*P.C.** 1892. *Feb.* 9. *March* 5.

SAHIB MIRZA AND OTHERS (DEFENDANTS) *v.* UMDA KHANAM (PLAINTIFF),

AND

SAHIB MIRZA AND OTHERS (DEFENDANTS) *v.* GUNNA KHANAM (PLAINTIFF).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Will, revocation of—Evidence as to revocation of a Will—Onus of proof of revocation of Will—Will, Construction of, as to whether payment of a legacy was to be out of a particular fund, or out of general assets—Demonstrative legacy.

A will, duly executed, is not to be treated as revoked, either wholly or in part, by a will which is not forthcoming, unless it is proved by clear and satisfactory evidence that the will contained either words of revocation or dispositions so inconsistent with those of the earlier will that the two cannot stand together. It is not enough to show that the will, which is not forthcoming, differed from the earlier one, if it cannot be shown in what the difference consisted. It is also settled that the burden of proof lies upon him who challenges the existing will. These propositions are of general application.

Payment of legacies, or gifts of stipends, having been refused by the representatives of the testatrix, on the ground that she had no power to dispose of the fund out of which the will must be construed to direct their payment;—*held*, on a consideration of the whole will, that the words of the gifts were wide enough to charge them upon the whole of her moveable estate: also, that if the words of the will were to be taken in a more restricted sense, the gift of the stipends must be regarded as a demonstrative legacy, and in that view they would be payable out of the general estate, on failure of the particular fund pointed out.

CONSOLIDATED appeal from a decree (9th February 1888) reversing a decree (28th March 1887) of the District Judge of Lucknow, and restoring a decree (1st November 1886) of the Subordinate Judge of Lucknow.

The question was as to the rights of the plaintiffs in the suits in which these appeals were preferred to obtain decrees for their respective annuities or stipends with arrears, under the will, dated 19th March 1861, of the late Nawab Mulka Jehan. The testatrix, who died on the 9th July 1881, was the widow of Mahomed Ali

* *Present:* LORDS MACNAGHTEN, MORRIS, and HANNEN, and SIR R. COUCH.

Shah, formerly King of Oudh. The plaintiffs were her servants, as also was Maiku Lal who brought a similar suit, and for them the will provided by giving them small annuities. The defendants who now appealed were her grandson and two granddaughters, heirs and residuary legatees.

Umda Khanam claimed Rs. 204 as arrears, admitting a payment of Rs. 20, and Rs. 4 a month for the future. Gunna Khanam made an exactly similar claim.

The defence was that the Nawab Mulka's will had been revoked, and also that the fund out of which she had temporarily directed payment was one that terminated with her life.

By consent the three suits were disposed of by the judgment in this one, given by the Subordinate Judge. His decision was that no revocation of the will of 19th March 1861 had been proved, and that the plaintiff was entitled to payment of the legacy by the defendants out of any of the moveable property of the testatrix.

The District Judge, however, was of the contrary opinion as to the question of the revocation of the will. In his view of the matter the preparation of a new will by the Nawab Mulka, her sending to the officials a letter setting forth its terms, the disbursement of money to some of her servants after her return, they also having been legatees in the will of 1861, sufficed, with other evidence, to give rise to an inference of an intention to revoke it; and he held this will to have been revoked. There was an appeal to the Judicial Commissioner; objections being also filed by the present appellants under section 561 of the Code of Civil Procedure. On this second appeal the judgment of the District Judge was reversed, and that of the first Court restored. As to the principal points raised the reasons were the following:—"It was further contested that the will itself specifies a particular fund out of which the legacy in question was to be paid, and that that fund failed; and that the legacies could not be paid out of the general assets. This contention, however, is refuted by the words of the will itself, which declared that the legacy was to be paid from the testatrix's 'Moshahra *Wasika, Lote, wagaira,*' *i.e.*, 'from my monthly pension, notes, &c., &c.' These words are, I consider, quite wide enough to include the rest of the testatrix's moveable property. It was

1892

SAHIB MIRZA v. UMDA KHANAM.

further urged that the legacies had been adeemed; of this, however, there is no proof whatever as far as plaintiff is concerned. No doubt Nawab Mulka Jehan made large gifts on her safe return from Karbala in 1866. But there is nothing on the record to show that she ever intended that any gift of hers to the plaintiff should be in lieu of the legacies. In former similar cases the lower Appellate Court has on such considerations as these held similar legacies by Nawab Mulka Jehan to be valid. It has come to a different conclusion in the present instance, mainly in consequence of certain facts which have come to the Court's notice subsequent to the decision of the former cases. Certain correspondence between the Queen and the Chief Commissioner of Oudh has been produced on behalf of the defendants-respondents, which was not before the lower Appellate Court on the previous occasions. The will of 1860 was executed just before the lady's departure to the holy place at Karbala (Baghdad). The lady returned in 1866, and her letter to the Commissioner, Lucknow, which has now been produced in this case, is dated 6th December 1876. This letter purports to pray the Commissioner to peruse a document, which she apparently enclosed with her letter, and states that that document was a will appointing her 2nd grandson, Nawab Sahib Mirza, executor thereof. She prayed the Government to approve of it, and said that on receipt of Government sanction she would complete and perfect it, and would do all that was necessary to make it legally valid. She also prayed that certain Government promissory notes might be received in trust for her and lodged in the Government Treasury. Her requests were refused by the Chief Commissioner, who, for some reason not clearly apparent, considered that this lady was not entitled to any special indulgence. He recommended her to have the will sent to the Registrar under section 42, Act VIII, 1871. This course the lady never adopted. What she did with this draft will (for such I presume it was) cannot now be known. Neither it nor any copy thereof, executed or non-executed, has been filed.

"On these facts it has been contended for the respondents that the will of 1860 was merely a conditional or temporary will, such as is known to Muhammadan law, and that it was designed merely to operate in the event of Nawab Mulka Jehan's not

returning to India from her pilgrimage to Karbala, and that as she in fact safely returned from Karbala, the will became inoperative after her said return; and, 2ndly, it is contended that if it did not become inoperative by the mere fact of the lady's return from Karbala, yet it was rendered void by a subsequent revocation thereof by Nawab Mulka Jehan herself, as witnessed by the documents above referred to. These arguments have induced the District Judge to reverse the judgment of the Court of first instance, though he owns that he does so with much hesitation. In my opinion there was no complete revocation of the will of 1860.

"No doubt the correspondence now brought on the file shows that the Queen in 1876 clearly had the *animus revocandi*, but in my opinion it goes no further than this. On the contrary, the correspondence shows that the document therein referred to, namely, the new draft will, was then not finally completed, for the lady says she will do what is necessary to make it legally complete when the Government shall have approved of it and of her proposals in connection with it. But the Government never gave that sanction. On the contrary, it declined to assist the Queen at all in the matter. There is absolutely nothing on the record to show that she did ever complete and make legally perfect the said proposed second will. She never registered it, though she was expressly recommended by the Government to do so, and the natural inference is that she laid aside her intention when she found that the Government would not assist her. This conclusion is strengthened by the fact that she never withdrew her old will of 1860 from the Wasika Office, wherein it had been deposited."

On this appeal—

Mr. *J. Rigby*, Q.C., and Mr. *C. W. Arathoon*, for the appellant, argued that the decree of the District Judge was correct, and should be restored. From the Nawab Mulka's letter written in 1876, and from her acts and omissions, it was a reasonable inference that she considered that the will of 1860 was revoked by another will, although the latter was not forthcoming, made in 1876. It might be doubted whether the revoked will of 1860 was ever intended by her to do more than operate in the event of

1892

SAHIB MIRZA v. UMDA KHANAM.

her death while absent on her pilgrimage. If the will of 1860 was not revoked, then arose a question of the construction of the 5th clause of it. The contention was that the intention of the testatrix was shown to be that the source from which the legacies, now sued for, should be taken was her pension. While that lasted, the legacies might have lasted; when it came to an end, they failed. In the course of the argument *Suleman Kadr* v. *Dorab Ali Khan* (1) was referred to, and Act XXIII of 1871, the Pensions Act.

There was no appearance for the respondents.

Afterwards, on the 5th March, their Lordships' judgment was delivered by—

LORD MACNAGHTEN.—The respondents in these consolidated appeals, who were plaintiffs in the Court of the Sub-Judge of Lucknow, are two servants of the late Nawab Mulka Jehan, widow of Mahomed Ali Shah, King of Oudh.

Nawab Mulka Jehan died in the year 1881. Each of the respondents claimed to be entitled to an annuity or stipend under her will. The annuities are very small in amount, but it is said that there are many other claimants in a similar position, and that the total amount involved in the decision of these appeals is considerable.

The will on which the respondents founded their claims is dated the 19th of March 1860. The appellants, who are heirs of Nawab Mulka Jehan, as well as residuary legatees under her will, rested their defence on two grounds, both of which were urged at the Bar. In the first place, it was said that the will of 1860 was revoked by a will made in 1876. In the next place, assuming the will of 1860 to have become operative, it was contended that, upon the true construction of that will, the annuities were directed to be paid solely and exclusively out of certain funds over which the testatrix had, at the time of her death, no power of disposition.

The Sub-Judge and the Judicial Commissioner were in favour of the respondents on both points. The District Judge held that the will of 1860 was revoked.

(1) I. L. R., 8 Calc., 1; L. R., 8 I. A., 117.

1892

SAHIB MIRZA v. UMDA KHANAM.

The alleged will of 1876 is not forthcoming. All that is known about it is to be found in a letter addressed by Nawab Mulka Jehan to the Commissioner of Lucknow, and dated the 6th of December 1876. In that letter Nawab Mulka Jehan expressed herself as follows: "I heartily desire that, with your permission and consent, a will in which I have appointed my grandson Sahib Mirza Bahadur my executor be formally and with certain conditions executed and ratified, so that in accordance therewith my estate may be managed after my death, in future, with the exception of the arrangement connected with the distribution (of stipends) among my dependents and the establishment of a charitable institution for the benefit of the public in general, the management and administration of which are not possible without the aid of Government." A little further on she says, "a copy of the will is also forwarded for your inspection." And the letter concludes with this sentence: "In short, this last will and testament of mine, being completed and properly executed, shall, after the Government shall have accorded its sanction thereto, be deposited with the Government." No other passage in the letter throws any light upon the subject. No copy or draft of the will referred to in the letter has been produced. Some oral evidence was offered as to its contents, but this evidence was held to be worthless.

The Government, it seems, declined to have anything to do with the matter. Nawab Mulka Jehan was recommended to deposit her will with the Registrar under the Registration Act. This advice, however, was not followed.

Considering the terms of the letter of the 6th of December 1876, it is by no means clear that the will referred to in it was ever executed. The expressions in the letter are no doubt consistent with the view of the District Judge that the will was executed before application was made to the Commissioner, but they are not inconsistent with the view of the Sub-Judge and the Judicial Commissioner that the will was not executed at the date of the letter, and that it was not intended to be executed until after the Commissioner's consent had been obtained. There is nothing to show in what respects the alleged will of 1876 differed from the will of 1860, except that it appears that Sahib Mirza

1892

SAHIB MIRZA v. UMDA KHANAM.

Bahadur was named as executor in the later instrument. Nor indeed is it possible to determine whether the reference to "the arrangement connected with the distribution of stipends" and "the establishment of a charitable institution" points to dispositions which are found in the will of 1860 and with which the testatrix did not propose to interfere, or to new and perhaps different dispositions contained in the alleged will of 1876.

In these circumstances, and upon these materials, which are the only materials relevant to the question under consideration, their Lordships are of opinion that the proper and necessary conclusion of law is that the will of 1860 was not revoked.

It is well settled that a will duly executed is not to be treated as revoked, either wholly or partially, by a will which is not forthcoming, unless it is proved by clear and satisfactory evidence that the later will contained either words of revocation, or dispositions so inconsistent with the dispositions of the earlier will that the two cannot stand together. It is not enough to show that the will which is not forthcoming differed from the earlier will, if it cannot be shown in what the difference consisted. It is also settled that the burden of proof lies upon the person who challenges the will that is in existence. These propositions have been established in this country, both in this Tribunal and in the House of Lords [*Cutto* v. *Gilbert* (1), *Hitchins* v. *Basset* (2), *Goodright* v. *Harwood* (3)], and as they are founded on reason and good sense they must be regarded as of general application.

The only remaining question is as to the true construction of the will of 1860.

That will was made when the testatrix was about to proceed on a pilgrimage to "Holy Karbala." Nawab Mulka Jehan it seems was a lady of great wealth. Besides her landed property, she was in the enjoyment of wasika allowance of Rs. 405 a month, in regard to which no claim is made by the respondents, a pension of Rs. 4,500 a month which was stopped in 1873, and the income of 12 lakhs of rupees which were settled by treaty, and in which apparently she had only a life-interest. It is, moreover, admitted that at the time of her death her moveable

(1) 9 Moo. P. C., 131. (2) 3 Mod., 203; Show. Par. Ca., 146.
(3) 2 W. Black, 937.

property was worth about Rs. 9,11,166, including Government notes worth about Rs. 6,96,000. The will provides for the management of her affairs during her pilgrimage, as well as for the distribution of her estate after her death. It is addressed to the Chief Commissioner, and invokes the assistance and protection of the Government under whose supervision the testatrix places her property.

The instrument begins with some general reflections on the duty of a pious Muhammadan to make a will, in order to prevent disorder in his affairs after his death, which seem to show an intention on the part of the testatrix to dispose of the whole of the property over which she had disposing power.

Clause 3 deals with the application of the income of the testatrix's landed property during her pilgrimage. If there should not be enough in hand from that source to answer the purposes of the will, her agent was to make up the deficiency from "the pensionary allowance and interest on notes, &c., paid from the treasury," and remit the balance to the testatrix. Pausing there, one can hardly doubt that the testatrix must have intended her agent to remit to her the whole balance of the income of her moveable estate, and not merely the balance of her wasika allowance and pension, and the income of the 12 lakhs. But the only words to carry the income are the words "pensionary allowance and interest on notes, &c., paid from the treasury." Then the will goes on to provide for the remittance to the testatrix of the income of her landed property when collected.

Clause 5 contains the gift on which the present question turns. In it Nawab Mulka Jehan, in the event of her death, declares her will as follows:—

"Rupees 981 of the Queen's coin, out of my allowance from wasika and notes, &c., shall be paid monthly from the Government treasury to my relations, dependents, and servants as detailed below . . . and the remainder of my allowance from wasika and notes, &c., and the whole of my landed property, *i.e.*, houses and groves, &c., and jagir villages, shall be divided among my grandsons and grand-daughters according to their lawful shares, and be paid to the agent of each of them." There again, in the ultimate disposition, it would appear that the testatrix must

1892

SAHIB MIRZA v. UMAD KHANAM.

have intended to deal with all her moveable property over which she had disposing power.

On consideration of the whole will their Lordships are of opinion that the Sub-Judge and the Judicial Commissioner were right in holding that the annuities or stipends given to the respondents were payable out of the testatrix's moveable property, which she had power to dispose of by will. Probably the testatrix was under the erroneous impression that she could deal with the wasika allowance, and her pension from Government, and the income of the fund settled by treaty. But their Lordships are of opinion that the words of the gift are large enough to charge the annuities or stipends in question upon the Government notes held by the testatrix, and also upon the rest of her moveable property. They may add that if the words of the will are to be taken in a more restricted sense, it appears to them that the gift of these annuities or stipends must be regarded as a demonstrative legacy, and in that view they would be payable out of the testatrix's general estate, in the event of the failure of the particular fund pointed out for their payment.

In the result, therefore, their Lordships are of opinion that the appeals ought to be dismissed, and they will humbly advise Her Majesty accordingly.

Appeals dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B.

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*P. C.** 1892. *Feb.* 3. *March* 5.

BIRESWAR MUKERJI AND OTHERS (DEFENDANTS) *v.* ARDHA CHANDER ROY AND OTHERS (PLAINTIFFS),

AND

SHIB CHANDER ROY (DEFENDANT) *v.* GOBIND MOHINI AND OTHERS (PLAINTIFFS).

[On appeal from the High Court at Calcutta.]

Hindu law, Adoption—Adoption, necessity of there being gift and acceptance of the adopted child—Construction of Will as to there being a designation, as legatee, of a child whose adoption failed.

The Court of first instance and the Appellate Court, after observing fully upon the evidence, found that, although a ceremony of adoption had taken place, there had not, in fact, been a giving and taking of the child.

* *Present:* LORDS HOBHOUSE, MACNAGHTEN, MORRIS and HANNEN, and SIR R. COUCH.