

(1983) 07 CAL CK 0026

In the Calcutta High Court

Case No : F.A.T. No's. 1491 and 2226 of 1978

Balai Lall Banerjee and Others

APPELLANT

Vs

Debaki Kumar Ganguly and Others

RESPONDENT

Date of Decision : 05-07-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2(2)
Succession Act, 1925 — Section 276, 278, 299

Citation : AIR 1984 Cal 16 : 87 CWN 1020

Hon'ble Judges : B.C. Chakrabarti, J; Anil K. Sen, J

Bench : Division Bench

Advocate : Saktinath Mukherjee, Manjusree Das, in FAT No. 1491/1978 and Samir Kumar Mukherjee and S.K. Das, in F.A.T. No. 2226/78, for the Appellant;

Judgement

B.C. Chakrabarti, J.—These two matters arising out of two memoranda of appeal -- one against an order for the grant of Letters of Administration and the other against an order for the grant of Probate, have been referred to us in view of a report of the Stamp Reporter regarding the maintainability of the appeals without a certified copy of decree accompanying the judgments appealed against. The question that falls for our consideration is whether a decree is at all required to be drawn up after the passing of an order for the grant of Probate or Letters of Administration as the case may be.

2. The provision of appeal is contained in Section 299 of the Succession Act. The section reads as follows:--

"299. Appeals from orders of District Judge -- Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Civil P. C., 1908, applicable to appeals."

3. Although the section makes it clear that the appeal is against the order made on an application, the Stamp Reporter is of the view that copy of decree is

required to be filed along with the Memorandum of Appeal in view of a provision contained in Rule 10, Chap. IV of the Rules of Business of the Judicial Department, Appellate Side, High Court, Calcutta. The rule in question relates/to classification of appeals. The relevant portion of the Rule is to the following effect :

"Classification of Appeals.

10. It is the duty of the Stamp Reporter to classify appeals before making them over to the Appeal Sections concerned for registration.

Under the existing practice of this Court, appeals are classified in the manner indicated below:--

APPEALS FROM ORIGINAL DECREES,

(1) to (3)

(4) Appeals against the grant of refusal to grant or revocation or refusal of revocation of probate or letters of administration.

4. The attention of the learned Advocates being drawn to the report of the Stamp Reporter the appellant in F.A.T. No. 1491 of 1978 applied for a certified copy of the decree on 30-11-1978. The decree was drawn up on 1-12-1978 and filed before this Court on 8-12-1978. Thereupon the Stamp Reporter reported that calculating the period of limitation with reference to the date of filing of the certified copy of the decree, the appeal was out of time by 175 days.

5. In the other appeal no certified copy of decree was filed and upon a reference being made to the court against whose order the appeal had been preferred, it was reported by the learned Judge that as per practice of the court no formal decree was drawn up in the Probate case and the case was closed after the Probate was drawn up, sealed and signed.

6. Mr. Saktinath Mukherjee appeared in support of F.A.T. 1491 and Mr. Samir Mukherjee appeared in the other matter, Mr. Saktinath Mukherjee contended that in the matter of an order for the grant of Letters of Administration no formal decree is required to be drawn up either under the provisions of the Indian Succession Act or the Civil P. C. In support of his contention reliance was placed on several provisions of the Indian Succession Act. Section 266 of the Act provides that the District Judge shall have, in relation to the granting of Probate and Letters of Administration, all the powers and authority as are vested in him in relation to any civil suit.

7. Section 288 lays down that the proceedings of the Court of the District Judge shall, save as otherwise provided, be regulated, so far as the circumstances of the case permit, by the Civil P. C. A proceeding for probate is initiated by the presentation of an application in that behalf. What such application should contain is provided in Section 276. Similarly, a proceeding for Letters of Administration is initiated by an application as provided in Section 278.

8. Section 295 lays down that in any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit. The petitioner in such a case is termed as the plaintiff and the person who has appeared to oppose the grant shall be the defendant.

9. Sections 289 and 290 provide for the form of the grant. The form in Schedule VI is meant for the grant of Probate while the form set-forth in Schedule VII is meant for the grant of Letters of Administration.

10. Finally, Section 299 already referred to, provides for an appeal against every order made by the District Judge by virtue of the powers conferred on him by the Act.

11. Reading all these sections together, it was contended that a proceeding for the grant of probate or Letters of Administration is not strictly a suit and as such there would be no question of such a proceeding terminating in a decree as provided in the case of suits under the Civil Procedure Code. Classification of a proceeding as a suit in the case where it becomes contentious does not necessarily convert the proceeding into a suit within the meaning of the Civil P. C. Though in a different context, the Supreme Court in the case of *Diwan Bros. Vs. Central Bank of India, Bombay and Others*, observed that in order to come within the definition of a decree contained in Section 2(2) of the CPC three essential elements must exist, namely,

- (1) that the adjudication must be given in a suit;
- (2) that the suit must start with a plaint and culminate in a decree; and
- (3) that the adjudication must be formal and final and must be given by a Civil or Revenue Court.

12. Consequently the final adjudication in a proceeding for grant of Probate cannot perhaps be termed as a decree in so far as one of the essential elements namely, the initiation of the proceeding by the presentation of a plaint is lacking in such a case.

13. The fact that a contentious proceeding is classified as a suit, in our view, does not make much of a difference. If the proceeding is to culminate in a decree there ought not to be any distinction between a contentious or non-contentious proceeding. In the case of a suit within the meaning of the Civil P. C., the final adjudication whether contested or ex parte must invariably be followed by a decree. To hold that a contentious proceeding for the grant of Probate only shall be treated as a suit and, therefore, required to be followed by a decree, while a non-contentious proceeding ending with an order for grant need not be followed by a decree seems to be against commonsense. If it is a suit, it is so for all practical purposes -- whether contentious or otherwise. In our view, therefore, the provisions in Section 295 is merely for the purpose of classification. The provisions for the application of the Civil P. C. as far as may be is intended only to indicate the procedure to be followed in disposing of an application for grant of

Probate or Letters of Administration as the case may be.

14. Section 299, we have already indicated, makes the order for the grant appealable. There is no reference to any decree in that section.

15. It is significant that in the definition of the term "decree" as defined in the Code, it is provided that it shall not include any adjudication from which an appeal lies as an appeal from an order. Provisions for appeal against orders are contained in Order XLIII of the Code. It enumerates the orders against which an appeal shall lie. It does not include an order for the grant of Probate. Therefore, a question may arise whether any appeal lies at all or not as an appeal against an order. In the case of *Sheikh Azim Vs. Chandra Nath Namdas and Another* an appeal was preferred against an order rejecting an application for revocation of Probate. A point was taken that a judgment directing the rejection of the application, amounted to an order only and that an appeal would lie against that order only under the provisions of Section 588 of the Civil P. C. This contention apparently was based on the fact that in Section 86 of the Probate and Administration Act, every order is described as an order. It was observed that that section also covers orders granting Probate and "as these orders undoubtedly amount to decrees" the expression "order" in Section 86 does not mean such an order only as is referred to in Section 588 of the Civil P. C. Consequently it follows that though the order referred to in Section 299 is made appealable, all orders referred to therein are not necessarily restricted to orders contemplated by Order XLIII of the Code. An order for grant of Probate is nonetheless appealable as an order treating the same as amounting to a decree, though it does not in all respects come within the definition of a decree.

16. In the case of *Sarat Chandra v. Benode Kumari*, reported in 20 CWN 28 : AIR 1916 Cal 473), it was observed that an appeal lay under terms of Section 86 of the Probate and Administration Act irrespective of whether the order was a decree or not. These decisions appear to create an impression that an order for grant of Probate though described as an order, amounts to a decree for the purpose of an appeal. It may be pointed out here and now that Section 86 of the Probate and Administration Act of 1881 corresponds to S, 299 of the Succession Act.

17. Mr. Mukherjee wanted to draw a distinction between a decree and an order having the force of a decree. In support of such contention reliance was placed OK a Full Bench decision of the Allahabad High Court in the case of *Mrs. Panzy Fernandas Vs. Mrs. M.F. Queoros and Others*, . In that case the ultimate question for consideration was as to the court fees payable on a Memorandum of Appeal u/s 299 of the Succession Act. In discussing the question it was held that the order on a petition for Letters of Administration u/s 278 of the Succession Act is not a decree as the order is not passed in a suit. Proceedings for Letters of Administration are not commenced by the institution of a plaint. They are commenced by an "application" or a "petition". The decision appealed against is described in Section 299 as an order and not a decree, Therefore, it was held

that the decision of a Court in proceedings for Letters of Administration cannot be described as a decree. In coming to the decision reliance was placed on the case of *Hansraj Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63 where it was observed that a suit was ordinarily instituted by the presentation of a plaint. This view expressed by the Allahabad High Court was approved by the Supreme Court in the case of *Diwan Bros. Vs. Central Bank of India, Bombay and Others*, .

18. Therefore, upon reading the relevant provisions of the Succession Act and the authorities referred to above, we are of the view that a proceeding for grant of Probate or Letters of Administration is not strictly a suit though in some cases where the grant is opposed it is deemed as such. That, in our view is only for the purpose of classification of the proceeding without changing its, character. The order passed in such a proceeding may have the force of a decree but strictly it is not a decree not having been passed in a suit. Therefore, in our view a formal decree does not seem to be required to be drawn up following an order of grant. What follows from the order is the grant in the form set out in Schedule VI or VII of the Act.

19. Consequently the view of the Stamp Reporter that the appeals being against the order for grant of Probate in one case and Letters of Administration in the other should be classified as appeals from original decrees in terms of Rule 10, Chap. IV of the Rules of Business and, as such, required to be accompanied by the certified copies of the decrees or that in the absence of such copy the appeals are incompetent, does not seem to be correct. The preface to the Rules of Business makes it abundantly clear that the Rules are merely administrative instructions prescribed for the guidance of everybody concerned in the Judicial Department. In other words, the provisions in Rule 10 referred to above are merely intended for classification of the appeals for statistical purposes. It cannot and does not have the effect of converting an order for the grant into a decree which it really is not. Therefore, we are enable to agree with the view taken by the Stamp Reporter that the appeals in the absence of certified copies of decrees are incompetent.

20. Where in disposing of an application for grant, costs are awarded in favour of one or the other party which is capable of execution, it is desirable that a formal order showing the result of the case and containing a concise expression of adjudication be drawn up in the order sheet and if costs have to be paid by one party to the other, such costs should be shown in the order sheet. (See Rule 141 of the Civil Rules and Orders, Vol. I).

21. For the reasons that have gone forward, we are unable to agree with the view of the Stamp Reporter that the appeals are incompetent in so far as we have found that an order for the grant though it may have the force of a decree is not really a decree in the strict and legal sense of the term. If it is not a decree there is no question of a formal decree being drawn up, and the failure to supply a copy of a decree along with the Memorandum of Appeal cannot render the appeal itself incompetent. The objection raised by the Stamp Reporter is thus

overruled and the matters be disposed of accordingly.

Anil K. Sen, J.

22. I agree.