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Present : Dalton and Drieberg JJ.

AHAMATH *et al.* *v.* SARIFFA UMMA.

15—D. C. (Inty.) Colombo, 4,005.

Muslim law—Power of testator to make free disposition—Right of heirs to portion—Property left to widow—Ordinance No. 21 of 1844, s. 1.

A Muslim may dispose of the entirety of his property free from any limitation imposed on him under the Muslim law.

The incapacity created by section 1 of the Wills Ordinance, No. 21 of 1844, applies to persons who are prohibited from taking under a will by legislative enactment or on grounds of public policy.

APPEAL from an order of the District Judge of Colombo. The respondent applied for probate of the last will of her husband, Uduma Lebbe Ibrahim, by which he left all his property to her and appointed her executrix. The appellants, who are the brothers and sister of the deceased, opposed the grant of probate on several grounds, one of which was that under the Mohammedan law the testator could not dispose of more than one-third of his estate. The learned District Judge held against the appellants.

H. V. Perera (with *Garvin* and *Deraniyagala*), for appellants.—The Mohammedan law is clear that a testator cannot will away more than one-third of his property. The only question is whether section 1 of the Wills Ordinance, No. 21 of 1844, has abolished this restriction. In *Shariffa Umma v. Rahamathu Umma*[1] it was held that since Ordinance No. 21 of 1844 a Muslim has an unrestricted power of alienation by will. But it is submitted that this decision is wrong. The appellant in that case was unrepresented by Counsel.

An examination of the Muslim law reveals the fact that the disability is not one really attached to a testator but to the heir. The principle is that no one heir should receive a larger share than any other. Thus the one-third that a testator is permitted to will away can only be left to a person other than an heir. The equality between the heirs is maintained, and one heir is not allowed to receive a larger share than another even though the testator should wish it.

Section 1 of Ordinance No. 21 of 1844 says "It shall be lawful for every person competent to make a will to devise, bequeath, and dispose of by will all property . . . . to such person or persons not legally incapacitated from taking the same, as he shall see fit." A Mohammedan heir is one so incapacitated, and it is submitted this will is invalid.

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

B. F. de Silva (with *Canakaratne*) for respondent.—Section 1 expressly states "No will made either within or beyond the limits of this colony subsequently to the time when this Ordinance shall commence and take effect 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." Counsel cited *Shariffa Umma v. Rahamathu Umma.*[1]

May 27, 1929. DRIEBERG J.—

The respondent applied for probate of the last will of her husband Uduma Lebbe Ibrahim dated May 24, 1917, by which he left all his property to her and appointed her executrix. There were no children of the marriage.

Ibrahim died on April 30, 1928. Order *nisi* issued declaring the respondent entitled to probate, whereupon the appellants petitioned the Court opposing grant of probate on several grounds, viz., that the will was not duly executed, that it did not express the true intention of the testator, undue influence, and that under the Mohammedan law the testator could not dispose by will of more than one-third of his estate. They prayed for a declaration that Ibrahim died intestate and that letters of administration be issued. The learned District Judge held against the appellants on all these grounds and they have appealed. The first and second appellants are the brothers, and the third appellant a sister, of the deceased.

The will was prepared in accordance with instructions given by the testator to the notary, Mr. Fuard, on May 21. The attesting witnesses were Dr. S. C. Paul and Perera, the notary's clerk. Dr. Paul is Senior Surgeon of the General Hospital, Colombo. He was the medical attendant of the testator, whom he had known for twenty or thirty years.

Dr. Paul says that he had been asked to be at the testators' house to sign the will as a witness; that when he went there he met the notary, whom he did not know before; the notary gave him a copy of the will and he found the testator reading the other copy of it; he asked the testator what the purport of the will was, and he replied that it was in favour of his wife. Dr. Paul says that he glanced at the copy given him and found that it was in favour of the testator's wife; he did not however read through it. The notary then took back both the copies and they were signed in the presence of the two attesting witnesses. The attestation states that the will was duly read over by the testator in the presence of the notary and the witnesses. Dr. Paul says that the testator's mind

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was quite clear and he was able to give instructions for the will. There is no suggestion that he was otherwise than normal mentally.

The evidence of the notary is to the same effect. He says that he gave the testator a copy of the will after Dr. Paul came, but the disagreement on this point cannot affect the clear evidence that the testator read over the will before he signed it.

There is the evidence of Dr. Paul that the testator told him that the will was in favour of the testator's wife, but apart from this, if the testator could read and understand the will no further question could well arise. The will was one which was to be expected: the testator was very fond of his wife and she previously had made a will in his favour.

That the testator could read and write English is fully proved. He was a building contractor under Messrs. Walker, Sons & Company, and had a considerable business. Mr. Bottoms, the manager of the building department of that firm, who does not know Sinhalese or Tamil, says he met him daily, that he spoke English very well, and that he discussed bills of quantities and specifications of plans with him. Mr. Fonseka, a proctor, states that he used to meet the testator when he was a master at Wesley College. A nephew of the testator was a pupil of Mr. Fonseka. The testator used to speak in English to Mr. Fonseka and they used to go through the boy's school reports.

P 13 is a book of accounts, and D 6, P 253, a press copy of a letter. It has been proved that these were written by the testator, and there is no evidence to the contrary.

P 17 and P 18 are two notarially attested conditions of sale of land, the notary being Mr. E. R. Williams of Messrs. Julius & Creasy. It is accepted that Mr. Williams, who is an Englishman, did not know Tamil. In both documents Mr. Williams certified that the testator, who was one of the executing parties, " duly read over " the documents. It may fairly be presumed that Mr. Williams ascertained whether the testator knew English and that if he found that the testator did not, he would have prepared the attestation in the form required by section 29 (11) in cases where the executing party does not know the language in which the instrument is written.

No evidence was led to show that the testator could not read English, and no such inference can be drawn from the evidence of Mr. de Rooy and Mr. Abdul Cader, who were called by the appellants.

Where a testator is unable to read the will the notary has to read over and explain it to the testator (section 29 (11) of the Notaries Ordinance, 1907), but failure to do so does not affect the validity of a will, and apart from the evidence of Mr. Fuard that the will was prepared in accordance with instructions previously given, no question as to the regularity of its execution can arise if the evidence

of Dr. Paul, that the testator said that the will was in favour of his wife, is accepted (*Pieris v. Pieris*[1]). It was sought to meet Dr. Paul's evidence on the ground that he was, so it was said, an old man and too busy to retain a clear recollection of what took place when the will was signed. The Government Civil List shows that Dr. Paul was born in 1872, and there is no reason to doubt his recollection of what the testator told him of the will. The opposition to the will is frivolous and without foundation. Asia Umma, the only opponent who gave evidence, said at the end of this protracted inquiry that the will was forgery while denying knowledge as to who the attesting witnesses were. The learned District Judge has condemned the opposition in terms which I cannot say are unmerited.

The appellants say that Ibrahim would not have made a will without providing for relations whom he helped generously during his lifetime. The trial Judge has dealt fully with this matter, but these considerations were entirely irrelevant. No suspicion whatever can attach to the will for the reason that no provision was made for those whom he helped during his lifetime. The testator derived a good income from his contracts, but this would cease with his death, and it is natural that he did not wish further to reduce his wife's income by giving away a part of his estate, and it is also natural that he should leave it to his wife to give such help to his relations as their treatment of her merited and her income would allow.

Mr. Fuard says that having heard that the testator was seriously ill on the 19th night, he called at his house on the 20th morning to inquire and was told that Dr. Paul and Dr. Cooke had been there the previous night and given the testator oxygen ; that on the 21st morning he got a telephone message asking him to call at the testator's ; he did so in the afternoon and was given instructions for the will ; he was taken into the room by a Cochin boy and nobody was present when he received instructions ; he had a draft will prepared and saw the testator with it on the 23rd and went through it with him, explaining to him some legal terms which he did not understand ; on this occasion too nobody else was present.

The appellants sought to make out that this serious illness—it was an attack of asthma with cardiac trouble due to his diabetic condition—occurred not on the night of the 19th but on the 20th night. It was suggested that the notary falsely placed this event on the 19th for the reason that if he said it occurred on the 20th his evidence would be open to the comment that the testator would not have been in a fit condition to give instructions so soon after the serious attack he had the previous night, and further, that it was incredible that at such a time he would have been alone in his room without anyone in attendance.

[1] *(1906) 9 N. L. R. 14.*

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I agree with the opinion of the trial Judge on this point. It has not been proved that the visit of Dr. Paul and Dr. Cooke was on the 20th night and not on the 19th, but apart from this, Dr. Paul says that the testator rallied completely after the heart attack, he saw him two or three times daily after it, there was no special necessity for him to have an attendant, and that his mind was clear, and he was quite able to give instructions for a will.

The appellants contended that the will was invalid, for under the Mohammedan law it is not possible for a person to dispose of by will more than one-third of his property to the prejudice of his lawful heirs. Mr. Perera referred us to *Tyabji (1913 ed.), p. 526*, and *Amir Ali's Mohammedan law (4th ed.), vol. I., p. 570.*

It was held in *Shariffa Umma et al. v. Rahamathu Umma*[1] that section 1 of Ordinance No. 21 of 1844 enabled a Muslim in Ceylon to dispose of the entirety of his property by will free from any limitations imposed by the Mohammedan law. This section provides that ". . . . 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 any 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 . . . . ."

Mr. Perera contended that the Mohammedan law did not impose a restriction on a person's power of disposal but that it was rather an inability in a legatee to receive property to the prejudice of the heirs, and he relied on the earlier part of the section which empowers a testator to leave property " to such person or persons not legally incapacitated from taking the same." It is clear, however, that this applies to persons who are prohibited by legislative enactment from taking under a will, such as attesting witnesses (section 10, Ordinance No. 7 of 1840), or who on grounds of public policy are incapable of taking under a will, for example, a person who has murdered the testator. A list of the classes of persons who are under this disability under the Roman-Dutch law is given in Morice's *English and Roman-Dutch Law, p. 274.*

The provision of the Mohammedan law in no way differs from the Roman-Dutch law regarding the legitimate portion and is merely a limitation on the disposing power of a testator. Such limitations have been removed by Ordinance No. 21 of 1844.

The appeal is dismissed with costs.

DALTON J.—I agree.

Appeal dismissed.

[1] *(1911) 14 N. L. R. 464.*