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Issues 1 and 2 will be found for the defendants. No finding will be recorded on the remaining issues, and the suit will be dismissed with costs.

Suit dismissed with costs.

Attorney for the plaintiffs :—Mr. *Mirza Hussein Khan.*

Attorneys for the defendants :—Messrs. *Little, Smith, Frere and Nicholson.*

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15 B. 543.

[543] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

KRISHNANATH NARAYAN AND ANOTHER (*Original Plaintiffs*), *Appellants v.* ATMARAM NARAYAN AND OTHERS (*Original Defendants*), *Respondents.** [16th January, 1891.]

Will—Construction—Right to live in a house given to parents and their children—Right of children under such gift independently of the parents—Gift to the children of A—Gift to a class some members of which not in existence at testator's death—What is a gift to a class within the meaning of the rule in Leake v. Robinson (1).

B., who died in 1836, left a will, in the English form, whereby he bequeathed a house to his two sons, Venkoba and Moroba, and directed that they should not sell or mortgage it, but were either to live in it, or enjoy the rents and revenue thereof for ever. He further directed as follows :—" My son-in-law, Narayan Ganoba, with his wife Sokabai and children to live in the house for ever." Venkoba died in 1838, and his four grandsons were the first four defendants in this suit. Moroba became insolvent, and his interest passed to the Official Assignee, who was the fifth defendant. Sokabai was the testator's daughter, and she and her husband, Narayan Ganoba, went to live in the house in question when the testator first went to reside there, and they and their family had lived there ever since. Both the plaintiffs (her sons) were born in the testator's life-time. Narayan Ganoba died in 1844. Sokabai died in 1887. Subsequently to her death her children (the plaintiffs) continued to reside in the house and to occupy the rooms which they had always occupied until April 1889, when the first four defendants, who were grandsons of Venkoba, dispossessed them. The plaintiffs filed this suit, praying for possession of the rooms and for a declaration that they and their families were entitled to reside there. The defendants contended (1) that there was no gift to Sokabai's children independently of Narayan Ganoba ; (2) that if there was a gift to the children, it was void, as being a gift to a class some members of which might have come into existence after the testator's death.

Held—

(1) that the clause in the will should be construed as giving the right to live in the house to Sokabai and the children after Narayan Ganoba's death. The benefit was intended to be conferred, not only on Narayan Ganoba, but also on his wife and children ;

that this was not a devise to a class in the sense in which that expression was used in *Leake* v. *Robinson* (1), *viz.*, a gift to a body of persons uncertain in number at the time of the gift to be ascertained at a future time, the share of each being dependent for its amount upon the ultimate number of persons. The benefit which each member of the class was to take, was in no way dependent, on the number of the children, each had a distinct and independent right to [544] reside in the house, and the number of persons who might ultimately belong to the class was in no sense regarded as a criterion of the interest which each was to take.

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* Suit No. 597 of 1889 ; Appeal No. 690.

(1) 2 Mer. 363.

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Query, whether *Soudaminey Dassee* v. *Jogesh Chunder Dutt* (1) and *Kherodemoney Dossee* v. *Doorgamoney Dossee* (2) are not overruled by *Rai Bishenchand* v. *Mussumat Asmaida Koer* (3).

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[R., 22 B. 533 (539).]

APPEAL from Parsons, J.

15 B. 543.

Balkrishna Dwarkaji died at Bombay in 1836, leaving four sons and four daughters him surviving. Sokabai, one of his daughters, was married to Narayan Ganoba, and the two plaintiffs (Krishnanath and Shamrav Narayan) were their sons. Of the four sons of Balkrishna Dwarkaji, two were named, respectively, Venkoba and Moroba. The first four defendants were the grandsons of Venkoba, who died in 1838. Moroba became insolvent, and the property left to him by his father Balkrishna passed to the Official Assignee, who was the fifth defendant in this suit.

Balkrishna Dwarkaji at his death in 1836 was possessed of property. He left a will, in the English form, which was duly proved in the Supreme Court. It contained the following clause:—

"2. I give and bequeath to my younger sons, named Venkoba and Moroba, by my second wife a house new-built, with its appurtenances, also situate in Palav Road, lately purchased by me from Ramchandra Keshavji, my father-in-law. They are not at liberty to sell or mortgage the same, but either to live in or to enjoy the rents and revenue thereof for ever. My son-in-law, Narayan Ganoba, with his wife, Sokabai, and children to live in the house for ever."

Sokabai and her husband, Narayan Ganoba, went to live in the said house when the testator first went to reside there, and they continued to live there with their family after his death. Both the plaintiffs were born in the testator's life-time. Narayan Ganoba died in 1844; Sokabai died in 1887. Subsequently to her death her children (the plaintiffs) continued to reside in the house and to occupy the rooms, which they had always occupied, until the 28th April 1889, when the first defendant (a grandson of Venkoba) dispossessed them of one of the rooms on the ground that he and his brothers (the other defendants) had not sufficient accommodation in the house. The plaintiffs **[545]** then filed this suit, praying for a declaration that they and their families were entitled to reside in the said house, and for possession of the said room.

The first four defendants filed a written statement. The following clauses set forth their defence:—

"1. These defendants submit to this Honourable Court's judgment whether or not the provision in the second clause of the will is operative as conferring on the plaintiffs any rights of residence in the house, the subject of this suit.

"2. The defendants submit that, if the clause be operative, it can only be held to operate in favour of persons living at the date of the death of Balkrishna Dwarkaji; and, further, that it confers no separate and undivided rights upon any members of the family of Narayan Ganoba to live in the said house after the death of the said Narayan Ganoba.

"3. The defendants submit, if it be held that the plaintiffs have any right of residence in the said house, the same should be ascertained and defined and declared by this Honourable Court."

(1) 2 C. 262. (2) 4 C. 455. (3) 6 A. 560=11 I. A. 164.

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At the hearing an issue was raised as to the proper construction of the above clause of the will. Parsons, J., was of opinion that a personal right of residence was given to Narayan Ganoba, and that his wife and children had the right to live there only so long as he lived; that no separate and independent right was given to them to continue to reside there after his death; and that the house belonged to Venkoba and Moroba.

From this judgment the plaintiffs appealed.

Vicaji and *Vaidya*, for the appellants (plaintiffs).

Latham (Advocate-General), *Lang* and *Inverarity*, for the first four defendants.

Inverarity and *Sandars Slater*, for the Official Assignee.

Vicaji and *Vaidya*, for the appellants.—The intention of the testator in giving a right of residence was to benefit his daughter Sokabai and her family. The gift of a right to residence is thus to two designated individuals and to a class, *viz.*, their children. The plaintiffs are two of their children, and they were both born in the life-time of the testator. They take an interest independently of their parents—*Tagore Case*(1). It is true there was a possibility that other members of the class to which they **[546]** belonged would be born after the testator's death; but that circumstance does not prevent them from taking—*Ram Lal Sett* v. *Kanai Lal Sett* (2); *Rai Bishenchand* v. *Mussamat Asmaida Koer* (3). Counsel also referred to *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (4); *Srinivasa* v. *Dandayudapani*(5); *Kumar Tarakeswar Roy* v. *Kumar Shoshi Shikareswar*(6); Mayne's Hindu Law, para. 356 (4th ed.); Theobald on Wills (3rd ed.), p. 349.

Inverarity with *Latham* (Advocate-General) and *Lang*, for the first four respondents.—There are two questions: 1st, is there any gift to the children of Narayan and Sokabai at all? 2nd, if there is such a gift, is it not void? As to the first point, we say there is no gift to the children, and, therefore, the plaintiffs have no claim. Narayan Ganoba was one of the testator's executors, and the will gives him a right of residence with his wife and children, but there is no independent gift to the wife and children —Mayne's Hindu Law (4th ed.), paras. 354, 356; *Kumar Tarakeswar Roy* v. *Kumar Shoshi Shikhareswar* (6). A desire to benefit Sokabai because she was the testator's daughter cannot be presumed, for he had three other daughters who are not provided for by the will.

As to the second point, we say the gift (if any) is void as being a gift to a class some members of which might have come into existence after the testator's death. The cases of *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (7) *and Kherodemoney Dossee* v. *Doorgamoney Dossee*(8) are authorities upon the point. The case of *Ram Lal Sett* v. *Kanai Lal Sett*(2) is no authority to the contrary. The question did not arise in that case, and the observations of Wilson, J., are merely *obiter dicta*: see Mayne's Hindu Law (4th ed.), paras. 355, 356.

The prayer of the plaint is for a declaration that the plaintiffs with their families are entitled to live in this house. That is a claim beyond the alleged gift in the will. The term "children" does not include grandchildren—Hawkins on Wills, p. 85,

(1) I.A. Sup. Vol. 47.
(2) 12 C. 663.
(3) 6 A. 560=11 I.A. 164.
(4) 9 M.I.A. 123.
(5) 12 M 411 (414).
(6) 10 I.A. 51.
(7) 2 C. 262.
(8) 4 C. 455.

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JUDGMENT.

[547] SARGENT, C.J.—The question in this case is as to the proper construction of the concluding clause of the 3rd paragraph of the will of the testator, Balkrishna Dwarkaji, written in the English language. By the said paragraph the testator gives his old dwelling-house at Palav Road to his eldest son, Makand, and the sons of his son Juggonnath and their heirs. By the second he gives his younger sons Venkoba and Moroba by his second wife another house, with a direction that they are not at liberty to sell or mortgage the same, but to live in it or enjoy the rent for ever. Then follows the clause which has given rise to the present suit:—"My son-in-law, Narayan Ganoba, with his wife, Sokabai, and children, to live in the house for ever." The Judge of the Division Court held that this clause conferred the right to live in the house exclusively on Narayan accompanied by his wife and children, but that the latter had no independent right to live in the house after Narayan's death.

We think that this construction is not required by the language of the clause, and does not give effect to the intention of the testator. It is to be remarked that it pays no regard to the words "for ever" with which the clause concludes, and which could scarcely have been used by the testator had he intended to restrict the right to live in the house merely to the life-time of his son-in-law. It is, moreover, inconsistent with the general tenor of the will, which throughout shows a clear desire on the part of the testator to provide permanently for the enjoyment of his two houses by the members of his family. Lastly, it is highly improbable that the testator should have intended to benefit only his son-in-law and to leave his own daughter and the children without a house at the time when they would most require it. We think, therefore, that the clause must be construed as giving the right to live in the house to Sokabai and the children after Narayan Ganoba's death.

If this be so, the question arises, whether the plaintiffs, who are children of Narayan and were in existence when the testator died, are entitled to live in the house. It has been argued that they are not so entitled, because they claim under a gift to a class, *viz.*, the children of Narayan Ganoba, some of whom might not be alive at [548] the death of the testator, and who would, therefore, be incapable of taking by the ruling in the *Tagore Case*(1); and that the decisions in *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (2) and *Kherodemoney Dossee* v. *Doorgamoney Dossee* (3) establish that under such a devise even members of the class who are alive at the time of the death of the testator are precluded from taking. The soundness of those decisions has been questioned by a Division Bench of the Calcutta Court consisting of Garth, C.J., and Wilson, J., in *Ram Lal Sett* v. *Kanai Lal Sett*(4) on the ground that they are not consistent with the decision of the Privy Council in *Rai Bishen Chand* v. *Asmaida Koer*(5). It is not necessary for us to express an opinion on that question, as we think it is impossible to hold that there has been a devise to a class in the sense in which that expression is used in *Leake* v. *Robinson* (6), which is the leading English authority on the subject, and upon which the decisions in *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (2) and *Kherodemoney Dossee* v. *Doorgamoney Dossee* (3) proceeded.

(1) 9 B.L.R. 377. (2) 2 C. 262. (3) 4 C. 455.
(4) 12 C. 663. (5) 11 I.A. 164=6 A. 560. (6) 2 Mer. 363.

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What is meant by a gift to a class, as understood in *Leake* v. *Robinson* (1), is explained very clearly in Jarman on Wills (4th ed.), p. 268. The learned author says :—

"A number of persons are popularly said to form a class when they can be designated by some general name, as 'children,' 'grandchildren,' 'nephews;' but in legal language the question whether a gift is one to a class depends not upon these considerations, but upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons."

In the present case the benefit which each member of the class takes is in no way dependent on the number of the children. Each [549] has a distinct and independent right to reside in the house, and the number of persons who may ultimately belong to this class is in no sense regarded as a criterion of the interest which each takes. We must hold, therefore, that the rule laid down in *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (2) and *Kherodemoney Dossee* v. *Doorgamoney Dossee* (3) has no application to the present case, and that the plaintiffs, who, it is admitted, were in existence when the testator died, are entitled to share in the benefit which, in our opinion, was intended to be conferred, not only on Narayan Ganoba, but also on his wife and children.

The decree of the Court below must, therefore, be reversed, and a declaration made that the appellants are entitled to live in the house, and the case must be sent back for trial on the other issues so far as they raise the question as to the right of the plaintiffs to the possession of the particular room in the pleadings mentioned. Costs of this appeal to be dealt with by the Court which hears the case on remand.

Attorneys for the appellants :—Messrs. *Balkrishna and Dikshit.*

Attorneys for the respondents.—Messrs. *Wadia and Ghandhy* and Messrs. *Roughton and Byrne.*

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15 B. 549.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

BAI MANIGAVRI (*Plaintiff*) *v.* NARONDAS CALLIANDAS AND OTHERS (*Defendants*).* [24th, 26th and 27th January, 1891.]

Voluntary deed—Suit by settlor to set aside his deed—Burden of proof.

One Manekram, (the original plaintiff), was priest in the family of the first and second defendants, and was treated with much kindness by the first defendant (Narondas), upon whom he chiefly relied for advice in worldly matters. A sum of Rs. 30,000, which was the bulk of his property, was in deposit in the defendants' firm at interest. Early in 1887 he became ill, and in June, 1887, he expressed a wish to execute a trust-deed and an English will. He gave instructions to Narondas, (defendant No. 1), for the trust-deed. By this deed, which contained no power of revocation, he settled Rs. 30,000 upon the first and second defendants,

* Suit No. 421 of 1888.

(1) 2 Mer. 363. (2) 2 C. 262. (3) 4 C. 455.