

law, when there is an appeal as well as a reference, is there any apparent reason why it should not have the same power when there is a reference only. However, we have no choice but to obey the provisions of the law, which require us to annul the conviction, and order a new trial. Fortunately, however, in the present case, the prisoners were arraigned on the charge of culpable homicide, as well as on that of murder, and the trial on both charges was so far completed that the opinion of the assessors was taken on both charges, though the Session Judge only recorded a finding on the charge of murder. We think that we shall be sufficiently fulfilling the requirements of the law if, instead of ordering a new trial *ab initio*, we direct the Session Judge to complete the trial of accused Nos. 1 and 2 by recording a finding on the second charge, viz., that under Section 304 of the Indian Penal Code, and in the event of his convicting the accused, (as it may be presumed that he will do, though this Court has no authority to direct him to do so), we would suggest to him that he might appropriately sentence the accused No. 1 Bálápa to rigorous imprisonment for five years, and accused No. 2 Mhádeváppá to rigorous imprisonment for three years.

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v.  
BALA'PA' BIN  
DUNDAPA'.

*Proceedings returned.*

## [APPELLATE CIVIL JURISDICTION.]

*Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Nánábhái Haridás.*

BHAGVAN DULLABH (ORIGINAL PLAINTIFF, SPECIAL APPELLANT) v.  
KALA' SHANKAR (ORIGINAL DEFENDANT, SPECIAL RESPONDENT.)\*

April 26.

*Hindu Law—Will—Nuncupative will.*

A nuncupative will, or a verbal bequest, of his separate property, made by a separated Hindu, beyond the limits of the ordinary original jurisdiction of the High Court of Bombay, and not relating to any immoveable property to which the Hindu Wills Act (XXI. of 1870) applies, is valid.

\* Special Appeal No. 20 of 1875.

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KAR.

THIS was a special appeal from the decision of H. J. Parsons, Assistant Judge of the District of Surat, confirming the decree of the 2nd Class Subordinate Judge of Bulsar, rejecting the plaintiff's claim.

The plaintiff, as heir of his divided brother, sued to recover certain immoveable property in the hands of his sister's son. The defendant answered that he had always lived with the deceased, and been treated by him as his son, and that before his death deceased had made a verbal bequest of the property in dispute to the defendant. The property was situated and the bequest made beyond the limits of the town of Bombay.

*Shivshankar Govindrám*, for the appellant, contended that there having been no formal adoption of the defendant he could not claim the property as against the brother and next heir of the deceased. He must, therefore, fall back on the nuncupative bequest; but this was invalid, because, in the first place, a Hindu could not leave the whole of his property away from his right heir, and in the next place, supposing he could, it must be by testamentary writing, not verbal bequest.

*Nagindás Tulsidás*, for the respondent, contended that the brothers being divided, either of them might dispose of the whole of his separate property by will in whatever manner he pleased.

There is nothing in the Hindu Law to render void a nuncupative bequest, and the provisions of the Hindu Wills' Act do not apply to the case.

The following judgment was delivered by

NA'NA'BHA'I HARIDA'S, J.:—The plaintiff Bhagvan Dullabh brought this suit to recover certain immoveable property belonging to his deceased brother, Ranchhod.

The defendant, Kala Shankar, who is his sister's son, alleged in his written statement that the plaintiff and the deceased Ranchhod were divided in estate; that from his childhood he had lived with his deceased uncle as his son; and that the deceased had made him owner of his estate. He accordingly contended that the plaintiff was not entitled to recover from him the property sued for.

It is not alleged that there is any nearer relative of the deceased than the plaintiff. The question, therefore, simply is, which of the two is entitled to the property in preference to the other. It is found that the plaintiff and the deceased were divided in estate; and it is also found that the defendant "from his childhood always lived with the deceased, and seems always to have been treated and recognized and acknowledged by him and even by others as his son." Such recognition and acknowledgment, however, would not give the defendant the legal *status* of a son in the absence of any formal adoption; and it is found that none such took place. The plaintiff, therefore, although divided from the deceased, would, according to Hindu Law, be entitled to the property in dispute, if the defendant had merely to rely upon his relationship to the deceased and upon the fact of his having from his childhood lived with the deceased and been recognized by him as his son. But the defendant rests his claim also upon a title created in his favour by the deceased—a verbal bequest. The fact of such bequest, "in pursuance of intentions previously expressed," is clearly found by the Assistant Judge. We have, therefore, to determine whether the title to the property has thereby passed to the defendant or not. It is, indeed, urged for the appellant that it has not, on the ground that the deceased had no power to make any such disposition of his property. But we think the power of a Hindu to make a testamentary disposition of whatever is his absolute property is now clearly established: see *Narottam Jagjivan v. Narsandás Harikisandás*,<sup>(1)</sup> *Mulraz Lachmia v. Chalekany Venkata Rámá Jagganadha Row*;<sup>(2)</sup> *Nagalutchmee Unmal v. Gopoo Nardaraja Chetty*;<sup>(3)</sup> and *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*.<sup>(4)</sup> In the last case their Lordships of the Privy Council observe<sup>(5)</sup> :—"It is too late to contend that, because the ancient Hindu treatises make no mention of wills, a Hindu cannot make a testamentary disposition of his property. Decided cases, too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised, at least, within the limits which the law prescribes to alienation by gift *inter vivos*." That the plaintiff and

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(1) 3 Bom. H. C. Rep 6, A. C. J.

(2) 2 Moore I. A. 54.

(3) 6 Moore I. A. 309.

(4) 12 Moore I. A. 1.

(5) Page 37.

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the deceased Ranchhod were separate in estate is, as above observed, clearly found by the Lower Court. The latter, therefore, might have made a valid gift *inter vivos* of the whole of the property in dispute. Hence, it follows that it was equally competent to him to bequeath that property by will, as he has done in this case. But it is further urged that the will here was merely a nuncupative will. We cannot see how that circumstance could affect the validity of the will, if it were in fact made. Not a single authority is cited to us to show that a nuncupative will by a Hindu is invalid; and there are authorities the other way: see *Crinivasammal v. Vijayammal*; <sup>(1)</sup> *Tarachand Bose v. Nobeen Chunder Mitter*; <sup>(2)</sup> *Sudanund Mohapattur v. Soorjo Monee Debee*; <sup>(3)</sup> *Vinayak v. Govindrao*. <sup>(4)</sup>

The will in this case was made in 1871, after "The Hindu Wills Act, 1870," came into force; but as it was made beyond the limits of the ordinary original jurisdiction of this Court, and does not relate to any immoveable property situated within them, the provisions of that Act in no way apply to it.

We must, therefore, confirm the decree of the Lower Court, rejecting the claim with costs.

It was stated to us that the plaintiff himself was present at the time his brother Ranchhod made the verbal bequest in favour of the defendant, and actually consented to it; and it was accordingly contended that, he having thus allowed his brother to die in the belief that he had made a good bequest, in favour of the defendant, it was not competent to the plaintiff now to question that bequest. But in the view we have taken of the case it becomes unnecessary for us to express any opinion on that point.

*Decree affirmed.*

(1) 2 Mad. H. C. Rep. 37.

(2) 3 Calc. W. R. 138, Civ. Rul.

(3) 8 Calc W. R. 455, Civ. Rul.

(4) 6 Bom. H. C. Rep. 224, A. C. J.