APPELLATE CIVIL.

1903
February 19.

Before Mr. Justice Blair and Mr. Justice Banerji.

GOKUL CHAND (OBJECTOR) *v.* MANGAL SEN AND OTHERS (APPLICANTS).*

Act No. V of 1881 *(Probate and Administration Act), section* 3—*Will*—*Probate*—*Probate granted of a nuncupative will made by a Hindu.*

Held that probate may be granted of a nuncupative will made by a Hindu. *In re the will of Haji Mahomed Abba* (1) followed.

MANGAL SEN and others filed an application in the Court of the District Judge of Agra setting forth that, according to an oral will made shortly before her death, which occurred on the 18th of December 1901, one Musammat Gulab Kunwar, widow of Balmakund, and manager of a temple described as the temple of Murli Manoharji, the applicants with others had been constituted managers of the said temple, and certain instructions, afterwards embodied in writing by the persons concerned, had been given by the Musammat, and they prayed that this nuncupative will of the deceased lady might be admitted to probate, or in default, that letters-of-administration might be granted to them. This application was opposed by one Gokul Chand, who set up an alleged will said to have been executed by Gulab Kunwar on the day of her death. It was also opposed by one Murli, who alleged that Gulab Kunwar left no will at all, and that he himself was her heir.

The District Judge found in favour of the case put forward by the applicants, and that the will relied upon by Gokul Chand was a forgery invented to meet the applicants' petition, and accordingly granted the applicants' prayer for probate. Gokul Chand thereupon appealed to the High Court, urging that the nuncupative will set up by the applicants had not been satisfactorily proved, and if it had been, no probate could be granted of such a will.

Mr. *R. K. Sorabji* and Maulvi *Ghulam Mujtaba*, for the appellant.

Pandit *Sundar Lal* (for whom Pandit *Baldeo Ram*) and Dr. *Satish Chandra Banerji*, for the respondents.

* First Appeal No. 98 of 1902 from an order of H. D. Griffin, Esq., District Judge of Agra, dated the 26th of July 1902.

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

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BLAIR and BANERJI, JJ.—This appeal arises out of an application to the District Judge of Agra, asking him to find in favour of the validity of a certain nuncupative will alleged to have been made by one Musammat Gulab Kunwar, a Brahman widow, who died on the 18th of December, 1901, and to admit that will to probate. On the other side the validity of the fact of such disposition of her property is denied, and furthermore, one Gokul Chand set up a written will of a later date. The oral will, as the Judge has found, was made four days before the death of the testatrix. The written will set up by Gokul Chand was alleged to have been made on the very date on which the testatrix died. We have considered the evidence on the record in relation to both of these wills, and we see no reason to differ from the conclusions arrived at by the learned Judge. It is not, in our opinion, proved that the document produced and alleged to have been signed on the date of the death of the testatrix was really her last will and testament. On the other hand, we think it not improbable that the testatrix should have desired to perpetuate after her death the worship which had been going on upon her premises during her own life and probably before. The evidence is considerable in quantity and in our view is open to no grave suspicion. The amount at issue is very small. No questions were put to show that the witnesses were persons who are likely to perjure themselves for so small a consideration, and except as co-worshippers they have no interest in the estate disposed of by the oral will. We therefore find that the nuncupative will alleged to have been made by the deceased widow was, in fact, made by her as her last will and testament.

The question of admitting the will to probate is one of some difficulty. According to the interpretation clause in the Probate and Administration Act, 1881, probate means a copy of the will with a grant of administration to the estate of the testator, and it is argued with some considerable force that there can be no copy of a purely oral will. The same question has been dealt with in England under the provisions of the law relating to oral wills. The right to make an oral will was limited by the Statute of Frauds to sailors and

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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 SAFDAR 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.