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MAUNG CHIT U v. MAUNG PYA.

RAGULEY, J.

The defence evidence is entirely beside the point. The defendant called five witnesses but they talked about things which appear to me to be entirely immaterial. He starts his own evidence completely away from the point deposing to all sorts of individual items. If the settlement of account was made and agreed to it cannot be re-opened in the absence of an allegation of fraud, coercion and so on, and there is no allegation that the agreement of the defendant to the correctness of the account was procured by fraud etc. I therefore set aside the decree of the lower appellate Court and give plaintiff a decree for the amount sued for with costs in all Courts.

APPELLATE CIVIL.

Before Mr. Justice Pratt, Officiating Chief Justice and Mr. Justice Cunliffe.

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May 14.

E. C. JEEWA

v.

H. H. YACOOB ALLY AND ANOTHER.*

Mahomedan will—Testator's powers of bequest—Mahomedan heirs' shares cannot be modified by will—Restriction of enjoyment of inheritance, whether permissible—Physical incapacity of an heir.

A Sunni Mahomedan by his will left a third of his estate to charity and placed the remaining two-thirds in the hands of a trustee with instructions to the trustee to pay to the testator's son an allowance which did not represent the total income of his share as heir. The testator's idea was a prudent one in view of the fact that the son was of weak intellect and suffered from other physical disabilities.

Held, that according to Sunni Mahomedan law a testator may bequeath one-third of his estate to a charity or to a stranger, but he cannot by a testamentary disposition reduce or enlarge the shares of his heirs, who are entitled to inherit, nor can he restrict their enjoyment of the property they inherit.

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* Civil First Appeal No. 172 of 1927 from the judgment of the Original Side in Civil Regular Suit No. 585 of 1926.

Moulvi Muhammad v. *Mussumat Fatima Bibi*, 12 I.A. 159 ; *Rance Khujoornnissa* v. *Mussamut Roushan Jehan*, 2 I.A. 192—*referred to.*

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Auzam for the appellant.

Rahman for the respondent.

CUNLIFFE, J. CUNLIFFE, J.—This is an appeal by one Ebrahim Cassim Jeewa. He is a young married man belonging to the Sunni Mahomedan Sect. He is co-heir, together with his widowed mother, to part of the estate of his father, the late Cassim Ebrahim Jeewa.

In the Court below, he sued for the administration of the moveable and immoveable properties belonging to his late father. The defendant to the action was his father's executor. From a schedule attached to the plaint, the estate was shown to consist of jewellery and immoveable property situated in Rangoon and thirteen racing ponies. The estate was said to be of the value of about Rs. 4,00,000. The defence set up by the executor was that the inheritance of the appellant came to him by will ; that the appellant is weak-minded and easily influenced ; and that the will directs that the appellant should merely enjoy a partial life interest of his share in the testator's estate. The will has been proved in a separate action. By its provisions a third of the father's property was left to charity. The remaining two-thirds was placed in the hands of a trustee to invest and some of the income from the investment, the actual amount named being Rs. 300 to Rs. 500 a month, was directed to be paid by the trustee to the appellant. There were further words added that the trustees were to buy for the appellant all things that may be necessary for his comfort at his request if funds permitted.

The learned Judge in the Court below in the action from which this is an appeal, came to the conclusion that the appellant *was* a person of weak intellect. He

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CUNLIFFE, J.

formed this conclusion by seeing the appellant in the witness box. The learned Judge thought too that the appellant was not well qualified to manage his own estate and that in all probability if he attempted to do so, he would fall into the hands of unscrupulous persons, who would waste his property. It was argued on behalf of the appellant both here and in the Court below that it was illegal for a Mahomedan to make a will at all in relation to more than one-third of his estate, but the learned Judge found on the authority of certain decisions which he quoted in his judgment, more especially under that of *Moulvi Muhammad Abdul Majid* v. *Mussumat Fatima Bibi* (1), that it was legal for a testator to restrain by a will the right of enjoyment of an heir to the property bequeathed to him.

On the facts only, I agree with this view and think that the learned Judge came to an eminently right and sensible decision. I regret, however, to be of the opinion that in law the decision was contrary to the Mahomedan rule of inheritance. It is quite clear that the right of adult Mahomedan heirs to the unrestricted enjoyment of the property they inherit is unassailable. A Mahomedan testator cannot by a testamentary disposition reduce or enlarge the shares of those who are entitled to inherit. Here the will, not only purports to limit the right to enjoyment of the outside one-third, devoted to charity, but deals with the right to the unrestricted enjoyment of the remainder of the estate. The principle of the unrestricted enjoyment of heirs of the property they inherit was specifically recognised by the Privy Council in the case of *Ranee Khujoorunnissa* v. *Mussamut Roushan Jehan* (2). The Privy Council there said: "The policy of the Mahomedan law appears to be

(1) (1885) 12 I.A. 159. (2) (1876) 2 I.A. 192.

to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion as much as a third, to a stranger." It is a curious survival of principle in modern times because one finds that no such restriction is maintained in relation to a gift *inter vivos*.

According to the Hedaya, a bequest cannot in any case exceed one-third of the testator's property. Here the whole of the property was bequeathed to a main trustee and the payments authorised to the appellant certainly do not represent the total income of his share of the two-thirds. I have been unable to find any reference to trusts in Mahomedan law except in the case of that form of endowment of a religious or semi-religious character, which is known as a "waqf."

The fundamental principles of Mahomedan law applicable to this case appear to me to be as follows :— (1) a Will may be made by a Mahomedan as to one-third of his estate ; (2) no Will may deal with the remaining two-thirds of the estate which devolves to the heirs by a kind of intestacy ; (3) personal trusts are unknown to Mahomedan law except in the form of a waqf.

There is no doubt from the medical certificates that were produced on the appellant's behalf that he is a person ill-fitted for the battle of life from a physical point of view. He is deaf ; he has a cleft palate and apparently speaks in a manner which it is extremely difficult to understand. He is not conspicuous for strength of character. Nevertheless, the archaic tenets of the law of Islam do not permit the foresight and prudent intentions of his father to be carried into effect.

The order of the Court will be that the moveable and immoveable properties of the late Cassim Ebrahim

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Jeewa, now in the hands of the Administrator-General (who has been substituted as the respondent to this appeal) will be the subject of an account and thereafter seven-eighths of two-thirds of the estate will be handed over to the appellant, the costs both here and below to come out of the estate.

PRATT, C.J.—I agree with my learned brother that the decree of the Original Side cannot stand, and must be modified.

It is settled law that a Mahomedan can only dispose of one-third of his estate by willand cannot interfere with the devolution of property according to law among the heirs. The testator disposed of one-third of his estate for charitable purposes, and left appellant's legal share to a trustee, with instructions to pay him an allowance, which did not even represent the total income of his share.

This obviously the testator had no legal right to do, however, laudable his intentions. I am quite unable to understand the finding of the learned Judge on the Original Side that the effect of plaintiff signing the will as a witness is to prevent him from pleading that the will is not binding on him.

It is quite clear from para. 270 of Wilson's Digest and the other authorities that it requires the consent of the heir after the death of the testator to validate a disposal of more than one-third of the estate by will. The fact that the plaintiff accepted certain monthly payments made under the terms of the will, under the circumstances, cannot possibly be construed into acceptance of the terms of the will and estop plaintiff from challenging them.

I concur in the proposed order for administration of the estate and payment to plaintiff of his share.