APPELLATE CIVIL

G. S. NAYYAR.....APPELLANT

VERSUS

SMT. KAUSHALYA RANI AND OTHERS.....RESPONDENTS

(T.V.R. TATACHARI & B. C. MISRA, JJ)

C. M. 508 of 1973 in

R.F.A. No. 178 of 1970. Decided on : 28-11-1973.

(i) Succession Act (39 of 1925), Ss. 272 & 278, 295 & 299—nature of—appeal under S. 299 from order of District Judge granting Letters of Administration with copy of will annexed thereto—maintainability of—form and heading of appeal—procedure indicated—appeal treated as appeal from order and not as Regular First Appeal.

The proceedings initiated under the Indian Succession Act for grant of letters of administration are clearly not suits. Section 295 of the Succession Act only provides that contentious proceedings shall as nearly as may be, take the form of a regular suit. The statutory provision is a recognition of the fact that the proceedings are in reality not a suit but they have been directed to merely assume the form of a regular suit and that too as nearly as may be. [P-9 G&H]

HELD, accordingly, that the proceedings under the Succession Act do not constitute a suit nor is a decision given in them a decree within the meaning of definition given in the Code. [P-11 H]

HELD FURTHER, that the appeal under section 299 of the Succession Act, therefore, does not lie as an appeal from a decree under section 96 of the Code. [P-12 H]

HELD THEREFORE, that the present appeal is maintainable in this Court but it is to be registered as FAO with necessary consequences. [P-13 B]

(ii) Practice—Regular First Appeal and Appeal from order—Procedure in each case—difference between—Part B of Chapter 3 of Part V of the High Court Rules & Orders.

Under Part 'B' of Chapter 3 of Part V of the Rules & Orders of the High Court, regular first appeals from decrees are placed before a Single Judge for admission and are heard by a Division Bench. On the other hand, first appeals from orders are placed for admission before a Division Bench and are eventually heard by a Single Bench. The present appeal is, therefore, to be admitted by a Division Bench and will be heard by a Single Bench in accordance with law and rules and practice of the Court. This will probably not involve printing of the record. [P-12 I]

For the appellant : Mr. I. C. Jain, Advocate.

For the Respondents : Mr. S. N. Marwaha, Advocate.

Cases referred :

(1) Hansraj v. Dehra Dun-Mussoorie Electric Tramway Company Ltd. A.I.R. 1933 Privy Council 63. (2) Mt. Bhonri v. Suwalal, A.I.R. 1956 Rajasthan 119. (3) Meenakshi Naidoo v. Subramaniya Sastri, I.L.R. 11 Madras, 26(35); (4) Antala Gope v. Sarbo Gompain, A.I.R. 1962 Patna 489. (5) Panzy Fernandas v. Mrs. M. F. Queros and others, AIR 1963 Allahabad 153. (6) Mst. Puinbasi Majhiani v. Shiba Bhune AIR 1967 Orissa 41. (7) Bai Lalita v. Sharda-ben, AIR 1970 Gujarat 37.

JUDGMENT

B. C. MISRA.—In this case an interesting question of law has been raised by the respondents by an application (C.M. 508 of 1973) and it has been contended that the appeal filed by the opposite party and registered as R.F.A. 178 of 1970 be treated as a first appeal from order instead of an appeal from a decree with necessary consequences of dispensing with the printing of the record and its hearing by a Single Judge of the Court.

The legal proceedings were initiated by the respondent Smt. Kaushalya Rani in the Court of the District Judge, Delhi by a petition under section 272/278 of the Indian Succession Act 39 of 1925 praying for grant of letters of administration with a copy of the will annexed in respect of the estate of the deceased Shri Ram Rakha Mal Nayyar, her father, who died at Delhi on 1st October, 1964 after having executed a will dated 3rd February, 1964 registered on 17th February, 1964. The petition was contested by Shri G. S. Nayyar, appellant, son of the deceased. The petition was tried and the District Judge by order dated 14th January, 1970 held that the will in dispute had been duly proved and so he granted to Smt. Kaushalya Rani letters of administration with a copy of the will attached.

Aggrieved by this order, G. S. Nayyar (contesting respondent in the Court below) filed an appeal in this Court on 15th March, 1970. He described it a Regular First Appeal but paid a fixed court-fees stamp of only Rs. 2.75, presumably under Article 11 of Schedule II of the Court Fees Act. On the raising of an objection by the office the counsel for the petitioner stated that the appeal had properly been classified as R.F.A. and had been filed under section 299 of the Indian Succession Act 39 of 1925 (hereinafter referred to as the Act). The matter was consequently placed for admission before a learned Single

Judge of the Court and on the statement of the counsel that the order was appealable under section 299 of the Act, the appeal was admitted subject to the question being examined at the time of arguments. In accordance with the rules of the Court in regular first appeals, the record has to be printed and it appears that the appellant proceeded with the preparation of the records which was likely to take considerable time. The contesting respondent, time and again, moved applications in this Court for dispensing with the printing of the record but did not succeed.

Eventually the respondent has filed the present application on the contentions that the question of the appealability of the order of the Court below and registration of the appeal as R.F.A. or as a first appeal from order be determined as preliminary points. The matter came up for hearing before H. L. Anand, J. who by order dated 26th September, 1973 directed the application to be placed for consideration before a Division Bench of the Court. Thus the matter has been placed before us.

The appellant in the main appeal (opposite party in the application) has opposed the application on various grounds which it is not necessary to state. The questions for consideration and determination at this stage are the following :—

1. Whether the impugned order of the District Judge is appealable in this Court ?

2. Whether the said appeal is to be registered and treated as a regular first appeal or as a first appeal from order.

We have heard the counsel for the parties at some length. The appeal really lies under section 299 of the Act which reads as follows :—

> "Every order made by a District Judge by virtue of the power hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908, applicable to appeals."

Section 295 of the Act provides that in any case before the District Judge in which there is a contention, every proceeding shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the

A grant, shall be the defendant. The proceedings before the District Judge, however, do not originate by a plaint, but they are initiated by a petition as provided by section 272 and 278 (or section 276 in other cases) of the Act. Section 272 of the Act provides that probate and letters of administration may be granted upon an application for that purpose by a petition verified as provided. Section 278 prescribes the contents of the petition to be filed. Section 277, 280 and 281 require additional information and make special provisions. Section 283 makes further provisions for the procedure to be followed and section 290 provides that "where it appears to the District Judge * * * * that letters of administration to the estate of a person deceased, with or without a copy of the will annexed, should be granted, he shall grant the same under the seal of his Court in the form set forth in Schedule VII. Schedule VII gives the form of the letters of administration.

From a perusal of the above-mentioned provisions of law it would appear that the Act purports to be a complete Code by itself and makes special provisions for the matters dealt with by it. Section 295 provides that where there be contentious proceedings, they shall take, as nearly as may be, the form of a regular suit in which the petitioner would be treated as plaintiff and the opposite party as defendant. This provision only prescribes the rule of procedure as does section 141 of the Code of Civil Procedure. An interesting analogy would be found in section 20 of the Indian Arbitration Act, 1940 where an application for filing an arbitration agreement and appointment of an Arbitrator is directed to be in writing and to be numbered and registered as a suit between one or more of the parties interested as plaintiffs and remainder as defendants. These proceedings, however, do not result in a decree.

The word 'decree' is defined in sub-clause (2) of section 2 of the Code of Civil Procedure. Clause (14) defines "order" as formal expression of any decision of a Civil Court which is not a decree. Under section 96 of the Code, an appeal lies from every decree passed by a Court exercising original jurisdiction. Appeals from orders are also provided by section 104 and Order 43 of the Code. It may be mentioned that rule 2 of Order 43 provides that the rules of Order 41 relating to appeals from decree shall, so far as may be, apply to appeals from orders. It is also provided by section 108 of the Code that the provisions of part VII dealing with appeals from original decree shall, so far as may be, apply to appeals from orders made under the Code or under any special or local law in which a different procedure is not provided. So far as executability is concerned, the

orders passed by the Court are under section 36 executable in the same manner and according to the same procedure as a decree. This shows that although the rules of procedure for appeals from orders are substantially the same as for appeals from decrees, a marked distinction has been maintained by the Code in respect of orders and decrees and respective appeals therefrom.

The question for consideration, therefore, is whether the impugned order of the District Judge can be treated as a decree. The definition of the word "decree" contained in clause (2) of section 2 of the Code is that it means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. By an extended definition, orders under section 47 and section 144 of the Code and an order rejecting a plaint have been included in the definition of decree. However orders of dismissal for default and adjudication from which an appeal lies as an appeal from an order have been expressly excluded from the purview of decree. It is clear from the definition that the decree finally determines the rights of the parties in a suit and formal expression of such adjudication is called a decree. The decrees are, therefore, passed, whether preliminary or final, only in suits. There is no definition of the word suit given in the Code, but section 26 and Order 4, Rule 1 of the Code give a clue that suits are instituted by presentation of a plaint to the Court. The Judicial Committee of the Privy Council in Hansraj vs. Dehra Dun-Mussoorie Electric Tramway Company Limited. A.I.R. 1933 Privy Council 63(1), observed that a suit was ordinarily instituted by the presentation of a plaint. The proceedings initiated under the Indian Succession Act for grant of letters of administration are clearly not suits. Section 295 of the Succession Act only provides that contentious proceedings shall, as nearly as may be, take the form of a regular suit. The statutory provision is a recognition of the fact that the proceedings are in reality not a suit but they have been directed to merely assume the form of a regular suit and that too as nearly as may be. A learned Single Judge of the High Court of Rajasthan in Mt. Bhonri vs. Suwalal, A.I.R. 1956 Rajasthan 119(2), observed that the proceedings under the Indian Succession Act, even if they became contentious, were not in the form of a regular suit and unless there was a suit as provided by the Code of Civil Procedure, there could not be any decree.

The order of the District Judge under appeal has, therefore, not been passed in a suit and so it can ordinarily not be called a decree.

A The Judicial Committee of the Privy Council in Meenakshi Naidoo vs. Subramaniva Sastri, I.L.R. 11 Madras 26(35) (3), after quoting the definition of the decree as contained in the Act 10 of 1877 as modified by Act 12 of 1879 has observed in regard to proceedings taken under section 10 of the Pagoda Act that a decree means a B formal expression of an adjudication upon any right, claim or defence set up in a civil Court, where such adjudication decides the suit or the appeal and since there was no civil suit respecting the appointment, it would not be possible to bring the order passed by the C District Judge pursuant to section 10 of the aforesaid Act within the definition of decree as contained in the Code.

The High Court of Patna in a Division Bench authority in Antala Gope vs. Sarbo Gopain, A.I.R. 1962 Patna 489(4) was considering D the question of the payment of Court fees on an appeal from a decree for divorce which has been passed under Hindu Marriage Act of 1955. A decree of divorce dissolving the marriage had been passed under section 13 of the said Act and the provisions for appeal contained in section 28 of the said Act were to the effect that all decrees E and orders made by a Court in any proceedings under the Act would be enforced in the like manner as decrees and orders of the Court made in the exercise of original civil jurisdiction are enforced and may be appealed from under any law for the time being in force. The contention advanced before the Division Bench was that the F appeal plainly lay against a decree and so the court-fees must be payable in accordance with Article 17(vi) of Schedule II of the Court Fees Act. After examining the provisions of law, the Court observed that section 21 of the Hindu Marriage Act which provided that all proceedings under the Act shall be regulated, as far as may be by G the Code of Civil Procedure, only laid down that the procedure to be adopted by the Court would be akin to that provided for the trial of suits in a civil Court, but it did not make the proceedings under the Hindu Marriage Act a suit, nor the application for divorce H a plaint. The Division Bench also considered the analogous provisions relating to Provincial Insolvency Act and the Guardians and Wards Act. It finally came to the conclusion that the proceedings under the Hindu Marriage Act did not constitute a suit nor did a decree of divorce passed in the same constitute a decree in a suit and I so did not attract the court-fees payable under Article 11 of Schedule II of the Court Fees Act. It finally held that the court-fees payable was under Article 11 of Schedule II of the Court Fees Act which provides for memorandum of appeal when the appeal is not from a decree or an order having the force of a decree. The same view has been taken

in a well considered judgment of a Full Bench of the High Court of Allahabad in Panzy Fernandas vs. Mrs. M. F. Queros and others, A.I.R. 1963 Allahabad 153(5). There, the question was of court-fees payable on an appeal from an order passed under section 278 of the Succession Act granting letters of administration. Although the Court was concerned with the only question of court-fees, it has made some valuable observations which are of assistance in the question raised before us. The Full Bench observed that an order on a petition for letters of administration under section 278 of the Succession Act was not a decree as the order had not been passed in a suit and proceedings for letters of administration were not commenced by institution of a plaint; on the other hand section 278 showed that they were commenced by an application or a petition and the decision appealed against was described in section 299 as an order and not a decree and so the decision of the Court in proceedings of letters of administration could not be described as a decree.

A learned Single Judge of the High Court of Orissa in Mst. Puinbasi Majhiani vs. Shiba Bhunc A.I.R. 1967 Orissa 41(6), was concerned with the question of payment of court-fees on a memorandum of appeal against an order refusing to grant probate of a will under the Indian Succession Act. The Court followed the Full Bench decision of the High Court of Allahabad referred to above and held that the word "suit" ordinarily meant and apart from the context must be taken to mean a civil proceeding instituted by a plaint and so in spite of the provisions of section 295 of the Succession Act, the proceedings under the Act could not be taken to mean a suit, nor could a decision given in the said proceedings be taken to be a decree. Accordingly the Court held that an appeal against an order refusing probate was not an appeal from a decree but was only an appeal from an order and was, therefore, liable to payment of fixed court-fees under Article 11 of Schedule II of the Court Fees Act.

The aforesaid authorities support us in the view that the proceedings under the Succession Act do not constitute a suit nor is a decision given in them a decree within the meaning of definition given in the Code. The learned counsel for the appellant, who is the opposite party in the application, invited our attention to section 54 of the Land Acquisition Act, 1894 and be relied upon a decision of the High Court of Gujarat in Bai Lalita vs. Shardaben, A.I.R. 1970 Gujarat 37(7). The relevant provisions of the Land Acquisition Act on the subject are different from the provisions of the Indian Succession Act. Section 26(2) of the Land Acquisition Act lays down that every such award shall be deemed to be a decree and the state-

ment of the grounds of every such award a judgment within the meaning of section 2, clause (2) and section 2, clause (9) respectively of the Code of Civil Procedure. Section 54 of the said Act provides that subject to the provisions of the Code applicable to appeals from original decrees and notwithstanding anything to the contrary in any enactment for the time being in force, an appeal shall only lie in any proceedings under this Act to the High Court or from any part of the award, of the Court * * * *. The statutory provision, therefore, by a fiction of the law, has constituted the award of the District Court given under the Land Acquisition Act to be a decree and an appeal against the same will, therefore, rightly be classed as an appeal from a decree. In fact the practice in this Court has been to register appeals from awards as regular first appeals from decrees and the court-fees has been levied ad valorem in accordance with Article 1 of Schedule I of the Court Fees Act. The reason for this practice is found in the provisions of the Land Acquisition Act which make the award a deemed decree. No irregularity or illegality, therefore, attaches to the said practice. However, under the provisions of the Indian Succession Act, we do not find any such words which make the decision of the District Judge a decree or an appeal against his decision as an appeal from a decree. On the other hand, section 299 itself speaks of every order of the District Judge and we assume that the Legislature was well aware of the distinction between the expression "every order" and "every decree" and it had deliberately used the distinct word "order" and not a decree in this provision of law. There is, therefore, no justification for construing the expression in section 299 as a decree passed in a suit. We are, therefore, of the conclusion that the proceedings under the Indian Succession Act do not constitute a suit and the decisions on the petitions and applications therein are not included within the definition of decree given in section 2(2) of the Code either by any express provision or by any necessary intendment. The appeal under section 299 of the Succession Act, therefore, does not lie as an appeal from a decree under section 96 of the Code.

Under Part 'B' of Chapter 3 of Part V of the Rules and Orders of the High Court, regular first appeals from decrees are placed before a Single Judge for admission and are heard by a Division Bench. On the other hand, first appeals from orders are placed for admission before a Division Bench and are eventually heard by a Single Bench. The present appeal is, therefore, to be admitted by a Division Bench and will be heard by a Single Bench in accordance with law and rules and practice of the Court. This will probably not

A involve printing of the record, but we do not express any opinion on the same as it is not necessary to do so.

As a result, we answer the questions raised before us as follows:—

B The appeal is maintainable in this Court but it is to be registered as F.A.O. with necessary consequences.

Since we have answered the questions, we also order admission of the appeal and direct it to be heard by a learned Single Judge C in due course. Costs of this application would be costs in the cause.

A.N.K. *Orders accordingly.*