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VIAS RAM SHANKAR v. RALLA RAM MISIR.

As to the case now before us, we, in the exercise of our discretion in this particular case, refuse (as in *Sarman Lal* v. *Khuban*, (1)) to try in revision and reopen questions of law and fact which have, in the lawful exercise of its jurisdiction, been decided by a Court whose decision the Legislature made final. We reject the application with costs.

Application rejected.

PRIVY COUNCIL.

P C.
1898
February 16*th*.
August 3*rd*.

MAZHAR HUSEN (DEFENDANT-APPELLANT) AND BODHA BIBI AND ANOTHER (PLAINTIFFS-RESPONDENTS).

Muhammadan will—Construction of a letter containing a bequest—Suicide of testator.

A letter, written shortly before the testator's death, contained directions as to his property, conferring the proprietary right therein in equal shares on certain persons, to take effect on his death. Accordingly, the letter acted as a will under Muhammadan Law. The testator died, within a few hours after, from poison administered by himself with the intention of suicide. The letter stated that he had taken poison, but this was construed as a representation of the state of things as they would present themselves at the time when the letter arrived.

Title under the will having been disputed in this suit, on the ground that the will having been made by a person who had taken poison for the above purpose, was invalid by Muhammadan Law.

Held, that the burden of proving that the will was written after the taking the poison was on the party impugning the will; that the letter was consistent with its having been written before the taking the poison; that the other evidence tended strongly to show that it was written before; and that, therefore, the reason alleged against the validity of the will was not applicable to the case.

Two appeals, by special leave, consolidated from two decrees (11th January 1894) of the High Court, reversing decrees (17th March 1891) of the Subordinate Judge of Allahabad.

The plaintiff in both these suits, which were heard together in the original and appellate courts, was Bodha Bibi, widow

Present:—Lords HOBHOUSE, MACNAGHTEN and MORRIS AND SIR R. COUCH.

(1) I. L. R., 17 All., 422.

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of Amir Ali, and in one of the suits Nasiban Bibi joined her. The defendants were the same in both. They were Haidri Begam; her husband, Syed Mazhar Husen, who, after her death in 1894, represented her; and Nazir Bandi, Habib Bandi, two sisters, with Fayed Fazal Husen, husband and representative of Rahim Bandi, a third sister.

In each of the suits proprietary possession was claimed of property alleged to have been bequeathed by the will of the late Syed Ibn Ali to the extent of one-third of his estate, consisting of zemindaris and other immovables, to the three sisters abovenamed, his first cousins.

The plaintiffs claimed, as assignees of the property from the legatees, to recover from the second defendant, who had obtained possession of the property from the first defendant, all such interests in it as had been validly bequeathed to them by Ibn Ali's will. And they joined two of the assignors, and the representative of the third, these being the said three sisters, as defendants.

The alleged testator, Syed Ibn Ali, died on the 2nd August 1878, unmarried and without issue. It was a fact not disputed that he committed suicide with arsenic; and it was not contested that, if a letter written by him on the forenoon of the 1st August, the preceding day, had not contained a valid bequest of his property to the three sisters, his mother, Hindri, would have inherited his property.

The question raised was whether the letter of the 1st August contained a valid bequest to the three sisters; this comprehending a further question (in view of what was alleged by the appellant to be the Muhammadan Law on the subject of wills), whether or not the deceased had taken the poison which caused his death before he wrote the letter alleged to contain his will.

The facts, as stated in the judgment of the appellate court below, were that Syed Ibn Ali, early in the forenoon of the 1st August 1878, wrote a letter to his mukhtar, Zain-ul-Abdin, which was the document relied upon as containing his will,

and that he was found to be dead on the 2nd August 1878. The letter professed to be written an hour before his death, and used words which gave rise to the question whether they might, or might not, accord with his having already taken poison. The letter stated his desire that his mother should not get a pie of his property, and for a disposition in one part of the letter in favour of other persons the writer substituted a direction that the three daughters of his paternal uncle should share equally his property, directing Zain-ul-Abdin to see that each should get an equal share. The words of the bequest appear in their Lordships' judgment.

The two principal issues tried by the Subordinate Judge were, first, as to whether the letter of the 2nd August contained what could by the law of the Shias be held to be a bequest to the three daughters. As to this the Judge was of opinion that Ibn Ali's object was to exclude his mother from a share in his estate, but he decided as follows :—

"There was no *tamlik ain* (constituting a proprietor of the property itself) nor *ijab* (proposal) which is one of the conditions for enforcement (of a bequest) in respect of the profit. For *tamlik ain* it would have been essential to write in clear terms—"My uncle's daughters shall be the owners of my property on my death." And for *ijab* it would have been necessary to write :—"I have given my property to my sisters (cousins) after my death." The modes of transferring the property suggested in the letter were calculated to waste the property, and they did not show an intention to carry out a bequest, or to bequeath the property absolutely to his cousins. From these circumstances it may be concluded that the contents of the letter do not amount to a will, and, according to Muhammadan Law, as observed by the *Shia* sect, a bequest cannot be inferred from such a declaration or writing."

Secondly, as to whether the will was or was not invalid on the ground that it had been written after the writer had taken poison. As to this the Subordinate Judge wrote :—

"The book called *Riyaz-ul masæl*, commonly known as "*Sharah Kabir*, Volume IV, chapter on wills, contains a

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"passage in Arabic which may be translated thus :—"If any "one intentionally wounds himself so that there is a danger of "death, and then makes a bequest, such bequest will not be "accepted. *Sharah Suma*, chapter on wills, which is in "Arabic, contains a passage which may be translated thus :— "But a bequest made by any of these, namely, a lunatic, one in "a state of intoxication, and he who has inflicted a fatal wound "on himself is void; in the first two cases, apparently from want "of sense, and in the last case there is a saying of Abi Vilad "based on a tradition of Sadik, may peace be with him, that "is, if any one makes a bequest after he has wounded himself "or done an act which must necessarily result in his death, such "bequest will be illegal, for this act goes to prove his want of "sense, and also because he falls within the category of a dead "man, and therefore the provisions which hold good in "respect of the living will not hold good in respect of him, "and consequently it is not necessary for him to pay *zakat*, "though he be fit to pay it. And the less authoritative "saying is that the bequest is valid provided the mind was "sound. This opinion was a good one, if it were not inconsis- "tent with the well-known tradition. The book called *Tahzib* "also says that bequests made by such persons are invalid. "In *Maula-yah Zar-ul-fakih* also this tradition is found. "This doctrine was followed in the book called *Vasail Tashaya*. "In *Furu Kafi* this doctrine has been recognized and *Jawahir-* "*ul-kalam* contains a verdict that such bequests are invalid. In "the book called *Sharaya-ul-Islam* and in its commentary, "and in the book *Mukhtasar Mani* also this doctrine has been "followed.

"The passage in the book called *Javahar-ul-Kalam*, which "bears upon this doctrine may be translated thus,—'One who "'voluntarily does an act from which he thinks he must die, is "'to be classed with one who has committed suicide; for "'instance, one who has taken poison will come under the same "'category.' From the above authorities it will appear that, "even assuming that the letter written by Ibn Ali amounts to a

"will, such will is void and unenforcible, because Ibn Ali made "it after his attempt at suicide."

From this decision the plaintiffs appealed, and the judgment of a divisional bench (TYRRELL and BLAIR, JJ.) reversed it. They were of opinion that the letter constituted a will under Muhammadan Law, and that it was not bad as being executed by a suicide, who had already taken poison when he wrote it. They remanded the suit under section 562 of the Code of Civil Procedure.

Their judgment was the following,—part being omitted.

"The two leading questions sent to trial below were:—First, "can it be concluded from the contents of the letter, and from its "surrounding circumstances, that the letter is not a will under "the Muhammadan Law of the Shias from the declarations of "which a bequest cannot be inferred? and, secondly, whether "the will is invalid because it was made by a man who had "previously taken poison for the purpose of suicide?

"The Court below has found on both these issues against "the appellant. It is convenient to deal with the suicide question "first."

With reference to this question the Judges, after examining the evidence on the record, decided as follows :—

"We think that the finding that the letter was written after "the writer had poisoned himself is based on flimsy evidence "and is against good and solid evidence to the contrary. So far, "therefore, the appellant succeeds, and the bequest, if it was a "bequest, is not bad for being the act of a suicide.

With regard to the question as to whether it could be concluded from the contents of the letter and from its surrounding circumstances, that the letter or document dated August 1st, 1878, was not a will, under the Muhammadan Law of the Shias, from the declarations of which a bequest could not be inferred, the Judges differed from the conclusions arrived at by the Subordinate Judge, and held that the letter constituted a valid will, under the

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Muhammadan Law of the Shias, and they concluded their judgment as follows :—

"In what we have said, we have tried to show that the very "terms of this will are virtually the terms which the Court "below would accept as fulfilling the requirements of the Shia law "as to bequests. We believe that the word 'bequeath' has been "rightly defined under that law, 'as the act of conferring a "'right in the substance or the usufruct of a thing after death.' "We find on the 460th page of the first volume of Syed Amir "Ali's book on the Muhammadan Law relating to Shias that a "bequest may be constituted by the use of any expression that "sufficiently indicates the intention of the testator. A ruling of "their Lordships of the Privy Council to be found in the 25th "volume of the Weekly Reporter page 121, where their Lordships "held, that 'no particular form, even of verbal declaration, is "'necessary as long as the intention of the testator is sufficiently "'ascertained.' If this decision was between Shias, and we have "no reason to think otherwise, it lends the strongest authority "to our view of the effect of paragraph 10 of Ibn Ali's "document of the 1st August 1878. The result of these our findings "is that this case must be remanded under section 562 of the "Code of Civil Procedure, to be restored to the register of "original suits, and to be disposed of on the other issues according "to law. The costs will abide the result."

The High Court refused to admit an appeal to Her Majesty against their decision, on the ground that their decree was not a final one within section 595 of the Code of Civil Procedure. But on an application for special leave to appeal being made on the 24th November 1894 it was granted. *Saiyid Muzhar Hossein* v. *Mussamat Bodha Bibi* (1).

Mr. *J. D. Mayne* and *Mr. W. A. Raikes*, for the appellant, contended that the High Court should have found that there was no evidence that the poisoning took place after the letter had been written. As regards the state of the testator's mind, the

(1) (1894), I. L. R., 17 All., 112; L. R., 22 I. A., 1.

important consideration, there would be little difference whether he had already taken the poison or had resolved to take it immediately afterwards. The sources of the law on the point did not appear numerous. Reference was made to the translations on the judgment of the Subordinate Judge of the passages on the work cited by him.

They also referred to the Muhammadan Law Imamia by E. N. Baillie, 232, and to Taylor's Medical Jurisprudence (edn. 1883), 252.

The Indian Evidence Act, 1872, section 101.

Mr. *G. E. A. Ross*, for the respondents, argued that the case that the letter operated as a will had been established.

The High Court had rightly reversed the finding of the original Court as to the arsenic having been taken before the letter was written. The expressions in the letter were consistent with the writer's not having, in fact, already taken it at the time of writing. The general evidence tended to show clearly that he had not. He referred to the Introduction, Baillie's Imamia, p. 26. and p. 232 of the book.

The order of remand under section 562 of the Code of Civil Procedure was right under the circumstances.

Mr. *J. D. Mayne* replied. Afterwards, on 3rd August, their Lordships' judgment was delivered by LORD MORRIS.

Ibn Ali died on the 2nd of August 1878. He was possessed of property. The Respondents are the assignees of two ladies, the first cousins of Ibn Ali, and described in the letter or will of the 1st of August as his paternal uncle's daughters.

The appellant is the assignee and representative of Haidri Begam, the mother and heir of Ibn Ali. The respondents claim the property in dispute under a letter or will of the 1st of August 1878.

Two questions arose: 1st, whether the letter of 1st August amounted to a will. 2nd, was it written after Ibn Ali had taken poison from the effect of which he died. On both questions the Subordinate Judge decided in favour of the appellants,

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holding that the passages in the letter of 1st August did not amount to a bequest, and that even if they did it was written after Ibn Ali had taken poison, the cause of his death. On appeal, the High Court reversed the decision of the Subordinate Judge on both questions. The bequest on which the respondents rely is contained in the letter written by Ibn Ali to his general attorney, Syed Zain-ul-Abdin. The fact of the writing the letter by Ibn Ali was clearly proved and was so accepted by the Subordinate Judge and is not now disputed. The letter was sent by the hand of Musharraf, a servant of Ibn Ali. The Subordinate Judge decided that the contents of the letter did not amount to a bequest, as they did not bequeath the property directly to his cousins. The letter by clause 10 states "You "should not have the property given to (my) grandmother and "paternal uncle's wife, but you should give the whole to my "three sisters, who are my paternal uncle's daughters. You "should see that they all get an equal share, and in the same "manner as stated by me in paragraph 3." This paragraph appears to their Lordships to confer a right on the three sisters in the property to take effect on Ibn Ali's death, and accordingly that the letter acts as a will under Muhammadan Law.

Now comes the more important question as to the writing of the will being before or after the poison was taken by Ibn Ali. It is not at all free from difficulty, but their Lordships are not prepared to dissent from the decision of the High Court. It appears reasonable to hold that the onus of proving whether the letter or will was written after the swallowing of poison should rest on the party impugning the will. The Subordinate Judge came to his conclusion apparently on the terms of the letter itself in which the writer states "I, in consequence of "my honour having suffered to a certain extent, and the "exposure being so great that I could not show my accursed "face to any one, thought it advisable to put an end to my life "and therefore took poison and died to-day." And again in paragraph 5 the writer states: "Please begin to take all these

"proceedings after perusing this letter. Don't delay in hope "of my life, for, by God, I am actually dead and this letter I "have written an hour before death." The Subordinate Judge considers these passages prove that Ibn Ali had taken the poison, but their Lordships are of opinion, though the words "took poison" are in the past tense, they are connected with the words "and died to-day," which cannot be read in the past tense, and the statement is consistent either with the fact that he had taken the poison or that he had resolved to take poison and resolved to die. The evidence is circumstantial and the evidence of Musharraf and Husen Bakhsh go strongly to show that it must have been subsequent to the sending of the letter that Ibn Ali retired from the mardana and went into the zenana on the 1st of August then apparently well. The circumstances lead their Lordships to agree with the conclusion of the High Court that the deceased Ibn Ali took the poison after sending the letter to his friend, who lived some twenty miles distant. Their Lordships will therefore humbly advise Her Majesty that the appeals in this case should be dismissed. The respondents will have their costs.

Solicitor for the appellant—Mr. *T. C. Summerhays.*

Solicitors for the respondents Messrs. *Barrow and Rogers.*

APPELLATE CIVIL.

1898.
August 11.

Befor Mr. Justice Banerji and Mr. Justice Aikman.

SHOME SHANKAR RAJENDRA VARERE (PLAINTIFF) *v.* RAJESAR SWAMI JANGAM (DEFENDANT.)*

Hindu Law—Mitakshara—Sudras—Illegitimate sons—Collateral succession.

Amongst Sudras governed by the Mitakshara law an illegitimate son does not inherit collaterally to a legitimate son by the same father. *Sarasuti* v.

*First Appeal No. 117 of 1896 from a decree of Babu Nilmadhab Rai, Subordinate Judge of Benares, dated the 24th March 1896.