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PRIVY COUNCIL.

SAJID ALI AND ANOTHER (DEFENDANTS) *v.* IBAD ALI (PLAINTIFF) AND CROSS APPEAL.

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

Will—Suit by testator's son contesting its validity—Alleged testamentary incapacity—Limitation Act (XV of 1877), Schedule II, Art. 91.

Although the mental faculties of a person suffering from partial paralysis may have been affected by his physical weakness, he may still be capable of devising and of executing a will of a simple character, although unfit to originate or to comprehend all the details of a complicated settlement.

In one sense the testator may not have been in the state which the witnesses described as "his full senses." He was feeble in body. The vigour of his mind was impaired, and his utterance was defective. On the other hand, there was nothing in the evidence which could reasonably lead to the inference that he was incapable of understanding such business as fell to his lot, or of regulating the succession to his property.

At the hearing of the suit, it was alleged that he was subject to insan delusions, as to which, however, the Courts below concurred in finding th they had not been shown to have existed. The statements made by hi alleged to have been the result of delusion, had not been shown to altogether without foundation. As to this their Lordships' opinion v that, in order to constitute an insane delusion affecting the question testamentary capacity, it should have been shown, not only that it v unfounded, but also that it was so destitute of foundation that no one, s an insane person, would have entertained it.

* *Present :* LORDS WATSON and MORRIS, and SIR R. COUCH.

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The judgment that this testator had not testamentary capacity appeared to them to have had the unsafe basis of speculative theory derived from medical books, and judicial *dicta* in other cases, and not to have been founded on the facts proved in this.

Article 91 of Schedule II of Act XV of 1877 did not appear to them to have any application to the case of a will.

APPEAL from a decree (19th July 1889) of the Additional Judicial Commissioner, reversing a decree (25th January 1888) of the District Judge of Lucknow.

This suit was brought on the 9th of April 1887, by the respondent against the appellants, for the proprietary possession by right of inheritance of a share in *taluk* Din Panah Panchgahni, in the Barabanki District, entered in the name of the plaintiff's father in lists 1 and 3 of the Chief Commissioner, prepared under section 8 of Act I of 1869 (the Oudh Estates Act); the plaintiff also claiming other property possessed by Chaudhri Karim Baksh till his death on the 16th October 1883. The plaintiff was the eldest son of the latter by his first wife. The defendants were his two sons by a second wife. Of three wills made by him the last was dated the 10th July 1883. By this will he had disinherited the plaintiff, who now alleged it to be void, having been executed after his father had ceased to be of sound and disposing mind.

The plaintiff alleged title "under an old family custom having the force of law." Besides alleging that the testator had, by reason of having been for five years paralytic, become of weak intellect and infirm, the plaintiff added that the will of the 10th July 1883 had been "unduly obtained from him by the two defendants of whom he went in fear"; and the cause of action was stated to have arisen when they obtained possession on the 29th July 1884.

The defendants by their written statement relied on this will, asserting that Karim Baksh had executed it while in sound mind, and traversing the statement of undue influence and coercion exercised upon him.

In the Courts below, principally, and on the hearing of this appeal, exclusively, the question was of the testator's capacity to make the will of the 10th July 1883, regard being had to his having been enfeebled by ill-health, having suffered from extravasation of blood on the brain, and consequent paralysis.

Whether or not the facts, and among them the alleged existence of delusions, were sufficient evidence, showing a mind unsound for the purpose of making a will, came into question.

At the hearing the District Judge found that no sufficient evidence had been adduced to prove the alleged undue influence and coercion. At that hearing the plaintiff brought forward that the testator had delusions, putting in evidence the deposition which the latter had made in previous proceedings containing statements said to be erroneous and the result of delusion.

In this suit both the Courts below had found that the existence of delusions had not been proved.

On the 24th March 1882 the testator had executed the first of the wills above referred to. On the 25th September in that year he executed the second. The Appellate Court below intimated that the evidence, causing it to pronounce against the will of 1883, did not apply to the wills of 1882. The effect of the first will was to give to the plaintiff a third share of the estate; of the second, to give him a third of the profits, without a right to share the estate itself; of the third, to disinherit him altogether.

That part of the property in suit which consisted of the *talukdari*, having been granted, at the time of the settlement, to the testator in 1858-59, he elected, on the 27th February 1860, that the succession should be regulated by the rule of primogeniture; and in 1862 he made over the management of the estate to the plaintiff, who retained it for twenty years. Differences then arose between the father and the son, and in 1882 Karim Baksh took back the estate, and delivered the management to his second son, the present appellant, Sajid Ali, and executed the first of the three wills. On the 29th May 1882, Karim applied for mutation of names in favour of all three of his sons as to equal parts of the estate. The plaintiff filed an objection to this, and mutation was refused. The withdrawal of the application took place according to the plaintiff, on the 13th October 1882, and meanwhile the second will was made. Disputes continued between the testator with the present appellants, on the one side, and the plaintiff, respondent, on the other, with the result of the proceedings in the Criminal Courts mentioned in their Lordships' judg

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and the application of the 29th June 1883 that the estate should be placed under the management of the Court of Wards, with the allegation by the plaintiff that his father was "a perfect insane." Thereupon the third will, now in dispute, was executed by the father. An inquiry was made by Shams-ud-din Ahmed, Extra Assistant Commissioner, under the Deputy Commissioner's order, with the result of a report, on the 30th August 1883, that "Karim Baksh was not out of his senses, nor of unsound mind."

After the testator's death, the Deputy Commissioner, on the 8th November 1883, attached the *talukdari* estate under section 146 of Act X of 1882. The present appellant, Sajid Ali, who had previously applied for mutation of names, discontinued those proceedings, and sued in the Civil Court, on the 10th January 1884, to have the will of his father, of the 10th July 1883, declared valid. The plaint was, for some informality, rejected, and no further steps were taken in regard to it. But the mutation proceedings were resumed, and on the 2nd May the Deputy Commissioner reviewed his order of attachment, and under section 65, Act XVII of 1876, placed the appellant, Sajid Ali, in possession. This order was confirmed on appeal.

In this suit the District Judge found that the plaintiff had not shown Karim Baksh to have been of unsound mind on the 10th July 1883, and that the evidence on the other side had shown him to have been of sound mind and capable of making a will on that date. Neither as regarded coercion, nor as regarded undue influence, was there credible evidence. While this opinion would have apparently led to the dismissal of the suit, he dismissed on another ground, *viz.*, that the suit, being brought for the cancellation of an instrument, fell within the three years bar of Article 91 of Schedule II of Act XV of 1877, as the plaintiff admitted, in his plaint, knowledge of the will more than three years before suing.

On appeal, the Judicial Commissioner came to a different conclusion. He concluded that the wills of 1882 could not be validated on the ground of the testator's incapacity, agreeing with with the District Judge; and also he agreed with him, as stated, that the evidence had failed to prove the existence

of any delusions on the part of the testator. He, however, was not satisfied that the will of 10th July 1883 was executed by the testator while of sound and disposing mind, for three reasons: *First*, that before 1882 there had been a sudden perversion of his feelings towards his eldest son, for which, before the middle of that year, no cause had been assigned, although, after 1882, abundant cause might be adduced for the ill-feeling which existed. *Secondly*, that, at the date of the will of 1883, there had been recent extravasation of blood on the brain; this, to his mind, showing a fresh access of a disease which must, according to the medical authorities, have affected the testator's faculties; and that thus there was reason for the Court to doubt the correctness of the assertion made both by Dr. O'Brien and Shams-ud-din that Karim Baksh was, on the 10th of July 1883, of sound mind and memory and capable of managing his affairs. *Thirdly*, that the will of 1883 was of a patently unjust character and ought not to be maintained. SA

Upon the question of limitation, the Judicial Commissioner found that the defendants had not been in possession till the 5th May 1884, so that the plaintiff's suit was within time, he being also entitled to deduct the time occupied by his attempts to sue *in formâ pauperis*.

The Judicial Commissioner held that sound disposing capacity meant, not merely the ability to comprehend simple propositions and to answer ordinary questions correctly, but also implied the possession of ordinary memory that was sound, and capable of bringing to a testator's mind those having a claim upon him, and causing him to act justly with proper regard and affection towards them. He referred to the judgments in *Smith* v. *Tebbit* (1) and in *Banks* v. *Goodfellow* (2). On the evidence he found that the testator, having suffered from cerebral hæmorrhage, the result upon his mental faculties, described by writers on medical subjects as being usual, had occasioned to him the loss of that amount of memory, judgment, and unwarped affections requisite for making a valid will.

Mr. *H. Cowell*, for the appellants, argued that no grounds were shown by the Judicial Commissioner's judgment, either of law or

(1) 36 L. J. P., 97. (2) L. R., 5 Q. B., 549 (565.)

of fact, for his reversal of the decree of the first Court. The effect of the findings of both the Courts, original and appellate, was that abundant cause appeared for the testator's alteration, in the will of 1883, of the arrangements made by the wills of 1882. There had been no medical evidence given that either paralysis, or extravasation of blood upon the brain, some time previously suffered, must necessarily have produced testamentary incapacity. The weight of the evidence was in favour of the testator's having possessed, on the 10th July 1883, a sound and disposing mind. The Courts below had concurred in finding that the alleged delusions had not been proved. The statements made by the testator, which are relied upon as showing the existence of such delusions, had not been shown to be entirely erroneous statements. The testator's having given his deposition in Court as to his will in the proceedings in 1883, and the evidence in this case of those who witnessed its execution, might alone be considered sufficient to establish the will. The law of Oudh on this subject was declared in section 11 of the Oudh Estates Act, 1869, and did not differ from the English law. It was that no *talukdar* could, under that Act, make a bequest who did not know what he was doing. The cases cited in the judgment below were then examined ; and it was argued that they did not support it. As to Article 91 of Schedule II of Act XV of 1877, the appellants relied on the merits and not on the bar. He referred to *Janki Kunwar* v. *Ajit Singh* (1), but he did not contend that either the article or the case cited applied to the case of a will disputed as was this.

Mr. *R. V. Doyne*, for the respondent, withdrew the contention raised in the cross-appeal that Karim Baksh, the *talukdari* title being entered in lists 1 and 3, prepared in pursuance of section 8 of the Oudh Estates Act, 1869, had no right to alter by will the rule of primogeniture. But he relied on the necessity of its being established that the *talukdar* under section 11 of that Act was of sound mind when exercising his right of bequest. He contended that upon the whole evidence, the soundness of mind of Karim Baksh had not been proved. He also argued that he had been subject to the influence of his younger sons.

(1) I. L. R., 15 Calc., 58 ; L. R., 14 I. A., 148.

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H. Cowell replied.

rwards, on the 20th July, their Lordships' judgment was d by

D WATSON.—The late Chaudhri Karim Baksh was owner half share of the *taluk* Panchgahni, in the district of Bara- which was duly entered in lists 1 and 3 prepared under dh Act, I of 1869, and was therefore descendible, in the of his dying intestate, according to the rule of primogeni- He had three sons, the eldest, Ibad Ali, by his first wife, the respondent, and the younger sons, Sajid Ali Wajid Ali, by his second wife, being the appellants in riginal and only appeal which has been insisted in at their ships' bar.

The deceased had a paralytic attack about the year 1879, by ich he was affected until his death, which occurred on the 16th ober 1883. In the year 1882 the deceased became dissatisfied th the conduct of the respondent, Ibad Ali, to whom he had viously entrusted, for a period of twenty years, the entire ma ement of his property. On the 24th March 1882 he executed ill by which he settled his estates upon his three sons in equal res; and on the 27th May 1882 he applied for mutation of mes in their favour. That application was resisted by the pondent, on the ground that his father had become unable to manage his own affairs, and was "a perfect insane." It was ultimately withdrawn, in consequence of the deceased having executed a second will on the 25th September 1882, by which he appointed his two younger sons to succeed him as *talukdars*, having the sole management and administration, and restricted the interest of the respondent to one-third of the free profits uring his lifetime.

From the time when the respondent was deprived of the management he appears to have lived on terms of open enmity with his father until the death of the latter. After the execution of his second will, the deceased, on the 7th November 1882, obtained an order from the Assistant Commissoner, which was subsequently confirmed by the Commissioner on an appeal by the respondent, to the effect that the possession of the deceased was to be maintained until removed by a Court of competent

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jurisdiction. All the parties, including the respond by the same order, bound over to keep the peace. The dent, notwithstanding, forcibly interfered with his father and its management; and on the 23rd December 1882, complaint at the instance of the deceased, which was su by the testimony of the deceased given in open Court, convicted of breach of the peace, and sentenced to pay a Rs. 200. In April and May 1883 similar proceeding taken against the respondent, when the deceased again ap in Court, on the 5th May 1883, and gave his deposition oath.

On the 29th June 1883, the respondent presented a pe to the Deputy Commissioner of Barabanki, praying hi place the estate of the deceased under the manageme the Court of Wards. The reasons assigned for the applic were, that the deceased was a man of 70, that he had paralysed for three or four years, and that he had "consequ become weak and imbecile, quite unable to manage the affair the estate. He has no discretion of either good or bad, and lost his powers of moving and seeing, and is a perfect insa The Deputy Commissioner made a remit to his Assistant enquiry into the condition of the deceased. The Extra Assist Commissioner summoned Karim Baksh before him, and an examination on various matters connected with the estate a family of the deceased, he reported, on the 30th August 188 "Chaudhri Karim Baksh certainly had an attack of paralysi and in consequence thereof he has lost strength of his leg to som extent, but he is not out of his senses, nor is he of unsound mind He has answered the questions put to him very thoughtfully." Upon receiving that report the Deputy Commissioner declined entertain the respondent's petition.

On the 10th of July 1883, ten days after the date of the respondent's application to have his estate placed under the guardianship of the Court of Wards, the deceased executed a third will. By it, he appointed that his second son, Sajid Ali, should succeed him as sole *talukdar*; that his third son, Wajid Ali, should be entitled to a moiety of the profits remaining after payment of the Government revenue and other necessary expenses; and that

must be shown, not only that belief in it was unfounded, but that it was so destitute of foundation that no one except an insane person would have entertained it.

In the present case, there is no reason whatever for supposing that the respondent did not contract debt to the amount stated during his twenty years' management of the estate. He knew the terms of his father's statement before the proof commenced; and, although the *onus* was upon him of showing that the statement was due to insane delusion, he had no evidence to contradict it. The suggestion that the deceased laboured under delusions with respect to his daughter's garment appears to their Lordships to be no less absurd. His statement with regard to that article of dress was said to be contradicted by the evidence of the appellant, Sajid Ali, who, in answer to a question by the respondent's pleader, stated: "My sister died in her husband's house, she was married to a *talukdar*. When she died, she was not wearing the *pajamas* of one of her brothers." Now the deceased, in his deposition, said nothing to contradict that statement. Their Lordships would naturally infer from his deposition that the domestic incident, which is not shown to have been impossible, occurred whilst his daughter was still living in family with him, and was probably told to him, and not actually observed by him. At all events the statement does not afford the least evidence of insane delusion.

Their Lordships do not think it necessary to refer in detail to the evidence of all the witnesses who were adduced in support of the will. But the testimony of one witness, Dr. O'Brien, at or time Civil Surgeon at Barabanki, is valuable, because he is t only European expert who saw the deceased, and also because character and skill were admitted by the respondent's Counse be beyond question. He visited the deceased on the 18th 1883, three weeks before the date of the will, and on that oc gave him two certificates. One of these was to the effect th deceased was "suffering from paralysis, the result of an ex sation of blood in the brain. He is physically unfit for dance at Courts, and in my opinion should be exempt such." The other was to the effect that the deceased sound state of mind, and is capable of understanding

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of any will, deed, or other legal instrument he may wish to execute." In his deposition as a witness Dr. O'Brien affirmed the accuracy of these documents. He explained that the deceased "had recently suffered from an extravasation of blood in the brain," and that, in his opinion, any excitement would be likely to occasion fresh hæmorrhage. He adhered to his opinion that the deceased was mentally sound, and quite capable of making a will.

Upon the whole evidence, their Lordships have had no difficulty in coming to the same conclusion with the District Judge, and in rejecting the decision of the Judicial Commissioner. There is not only reliable oral testimony, but there are facts in the case established beyond controversy, all tending to show that the deceased continued in the same mental condition from the time of his first attack in 1879 until his second and fatal attack in October 1883.

Their Lordships have had some difficulty in apprehending, and are quite unable to concur in, the reasons assigned by the Judicial Commissioner for his decision. The learned Judge, after an examination of the evidence, cites passages from the treatise of Dr. Ross on "Diseases of the Nervous System," and Dr. Quain's "Dictionary of Medicine," and then proceeds to quote various *dicta* of English Judges in cases of insanity and incapacity, which appear to their Lordships to have little or no bearing upon the facts of the present case. Under the influence apparently of these medical and legal authorities, and relying on the fact spoken to by Dr. O'Brien, that there had been extravasation of blood in the brain, held that the deceased must, at the time when he made his rd will, have had "a fresh access of his terrible malady." That pulative theory, for it is nothing else, illustrates the danger eriving inferences of fact from medical books and judicial instead of depending upon the facts established by the evi- in the case. It does not seem to have occurred to the learned that assuming the deceased to have had a "fresh access" Dr. O'Brien saw him, which is neither probable nor he must have recovered from it before the 18th of June; there is not a particle of evidence to show that there was ge in his condition, bodily or mental, between that date ecution of the will.

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Their Lordships will humbly advise Her Majesty to dismiss the cross-appeal, and, in the original appeal, to reverse the decree of the Judicial Commissioner, to restore the decree of the District Judge, and to order Ibad Ali to pay to Sajid Ali and Wajid Ali their costs of the appeal to the Court of the Judicial Commissioner. Ibad Ali must pay to Sajid Ali and Wajid Ali their costs of these appeals.

Appeal allowed.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitor for the respondent: Mr. *J. F. Watkins.*

C. B.

GANGA BAKSH AND ANOTHER (DEFENDANTS) *v.* JAGAT BAHADUR SINGH (REPRESENTATIVE OF THE PLAINTIFF).

P. C.* 1895 *June* 20 & 21. *July* 27.

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

Gift—Transfer by gift—Failure to prove alleged inequitable advantage taken by donee over donor—Contract Act (IX of 1872), sections 16 and 17.

The heir to a share in an ancestral estate, out of possession, and at a time when he expected that his right would be contested by another claimant, made a gift of his title to his brother's son, providing that he, the donor, should have nothing to do with the cost of getting possession. After the donee had obtained possession, the donor sued to have the gift set aside. The gift, having been maintained in the first Court, was set aside by the the Appellate Court, on the ground that, it having been made without consideration and imprudently as regarded the donor's interests, he had had no opportunity to obtain any advice from an independent person, but had only had that advice which came from, or was given on behalf of, the donee. Thus the gift was not an equitable transaction which the Court should enforce. The Appellate Court had, however, affirmed the finding of the first Court, that the donor, with full knowledge of the contents of the deed, had voluntarily executed it, and that he had been apprehensive of incurring costs in litigation in getting possession of his inherited share.

Held, that the Appellate Court was in error in taking it that the question was whether the transaction was an equitable one which that Court should enforce. The defendant was not asking the Court to enforce the deed; and the reason why the gift was without consideration was explained by the circumstances. The reasons given by the Appellate Court for reversing the decision of the first Court were insufficient. It did not appear that unsound advice was given to the donor by, or on behalf of, the donee, or that confidence was

* *Present:* LORDS WATSON and MORRIS, and SIR R. COUCH