

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sala Mahommed Jafferbhoy and another v. Dame Janbai, from the High Court of Judicature at Bombay; delivered 7th April 1897.

Present :

LORD WATSON.

LORD HOBHOUSE.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

Sir Tharia Topan was a native of Zanzibar and the owner of a large mercantile business carried on in that island and in the city of Bombay. He resided in Bombay for some years and managed the business there, while his eldest son Moosa managed the business in Zanzibar. He belonged to the sect called Khojas, being Mahomedan in religion but observing Hindu customs as regards their property. In the year 1886 he made his will. He had then a wife named Janbai, who is the present Respondent, and who apparently belongs to a family of Shiya Mahomedans. He had also eight living children, three of whom were born of a former marriage and were of middle age. The other five were children of Janbai, and were much younger. Later in the same year when another son had been born to him, he made a codicil to his will, and in the year 1889 a second codicil. On the 12th January 1890 he made a third codicil. On

the 1st November 1890 he made a fourth codicil. On the 6th February 1891 a document was prepared which is propounded as a fifth codicil. On the 9th February 1891 he died. His executors were the Respondent Dame Janbai and his eldest son Moosa.

On 23rd of July 1891 the widow Janbai petitioned the High Court of Bombay claiming probate of the will and five codicils. Moosa opposed her. As regards the will and the two first codicils there was and is no dispute; but Moosa contends that the third and fourth codicils were obtained from the testator by the undue influence or coercion of Janbai, and that the fifth codicil if signed at all by the testator was signed when he was unconscious. Those are the issues now before their Lordships. They were decided in favour of Moosa by Mr. Justice Bayley at the trial, and against him by the Court of Appeal. He is now dead, and his executors are the present Appellants.

As regards the third and fourth codicils their Lordships cannot say that the case when once cleared of a multitude of rather unimportant details presents much difficulty. Moosa's contention is that in the course of the year 1889 the testator became very infirm in health, and that in particular his eyesight was so much impaired as to make him very dependent on others; that Janbai was a woman of superior abilities and great force of character; that she acquired constantly increasing dominion over the testator's mind; and that she used it to obtain from him a constantly increasing amount of benefit for herself, which it is extremely improbable that he would have given her of his own accord. To support this case there are produced letters written by the testator to Moosa containing some bitter complaints against his wife and lamentations over his own weakness.

The most emphatic of these letters is dated the 16th January 1890, four days after the date of the third codicil. It is written in Gujerathi and is translated as follows :—

“ To the chiranjivi (long lived) Moosabhai Tharia to wit.

“ Your bhabhi has been exercising great zulum (oppression) “ I have been much distressed (at it) what can I do? There “ is nothing I can do papers (or writings) are prepared* and “ brought (to me) and (she) forcibly takes my signatures (to “ them). A paper about the (household) things and articles “ at Zanzibar having now been prepared and brought (she) “ has forcibly obtained my signature (to it) consider that paper “ as null. And if I should not give (my) signature, I feel “ danger to my person (or life) and as to whatever money she “ draws, if I should speak (and raise an objection) thereto “ (she) creates a noise (or bustle) I have been made very “ miserable by your bhabhi. If God should call me over, I “ shall be freed from her persecution I write and leave this “ letter but I cannot read it I cannot now endure the disgust “ (any longer) your right is great but there is great “ persecution from her.† The 16th of January 1890.”

A second letter is dated the 10th August 1890. It is of great length referring mostly to the affairs of the firm and showing no lack of capacity for business in the testator. The most important passage is as follows :—

“ And the inward reason of (her) giving the annoyance to “ me is that she wanted me for the benefit of my youngest son “ (by her) to give (*i.e.* convey) to my (said) son the two large “ immoveable properties which are situated in Bombay and the “ one (or) two large immoveable properties which are situated “ in Zanzibar. I did not care for her and did not give (*i.e.* “ convey) my said properties in writing (to her) and shall not “ give (the same) in writing either. On the contrary I told “ her that I have not even privately given in writing anything “ to the eldest son who is entitled to a greater (share). She “ then remained silent never spoke about it again.”

Another letter is dated the 5th November 1890, four days after the date of the fourth codicil. It does not mention that codicil but it refers apparently to the same incident mentioned in the letter of August on which that codicil has a bearing.

Taking first the suggestion of violent improbability, it is necessary to see what the

codicils actually do or purport to do. The third codicil is confined to chattels belonging to Janbai who appears to have had considerable property of her own. This is acknowledged briefly in the will. The codicil appears to do exactly the same thing, only with more specific reference to places of deposit, and with an express acknowledgment that the testator is bound to restore the articles to her or to make good any loss. The codicil then goes on to say that his executors shall be bound likewise, and that Janbai's assertions shall be conclusive on the subject without any evidence or proof. Such a provision is no doubt, if literally applied, calculated to confer a power open to great abuse. But it is clear from the will and otherwise that the testator had a very high opinion of his wife; probably the idea of her making a dishonest use of her powers would not occur to him; or if it did he may very conceivably have thought that such a risk was less in amount and less dangerous to his estate than the risk of quarrels over a number of detached articles.

The fourth codicil deals with property given by the will to Janbai for life and afterwards to her sons. It is not quite easy to understand it, either with regard to the property it comprises or to the interests it confers, and it is not necessary to give any opinion on those points. The most adverse construction to Janbai for the present purpose is that which ascribes the greatest amount of increased benefit to her. On that construction the codicil gives to her an absolute interest in a block of buildings and adjacent ground at Zanzibar which the will gave to her and her sons; and it also adds to the gift another building lately joined on to the block. This addition is valued by Moosa at Rs. 65,000. It may be observed here that the

estate is valued at 29 lacs at the lowest, and another account makes it of much greater value; somewhere about 40 lacs.

The result is that in the third codicil their Lordships cannot find any such improbability as should induce a Court of Justice to lean favourably towards the other evidence brought to show undue influence. In the fourth codicil they cannot find any improbability at all; indeed the gift of the added building seems a highly probable one for the testator to make.

The general evidence brought to show Janbai's dominion over her husband is loose and vague. He was in failing health; he was nearly blind; she was a woman of great force of character and will, apt to show temper when thwarted; very constantly with the testator, and conversant with his property and with the affairs of the firm. The testator was of parsimonious habits, his wife was fond of what he thought undue display, and by her expenditure goaded him sometimes into expressions of anger and complaint. It is hardly worth while to pursue this class of evidence into further detail. If there is not evidence to show coercion in the special matter of the codicils, general assertions of the wife's commanding character and the husband's weakness, and of wrangling about expenses, go for little.

If indeed it could be shown that the statements in the letter of 16th January 1890 were true, Moosa's case would be carried a long way. On that account a serious attack is made on the genuineness of the letter. There are certainly some considerations relating to its writer's infirmities, to its contents, and to its production by Moosa, which are calculated to raise doubts, and the Court of Appeal on these grounds came to the conclusion that it would not be safe to rely upon it. On the other hand

Mr. Justice Bayley who presided at the trial thought that the external evidence placed the genuineness of the letter beyond dispute. Moosa received it by post, and of his truthfulness the learned Judge had no doubt. Fazul saw it before it was sent and posted it. He was a confidential man of business in the service of the testator for 24 years, and was moonim or head manager of the Bombay branch for 10 years. He was not shaken in cross-examination, and he impressed the presiding Judge very favourably as a witness. The legal adviser of the sons in Zanzibar thought he saw it in the summer of 1890. Several persons familiar with the testator's handwriting deposed to it, and the Judge was quite satisfied on that point.

Their Lordships would hesitate much before overruling a conclusion so formed on account of difficulties more or less conjectural; the more especially as the contrary conclusion implies an accusation of elaborate conspiracy perjury and forgery against Moosa and Fazul, two persons of high commercial position and of otherwise unblemished character; all for a most inadequate temptation, considering the magnitude of the estate and the small amount of gain which could be effected in Moosa's share of it by such a letter. They may however content themselves with assuming the genuineness of the letter, because it does not affect the result of their judgment.

The third codicil was prepared by Mr. Sayani, a solicitor of the first rank in Bombay, and the testator's confidential legal adviser. It was prepared as early as August 1889, on the testator's own instructions; and a declaration of trust to the same effect was prepared at the same time. There was delay in its execution because the testator was expecting the knight-hood actually conferred upon him at the

beginning of 1890; and he wished not to execute the documents before that time, saying that his sons might not like it, and might do something to prejudice him. Janbai was opposed to the delay, but his will and not hers carried the day. The execution of the documents was effected in the regular way of business by Sayani at his own office. Janbai, though with her husband, took no part in the instructions or during the execution.

Sayani's evidence must be taken as giving the exact truth of the case so far as he saw it, and there is nothing beyond the intrinsic nature of the disposition (which has been before observed on) to suggest any other conclusion than his. The testator's statement that his wife came and forcibly obtained his signature is not true. It may be that his brain was clouded for the moment; it may be, as the High Court suggests, that he wished to excuse himself to his sons, it may be, and is perhaps more probable, that something had occurred to throw him into a state of irritation not uncommon with strong men whose powers are decaying, and that he vented it in exaggerated and unjust complaints against his wife. Whatever the cause, his letter is clearly contrary to the proved facts of the case.

The two later letters have reference to the dispositions of the 4th codicil. Sayani indeed was not employed in that business, but Fazul, who has in the main given evidence against the codicils, shows how it was executed. By order of the testator he prepared a draft dictated by Janbai. The draft was copied by Mohunlal the cashier of the firm. He is a witness who has in the main given evidence against the codicils, and he is a witness commended by Mr. Justice Bayley. It was read over to the testator, signed by him, and attested by Fazul. There is no evidence of any pressure, and no improbability (as before

observed) in the dispositions. Even if the two letters had contained allegations of coercion by Janbai, it is seen by the previous letter of January with what caution they should be received. But the effect of the letters is rather to show that the testator held his own against some importunities of his wife. According to that of August, she wanted a conveyance "in writing" (apparently by deed *inter vivos*) to her youngest son. According to that of November, she wanted a Mahomedan wife's share "in writing." The testator refused in both cases: saying in the first case that he had not even given anything in writing to Moosa himself, upon which she remained silent; and in the second case that what she asked was not the custom among the Khojas, and that he had made his dispositions by will.

The result is that their Lordships agree with the Court of Appeal that there has been no undue influence, and that the third and fourth codicils should be admitted to proof.

The fifth codicil presents questions of much greater difficulty. It bears date the 6th February 1891. It consists of five clauses. The effect of the first is to give to Janbai's youngest son Mahomed Hoosain a boy of six years, a property of considerable value in Bombay, probably one of the properties referred to in the letter of August 1890. The effect of the second clause is to recognise a draft of Rs. 20,000, recently made by Janbai from the funds of the firm, and to give her Rs. 30,000 in addition. The other three clauses relate to her separate property, and their effect need not be considered. The codicil is attested by Fazul, by Dr. Merwanji, who was in habitual attendance upon the testator, and by Abdoola a Bombay merchant whose daughter was then betrothed to Janbai's son.

It must be admitted that there is much

improbability in these dispositions, as to both of which the evidence leads to the belief that they were contrary to recently expressed wishes of the testator. But their Lordships do not follow this point into detail, because the validity of the codicil depends not upon probabilities but upon the circumstances attending its execution.

Four witnesses, being members of or connected with the family, give evidence to support it, viz., Janbai herself, her two daughters Katzibai and Fatmabai, and Abdoola the attesting witness. Janbai's account is that on the 6th February between 10 and 11 a.m. the testator told Fazul to make a draft and gave him instructions. The draft was fair copied by Mohunlal and read over to the testator; he was then assisted to sit up, and so signed the codicil; only when his hand was shaky, Fazul put his hand on the pen. There were present besides herself, Fazul, Bandi Ali, Dr. Merwanji and Abdoola. She had never asked the testator for the Bombay property, or for the money. She did not take any part in giving instructions for the codicil. To that denial she firmly adhered. Katzibai tells the same story, only adding that the signature took place about a quarter or half past four. Fatmabai substantially agrees. Abdoola says that he attested the codicil between 2 and 4 p.m. Earlier in the morning between 8 and 11 the testator told him that he was giving his bungalow to Mahomed Hoosain. As to the exact mode of signature he agrees substantially with the others. About the instructions and reading to the testator he knows nothing.

So far the history is plain enough. But the statements of the family witnesses are at variance on important points not only with those of the testator's servants including the attesting witness Fazul, but with those of the third attesting witness Dr. Merwanji. This gentleman is so important a witness that

Mr. Justice Farran says the whole case for the codicil rests on his testimony. That learned Judge entirely disbelieves, as did Mr. Justice Bayley, the evidence of the family witnesses; and at this bar the Respondent's counsel treated that evidence not as a support but as a hindrance to his case. In estimating the effect of Merwanji's evidence it must be borne in mind that the hour of signature is very important, because the testator's strength steadily deteriorated throughout the day. Dr. Bhalchand a medical man of good position who was called in on the 5th, tells us that on the 6th he paid five visits. On that day he believed the testator would die. His temperature was 102° on the 5th, rose to 103° at 3 o'clock on the 6th, and may have gone to 104°. Merwanji tells us that his temperature was 102° in the early morning of the 6th, in the afternoon (about 5 o'clock) 103°, and between 7 and 8, after Bhalchand's visit, 104° minus 2 points.

Merwanji went away to his dispensary in the afternoon, and after his return was called into the room where the testator was. Then he gives the following evidence as to the codicil:—

"I see my attestation. I saw the testator execute it. After my return at $\frac{1}{2}$ past 6 I was called into the room where Sir Tharia Topan was.

"This document was being dictated by Sir Tharia. A Guzerathi Mehta was writing. It was dictated by Sir Tharia to Fazalbai who was making a rough draft. Only the first clause was dictated by Sir Tharia Topan. Then Sir Tharia Topan who was in fever and exhausted told his servants to let him lie down on his bed.

"Then Lady Janbai dictated the last four clauses. Sir Tharia heard her do so. I did not hear him make any objection. A fair copy was made from the rough draft. It took about an hour to write a fair copy. When the fair copy was made Sir Tharia Topan was made to sit up in his bed and sign the fair copy. I don't remember if the fair copy was read over to him before it was signed.

"He was told what it was. He only held out his hand for a pen.

"He was blind and so very weak and his hand was very shaky. The pen was put into his hand but he was not able to sign. Fazul Mahomed caught hold of his hand along

“ with the pen and signed. After he had signed it was
“ attested.

“ At the time this was done the testator was in a conscious
“ state; at the same time he had a little high fever. A little
“ above 103.

“ As long as he dictated the 1st clause I thought he
“ understood it. I noticed no change for the worse from the
“ time he ceased dictating to the time he executed the fair
“ copy.

“ Seeing he tried to get a pen I think he seemed to
“ understand what he was doing when he executed the
document.

“ After the first clause was dictated he fell back exhausted.
“ He did not speak from that time till after the document was
“ executed and attested.”

In cross-examination he says:—“ I asked
“ him how he felt off and on during the day.
“ That is all I asked him. Sometimes he would
“ say ‘ So so,’ sometimes he would only nod.
“ That is all I heard him say during the day
“ except dictating the codicil. Except when at
“ my dispensary, I was in his room the whole
“ day and evening.”

Dr. Bhalchand says he spoke to the testator
on the evening of the 6th. “ His answers were
“ rational and connected. I believe he was at
“ that time in a fit condition to make his will.”
But in cross-examination it appears that his only
conversations with the testator were to ask him
“ How are you?” when he said “ I am not
“ feeling well”; and to ask about his appetite,
his sleep, and his cough; and “ it was from
“ these conversations that I say I believe he was
“ fit to make his will.” Now it is obvious that a
sick man may well be able to answer simple
questions about the state of his body and yet be
quite unequal to the effort of making new
dispositions of his property.

Yet another doctor gave evidence, one of
high standing in Bombay, not specifically as to
the codicil, but generally as to the testator’s
health. Doctor Bahadoorji says that he in
company with Bhalchand visited the testator on

the 5th, and again visited him on the 6th, when he describes him as being in a state of semi-stupor. But this gentleman does not keep memoranda, and reasons are given for thinking that he may be mistaken as to the days of his visits. The other two medical men say that he did not come before the 7th and it is admitted on all hands, that after the 6th the testator was quite incapable of attention to business. The First Court expresses doubts on the disputed point, and their Lordships think it safer not to rest weight on Bahadoorji's evidence. They would pass it over without further remark, but for an incidental result of the view taken by the Court of Appeal. The learned Judges there think it so clear that Bahadoorji was not present on the 6th, and that everybody must remember the day on which he first came, that they have wholly discredited the testator's servants, three witnesses strongly relied on by Mr. Justice Bayley, mainly on the ground (which as regards Fazul does not exist) that they ascribe Bahadoorji's visit to the 6th. Nobody imputes anything worse than mistake to Dr. Bahadoorji, and it seems to their Lordships that even if the other witnesses are wrong in their dates, there is no ground for ascribing to them deliberate perjury so as to vitiate their evidence in every point.

The first of these witnesses is Fazul the moonim. His story is to the following effect. Between 4 and 5 in the evening of the 6th Janbai told him that the testator wanted to give the bungalow to her younger son, and a sum of money to herself. He made a draft from her instructions, and dictated it to Mohunlal. The fair copy was executed between 7.30 and 8. While it was being executed Merwanji came in. The draft was not read to the testator, but Mohunlal read the fair copy to him. As to the testator's sitting up, his inability to sign, and the

guidance of his hand, he gives much the same account as that of Merwanji. The testator he says was held up by Janbai on one side and Bandi Ali on the other. Then he says again that when the signature was being made Merwanji came in, and adds that at Janbai's request he put his attestation. He was asked no questions on his statement about the arrival of Merwanji. He says nothing about the visit of Bahadoorji.

The next servant witness is Mohunlal the cashier. On the 6th he went to the bungalow in the forenoon with Fazul and waited till between four and five doing nothing. Then Janbai gave him a draft in Fazul's handwriting, which at her request he copied. At 7.30 or 8 he with the others went into the testator's room. As to the circumstances of the signature he gives an account not materially different from the other witnesses, except that he says the document was not read over before the signature. Merwanji, he says, came into the hall after Fazul had attested, and was not in the testator's room while the codicil was being signed. "When I went out of the room, I saw Merwanji; he had just come. The lady asked him to sign, he said nothing. Took the pen and signed at once." He was not asked any further questions on these points. He mentions the visit of Bahadoorji about 6 o'clock; this was stated in cross-examination, apparently without remark on either side.

The third servant witness is Bandi Ali who had been employed upwards of 12 years in one of the sale departments of the business. In the morning of the 6th he by Janbai's order telephoned for Fazul and Mohunlal to come with the cash-book. He took no part in preparing the codicil, but saw the others Janbai, Fazul, and Mohunlal, consulting and writing. The part he took in the signature was to help Janbai in making the testator sit up. His account of

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to dictate a clause ; that he was then exhausted, fell back, and never spoke again till after the signature ; that his wife dictated the rest, he making no objection ; that some time (an hour or so) afterwards a fair copy was brought to him to sign ; whether it was read over to him or not the witness cannot say ; that he held out his hand, for a pen as the witness thought ; that he was not able to write ; that he was made to sit up and his hand was guided ; that his holding out a hand for a pen when invited to sign made the witness think that he understood what he was doing at the time when he executed the document ; that the witness had no communication with the testator all day except to ask him off and on how he felt, and to receive for answer a nod, or the expression "so, so ;" and that the testator said nothing else the whole day except to dictate the codicil.

Now the great importance of Merwanji's evidence consists in his statement that the testator dictated the first clause of the codicil. If that is left out, his account is that of a man who had all day been declining in power and had become at length wholly incapable, too exhausted to speak, to sit up, or to write ; this too being his last effort, for it is not suggested that he was afterwards of capacity to act, and it is that circumstance which caused so acute a controversy over the dates of Bahadoorji's visits. Supposing that the testator's dictation is accepted as clearly established, there is still the interval of an hour between that act and the signature, during which he did nothing but hold out his hand ; and the evidence, to put it at the highest, still leaves open the inference that after he sank back exhausted he was not capable of a testamentary act.

If then Merwanji's evidence stood absolutely unimpeached it would hardly support

the Respondent's obligation to prove that the testator was capable. But so far from being unimpeached, on this point Dr. Merwanji is in flat contradiction to every one of the seven other persons who have given evidence bearing on it. The evidence of the family witnesses may be untrustworthy. But it is impossible to shut our eyes to the fact that Janbai herself, supported by her daughters and her intended son-in-law, flatly denies all participation in the instructions for the codicil, and gives an account of its preparation in a different way and at a different time of day. And it is very difficult indeed to believe that so intelligent a lady would have committed herself to such statements, if all the time she had in her mind the consciousness that, in the presence of Dr. Merwanji and (as he says) of Abdoola and of two out of the three servants, she had taken the prominent part, equally impossible to mistake or to forget, of dictating the greater part of the codicil out of her own head. Then comes the evidence of the three servants, as to which their Lordships have already given reasons why they cannot acquiesce in its summary rejection by the Court of Appeal. That evidence leaves it very doubtful at what point of the proceedings Merwanji came upon the scene; but except in one respect, viz., whether the fair copy was read to the testator, it is quite clear and consistent as to the mode in which the codicil was prepared and signed. Dr. Merwanji was, with intervals of visits to his dispensary, about the house all day; and it may be that, having heard much conversation he has not kept his memory clear about that anxious time. But whatever may be the explanation of his evidence, it is quite unequal to bear the weight of proving a due execution of the codicil. Their Lordships cannot accept it as giving a correct account of what

happened; and they do not see their way to depart from the decision of Mr. Justice Bayley in accepting the account of the three servants as substantially consistent and correct.

The First Court decreed probate of the will and first two codicils and ordered the Plaintiff (Janbai) to pay costs of suit. The Court of Appeal varied that decree by pronouncing in favour of all five codicils, and by ordering all costs to be paid out of the testator's estate. Their Lordships hold that the decree of the Appellate Court should be varied by ordering that the fifth codicil should not be admitted to probate, and *quoad ultra* affirmed. They will humbly advise Her Majesty to this effect. As to the costs of this appeal, each party has succeeded on a substantial point, and has failed on a substantial point; and their Lordships follow the usual course by directing that they shall bear their own costs.
