APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Heaton.

1916

November 27.

AHMAD ASMAL MUSE (ORIGINAL PLAINTIFF), APPELLANT *v.* BAI BIBI, WIDOW OF ADAM AMANJI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mahomedan Law—Will—Bhagdari property—Will in favour of widow and daughter—Suit by a residuary heir of the testator for a declaration that the will was invalid—Bhagdari custom—Testamentary capacity of the owner—Rule of Mahomedan Law to be applied—Validity of the will,

A Mahomedan Bhagdar made a will by which he purported to dispose of his entire property including Bhagdari property in favour of his widow and daughter. The plaintiff who was the residuary heir of the testator never consented to this form of the will. He, therefore, sued for a declaration that the will was invalid under Mahomedan Law so far as the *Bhag* property was concerned and that he was entitled to succeed to it after the death of the widow under the Bhagdari custom. The question being raised as to what was the rule which regulated the testator's power to make the will,

Held, that the rule of Mahomedan Law was the only law which could be applied and according to it the will was invalid. The plaintiff was, therefore, the presumptive reversioner under the Bhagdari custom.

SECOND appeal against the decision of P. J. Taleyarkhan, District Judge of Broach, reversing the decree passed by Naginlal V. Desai, Additional Subordinate Judge at Broach.

Suit for a declaration.

The property in suit originally belonged to one Adam Amanji, a Mahomedan Bhagdar. By his will dated November 26, 1900, he disposed of his entire property in favour of his widow, defendant No. 1, and daughter, defendant No. 2. The plaintiff was the residuary heir of the testator under the Mahomedan Law. His consent was not taken to this form of the will. He, therefore, sued for a declaration that he was the nearest agnate of deceased Adam, that defendants Nos. 1 and 2

* Second Appeal No. 936 of 1915,

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acquired no rights under the will which was invalid under the Mahomedan Law and that he was entitled to succeed to the *Bhag* property in suit mentioned in the will after the death of the widow, defendant No. 1, under the Bhagdari custom. He also prayed for the appointment of a Receiver on the ground that the defendants were mismanaging and wasting the properties to harm the plaintiff's future rights.

The defendants contended that under the will defendant No. 2 was heir to the property after defendant No. 1's death, that the will was not void, and that there was no case for the appointment of a Receiver.

The Subordinate Judge held that the acts of waste had not been proved and hence a Receiver should not be appointed, but being of opinion that the will was contrary to the Mahomedan Law, passed a decree in favour of the plaintiff declaring him the nearest agnate of the deceased and entitled to succeed to the *Bhag* property in suit after the death of the widow. His reasons were :—

"It is not denied that deceased Adam had made a will about the Bhag property. That will is Exhibit 42, but he was a Mahomedan and on the evidence in the case as also under the ordinary law, a Bohra of a Mahomedan faith is governed by Mahomedan Law. Under that law, a Mahomedan cannot dispose of, by will, more than a third of his property. Therefore, if the property in suit were not subject to any special law, viz., the Bhagdari Act, this will would be valid to the extent of a third of his property. But the Bhagdari Act has been passed to prevent the dismemberment of a *Bhag*; therefore to permit a Mahomedan Bhagdar to make a will about a third of his *Bhag* property will be against sections 3 and 5 of that Act read together. For that reason I think the will, Exhibit 42, will be quite inoperative so far as Adam's *Bhag* property is concerned and none of the defendants can claim to have any title to the *Bhag* property under this will. It was contended for defendants that by a special custom amongst the Bhagdars, they have a right to make a will about the whole of their *Bhag* property even if he, i.e., the Bhagdar be a Mahomedan. This alleged custom was not so clearly pleaded in the written statement except in what is suggested by para. 2 of the

written statement, Exhibit 10. I have taken evidence upon that point and after carefully considering the same, I have come to a conclusion that no such custom is proved.

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"In 12 Bom. L. R. 341 at p. 353 it is observed that modern ingenuity will seek ways to evade the rigid restrictions of Mahomedan Law of wills. But Courts should be wary against allowing it. Then again 13 Bom. L. R. 717, p. 773 is a case where a local usage was not allowed to permit Khojas to override Mahomedan Law which prohibits any moslem to make a will of more than one-third of his property. In this case, therefore, the will is for the reasons given by me above inoperative so far as the *Bhag* property is concerned."

On appeal, the District Judge, reversed the decree and dismissed the suit on the ground that although according to Mahomedan Law a will in favour of one of the heir or a part of the heirs is invalid unless the other heir or heirs consent, the rule could not be applied so as to bring in a course of devolution according to the Bhagdari custom which would be at variance with the Mahomedan Law.

The plaintiff preferred a second appeal.

G. S. Rao, for the appellant:—We ask for three reliefs. The defendants contended that the plaintiff was no relation of the deceased and the will was valid. Plaintiff is now found to be the nearest agnate. We contend the will is invalid on two grounds: (1) as it bequeathes property to 2 out of 3 heirs without the plaintiff's consent, and (2) the bequeast exceeds 1/3rd of the whole property. The widow does not claim under the will. The daughter does: see Hamilton's Hedaya, pp. 671-72. The Mahomedan Law on this point is clear. The appellate Court is wrong in assuming that Mahomedan Law of wills is displaced merely because custom has altered the law of succession. So far as the right to make a will is concerned parties continue to be governed by the Mahomedan Law. No special custom was proved though it was alleged.

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Secondly, suit should not have been dismissed *in toto*. Declaration that plaintiff is the nearest heir should have been given.

G. N. Thakor, for the respondents:—The suit concerns and is limited to Bhagdari properties. The Mahomedan Law of succession does not apply to such property. The plaintiff's case was that the will being valid only to the extent of 1/3rd it would contravene the terms of Bom. Act V of 1862. It was not contended that the whole will was invalid.

I contend (1) that the Mahomedan Law of wills does not apply to Bhagdari properties. The law of succession and wills being inter-dependent and the law of succession being superseded by custom, the Mahomedan Law of wills has no application; (2) Assuming that Mahomedan Law applies, the heirs who may have a right to object will be the heirs under the Bhagdari law. The plaintiff is no heir under this law. The widow is the only heir. She has consented to the will. Therefore, the will is valid and the Mahomedan Law, if it applies, is also satisfied. I rely on *Bai Kheda* v. *Dasu Sale*[1] and *Pranjivan Dayaram* v. *Bai Reva*.[2] The heirs referred to in the Mahomedan Law must mean actual heirs. It is in this case the widow. Otherwise you give a person who was not the heir and who may have no right to the property to object to a will. This is absurd. It is an accident in this case that the plaintiff is both a reversionary heir and an heir under the Mahomedan Law. There is no reversionary heir under the Mahomedan Law. To give him a right to object he must be present heir which he admittedly is not under the Bhagdari law. He may not be the heir when the widow dies.

(1) (1868) 5 Bom. H. C. R. (A. C. J.) 123.

(2) (1881) 5 Bom. 482.

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That the Mahomedan Law of wills does not apply will appear from *Advocate-General* v. *Karmali*;[1] *Francis Ghosal* v. *Gabri Ghosal*.[2]

If Mahomedan Law is applied, a Mahomedan Bhagdar is deprived of the right of making a will altogether. The consent contemplated is after death. Will operates at death and will be invalid under the Bhagdari Act.

It was plaintiff's duty to prove a custom prohibiting wills. We should at any rate be allowed to prove custom as the appellate Court does not find on it.

As regards declaration see *Janaki Ammal* v. *Narayanasami Aiyer*.[3]

SCOTT, C. J.:—A deceased Mahomedan purported to dispose by will of certain Bhag property and other property in favour of his widow, with a remainder to his daughter and her issue if she survived the widow. The plaintiff is a residuary of the testator according to Mahomedan Law. He sues for a declaration that he is the nearest agnate of the deceased, and that defendants Nos. 1 and 2, that is, the widow and the daughter, acquired no rights by the will, and that he is entitled to the property after the death of the widow. The suit relates only to the Bhagdari properties, which in the absence of a will devolve by custom upon the Bhagdar's widow, if he dies sonless, for her life, and after her death are inherited by his nearest male agnate to the exclusion of the daughter and sister. The plaintiff is, therefore, interested in the property both under the Mahomedan Law, and under the custom in the absence of a will. He charged that the widow and the daughter were managing the properties in suit and wasting them to harm plaintiff's future rights. The waste

(1) (1903) 29 Bom. 133. (2) (1906) 8 Bom. L. R. 770.
(3) (1916) 39 Mad. 634.

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alleged is that two portions of the property in suit had been given to a Masjid and that the rest of the property has been transferred to the name of the daughter with the intention of her becoming the owner thereof.

The learned Judge in the trial Court held that the acts of waste had not been proved, and that, therefore, a Receiver should not be appointed, but being of opinion that the will was contrary to the Mahomedan Law passed a decree in favour of the plaintiff declaring him the nearest agnate of the deceased and entitled to succeed to his Bhag property in suit after the death of the widow, and that the will of the deceased was inoperative so far as the Bhag property in suit was concerned, and that defendant No. 2 did not acquire any right to the property under the said will against the plaintiff.

On an appeal being preferred to the District Judge the decree was reversed and the suit was dismissed, the ground being that although according to Mahomedan Law a will in favour of one of the heirs or a part of the heirs is invalid unless the other heir or heirs consent, the rule could not be applied so as to bring in a course of devolution according to the Bhagdari custom which would be at variance with the Mahomedan Law. It is, however, conceded that a will can be made of Bhagdari property notwithstanding the existence of the custom. The existence of the custom does not destroy the testamentary capacity of the owner. If then the owner is a Mahomedan, what is his testamentary capacity? There is no evidence in the case that his testamentary capacity has been converted by custom into something different from the ordinary capacity of a Mahomedan testator. That capacity is limited by the rule of testation above stated. It appears to me, therefore, that the rule of Mahomedan Law is the only law which can be applied and according to it the will is invalid. If so,

the plaintiff is the presumptive reversioner under the Bhagdari custom. It has been held by the Privy Council in *Janaki Ammal* v. *Narayanasami Aiyer*,[1] that if there has been waste or there is danger to the estate established, a possible reversionary heir may come in and ask for relief. There are cases of waste alleged and there is a danger of transfer to the second defendant suggested. Neither of these points have been discussed by the learned District Judge, and as we are of opinion that his judgment upon the preliminary question of the application of the rule of Mahomedan Law to the will of the deceased cannot stand, we set aside the decree and remand the case for disposal upon the other questions discussed in the trial Court. Costs costs in the cause.

HEATON, J. :—I agree. I think that in this case the correct solution is furnished, as it often is, by the simplest method of dealing with the case. We have a Mahomedan making a will. Under the Mahomedan Law there are three persons who in case of an intestacy would inherit his property. By his will he bequeathed the whole of it to one of these three persons, with remainder to the second, and he left the third, the plaintiff, out of the property altogether. The plaintiff never has consented to this form of will, and therefore, under Mahomedan Law the will is invalid. Unless we are to deal with the will as a will made by a Mahomedan, and therefore subject to the Mahomedan Law relating to wills, I cannot for myself discover how we ought to deal with it. I cannot accept the District Judge's reasoning, although I think that it is very ingenious and also that it is a very earnest effort to find a way out of a difficult position. He thinks that the law relating to Bhagdari property eliminates the Mahomedan Law of wills altogether in the case of a will concerning Bhagdari

[1] (1916) 39 Mad. 634.

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property, and we have such a will here. But to my thinking the existence of Bhagdari property does not affect the Mahomedan Law of wills in any way beyond this, that Bhagdari property might in certain circumstances be taken out of the operation of a will. That would happen if the will provided for a division of the testator's property which would be contrary to the Bhagdari Act. In that case the property would be taken out of the operation of the will because the Mahomedan Law could not be applied to it. But I do not think and I cannot see how the existence of Bhagdari property can affect the Mahomedan Law of wills any further than that. In this particular case the will leaves the entire property, including Bhagdari property, to one person. It does not in any way offend against the provisions of the Bhagdari Act. So far as they are concerned, the will would be a perfectly valid will. But when we come to consider the rule regulating the testator's power to make a will, then we find that the will is invalid.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

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December 4.

GOVIND BHIKAJI MAHAJAN (ORIGINAL PLAINTIFF), APPELLANT *v.* BHAU GOPAL LAD AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), section 59—Deed of mortgage—Attestation—Execution—Mark by illiterate executant—Mark described by the scribe—Signature—General Clauses Act (X of 1897), section 3, clause 52.

* Second Appeal No. 998 of 1915.