APPELLATE JURISDICTION (*a*)

Ecclesiastical Side.

In the matter of the printed will of TIRUVALUR KIRUSTNAPPA MUDALI, *deceased.*

The High Court cannot compel a native to prove a will in solemn form, unless he have applied for probate and thus submitted himself to the jurisdiction.

1862. *Nov.* 7, 11.

THE *Advocate General*, on behalf of the heir of Tiruvalur Kirustnappa Mudali, late a merchant and a Hindu inhabitant of Madras, deceased, moved for a citation to the Sheriff of Madras, commanding him to cite Áni Shanmuga Mudali and Parasuráma Mudali, the pretended executors appointed in and by the alleged last will and testament of the said Tiruvalur Kirustnappa Mudali, to bring in and leave in the registry the said alleged will, and to prove the same in solemn form. He cited three cases. In one of these the late Supreme Court of Madras, on the 24th October 1851, had directed a citation to Kaliyánáchárlu and Anantaiyar to bring in a Hindu's will, and prove it in solemn form; and on the 20th of June 1852 a paper in Telugu purporting to be the will was brought in, but nothing further appeared to have been done. In the second—*In re Venkatachalam deceased*—a Hindu executor, on the 13th of June 1862, applied to the late Supreme Court of Madras for an order citing another person to bring in a will in order that he, the executor, might prove it. Nothing further appears to have been done in this case also. The third case—*Anundchunder Ghose* v. *Soojee Money Dossee*(*b*)—was as much in point as the second. It ruled that where a Hindu executor made perfect of letters testamentary, the late Supreme Court at Calcutta would receive no other proof of the will but the probate itself, or the entry in the Register's Book.

SCOTLAND, C. J. :—The testamentary and intestate jurisdiction of this Court is the same as that which was administered by the late Supreme Court under the letters patent of the 26th December 1800, and (I regret to say) the ecclesiastical practice which governed the Supreme Court

(*a*) Present Scotland, C. J. and Bittleston, J.

(*b*) Morton 77

1862. Nov. 7, 11.

is still the practice of the High Court also. There is no doubt that the Court has power to grant probate of a Hindu will if applied for. But it has, I believe, always been held that a Hindu executor could not be compelled to bring in a will and prove it in solemn form. It is not incumbent upon the representative of a Hindu to take out administration or probate, except in the case provided for in the second section of Act XXVII of 1860; and even then he need not have the certificate, probate or letters of administration, where the Court is of opinion that payment of a debt due to the estate is withheld from fraudulent or vexatious motives, and not from a reasonable doubt as to the party entitled.

There seem, no doubt, to have been two cases in which an application resembling the present was granted by the late Supreme Court. But, in the first, "the point as to jurisdiction does not appear to have been mooted, and, though the paper was brought in, nothing further seems to have been done. In the second, the application was by the executor himself: quite different case from the present, where we are asked to direct a citation against the executor. Neither of these cases, then, can be regarded as an authority for granting the present application. On the other hand there is *Chellammal* v. *Garrow* (*a*), a direct decision on the subject: where it was held that natives, representatives of a deceased native, are not bound to take out letters of administration, in order to be entitled to sue in favour of the estate, or to act as representatives of the intestate. Nor would the Supreme Court in any instance cite or use any means towards compelling natives to come in and prove wills, or take out letters, or grant them to creditors to the prejudice of the next of kin. And in Calcutta we find from the case of *In the goods of Hadjee Mustapha*, quoted from Hyde's notes in 1 Morley's Digest, p. 245, that "probate of will was formerly granted to the executors of Hindus and Muhammadans, conformably to the practice of the Mayor's Court, under the Statute 21 Geo. III. arrived in India. *when it was refused.*"

I think it clear that it is optional with the Hindu executor whether he will prove the will or not. The

(*a*) 2 Sir T. Strange N. C. I.

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Court has no jurisdiction to compel him to do so. If he set up the will in a suit its validity will be tried, just as is the case in England when a will relating only to realty, and therefore not requiring probate, is set up by some one claiming under it. It is a totally different matter when the executor has actually applied for probate, and thus submitted himself to the ecclesiastical jurisdiction. Then I think the next of kin have a right to compel him to proceed and prove the will : *In the goods of Rempriah Dossee*(*a*). This motion must therefore be refused.

BITTLESTON, J. :—I also think that the Court cannot compel a Hindu to come in and submit to its ecclesiastical jurisdiction. Under the old Chapter that jurisdiction was limited to British subjects, and to such other persons as might voluntarily apply for probate or letters of administration. Unless in cases of Hindus or Muhammadans voluntarily seeking the aid of the Court on its ecclesiastical side, the late Supreme Court could not, and consequently the High Court cannot, compel them to submit to the ecclesiastical jurisdiction. No doubt, if a native letigant set up a will, he must prove it as the law requires, and if he have not the necessary evidence the instrument will not be recognised as a will. But that is not now before the Court. We are asked to cite a Hindu to bring in and prove a will, and I am clearly of opinion that we have no jurisdiction to grant the application.

Motion refused.

(*a*) Morton 79 : 1 Morley Dig. 245-261.