

soldiers actually upon service, and it was provided that the witnesses to such wills should make memoranda of the contents of the will within six days from the time when such will was made. The Ecclesiastical Courts have, it seems to us, *ex necessitate*, granted probate of such wills. It is true that in English law the probate of a will is not defined as it is in the Indian Act. The word "probate" includes everything which is necessary to establish a will, and there is no reference to writing. It seems to us that the practice of the English law presents a bridge by which we may escape from the difficulty of finding that whereas a Hindu or Muhammadan can make a good oral will, no effect can be given to that will, such as would be given to a written document, and we have been led in that direction by the Bombay Court, which, in the judgment in *In re the will of Haji Mahomed Abba* (1) recognising clearly the difficulty of the situation, arrived at the conclusion that it is more in accordance with the intention of the Legislature and the spirit of the law that probate should issue, although the will is an oral will. We approve of that decision, and affirming the order of the Judge, dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1903
February 20.

Before Mr. Justice Banerji.

IN THE MATTER OF THE COMPLAINT OF SAJDAR HUSAIN.*

Criminal Procedure Code, section 250—Frivolous accusation—Award of compensation to accused—Such award to be made by the order of discharge or acquittal and not by a separate order.

When a Magistrate, on finding a complaint to be frivolous or vexatious, thinks it right to award compensation to the complainant, he must do so by his order of discharge or acquittal. Where a Magistrate made such an order in a separate proceeding after the accused had been discharged, it was held that his order was not merely irregular but without jurisdiction.

A Magistrate of the 1st class having before him a complaint of an offence under the Cattle Trespass Act, 1871, came to the conclusion that the complaint was frivolous and vexatious. He did not, however, when discharging the accused, make an order for compensation against the complainant; but subsequently

* Criminal Reference No. 30 of 1903

(1) (1899) I. L. R., 24 Bom., 8.

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to the discharge of the accused he held a separate inquiry, and in that proceeding made an order calling upon the complainant to pay compensation. The Sessions Judge of Moradabad, being of opinion that the lower Court's procedure was not supported by the Code of Criminal Procedure, referred the case to the High Court for orders under section 438 of the Code.

The following order was passed :—

BANERJI, J.—In this case one Sajdar Husain brought a complaint against several persons, accusing them of an offence under the Cattle Trespass Act, No. I of 1871. The Magistrate discharged the accused, and came to the conclusion that the accusation was frivolous and vexatious. He then proceeded to record an order to the effect that he proposed to award compensation to the accused under section 250 of the Code of Criminal Procedure. It appears that he adjourned the proceedings to a future date in order to enable the complainant to show cause against the award of compensation, and manifestly made the actual order for awarding compensation, not on the date on which the accused were discharged, but on a subsequent date. I agree with the learned Sessions Judge that this proceeding of the Magistrate was not merely irregular, but his order was without jurisdiction. Section 250 requires that the Magistrate, if he wishes to exercise his discretion as to the award of compensation, should do so by his order of discharge or acquittal. There is nothing in the Code of Criminal Procedure which authorizes him to hold an inquiry on a subsequent date, and make an order under section 250 on such date. He was bound under the proviso to that section to record and consider any objection which the complainant might urge before he directed compensation to be paid; and if he directed compensation to be paid he was bound under clause (b) of the proviso to state his reasons for awarding compensation in his order of discharge or acquittal. It is quite clear, therefore, that the direction for payment of compensation must be contained in the order of discharge or acquittal. The Magistrate's order of discharge did not contain any such direction in the present instance. I therefore set aside his subsequent order, and, acting under section 423, clause (d), read with section 439, I direct that the compensation awarded be refunded to the complainant.