was a prior security in that case and that the decision turned upon the provisions of section 99. In the last case also there was a mortgage prior to the decree. It is significant that in that case the argument as to Rule 14 is met by the fact that the decree-holder was a charge-holder at the date of the decree. In the present case the fact is otherwise.

I, therefore, agree with my brother Heaton in holding that the property charged can be sold in execution.

The result is that the order of the lower Court is set aside and the lower Court is directed to proceed with the Darkhast according to law. The defendant to pay the costs of this appeal: other costs to be costs in the Darkhast.

Order set aside.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Marten.

SARABAI AMIBAI *v.* MAHOMED CASSUM HAJI JAN MAHOMED.*

1918.

August 22.

Will—Cutchi Memon—Mahomedan law—Document in the nature of instructions as to the disposition of property operating as a will under Mahomedan law—Probate—Probate and Administration Act (V of 1881), section 3.

A widow of a Cutchi Memon applied for probate of a document in Gujerati as being the last will and testament of her deceased husband, the document according to the official translation being in the following terms:—"May it be known to Bhai Abdullabhai as follows:—In the will which you will get made to-morrow and give me, be kind not to forget (to add) my 'Mukhatyari' as long as I am alive and after me my wife's 'Mukhatyari'. Whatever costs may be incurred I will pay you. Written by your servant Mahomed Hasam Haji". On the other side of the document were the words "Bhai Abdullabhai". 'Mukhatyari' in the document meant absolute ownership or

* O. C. J. Suit No. 10 of 1918.

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full power. The document was unattested but was written by the deceased, and given to his brother-in-law Abdullabhai at a time when the deceased was lying on his death-bed suffering from cancer of the tongue and unable to speak properly. The deceased died two days after the date of the document.

Held, (1) that the document in question was in the nature of instructions by the deceased to his legal advisers, or to his relative as to the instructions to be given to the legal adviser as to the disposition of his property;

(2) that under the Mahomedan law which governed the execution of wills of Cutchi Memons no attestation was necessary and the document operated as a valid will which might be admitted to probate.

In re Aba Satar (1) and *Mahomed Altaf Ali Khan* v. *Ahmed Buksh* (2), referred to.

PETITION for probate.

The petitioner Sarabai Amibai was the widow of one Mahomed Hasam, a Cutchi Memon, who died at Bombay on the 4th of August 1918 leaving property in Bombay.

Mahomed Hasam, two days before his death, wrote on a piece of paper in Gujerati the following words:—

"May it be known to Bhai Abdullabhai as follows:—In the will which you will get made to-morrow, and give me, be kind not to forget (to add) my 'Mukhatyari' as long as I am alive and after me my wife's 'Mukhatyari'. Whatever costs may be incurred I will pay you. Written by your servant Mahomed Hasam Haji".

On the other side of the paper were the words "Bhai Abdullabhai".

The petitioner stated that the above writing was the last will and testament of her deceased husband; that it was duly executed at Bombay on 2nd August 1916 under the circumstances mentioned in the affidavit of Abdullabhai annexed to the petition; and that she was the executrix according to the tenor of the said will. The petition prayed that the probate might be granted to her having effect throughout the Bombay Presidency.

(1) (1905) 7 Bom. L. R. 558.

(2) (1876) 25 W. R. 121.

The affidavit of Abdullabhai ran as follows :—

1. I was very well acquainted with the deceased testator Mahomed Hasam Haji Jan Mahomed. I was married to his full-sister named Raboobai who predeceased him.

2. The deceased testator had very great confidence in me and consulted me in all his affairs.

3. The deceased was taken ill sometime before his death. When I went to see him about a month before his death he told me that he intended to make his will and would request me to bring over my own solicitor to him for doing needful. I told him I would get my solicitor to attend whenever required and I had a talk upon the subject with my solicitor, Mr. Dinshaw J. Vakil.

4. After this the testator became worse and for a few days before his death he was unable to speak as he had cancer in his tongue and he communicated all his wants in writing.

5. Two days before his death he sent for me and gave me a letter which he himself had written and addressed to me containing instructions for his will. This letter is annexed to the petition herein. He was then quite conscious and in a sound and disposing state of mind. He grew worse on the next day and he died on the following day.

Abdullabhai was examined in order that the Court might be satisfied that the writing which was sought to be admitted to probate was written by the testator and given to the witness under the circumstances stated in his affidavit.

Kanga, for the petitioner.

MARTEN, J :—This is a curious case. The petitioner who is the widow of a Cutchi Memon applies for probate of a document as being the last will and testament of her deceased husband, which document is in the following terms according to the official translation :—

" May it be known to Bhai Abdullabhai as follows :—In the will which you will get made to-morrow and give me, be kind not to forget (to add) my 'Mukhatyari' as long as I am alive and after me my wife's 'Mukhatyari'. Whatever costs may be incurred I will pay you. Written by your servant Mahomed Hasam Haji. (On the other side) Bhai Abdullabhai ".

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'Mukhatyari', I should explain, means absolute ownership or authority or full power.

Now this gentleman Abdullabhai is the testator's deceased sister's husband, in other words, his brother-in-law. He has made an affidavit and I have also seen him in the witness box, and I may say that I am satisfied that this document was written by the testator and given to the witness under the circumstances stated in his affidavit.

The testator was a Cutchi Memon and in some respects Cutchi Memons are governed by Hindu law. Further, the document in question is not attested. But I think it is quite clear, and at any rate there is an express authority of this Court precisely in point, that Cutchi Memons are governed by Mahomedan law as regards the execution of their wills, and that under Mahomedan law no attestation is necessary. The case I refer to is *In re Aba Satar*[1] and is a decision of Mr. Justice Tyabji. So far, therefore, as that point is concerned, I think, no difficulty arises.

But the point on which I have felt difficulty was whether this document can fairly be regarded as a will. Having regard to who the testator was, all we are concerned with is the Probate and Administration Act. Under section 3 of that Act the definition of will is :

> "'Will' means the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death."

The declaration must, therefore, be a "legal declaration." But I see nothing here which, according to Mahomedan law, is illegal. In fact, by that law an unsigned declaration or even an oral declaration is sufficient. The document in question is therefore a

[1] (1905) 7 Bom. L. R. 558.

legal declaration, and *prima facie* it would seem to be a declaration of "his intentions with respect to his property which he desires to be carried into effect after his death." It is true that this document might be construed and probably is in the nature of instructions to his legal advisers or to his relative as to the instructions to be given to the legal adviser as to the disposition of the property, but as to that I think one may compare what is said in Mayne's Hindu Law, 8th Edition, page 588:

> "So, a paper drawn up in accordance with the instructions of the testator, and assented to by him, will be a good will, though not signed. And if a paper contains the testamentary wishes of the deceased, its form is immaterial. For instance, petitions addressed to officials, or answers to official enquiries have been held to amount to a will...Similarly a matrimonial arrangement deed and a deed of assignment have been held to operate as a will."

In a case before the Privy Council of *Mahomed Altaf Ali Khan* v. *Ahmed Buksh* [1] a document there which was a power of attorney having an expression of what was to be done with the property after the death of the person giving the power was held to operate as a will.

Further, it seems to be the case that if the solicitor had drawn up the document in accordance with the intention of the testator as being his will and he had assented to that, that would have been a valid will although not signed by him.

Here we have the converse case, for we get the original instructions of the testator to the solicitor. I think, therefore, that his original instructions should be as valid as the more formal document that the solicitor would, in the ordinary course, have drawn up in accordance with those instructions.

Abdullabhai, as I have said, has been in the box and he says that he told the testator that he would send for

[1] (1876) 25 W. R. 121.

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the vakil the next day and prepare a will to that effect, that is to say, to the effect mentioned in the document in question. I think this shows that the document really contained the testamentary intentions of the testator. I should perhaps explain that the reason for all this was that the testator was lying on his death-bed suffering from cancer of the tongue and was unable to speak properly at the time and that he died two days after the date of this letter.

On the whole, although this case is near the line, I think that, having regard to the fact that the parties are Mahomedans, this document was a valid will and may be admitted to probate accordingly. I should have mentioned that there was at one time a caveat lodged by the testator's brother disputing the document as a will. That caveat has been withdrawn and I dare say the reason for it is that probably at a subsequent stage it will be contended that all that the widow takes under the document is a Hindu widow's estate. If that contention is correct, the question is largely academic whether this is a good will or not, for the property will devolve in the same way as on an intestacy. But as I have intimated in my view it is a good will and accordingly I admit it to probate.

Caveat dismissed.

Probate granted.

Solicitors for plaintiff: Messrs. *Ardeshir, Hormusji, Dinshaw & Co.*

Solicitors for defendant: Messrs. *Kanga & Sayani.*

G. G. N.