would take away the estate from the other. [Mitter, J.--That has never been decided, and is still an open question.] An estate is liable also to be divested in case the disqualification is removed, either by expiation for an offence, or by restoration from disease, Vyavastha, 658, 1005. But they ought to receive maintenance. Gurudas took the estate subject to maintenance, and subject also to its being divested when a qualified son was born to the person to whom the estate would have gone but for his disqualification.

13. The Advocate-General in reply.--In the case of adoption, the son does certainly inherit from the father; but then the widow, by her own voluntary act, relinquishes the estate, and is in the same position as if she had been left pregnant and given birth to a son after her husband''s death. She takes an estate defeasible by her own act; the son when adopted being looked upon in the same light as a son born before the death of his father. This clearly distinguishes it from the present case. Suppose a Hindu widow has the power to adopt, and the next contingent heir was a sister''s son, and the widow without adopting surrenders to that heir, at the time she does so, the son of that sister''s son would not be heir. Suppose her now to exercise her power of adoption, it could not be said that the

adopted son could recover possession, as the last full owner would be the sister''s son, who, though he could not take through his uncle, would do so through his father. The Mitakshara, Chap. I, Section 6, verses 4, 5, and 6, seems to treat the case of the son born after partition on this principle: that he is not to take a share of what his brothers had, taken, but to take a separate share from his father; the 9th paragraph is the same, applied to the case where the wife''s pregnancy is not manifest; the 12th when it was known. Nothing is laid down with respect to after-born qualified sons of unqualified persons, and this shows that the question of exclusion was only considered when it became necessary by the estate being ready for division, that is, on the death of the ancestor. Expiation does not revest the estate in one who has not taken through being unqualified by want of expiation (1 Strange, 185). So exclusion is not got rid of by the restoration of the person afflicted; in the same way, the subsequent begetting of a son can do no more than expiation or restoration from disease; it cannot vest in the subsequently begotten son a right to which the father had never succeeded. The same principles are laid down in the Dayakrama, Chap. V, verses 10, 12, 20, and 21, and it is borne out in the case of a subsequently-born sister''s son, in the case of Aulim Chund Dhur v. Bejai Govind Burral (6 Sel. S.D.R., 224).

Peacock, C.J.

14. The facts, as found by the learned Judge in this case, are not disputed. They are as follows:

Deochandra Das died in the year 1832, leaving an only son Bireswar Das, who had been blind from his birth, and two widows, the survivor of whom, Pyari Mani, died in 1849. Bireswar, the blind son, having, according to Hindu law, been excluded from inheritance, on the death of Pyari Mani, Gurudas, the nephew of Deochandra, occupied the position of heir of Deochandra. Bireswar having married, a son, Krishan Chandra, was born to him, in 1858. Bireswar died in 1861.

15. On the above facts, the learned Judge held that, on the birth of Krishan Chandra, he became entitled to the inheritance, from which his father had been excluded. Now, if Krishan Chandra succeeded to the estate by inheritance, he succeeded as the reversionary heir and grandson of Deochandra. He could not succeed as son and heir of his father, who was then alive, and to whom the estate never belonged. If he succeeded as reversionary heir of his grandfather, Deochandra, he did so 26 years after his grandfather''s death, and nine years after the death of Pyari Mani, his grandfather''s surviving widow, upon whose death the right of the reversionary heirs of his grandfather first occurred. Krishan Chandra not being in existence when Pyari Mani died, he was not the reversionary heir at that time; and the estate descended to Gurudas, who was a nephew, and would, at that time, in the absence of Bireswar, have been the reversionary heir of Deochandra.

16. There is no case of which I am aware, in which, according to the Hindu law as administered in Bengal, a male, who takes by descent, takes anything less than a full and absolute estate, subject to charges for maintenance, &c.; or to show that he is not at liberty to alienate that estate by gift or sale. The cases of widows and sons adopted after the deaths of their adoptive fathers, were referred to in the course of argument, to show that an estate, less than a full and absolute estate, may be taken by inheritance, and that an estate vested by descent may be divested. But these cases are not analogous.

17. The case of a widow succeeding to the estate of her husband upon his dying without issue, and the case of other females, depend upon particular texts. Baudhayana, after premising a woman is entitled, "proceeds not to the heritage; for females and persons deficient in an organ of sense or member, are deemed incompetent to inherit." The construction of this passage, is "a woman is not entitled to the heritage;" that the succession of the widow and certain others (viz., the daughter, the mother, and the paternal grandmother) takes effect under express texts, without any contradiction to this maxim, Dayabhaga, Chap. II, Section 6, verse 11.

18. The case of a widow adopting a son after her husband''s death, and thereby divesting the estate which she took upon the death of her husband without issue, is one in which only her own estate is divested. There is no case in which an estate vested in a male heir by inheritance, can be divested by the adoption of a son by a widow after her husband''s death; and the case of a widow divesting her own estate by the adoption of a son, is not one from which inferences can be drawn by analogy as to the divesting of an estate once vested in a male heir by inheritance.

19. If Krishan Chandra, upon his birth, took as grandson and heir of Deochandra, the estate which, before his birth, Gurudas took as nephew and heir of the same person, and which he, as such heir, held for a period of nine years before the birth of Krishan Chandra; the case is one in which the estate of a male heir must be divested in favour of a nearer relative not in existence when the ancestor died. This appears to me to be quite at variance with every principle of the Hindu law of inheritance.

20. According to that law, heritage is defined to be wealth in which property dependent on relation to the former owner arises on the demise of the owner, Dayabhaga, Chap. I, verse 5; and again it is said in the same book. ''Though the word ''heritage'' signifies by derivation '' which is given,'' it has been pointed out that the use of the word ''da'' is secondary or metaphorical, since the same consequence (as that of gift) is produced, namely, that of constituting another''s property after annulling the previous right of a person who is dead, or gone into retirement or the like." Dayabhaga, Chap. I, verse 4.

21. That in heritage, property arises on the demise of the owner is also shown by verse 12 of the same Chapter, when it is said, "since it is the practice of people to call an estate their own, immediately the demise of their father or other predecessor, and the right of property is acknowledged to vest without partition in the case of an only son, the demise

of the relative is the cause of property." In verse 31 of the same Chapter, it is clear that mere demise is not exclusively meant, "for it intends also the state of a person degraded, gone into retirement, and the like, by reason of the analogy, as occasioning extinction of the property."

22. If that which occasions an extinction of property, is by reason of analogy included under the term demise, it seems to me to follow that by analogy a person incapable of inheritance, on account of blindness or the like, is, so far as inheritance is concerned, in the same position as if he were not in existence, although, as far as maintenance is concerned, he and certain members of his family have a claim upon the heir, and thus it is that as regards inheritance, though not as regards the obligation of maintenance, the son of that person may take by relationship derived through his father in the same manner as if his father were dead. If, then, property by inheritance arises on the death of the former owner, and the property of the heir is created by annulling the previous right of the ancestor, how can property once descended to an heir be divested in favour of a nearer relative, not in existence at the time of the ancestor''s death, when the property of the ancestor was annulled, and the property of the heir created?

23. In the case of Mussumat Bhoobun Moyee Debia referred to by Mr. Justice Norman, it is said, "the rule of Hindu law is that, in the case of inheritance, the person to succeed must be the heir of the lawful owner." In that case, the ancestor died leaving a son and a widow. The son survived his father, and took the estate by inheritance, and upon his death without issue, his widow took the estate as his heir. Afterwards the widow of the father having a power to adopt, adopted a son who claimed the estate as heir in preference to the widow of the deceased son. The Privy Council held, that the adopted son could not take in preference to the son''s widow. In speaking of the deceased son, who succeeded on his father''s death, and whose widow, the son subsequently adopted, claimed to displace, Lord Kingsdown said: "In this case, Bhowanee Kishor had attained an age which enabled him to perform, and it is to be presumed that he did perform, all the religious services which a son could perform for a father; he had succeeded to the ancestral property as heir; he had full power of disposition over it; he might have alienated it; he might have adopted a son to succeed to it, if he had no male issue of his body; he could have defeated every intention which his father entertained with respect to the property."

24. Speaking also of the subsequent adoption, his Lordship added: "If Bhowanee Kishor (the son who succeeded upon his father''s death) had died unmarried, his mother (i.e., the adopting widow of the father) would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule, but no case has been produced, no decision has been cited from the textbooks, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession, can be defeated and divested."

25. So, it appears to me in the present case, there is no principle and no authority cited, save only the answer of the Pandit referred to by Mr. Justice Norman, 2 Mac. Hindu Law, 300, to show that the estate once vested in Gurudas, as nephew and heir, could be divested by the birth of the grandson, Krishan Chandra, 26 years after the death of Deochandra, and 9 years after that of his surviving widow Pyari Mani. In the Vyavastha Darpana, 2nd edition, page 2, the following Vyavasthas are given:

The existence (of the son) at the time of the father''s death alone constitutes the son''s title.'' ''The meaning is that the existence of the son is the sole cause of heritable right to which the time of the father''s death is an aid.'' The phrase ''the existence of the son at the time of the father''s death'' indicates also the fetal existence of an heir in the womb.

26. Mr. Justice Norman says:--''The passage from Yajnavalkya is remarkable, and is certainly capable of bearing the construction that the share of an excluded person will remain unallotted, or as it were in abeyance, and will not pass to the other heirs. It certainly does not vest absolutely in them, Yajnavalkya shows that not only is the excluded person to be maintained, but his wife is to receive maintenance; his daughters also are to be maintained, until their marriage; and the expenses of their nuptials are to be defrayed. As to this latter point, see Mitakshara, Chap. II, section 10, verse 13.''

27. The passage is as follows:--''Yajnavalkya says, an outcast and his son, an eunuch, one lame, a madman, an idiot, one born blind, and he who is afflicted by an incurable disease, must be maintained without any allotment of shares.'' But an estate cannot, in my opinion, be said not to vest absolutely in an heir, because he is bound to provide maintenance for certain relatives of his ancestor, of a person who, but for incapacity, would have succeeded to the estate by inheritance. No one could, I think, fairly contend that a son, taking an estate by descent from his father, does not take an absolute estate, because he is bound to provide maintenance for his father''s widows and daughters, and to pay for the expenses of the daughters'' nuptials.

28. The learned Judge refers to the text of Manu and says:--''Manu says Chap. IX, sloka 203: If the eunuch and the rest should, at any time, desire to marry, and if the wife of the eunuch should raise up a son to him by a man legally appointed, that son and the issue of such as have children shall ''be capable of inheritage.''

29. The text cited from Manu, Chap. IX, sloka 201, lays down the rule that eunuchs and persons born blind are excluded from a share of the heritage. He adds (verse 202):--''But it is just that the heir who knows his duty should give them food and raiment without stint'' (meaning for life, see Mitakshara, Chap. II, section 10, verse 5) ''according to the best of his power. He who gives them nothing sinks assuredly into a region of punishment;'' and then he says in the text referred to by Mr. Justice Norman:--''If the eunuch and the rest should, at any time, desire to marry, and if the wife of the eunuch should raise up a son to him by a man legally appointed, that son and the issue of such as have children'' (meaning of such of the others as are themselves declared incapable of inheriting) ''shall

be capable of inheriting."

30. Mr. Justice Norman says:--"There is no provision that the son to be capable of inheriting must be born in the life-time of the ancestor as the heir of whom he is to take;" and that, unless full force is given to the words "at any time," in the passage before quoted, the wife and daughters of an excluded person would, under all circumstances, be entitled to maintenance, yet the son of such person born after the death of the ancestor, would offer the funeral cake, and be excluded from all participation in the ancestral property." There is no more reason for divesting the heir to whom the estate descended, than there was in the case cited from the Privy Council. If he cannot offer the funeral cake because of his non-existence, and his father could not do so on account of incapacity, I apprehend the estate passed to the person who would have been heir, and who would have offered the funeral cake, and succeeded as heir if the incapable father had not been in existence.

31. The words "the issue of such shall be capable of inheriting" mean merely that a son legally raised up to a eunuch or the issue of a man born blind, shall have a legal capacity to inherit according to the ordinary rules of inheritance, notwithstanding the eunuch or the man born blind is not capable. Inheriting and having a capacity to inherit, are two very different things. A man born blind, and the others who are declared to be incapable have not the legal capacity to inherit to any one. The son of any of such persons, if free from similar defects, has a capacity to inherit; but he does not inherit from every one who dies, but only from every one of whom, according to the laws of inheritance, he is the heir.

32. For example, a sister''s son, as the son of his uncle''s father''s daughter, may inherit the property of his uncle, his mother''s brother, if there is no other heir, and he is not incapable of inheriting, though his father was born blind, and is incapable of inheriting; but a sister''s son, although capable of inheriting, does not inherit his uncle''s property, if his uncle leaves a son or a grandson; because, though capable of inheriting, he is not, according to the Hindu law of inheritance, the heir of his uncle. The son of that son, being a sister''s grandson, cannot offer the funeral cake to his paternal grandmother''s brother; and although, if not under one of the legal disabilities, he is a person capable of inheriting by reason of relationship through his father, yet he cannot inherit the estate of his grandmother''s brother, because the relationship derived through his father does not, according to the Hindu law of inheritance, constitute a sister''s grandson the heir of his paternal grandmother''s brother. A sister''s son, if capable, is, in the absence of a nearer relation, the heir of his mother''s brother; but the son of that son is not the heir of his grandmother''s brother. The sister''s son, if born blind, would be incapable of inheriting the estate of his mother''s brother; but the son of that son, although capable of inheriting according to the text of Manu, would not inherit the estate of his father''s mother''s brother, not on account of an incapacity to inherit, but because he is not the heir of his grandmother''s brother.

33. The right of a wife and daughters of a sister''s son to receive maintenance and the like out of an estate of the uncle which the sister''s son but for incapacity would have inherited, and the right of a son of that sister''s son to inherit are, according to the Hindu law of maintenance, and inheritance, entirely different. The wife and daughters might be entitled, according to the law of maintenance, to be maintained; but the son could never, as a sister''s grandson, become entitled to succeed as heir to the estate of his father''s maternal uncle.

34. Now, it is just as much one of the general rules of inheritance that a person cannot succeed as heir, unless he is in existence either in his mother''s womb, or otherwise, at the time of the ancestor''s death; as it is, that a sister''s grandson is not the heir of his grandmother''s brother. There is no more reason for contending that the text of Manu was intended to declare that a person not in existence at the time of the death of the ancestor, would be entitled to inherit, than there is for saying that a capable son of an incapable son of a sister would be entitled to inherit the estate of his paternal grandmother''s brother. Both are capable of inheritance, but neither can inherit the particular estate, because he is not the heir of the last owner.

35. The object of Manu in pointing out that the legitimate issue of a man who was born blind, &c., is capable of inheriting, appears to have been to avoid a doubt, which might otherwise have arisen as to whether the son of a man, who is in capable of inheriting, can derive any title to inherit by reason of relationship derived through his father. This is made clear by reference to the Mitakshara, Chap. II, Section 10, verse 9, in which, speaking of the persons declared to be incapable, the commentator says:--"The disinherison of the persons above described, seeming to imply disinherison of their sons." The author (Yajnavalkya) adds:--"But their sons, whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects;" and then, in the 10th verse, the commentator says:--"The sons of these persons, whether they be legitimate offspring or issue of the wife, are entitled to allotments, or are rightful partakers of shares, provided they be faultless or free from defects which should bar their participation, such as impotency and the like."

36. Here the reason for saying that the sons of incapable persons are entitled to allotments is clearly explained. It was not for the purpose of declaring that the sons of incapable persons should have a right to inherit, whereas in the case of sister''s grandsons, they would not, according to the rules of inheritance, be heirs, but to prevent any implied disinherison of those who, according to the rules of inheritance, would be heirs in the absence of their fathers, if such fathers had not been incapable.

37. In the Dayabhaga, Chap. V, verse 11, it is said: "When the father is dead (as well as in his life-time) an impotent man, blind man, &c., are not competent to share the heritage. Food and raiment should be given to them, excepting the outcast. But the sons of such persons, being free from similar defects, shall obtain their father''s share of the inheritance;" and at verse 19: Therefore, the sons of such persons, being either their

natural offspring or issue raised up by the wife, as the case may be, to take their allotments according to the pretensions of their fathers."

38. That grandsons can take property by inheritance from their grandfather, during the life of their father, if he is incapable, is shown by this text, for he could not be entitled to an allotment, upon partition, unless he were a co-heir; and the same rule may also be inferred from the text of Devala, Chap. I, verse 18, of the Dayabhaga. Devala, too, expressly denies the right of sons in their father''s wealth: "When the father is deceased, let the sons divide the father''s wealth, for sons have not ownership while the father is alive and free from defect." Incapacity to inherit for any of the specified causes is treated as disinherison of the incapable person, but not of his capable sons. See Mitakshara, Chap. II, Section 10, verse 9, which is as follows: "The disinherison of the persons above described seeming to imply disinherison of their sons." The author adds: "But their sons, whether legitimate or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects." The above texts appear to show that the son of an incapable person may, in the lifetime of his father, have a right through his father to inherit, but they do not show that such son can inherit, if he is not in existence at the time when the right of the ancestor ceases in consequence of his death.

39. The text cited by Mr. Justice Norman from the Mitakshara, Chap. II, Section 10, verse 7, appears to me, when carefully considered, rather to support the view that an estate vested by inheritance in another, in consequence of the incapacity of nearer heirs, is not divested either by the removal of the defect or by the subsequent birth of a son of the person who was incapable, if such son was not in existence in his mother''s womb at the time of the ancestor''s death. The passage is as follows:--"If the defects be removed by medicaments or by other means, as penance and atonement, at a period subsequent to partition, the right of participation takes effect by analogy to the case of a son born after separation; when the sons have been separated, one who is afterwards born of a woman equal in class, shares the distribution." Now, there are two periods for partition; one, in the life-time of the father when he separates from his sons; the other, after the death of the father when the brothers divide. In the former case, as the father is still living, he may have a son born after partition, who was not in existence or in his mother''s womb at the time of partition. In the second case, as the father''s death at the time of partition is assumed, there cannot be a son born after partition who was not in his mother''s womb at the time of partition.

40. The text quoted in the verse 7, cited from Mitakshara, Ghap. II, Section 10, "when the sons have been separated, one who is afterwards born of a woman equal in class, shares the distribution," refer to partition in the father''s life-time. See Mitakshara, Chap. I, Section 6, verses 1 and 2, in which the meaning of the words "shares the distribution" are explained. The verses quoted are as follow:--"How shall a share be allotted to a son born subsequently to partition of the estate?" The author replies, "when the sons have been separated, one who is (afterwards) born of a woman equal in class, shares the distribution." Here the text quoted is set out: "The sons being separated from their father,

one who shall be afterwards born of a wife equal in class, shall share the distribution. What is distributed is distribution, meaning the allotments of the father and mother, he shares that; in other words, he obtains after the demise of his parents, both their portions; his mother''s portion, however, only, if there be no daughter, for it is declared that daughters share the residue of their mother''s property, after payment of her debts." This is made more clear by verses 3, 4, 5, and 6:

Verse 3.--"That a son by a woman of a different tribe receives merely his own proper share from his father''s estate, with the whole of his mother''s property (if there be no daughter)."

Verse 4.--The same rule is propounded by Manu; "A sou, born after a division, shall alone take the parental wealth. The term parental must be here interpreted appertaining to both father and mother; for it is ordained that a son, born before partition, has no claim on the wealth of his parents; nor one begotten after it, or that of his brother."

Verse 5.--The meaning of the text is this: "one born previously to the distribution of the estate, has no property in the share allotted to his father and mother who are separated (from their children); nor is one, born of parents separated (from their children), a proprietor elder of his brother''s allotment."

Verse 6.--"Thus, whatever has been acquired by the father in the period subsequent to partition, belongs entirely to the son born after separation. For it is so ordained. All the wealth which is acquired by the father himself, who has made partition with his sons, goes to the son begotten by him after the partition: those born before it are declared to have no right.

41. This shows that a son begotten after his father has been separated from his brothers, alone inherits the share which his father took upon partition as well as any wealth acquired by his father himself, but that the allotments once vested in his brothers by such father cannot be divested in his favour: and even as regards the allotment taken by the father on partition, neither the after-born son, nor the blind son, whose disqualification has been removed subsequent to the partition, would take anything, if the father should alienate his own share or allotment during his life-time. If a father should separate from his sons, having at the time of a partition one son born blind, or having some other defect which renders him incapable of taking a share, that son, if the defect should be subsequently removed, would inherit the whole of the share which his father took upon partition and all his other wealth; and I apprehend, that if the incapable son should have a son born afterwards, that son, if capable, would stand in his father''s place, and if in existence at the time of his grandfather''s death, would inherit that property which his father would have inherited, if capable.

42. The text, however, alludes merely to the person who was incapable, and points out what he is entitled to if the defect is removed. It says nothing as to the rights of a son of

the son who was incapable when his father and brothers separated. If after the death of the father his sons should divide, and one of them should have a defect rendering him incapable of inheriting, that son would not take a share upon partition. If the analogy to a son born after partition applies to this case, the incompetent man, upon removal of the defect, would be entitled to an allotment out of the visible estate received by the brothers corrected for income and expenditure. See Mitakshara, Chap, I, Section 6, verses 8, 9, 10, and 11.

43. This son, if in existence in his mother''s womb at the time of partition, if subsequently born capable, might also, by analogy, be entitled to share with his father''s brothers, in the same manner as if his father had died before partition and he had been in existence in his mother''s womb at the time of partition, and had been subsequently born capable. See Mitakshara, Chap. I, Section 6, verse II, above cited. See also Dayabhaga Ghap. VII. By a son born after partition is meant a son of whom the conception was subsequent to the division of the estate. A son, in his mother''s womb at the time of partition, does not come within the phrase "son born after partition," for the son in the womb is in point of law in existence.

44. I am of opinion that the estate which descended to Gurudas was not divested by the birth of Krishan Chandra, and that the latter on his birth did not take Deochandra''s estate by inheritance. This decision does not apply to the case of the son of a man born blind, if such son has been begotten, and is in his mother''s womb at the time of the death of the ancestor, and is afterwards born capable. The rules as to the fetal existence of an heir in the womb are collected in the Vyavastha Darpana, pp. 2, 3, and 4. See also Dayabhaga, Chap. VII, especially verses 12 and 13, and annotations thereon.

45. The Judgment of Mr. Justice Norman is reversed without costs.

Loch, J.

46. I concur.

Kemp, J.

47. I concur in the opinion that the estate which descended to Gurudas was not divested by the birth of Krishan Chandra Das, and that the latter, on his birth, did not take the estate of Debendra Chandra Das in right of inheritance.

Macpherson, J.

48. I concur in the judgment of the Chief Justice. The conclusion at which the Court arrives is in accordance with that evidently arrived at by Mr. Justice Bayley and myself as regard the case of a deaf and dumb man, in the case of Pareshmani Dasi v. Dinanath Das (1 B.L.R., A.C., 117.)

Mitter, J.

I concur.