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correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court," or section 439, sub-sections 1, 3 and 4 of which contemplate a case in which sentence has been passed and final decision has been arrived at, the High Court at this stage can interfere with the action taken by a Civil Court in sending a case for inquiry and trial under section 476.

Rule discharged.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Batty.

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BAL GANGADHAR TILAK (ORIGINAL OPPONENT), APPELLANT, *v.* SAKWARBAI *alias* TAI MAHARAJ AND OTHERS (ORIGINAL APPLICANT AND OPPONENTS), RESPONDENTS.*

GANESH SHRIKRISHNA KHAPARDE AND ANOTHER (ORIGINAL OPPONENTS 2 AND 3), APPELLANTS, *v.* SAKWARBAI *alias* TAI MAHARAJ AND OTHERS (ORIGINAL APPLICANT AND OPPONENTS 1 AND 4), RESPONDENTS.*

Probate—Effect of probate—Revocation of probate—Grounds of refusal or revocation of probate—Filing of inventory and account—Probate and Administration Act (V of 1881), sections 50 and 98.

On the 7th August, 1897, one Baba Maharaj died at Poona, leaving his widow pregnant. By his will he appointed Bal Gangadhar Tilak (the appellant) and three others to be his executors. The will, after reciting the fact of his wife's pregnancy, provided that if no son was born, or if one was born and should die prematurely, his wife should, with the advice of the executors, adopt a son to him, and the executors should continue to manage the property on behalf of that son until he attained his majority. A posthumous son was born on 18th January, 1898. The executors obtained probate of the will on 16th February, 1898, and assumed the management of the estate. The son died on 9th March, 1898. Three years subsequently, viz., on 24th July, 1901, the widow applied to the District Court for revocation of the probate granted to the executors on the grounds (1) that the will had become inoperative by the birth of her son who had succeeded to the property, which on his death had devolved on her as his heir, and (2) that the executors had wilfully and without reasonable cause omitted to file an inventory and account as required by section 98 of the Probate Act (V of 1881).

* First Appeals Nos. 38 and 50 of 1902.

The District Judge granted the application and revoked the probate. On appeal to the High Court,

Held, that an order of revocation could not be made. The circumstances which had supervened with regard to the devolution of the property would not have justified the refusal of probate if they had existed at the time at which it was granted, and they were therefore no grounds for its revocation.

Held, also, that the mere omission by the executors to file the inventory and account required by section 98 of the Probate Act (V of 1881) was not a ground for revocation. There was no circumstance in the case from which wilful omission on the part of the executors could be inferred.

The grant of probate is decisive only of the genuineness of the will propounded and of the right of the executors thereby appointed to represent the estate of the testator. It in no respect decides any question as to the disposing power of the testator or as to the existence of any disposable property.

The words "become useless and inoperative" in section 50, clause 4, of the Probate Act (V of 1881) imply the discovery of something which, if known at the date of the grant, would have been a ground for refusing it: *e.g.*, the discovery of a later will or codicil, or subsequent discovery that the will was forged, or that the alleged testator is still living.

APPEAL from an order passed by H. F. Aston, District Judge of Poona, under the Probate and Administration Act (V of 1881), revoking probate.

One Baba Maharaj *alias* Shri Vasudev Harihar Pandit died at Poona on the 7th August, 1897, leaving a will whereby he appointed five persons, viz., Bal Gangadhar Tilak, Ráo Sáheb Kirtikar, Ganesh Shrikrishna Khaparde, Shripad Sakharam Kumbhojkar and Balvant Martand Nagpurkar, to be his executors and trustees. The will further provided:

My wife Shri Sakwar is at present pregnant. If no son is born to her, or if one is born and dies prematurely, a son should be given in adoption, with the advice of the above-named gentlemen, in the lap of my wife in accordance with Shastras, as many times as it may be found necessary, in order to continue the name of my family; and the above-named Panchas should manage the immoveable and moveable estate on behalf of that son until he attains majority.

One of the executors, Ráo Sáheb Kirtikar, was unwilling to act. Probate was granted to the remaining four executors on the 16th February, 1898.

Sakwarbai gave birth to a son on the 18th January, 1898, who died on the 9th March, 1898.

The property was actually managed by the executor Balvant Martand Nagpurkar.

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The inventory and account required by section 98 of the Probate and Administration Act (V of 1881), showing the assets which had come to their hands and the manner in which such assets had been applied or disposed of, was not filed by the executors. On the 15th October, 1901, the District Court of Poona made an order that this account should be filed.

On the 29th July, 1901, Sakwarbai applied to the District Court of Poona, praying that the probate should be revoked. She contended that her husband's property had descended to her son born after her husband's death, and that on her son's death the property had come to her as his heir, and that under these circumstances the probate had become inoperative.

The District Judge ordered the probate granted to the executors to be revoked, holding that it had become useless and inoperative in the events that had happened, and also on the ground that the executors had neglected to file the inventory and account as required by section 98 of the Probate and Administration Act (V of 1881).

The executors appealed to the High Court.

Branson and *P. M. Mehta* for the appellants (the executors):—The real question in these proceedings is whether the probate granted to the executors should be revoked because of their omission to file an inventory and accounts required by section 98 of the Probate and Administration Act (V of 1881) or because of the events which have since happened. Sakwarbai cannot rely on the former point, because her contention is that the probate ceased to operate on the death of her son: see also Williams on Executors, Vol. I, pages 496-497. The fact that on the death of her son the applicant has become the owner of the property is no ground for revoking the probate.

The probate does not affect Sakwarbai's rights in any way. The probate only validates the acts of the executors, and therefore they have a right to say that the probate must continue.

Lowndes for respondent (Sakwarbai):—The probate has become inoperative by reason of the events that have happened since. The property vested in the executors whilst the will was good. The birth of a son made the will ineffectual *ab initio*; and

that being so, the executors are to be regarded as having no authority of any kind.

The clause in the will which gives the management of the property to the executors is inoperative. A Hindu has no power to appoint a testamentary guardian. In England the power is expressly given by statute. In India section 47 of the Indian Succession Act (X of 1865) gives such a power; but that section is not incorporated in the Hindu Wills Act (XXI of 1870). A Hindu has, therefore, no power to appoint a guardian by will. Under English law a person can only appoint a guardian of the person. The guardian can then deal with the property. But nowhere is there any power to appoint a guardian of property apart from the guardianship of the person.

The test to apply here is, would the Court have granted probate to the executors if the circumstances now existing had existed at the time they applied for it? If it would not, then it is clear it can revoke the probate then granted: see also *In re goods of Francis Morton* (1); *In re Alexander Ferrier* (2); *Gilliat* v. *Gilliat*.(3)

CROWE, J.:—The applicant Sakwarbai *alias* Tai Maharaj prayed for a revocation of the probate granted to the opponents on 16th February, 1898, on the grounds that she gave birth to a son on the 18th January, 1898, that the child died on the 9th March, 1898, leaving her heiress of her son, and that the opponents appointed by a will of her deceased husband to administer his estate have failed to exercise due diligence and by their conduct have shown themselves unfit to act as trustees.

The District Judge has held that the grant of probate has become useless and inoperative, and that the opponents have wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of Act V of 1881.

The law contained in section 50 of the Act specifically prescribes that a grant of probate may be revoked or annulled for just cause, which process is defined in the explanation which follows in

(1) (1864) 3 Sw. and Tr. 422. (2) 1823) 1 Hagg. 241.
(3) (1820) 3 Phill. 222.

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that section. Of the grounds specified in that section we need only refer to those relied on by the District Judge, viz., fourth and fifth

It was urged by the applicant's pleader that the deceased had no testamentary power to dispose of the property; that the rule that the property of a deceased person vests in his executor does not apply to property which passes by survivorship; that on the death of the posthumous son his mother succeeded as sole heir; and that when the property vested in her, the grant of probate became useless and inoperative from that date if not from the date of the birth of her son.

The contention of the opponents was that, although the will could not alter the devolution of ancestral family property, the effect of its provisions was to create a trust under which the executors were entitled to hold and manage the property (*a*) on behalf of the posthumous son, or (*b*) of any minor son to be adopted thereafter, and if no adoption took place, (*c*) until the property devolved upon a male owner by inheritance from the last male owner.

The District Judge held that "Tai Maharaj having become owner of the estate on 9th March, 1898, when her and the testator's posthumous son died, and the defendants having failed to prove the adoption of Jaganath they set up in their answer, the plaintiff having, on the contrary, proved that she never adopted Jaganath by act, word or writing, the grant of probate to the defendants became inoperative and useless on the 9th March, 1898, and this reason alone is sufficient for revoking the grant for just cause."

It will be convenient to deal with this alleged just cause for revocation first.

In the view we take of the meaning to be attached to clause 4 of the explanation to section 50, it is immaterial whether there was anything for the will to operate upon or not; for we regard the grant of probate as decisive only of the genuineness of the will propounded, and the right of the executors thereby appointed to represent the estate of the testator. It in no respect decides any question as to the disposing power of the testator or as to the existence of any disposable property. The words "become useless and inoperative" imply the discovery of something which,

if known at the date of the grant, would have been a ground for refusing it; such, for instance, as the discovery of a later will or codicil, or subsequent discovery that the will was forged, or that the alleged testator is still living. In *Hormusji Navroji* v. *Bai Dhanbaiji*[1] it was held that "probate is only conclusive as to the appointment of executors and the validity and the contents of the will, and on the application for probate it is not the province of the Court to go into the question of title, with reference to the property of which the will purports to dispose, or the validity of such disposition." It is clear that what would not have furnished a ground for refusing probate can form no ground for revoking it, because the grant still stands good for the purposes for which it was granted.

The Bombay ruling above quoted followed one of Garth, C.J., in *Behary Lall Sandyal* v. *Juggo Mohun*.[2] That decision had reference to the Succession Act (X of 1865), and laid down that the grant of probate only perfects the representative title of the executor to the property which belonged to the testator and over which he had a disposing power. The same principle was followed in *Abhiram Dass* v. *Gopal Dass*,[3] where it was held under sections 69 and 86 of Act V of 1881 that caveator claiming the property dealt with by the will is not entitled to come in and oppose the grant of probate. In *Barot Parsholam* v. *Bai Muli*[4] it was held that a "Court is not justified in refusing to grant probate of a will because the testator had no power to dispose of some or even of all the property he purported to deal with," and this view was followed in *Birj Nath De* v. *Chandar Mohan*.[5]

In the matter of the petition of *Mohun Dass* v. *Lutchmun Dass*[6] the Court declined to revoke or annul the grant of probate on the ground that the person to whom it was granted had become morally disqualified to act as Mohunt, and held that there was no analogy between such a case and the case cited in illustration (*h*) which contemplates the case of an executor who is acting under a will and whose subsequent lunacy disables him from so acting. The remark that "on a decree under the

(1) (1887) 12 Bom. 164.
(2) (1878) 4 Cal. 1.
(3) (1889) 17 Cal. 48.
(4) (1893) 18 Bom. 740.
(5) (1897) 19 All. 458.
(6) (1880) 6 Cal. 11.

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Religious Endowment Act declaring the holder of the office disqualified being certified to the Court which granted probate, that Court would no doubt direct revocation of the probate" is manifestly an *obiter dictum*. It was held in *Annoda Prosad* v. *Kalikrishna*(1) that mismanagement by an executor of an estate is not, under section 50, explanation 4, of the Probate and Administration Act, 1881, a just cause for revoking the probate, and that the words "just cause" in section 50 are not illustrative merely, but exhaustive.

The result of these cases leads us to the conclusion that the grant of probate of a will could not, in the light of the circumstances which have supervened, have been refused, and that, as far as this argument is concerned, no ground for revocation exists now which would have been a ground for refusal then. The only cases cited by Mr. Lowndes are English cases. He relied on *In the goods of Alexander Ferrier*(2) as authority for holding that the grant of letters of administration limited to an interest in certain property might be revoked, and a new administration decreed to the remainderman where the trustee for life of that property has assigned his interest to the remainderman. That case was decided on a motion brought before the Prerogative Court of Canterbury, and the Court at the outset took the objection that there was a difficulty in revoking an administration which was effective for all the purposes for which it was originally granted. The motion was one made by consent and was granted with considerable reluctance and only on the condition of the original grantee having executed a release of his power of appointment. The case of *Gilliat* v. *Gilliat*(3) only ruled that it was not necessary that a will appointing testamentary guardians should be proved in the Prerogative Court of Canterbury. The point urged by Mr. Lowndes that there exists no legal authority for a Hindu to appoint a testamentary guardian can afford no ground for refusing or revoking a grant of probate of a will purporting to effect such appointment. But this objection again goes only to the question as to the extent of the testator's authority

(1) (1896) 24 Cal. 95. (2) (1828) 1 Hag. 241.
(3) (1864) 3 Phill. 222; 3 Sw. & Tr. 422.

and leaves unaffected the question whether probate could have been refused on that ground.

We now come to the second ground on which the District Judge has held that a just cause for revocation is made out by reason of the executors having wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of the Act. We notice in passing that this, the 5th paragraph of the explanation to section 50, was added by specific enactment (Act VI of 1889) eight years after the passing of the original Act. No issue was framed on this point in the Court below, and it was not made a ground for her application by the applicant herself. She made no allegation that the executors had filed no accounts, and such an allegation would have been inconsistent with the case as put forward in her behalf, viz., that on the death of her son on the 9th March, 1898, she succeeded to the estate, and that from that date Mr. Nagpurkar, one of the executors, who, though joined *pro formâ* as one of the opponents, supports the application, has been acting as her agent under her orders and has treated the grant of probate as inoperative. It is not contended on the part of the opponents that an inventory or accounts have ever been submitted. And the District Judge observes that there is no satisfactory explanation why the inventory and account required by section 98 of the Act were not exhibited within the statutory period. It is admitted, that one of the executors, Mr. Khaparde, resides at Amraoti and another, Mr. Kumbhojkar, at Kolhápur. Mr. Tilak and Mr. Nagpurkar were residents at Poona, but owing to circumstances which necessitated Mr. Tilak's residence in another place, he was unable to exhibit the inventory within the prescribed time. It was contended on behalf of the executors that the filing of the accounts within a limited time is a technical matter, and one which, in the absence of evidence of mismanagement of the property, can be got over without dismissing the trustees. It does not appear from the evidence that the executors were ever called upon to file accounts within any specified date. The Judge finds that according to the evidence the estate records were kept in the Maharajwada, where Tai Maharaj resides, and the estate was in

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charge of Mr. Nagpurkar from the time of the testator's death until the dispute about Tai Maharaj's determination to adopt Bala Maharaj arose in July, 1901. The opponents rely on two letters to show that it was from no disinclination on their part that an inventory was not exhibited. These two documents were produced at the hearing from the record of the suit No. 358 of 1901 and have been relied on by both parties. The first of these is a letter (Exhibit 86 in that suit) from Mr. Kumbhojkar to Mr. Nagpurkar, dated 16th September, 1898, in which he states that he has no kárkun at his disposal and sees no reason for filing accounts, but that Nagpurkar is at liberty to do so if he liked. The second document is a report from Nagpurkar to the trustees of Tai Maharaj (Exhibit 76 in that suit), dated 22nd May, 1901, in which, in reply to a demand by the co-executors for accounts, he admits that he is indolent by nature, has no habits of despatch in matters of administration, and requests that indulgence may be shown to him. There is nothing to show that the executors were ever called upon by the applicant or by the Court to furnish accounts and that they refused to do so. The only order referred to in the evidence is that of the District Judge on 15th October, 1901, while these proceedings were pending, addressed to all the executors, which, for reasons which he has recorded, he did not think proper to enforce. There is no circumstance in the case from which wilful omission on the part of the executors can be inferred. A mere omission to submit accounts has been held to be no ground for revocation of grant of probate: Williams on Executors, Vol. 1, pages 496-7; *Hill* v. *Bird*; Story, 102.

We think that there is much in the contention of Mr. Lowndes that it is the duty of the Court to see that the provisions of the Probate Act are duly complied with, but in the absence of any evidence of an order calling on the executors to exhibit accounts, we think it is not open to the Court to put forward as a just cause for revocation of the grant of probate the omission to exhibit an inventory and accounts—a contention which was not put forward by the applicant herself and could not have been put forward by her, having regard to her contention and that of Mr. Nagpurkar that she succeeded to the estate and he managed it for her as her Karbhari, and not as executor.

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On these grounds we consider there was no sufficient cause within the meaning of explanation 4 to section 50 for revoking the grant of probate. The mere fact that the estate has now devolved on the widow as heir of her deceased son does not by itself render any revocation of the probate necessary, as the widow is at liberty to apply for letters of administration to the estate of her deceased son.

We must reverse the order of the Court below and allow the appeal. The costs to be borne by applicant throughout. An application for revocation of probate being of the nature of a miscellaneous proceeding, the costs should be regulated accordingly.

Order reversed.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Batty.

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August 20.

SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL FIRST DEFENDANT), APPELLANT, *v.* SULEMANJI MOOSAJI [AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Principal and Agent—Government—Government officers—Scope of authority—Ratification.

The plaintiffs sued the Secretary of State (defendant 1) and one Makan Haribhai (defendant 2), who was an overseer in the Government Local Fund Department in the Surat District, for the price of bamboos sold to the second defendant for the purpose of erecting sheds during an epidemic of plague in 1897. The plaintiffs alleged that they supplied the bamboos to the second defendant on his representing that he was acting under the orders of the Assistant Collector and the Mámlatdár. The first defendant denied that Government had ever authorised the purchase of the bamboos, and the second defendant denied that he had made the alleged representation. The lower Court passed a decree against the first defendant. On appeal to the High Court,

Held, (reversing the decree) that there was no evidence to show that the second defendant was authorised by Government to purchase the bamboos and

* Appeal No. 132 of 1901.