ORIGINAL CIVIL.

Before Mr. Justice Pugh.

SAKINA BIBEE

v.

MAHOMED ISHAK.*

1910
May 31.

Mahomedan Law—Probate—Will, admissibility of, in evidence, without probate —Probate and Administration Act (V of 1881) s. 4—Succession Act (X of 1865) s. 187—Hindu Wills Act (XXI of 1870) s. 2.

There is no provision of law rendering it obligatory, in the case of a Mahomedan will, to take probate. After due proof, a Mahomedan will is admissible in evidence, notwithstanding that grant of probate has not been obtained.

Fatma v. *Shaik Essa* (1) not followed.

Shaik Moosa v. *Shaik Essa* (2), followed.

Kherodemoney Dossee v. *Durgamoney Dossee* (3), *Administrator-General of Bengal* v. *Premlal Mullick* (4), *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (5), *Bhagvansang Bharaji* v. *Bechardus Harjivandas* (6) and *Surbomungola Dabee* v. *Mohendronath Nath* (7) referred to.

ORIGINAL SUIT.

On the 9th May 1908, one Sheikh Din Mahomed, a Mahomedan belonging to the Sunni sect, died, leaving a considerable estate in Calcutta, and leaving him surviving three widows, one of whom was Sakina Bibee, four sons, three daughters and two grand-daughters by a pre-deceased son. It appears that on the 2nd October 1902, Din Mahomed had made and published a will, by which he disposed of his property among his then existing heirs, and created a *wakf* for the maintenance of a mosque and a tomb. Thereafter his youngest son was born, and he executed and registered a deed of gift in the favour of this son of two properties acquired subsequent to the will.

This suit was instituted by the widow Sakina Bibee and the two grand-daughters against the other heirs and heiresses of

*Original Civil Suit No. 889 of 1909.

(1) (1883) I. L. R. 7 Bom. 266.
(2) (1884) I. L. R. 8 Bom. 241.
(3) (1878) I. L. R. 4 Calc. 455.
(4) (1895) I. L. R. 22 Calc. 788.
(5) (1897) I. L. R. 25 Calc. 103.
(6) (1881) I. L. R. 6 Bom. 73.
(7) (1879) I. L. R. 4 Calc. 508.

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the deceased for a declaration of their shares and interests in the general estate of the deceased, including the properties disposed of by the will and the deed of gift.

Some of the defendants set up the will and an alleged verbal gift in their favour in opposition to the plaintiff's claim. The youngest son set up the deed of gift in his favour, and further challenged the validity of the will.

It appears that probate of the will had not been obtained. At the trial the will was duly proved and tendered in evidence, and the question arose as to its admissibility in view of the fact that probate had not been obtained.

Mr. H. D. Bose (with him *Mr. C. C. Ghose*), for the plaintiffs. No Mahomedan will, anymore than any other will, is admissible in evidence before grant of probate has been obtained. The executor has no representative capacity until he obtains probate: Evidence Act, section 91, Probate and Administration Act, sections 4 and 12. It was by an oversight on the part of the Legislature that a provision was not included in the Probate and Administration Act, similar to section 187 of the Indian Succession Act, which is made applicable to Hindus by the Hindu Wills Act, section 2. The judgment of West J. in *Fatma* v. *Shaik Essa* (1) is more in accordance with the general scheme and policy of the Probate and Administration Act, than the judgment of the Appellate Court in *Shaik Moosa* v. *Shaik Essa* (2).

Mr. Rasul (with him *Mr. Gauher Ali*); *Mr. S. R. Das* (with him *Mr. Sheriff*); *Dr. Suhrawardy* (with him *Mr. Sircar*), for the various defendants.

Mr. Rasul. A Mahomedan will is admissible in evidence without probate. Section 331 of the Indian Succession Act negatives the general application of the Act to Hindus, Mahomedans and Buddhists. It is by an express provision in the Hindu Wills Act that section 187 of the Succession Act is made applicable to Hindus. There is no such statutory direction in the case of Mahomedans: *Shaik Moosa* v. *Shaik Essa* (2), which

(1) (1883) I. L. R. 7 Bom. 266. (2) (1884) I. L. R. 8 Bom. 241.

was referred to in *Motibai* v. *Karsandas Narayandas* (1). See also Wilson's Anglo-Mahomedan Law, 3rd Edition, page 231: "the person to whom the execution of the last will of a deceased Mahomedan is by the testator's appointment confided may, but need not, apply for probate of the will."

PUGH J. I think this will must be admitted in evidence. It is admitted by those who object to its admission that the document *quâ* document is duly proved and would have to be admitted, but it is contended that as it is a will it cannot be given in evidence until it has been proved in the Testamentary and Intestate Jurisdiction, and that the probate of the will, when proved, is the only evidence by which it can be brought before the notice of the Court. Now the point turns on the construction of the Probate and Administration Act (V of 1881). That Act provides for the consequences and results that will happen if probate is taken of the will of a Mahomedan, and it seems clear that under such circumstances, by force of section 4 of the Act, all the property of the testator vests in the executor.

As I have said, there is no provision rendering it obligatory in the case of a Mahomedan will to take probate. It is contended by Mr. Bose that, looking at the whole policy of the Act, it would appear that it was intended that Mahomedans as well as Hindus should take probate when there is a will, before that will be acted upon. He adopts as his argument the judgment of Mr. Justice West in *Fatma* v. *Shaik Essa* (2). That decision, however, was reversed on appeal: *Shaik Moosa* v. *Shaik Essa* (3). Apart from the respect for and due to the superior Court, the argument in the judgments in the Court of Appeal seems to me to be conclusive, and the judgment of Mr. Justice West adopted by Mr. Bose to be fallacious. It is argued that a certain provision, *viz.*, section 187 of the Succession Act, applies, by virtue of that Act, to certain persons, and that the same provision has been made applicable to Hindus

(1) (1893) I. L. R. 19 Bom. 123. (2) (1883) I. L. R. 7 Bom. 266.
(3) (1884) I. L. R. 8 Bom. 241.

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by the Hindu Wills Act, 1870, and that the fact that this provision is not included in the Probate and Administration Act must be due to an oversight; it is urged that if the Legislature had noticed this omission it would have provided for it, and it is said the Court should so proceed to do that which the Legislature has not done, but which it thinks it ought to have done, and would have done, if its attention had been drawn to the matter. I agree with the view of the Appellate Court by which this judgment was reversed on appeal, and I hold that there is no legislation in force requiring probate to be taken of a Mahomedan's will. The position under the will of a Mahomedan, before the Probate and Administration Act came into operation, is one which is thoroughly well established. The position of both Hindus and Mahomedans was at first exactly the same. There has been a divergence in the subsequent legislation as regards Hindus, but we can easily ascertain what the position under a Mahomedan will is by looking at what was the position of both Hindus and Mahomedans before the legislation.

Prior to the Indian Succession Act of 1865, the Court used to grant probate of wills of Europeans and also of Mahomedans and Hindus, but the effect of probate was different in the two cases. In the case of Europeans the personal estate vested in the executors in the same way as it did in England, and as both moveable and immoveable properties do now under the Succession Act. In the case of Hindus and Mahomedans, nothing vested in the executor, the will operated as a gift from the testator to the legatee, and the executor was merely a manager for the purpose of paying the debts and distributing the estate, and in fact carrying out the distribution which the testator intended, but which, by reason of his departure to another place, he was unable personally to carry out. This proposition has been frequently laid down by a number of cases, of which I may mention *Kherodemoney Dossee* v. *Durgamoney Dossee* (1), and the Privy Council case of *The Administrator General of Bengal* v. *Premlal Mullick* (2) where the very point, we are now considering, is decided as regards a Hindu. From the judgment

(1) (1878) I. L. R. 4 Calc. 455. (2) (1895) I. L. R. 22 Calc. 788.

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it appears, speaking of an executor of a Hindu estate before the Succession Act, that his powers and functions were not those of an English executor, but rather those of a manager; he did not require probate, and probate, if obtained, would not have vested him with any title to the estate, either real or personal, which he administered.

This is a direct decision of the Privy Council that a Hindu's executor did not require probate, also that he was merely a manager. The same proposition is referred to by Maclean C.J. in *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (1). Now that being the position clearly laid down as regards Hindus, there can be no doubt that the position regarding Mahomedans was the same in principle—it is undistinguishable. By the Hindu Wills Act of 1870, section 187 of the Succession Act was applied to Hindus. This section renders it compulsory to take probate, but there is no such provision in the Probate and Administration Act, 1881; and no such provision has ever been applied to Mahomedans. It, therefore, follows that the position, as regards Mahomedans, must be the same as it originally was as regards Hindus, and it follows that probate is not necessary. I am referred by Mr. Rasul to a statement in Sir Rowland Wilson's Mahomedan Law, page 231, where the learned author says that the person to whom the execution of a will of a Mahomedan is confided may, but need not, apply for probate of the will, and I agree with the first paragraph of that section; but he proceeds to go on and say, with or without probate he is an executor within the meaning of the Probate and Administration Act. The powers of that Act must be taken to apply to an executor who has not taken probate except where the contrary appears from the context. With due respect to the learned author, he seems to be following the same line of reasoning which Mr. Justice West adopted in *Fatma* v. *Shaik Essa* (2), which has been held to be wrong by the Appellate Court, and it seems to me that the consequences provided in case of the Probate and Administration Act, as following upon a grant of probate, do not and cannot apply where there is no probate.

(1) (1897) I. L. R. 25 Calc. 103. (2) (1883) I. L. R. 7 Bom. 266.

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It appears to me that in case of a non-probated will, if I may use the expression, the position must be as it was before the legislation, *i.e.*, the will is a gift from the testator to the legatees, and the executor is merely a manager to carry out the intentions of his testator. I notice, however, from the same passage, that the learned author, quoting from the Fatawa-Alamgiri, Baillie 665, states that, according to the Mahomedan Law, the position of a *wasi*, who would correspond to an executor, is that of an *amin* or trustee appointed by the testator to superintend, protect and take care of his property and children after his death; that he is not the legal owner of the property left by the deceased, nor is he the personal representative. He is rather manager or agent for the purpose of payment of the funeral expenses, debts and legatees, to which functions may be added those of guardian of any minor children of the deceased. In my judgment, therefore, the position of an executor who does not take probate is the same as that of a Hindu or Mahomedan executor before the Succession Act, and it is satisfactory to find that it is almost exactly that of the *wasi* or *amin* under the Mahomedan law. It therefore follows that the will should be admitted in evidence though there is no probate, and, as was done in *Bhagvansang Bharaji* v. *Bechardas Harjivandas* (1), the Court will determine whether it is duly proved in the suit in which it is sought to be made evidence. A similar course was adopted in the case of *Surbomungola Dabee* v. *Mohendronath Nath* (2).

There being no dispute as to the *factum* of the will, I direct it to be admitted and marked as an exhibit in the case.

[The parties to the suit having eventually arrived at a compromise, a decree was passed in terms of the settlement.]

J. C.

Attorney for the plaintiffs: *S. K. Deb.*

Attorneys for the defendants: *G. C. Chunder & Co, S. Alum, N. N. Mitter.*

(1) (1881) I. L. R. 6 Bom. 73. (2) (1879) I. L. R. 4 Calc. 508.