APPELLATE CIVIL.

1937

Dec. 7.

Before Monroe J.

RAM LAL (APPLICANT) Appellant,

versus

CHANAN DASS AND ANOTHER,—Respondents.

Civil First Appeal from Order No. 160 of 1937.

Indian Succession Act (XXXIX of 1925), SS. 228, 276 — Will, Probate of — granted by another Court — original will deposited in that Court — application for Probate of same Will — Amendment of — Letters of Administration under S. 228 — Factum and Validity of Will — whether can be challenged in proceedings under S. 228.

One G. died in Nairobi leaving property both there and in India. The probate of his will was granted by the Supreme Court of Kenya to his son R., who later applied under section 276 of the Indian Succession Act in the Court of the District Judge, Shahpur, at Sargodha, praying that "the probate of the will (copy annexed) be granted to him." The District Judge held that the law of Kenya having been complied with, not only was the probate good in Nairobi but was conclusive and that all questions concerning the execution of the will and the like were finally determined between the parties but he dismissed the application on the technical ground that the applicant must apply for letters of administration under section 228 of the Act.

Held, that the petition ought to be amended so as to alter the prayer to a prayer for letters of administration under section 228 of the Act with a copy of the copy of the will on the record annexed.

That the objector is entitled to attack the factum as well as the validity of the will in the present proceedings under section 228 of the Act.

That the real object of that section is to dispense with the production of the original will owing to its having been deposited in some other Court and the difference in such a case between probate and the letters of administration is little more than technical.

Behari Lal Mahton Tatak Gayawal v. *Ganga Dai Tatkain* (1), distinguished.

Appeal from the order of Mr. G. S. Mongia, District Judge, Shahpur at Sargodha, dated 29th June 1937, dismissing the application for grant of probate.

M. C. SUD, for Appellant.

INDER DEV, for Respondents.

MONROE J.—An application was brought in the Court of the District Judge, Shahpur at Sargodha, by Ram Lal for probate of the will of Guranditta Mal Sapra, his father, under section 276 of the Indian Succession Act. The prayer in the petition was that " the probate of the will (copy annexed) be granted to him ". The testator died on the 8th of June 1934. These proceedings were instituted early in 1935 and as yet there has been no final decision of the matter. MONROE J.

The case has now come before me on appeal from the order of the District Judge, Shahpur at Sargodha, who decided that the applicant must apply for letters of administration under section 228 of the Indian Succession Act, if so advised. The ground of the learned Judge's judgment was based on the barest technicality; but in order to understand the position it is necessary first to set out some facts relating to the case :—

The testator died at Nairobi on the 8th of June 1934, leaving property, it is alleged, both there and in India. He made a will written in Urdu, which, on the face of it, was duly executed and when he died, an application for probate of this will was made in the Supreme Court of Kenya, and probate of the will

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was duly granted on the 18th of September 1934 to "Ram Lal-Guranditta Mal of Nairobi the executor in the said will named".

The evidence of the will and probate offered is the original probate of the will issued at Nairobi, the original will itself being retained in the Probate Registry there. The grant contains first a copy of the Urdu will and then a translation into English and is beyond question a document regularly issued by a Court of competent jurisdiction. Under the Indian Succession Act, whether for probate or letters of administration with the will annexed, the normal course is that the original will should be lodged with the application, but section 228 empowers the Court, when a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the Province, and a properly authenticated copy of the will is produced, to grant letters of administration with a copy of such copy annexed. It will be observed that this section gives power to grant letters of administration, but the difference in such a case between probate and letters of administration is little more than technical.

The learned District Judge had before him two issues:—

(*a*) Whether the Court at Nairobi had jurisdiction to grant probate for the property situate in British India; and

(*b*) Whether the objectors had notice and if not, what is the legal effect of this?

But in his judgment he points out that in addition to these two issues before him the arguments raised certain other points: These being:—

(*c*) If the Nairobi Court had no jurisdiction to grant probate for the property in British India, could

it grant probate of the will on the ground that the deceased was domiciled there at the time of his death and some at least of the property was situated within the jurisdiction of that Court?

(*d*) If so, what is the effect of the grant of that probate in the present case?

As to (*a*), he points out that the applicant never contended that the Court at Nairobi had jurisdiction to grant probate for property situated in British India and that the real question was that put by him at (*c*). He held that it was within the jurisdiction of the Nairobi Court, as it obviously was, to grant probate of a will dealing with property situated within its jurisdiction. On the final point at (*d*), as to the effect of the grant of probate on this case, he seemed to take the view that it was conclusive as between the parties and that whether notice was issued or not, the law of Kenya having been complied with, not only was the probate good in Nairobi, but that all questions concerning the execution of the will and the like were finally determined. In my opinion, this is not the effect of section 228 of the Indian Succession Act. The real object of that section is to dispense with the production of the original will owing to its having been deposited in some other Court. It is well known that a Court of Probate acting under the English practice retains for ever every original will of which probate has been granted by it. The section is merely an enabling section and if the Court in this country considers that there is a question to be decided relating to the validity of the will, I think that the Court is bound to try that question before enabling the executor to act under the will in this country.

The respondent in this case through his counsel insists that he wishes to attack this will on the ground

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that it has not been duly executed and also on the ground that the testator was not of sound mind when he executed it. He is entitled, in my opinion, to have this question tried before effect is given to the will in this country and though there is no indication on the record that there is any good ground for such allegations, it may be that the respondent could say that he has not yet had an opportunity of showing whether there was any substance in them.

In the arguments before me it was suggested that the form of the application in this case was fatal and that the learned District Judge was right in rejecting the application on a technical ground. I do not agree with this view and I would be prepared to hold, if necessary, that as the application stands, the facts being all set out clearly in the petition, letters of administration under section 228 could be granted to the petitioner; but in any event I am prepared to allow the amendment of the petition and I think it ought to be amended so as to alter the prayer to a prayer for letters of administration with a copy of the copy of the will contained in the grant of probate issued by the Supreme Court at Nairobi on the 18th of September 1934 annexed.

I may say that it was contended before me that there was no power to make such an amendment but the one case cited, *Behari Lal Mahton Tatak Gayawal* v. *Ganga Dai Tatakain* (1), has no application to the circumstances of the present case. As I have said, the respondent must be allowed to substantiate his objections to the will, if he can do so, and accordingly I set aside the order of the learned Judge, dismissing the petition and I direct the learned Judge to frame issues for the trial of questions relating to the validity of the

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will in accordance with the provisions of the Indian Succession Act and to try the case on the merits and accordingly to give judgment either granting or refusing to grant letters of administration with a copy of the copy of the will on the record annexed, as the facts before him may justify. The costs of the proceedings up to the present will be costs in the cause.

A. N. K.

Appeal accepted.

REVISIONAL CRIMINAL.

Before Blacker J.

GIAN SINGH (ACCUSED) Petitioner,

versus

AMAR SINGH,—Respondent.

1938

Jan. 31.

Criminal Revision No. 1623 of 1937.

Criminal Procedure Code (Act V of 1898), SS. 366 (1) and (3), 369, 526 (8) and 537 — Transfer — Intimation of intention to make an application — when to be made — Trial — when over.

The trial Magistrate fixed a date for arguments after the defence was closed and then extended the date. On the second date the accused was absent and the Magistrate wrote out the judgment convicting the accused and adding a sentence at the end that as he was under orders of transfer he would leave the judgment to be pronounced by his successor. He then signed and dated it. After this counsel for the petitioner appeared and put in an application for transfer. It was contended (*i*) that the Magistrate was bound to adjourn the case when it was intimated to him that the accused intended to make an application for transfer and that his not doing so vitiated the whole proceedings; (*ii*) that the successor in office of the Magistrate could not pronounce the order without giving the accused an opportunity to claim a *de novo* trial.

Held, that the intimation which is contemplated under section 526 (8) of the Act must be made before the close of