APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Lindsay.

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July, 6.

BALMAKUND (PLAINTIFF) *v.* RAMENDRA NATH GHOSE (DEFENDANT).*

Act No. VI of 1881 (*Probate and Administration Act*), *section* 3—*Will—Probate—Application to admit to probate a draft will neither signed nor attested.*

Draft instructions given by a testator to a lawyer, or a draft will prepared on such instructions can be treated as a will so as to allow grant of probate.

Aulia Bibi v. *Ala-ud-din* (1), *Janki* v. *Kallu Mal* (2) and *Sarabai Amibai* v. *Mahomed Cassum* (3), followed.

THIS was an appeal from an order of the District Judge of Allahabad, refusing to admit to probate a document which was the draft of a will prepared by a vakil according to instructions given to him by the testator. The facts of the case are fully set forth in the judgement of the Court.

Pandit *Shiam Krishna Dar* (with him Dr. *Kailas Nath Katju*), for the appellant.

Babu *Piari Lal Banerji*, for the respondent.

MEARS, C.J., and LINDSAY, J. :—The question to be decided in this First Appeal is whether the document which was exhibited as Exhibit 4 in the court below, and which was propounded as being the last will of Ram Rup Ghose, ought to have been admitted to probate by the District Judge. Ram Rup Ghose was once a head-master and had been living for a number of years in Allahabad after his retirement on pension. It is admitted on both sides that on the 2nd of February, 1920, Ram Rup Ghose executed a will which was registered. At that

*First Appeal No. 372 of 1924, from a decree of D. C. Hunter, District Judge of Allahabad, dated the 25th of April, 1924.

(1) (1906) I.L.R., 28 All., 715. (2) (1908) I.L.R., 31 All., 236.
(3) (1918) I.L.R., 43 Bom., 641.

time the members of Ram Rup Ghose's family, who were alive and in whom he was necessarily interested, were his wife, his son Ramendra Nath Ghose, his daughter-in-law Mirnalini Debi (the widow of a deceased son) and her three children (two sons and one daughter). By his registered will, Ram Rup arranged for the distribution of his property after his death. He appointed four executors to his will, and directed that one-half of the annual income of his estate should be paid to his wife and his son Ramendra Nath until his wife's death. After his wife's death one-half of the estate was to be made over to his son Ramendra Nath, subject to a deduction of Rs. 2,000 which was to go towards the marriage expenses of the testator's grand-daughter Kanak Champa Debi. The other half of the income was to be devoted to the maintenance of the testator's daughter-in-law Mirnalini Debi and her children. Provision was made for the education of the two grandsons and it was provided that when his grandsons attained full age, half of the estate was to vest in them, subject to a charge for the maintenance of their mother Mirnalini Debi, and subject to a contribution of Rs. 2,000 towards the marriage expenses of the grand-daughter. The will also provided that while the wife of the testator was alive, the family were to live with her. The property disposed of by the will consisted of Government Promissory Notes, shares in certain companies, a one-third share in two houses in Mirzapur and certain moveable property.

The document Exhibit 4, which was brought into court by Babu Balmakund, one of the executors, purported to revoke this earlier will. Exhibit 4, as it stands, is the draft of a will. It is not pretended that the testator, the deceased Ram Rup Ghose, who died on the 25th of September, 1923, ever signed this document, nor again does it bear the attestation of any witnesses. Nevertheless it was put forward

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as being the last will of Ram Rup Ghose, the case for the applicant being that this document, although informal in the manner just indicated, nevertheless had been prepared at the express request of Ram Rup, and with an express declaration by him that it contained his last wishes regarding the disposal of his property.

The document made a different distribution of the property to that which was provided in the registered will of the 2nd of February, 1920. The son Ramendra Nath was given a one-third share in a house in Mirzapur and was also given certain shares in the Tata Iron and Steel Works of the face-value of about Rs. 3,000. The income of the rest of the property was to be devoted to the maintenance of the daughter-in-law and grandchildren of the testator and the remaining corpus of the property was to vest in the grandsons on their attaining majority, subject to the maintenance of their mother. The same provision was made in this will as in the earlier will, namely, that Rs. 4,000 was to be spent on the marriage of the testator's grand-daughter. There was a gift over to the Kayestha Pathshala in certain events. Provision was also made by which certain ornaments, which belonged to the testator's wife, were to be given to the grandsons and, lastly, it was declared in clause 14 of this document that the earlier registered will of the 2nd of February, 1920, had been cancelled.

The grant of probate was opposed by the son of the testator, Ramendra Nath. It was not denied that the draft, Exhibit 4, as brought into court, had been prepared under instructions given by Ram Rup, but it was said that the will of the 2nd of February, 1920, had never been revoked and there never had been any intention to revoke it. It was suggested that this draft Exhibit 4 had been prepared merely for the purpose of pacifying the daughter-in-law Mirnalini, who, it was said, had acquired an ascendency over Ram Rup. It was said that the draft did

not represent the last wishes of the testator and that the preparation of the draft will could not amount to a revocation of the earlier will. It was also pleaded that no execution of the will had taken place and that Ram Rup never had any real intention to make a new will and to revoke the earlier one.

Under section 3 of the Probate and Administration Act a will is defined as being the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. It is not disputed that in the case of a Hindu, as Ram Rup Ghose was, the declaration may be legal although it is not signed by the testator, nor attested by witnesses, and it has been held in a number of cases that the draft instructions given by a testator to a lawyer, or a draft will prepared on such instructions can be treated as a will so as to allow grant of probate. We may refer in this connection to three cases, *Aulia Bibi* v. *Ala-ud-din* (1), *Janki* v. *Kallu Mal* (2) and *Sarabai Amibai* v. *Mahomed Cassum* (3).

Consequently if it is found that the draft Exhibit 4, though not signed by the testator and unwitnessed, does represent the last wishes of Ram Rup Ghose regarding the disposal of his property, effect must be given to it as a will, and as it contains a clause expressly revoking the registered will of the 2nd of February, 1920, the latter will must in that case be deemed to have been duly revoked.

Before discussing the evidence in the case it should be premised that Ram Rup was a well-educated man, who had been the head-master of a Government School and knew English well. There can be no question of his ability to understand a document prepared in English. One of the witnesses describes Ram Rup as having been a graduate of the Calcutta University.

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[After dealing with the evidence at some length, their Lordships continued :—]

On this evidence the learned Judge seems to have come to the conclusion that it was not possible for him to say that the document Exhibit 4 represented the last wishes of Ram Rup regarding the disposal of his property after his death. There was, of course, considerable conflict in the evidence and the result of this was to leave the Judge, as he says, convinced of nothing. He seems to have thought that before Ram Rup died he had not definitely made up his mind to make a fresh disposition of his property and to cancel his previous will.

It has been very strongly argued before us by Mr. *Dar*, on behalf of the applicant for probate, that the circumstantial evidence in the case points clearly to the conclusion that Ram Rup had definitely decided to alter his will and to revoke the earlier will of 1920.

It is not to be denied that there were reasons why Ram Rup might very well wish to make a new will. In the first place, since he executed the earlier will of 1920, Ram Rup's wife had died. It was no longer necessary therefore to make provision for her. Another fact was that his son Ramendra Nath was able to earn his own living. We have also every reason to suppose that Ram Rup was most anxious to provide, as well as he could, for his grandchildren. It was for them that provision was being made in the will and not for the mother Mirnalini. There is also the fact that Ramendra Nath himself admits that there were quarrels between him and his sister-in-law, quarrels which might very well have led Ram Rup to suppose that after his death Ramendra Nath would not be well disposed towards his brother's widow.

A good deal has been said about the conduct of Ram Rup himself and in particular as to the inference which

might be drawn from the fact that Ram Rup had never signed this draft document, Exhibit 4. There can be no doubt that he had read the draft, that he understood it, and had made corrections in it, and so far as we are able to understand, Ram Rup was quite in earnest about the preparation of this deed. It is difficult to suppose that he was taking all these pains if he did not seriously intend to make a new will.

As regards the fact that Ram Rup did not sign the will, it is to be remembered that early in September he had handed over the draft of the new will to his vakil, and asked him to make arrangements for the deposit of the document with the District Registrar. There can, we think, be no doubt that Ram Rup fully trusted his vakil in this matter and left it to him to do all that was necessary in order to get the will deposited in court. From early in September the vakil was in possession of Exhibit 4 and also two fair copies of the same, and it seems to us most likely that Ram Rup believed that all steps would be taken in order to carry out his wishes. Before, however, any deposit was made Ram Rup died. We do not think that it ought to be concluded from this conduct of Ram Rup that he was wavering or uncertain in his intentions. That conclusion might have been possible if it turned out that the draft document had been in his possession right up to the time of his death, but the explanation is that it was not in his possession—it was in the possession of the vakil. It was most reprehensible on the part of the vakil not to take immediate steps for the deposit of this document, and the excuse he has given, namely, that the Judge was busy in dealing with the Karari case was no excuse at all. Had an application been made to the District Judge for the deposit of this will, he would have been bound to entertain it at once, whether he was trying the Karari case or not. In short

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it is not possible to infer from the negligence of the vakil that Ram Rup, who was the author of this document, was in any way in an uncertain state of mind, and to hold that for this reason effect should not be given to his wishes as contained in this document Exhibit 4.

For these reasons we have come to the conclusion that the Judge ought to have pronounced in favour of the document, Exhibit 4, and to have granted probate of it as being the last will of Ram Rup Ghose.

This case has, we admit, been a difficult one, and when it was first opened, it appeared to us that the appeal stood very little chance of success. We have, however, to acknowledge the very able argument of Mr. *Dar*, who has removed all doubts which we might have been disposed to entertain in this matter, and has convinced us that the document, Exhibit 4, is a genuine document and was intended by the deceased Ram Rup to take effect as his last will.

We, therefore, allow this appeal, set aside the order of the District Judge and grant the application for probate of the document, Exhibit 4. The applicant is entitled to the costs both in this Court and in the court below.

Appeal allowed.