Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sayad Muhammad v. *Fatteh Muhammad and others from the Chief Court of the Punjaub, delivered 6th November* 1894.

Present:

LORD HALSBURY.
LORD HOBHOUSE.
LORD SHAND.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Halsbury.*]

THIS is an appeal against a Judgment of the Chief Court of the Punjaub, reversing a Judgment of the District Judge of Montgomery by which it had been ordered that the Appellant, who was the Plaintiff in the Suit, should be appointed gaddi-nashin of the shrine of Baba Farid Shakarganj, and should get possession of certain property attached thereto.

The forms of procedure in the Suit are not very clearly stated, but their Lordships think it must be assumed that the questions which have been in debate before them were in debate before both the Courts below. It does not quite appear at what period of the Suit the question of the sound disposing mind of the Diwan, Pir Allah Jowaya, was raised, nor is it very material, excepting in one aspect. Whatever system of pleading may exist, the sole object of it is that each side may be fully alive to the questions that are about to be argued, in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues; and it may perhaps not be altogether immaterial to observe that the question of the capacity of the Diwan does not appear to have been prominently

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raised, at all events in the first instance. Their Lordships are, however, of opinion that they must assume that the question of his capacity was open upon the proceedings sufficiently to give each Court below the right to form a judgment upon the matter. The question is, which of those judgments is right?

The decision of this appeal turns really upon two questions of fact. The first question is, the right of the Diwan to appoint his successor in his lifetime according to the custom of the worshippers of the shrine. On behalf of the Defendant Abdul Rahman, the father of the first and second Respondents, it was contended that there was no proof of the alleged custom, and that the general Mahomedan law would carry to the Defendant, as the nearest agnate, the right to occupy the gaddi. For the Plaintiff it was said that the only question was whether or not the custom of the shrine permitted the Diwan to appoint anyone within certain limits, and whether he did in fact appoint the Plaintiff. That is a question to be determined by the evidence applicable to the custom, and their Lordships are of opinion that the evidence overwhelmingly establishes the right of the Diwan to appoint, within certain limits, within which limits the Plaintiff was, inasmuch as he was both an agnate and a worshipper. Their Lordships think that the right so to appoint is established both by documentary evidence and by the history of the shrine itself, and conspicuously in the case of the Diwan himself, seeing that it has been proved that he was not the person who would have succeeded to the office of gaddi-nashin according to the Mahomedan law. The evidence which was produced on the other side does not appear to their Lordships to be either as valuable, or indeed as consistent with itself, as either the documentary evidence in favour of the right to appoint, or as the evidence in fact. In truth

the witnesses for the Defendant seem to alternate between a strict application of the Mahomedan law of succession to realty, and a sort of popular choice which must be ascertained by the wishes of the worshippers. In that state of things it is impossible to give the same effect to the latter evidence as to the coherent and perfectly reasonable evidence given for the Plaintiff.

Assuming therefore that it was within the power of the Diwan to exercise the power of appointing a successor within certain limits, and that the Plaintiff was within those limits, the next question is, whether he in fact appointed the Plaintiff. The first event in order of date was an expression made by the Diwan, about the year 1882, that he intended to appoint the Plaintiff as his successor. He so expressed himself two years before he actually made the appointment. The evidence on this point was not credited by the Judges of the Chief Court, but their Lordships are wholly unable to understand upon what ground they rejected it. The evidence that the Diwan did so express himself was given by persons against whom no imputation was made, and the sole ground, so far as their Lordships can see, for the rejection of the evidence was because in his will, made in 1884, he expressed a hope that he might yet be granted a son of his own. That would seem to be a wholly inadequate reason for disbelieving the evidence of persons who stated in the plainest possible terms that the Diwan had expressed his intention to appoint his daughter's son as his successor, if he had a revelation.

Their Lordships are then brought to the question of the actual appointment. The appointment is said by two witnesses to have been made in their presence. If the matter had remained entirely upon that state of the evidence, and nothing had been done afterwards, some

observations which are made by the Chief Court perhaps might have some force in them, but it is a mistake to look at each part of this evidence as if it were to be taken only by itself. The evidence of the deed of appointment itself is very powerful evidence that something had previously taken place. Mr. Doyne, indeed, strenuously contended that the deed was only intended to have reference to something that was yet to be done. But he was met by the fact that the deed speaks throughout in the past tense of something which had already been done. He then ingeniously suggested that the deed did not really intend to appoint a successor, but was something in the nature of an adoption of a son. The answer appears to be very manifest upon the deed itself. It uses phraseology which is only applicable to the appointment of a successor. It is not a deed purporting to make the appointment, but witnessing and testifying to the fact that the appointment had already been made. Therefore if their Lordships should ultimately come to the conclusion that the deed was executed by the Diwan when in his right mind, it is about the strongest possible evidence that could be given in confirmation of the evidence of those persons who alleged that an appointment had previously, in their presence, been in fact made.

That brings their Lordships to the question which is really the only question that has been substantially argued for the respondents, namely, whether the Diwan when he executed the deed was in a state of mind capable of appreciating the nature of the act that he was performing. There are some witnesses who say that the Diwan was senseless, that he did not know what he was doing, that he was wholly incapable of managing himself or his concerns. On the other hand there are several witnesses who give exactly contrary

evidence. In that condition of things, without proceeding to the extreme length of assuming that one side or the other were committing perjury, their Lordships prefer to look about to see, not perhaps whether it is possible to reconcile in a reasonable way the extreme views of each set of witnesses, but whether there are not some circumstances which may account for differences of opinion, and honest differences of opinion, on the matters on which the witnesses have given evidence.

Now the undoubted fact is that the Diwan was suffering from paralysis. It is equally certain that he was affected by difficulties of speech which sometimes attend that disease. Their Lordships think it very likely, in that condition of things, that there would be differences of opinion as to the extent and degree of intelligence that he exhibited. But this is certain, that the execution of the deed was not a thing done in a corner, that the fact that the Diwan was alleged by some people to be about to make a deed declaratory of his already having made an appointment of a successor was known in the village, and that there were many people who were anxious to insist upon the right of Abdul Rahman, the uncle of the plaintiff, to succeed, and were consequently anxious that the Diwan should not execute the deed. Accordingly a number of persons, [a sort of deputation, came to him, and endeavoured to persuade him not to execute the instrument which it was supposed he was about to execute, for the purpose of establishing his grandson's rights. There can hardly be a more forcible argument in a matter of this kind, than to see, not what people say at a considerable distance of time after the events have happened, but what their conduct was at the time, to see the hypothesis upon which they were there, and what they were doing; and in this view, it is impossible not to be struck by

this, that in the transaction to which the different witnesses speak, it seems to be assumed on both sides that the Diwan was open to persuasion, but that if he would insist upon executing the deed, the party who supported the claims of the uncle could not help it, and that although some of them remonstrated against his doing so, and were anxious that he should not do so because it would give rise to dispute, yet they were so satisfied that he was exercising his own will on the subject, and that it was his will which was being followed in the execution of the instrument and the attaching of the seals, that when they failed to succeed in making him abstain, they actually, many of them, attached their seals in verification of the execution of the document.

The narrative then proceeds with the authority given by the Diwan for the registration of the deed, the application to the Sub-Registrar to register it, the opposition of Abdul Rahman's party, and the refusal of the Sub-Registrar to register it. The Chief Court placed great reliance on the fact that the Plaintiff did not appeal to the Registrar against the refusal by the Sub-Registrar to register the deed. But it is admitted now that it did not require registration, and if the Plaintiff was so advised, that would be a sufficient reason for taking no further steps. In truth, however, the whole proceeding before the Sub-Registrar was irregular, that officer having no such power under the Registration Act as he seems to have assumed.

As regards the condition of the Diwan after the execution of the deed, there is the evidence of Rup Singh, a serjeant of police, who was sent for by the Diwan to his kacheri, and who speaks to a conversation which took place between the Diwan and himself, and says that the Diwan was in his right senses. Mr. Doyne says the serjeant is not to be believed because he said that the

Plaintiff was turned out of the kacheri by the Defendant's party, whereas Mr. Doyne contends that the Plaintiff was not turned out, and that the criminal proceedings brought by him against the Defendant, in respect of his alleged ejection, were unsuccessful. Their Lordships think that this contention is a little overstrained, because on looking at the Judgment of the District Judge, they observe that the ground on which the criminal proceedings failed was, not because the Plaintiff was not forcibly turned out of the property, but because the Indian Penal Code lays down that the violence must be "with "intent to commit an offence, or to intimidate, "insult, or annoy, any person in possession of "such property," and that it was not a case of that kind.

On the whole it seems to their Lordships that the result of the evidence is as follows :—that there is a considerable body of affirmative evidence which establishes capacity on the part of the Diwan; and that the evidence on the other side is reconcileable with exaggeration or mistake, or the absence of any testing of the real state of the Diwan's mind on the various occasions to which the witnesses for the defence speak, for it is to be observed that in speaking of the occasions on which they say they went to see the Diwan, nothing could be more loose than their evidence, inasmuch as they give no particulars of any specific interview with the Diwan, but say generally that he did not know what he was about.

Under these circumstances their Lordships are of the clear opinion that the evidence establishes sufficiently that the Diwan was in a state of mind which showed that he knew what he was doing, and that the act which he did was one which he intended to do, and that he was capable of understanding the nature and consequences of the act which he had done.

The Chief Court appear to their Lordships to have mixed up the questions of undue influence and incapacity. They are totally different issues. So far as the question of undue influence is concerned, there does not appear to be a particle of evidence of any influence of any sort exercised towards the Diwan on the part of the Plaintiff or his supporters. The question of what is undue influence is sometimes a difficult one. Lord Cranworth, when giving judgment in the House of Lords in the case of *Boyse* v. *Rossborough* (6 H. L. Rep. 49), gives this definition :— " It is sufficient to say, that allowing a fair " latitude of construction, they must arrange " themselves under one or other of these heads, " coercion or fraud." It is enough in this case to say that there is not a particle of evidence of either coercion or fraud, or indeed of any influence of any sort or kind exercised on the Diwan by the Plaintiff.

Their Lordships will for these reasons humbly recommend to Her Majesty that the Decree of the Chief Court ought to be reversed, that the Appeal to the Chief Court ought to be dismissed with costs, that the Decree of the District Judge ought to be varied by declaring that the Plaintiff was duly appointed to the office of gaddi-nashin of the shrine of Baba Farid Shakarganj by the late Diwan, Pir Allah Jowaya, and was entitled to possession of the property attached thereto from the date of the death of the said Pir Allah Jowaya, and that the said Decree ought to be affirmed in other respects.

The first and second Respondents will pay the costs of this Appeal.