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BROMLEY v. THE G. I. P. RAILWAY COMPANY.

not know where he was. He could, no doubt, by a process of reasoning have discovered that he was near the reversing station. But under the circumstances was it negligent of him to act immediately in the way he did? In other words, was there anything unreasonable in his immediately trying to avert a great present inconvenience from the hideous noise and an imminent and possible danger from the sunshade striking against the tunnel or even against the side of the carriage? I am fully persuaded that nine persons out of ten would, under the same circumstances, have done precisely what Mr. Bromley attempted to do. On the whole, therefore, I have come to the conclusion, though after much hesitation and doubt, that the injury to the plaintiff's hand was connected with and is the result of the defendants' negligence in not fastening the door at Khandálá, and that the defendants are liable for the injuries according to the principles laid down in the authorities cited above.

As to the question of damages, I accept the plaintiff's evidence in the main, and I think that under the circumstances Rs. 2,000 for loss of income and medical charges and Rs. 2,000 for personal suffering would not be unreasonable. I accordingly award Rs. 4,000 in all for damages, and the costs of the suit.

Attorneys for the plaintiff:—Messrs. *Smetham, Bland and Noble.*
Attorneys for defendants:—Messrs. *Little and Company.*

TESTAMENTARY JURISDICTION.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.

1899.
September 1.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF HAJI MAHOMED ABBA.

MARIAMBAI AND ANOTHER, PETITIONERS.*

Probate—Will—Nuncupative will of a Mahomedan—Probate and Administration Act (V of 1881), Secs. 3, 24, 25, 26, 62—Indian Succession Act (X of 1865), Sec. 244, and Chap. IX.

Probate may be granted of a nuncupative will.

PETITION for probate of a nuncupative will. The petitioners were the testator's widow Bai Mariambai and one Haji Sulleman

*Appeal, No. 1040 of 1899.

Abdul Wahed, the executrix and executor appointed by the said will.

The testator, Haji Mahomed Abba, a Cutchi Memon merchant, died in Bombay on the 15th May, 1898. The petition (*inter alia*) stated as follows:—

"3. That the nuncupative will set out in the joint affidavit of Jacob Ebrahim and Aba Fakir Mahomed solemnly affirmed on the 26th day of August, 1898, and hereto annexed and marked A, is the last will and testament of the said deceased, the said deceased having left no other will.

"4. That the provisions of the said will were orally declared by the above-named deceased on Saturday the 14th May, 1898, at his house near Jakeria Masjid in the presence of the said Jacob Ebrahim and Aboo Fakir Mahomed and the petitioners. The deceased requested the said provisions to be carried out as his will after his death, and the next day within a few hours thereafter he died.

"5. That the petitioners are the sole executors named under the said will."

The joint affidavit referred to in the above paragraph 3 set forth as follows:—

"On Saturday the 14th day of May last, we the abovenamed deponents and the above deceased's widow Mariambai and Haji Sulleman Abdul Wahed, of the firm of Messrs. Ludha Ebrahim and Co., were present at the deceased's house near Jakeria Masjid where the deceased was lying ill with asthma and heart disease. The deceased being desirous of making his last will and testament requested us to note the manner in which he wished his property to be disposed of after his death, and requested all present to see that such testamentary intentions were carried out after his death. The deceased at such time was in sound and disposing mind. The oral provisions he made, and which we distinctly without any likelihood of error remember, are as follows:—

"1. He appointed his said wife Mariambai and the said Haji Sulleman Abdul Wahed the executors of his will.

"2. He directed that a sum of Rs. 5,000 should be spent on the marriage expenses of his daughter Hawabai, and that Government promissory notes for the sum of Rs. 20,000 should be purchased out of his estate and invested in the name of the said Hawabai, and that the interest accruing due thereon should be paid to Hawabai and her heirs."

The subsequent clauses of the affidavit stated the rest of the will, and the last paragraph was as follows:—

"11. The deceased gave no other directions, save the aforesaid, to be carried out after his death as his last will. We remained with him until his death, which took place on the 15th May last, but he did not [illegible] never from the

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The executors having applied to the Registrar for probate, he referred the petitioners to the Court. The matter came before Russell, J., who was of opinion that no probate of a nuncupative will could be granted. His judgment was as follows :—

"The question in this case is whether probate can be granted of a nuncupative will of a deceased Cutchi Memon named Haji Mahomed Abba, who died at Bombay on or about the 15th day of May, 1898. The terms of the said nuncupative will are set forth in the affidavit of Jacob Ebrahim and Abba Fakir Mahomed affirmed on the 26th day of August, 1898, wherein it is stated that the said will was made on the 14th day of May, 1898. Prior to the Probate and Administration Act, 1881, I think there can be no doubt that a nuncupative will of a Mahomedan was valid and effectual (see *Nawab Amin-Ood-Dowlah* v. *Syud Roshun*(1); Wilson's Mahomedan Law), and consequently could be admitted to probate. It must be observed that Cutchi Memons are Mahomedans to whom in such case as the present Mahomedan law is to be applied—*In re Haji Ismail Haji Abdula*(2).

"The Probate and Administration Act, 1881, applies section 2 (*inter alia*) to every Mahomedan dying before, on or after the 1st day of April, 1881, and on considering the following sections of the Probate and Administration Act, 1881, it appears to me that it is now necessary that 'the will' of a Mahomedan dying before, on or after the 1st day of April, 1881, must be in writing. Section 3 defines 'will' and 'codicil.' These two definitions clearly contemplate a written document. These definitions correspond with the definitions of will and codicil in the Indian Succession Act, and section 62 deals with the application for probate, which is to be by petition with the will, or in cases mentioned in sections 24, 25 and 26 a copy, draft or statement of the contents thereof annexed, stating (*inter alia*) that the *writing annexed* is his (the testator's) last will and testament. Section 24 provides for the probate of copy or draft of a last will. Section 25 for the probate of the contents of a lost or destroyed will. Section 26 for probate of copy where the original exists. Section 63 provides for the translation of the will. Lastly, section 27 provides for administration limited until *the will* or an authenticated *copy of it* be produced. It is impossible, in my opinion, to read the above provisions without coming to the conclusion that the purview of the Probate and Administration Act intended that no nuncupative will should be proved. If otherwise, why was provision therefor not made in the Act? *Expressio unius est exclusio alterius*. By making provision for the various cases in which wills in writing should not be forthcoming, the Legislature, in my opinion, intended to exclude the possibility of nuncupative wills being admitted to probate.

"I have been referred to two cases—*In re Haji Ahmed bin Haji Raju*, in which the petition for letters of administration with the will annexed was declared on the 18th January, 1898, and *In re Hajee Adum Hajee Fathe Mahomed*,

petition for probate wherein was filed on the 21st December, 1886. In the first of these cases it will be found that the nuncupative will had been established by the Court at Bagdad and a copy of the Court's order was annexed to the petition. In the latter case a draft of the will had been prepared and was annexed to the petition. It will be observed that in both these cases what was admitted to probate was an instrument in writing, and it, therefore, seems to me that neither of these cases affect the opinion which I had formed in this case and which I had written out before my attention was drawn to the two abovementioned cases."

The petitioners appealed.

Scott (Acting Advocate General) for the appellants.

JENKINS, C. J.:—This is an appeal from Mr. Justice Russell, who has decided that probate cannot be granted of the nuncupative will of a Mahomedan.

It is beyond question that prior to the Probate Act a Mahomedan could make a nuncupative will, and the learned Judge seems to have thought that such a will could have been admitted to probate, but in his opinion the Act has introduced a change which necessitated the conclusion he has expressed. He has based this conclusion on a consideration of sections 3, 24, 25, 26 and 62 of the Act,

In my opinion there is nothing in the Probate Act that can be construed as taking from a Mahomedan the power to make an oral will. Had such a radical change been intended, it is difficult to suppose that it would not have been expressed in plain and decisive words, but none such are to be found.

Assuming, then, that a Mahomedan can make an oral will, why should it not be admitted to probate? The question is governed by the Probate and Administration Act, the object of which was to provide for the grant of probate to the estates of deceased persons in cases to which the Indian Succession Act does not apply.

Section 3 provides that "will" means "the legal declaration of the intention of the testator with respect to his property, which he desires to be carried into effect after his death." There is not a word in this interpretation about writing, nor is there any thing to suggest that an instrument is required; and this is made the clearer from the

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an instrument. Turning to the Succession Act, we find the words "will" and "codicil" have the same interpretation given to them in section 3, and there can be no question that a will under that Act may be nuncupative, for Part IX of the Act so provides. It may, therefore, be safely said that, if the matter is to be determined on section 3 alone, the Probate Act extends to nuncupative wills.

But, then, it may be suggested that this view is inconsistent with the terms of section 62, which no doubt contemplates only a written will. I think, however, it would be attributing to that section a result that was never contemplated, to read it as excluding an oral will from the operation of the Act, seeing that the purpose of that section is to regulate the procedure according to which applications for probate should be made. Here, too, light may be extracted from the Succession Act. Section 244 of that Act is in identical terms with section 62 which we have been considering, save that it has no reference to sections corresponding with sections 24, 25 and 26 of the Probate Act, while section 187 provides that no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the province shall have granted probate of the will under which the right is claimed or shall have granted letters of administration under section 180.

The result, then, is that if we accept the decision of the learned Judge by parity of reason we should be forced to hold that the Succession Act, though expressly permitting an oral will at the same time for practical purposes nullified its effect. We may also refer to the difficulties that would arise from that conclusion in connection with section 4 of the Succession Certificate Act, 1889.

In my opinion, therefore, a nuncupative will can be admitted to probate in this country as well as in England, and we only now have to consider whether the existence of the will has been established.

The Courts naturally regard an oral will with suspicion and require it to be established by clear proof. We understand from

Russell felt no difficulty

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as to the proof, and we think that in view of the absence of all opposition notwithstanding the citations, the burden of proof has been under the circumstances of this case sufficiently discharged.

Differing, then, from Mr. Justice Russell on the question of law involved, we reverse his decree and direct that probate be granted, and that the costs of the application and the appeal come out of the estate.

Attorneys for the petitioner :—Messrs. *Framji and Dinshaw.*

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899.
June 26.

KESHAVLAL (ORIGINAL DEFENDANT), APPELLANT, *v.* BAI GIRJA (ORIGINAL PLAINTIFF), RESPONDENT.*

Defamation—Privileged communication—Excommunication—Caste question—Jurisdiction of Civil Court.

Plaintiff was a Hindu widow of the Modh Wânia caste. Defendant was the head of the caste. He received anonymous letters imputing bad conduct to the plaintiff. He was requested to call a caste meeting to consider the matter ; he did so, and placed the letters before the meeting, and it was then resolved to warn the plaintiff. The warning was, however, unheeded. So a second meeting was called by the defendant. Plaintiff sent her brother and sister's husband to the meeting in order that they might defend her. But they offered no explanation on her behalf. Witnesses were then heard and ten persons selected to decide what should be done. Defendant was one of those ten, and he communicated to the general meeting the decision they had come to—namely, that the plaintiff should be excommunicated. The meeting unanimously adopted this decision, and the defendant announced the decision of the caste to the *gor* for him to promulgate. The plaintiff thereupon sued to recover from the defendant Rs. 5,249 as damages for defamation.

Held, that the defendant was not guilty of defamation. He acted in the matter honestly, and as he was bound to act in the interests of the caste, and in the discharge of his duties as leader of the caste.

Per RANADE, J. :—The defendant's act was privileged. Defendant was the head of the caste, and the caste men assembled were interested in the matter along with the defendant. Anonymous letters were received and the defendant had a duty to perform. The matter was discussed at a properly convened meeting, where the plaintiff's near relations were duly summoned and were in fact present. The occasion was lawful and properly exercised to protect mutual interests. The

* Appeals, Nos. 117 and 120 of 1898.