

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Consolidated
Appeals of Nawab Sahib Mirza and others v.
Mussammât Umda Khanam, and Nawab Sahib
Mirza and others v. Mussammât Gunna Khanam,
from the Court of the Judicial Commissioner of
Oudh, delivered 5th March 1892.*

Present :

LORD MACNAGHTEN.

LORD MORRIS.

LORD HANNEN.

SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

The Respondents in these consolidated appeals, who were Plaintiffs in the Court of the Sub-Judge of Lucknow, are two servants of the late Nawab Malka Jehan, widow of Mahomed Ali Shah, King of Oudh.

Nawab Malka Jehan died in the year 1881. Each of the Respondents claimed to be entitled to an annuity or stipend under her will. The annuities are very small in amount; but it is said that there are many other claimants in a similar position, and that the total amount involved in the decision of these appeals is considerable.

The will on which the Respondents founded their claims is dated the 19th of March 1860. The Appellants, who are heirs of Nawab Malka Jehan as well as residuary legatees under her will, rested their defence on two grounds, both of which were urged at the bar. In the first

place it was said that the will of 1860 was revoked by a will made in 1876. In the next place, assuming the will of 1860 to have become operative, it was contended that, upon the true construction of that will, the annuities were directed to be paid solely and exclusively out of certain funds over which the testatrix had, at the time of her death, no power of disposition.

The Sub-Judge and the Judicial Commissioner were in favour of the Respondents on both points. The District Judge held that the will of 1860 was revoked.

The alleged will of 1876 is not forthcoming. All that is known about it is to be found in a letter addressed by Nawab Malka Jehan to the Commissioner of Lucknow, and dated the 6th of December 1876. In that letter, Nawab Malka Jehan expressed herself as follows: "I heartily
 " desire that, with your permission and consent,
 " a will in which I have appointed my grandson
 " Sahib Mirza Bahadur my executor be formally
 " and with certain conditions executed and
 " ratified, so that in accordance therewith my
 " estate may be managed after my death, in
 " future, with the exception of the arrangement
 " connected with the distribution (of stipends)
 " among my dependents and the establishment of
 " a charitable institution for the benefit of the
 " public in general, the management and adminis-
 " tration of which are not possible without the
 " aid of Government." A little further on, she
 says, "a copy of the will is also forwarded for
 " your inspection." And the letter concludes
 with this sentence: "In short, this last will and
 " testament of mine, being completed and
 " properly executed, shall after the Government
 " shall have accorded its sanction thereto be
 " deposited with the Government." No other
 passage in the letter throws any light upon

the subject. No copy or draft of the will referred to in the letter has been produced. Some oral evidence was offered as to its contents, but this evidence was held to be worthless.

The Government, it seems, declined to have anything to do with the matter. Nawab Malka Jehan was recommended to deposit her will with the Registrar under the Registration Act. This advice, however, was not followed.

Considering the terms of the letter of the 6th of December 1876, it is by no means clear that the will referred to in it was ever executed. The expressions in the letter are no doubt consistent with the view of the District Judge that the will was executed before application was made to the Commissioner, but they are not inconsistent with the view of the Sub-Judge and the Judicial Commissioner that the will was not executed at the date of the letter, and that it was not intended to be executed until after the Commissioner's consent had been obtained. There is nothing to show in what respects the alleged will of 1876 differed from the will of 1860, except that it appears that Sahib Mirza Bahadur was named as executor in the later instrument. Nor indeed is it possible to determine whether the reference to "the arrangement connected with the distribution of stipends" and "the establishment of a charitable institution" points to dispositions which are found in the will of 1860 and with which the testatrix did not propose to interfere, or to new and perhaps different dispositions contained in the alleged will of 1876.

In these circumstances, and upon these materials, which are the only materials relevant to the question under consideration, their Lordships are of opinion that the proper and necessary conclusion of law is that the will of 1860 was not revoked.

It is well settled that a will duly executed is not to be treated as revoked, either wholly or partially, by a will which is not forthcoming, unless it is proved by clear and satisfactory evidence that the later will contained either words of revocation, or dispositions so inconsistent with the dispositions of the earlier will that the two cannot stand together. It is not enough to show that the will which is not forthcoming differed from the earlier will, if it cannot be shown in what the difference consisted. It is also settled that the burthen of proof lies upon the person who challenges the will that is in existence. These propositions have been established in this country, both in this Tribunal and in the House of Lords (*Cutto v. Gilbert*, 9 Moore P. C., 131; *Hitchins v. Bassett*, 3 Mod., 203; Show. Cas. Par., 146; *Goodright v. Harwood*, 2 W. Black, 937), and as they are founded on reason and good sense they must be regarded as of general application.

The only remaining question is as to the true construction of the will of 1860.

That will was made when the testatrix was about to proceed on a pilgrimage to "Holy Karbala." Nawab Malka Jehan it seems was a lady of great wealth. Besides her landed property she was in the enjoyment of wasika allowance of Rs. 405 a month, in regard to which no claim is made by the Respondents, a pension of Rs. 4,500 a month which was stopped in 1873, and the income of 12 lakhs of rupees which were settled by treaty, and in which apparently she had only a life interest. It is, moreover, admitted that at the time of her death her moveable property was worth about Rs. 9,11,166, including Government notes worth about Rs. 6,96,000. The will provides for the management of her affairs during her pilgrimage, as well as for the distribution of her estate after her death. It is

addressed to the Chief Commissioner, and invokes the assistance and protection of the Government under whose supervision the testatrix places her property.

The instrument begins with some general reflections on the duty of a pious Mohammadan to make a will, in order to prevent disorder in his affairs after his death, which seem to show an intention on the part of the testatrix to dispose of the whole of the property over which she had disposing power.

Clause 3 deals with the application of the income of the testatrix's landed property during her pilgrimage. If there should not be enough in hand from that source to answer the purposes of the will, her agent was to make up the deficiency from "the pensionary allowance and interest on notes, &c., paid from the Treasury," and remit the balance to the testatrix. Pausing there, one can hardly doubt that the testatrix must have intended her agent to remit to her the whole balance of the income of her moveable estate, and not merely the balance of her wasika allowance and pension, and the income of the 12 lakhs. But the only words to carry the income are the words "pensionary allowance and interest on notes, &c., paid from the Treasury." Then the will goes on to provide for the remittance to the testatrix of the income of her landed property when collected.

Clause 5 contains the gift on which the present question turns. In it Nawab Malka Jehan, in the event of her death, declares her will as follows :—

“ Rs. 981 of the Queen's coin, out of my allowance from wasika and notes, &c., shall be paid monthly from the Government treasury to my relations, dependents, and servants as detailed below . . . and the remainder of my allowance from wasika and notes, &c., and

“ the whole of my landed property, *i.e.*, houses
“ and groves, &c., and jagir villages, shall be
“ divided among my grandsons and grand-
“ daughters according to their lawful shares, and
“ be paid to the agent of each of them.” There
again, in the ultimate disposition, it would
appear that the testatrix must have intended to
deal with all her moveable property over which
she had disposing power.

On consideration of the whole will their Lordships are of opinion that the Sub-Judge and the Judicial Commissioner were right in holding that the annuities or stipends given to the Respondents were payable out of the testatrix's moveable property, which she had power to dispose of by will. Probably the testatrix was under the erroneous impression that she could deal with the wasika allowance, and her pension from Government, and the income of the fund settled by treaty. But their Lordships are of opinion that the words of the gift are large enough to charge the annuities or stipends in question upon the Government notes held by the testatrix, and also upon the rest of her moveable property. They may add that if the words of the will are to be taken in a more restricted sense, it appears to them that the gift of these annuities or stipends must be regarded as a demonstrative legacy, and in that view they would be payable out of the testatrix's general estate, in the event of the failure of the particular fund pointed out for their payment.

In the result therefore, their Lordships are of opinion that the appeals ought to be dismissed, and they will humbly advise Her Majesty accordingly.
