[IN THE PRIVY COUNCIL.]

1931

Present: **Lord Blanesburgh, Lord Tomlin, Lord Russell of Killowen**

AHAMAT *et al. v.* SARIFFA UMMA

Muslim law—Power of disposition by will—Rights of heirs—Legal incapacity—Evidence of attestation of will—Point taken in appeal given up in original Court—Ordinance No. 21 of 1844, s. 1.

A Muslim, domiciled in Ceylon, has power to dispose of all his property by will, regardless of any limitation imposed by the Muslim law.

The Wills Ordinance, No. 21 of 1844, applies to the will of a Muslim testator. The words "legally incapacitated" in section 1 of the Ordinance apply to persons, who are prohibited by legislative enactment or by the ordinary law from taking under a will or to those who, on grounds of public policy, are incapable of taking under a will.

It is unnecessary to call both the attesting witnesses to prove the execution of a last will.

July 21, 1931. Delivered by LORD BLANESBURGH.—

By his will, dated May 24, 1927, Ibrahim, a wealthy Mohamedan of the Shafi sect, domiciled in the Island of Ceylon and resident at Colombo, bequeathed the whole of his property to his widow, the respondent, and appointed her his sole executrix. The will purports to have been executed by the testator in the presence of A. M. Fuard, a licensed notary public and two witnesses (S. C. Paul and James Ed. Pereira)—the notary public and minimum number of witnesses required by section 3 of the Ceylon Ordinance No. 7 of 1840. Of the attesting witnesses, Dr. S. C. Paul was the medical attendant of the testator, Mr. Pereira was the clerk of the notary, Mr. Fuard.

The testator died at Colombo on April 30, 1928, nearly a year later, and the grant of probate of the will thereafter applied for by the respondent was opposed in the District Court of Colombo by two of the brothers of the deceased, and a sister, who with her husband, are the present appellants. After prolonged inquiry, probate of the will was, by order of the District Court dated December 17, 1928, granted to the respondent and, on appeal, the order was affirmed by a decree of the Supreme Court of the Island dated May 27, 1929.

The present appeal is from that decree.

In the District Court the grant to the widow was opposed on allegations which led to the following, amongst other, issues being settled for trial:—

1. Was the document produced as being the last will of the deceased executed by him ?
2. Does the document represent the true intention of the deceased in regard to the disposition of his estate, and did he know and approve of the contents thereof ?
3. [As a Mohamedan of the Shafi sect] was it competent to the deceased, in law, to dispose of more than one-third of his estate by his last will ?
4. Was the last will duly executed ?

With reference to the issues 1 and 4, the learned Judge said that these had not been seriously pressed by the appellants, and that the evidence of Mr. Fuard and Dr. Paul, that the will was duly executed by the deceased had not been seriously challenged. There was no doubt that these issues, regarding the execution of the will, must be answered in the affirmative. The learned Judge, as he indicates, reached that conclusion on the evidence of Mr. Fuard and Dr. Paul, who were called and examined at length before him. Mr. Pereira, the second attesting witness, was not called. But no comment on his absence and no reference to any testimony from him being possibly helpful—indeed, no reference to him at all—is to be found, either in the learned Judge's full note of Counsel's argument or in his own judgment. Further, his finding on these issues was not challenged in the appellant's petition of appeal to the Supreme Court. Nor is it referred to in the judgment of that Court. There can, their Lordships conclude, be little doubt that by that time these issues as originally raised had been entirely eliminated from the case. In view, however, of the attempt by the appellants to recur to them again—an attempt to which reference must later be made—it is convenient in passing to draw attention to these facts.

Upon the second issue the learned District Judge, after a careful review of the evidence, found that the will did express the true intention of the testator in regard to the disposition of his estate, and that he knew and approved of its contents. The learned Judges of the Supreme Court took on appeal the same view and expressed it in stronger terms. The opposition to the will on this ground was, in their judgment, frivolous and without foundation.

As to the third issue, it was conceded by the appellants before the learned District Judge, that he was bound to answer it in the affirmative, following the decision of the Supreme Court in *Shariffa Umma v. Rahamath Umma* [1]. They reserved to themselves, however, the right to challenge that decision in a higher Court. And they did so challenge it on appeal to the Supreme Court. But that Court adhered.

In these circumstances, it would appear that the question raised by the third issue is alone really open upon the present appeal. The question under the second, by their Lordships' rule—from which in the present case no reason for departure is shown—is disposed of against the appellants by concurrent findings of fact in the Courts below: the first and fourth issues are out of the case, because they were not even raised in the Supreme Court.

But the appellants, while recognizing that the second of the issues might no longer be canvassed, sought with reference to the first and fourth to raise before their Lordships a contention which had not before been heard of in these proceedings, namely: that the absence of Mr. Pereira from the witness-box, without explanation from the respondent of that absence, was fatal to her contentions on these issues, which ought accordingly to be answered in the negative.

Their Lordships as a matter of indulgence, and also that they might be placed in full possession of the facts, permitted some argument to be addressed to them in support of that contention. But they think it necessary in the interests of regularity of procedure to say that, in the circumstances already stated, no such contention was effectively open to the appellants on this appeal.

It must only be under exceptional circumstances that an issue dropped in the intermediate Court of Appeal, and for that reason not dealt with or referred to by that Court, can be revived before this Board. It can only be under even more exceptional circumstances that an objection, not taken before the Trial Judge at all—where, if taken, it could at once have been disposed of in a manner satisfactory to all parties—can be raised in the tribunal of final appeal as a fatal objection to a finding of the Trial Judge, which was not even challenged in the intermediate Court.

But their Lordships, merely as a concession to the appellants, would add that they have considered the point raised, and in their opinion there is nothing in it. Conceding, as they will, that as a result of section 100 of the Ceylon Evidence Ordinance, 1895, the effect of Mr. Pereira's absence from the witness-box—he being then, as they assume, alive and available—must be determined in accordance with the English law of evidence for the time being: even so, the conclusion must be that the

[1] *14 N. L. R. 464.*

evidence of execution tendered at the trial was by the then existing law of England, if accepted, sufficient for its purpose. To these proceedings in Ceylon the closest analogy in English practice is a contested probate action. In such an action, it was formerly the rule that if a party were put to proof of a will, he must examine the attesting witnesses, and that practice, as prescribed also by the Court of Chancery for the regulation of proceedings at law, is illustrated by the cases of *Bootle v. Blundell* [1], *Macgregor v. Topham* [2].

But by section 33 of the Court of Probate Act, 1857, it is enacted that the rules of evidence observed in the Superior Court of common law at Westminster shall be applicable to and observed in the trial of all questions of fact in the Court of Probate. The effect of this enactment was, from its date in 1857, to make it unnecessary in a probate suit to call both the attesting witnesses to prove the execution, for in the Courts of law the execution of a will might always be proved by calling one only of them. And that practice the Court of Probate accordingly normally adopted, except in a case where the attesting witness called gives evidence against the due execution—as to which see *Owen v. William* [3].

But all this is by the way. This appeal is concerned with and must be confined to the third issue, which, in terms more apt to the actual problem before the Board, may be phrased thus:—Does the Ordinance 21 of 1844 apply to the will of a Mohamedan at all? If it does, is its effect that every Mohamedan domiciled in Ceylon has thereunder full power of disposition of all his property by will (*a*) in favour of a stranger, (*b*) in favour of his wife, and as such one of his "heirs"?

The position of a Cingalese Moslem in the matter of testamentary powers, apart from the ordinance, may perhaps, for the purposes of the present case, be described with sufficient accuracy as follows:—He is precluded from making by will dispositions exceeding one third of his net assets remaining after payment of his debts and funeral expenses to persons other than his lawful heir or heirs, the balance of two-thirds being reserved to be distributed among the lawful heir or heirs according to the rules of inheritance, unless the excess is rendered valid by the consent given after the death of the testator of the heir or heirs whose rights are thereby infringed or by the fact of there being no such heir or heirs. A bequest to an heir or heirs is void by the same law although it may, certainly in the opinion of some authorities, be validated by a corresponding consent. A widow is included amongst the heirs.

The recognition of the Moslem law in these matters is secured to the Moslems of Ceylon by the special laws concerning Maurs or Mohamedans of August 5, 1806, but such recognition is subject always to repeal, alteration or amendment by ordinance enacted from time to time. The whole question, therefore, is whether these special laws have not been modified by the terms of this Ordinance of 1844; and, if they have, whether they have been so far modified as to make the testator's will a valid disposing instrument according to its tenor.

Section 1 of the Ordinance is preceded by the preamble that "it is expedient that some uniform provision should be made with respect to

[1] *(1815) 19 Ves. 494.* [2] *(1850) 3 H. L. C. 132.* [3] *32 L. J. P. M. & A. 159.*

testamentary dispositions of property ". Section 1, so far as now material, is in the terms following:—

> " It shall be lawful for every person competent to make a will to devise, bequeath and dispose of by will all the property within this Colony which at the time of his death shall belong to him or to which he shall be then entitled . . . . and which if not so devised, bequeathed, or disposed of would devolve upon his heirs at law, executor or administrator, to such person or persons not legally incapacitated from taking the same as he shall see fit; and no will . . . shall be or be liable to be set aside as invalid or inofficious, either wholly or in part, by reason that any person who by any law, usage or custom now or at any time heretofore in force within this Colony, would be entitled to a share or portion of the property of the testator has been excluded from such share or portion or wholly disinherited by or omitted in such will; but every testator shall have full power to make such testamentary disposition as he shall feel disposed, and in the exercise of such right to exclude from the legitimate or other portion any child, parent, relative or descendant or to disinherit or omit to mention any such person without assigning any reason for such exclusion, disinheritance or omission, any law, usage or custom, now or heretofore in force in this Colony to the contrary notwithstanding. "

Now, approaching the consideration of the Ordinance first, apart from authority, their Lordships cannot doubt that it applies to Mohamedan testators as much as to all other domiciled Cingalese. The words of the enactment are of themselves sufficiently comprehensive to include Moslems within their scope. When read in connection with the preamble, which shows that the purpose of the Ordinance is to secure uniformity with respect to testamentary dispositions of property, it is not in their judgment possible to limit or restrict the operation of the Ordinance so as to exclude the wills of Moslem testators from its purview. Their Lordships are struck by the fact that where such limitation is intended to be placed on words of general import with reference to just such a subject as that with which this Ordinance is dealing, it can clearly and easily be done. A provision with such a result will, for example, be found in the Ordinance No. 15 of 1876, section 2.

The Ordinance then being applicable to the will of a Moslem testator, it is clear to their Lordships that it enables the testator to dispose of the whole of his property and not merely one-third part of it. And such has been the declared judicial view in Ceylon since the year 1911, when the decision of the Supreme Court in *Shariffa Umma v. Rahamath Umma*, (*supra*) was pronounced.

Their Lordships agree with that decision in the terms in which it was given, but even if they had felt more doubt on the matter than they do, they would have hesitated now to interfere with it after 20 years, especially as they find the learned Chief Justice saying that the Ordinance has always been construed to enable Mohamedans in Ceylon to dispose of the whole of their property by will and that the Mohamedan population in Ceylon had even then freely taken advantage of the privilege. In

face of a practice so well authenticated and so long continued, any alteration in the law as so authoritatively laid down must now come from Legislation and not from the Courts.

But although the will of the Moslem testator in the case cited was, as is the will here, one in favour of the testator's widow, the actual decision was given without reference to a point which seems to have been taken for the first time in the present case. The appellants here say that, even if on the true construction of the Ordinance a Moslem testator may be empowered by his will to dispose of all his property, he is only so empowered to dispose of it in favour of a " person not legally incapacitated from taking the same ", and that a testator's widow, as being one of his heirs, is by Mohamedan law so incapacitated.

To that argument there are, as it seems to their Lordships, at least three answers.

The first is that this is a statute of general application and their Lordships are in agreement with the Supreme Court in the view expressed by them that the words " legally incapacitated "—the word " legally " is of striking significance in this context—apply to persons who are prohibited by legislative enactment or by the ordinary law from taking under a will, such as attesting witnesses (section 10, Ordinance 7 of 1840), or those who, on grounds of public policy, are incapable of taking under a will, as for example, one who has murdered the testator. But, secondly, the Ordinance expressly enacts that " every testator shall have full power to make such testamentary disposition as he shall feel disposed ", and it is not permissible to rank as a person " legally incapacitated from taking " one whose incapacity only arose as incident to a limitation on the power of testamentary disposition, which it is the object and purpose of the Ordinance to abolish.

Again that a person is not so incapacitated by reason of the fact that he or she is one of the heirs of the testator is further shown as their Lordships think by the fact that under the Ordinance a will is not to be invalidated by reason of such person " being disinherited by or being omitted in such will ", on the contrary the testator in the exercise of his full power of disposition may exclude or " omit to mention " any such person without assigning any reason for such exclusion or omission. These provisions, as it seems to their Lordships, necessarily connote that it is within the testamentary power conferred upon every testator to include and mention amongst those to take under his will any person by whom no objection is to be taken if he be excluded or not mentioned.

On every ground accordingly, their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Appeal dismissed.