APPELLATE CIVIL.

1908
February 1.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

FAHMIDA KHANUM (DEFENDANT) *v.* JAFRI KHANUM (PLAINTIFF).*

Muhammadan law—Shias—Will—Power of devise amongst Shias.

Amongst Muhammadans of the Shia sect a testator can leave a legacy to one of his heirs so long as that legacy does not exceed one-third of his estate, and such a legacy will be valid without the consent of the other heirs. Where, however, the legacy exceeds one-third of the estate it will not be valid to any extent unless the consent of the heirs, given after and not before the death of the testator, has been obtained. *Cherachom Vittil Ayisha Kutti Umah* v. *Valia Pudiakel Biathu Umah* (1), *Keramatulnissah Bibee* (2) and *Ranee Khujoorooniesa* v. *Roushun Jehan* (3) referred to.

THIS was a suit brought by one Jafri Khanum against her sister Fahmida Khanum for the partition of a house and certain movable property and for recovery of possession of a half share. In the plaint as originally filed the plaintiff alleged that the house had belonged to Husaini, the deceased father of the parties. The plaint was, however, amended, and it was then alleged that the property in suit belonged to Musammat Muhammadi Khanum, mother of the parties, who died on the 3rd October 1905, leaving her husband Husaini, one son, Kallu, and two daughters; that Kallu died on the 31st January and Husaini on the 7th February 1906; that the property therefore belonged in equal shares to the two daughters, but the defendant had taken exclusive possession thereof on the 25th February 1906. The defendant contended that the amendment of the plaint was improper; that the house had belonged to Husaini, husband of Musammat Muhammadi Khanum, and he had bequeathed the whole of it to the defendant by a will, dated the 2nd February 1906; that the defendant had expended Rs. 300 on Husaini's death ceremonies and that some of the ornaments claimed belonged to the defendant as her own property. The Court of first instance (Munsif of Cawnpore) gave the plaintiff a decree for part of her claim,

* Second Appeal No. 1186 of 1906, from a decree of Bepin Behari Mukerji, Judge of the Court of Small Causes, Cawnpore, exercising the powers of Subordinate Judge, dated the 17th of August 1906, modifying a decree of Raj Behari Lal, officiating Munsif of Cawnpore, dated the 6th of June 1906.

(1) (1865) 2 Mad., H. C. Rep., 350. (2) (1817) 2 Morley's Digest, 120.
(3) (1876) L. R., 3 I. A., 291.

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including one-third of the house and ornaments. Both sides appealed, and these appeals were heard together. The lower appellate Court (Small Cause Court Judge) held that the will set up by the defendant was wholly invalid, and modified the Munsif's decree by giving a decree for one-half instead of one-third of the property in suit. The defendant appealed to the High Court.

Mr. *Muhammad Ishaq Khan*, for the appellant.

Munshi *Haribans Sahai*, for the respondent.

STANLEY, C. J., and BURKITT, J.—We think that the decision of the lower appellate Court is correct. It appears to be well settled law that a Muhammadan testator, governed, as in this case, by the Shia School of law, cannot make a valid bequest of all his property to one of his heirs to the exclusion of the other heirs, without the consent of all the heirs obtained subsequent to his death. The legacy in this case included all the testator's property, both movable and immovable, and from the will it appears that he intended to exclude one of his daughters from participation in his estate. The Sunni School agree in holding that a bequest in favour of an heir is invalid, but according to the Shia law it would seem that a testator can leave a legacy to one of his heirs so long as that legacy does not exceed one-third of his estate, and that such a legacy would be valid without the consent of the other heirs. Where, however, the legacy exceeds one-third of the estate, it will not be valid to any extent unless the consent of all the heirs, given after and not before the death of the testator, has been obtained. Mr. Baillie in his Digest of Muhammadan law, at p. 238, says:—If a person should make a will excluding some of his children from their shares in his succession the exclusion is not valid." Mr. Ameer Ali in his well known work, at p. 486 of the last edition, observes that "the author of the Sharaya has laid down that when a testator has excluded one of his children from succession and left the property wholly to others, his direction is entirely invalid and the inheritance will be apportioned among the heirs according to their legal share." Again, Sir Roland Wilson in his Digest of Anglo-Muhammadan Law, after stating the rule that a bequest to an heir (not exceeding the legal third) does not require the assent of the other heirs either before or after the death of

the testator to render it valid observes:—"The Shia view is certainly the most easy to reconcile with the text of the Koran (II, 178), which recommends the believer to 'bequeath a legacy to his parents and kindred in reason,'" and than, referring to the existence of the difference between the two schools and the doubt which existed on the question, says:—"This, however, was just before the publication of Baillie's translation of the Sharâya, which places the matter beyond doubt." In the latest work on the subject, namely the Institutes of Musalman Law, by Nawab Abdur Rahman, some of the principal texts upon the subject and also authorities are quoted at page 276 and following pages. The learned author of that treatise observes, at p. 278:—"The alienation of one-third to a portion of the heirs will not be legal without the assent of the other heirs subsequently to the death of the testator, because their benefits, already sufficiently secured by the law, are not within the reason of the rule on which testamentary disposition is established, and such a bequest would, as the certain occasion of family dissension, be opposed to public policy." He refers to the case of *Cherachom Vitil Ayisha Kutti Umah* v. *Valia Pudiakel Biathu Umah* (1), in which the question is discussed. In another case to which he refers, namely, that of *Keramatul'nissah Bibee* (2) it was held that if a man dispose of his property to his heirs and relations, to one more and to another less, or if he omit any of his relations and after his death the heirs and relations agree to the bequest, the will remains valid, otherwise the will only remains valid as to the bequest made to strangers and invalid for the heirs and blood relations who are to receive their respective shares according to Muhammadan law. See also *Ranee Khujooroonissa* v. *Roushun Jehan* (3). In view of the authorities we think that the decision arrived at by the Court below was correct and we dismiss the appeal with costs.

Appeal dismissed.

(1) (1865) 2 Mad., H. C. Rep., 350. (2) (1817) 2 Morley's Digest., 120,
(3) (1876) L. R., 3 I. A., 291.