he could doubtless have obtained them. But he puts forward the childish pretence that he knew nothing about the matter, and six years later sues for four times as much as due to him.

"The Munsif's decree will be varied. A calculation will be made of the amount due on the bond of the 8th Aswin 1301 with interest at the stipulated rate up to the end of that year. If this amount exceeds the deposit of Rs. 201, the plaintiff will be entitled to the difference. As the whole litigation is entirely unnecessary, he will bear the defendant's costs in both Courts. He will be authorised to draw what is ultimately found due to him from the deposit and the defendant will be entitled to the balance."

Babu *Shib Chandra Palit* for the appellant. There is no law under which the deposit was made, and therefore it was not a valid tender. The plaintiff was not bound to take any notice of it. The money deposited in Court cannot be said to have been at the plaintiff's disposal. The Munsif was wrong in accepting the deposit and issuing the notice.

Babu *Girija Prosanna Roy* for the respondent. The finding is that the defendant at first tendered the amount to the plaintiff and then deposited in Court practically all that was due, and served the plaintiff with notice. The deposit was accepted by [185] the Court, and it issued a notice to the plaintiff. The money was therefore at the plaintiff's disposal and he could have easily taken that out. These amount to a valid tender. The plaintiff's claim is inequitable, and it would be very hard upon the defendant if it were allowed. The first Court was right in regarding the claim for interest after due date as a penalty.

MACLEAN, C. J. I am afraid the defendant was ill advised in depositing the money in Court. There is no power enabling him to do so and no obligation on the plaintiff to take it out. There has been no valid tender to the plaintiff of the debt which the defendant owed to him, nor can I see under what authority the money was deposited in the Court of the Munsif of Diamond Harbour, or what power the Munsif had to issue through his officer a notice to the plaintiff of the payment in. The plaintiff in point of law was entitled to disregard such notice. I should have been glad to help the defendant if we could legally have done so, for it is a hard case, but I cannot find any principle upon which we can say that the plaintiff is not entitled to the money he claims.

The appeal must be allowed, and the plaintiff must have a decree for his principal and interest at the stipulated rate up to the date of the suit. We allow no interest after the date of the suit.

Under the circumstances each party will bear his own costs in all the courts.

GEIDT, J. I concur.

Appeal allowed.

31 C. 186.

[186] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, and Mr. Justice Geidt.

NUZHATUDDOWLA ABBAS HOSSEIN *v.* MIRZA KURRATULAIN.*

[6th August, 1903.]

Will—Probate—Caveat—Undue Influence—Validity of Will—Objection to a particular Clause of Will.

In a suit for probate, the caveators assailed the whole of the will on the

* Appeal from Original Decree No. 77 of 1901, against the decree of Jogendra Nath Roy, Subordinate Judge of 24-Perganas, dated March 4, 1901.

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ground of undue influence, but the Probate Court granted probate disallowing that objection :—

Held, that in a subsequent suit it was not competent for the caveators to show that any particular clause in the will had been inserted through undue influence.

Allen v. *M'Pherson* (1), referred to.

[Reversed. 33 Cal. 116. P. C.=32 I. A. 244=1 C. L. J. 594=9 C. W. N. 938=7 Bom. L. R. 876=2 A. L. J. 758=15 M. L. J. 336.]

APPEAL by the defendant, Nuzhatuddowla Abbas Hossein.

This appeal arose out of an action brought by the plaintiffs to establish their title to the properties in dispute as the heirs of Nawab Khas Mahal, deceased, widow of the late King of Oudh, and for account, against one Nuzhatuddowla Abbas Hossein *alias* Pearay Saheb the defendant No. 1, and the Administrator-General of Bengal.

The plaintiffs alleged that they were the only grand-children of Khas Mahal, who died intestate on 31st March 1894, leaving considerable properties. The defendant, Pearay Saheb, was related to Khas Mahal and, being in indigent circumstances, came to her some sixteen or seventeen years ago, appealed to her charity, and was allowed to live at her house from that time. He gradually gained her confidence, acquired considerable influence over her, and, in course of time, became her confidential agent. The King of Oudh died in September 1887; Khas Mahal was then 73 years old, feeble in body and mind, and quite unable to manage [187] her own affairs, and she had to depend entirely upon Pearay Saheb for the management of her properties. During Khas Mahal's lifetime Pearay Saheb removed and took possession of large sums of money, Government securities, jewellery, etc., belonging to her, and gradually deprived her of the bulk of her property. He set up a deed of release, dated 12th November 1891, executed by Khas Mahal in his favour, but the plaintiffs stated that at the date, when she is alleged to have executed the said document, she was incapable of executing it as a free agent, having regard to her bodily and mental infirmity and the great influence that Pearay Saheb exercised over her.

After the death of Khas Mahal a will, dated the 30th of June 1893, and alleged to have been executed by her, was discovered in which the said deed of release was referred to and confirmed, and the then Administrator-General, L. P. D. Broughton (the defendant No. 2), as executor of the said will, applied to the High Court for probate thereof on the 14th May 1894, and the plaintiffs Nos. 1 and 2 entered caveat raising substantially the same issues as in the present suit, and setting up that Khas Mahal was physically and mentally incapable of giving instructions for the will or of understanding the dispositions contained therein. The probate proceedings were pending when the present suit was being tried in the Court of first instance.

The defendant No. 1 pleaded *inter alia*, that at the time he was staying with Khas Mahal and till her death, she was perfectly competent to manage and supervise her own affairs ; that her orders were carried out by her mukhtiar and servants ; that he merely carried out her instruction from time to time ; that whatever money came to his hands was duly accounted for ; that he was in no way her agent, nor was her sole confidential agent ; that he never had any control over her ; that she, out of her own free will, having executed the deed of release dated the 12th November 1891, whereby she gave up all her claims against

(1) (1847) 1 H. L. 191.

him, that document was a valid one, and binding on the plaintiffs; that Khas Mahal made a will in which she expressly confirmed the said release; that, that will was proved in solemn form after a contest between the plaintiffs Nos. 1 and 2 and himself; that until that deed of release was set aside, it was not competent for [188] the Court to direct any inquiry to be made into, or account taken of, the transactions antecedent to the date of that release; and that as the plaintiffs did not pray to set aside the deed it stood in their way and the suit should be dismissed on that ground alone.

The judgment in the probate suit was delivered on the 2nd July 1900: the will was found to have been executed by Khas Mahal as a free agent, and probate was accordingly granted on the 30th August 1900.

The Subordinate Judge of 24-Perganas framed the following, amongst other issues:—

"Is the deed of release relied upon by the defendant No. 1 genuine? Was the said defendant the confidential agent or in a fiduciary relation to the said Khas Mahal as alleged in the plaint? Is the release bad on the ground of undue influence? Is it a fact that any of the properties in suit was obtained from Khas Mahal by undue influence or while the defendant was in a fiduciary relation with her? Does the release bar the present plaintiffs?

Is the defendant liable to render an account; if so, to what extent and in respect of what properties?"

And after recording voluminous evidence, the learned Judge found that the execution of the deed of release by Khas Mahal was not proved, that the defendant No. 1, Pearay Saheb, was her confidential agent, that there was no proof that the document was explained to her, and the intention of making a release did not originate with her; and he held that the release had no effect. And he further found that there was no proof that Khas Mahal had knowledge of the statement made in paragraph 2 of the will in which she was alleged to have confirmed the deed of release or that she understood its nature and effect; and he passed a decree in favour of the plaintiffs and against the defendant, Pearay Saheb, for a lump sum of eight lacs of rupees.

Mr. *O'Kinealy* (*Moulvi Mahomed Yusoof*, *Moulvi Serajul Islam* and *Moulvi Sowghat Ali* with him), for the appellant, contended that in the probate suit the will was contested by the present plaintiffs on the ground that it was executed by Khas Mahal under undue influence. The said contention was overruled, and the Court granted probate to the will. In that will the deed of release in favour of the appellant was confirmed. That being so, it is not competent for the plaintiffs now to show that the will was executed under undue influence or that a certain clause in it was inserted [189] through undue influence. The principle laid down in the case of *Allen* v. *M'Pherson* (1) applies to the present case. The Court below was wrong in allowing the plaintiff to adduce evidence to show that the will was executed under undue influence, and that the clause confirming the release was inserted in the will through undue influence of the appellant, Pearay Saheb.

Mr. *Hill* (*Moulvi Shamsul Huda* and *Moulvi Mahomed Tahir* with him) for the respondent. The judgment in the probate case does not preclude me from showing that the will was executed under undue influence: see Taylor on evidence, 8th edition, p. 1432, Art. 1677, and also *Kanhya Loll* v. *Radha Churn* (2). Assuming that I cannot go behind the probate proceedings to show that the will was executed

(1) (1847) 1 H. L. 191.

(2) (1867) 7 W. R. 338.

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under undue influence, I contend that the clause in the will confirming the release is not a will, it not being a testamentary disposition of property: see section 3 of the Probate and Administration Act. I am at least entitled to show that that clause was inserted in the will through the influence of Pearay Saheb.

Mr. *O'Kinealy* in reply.

MACLEAN, C. J. This is a suit by the heir and heiress of the late widow of the late King of Oudh, commonly called Khas Mahal, and another gentleman who claims as a purchaser of certain interest in the property, the subject of dispute, from his co-plaintiffs, against one Pearay Saheb and the Administrator-General of Bengal; and the object of the suit is to have an account taken of all moneys and other properties come to the hands of Pearay as the alleged confidential agent of Khas Mahal, and for payment of what shall be found due to the plaintiffs on taking such an account; for a declaration that he was a trustee of certain of her property; for enquiry as to certain property which he is alleged to have taken possession of after the death of Khas Mahal, and for consequential relief.

Shortly, the case of the plaintiffs is as follows:—

They allege that Khas Mahal died intestate on the 1st of April 1894, leaving the plaintiffs 1 and 2 as her heirs under **[190]** the Shiah School of Mahomedan Law; that she died possessed of considerable property both moveable and immoveable; that some sixteen years ago, the defendant Pearay, who was then in indigent circumstances, and who is apparently a first cousin once removed, of Khas Mahal, came to her and appealed to her kindness; that she took pity upon him, allowed him to live at her house at Garden Reach; that he acquired the confidence of the lady, and, as time went on, exercised a great influence over her; that he acted as her confidential agent for the purpose of transacting her business matters, and that he attained such ascendency over her as to deprive her entirely of all free agency in respect of her affairs and estate; that the late King of Oudh died in 1887; that on his death Khas Mahal became entitled to a large amount of property; that Khas Mahal was at this time an old lady—her then age would appear to have been about sixty—feeble in body and mind; that Pearay obtained large sums of money from her; that he entirely controlled her affairs; and, in effect, deprived the lady of the bulk, if not the whole, of her property.

Khas Mahal died, as I have said, on the 31st of March or the 1st of April 1894, and the present suit was instituted on the 26th of March 1897, some four or five days before the period, allowed by the Statute of Limitation, expired.

The defendant Pearay Saheb admits that some nineteen years or so before her death, he came to reside with Khas Mahal; that she did ask for his advice from time to time in relation to her business affairs, but he denies that he succeeded in gaining her confidence in any unfair sense, or that he exercised great influence over her or that he ever acted as her confidential agent, or gained such ascendency over her as to deprive her of her free agency in respect of her affairs and estate. He denies that she was feeble in body or mind or incapable of attending to her business affairs, and, on the contrary, he says that she was a woman of exceptional ability, of business habits, and was perfectly competent to supervise and manage her business affairs. He says that he rendered her services from time to time; that she

had considerable affection for him; and that she did, from time to time, give him jewellery and sums of money, which, on his [191] own evidence, amounted apparently to a very large sum. As a defence to this suit he relies upon a deed of release, dated the 12th of November 1891, which was executed by the lady, in which she recognized that her presents to him were freely given, and released him from all liability to account. That deed of release was duly registered. He also denies that the lady died intestate. He says that she made a will, dated the 13th of June 1893, under which the Administrator-General of Bengal was appointed executor, and in which she expressly confirmed the release in question; that that will was proved in solemn form after a severe contest between the present plaintiffs Nos. 1 and 2 and himself, and that, until such release is set aside, it is not competent for the Court to direct an enquiry into or any account of the transactions antecedent to the date of that release.

These being the issues between the parties the Subordinate Judge of the 24-Perganas, after a trial, which apparently lasted for some seventy-six days, made a decree in favour of the plaintiffs against the defendant Pearay not for an account, as was asked for, but for a lump sum of eight lacs of rupees. Pearay has now appealed against that decision.

Very little of the voluminous evidence in the case has been read to us, because, it has been conceded by the learned counsel for the respondent that they cannot succeed in their suit for an account, unless they can set aside the deed of release. As I have stated, the deed of release is dated the 12th of November 1891, and the will is dated the 30th of June 1893, and the will contains the following clause:—"I have from time to time made gifts of money and cash to the said Nawab Pearay Saheb, and on the twentieth day of November one thousand eight hundred and ninety-one, I executed a *safinamah* in his favour, which has been duly registered. I have also by a deed of trust, dated the fifteenth day of February, one thousand eight hundred and ninety-three, duly registered, dedicated certain property therein described for religious and charitable purposes. I confirm these transactions." The will was strongly contested by the present plaintiffs Nos. 1 and 2 when probate was applied for by the Administrator-General of Bengal, and the probate proceedings were pending during the trial of the present case in the Court below, judgment being delivered on the [192] 2nd of July 1900, and probate issuing on the 30th of August in the same year. The decree now appealed against is dated the 4th of March, 1901. The Administrator-General of Bengal applied for probate on the 14th of May 1894, and a caveat was entered by the plaintiffs Nos. 1 and 2 shortly afterwards. In the probate suit, substantially the same issues were raised as in the present case. The caveators set up that Khas Mahal was physically and mentally incapable of giving instructions for the will, or of understanding the will, that she was unable to understand the nature of the dispositions contained in the will by reason of her feebleness of body and mind, and that the will was prepared and executed under the undue influence of the defendant Pearay. Mr. Justice Sale, sitting on the Original Side of the High Court, held, however, that the caveators had absolutely failed to make out their case. He was satisfied that the lady did give instructions for her will, that she thoroughly understood its contents, and executed it as a free agent and not under the influence or ascendancy of Pearay, and with full testamentary capacity, and probate was accordingly granted. The present

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plaintiffs Nos. 1 and 2 appealed against that decision, but the appeal was dismissed with costs. There was no further appeal from that decision.

We must take it, then, for the purpose of the present discussion, that the lady thoroughly understood the purport and effect of her will, and that it was her voluntary act, and that she was of full testamentary capacity to make the will, and in that will she expressly confirms this release.

It has been contended for the present plaintiffs, the respondents, that the confirmation in the will of the deed of release by Khas Mahal does not prevent them from asserting and proving, if they can, in the present suit, that the release was, in point of fact, executed by the lady under the undue influence of Pearay; and, in our opinion, the mere grant of probate does not prevent them from going into that question. But it has been equally conceded by the counsel for the plaintiffs that in the face of the confirmation by the lady of the release in her will, executed under the circumstances proved in the probate suit, and which will, under the circumstances, she must be taken to have understood [193] and approved of, it would be virtually impossible, by any other evidence, to satisfy the Court that the release had been improperly obtained from Khas Mahal. To get over this difficulty the plaintiffs contend that in the present suit it is open to them to show that the particular clause, in the will confirming the release was inserted in the will through the exercise of undue influence on the part of Pearay. We are unable to accede to this contention. No doubt, according to the English authorities, caveators may object not to the whole of the will but to a particular part of it, and say that a particular clause has been inserted in the will by fraud, and if that be substantiated, probate will be granted, excluding such clause. But here, in the probate suit, the whole of the will was assailed on the ground of undue influence: it was said that the will as a whole was invalid on that ground; and the Probate Court decided that issue against the present plaintiffs. It appears to us, under these circumstances, that it is not now competent for the plaintiffs in this suit in the Court of the 24-Perganas, which was not sitting as a Court of Probate, to show that this particular clause in the will was inserted in the will through the undue influence of Pearay. No such case is made by the plaint, nor could it properly have been made in the Court which was dealing with the present suit.

The question of the exercise of undue influence in relation to the will—the whole will—has been decided adversely to the present respondents, and the present contention is a mere attempt to review the decision of the Court of Probate. The case seems to be governed by the principle of *Allen* v. *M'Pherson* (1). It must, we think, be taken as settled law in England that a will cannot, after probate, be set aside in equity on the ground that the will was obtained by fraud on the testator, and no argument has been adduced before us to show why the same principle should not apply in India.

The result then is this: we have the release confirmed by the lady by her last will, which, after challenge, has been found to have been duly explained to her and to have been executed by her as a free agent with due testamentary capacity. In the [194] face of that release we do not see how the plaintiffs, who are claiming through Khas

(1) (1817) 1 H. L. 191.

Mahal, that lady herself having made no complaint against Pearay during her lifetime in respect of the transactions in question, but having released him from all liability in respect of them, can now ask for an account as against Pearay of the transactions antecedent to that release. It has been admitted that there were no transactions subsequent to the release, and the plaintiff's case throughout has been that all the money was obtained from the lady before the release, and that all the transactions complained of were before the release. As regards the claim from an inquiry as to the property alleged to have been taken by Pearay after the death of the lady, the Court below has said nothing about that, and we have not been troubled with any argument upon that part of the case. The result, therefore, is that the appeal must be allowed with costs and the suit dismissed with costs.

GEIDT, J. I concur.

Appeal allowed.

31 C. 195.

[195] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Hill and Mr. Justice Stevens.

JOGESHWAR ROY *v.* RAJ NARAIN MITTER;

AND

BENODE BEHARY MOOKERJEE *v.* RAJ NARAIN MITTER.*

[3rd December, 1903.]

Acknowledgment of liability—Limitation—Limitation Act (XV of 1877), s. 19—Exception from Limitation—Civil Procedure Code (Act XIV of 1882), s. 50.

In reply to a letter enclosing a bill for work done the defendant wrote: "the bill glanced over is incorrect; large amounts have been wrongly introduced. I will first have the work examined, although I know that the whole of the work is not yet finished; then I will examine the estimates and after deducting what has to be deducted I will see what is due":—

Held, that the writing was not an acknowledgment of liability within the meaning of s. 19 of the Limitation Act (XV of 1877).

Green v. *Humphreys* (1), referred to.

Under s. 50 of the Civil Procedure Code the plaintiff cannot take advantage of any ground of exemption from the law of limitation which has not been set up in the plaint.

[**Ref.** 17 M. L. J. 281; 26 I. C. 441; 14 C. W. N. 128; 17 N. L. R. 209; 36 Mad. 68; 33 Cal. 1047 P. C.; 12 C. L. J. 423=8 I. C. 788; 53 I. C. 898=23 C. W. N. 921. **Dist.** 7 C. L. J. 560; 3 Lah. L. J. 22. **Diss.** 10 Bom. L. R. 346. **Foll.** 21 M. L. J. 1024=12 I. C. 878.]

APPEAL by the plaintiff.

One Jogeshwar Roy, a builder and contractor, had entered into an agreement on the 26th August 1895 with the defendant, Raj Narain Mitter, to do some building works for the settled sum of Rs. 29,500 and to finish the same by the 16th November 1895, and to pay, in the event of his not so finishing in due time, Rs. 30 per day as compensation from the due date until actual completion. The work was done under the supervision of one Hari Charan Pal, [196] an engineer employed by the defendant, who on the 12th July 1898 gave a certificate by which he certified that the work had been satisfactorily completed.

* Appeals from Original Civil, Nos. 10 and 14 of 1903, in Suits No. 447 of 1899 and No. 446 of 1901.

(1) (1884) 26 Ch. D. 474.