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There is no provision in the Dekkhan Agriculturists' Relief Act itself which lays down the procedure to be followed by the Special Judge, or gives him the power of reviewing an order once passed by him. Section 74 of the Act provides only that, except so far as it is inconsistent with this Act, the Code of Civil Procedure shall apply to all suits and proceedings before Subordinate Judges under the Act. It would appear, therefore, that the Code of Civil Procedure is not applicable to proceedings before the Special Judge; and this was the opinion also of the Division Bench (Sargent, C.J., and Nánábhái, J.), which decided *Vishwanáth Shridhar* v. *Abá bin Joti*[1]. It follows that the Special Judge has no jurisdiction to grant a review of a decree or order once made by him on the ground of the discovery of new evidence, as was done by the Special Judge in this case; for, apart from special legislative authorization, no Court would have any such power.

We reverse the order of the Special Judge, granting a review, and the decree which followed it, and restore the decree of the Subordinate Judge, with costs of this application on the opponent.

Order reversed.

(1) P. J. for 1886, p. 11.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

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May 5.

MANGALDA'S PARMA'NANDA'S, (PLAINTIFF), *v.* TRIBHUVANDA'S NARSIDA'S, (DEFENDANT).*

Will—Construction—Gift to sons or daughters of M. who may be alive at M.'s death—Gift to a class to be ascertained at future time—One member of such class in existence at testator's death—Tagore case—Hindu Wills Act (*XXI of* 1870), *Sec.* 3—*Succession Act* (*X of* 1865), *Sec.* 98.

P., a Hindu, died in September 1886, and left two sons, *viz.* the plaintiff and one Manmohandás. By his will P. left the residue of his property to trustees who were to invest it in Government promissory notes and to pay the interest thereof to the wife of his son Manmohandas and after her death to pay it to Manmohandás. He further directed that after Manmohandás' death "the amount of the interest

* Suit No. 413 of 1890.

is to be paid from time to time to his sons or daughters who may be alive according to what may be considered proper." By a subsequent clause he directed that if there should be no one living of his son Manmohandás' race or descent the said Government notes should be given to a certain charitable fund. At the time of the testator's death the wife and one daughter (Chandákuvar) of Manmohandás were living. Subsequently a son was born to Manmohandás, but this child died shortly after its birth. The wife of Manmohandás died in September, 1889, and Manmohandás himself died in October, 1889. The plaintiff then filed this suit, claiming the property in question as heir of the testator to the exclusion of Chandákuvar, the daughter of Manmohandás. He contended that she could only claim as one of the class of "sons or daughters" of Manmohandás mentioned in the will: that the gift to this class was void, as it included or might include persons who were not in existence at the time of the testator's death.

Held, that Chandákuvar was entitled to the property under the will. The primary intention of the testator was that all the members of the class specified should take, and his secondary intention was that if all could not take, those who could should do so. Here there was one member of the class who could take the property, and it might be inferred that the testator meant that she should take it, rather than that his intention should be defeated altogether.

SUIT for the construction of a will.

Parmánandás Tulsidás died on the 8th September, 1886, having made his will, dated 12th February, 1886. He left two sons, *viz.*, the plaintiff and one Manmohandás Parmánandás.

By his will, after making some bequests, he directed as follows:—

"As to whatever residue there may be, I appoint my son Manmohandás Parmánandás' wife as the heiress thereof after my death."

He then disposed of certain portions of his property, and by the eleventh and sixteenth clauses of the will directed as follows:—

Clause 11th.—"On the expenses and legacies, &c., having been paid, in accordance with what is written in the above-mentioned clauses, as to the residue that may remain for the same and for the moiety of the proceeds of sale of the *dharmshála* at Walkeshwar, (*i. e.*) for all this my trustees shall purchase Government promissory notes in their own names and shall deposit the same in the Bank of Bombay. And my trustees shall bring and pay to my heiress from time to time the interest thereon which may be received, in order to defray the expenses for maintaining her family. In case the decease of my heiress take place at any uncertain time, which God forbid, then the interest on the above-mentioned shall be paid to the husband of my said heiress, my son Manmohandás, and out of the amount of the said interest Bhái Manmohandás is to maintain his children (and) issue. In case the decease of this my son Manmohandás should take

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place at any uncertain time, *then the amount of the interest is to be paid, from time to time, to his sons or daughters who may be alive*, according to what may be considered proper."

Clause 16th.—"Notwithstanding what is written in this my will, may God forbid it, should there be no one living of my son Manmohandás' race or descent, then at last my Government promissory notes shall in my name be given away to the Kapol Nirashrit Fund."

At the time of the testator's death the wife of Manmohandás was living. Manmohandás had then only one child, a daughter named Chandákuvar. Subsequently a son was born to him, but this child died shortly after its birth. The wife of Manmohandás died on the 18th September, 1889, and Manmohandás himself died on the 6th October, 1889.

The plaintiff as testator's son and heir now claimed the testator's property to the exclusion of Chandákuvar, the daughter of Manmohandás, who claimed under the last words of the 11th clause. It was contended on the plaintiff's behalf that the gift to "the sons or daughters who may be alive" of Manmohandás was void, as it was a gift to a class which included, or might include, when the time came to ascertain it, persons who were not in existence at the time of the testator's death, and that as Chandákuvar could only claim as a member of that class, she was excluded; that the *Tágore Case*(1) decided that such a gift was void by Hindu law, and by section 3 of the Hindu Wills Act (XXI of 1870), section 98 of the Succession Act (X of 1865) did not apply.

Kirkpatrick and *Inverarity* for plaintiff:—Section 98 of the Succession Act X of 1865 does not apply—*Alangamonjori Dabee* v. *Sonamoni Dabee*(2); *Cally Náth Chowdhry* v. *Chunder Náth Naugh Chowdhry*(3). Only persons in existence at the death of the testator can take. As to gifts to a class, see Jarman on Wills, pp. 266, 271; *Pearks* v. *Moseley*(4); *Soudáminey Dossee* v. *Jogesh Chunder Dutt*(5); *Kherodemoney Dossee* v. *Doorgámoney Dossee*(6). The case of *Rám Lál Sett* v. *Kanái Lál Sett*(7) did not raise the question. The gift there was by deed, and the gift was not to a

(1) L. R., Ind. Ap. Sup. Vol. p. 47.
(2) I. L. R., 8 Calc., 157, at pp. 161—163 on appeal. *Ibid.*, 637.
(3) I. L. R., 8 Calc., 378, at p. 388.
(4) 5 Ap. Cas., 714, at p. 723.
(5) I. L. R., 2 Calc., 262.
(6) I. L. R., 4 Calc., 455.
(7) I. L. R., 12 Calc., 663.

class, but to two named individuals, and also to others of a class to which those individuals belonged. It was like a gift to two jointly, of whom one is incapable—*Nandi Singh* v. *Sitá Rám*[1]. The case of *Rái Bishen Chand* v. *Mussumat Asmaida Koer*[2] was decided on the ground that the gift there was not a gift to a class. Counsel also referred to Williams on Executors, p.1256; *Porter* v. *Fox*[3]; *James* v. *Wynford*[4].

Latham (Advocate General) and *Lang* for defendant:—The rule sought to be applied here is an extension of the rule laid down in *Leake* v. *Robinson*[5]; Theobald on Wills, p. 406, 407. There never has been such a rule in India as is referred to by the Judges in the Calcutta cases cited. The rule only applies where there is a named person joined with a class which is excluded by the rule of remoteness. The basis of the rule is the horror of remoteness apparently felt by the English Judges: Theobald on Wills, p. 559. We contend the point has been already decided—*Rám Lál Sett* v. *Kanai Lál Sett*[6]; *Manjámmá* v. *Padmanábhayya*[7]. Counsel referred to *Sreemutty Soorjeemoney Dossee* v. *Dinokand Mullick*[8].

FARRAN, J. (after dealing with other questions in the case continued):—I have already had occasion to consider the question arising upon the eleventh clause of this will, and I do not, therefore, think it necessary now to reserve my judgment. I concur in the view taken by Wilson, J., in *Rám Lál Sett* v. *Kanai Lál Sett*[9]. It is true that that case is in many respects distinguishable from the case now before me, and cannot perhaps be cited as an authority upon the particular point arising here. But the question which I have to decide was discussed at length by Wilson, J., in his judgment, and I agree with the opinions he expressed and in the conclusion at which he arrived. The case of *Manjámmá* v. *Padmanábhayya*[10] is, however, directly in point, and I am prepared to follow it as an authority.

(1) I. L. R., 16 Calc., 677.
(2) L. R., 11 Ind. App., 164.
(3) 6 Sim., 485.
(4) 1 Sm. & Giff., 38.
(5) 2 Mer., 390.
(6) I. L. R., 12 Calc., 663.
(7) I. L. R., 12 Mad., 393.
(8) 9 Moore's I. A., 123.
(9) I. L. R., 12 Calc., 663.
(10) I. L. R., 12 Mad., 393.

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I think the primary intention of the testator was to secure that the property should go to the family of his son Manmohandás. That is clear from the eleventh and sixteenth clauses of the will. To quote the words of Jessel, M.R.[1], cited by Wilson, J., in the Calcutta case (p. 683), "the testator may be considered to have a primary and a secondary intention. His primary intention is that all members of the class shall take, and his secondary intention is that if all cannot take, those who can shall do so." Here there is one member of the class who can take the property, and we must infer that the testator meant that she should take it, rather than that his intention should be defeated altogether. It is easy to imagine cases in which the application of such a rule as is sought to be applied here on behalf of the plaintiff would manifestly defeat a testator's intention altogether. Suppose, for example, in the present case that at the testator's death Manmohandás had five or six sons living. They would be all capable of taking, and the fair presumption from the eleventh clause of the will would be that the testator intended them, at all events, to take. But, if the proposed rule was to apply, the birth of a daughter to Manmohandás after the testator's death would exclude them all, for she would be incapable under the rule in the *Tágore Case*[2]; and her incapacity would affect all the other members of the class and exclude them. Indeed, according to the reasoning of Pontifex, J., in *Soudáminey Dossee* v. *Jogesh Chunder Dutt*[3], it would not be necessary that a child should afterwards be actually born to Manmohandás. It would be sufficient if it had been within the range of possibility that he should afterwards have had a child. This possibility would, in his opinion apparently, be sufficient to exclude the whole class.

I must find that the plaintiff is not entitled to the property of the testator, and that Chandákuvar is.

Attorneys for plaintiff:—Messrs. *Chitnis, Motilál and Málvi.*

Attorneys for defendant:—Messrs. *Crawford, Burder, Buckland and Bayley.*

(1) *In Re Coleman*, L. R., 4 Ch. D., at p. 169.

(2) L. R., 1 Ind. Ap. Sup. Vol., p. 47.

(3) I. L. R., 2 Calc., 262.