FULL BENCH.

1931 March, 2.

Before Justice Sir Shah Muhammad Sulaiman, Mr. Justice Mukerji and Mr. Justice Young.

PITAM LAL AND OTHERS (PETITIONERS) *v.* KALLA RAM AND OTHERS (OPPOSITE PARTIES)*

Probate—Oral will—Probate and Administration Act (V of 1881), section 62—Succession Act (X of 1865), section 244—Succession Act (XXXIX of 1925), section 276.

An application for the grant of probate of an oral will can be entertained under the Probate and Administration Act, 1881, and probate may be granted of such a will.

Messrs. *N. P. Asthana* and *Nanak Chand*, for the appellants.

Messrs. *U. S. Bajpai*, *S. N. Chaube* and *Hari Ram Jha*, for the respondents.

SULAIMAN, MUKERJI and YOUNG, JJ. :—Two questions have been referred to this Full Bench for consideration. They are :—

(1) Whether an application for the grant of probate of an oral will can be entertained under the Probate and Administration Act (Act V of 1881)?

(2) Whether the Act would apply to a case where the substance of the oral will was taken down by a witness at the time?

If the questions were *res integra* and we had to consider nothing but the provisions of the Probate and Administration Act (Act V of 1881) there would be considerable difficulty in holding that a probate of an oral will could be granted.

No doubt the definition of "will", though not that of "codicil", in section 3 was wide enough to include an oral will. But "probate" was defined as meaning the copy of a will certified under the seal of a court of competent jurisdiction, with a grant of administration to the

*First Appeal No. 134 of 1927, from a decree of M. F. P. Herchenroder, District Judge of Agra, dated the 16th of December, 1926.

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estate of the testator. We then had sections 24, 25, 26, and 27 relating to the grants limited in operation. The language of these sections presupposed that the will had been lost or mislaid or was in the possession of a person residing outside the province or that it was in existence but was not forthcoming. The language of these sections was therefore appropriately related to a written will and not to an oral will. Lastly we had section 62 which referred to the application to be made for probate, which must have the will annexed or in the cases mentioned in sections 24, 25 and 26, a copy, draft or a statement of the contents thereof annexed, and must also state that it was duly executed. It did not expressly say what was to be done in the case of an oral will. Section 63 referred to the case where the will was in a language other than English, of which a translation had to be annexed.

Reading these sections together, it would have followed that the procedure laid down for the grant of a probate related to the probate of a written will and not an oral one.

No doubt under the Succession Act (Act X of 1865) privileged wills made by soldiers or mariners need not be wholly in writing. Then there was section 187 which laid down that no right as executor or legatee could be established in a court of justice unless a court of competent jurisdiction had granted probate of the will under which the right was claimed. But the language of section 244 of the Succession Act, though similar in some respects to that of section 62 of the Probate and Administration Act, was not absolutely identical, as the latter section had the words allowing the annexing of "a copy, draft or statement of the contents of the original will" limited to the cases covered by sections 24, 25 and 26. It might also have been difficult to interpret section 62 of the Probate and Administration Act not according to its plain language but in the light of the difficulties which might arise under the Succession Act. However,

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the fact remains that the Bombay High Court in *In re the will of Haji Mahomed Abba* (1), held that a probate of a nuncupative will could be granted. This case was followed by the Allahabad High Court in *Gokul Chand* v. *Mangal Sen* (2), where the difficulties were fully appreciated but it was considered more convenient and in accordance with the practice in England to admit probate of an oral will.

The legislature has now consolidated these two Acts and passed the Indian Succession Act (Act XXXIX of 1925.) It permits of oral wills being made by Muhammadans as well as by soldiers, mariners and airmen, whose wills are not required to be in writing. The language of section 276 is almost identical with that of the old section 62 of the Probate and Administration Act. It does not expressly refer to oral wills. It must be presumed that the legislature was aware of the trend of rulings in this country. And when in re-enacting the statute it has adhered to the former phraseology, we are justified in inferring that the interpretation laid down in the rulings has been approved of by the legislature.

If oral wills are not to be admitted to probate, there would certainly be one serious difficulty in the way of soldiers, mariners and airmen. Section 213 of the new Act does not exempt them and lays down that their executor or legatee cannot establish the will without having obtained probate or letters of administration. If section 276 does not permit of a probate being granted of an oral will, their wills would be nullified in their effect.

We may further note that although the will in this case was made before the new Act came into force and would accordingly not be invalid, the application was made shortly before the coming into force of the new Act. The Act lays down a rule of procedure and not a substantive law and therefore there is no reason why the new Act should not govern these proceedings. It is also

(1) (1899) I.L.R., 24 Bom., 8. (2) (1903) I.L.R., 25 All., 313.

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obvious that there was nothing to prevent the applicant from withdrawing this application and filing a fresh application as soon as the new Act came into force. Having given the case our best consideration we think that the rule laid down in *Gokul Chand* v. *Mangal Sen* (1) should be followed.

Our answer to the first question is therefore in the affirmative.

In our opinion the fact that the substance of the oral will was taken down at the time the will was made would not make any difference in the eye of the law. That fact would only be a strong piece of evidence to prove the contents of the oral will.

REVISIONAL CRIMINAL.

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March, 3.

Before Mr. Justice Pullan.

RASHID AHMAD *v.* S. F. RICH.*

Criminal Procedure Code, sections 213(2) *and* 446—*European British subject—Special proceedings under chapter XXXIII—Charge framed by Magistrate—Subsequent discharge by Magistrate illegal—Magistrate must commit to court of session.*

When an order has been passed under section 443 of the Criminal Procedure Code that a case against an European British subject be tried under the provisions of chapter XXXIII of the Code, the powers of the Magistrate are limited by section 446. Section 446 takes away from the Magistrate, in cases tried under the special provisions of chapter XXXIII, the powers given him under section 213(2). So, if the Magistrate has framed a charge against the accused person, the Magistrate can not thereafter cancel the charge and discharge him, but must commit him to the court of session.

Mr. *Saila Nath Mukerji*, for the applicant.

Mr. *P. L. Banerji*, for the opposite party.

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

*Criminal Reference No. 892 of 1930.

(1) (1903) I.L.R., 25 All., 313.