1884

ABDULCADUR HÁJI MAHOMED v. C. A. TURNER.

has been directly decided by the highest Court in the *Tagore Case*(1), and the Privy Council lays down the rule that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and must, therefore, be either in fact, or in contemplation of law, in existence at the testator's death. The only persons who, though non-existent at the death, are by a legal fiction supposed to be in existence, are a son adopted after death by the testator's authority and a child in the womb. This rule, therefore, clearly excludes the plaintiff, who was not born till twenty-three years after the death of the testator.

Thus, no case is made out according to either Hindu or Mahomedan law. The learned Advocate General pointed out that his claim would be good according to English law. But the Privy Council has expressly stated that the nature and extent of the testamentary power must not be governed by any analogy to the law of England (*Nána Narian* v. *Huree Punth Bhaoo*(2)), and, I think, it would be a misfortune for the natives of India if testators were given the power to tie up their property for the benefit of persons unborn, to the exclusion of those who have the highest and most natural claim.

Rule discharged with costs; undertaking on part of Official Assignee not to sell during appeal if appeal is made.

(1) L. R. Ind. Ap., Sup. Vol., p. 47. (2) 9 Moo. Ind. Ap., 96.

REVISIONAL CRIMINAL.

Before Mr. Justice West and Mr. Justice Nánábhai Haridás.

1884
December 22.

In re THE PETITION OF MUSA' ASMAL AND OTHERS.*

Jurisdiction—Sessions Judge—Joint Sessions Judge—Criminal Procedure Codes Act X of 1872, *Sec.* 17, *and Act X of* 1882, *Secs.* 9 *and* 195, *and Ch. XXXII—Discharge by a Magistrate—Power of Joint Sessions Judge to direct committal.*

A Joint Sessions Judge cannot exercise the powers of the Sessions Judge under Chapter XXXII of the Criminal Procedure Code (X of 1882).

Accordingly, where a Magistrate had discharged certain accused persons, and the Joint Sessions Judge had subsequently, on the application of the complainant

* Criminal Review Petition 251 of 1884.

ordered their committal to the Sessions Court, the High Court set aside the proceedings of the Joint Sessions Judge, leaving it to the Sessions Judge of the district, if a proper case was made out, to order a committal, or dispose of the application as he might think fit.

THIS was a petition, under the revisional jurisdiction of the High Court, to set aside the order of committal passed by S. B. Thákur, Joint Sessions Judge at Broach.

The petitioners Musa Asmal and twelve others were charged with the offences of being members of an unlawful assembly and rioting, and thereby having caused the death of one Isaf Asmal. The First Class Magistrate at Broach at the trial, after having taken the whole of the evidence tendered for the prosecution, discharged the petitioners on the ground that the evidence was not trustworthy.

Subsequently to the discharge, the widow of the deceased Isaf applied to the Joint Sessions Judge at Broach (Mr. Thákur) to set aside the order of discharge. Mr. Thákur, being of opinion that, as the case stood, no order for committal could be made, directed the District Magistrate to make a further inquiry, as the Magistrate should think fit, into the merits of the case under section 437 of the Criminal Procedure Code (X of 1882). But the Magistrate, instead of making any inquiry as directed, pointed out to the Joint Sessions Judge that he was not competent to direct such inquiry. Mr. Thákur thereupon cancelled his first order, and directed the petitioners to be committed to the Court of Sessions. The petitioners thereupon applied that the order of committal should be stayed for a fortnight. Mr. Thákur granted their application with the following remarks :—

"One chief point urged here is, that I have no authority to alter or review my order originally directing the District Magistrate to make a further inquiry under section 437, and direct a committal of the applicants under section 436 subsequently to it. But on looking at section 369 of the Code of Criminal Procedure, to which I have been referred, I am clearly of opinion that it does not apply to the present case.

"Another point is, that a fresh notice should have been issued to the applicants under section 436. But a notice having been

1884

In re THE PETITION OF MUSÁ ASMAL.

issued once to them under this section, a second notice is, in my opinion, superfluous.

"The applicants further desire me to put my order, directing their committal, in abeyance, with a view to enable them to move the High Court. I am not sure if I can issue such an order; but as I am anxious to give the applicants every fair opportunity to take such steps as they may be advised, I have given them a fortnight's time to apply to the High Court in the matter.

"I may here explain that when I first directed the District Magistrate to make further inquiry into this case under section 437, I supposed that he might, under the circumstances, select another Magistrate to make it, if he did not wish to make it himself; but on receiving back the papers from him with a letter from the original Magistrate who had inquired into the case, I came to the conclusion that it would be a saving of time to the Magistrate, who eventually might have to make the further inquiry and to the applicants themselves, if the case were called up to the Sessions. I am, however, glad that the parties intend to apply to the High Court, as the difficulties which I have felt in regard to the case will be thus removed."

The petitioners accordingly applied to the High Court, and prayed for reversal of the order on the following among other grounds:—

"That the Joint Sessions Judge having once distinctly held that, as the case stood, no order for committal of the petitioners should or could be made, should not have afterwards directed a committal on the same evidence.

"2. That the said Judge had no authority to make the order for further inquiry, and, having made it, to review his said order.

"3. That the Judge had no authority, under section 436 of the Criminal Procedure Code, to direct the committal of the petitioners.

"4. That the Judge should have given the petitioners an opportunity to show cause why they should not be committed to the Court of Sessions."

1884

In re THE PETITION OF MUSÁ ASMAL.

An order was made on 20th November, 1884, calling up the papers and proceedings.

The petition now came on for argument.

Máneksha Jehángirsha for the petitioners.—It was not competent for the Joint Sessions Judge to order committal of a case discharged by a Magistrate. The jurisdiction of a Joint Sessions Judge is limited to such business as the Sessions Judge may transfer to him. Section 17 of the Code of Criminal Procedure (Act X of 1872) clearly confined the jurisdiction of a Joint Sessions Judge to the cases thus transferred to him; and section 9 of the present Code (X of 1882), which speaks of the appointment of Joint Sessions Judges, does not suggest otherwise. Section 193 of the present Code supports this contention. It is the Sessions Judge alone who can order committal of a person discharged. The Sessions Judge had such a power under section 295 of the former Code, and still has it under section 436 of the new Code. In the case of *Shoindoo Noshyo* v. *Runglál*[1] it was held that a Joint Sessions Judge could not proceed under section 295 of the Code of 1872, and that section corresponds with section 436 of the present Code.

The Legislature seems to have intended that there should be only one Sessions Judge. The order of the Joint Sessions Judge, therefore, was without jurisdiction, and should be quashed

Púndurang Balibhadra (Acting Government Pleader) for the Crown.

Goculdás Káhandás for the complainant.—Section 532 of the present Code (X of 1882) applies to the case, and the High Court cannot interfere with the order of the Joint Sessions Judge. A Joint Sessions Judge has as wide powers as the Sessions Judge. In section 9 the word "jurisdiction" is to be interpreted as giving to a Joint Sessions Judge jurisdiction, and not limited jurisdiction. If it were not so, section 17 of the Code would have expressly provided that the Joint Sessions Judge is subordinate to the Sessions Judge like a Sub-divisional Magistrate. Granting that the Joint Sessions Judge is to deal with such business as may be transferred

(1) 25 Calc. W. R., Cr. Rul., 21.

1884

In re THE PETITION OF MUSÁ ASMAL.

to him by the Sessions Judge, such Joint Sessions Judge has the full powers of a Sessions Judge.

WEST, J.—Act XXIX of 1845, which first gave power to the Government of Bombay to appoint Joint Sessions Judges, vested such Judges with all the powers of the Sessions Courts, but at the same time prescribed that they were to exercise these powers only on such business as should be made over to them by the Sessions Judge. This Act remained in force until 1872, when it was repealed by Act X of that year. The same Act, by section 17, provided for the appointment of Joint Sessions Judges. The section says that these "Joint Sessions Judges shall exercise all the powers of a Court of Session, but shall try such cases only as the Local Government directs, or as the Sessions Judge of the Division makes over to them for trial." On these mere words it might be argued that it was intended to restrict the powers of the Joint Sessions Judge only in relation to the trying of cases, and not in other respects in which he might desire to exercise the jurisdiction of a Court of Sessions, as, for instance, in directing a committal or making a reference. Section 18, however, shows that this was not the real intention, for in that section similar words were used in the case of an Assistant Judge, who clearly was not meant to be given a *quasi*-revisional power over the Magistrates of his district and at the same time no appellate jurisdiction. It is admitted that the new distribution of the matter of section 17 of Act X of 1872 between section 9 and section 195 of Act X of 1882 has not made any difference in the sense. Under the latter Act, therefore, as under the former, the Joint Sessions Judge cannot exercise the powers of the Sessions Judge under chapter 32 of the Criminal Procedure Code (Act X of 1882). We must set aside Mr. Thákur's proceedings as held without jurisdiction, leaving it to the Sessions Judge of the Division, if a proper case is made out, to order a committal, or to give such other direction disposing of the application as he shall think just and expedient.

Proceedings quashed.