Before Mr. Justice Norris and Mr. Justice Ghose.

KRISHNA KINKUR ROY AND ANOTHER (PETITIONERS) *v.* RAI MOHUN ROY AND ANOTHER (OBJECTORS).* 1886 *September* 2.

Probate Act (V of 1881)—Will of Hindu made before Hindu Wills Act, XXI of 1870—Succession Act, s. 187—Application for letters of administration.

Since the passing of Act V of 1881 the District Courts have jurisdiction to entertain applications for the grant of probate or letters of administration in respect of wills of Hindus made before the 1st September 1870, that is to say wills of Hindus to which the Hindu Wills Act, XXI of 1870, did not apply.

Semble.—Section 187 of the Succession Act not being made applicable to such wills, it is not obligatory on executors or legatees under them to take out probate or letters of administration in order to establish their rights in a Court of Justice.

THIS was an application by Krishna Kinkur Roy and Chunder Mohun Roy, made on the 23rd August 1884, for letters of administration under the will of their grandfather, Horo Chunder Roy, who died on the 6th Bhadro 1281 (21st August 1874).

The will was dated 16th Magh 1273 (29th January 1867). By it the bulk of the testator's property was left to his four grandsons, *viz.*, the two petitioners, Kedarnath Roy who was dead, leaving a widow and a daughter, and Shitanath Roy; and Revati Dassi, the testator's widow, was appointed sole executrix. The application was opposed by Rai Mohun Roy, one of the sons of the testator, and by Revati Dassi, on several grounds, the only one material to this report being that the will was executed before the Hindu Wills Act came into force, and the procedure of that Act and of the Probate Act 1881 did not apply; and that the petitioners were therefore not entitled to the letters of administration they asked for.

The following order was made by the District Judge:—

"I dismiss the application on the ground that this will purports to have been executed before the 1st September 1870, and that under Act XXI of 1870 this Court has no jurisdiction to grant

* Appeal from Original Decree No. 275 of 1885, against the decree of T. M. Kirkwood, Esq., Judge of Moorshedabad, dated the 10th of December 1884.

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letters of administration in respect of any will executed prior to that date—*Bharti* v. *Bharti* (1)—a disability which Act V of 1881 has done nothing to remove. The Bombay High Court, referring to the provisions of Act V of 1881, is of opinion—*Shaik Moosa* v. *Shaik Essa* (2)—that the object of the framers of that Act was "to frame an Act which will be applicable to all natives of this country, whilst leaving the existing law as to those Hindus to whom the Hindu Wills Act applied untouched." Revati, I may add, has not accepted or renounced her post as executrix.

"I award no costs because, but for the defect of jurisdiction of this Court, I think the applicants would have been entitled to the letters they ask for."

From this decision the petitioners appealed.

Dr. *Rash Behari Ghose*, Baboo *Amarendra Nath Chatterjee*, and Baboo *Sharoda Prosunna Roy*, for the appellants.

Dr. *Gooroo Dass Banerjee*, and Baboo *Gyanendra Nath Dass*, for the respondents.

The following judgments were delivered by the Court (NORRIS and GHOSE, JJ.)

NORRIS, J., (after shortly stating the facts and reading the final order of the lower Court) continued:—

It was contended before us by the learned pleader for the appellants that Act V of 1881 has altered the law as laid down in *Bhârti* v. *Bharti* (1), and that it is now competent to the Mofussil Courts to grant probate or letters of administration in respect of a will not coming within the provisions of the Hindu Wills Act, that is to say of wills of Hindus, Jainas, Sikhs and Buddhists in the territories subject to the Lieutenant-Governor of Bengal and in the towns of Madras and Bombay made prior to 1st September 1870.

In order to determine this point, it is necessary to see what the course of legislation has been.

In 1865, the Indian Succession Act was passed. Section 331 of that Act provided that "the provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Mahomedan or Buddhist." * * * * In 1870 the Hindu Wills Act was passed; s. 2 of that Act, provided that certain

(1) 6 C. L. R., 133. (2) I. L. R., 8 Bom., 241.

portions of the Indian Succession Act 1865, *viz.*, " ss. 46, 48, 49, 50, 51, 55, and 57 to 77 (both inclusive), ss. 82, 83, 85, 88 to 103 (both inclusive), ss. 106 to 177 (both inclusive), ss. 179 to 189 (both inclusive), ss. 191 to 199 (both inclusive), so much of parts XXX and XXXI as relates to grants of probate and letters of administration with the will annexed, and parts XXXIII to XL (both inclusive), so far as they relate to an executor and an administrator with the will annexed, shall, notwithstanding anything contained in s. 331 of the said Act, apply to all wills and codicils made by any Hindu, Jaina, Sikh, or Buddhist, on or after the 1st day of September 1870, within the said territories," (*i.e.* the territories subject to the Lieutenant-Governor of Bengal) " or the local limits of the ordinary Civil Jurisdiction of the High Courts of Judicature at Madras and Bombay."

The effect of this section was, amongst other things, to make a District Court of the Lower Provinces of Bengal a Court of competent jurisdiction, for the grant of probate or letters of administration, under the provisions of the Indian SuccessionAct in respect of wills of Hindus, Jainas, Sikhs, and Buddhists made within the Lower Provinces of Bengal after 1st September 1870; and also to prevent the establishment of any right as executor or legatee unless probate or letters of administration had been granted—see s. 187 of the Indian Succession Act.

In 1881 the Probate and Administration Act was passed; the preamble of that Act recites " that it is expedient to provide for the grant of probate of wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act does not apply." The provisions of the Indian Succession Act did not apply—(*a*) to the intestate or testamentary succession to the property of any Mahomedan; (*b*) the intestate or testamentary succession of any Hindu, Jaina, Sikh, or Buddhist within the territories subject to the Lieutenant-Governor of Bengal or the local limits of the ordinary Original Civil Jurisdiction of the High Courts at Madras and Bombay, whose will was made prior to 1st September 1870, or who died before that date; (*c*) to any will made or intestacy occurring before 1st January 1866; (*d*) to races, sects, or tribes exempted by the Governor-General in Council from the operation of the Act. Section 154 of

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the Probate and Administration Act provides, amongst other things, "that the following amendment shall be made in the Hindu Wills Act, (*namely*) for the portion of s. 2 commencing with the words 's. 179' and ending with the words 'Administrator with the will annexed,' the words 'and s. 187' shall be substituted." The effect of this amendment was to make the provisions of the Indian Succession Act with respect to the grant of probate of wills and letters of administration to the estates of deceased Hindus, Jainas, Sikhs and Buddhists in the Lower Provinces of Bengal and in the towns of Madras and Bombay where such wills were made subsequent to the 1st September 1870, or where such persons died after that date, inapplicable, and at the same time to leave the executor or legatee of such persons under the obligation of obtaining probate or letters of administration from a Court of competent jurisdiction before his rights as such executor or legatee could be established in a Court of Justice.

How then was this obligation to be discharged? Section 2 of the Probate and Administration Act provides that "Chapters II to XIII, both inclusive, of this Act" (which contain provisions identical with those of the Indian Succession Act, 1865, which under s. 154 of the Probate and Administration Act were struck out of the Hindu Will's Act) "shall be applicable to the case of every Hindu, Mahomedan, Buddhist, and person exempted under s. 332 of the Indian Succession Act, 1865, dying before, on or after the 1st day of April 1881."

Section 187 of the Indian Succession Act, 1865, is not incorporated in the Probate and Administration Act. The Bombay High Court in the case referred to says: "It is impossible to suppose that this exclusion of s. 187 from the Act of 1881 could have been done inadvertently; on the contrary it bears from the very manner in which it was done all the marks of having been done advisedly and of intention; the effect is to bring all Hindus, Mahomedans, and other persons exempted from the operation of the Indian Succession Act by s. 332 of that Act either immediately or as soon as the local Government, with the assent of the Governor-General in Council, may think fit, under all the provisions of that Act relating to grant of probate and letters of administration, *excepting* s. 187, which, however, re-

mains in force in those cases to which the Hindu Wills Act of 1870 was made applicable. The object seems to have been to frame an Act which would be applicable to all natives of this country, whilst leaving the existing law as to those Hindus to whom the Hindu Wills Act applied untouched. Not only, therefore, is there no express provision in the Act of 1881 making s. 187 of the Indian Succession Act applicable to Mahomedans and Hindus (except in such cases of Hindu wills as the Hindu Wills Act applies to), but it would appear that, so far as the intention can be gathered from the express provisions of the Act, it was the intention of the Legislature to exclude its operation."

This view of the law may be correct; but why executors of, and legatees under, the wills of Hindus, Jainas, Sikhs, and Buddhists in the territories subject to the Lieutenant-Governor of Bengal and in the towns of Madras and Bombay made subsequently to the 1st September 1870, should be under the disability created by s. 187 of the Indian Succession Act, and the executors of, and legatees under, the wills of other natives should be relieved from the liability, I am at a loss to understand. But however this may be, I am clearly of opinion that the Bombay case does not decide that a District Judge cannot grant probate or letters of administration of the will of a Hindu whose case does not come within the Hindu Wills Act; it seems to me to decide by implication that he can, but that such grant is not a condition precedent to the establishment by an executor of, or legatee under, such a will of his rights in a Court of Justice.

I am of opinion that the order appealed against should be reversed with costs, and the District Judge be directed to grant letters of administration to the applicant.

GHOSE, J.—I agree with my learned colleague in the conclusion at which he has arrived. I think that whatever might have been the state of the law before the passing of the Probate Act (V of 1881), the District Courts are now fully competent under that Act to entertain applications for the grant of probate or letters of administration in respect of wills made before the 1st of September 1870, although in respect to such wills, the provisions of s. 187 of the Succession Act, making it obliga-

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tory upon executors or legatees to take out probate or letters of administration, are not applicable.

The learned Judge of the District Court has found that but for the "defect of jurisdiction," which he supposed to exist, the applicants would have been entitled to the letters they ask for. That being so, I agree with my learned brother in holding that the Judge should be directed to grant letters of administration.

J. V. W.

Appeal allowed.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Wilson, Mr. Justice Macpherson and Mr. Justice Grant.

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IN THE MATTER OF THE PETITION OF F. W. GIBBONS.

Review of judgment of High Court—Criminal Procedure Code (Act X of 1882), s. 369.

The verdict and judgment of a Divisional Bench of a High Court, coupled with the sentence in a criminal case, are absolutely final, and as soon as they have been pronounced and signed by the Judges, the High Court is *functus officio*, and neither the Court itself, nor any Bench of it, has any power to revise that decision or interfere with it in any way.

THIS was an application in which the petitioner prayed that the High Court would review or revise the judgment and sentence of a Division Bench of the said Court.

The petitioner's case had been tried before the Sessions Judge of the Assam Valley Districts, and on the trial the jury unanimously acquitted him of the offence with which he was charged. The Judge differed from the verdict, and consequently referred the case to the High Court, under s. 307 of the Criminal Procedure Code. The case came before a Division Bench of the Court (MITTER and GRANT, JJ.) who reversed the verdict of acquittal and convicted and sentenced the petitioner to one year's rigorous imprisonment, and a fine of Rs. 1,000, or in default to suffer six months' further imprisonment.

Subsequently on the 31st August Mr. *Pugh* (with him Mr. *Evans*) applied to the Chief Justice to appoint a Bench to hear an application to review such order, and considering the importance of the case Mr. *Pugh* asked that a special Bench, consisting of