

High Court, which was made in accordance with the findings that have been stated. It became unnecessary for the respondent to proceed with his cross-appeal, and their Lordships will humbly advise Her Majesty that it should also be dismissed. It will be dismissed without costs, and the appellants in the principal appeal will pay the costs of that appeal, which are to be taxed and allowed as if there had been no cross-appeal.

1891

MAHABIR  
PERSHAD  
v.  
RADHA  
PERSHAD  
SINGH.

*Appeal and cross-appeal dismissed.*

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

Solicitors for the respondent and cross-appellant: Messrs. *Burton, Yeates, Hart, and Burton.*

C. B.

WAJID KHAN (PLAINTIFF) v. EWAZ ALI KHAN  
(DEFENDANT).

P. C.\*  
1891  
May 5.

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

*Equity as to gifts to persons in a fiduciary relation—Burden of proving absence of undue influence—Gift attempted by widow.*

An instrument executed by a widow, after setting apart the rental of villages, belonging to her as her patrimony, to defray the expenses of her and her deceased husband's tombs, gave to her managing agent, who was her sole adviser, the management of the endowment in perpetuity, with the residue, after the above expenditure should have been met, for himself; so that a large surplus would have remained each year in his hands, and he would have been the person substantially interested. *Held*, that this transaction was within the well-recognised principle that every onus is thrown upon a person filling a fiduciary character towards another of showing conclusively that he has acted honestly, and *bonâ fide*, without influencing the donor, who has acted independently of him.

In a suit brought by the agent's representative to have the gift enforced against the widow's successor in the estate, this burden had not, in the opinion of the Courts below, with which their Lordships concurred, been sustained; and it was *held* that the gift had been rightly set aside.

APPEAL from a decree (29th August 1887) of the Judicial Commissioner, affirming a decree (2nd October 1886) of the District Judge of Rai Bareli.

\* *Present*.—LORDS WATSON and MORRIS, SIR R. COUCH, and  
MR. SHAND (LORD SHAND).

1891  
 WAJID  
 KHAN  
 v.  
 EWAZ ALI  
 KHAN.

The plaintiff-appellant sued for a declaration of his right under a registered instrument executed on 21st June 1865, by a widow, Sadha Bibi, the predecessor in estate of the defendant-respondent, a talukdar. By this she had granted to the plaintiff's father, Dalmir Khan, the management of an endowment, consisting of the profits of twenty-nine villages, amounting to Rs. 9,993 a year, part of the Mahona taluk, pargana Jogdispur, in the Sultanpur district. In 1871 this taluk was placed under the management of the Court of Wards in virtue of Act XXIV of 1870. Sadha Bibi died on 27th August 1873; and Dalmir Khan died in November 1877, leaving the plaintiff, his son. The defendant-respondent, who was the nephew of Sadha Bibi's late husband, was recognized as the successor to the taluk while it was still under official management, which ceased before this suit was brought. The instrument in question, termed in it *ahdnama wasika*, recited that the widow had no child, and that she desired to provide for the expenses of the tomb of her deceased husband and her own tomb. For this purpose it set apart, "by way of *wasika*, or endowment," the above property, and appointed Dalmir Khan to be hereditary manager of the endowment. The making of this deed and the competence of the widow to alienate were not disputed. But the defence was that the document had been obtained by the undue influence of Dalmir Khan, who was, at the time, in the fiduciary relation of manager of the widow's estate. It was also in evidence that afterwards, on the 18th February 1872, she presented a petition informing the Deputy Commissioner, Rai Bareli, that she had "revoked her will in favour of Dalmir Khan," and had dismissed him from her employment.

The District Judge, holding that the document of 24th June 1865 was of a testamentary character, in which opinion the Judicial Commissioner afterwards concurred, found that Dalmir Khan was the widow's *karinda*, and in a position of active confidence and trust. The rule followed by Courts of Equity in such cases was "that he who bargains in a matter of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence." He referred to *Ashgar Ali v. Dilroos Banoo Begum* (1), and to the 11th section

(1) I. L. R., 3 Calc., 324.

of the Evidence Act, 1872. The deed of 21st June 1865 was not proved to have been obtained in good faith, and he, therefore, dismissed the suit with costs.

The Judicial Commissioner, in appeal, considered that the expenses of maintaining the tombs would have been wholly disproportioned to the income assigned for the purpose, and he affirmed the judgment of the lower Court.

Mr. *R. V. Doyne* appeared for the appellants.

Mr. *G. E. A. Ross* for the respondents.

For the appellants it was argued that the endowment for the tombs should receive effect, and the present case was not precisely one of the application of the rule as to the presumption of undue influence. Without that presumption there was little to show that any such influence had been exercised, and, as the endowment had been validly constituted, the Muhammadan law required that to deprive one who was in the position of a Mutawali, there should be ground shown by proof of his misconduct. Reference was made to Macnaghten's Muhammadan Law, edition of 1869, page 69, principle 5, in the chapter on Endowment.

[LORD WATSON said that the deed of 1865 was to be taken as a whole, and that if the presumption of undue influence arose, then it would relate, unless displaced by evidence, to all the objects of the instrument.]

Counsel for the respondents was not called upon.

Their Lordships' judgment was delivered by

LORD MORRIS.—In this case a suit was filed by the appellant Wajid Khan, the son of one Dalmir Khan, seeking to have a declaration of right to possession of certain villages under a deed or will of the 21st June 1865, purporting to have been executed by Rani Sadha Bibi, the widow of Raja Ali Baksh, in favour of Dalmir Khan. The District Judge and the Judicial Commissioner of Oudh decided against the plaintiff; and both those Courts decided substantially on the same ground, that the document was executed under circumstances in which it could not be supported.

For the purpose of their Lordships' judgment it appears to them that it is not necessary to consider whether the document should be constructed as a deed of present conveyance or a will, because

1891

WAJID  
KHANv.  
EWAZ ALI  
KHAN.

1891  
 WAJID  
 KHAN  
 v.  
 EWAZ ALI  
 KHAN.

in neither aspect can it be upheld. Dalmir Khan held a highly fiduciary position in regard to Rani Sadha Bibi, who was alleged to have executed it; she was a lady 65 years of age and comparatively illiterate, and she does not seem to have had any adviser or counsellor except Dalmir Khan, who appears to have had great influence over her, for one of the exhibits in the case is a will made by her in his favour in the year 1862, only some three years before the execution of the document which is in question in this case. He certainly filled such a position towards her as to render it incumbent upon him to show that he had made a proper use of the confidence reposed in him by her, and that the execution of the document, granted without any valuable consideration and from which he obtained important pecuniary benefit, was free from all attempt at undue influence. In the opinion of their Lordships the onus lay upon him to do so; because although the deed of 1865 at first provides that this lady sets apart 29 villages of her patrimony, producing a rental of Rs. 9,993 a year, to defray the expenses of her tomb and that of her deceased husband, it goes on to say that Dalmir Khan, her managing agent, shall have the management of the endowment in perpetuity, generations after generations, and that under every circumstance he shall have full power for good or for evil. Dalmir Khan thus became the person substantially interested, because, looking at the facts of the case, it would appear that a comparatively small portion of this large fund could be annually allocated to the expenses of the tomb, and that a large surplus would each year remain in his hands.

Under these circumstances Dalmir Khan is brought within all the well-recognised principles which have been already referred to in the discussion of this case by more than one of their Lordships, namely, that every onus is thrown upon a person who fills such a character as he did, of showing conclusively that the transaction was an honest one, and a *bond fide* one, as to which a woman in the position of this lady had had some independent advice, or some opportunity of knowing exactly what she was about, and in which she was not under the complete influence of her manager. Their Lordships are clearly of opinion that this instrument is one that cannot be sustained; that it is not a *bond fide* instrument; and that the onus which their Lordships consider lies upon Dalmir

Khan's representative has not been sustained, namely, that of showing that this was a proper transaction considering the relationship of the parties.

Then it is said that although Rani Sadha Bibi revoked this deed in 1872 by a registered petition, it was a deed *in presenti* which could not be revoked, at all events in so far as the endowment was in the nature of a dedication of her property to the expenses of her husband's and her own tomb, and that the petition itself recognised at that time the continuing existence and validity of the endowment. But if the instrument was bad in the beginning, at all events as regards the benefit which Dalmir Khan took under it, it is difficult to see how his representative is prejudiced by its revocation in 1872, which if valid puts an end to the instrument, and if invalid could not set up an instrument that was bad in itself. Their Lordships are clearly of opinion that the instrument was bad *ab initio*; that it was improperly obtained by a person in a fiduciary character; and that even if there were no onus on Dalmir Khan's representative to prove the honesty of the transaction, all the facts of the case go to show that there was active undue influence.

Upon these grounds their Lordships will humbly advise Her Majesty that this appeal should be dismissed, and that the judgment of the Court below should be affirmed. The appellant must pay the costs of this appeal.

*Appeal dismissed.*

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

Solicitors for the respondent: Messrs. *Barrow and Rogers.*

C. B.

### CRIMINAL APPELLATE.

*Before Mr. Justice Prinsep and Mr. Justice Beverley.*

LALCHAND (APPELLANT) *v.* QUEEN-EMPRESS (RESPONDENT).\*

*Confession—Criminal Procedure Code (Act X of 1882), ss. 164, 364 and 533—Examination of accused—Defect in confession—Confession not recorded in language in which it is given, admissibility of.*

Where a confession given in Hindustani was taken before a Subdivisional Magistrate, and was recorded by the Court Officer in Bengali, that being the

\* Criminal appeal No. 165 of 1891, against the order of Syed Ameer Hossein, Presidency Magistrate of Calcutta, Northern Division, dated the 16th of February 1891.

1891

WAJID  
KHAN

*v.*  
EWAZ ALI  
KHAN.

1891  
March 17.