

(1991) 03 MAD CK 0021

In the Madras High Court

Case No : T.O.S. No. 15 of 1989 (O.P. No. 197 of 1988)

Dr. (Mrs.) Ruth Annamalai

APPELLANT

Vs

Mrs. Valliammai Achi and others

RESPONDENT

Date of Decision : 21-03-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, 100, 104, 141, 144
Constitution of India, 1950 — Article 226
High Court Original Side Rules — Order 25 Rule 25, Order 25 Rule 4, Order 25 Rule 55, Order 25 Rule 689, Order 25 Rule 690
Limitation Act, 1963 — Article 137
Original Side Rules, 1956 — Order 2 Rule 2, Order 2 Rule 20
Succession Act, 1925 — Section 222, 261, 264, 265, 266
Tamil Nadu Court Fees and Suits Valuation Act, 1955 — Article 1, 11(K), 2, 3, 4
Tamil Nadu General Sales Tax Act, 1959 — Section 26(6)

Citation : AIR 1991 Mad 284 : (1991) 1 LW 352

Hon'ble Judges : Lakshmanan, J

Bench : Single Bench

Advocate : Mr. Radhakrishnan, for Massra D'Souza and Radhakrishnan, for the Appellant; Mr. T.R. Mani for M/s. T.M. Hariharan and P.R. Balasubramanian, for the Respondent

Judgement

1. On 4-3-1988 the plaintiff filed the O. P. No. 197 of 1988 under Ss. 222 and 276 of the Indian Succession Act, 1925 read with O. XXV, Rule

4 of the Original Side Rules. In the said petition, the petitioner sought to prove the writing propounded by her as the last Will and Testament of Dr.

A. L. Annamalai, one of the very eminent and leading medical practitioners in Tamil Nadu who passed away on 12-5-1987 at Madras. The prayer

in the O.P. is to prove the Will in comon form and for grant of probate to have the effect throughout India. In the petition she has described herself

as a Christian and claims to be second wife of the deceased and avers that the estate of the deceased was governed by the Hindu Succession Act.

In paragraph No. 7 of the original petition she has stated as follows :--

7. The estate of deceased was governed by the Hindu Succession Act and the following persons are his heirs:

(1) The petitioner herein who is the second wife is residing at No. 112, Poonamallee High Road, Madras-600 084.

(2) Mrs. Valliammalai Achi Annamalai, first wife is residing at No. 112, Baracah Road, Varadhamma Garden, Kilpauk, Madras-10.

(3) Dr. Mr. Annamalai Alagappan, son is residing at No. 112, Baracah Road, Varadhamma Garden, Kilpauk, Madras-10.

2. Admittedly, the caveators/defendants are the wife and son of the deceased Dr. AL. Annamalai. The writing attributed to Dr. Annamalai as his

will reads as under:--

She has been living with me for over twenty five years and looks after my personal comforts.

3. It further adds, "I am bequeathing all my properties to her for her to enjoy them absolutely for ever, in view of my natural love and affection for

her and our close personal relationship.

4. The defendants lodged a Caveat under S. 284 of the Indian Succession Act and O. XXV, R. 51 of the Original Side Rules on 11-4-1989 and

filed an affidavit in support of the Caveat on the same day. It is stated in the affidavit filed in support of the Caveat that Dr. AL, Annamalai died a

Hindu leaving Mrs. Valliammai Achi, his wife, and his son Dr. Annamalai Alagappan as the sole heirs at law and they alone are entitled to his estate

and effects as his lawful heirs. He left him surviving no other next of kins or heirs at law. The petitioner who is a Christian claiming to be the second

wife of Dr. Annamalai, has filed this O.P. for the grant of probate of a Will propounded by her as the last Will and Testament of Dr. AL.

Annamalai where-under she claims to be the sole legatee of the entire estate and effects of the deceased to the exclusion of the natural and legal

heirs and as the sole executrix herself. The defendants, in paragraphs Nos. 4 to 7 have stated thus:--

4. We deny and dispute the said Will, its due execution and proper attestation. This instrument which totally disinherits both the lawful heirs and

gives the entire property of the deceased to a stranger who procured it appears highly suspicious and cannot be the Will and testament of my

deceased father. Had he been aware of its terms, he would not have approved of the contents.

5. The petitioner's claim that she is the 2nd wife of my deceased father is a pretence and even the will propounded by her does not disclose such relationship. The petitioner cannot claim to be the lawful wife of my deceased father, since my mother whose status as his wife is admitted is alive.

The Will propounded by the petitioner is neither true nor valid.

6. Our relationship as wife and son of the deceased is admitted by the petitioner; we have the necessary right and interest to enter the caveat and

this cannot be gainsaid.

7. It is therefore, prayed that the caveat lodged by us be entertained and the O. P. registered as a suit.

Abdul Hadi, J. directed the O.P. to be converted into T.O.S. in view of the contest by the defendants. Learned Judge passed the following order

on 12-4-1989 :--

In view of the Caveat filed along with supporting affidavit this O.P. is converted into T.O.S.

Thereupon, the proceedings were numbered and registered as a suit. The citation dated 11-11-1989 served on the defendants reads that the O.P.

Has been converted and registered as T.O.S. No. 15 of 1989, in which the Caveators are the defendants and the petitioner shall be the plaintiff.

On 17-11-1989 High Court registry issued a notice to the petitioner requiring the petitioner/plaintiff to pay the Court-fee payable on the plaint as

required under Schedule II, Art. 11(k) of the Tamil Nadu Court-fees and Suits Valuation Act, 1955. In reply to the said notice, the

petitioner/plaintiff filed a memo dated 27-11-1989 requesting the matter be posted before the Court for directions. In the said memo it is stated as

follows :--

Order 25, Rule 55 of the Original Side Rules has to be read subject to S. 295 of the Indian Succession Act in view of inter alia, Cl. 34 of the

Latters Patent.

The ratio of judgment in Philo Peter and Another Vs. Divyanathan and Others, is that as long there is no suit in the eye of law, the provision of

Court-fees cannot be invoked.

Alternatively it is submitted that even if it could be invoked (without admitting so), the fee payable could be only in accordance with Appendix-IA of the High Court Rules.

5. The petitioner/plaintiff relied on the judgment reported in Philo Peter and Another Vs. Divyanathan and Others, holding that on matters

becoming contentious ad valorem Court-fee was not payable and that there was no provision under the Indian Succession Act or the Court-Fees

Act to register the petition under Indian Succession Act as a suit. When there is no provision in the Act, it was not open for the State to demand

Court-fees. It was also submitted that Order XXV, Rule 55 of the Original Side Rules had to be read with S. 295 of the Indian Succession Act

and with Cl. 34 of Letters Patent.

6. I have heard the elaborate arguments of Mr. Radhakrishnan Senior Advocate on behalf of M/s. D'Souza and Radhakrishnan and Mr. T. R.

Mani, Senior Advocate on behalf of defendants. Before considering the legal position emerging out of the submission made by the learned counsle

for both sides it is necessary to take notice of the relevant provisions in the Indian Succession Act, Tamil Nadu Court-Fees and Suits Valuation

Act, 1955, Letters Patent, High Court, Madras and the Original Side Rules, 1956 and certain provisions in the Code of Civil Procedure, 1908.

TAMIL NADU COURT-FEES AND SUITS VALUATION ACT, 1955 :--

Chapter VI (Ss. 55 to 65) makes a special provisions for the fee chargeable for the grant of Probate or Letters of Administration or Succession

Certificates. This levy, which is generally referred to as the probate duty, is different from the Court-fee payable on the petition or on the plaint.

Schedule I of the Act provides for payment of ad valorem fee under Arts. 1 to 6.

Article 1 provides for payment of Court-fee on plaint or written statement, on the amount or value of the subject-matter in dispute.

Articles 2 to 5 provide for payment of half the ad valorem fee on certain petitions and memoranda of appeal and on applications for review.

Article 6 provides for payment of probate duty on the amount or the estate in respect of which probate or letters of administration are sought for,

and not on the amount or value of the subject-matter in dispute.

Article 7, likewise, deals with the duty payable on succession certificates on the amount or value of the debt or security.

Schedule II of the Act prescribes the Court-fee payable on itemised petitions, complaints and appeals and runs into great details. Normally, Schedule

II prescribes a fixed Court-fee on various proceedings, except in cases where it is otherwise indicated.

Article 11(k) provides for Court-fee payable on applications for probate or letters of administration:

(i) to have effect throughout India ... Rs. 25/-

(ii) not falling under Clause (i) :

(1) If the value of the estate does not exceeding Rs. 1000 and ... Rs. 0.75 p.

(2) if the value exceeds Rs. 1000/- ... Rs. 5/-

It will be seen that the levy is on the value of the estate, and not on the value of the subject-matter in dispute. The proviso to Art. 11(k) requires

consideration. It reads :--

Provided that if a caveat is entered and the application is registered as a suit, one half the scale of fee prescribed in Art. 1 of Schedule I on the

market value of the estate less the fee already paid on the application shall be levied.

Under the proviso, payment of ad valorem Court-fee at a concessional rate is contemplated in cases where a caveat is entered and the application

is registered as a suit.

Once the matter becomes contentious on the filing of a caveat and the application is registered as a suit, ad valorem Court-fee is made payable, but

the concession of half the scale of Court-fee is granted in view of the probate duty payable under Schedule I, Art. 6.

It will also be seen that this ad valorem fee on half the scale is payable on the market value of the estate, and not on the value of the subject-matter

in dispute. Thus, there is no basis for the argument of Mr. Radhakrishnan that no Court-fee is payable since the value of the subject-matter in

dispute cannot be ascertained.

7. The value of the estate is stated in the petition and provision is made in S. 56 of the Act for the purpose of the computation of the fee chargeable

and S. 59 provides for enquiry by the Collector regarding the valuation of the estate. After the caveat is entered and the application is registered as

suit, the market value thus ascertained becomes the basis for computing the

Court-fee payable at half the scale prescribed, and this cannot be gainsaid.

8. Schedule III of the Act prescribes the Form of valuation to be used for the purpose of S. 55. Paragraph 3 of the statutory form reads as under :

I further declare that the said estate exclusive only of the last mentioned items., was on the date of the death of the deceased under the value/

is under the value of....

It will thus be seen that if the application for probate or letters of administration is made within a year after the death of the deceased, the estate is

to be valued as on the date of the death of the deceased. If, however, the application is made after one year from the date of death, the accrued

income or profits up to the date of the petition has also to be added in the value of the estate. Thus, a concession is shown in cases where the

application is made within a year. This view is reiterated in the amended form of valuation of the estate prescribed as per Ss. 61 and 63 of the Act.

There can, therefore, be no doubt that if a caveat is entered and the application is registered as a suit, one half of the ad valorem fee prescribed on

the market value of the estate has to be paid deducting, of course, the fee already paid on the application.

9. Referring to the provisions under O. XXV, R. 55 of the Original Side Rules, S. 295 of the Indian Succession Act, Cls. 19 and 34 of Letters

Patent, Mr. Radhakrishnan, submits as follows :--

After referring to the judgment (unreported) in R Natarajan v. N. Parthasarathy, T.O.S. No. 8 of 1972, dated 6-2-1973 and a judgment

reported in Kanni R. Krishna Iyer v. K. L. Krishnamachari 98 LW 80, a Division Bench of our High Court in Philo Peter and Another Vs.

Divyanathan and Others, observed that in so far as proceedings relating to testamentary and intestate matters covered by O. XXV of the Original

Side Rules are concerned there are specific provisions providing for registering a petition as a suit as and when application is registered on entering

of caveat with supporting affidavit and that in such a case payment of Court-fee was automatically payable under the Court-Fees Act as it stands.

However, Bench also observed further that it was not concerned with such matters in the case as the validity of such a procedure was not being

challenged before them. What was challenged before them was only a short

question relating to the original petition filed before District Judge under S. 295 of the Indian Succession Act. According to Mr. Radhakrishnan, although there is an observation of the Bench that the Court-fee would be attracted in view of the O. XXV, R. 55 of the Original Side Rules, that was not the finding in the matter arising before them, it was merely an observation. As what was said under O. XXV, R. 55 of the Original Side Rules, was only in the nature of an observation and not a finding, it binds not this Court because as expressly mentioned that issue was not before the Bench for adjudication. (That issue is now before me), as such Mr. Radhakrishnan, submits that the said observation is not binding on me as a precedent. The proviso to Art. 11(k) of the Tamil Nadu Court-Fees and Suits Valuation Act, provides that if a caveat is entered and the application is registered as a suit, one half of the scale of fee prescribed in Art. 1, Schedule I on the market value of the estate less fee already and paid on the application shall be levied. Mr. Radhakrishnan, drew my attention to the findings of the Bench which held that the provisions did not apply to The situation contemplated in S. 295 of the Indian Succession Act for the following reasons :--

a) The Expression ""Suit"" under S. 295 of the Indian Succession Act is not a suit contemplated by S. 26, C.P.C., as the proceedings was not commenced by institution of a plaint but was commenced with an application or petition.

b) The proceeding did not culminate in a decree.

c) Therefore it was not open to the State to demand Court-fee as if it was a regular suit.

c) Article I Schedule I of the Tamil Nadu Court-fees Act could not be made applicable because in a preceding u/s 295 of the Indian Succession

Act properties were not the subject matter of the dispute. The matter under dispute was only the right to represent the Estate of the deceased. The

title of the deceased was not in US.

On those findings it was held that no court-fee was payable when the matter became contentious. Relying on the abovesaid findings Mr.

Radhakrishnan submits that the said findings would also apply to the proceedings under Order XXV, Rule 55 of the Original Side Rules which

provides, that upon an affidavit in support of the caveat being filed the

proceeding shall be numbered and registered as a suit in which the petitioner shall be the plaintiff and the caveator shall be the defendant. The difference in the phraseology in Section 295 of the Succession Act and Rule 55 of Order XXV of the Original Side Rules is to be noted. In the former, the words ""numbered and registered as a suit"" does not appear and in the latter ""as nearly as may be a form of regular suit"" does not appear. Thus it was submitted that the distinction between the two phraseologies is a distinction without difference in law.

10. Referring to the provisions under Sections 264, 265, 266, 268, 276, 284, 295 and 299 of the Indian Succession Act, Mr. T. R. Mani, submits as under :--

Chapter IV (of part IX) deals, with the grant of revocation of the probate and letters of Administration.

Section 264 enacts that the District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district. Section 265 empowers the High Court to appoint delegates of District Judges to deal with non-contentious cases.

Section 266 provides that the District Judge shall have the like powers and authority in relation to the granting of probate and letters of administration as are by law vested in him in relation to any civil suit or proceeding pending in his court.

Under Section 268, the proceedings of the court are to be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure.

Section 276 prescribes the procedure for filing a petition for probate or letters of administration with the Will annexed.

Section 284 deals with caveat against granting of probate or letters of administration and Section 285 provides for notice to the caveator.

The procedure in contentious cases is prescribed in Section 295, which is the pivotal section which reads :

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,

according to the provisions of the Code of Civil Procedure, 1908, 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 grant

shall be defendant.

Under Section 299, every order made by a District Judge shall be subject to appeal to the High Court in accordance with the provisions of the

Code of Civil Procedure, applicable to appeals. Thus, an order granting or refusing to grant probate or letters of administration is treated as an

order, and not as a decree

.

Under Section 295, in all contentious cases, the proceedings shall take, as far as possible, the form of a suit and the petitioner for probate or letters

of administration becomes the plaintiff and the party opposing becomes the defendant. In my opinion the language of this Section is in clear contra-

distinction with the provisions of Order XXV Rule 55 of the Original Side Rules, which provides that upon the affidavit in support of the caveat

being filed, the proceeding shall be numbered and registered as a suit in which the petitioner shall be the plaintiff and the caveator, the defendant.

Thus, on the original side, the contentious matter becomes a suit on its being numbered and registered as a suit and the cavcator becomes the

defendant in the suit. This distinction in the language of the two provisions is vital and important. A proceeding referred to in Section 295 of the

Succession Act does not become a suit in the strict sense of the term even after it becomes contentious, but the proceeding is only to take, as

nearly as may be, the form of a regular suit.

11. In answer to the submission made by Mr Radhakrishnan on the decision reported in Philo Peter and Another Vs. Divyanathan and Others, ,

Mr. T. R. Mani, Senior Advocate submits that the Bench decision points out and relies upon the above distinction in holding that since the

proceeding u/s 295 does not become a suit, court-fee is not payable as in a suit under Article 11(k) of Schedule II of the Tamil Nadu Court-fees

Act. This is on the basis that when a proceeding initialed on a petition before a District Judge for grant of probate or letters of administration

becomes contentious and is required to be tried in the form of a regular suit to the extent possible. According to the provisions of the Code of Civil

Procedure, it cannot be considered as a suit in the strict sense of the term and as such, ad valorem court-fee is not payable." In support of this

argument, reference was made to proceedings relating to testamentary and

intestate matters covered under Order XXV of the Original Side Rules, wherein there are specific provisions providing for registering the petition as a suit as and when the application is resisted by means of a caveat and it is pointed out that in such a case ad valorem court-fee is automatically payable under the Court-Fees Act. In my opinion, though the Bench was not concerned with a matter arising on the Original Side, the clear distinction in the language of the two provisions, viz., Section 295 of the Succession Act on the one hand and Order XXV Rule 55 of the Original Side Rules on the other, is referred to and relied on for holding that by reason of the difference in language employed in Section 295, Succession Act, a contentious proceeding before the District Court does not become a suit and a higher court-fee is therefore not attracted, whereas by reason of the specific language employed in Order XXV Rule 55, Original Side Rules, wherein a contentious proceeding has to be registered as a suit, the higher court-fee automatically becomes payable. This is the part of the reasoning of the Bench decision and cannot be brushed aside as a mere obiter observation. The contention of Mr. Radhakrishnan, to the contrary, in my view, is only an escapist attempt to get over the sound reasoning on which the Bench decision is rested.

12. It is useful to extract Clauses 19 and 34 of Letters Patent which are as follows :--

Clause 19 -

(With reference to the exercise of its Ordinary Original Jurisdiction) And We do further ordain that with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Madras, in the exercise of its Ordinary Original Civil Jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued.

Clause 34 :

Testamentary and Intestate Jurisdiction --And we do further ordain that the said High Court of Judicature at Madras, shall have the like power and authority as that which may now be lawfully exercised by the said High Court, in relation to the granting of probate of Last Will and Testament and Letters of Administration of the goods, chattels credits and all other effects whatsoever of person dying intestate, whether within or without the

Presidency of Madras: Provided always, that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such Probates and Letters of Administration.

In my view Clause 19 of Letters Patent specifically preserves the pre-existing law and equity which would have been applied by the High Court if

the Letters Patent had not been issued, with respect to matters coming before the High Court in exercise of its ordinary original civil jurisdiction.

Likewise, Clause 34 makes a special provision for testamentary and intestate jurisdiction and invests the High Court with all pre-existing power and authority, subject to future regulation by law.

13. Let me now refer some of the provisions made in Original Side Rules, 1956:-- These Rules of the High Court are made by virtue of powers

conferred by Enactments set out in Appendix I thereto which include the Letters Patent of 1865, the Code of Civil Procedure, the Indian

Succession Act, 1925 and the Constitution of India. The enactments referred to in Appendix I are as under :

1. The Government of India Act, 1915, 5 and 6 Geo. V, 61.
2. The Letters Patent of the High Court at Madras, dated the 25th December, 1865, as amended by Letters Patent, dated the 11th March, 1919.
3. The Code of Civil Procedure, 1908, and the Acts amending the same.
4. The Indian Oaths Act, 1873 (X of 1873).
5. The Transfer of Property Act, 1882 (IV of 1882).
6. The Partition Act, 1893 (IV of 1893).
7. The Guardians and Wards Act, 1890 (VIII of 1890).
8. The Indian Succession Act, 1925 (XXXIX of 1925).
9. The Indian Divorce Act (IV of 1869) and the Acts amending the same.
10. The Specific Relief Act, 1877 (I of 1877).
11. The Indian Arbitration Act, 1940 (X of 1940).
12. The Indian Stamp Act, 1899 (II of 1899 and the Acts amending the same.
13. The Indian Trusts Act, 1882 (11 of 1882).
14. The Legal Practitioners" Act, 1879 (XVIII of 1879)

15. The Constitution of India.

Order II Rule 2 of Original Side Rules, 1956 states as follows :

A suit shall be commenced by presenting a plaint to the Court or such officer as the Chief Justice appoints in this behalf; all other proceedings shall

be commenced by petition unless otherwise provided for by these rules or by rules framed under any special Act.

Order IV, Rule 1 of the Original Side Rules -

A suit shall be instituted by presenting to the Registrar a plaint in Form No. 5 of Appendix hereto.

Order XXV of the Original Side Rules deals with testamentary and Intestate matters. Rules 20 to 50 relate to non-contentious business, not being proceedings in any suit Rules 51 to 68 deal with contentious proceedings.

Rule 55 of the Original Side Rules read as follows :

Upon the affidavit in support of the caveat being filed (copy whereof has been given by the caveator to the petitioner), the proceedings shall be

numbered and registered as a suit in which the petitioner shall be the plaintiff and the caveator shall be the defendant.

Rule 58 of the Original Side Rules states as follows :

If a petitioner for probate or letters of administration with the Will annexed desires to prove the Will in solemn form, he shall make the next-of-kin,

or other persons interested, respondents to the petition, which shall thereupon be numbered and registered as a suit, in which the petitioner shall be

the plaintiff and the persons made respondents shall be the defendants.

Rule 60 of the Original Side Rules provides inter alia that when the case is registered as a suit, the provisions of Order IV Rule 4 shall apply in the

same manner as if the petition was a plaint.

Rule 62 of the Original Side Rules, provides that when, after the grant of probate or letters of administration, if any person desires that the Will may

be proved in solemn form or that the grant may be revoked, he shall file an affidavit setting out the grounds therefore and apply for issue of a

citation to the grantee. Thereafter the petition for probate or letters of administration will be numbered and registered as a suit in which the

petitioner shall be the plaintiff and the person applying for citation shall be the defendant. The petition and the affidavit shall be taken as the plaint

and the written statement respectively.

14. These Rules make an exception to the general rule that a suit is to be commenced by presenting a plaint, and provide for treating the petition

for probate or letters of administration as the plaint and the affidavit of the caveator or the person seeking revocation as the written statement. It is

not correct to say that it is considered as a plaint only for the purpose of summons. It is equally not correct to say that the character of the

proceeding is to be determined as its commencement, and not at any later stage, notwithstanding the specific provisions to the contrary and dehors

their purpose, scope and effect.

15. It is relevant to point out the distinction between Rule 55 and Rule 58 extracted above. Under Rule 58, the petitioner for probate or letters of

administration may himself elect to prove the Will in solemn form and in such a case, in the absence of a caveat, the matter is not contentious, and

Proviso to Article 11(k) of Schedule II of the Court-fees Act is not attracted and ad valorem court-fee under Schedule 1 is, therefore, not

payable.

16. It has been so held by Paul, J. in a decision reported in P. Natarajan v. R. Parthasarathy and others 1973 T.L.N.J. 338.

As per R. 58 of the O. XXV of the Original Side Rules, since the petitioner desired to prove the Will in solemn form, the petition has been

registered as a suit with the petitioner as the plaintiff and the respondent as the defendants. The question is whether, since the petition has been so

converted into a suit, ad valorem court-fee has to be paid under the proviso to sub-cl. (2) to Art. 11(k)(ii)(2) of the Schedule II of the Madras

Court-fees and Suits Valuation Act. Under Art. 11 (k) (ii), for an application for probate or letters of administration not falling under clause (1) the

fee payable is 75 np. if the value of the estate does not exceed Rs. 1000/- and it is Rs. 5/- if the value exceeds Rs. 1000/-. In this case, since the

value of the estate has exceeded Rs. 1000 court-fee of Rs. 5 has been paid.

But the proviso to sub-cl. (2) of Art. 11(k) (ii) of Schedule II of the Madras Court-fees and Suits Valuation Act does not mention the case of a

petitioner for probate or letters of administration with a will annexed desiring to prove the will in solemn form. It applies only to a case where a

caveat is entered. By analogy, the proviso cannot be extended to cover a case

coming under R. 58 O. XXV of the Original Side Rules which applies to cases where the petitioner applying for probate or letters of administration desires to prove the will in solemn form. For the proviso to apply, there are two conditions to be fulfilled viz.. that a caveat is entered and as a result thereof the application is registered as a suit. Now in this case, no caveat has been entered but the petitioner merely wants to prove the will in solemn form and because of which the petition has to be registered as a suit and the court does not think that in the absence of any specific provisions even in such a case the proviso to sub-el. (2) referred to above would apply. The petitioner cannot be called upon to pay ad valorem court-fees merely on the ground that by reason of the petitioner desiring to prove the will in solemn form the proceeding has become a contentious one and as such the ad valorem court-fee should be paid as in the case of a caveat being entered. U/R. 57 of O. XXV of the Original Side Rules, exemption is granted from liability to pay the costs of the petitioner when the caveator merely insists upon the will being proved in solemn form of law and only intends to cross-examine the witness produced in support of the will. In this case the petitioner himself chooses to prove the will in solemn form so that all interested persons may come in watch and participate in the proceedings when he can as well apply for probate on proving the will in common form to avoid contest. If the proviso to clause (2) is extended to cases where a petitioner applying for probate or letters of administration with a will annexed wants to prove the will in the solemn form, it would encourage such persons to apply for probate on proving the will in the common form and avoid any contest in order to avoid payment of ad valorem court-fee. It is perhaps this aspect that has lead to no provision being made for the payment of ad valorem court-fee in cases coming u/R. 58 of O. XXV of the Original Side Rules. In these circumstances, the court is of the opinion that the petitioner need not pay ad valorem court-fee under the proviso to sub-cl. (2) of Art. 11(k)(ii) of Schedule II of the Court-fees and Suits Valuation Act.

The above decision of Paul, J. is cited with approval by the Division Bench in 1988 (2) Law Weekly 181 cited supra. However, if a caveat is entered and the proceedings are numbered and registered as a suit, there is no gainsaying that the Proviso to Article 11 (k) is attracted and the ad

valorem court-fee on the market value of the estate becomes payable. The petitioner becomes the plaintiff and the caveator, the defendant. On a

plain reading of these provisions and their necessary intend-ment, it is not possible to take a different view as contended for on behalf of the

petitioner plaintiff. The difference between a suit and other proceeding is well known, though the expression "proceeding" will include a suit.

17. It will be seen that "action" includes any matter or other proceeding requiring to be tried, and action and suit are to be included in the still wider

term "cause". The old distinction between actions at law and suits in equity is now rendered obsolete. The term "proceeding" is frequently used to

denote a step in an action. The Evidence Act, Section 5, provides for evidence to be taken in any suit or proceeding. It is not unoften in our system

that a suit is converted into a petition and a petition is converted into a suit.

18. Mr. Radhakrishnan submits referring to Order IV Rule 1 of Original Side Rules, that a suit shall be instituted by presenting to the Registrar a

plaint in form No. 5 of Appendix II to the Rules, containing particulars prescribed by the Code. However, the proceedings for the Probate is

commenced by petition u/s 222 read with Section 276 of the Succession Act and shall be in form No. 55 of the Original Side Rules (Order XXV

Rule 4 Original Side Rules). The two forms are materially different. Form No. 55 does not contain the particulars mentioned in Order VII Rule 1,

C.P.C. such as, in particular

1) The particulars of the defendant.

2) Facts constituting cause of action.

3) Statement of the value of the subject matter of the suit for the purpose of jurisdiction and court-fees.

19. The petition filed u/s 222 read with Section 276 of the Succession Act for Probate is not a suit in the light of Order 1, Rule 4 (17) of the

Original Side Rules, which reads as follows :--

"Suit" means all proceedings commenced by the filing of a plaint.

The Original Side Rules defines the word "suit". There is no definition of suit either in C.P.C. or in the General Clauses Act or in the Tamil Nadu

Court-fees and Suits Valuation Act. According to the learned counsel for the plaintiff when the legislature uses an expression well recognised in

Judicial parlance, the legislature should be taken to have used the expression in the accepted legal sense the nomenclature notwithstanding. In this

context the learned counsel for the plaintiff invites my attention to the decision reported in *Diwan Bros. Vs. Central Bank of India, Bombay and*

Others, in which the Supreme Court held as follows at page SC 1514 of AIR 1976 :--

A mere description of the decision of the Tribunal as a decree does not make it a decree within the meaning of the Court-fees Act. The term

decree"" appears to have been used by the Legislature to convey a sense of finality regarding the decision of the Tribunal more particularly since

the adjudication of the claim, but for the Act, would have been by a Civil Court and then it would have been a ""decree"".

In that case the meaning of the expression ""Decree"" used in Displaced Persons (Debt Adjustment) Act came in for consideration and it was held

the word ""Decree"" used in the Court-fees Act must be taken to mean as having the same meaning as the word ""Decree"" in C.P.C. The word

Decree"" in C.P.C. means a 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. Thus according to Mr. Radhakrishnan, the ""Decree"", therefore must

be passed by a Civil Court in a Civil Suit and must contain adjudication of rights between the parties thereto.

20. Learned counsel for the plaintiff next relied on a decision reported in *Indrajitsinghji Vijaysinghji Vs. Rajendrasinghji Vijaysinghji*, . A very

interesting question as to the rights of an ex-ruler arises in that Appeal. The appellant before the Bombay High Court, is the third son of the late

Maharaja of Rajpipla and the respondent is his eldest son. The appellant filed a petition for letters of administration to the State of the late

Maharaja of Rajpipla with the will annexed. Citations were served amongst others upon the respondent. The respondent filed a caveat and filed an

affidavit in support of that caveat and under the rules of the High Court, the petition was converted into a suit and a summons in the suit was served

upon the respondent, and when the suit came up for hearing before Desai, J. the respondent raised a contention that the suit was not maintainable

in the absence of a consent of the Central Government by reason of the provisions of Section 87B of the Civil Procedure Code. Desai J. upheld

that contention and dismissed the suit. Against which the above appeal was filed.

21. Section 86 gave certain immunity to Rulers of a Foreign State and that immunity was that he could not be sued in any Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by the Secretary to that Government. This section applied to Rulers of all Foreign States and before 1947 it also applied naturally to Rulers of Indian States which were looked upon as foreign States. After 1947 when the Indian States merged with the Union of India a special section was enacted to preserve certain rights which Rulers of Indian States had enjoyed & the section that was enacted was Section 87B which was in the following terms:

The provisions of S. 85 and of sub-ss. (I) and (3) of S. 86 shall apply in relation to the Rulers of any former Indian State as they apply in relation to the Ruler of a foreign State.

The Bench was called upon to consider what is the immunity which the C.P.C. confers upon the Ruler of a foreign State u/s 86(1), C.P.C. It was contended by the counsel for the respondent that even assuming Section 86 only applied to suits and as no consent has been taken, the respondent was right in contending that the appellant's suit must fail on that ground. Referring to the Bombay High Court Rules, the Bench held as follows :

It is true that the petitioner does not get this relief "ex parte". Both the Succession Act and the High Court Rules provide that notice must be given to the next of kin, and when notice is given it is open to any next of kin to file what is known as a caveat and also to file an affidavit in support of a caveat. It is at that stage that the proceedings become what is known as contentious, and when they become contentious they are treated as a suit, they are numbered as a suit and the petitioner is described as the plaintiff and the caveator is described as the defendant.

We are concerned here with the High Court Rules, and R. 689 deals with a caveat, R. 690 with the filing of an affidavit, and R. 692 which is the relevant rule, provides that :

Upon the affidavit in support of the caveat being filed, the petitioner for probate or letters of administration shall be called upon by notice to take out a summons, and the proceedings shall be numbered as a suit in which the petitioner shall be the plaintiff and the caveator shall be the defendant.

The procedure in such a suit shall, as nearly as may be, be according to the provisions of the Code of Civil Procedure.

Referring to the above Rule and Rule 665 which makes notice to the next of kin obligatory, and the corresponding section of the Succession Act.

Section 235 which also makes the issue of citation to the next of kin obligatory before the issue of letters of administration with the will annexed

and Section 268 which provides for a proceeding of the Court of the District Judge in relation to the granting of probate and letters of

administration. Hence it was argued that whatever the nature of the proceedings may be when they were first instituted at certain stage they

become a suit and Section 86 applies and if there is no consent taken of the Central Government the suit cannot be maintained against the

defendants if he is a ruler of a former Indian State. Rejecting the said contention the Bench observed that it was very difficult to accept the view

that these proceedings of a suit as contemplated u/s 26 by the presentation of a plaint and then obviously a petition for letters of administration with

the will annexed is not a plaint, and at no stage becomes a plaint as understood in Section 26 of the Code of Civil Procedure. The Bench held as

under :

What S. 86 requires is a suit instituted in the manner laid down in the Civil Procedure Code, not a proceeding which is treated as a suit by reason

of the provisions of some other law.

A suit can only be instituted as required by S. 26 by the presentation of a plaint, and obviously a petition for letters of administration with the will

annexed is not a plaint.

Merely because at a subsequent stage it has been converted into a suit under R. 692 of the Rules of the Bombay High Court, the petition does not

become a plaint as understood in S. 26 of the Civil P.C. Hence the proceedings for letters of administration are not a suit as contemplated by S.

86.

Regulating proceedings as contemplated by S. 268, Succession Act, does not include conferring rights and imposing disabilities, and what S. 268

does is nothing more than S. 141, Civil P.C. It only makes applicable the procedural provisions of the CPC to the proceedings instituted in a civil

Court under the Succession Act in relation to the granting of probate and letters

of administration.

Hence, S. 86, Civil P.C., which deals with substantive rights, is not made applicable to proceedings for letters of administration by virtue of S. 268,

Succession Act.

According to Mr. Radhakrishnan, Section 268 of the Indian Succession Act, also provides that the proceedings of the Court shall be regulated, so

far as the circumstances of the case permit, by the Code of Civil Procedure. The O.S. Rules, High Court does not exclude S. 268 of the Indian

Succession Act not does it exclude the operation of S. 295.

22. In my view, the decision cited above reported in *Indrajitsinghji Vijaysinghji Vs. Rajendrasinghji Vijaysinghji*, has no relevance. There the third

son of the late Maharaja of Rajpipla filed a petition for letters of administration to the State of the late Maharaja of Rajpipla with the Will annexed.

The eldest son of the late Maharaja of Rajpipla filed a caveat and filed an affidavit in support of that caveat and under the rules of the High Court,

the petition was converted into a suit. Rule 692 of Bombay High Court Rules which provides that upon the affidavit in support of the caveat being

filed, the proceedings shall be numbered as a suit. The contention raised was that the suit was not maintainable in the absence of consent of the

Central Government by reason of the provisions of Section 87B of Civil P.C. This contention was upheld by the trial Judge who dismissed the suit.

In the appeal, it was held that the consent of the Central Government to institute the suit against the Ruler of a former Indian State is not applicable

to the case on hand in the absence of a specific statutory provision in that behalf and the appeal was therefore, allowed. (Vide paragraph 11 of the

judgment). In my view, this Rule is no authority for the contention that ad valorem court-fee is not payable. Under Order XXV, Rule 55 of Original

Side Rules, the contentious proceeding is required to be numbered and registered as a suit and the contesting parties become the plaintiff and the

defendant respectively. There is thus, no legal fiction or a deeming provision, but the O.P. itself becomes a suit and is dealt with tried and disposed

of as such.

23. Mr. Radhakrishnan, next relied on. the decision reported in *Nagappan v. Rama-swamy Chettiar* 1976 Tax Law 1275. The difference in the

legal consequences in using the expression like ""Deemed to be Land Revenue"" ,

""May be recovered as Land Revenue"", or ""As if it is a Land Revenue"" or ""In like manner as for recovery of arrears of Land Revenue"" are pointed out in the above judgment. In that case a Bench of our High Court considered the point whether the sale of an immovable property under the Central Sales Tax read with Tamil Nadu General Sales Tax Act and Tamil Nadu Revenue Recovery Act made the sale free of all encumbrances. u/s 42 of the Revenue Recovery Act the sale is free of all encumbrances. Section 26(6) of the Tamil Nadu General Sales Tax Act reads as follows:--

Any amount which a person is required to pay to the assessing authority or for which he is personally liable to the assessing authority under this section shall if it remains unpaid be a charge on the properties of the said person and may be recovered as if it were an arrear of land Revenue.

The words ""as if"" did not make the sale, it was held, a sale free of all encumbrances as under Revenue Recovery Act. The omission to create a legal fiction as in Order 33, Rule 8 C.P.C., in Order XXV Rule 60, Original Side Rules would show that the authority did not want to treat the petition u/s 222 as a plaint for all purposes. According to the learned counsel for the plaintiff the scope of a legal fiction is really too wide and the expression ""As if"" cannot be treated as a legal fiction, which commands to treat as ""Real"" something which is not. On this aspect the learned counsel for the plaintiff referred to a decision reported in *The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others*, in which the Supreme Court held as follows :

If you are bidden to treat as imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine, as real the consequences and incidents which, if the putative, state of affairs had in fact existed, must inevitably have flowed from accompanied it..... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle what it comes to the inevitable, corollaries of that state of affairs.

Equally so, the petition filed for probate under Sections 222 and 276 of Indian Succession Act does not become a plaint either as provided in Order IV of the Original Side Rules or within the meaning of the Civil P.C. by reason of Order XXV Rule 60 which expressly provides only a

limited field for its operation. He also refers to another decision of our High Court reported in Jayalakshmi v. S. Krishnaswamy 1990 M L.W. 337

in which our High Court held as follows :--

Para-17 : In an ""Action"", which ""expression"" shall include suit, a right is asserted and denied. There is a controversy between the parties in respect

of mutual rights. But in Probate proceedings no relief is claimed against the defendant personally. It only determines whether the plaintiff can be

recognised by force of the Will as one to perform the duty of an Executor in pursuance of the Will. In the above case, it was held that the

Application for probate was not for the enforcement of a right and as such Art. 137 of Limitation Act did not apply.

It is therefore, submitted that if the proceeding is not an application to enforce a right, it cannot much less be a suit, and that Order XXV Rule 55,

Original Side Rules, cannot be read as referring to suit in substance but only in form.

24. In my view, the reference to 1976 Tax Law Reporter The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others, Madras Law

Weekly, 337 are misleading. In my opinion, the above judgments are not applicable to the facts of this case. The reference to 1976 Tax Law 1275

and the provision of the Revenue Recovery Act and the Tamil Nadu General Sales Tax Act, has therefore, no relevance, for the reasons stated

supra. There is no legal fiction and in that view The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others, , has no application since

the petition itself becomes a plaint and the petitioner and the caveator become the plaintiff and the defendant respectively. (1990) ILW 337, has no

relevance to the present case. It is held that the proceeding filed for grant of probate or letters of administration is not an action in law and hence it

is very difficult to construe the proceeding for grant of probate or letters of administration as an application coming within the meaning of an

application under Article 137 of the Limitation Act. No question of limitation arises in the present case.

25. It is beneficial to refer to certain provisions in the CPC before construing the rival submission made by the respective learned counsel.

Code of Civil Procedure, 1908. Section 2(2) defines a "decree" as meaning the formal expression of adjudication which conclusively determines

the rights of parties with regard to all or any of the matters in controversy in the suit, and includes the rejection of a plaint and the determination of any question within Section 144.....

Section 2(14) defines an "order" as meaning the formal expression of any decision of a civil court which is not a decree.

Section 9 provides for the trial of all suits of a civil nature by the courts except those whose cognisance is expressly or impliedly barred.

Section 26 deals with institution of suits, and reads thus:

Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

The distinction between Section 26, C.P.C. and Order II Rule 1 O. S. Rules does not make any difference in principle, since Order XXV Rule 55

of Original Side Rules specifically provides for the proceedings to be numbered and registered as a suit upon the affidavit in support of the caveat

being filed, and this position is reiterated in Rules 60 and 62 of Order II of Original Side Rules referred to above.

Part II of the Code deals with Execution proceedings. Section 36 provides that the provisions of the Code relating to execution of the decrees will,

so far as possible, be deemed to apply to execution of orders as well.

Order XXI of the Code deals with execution of decrees.

Sections 75 to 78, in Part IV, deal with incidental proceedings like Commissions and letters of request.

Order XXVI provides for appointment of Commissions in cases referred to in Section 75.

Part IV deals with suits in particular cases, like suits against Government by aliens and foreign States.

Sections 90 to 92 in Part V refer to special proceedings relating to stating of the case for the opinion of the Court, public nuisances and public trusts.

Sections 94 and 95 in Part IV deal with supplemental proceedings such as arrest, furnishing of security, grant of injunction, appointment of receiver, and other interlocutory orders.

Orders XXXIX and XL deal with Injunction and Receiver and provisions are made in Order XXI for arrest and furnishing of security.

Section 96 deals with appeals against original decrees (Order XLI). Section 100 deals with appeals from appellate decrees (Order XLII). Section

104 deals with appeals from orders (Order XLIII).

Part X of the Code deals with framing of Rules and their amendment and for amendment of Orders in First Schedule by individual High Courts.

Section 141 of the Code is as follows:--

The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of

civil jurisdiction.

Explanation :-- In this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under

Art, 226 of the Constitution.

This Section would cover all proceedings such as execution proceedings, incidental proceedings, special proceedings and supplemental

proceedings, referred to above.

Order XXI, R.58 deals with claim proceedings. Sub-rule (2) bars separate suits in contentious matters and sub-rule (5) enables filing of suits when

the claim or objection is refused to be entertained by the Court. Sub-rule (4) provides that when a claim or objection has been adjudicated upon,

the order made thereon shall have the same force and be subjected to the same conditions as to appeal or otherwise as if it were a decree.

26. It will be seen that all questions relating to a claim petition arising between the parties to a proceeding or their representatives have to be

determined by the Court dealing with the claim or objection and a separate suit is barred, and the order made on the claim or objection has the

force of a decree and is treated as such for purposes of an appeal. This provision makes it clear that a claim proceeding, which is instituted

otherwise than by a plaint, has to be dealt with and disposed of as a suit and an order made therein is treated as a decree in a suit. This is

destructive of the argument of Mr. Radha-krishnan, learned counsel for the plaintiff, that a suit has necessarily to be instituted by the presentation of

a plaint and must necessarily culminate in a decree, as a precondition for payment of ad valorem court-fee under Schedule I of the Tamil Nadu

Court-fees and Suits Valuation Act.

27. In fact, S. 47 of the Code provides that all questions arising between the parties to a suit in which a decree was passed, or their representatives

and relating to execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree, and not by a separate suit.

Instances are not uncommon where separate suits filed by the parties or their representatives have been directed to be treated as petitions in the

execution side to be disposed of according to law. Sub-sec. (2) of S. 47, which makes it a specific provision therefor, has now been deleted by

Amending Act 104 of 1976. Sub-sec. (2) read as follows :--

The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and

may, if necessary, order payment of any additional court-fees.

Order XXXIII deals with suits by indigent persons. R. 1 provides for institution of suits by indigent persons and R. 8 prescribes the procedure if

the application is admitted.

Rule 8 reads as follows :--

Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit and the suit shall proceed in all

other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any court-fee or fees payable for service

of process in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

This is another instance where, on the application for suing in the indigent form being allowed, it is numbered and registered as a suit and the

application is deemed the plaint in the suit and is to be proceeded with in all respects as a suit.

Rule 11A provides for abatement of such a suit and R. 15 bars a subsequent applications of like nature. Adjudication in such a suit is a decree.

28. Thus, the law recognises proceedings initiated otherwise than by the presentation of a plaint, to be tried and disposed of as a suit and dealt with

as such. The proceeding under Order XXV, R. 55 of Original Side Rules is only one such instance.

29. Mr. T. R. Mani, Senior Advocate, has relied on a judgment reported in *Saradambal Vs. Seethalakshmi*, . In the said case the plaintiff in T.O.S.

No. 3 of 1959 on the file of the Original Side of our High Court applied for refund

of the additional court-fee levied from him when the application was converted into a suit, on the ground that since the caveat was withdrawn the purpose for which the higher court-fee was collected was not achieved. Ganpatia Pillai, J. held that there was no inherent power to order refund of court-fee in such cases and that the fact that the caveat was withdrawn and the matter was disposed of as uncontested would not affect the legality of otherwise of the court-fee levied in the first instance. The Proviso to Art. 11(k) provides for levy of ad valorem court-fee in contentious matters when the application is registered as a suit and the subsequent withdrawal of the contest would not enable the plaintiff to have refund of the Court-fee lawfully levied from him on the petition being numbered and registered as a suit after the caveat is entered. In my opinion, this decision is clear authority against the contention of the plaintiff.

30. In Flarence Chelliah Vs. Soundararaj Peter and Others, , Veeraswami, J. (as he then was) held as follows :--

The substance of S. 295 of the Succession Act is that when there is an opposition to an application for probate, it becomes contentious and it is therefore to be tried as a suit. But merely because a caveat is not entered or that it does not bear a stamp, it does not mean that the application for probate when registered as a suit need not bear one half of the scale of Court-fee prescribed under the Court-fee Act as laid down in Art. 11(k) of the Court-fees Act.

Caveat in probate proceedings is nothing more than a warning that the application is likely to become contentious and will have to be tried as a suit.

Learned Judge held that the substance of S. 295 of the Succession Act is that when there is an opposition to an application for probate, it becomes contentious and it has therefore, to be tried as a suit and merely because a caveat is not entered it does not mean that the application for probate, when registered as a suit, need not bear one half of the scale of court-fee prescribed. It is pertinent to note that the order was passed by the learned Judge in C.R.P. No. 2299 of 1964 which was filed against the order of District Court, Madurai, dated the 7th October, 1964 and made in O.P. No. 88 of 1962, directing an O.P. for probate to be registered as a suit and payment of court-fee to be made under the proviso to Art.

11(k). The argument was that the Proviso to Art. 11(k) will have no application as no caveat was filed and the applicant herself had impleaded a number of respondents whom three objected to the grant of probate on certain grounds. Learned Judge held that merely because a caveat is not entered, the application for probate, when registered as a suit, need not bear the higher court-fee though the matter becomes contentious. This decision has been specifically overruled by the Bench in *Philo Peter & Arputhasamy v. Divyanathan & Mariapu-shpam* 1988 (2) LW 181 (sic). At stated above, Paul, J. in *P. Natarajan v. R. Partha-sarathy* 1973 TLNJ 338, held that additional court-fee will not be payable in proceedings falling under O. XXV, R. 58 of the Original Side Rules. In a T.O.S. on the Original Side, Sengottuvelan, J. in *Kanni R. Krishna Iyer v. K. L. Krishnamachari*, 98 LW 80, has held that whenever there is contest, whether a caveat is entered or not, enhanced court-fee is payable according to the provisions of Art. 11(k). These above two rulings arising on the Original Side, have been distinguished by the Division Bench in *Phillo Peter & Arputhasamy v. Divyanathan and Maria-pushpam* 1988 (2) LW 181. It is argued by Mr. T. R. Mani, that cases falling under O. XXV, R. 55 of the Original Side Rules, ad valorem court-fee on the concessional scale would be payable under Art. 11(k), by reason of the specific language of the said Article, but payment of additional court-fee would not arise in a case falling under O. XXV, R. 58 of the Original Side Rules. The Division Bench, with respects, rightly refers to the difference in language between S. 295 of the Indian Succession Act and O. XXV, R. 55 of the Original Side Rules. In paragraphs 12 and 16 of the above judgment, Sivasubramaniam, J. speaking for the Bench has observed as follows (Para 12) :--

The question relating to the meaning of the words "'as nearly as may be'" used in S. 295 of the Indian Succession Act has to be understood in the context in which it is used in the Act. A persual of S. 295 of the Indian Succession Act, 1925, which corresponds to S. 261 of the Indian Succession Act of 1865. itself indicates that such a proceeding is not a suit. Since the Legislature did not treat the proceeding itself as a suit, it was found necessary in S. 295 of the Act to lay down that such proceeding should, as nearly as possible, take the form of a regular suit. In this connection, we have to give special meaning to the words "'as nearly as may be'" in the section. The use of the said words itself indicates that the

proceeding in question was not considered to be exactly the same as a suit. Again we have to notice that the fact that the section itself directs that such a proceeding shall take the form of a regular suit indicates that in substance it is not a suit. It is evident that the Legislature thought fit to make a distinction between a regular suit and the proceeding under S. 295 of the Act. As there is a basic difference in the two proceedings, it was found necessary to direct that one was to take the form of the other. It is also significant to note that such a direction regarding the change of the form is to be adopted only in cases where there is contention. Therefore, when there is no contention, the change of form contemplated in S. 295 of the Act does not come into operation and the proceedings fully retain their initial form. These principles have been elaborately considered by a Full Bench of the Allahabad High Court in *Mrs. Panzy Fernandas Vs. Mrs. M.F. Queorós and Others*, and the learned Judges came to the same conclusion. We are in respectful agreement with the reasonings of the learned Judges who decided the said case.".....

(Para 16)

In so far as the decisions rendered by Paul, J. in *R. Natarajan, v. N. Parthasarathy* 1973 TLNJ 338, and Sengottuvelan, J. in *Kanni R. Krishna Iyer, v. K. L. Krishnamachari* 98 LW 80 are concerned, they related to the proceedings in the Original Side of the High Court and as such it cannot be stated that they have taken a different view in so far as the proceedings taken before the Courts outside the original jurisdiction of the High Court. As regards the decision of Veeraswami, J., as he then was, in *Flarence Chelliah Vs. Soundararaj Peter and Others*, it is seen that the question was not raised in the form in which it is raised in these proceedings and, therefore, the learned Judge had no opportunity to consider the matter from this angle. The only question that was raised before the learned Judge was whether the filing of a caveat is a condition precedent for treating the proceedings as a suit. It was a case where the objectors were impleaded as respondents in the original petition itself, and, therefore it was contended that in the absence of a caveat being entered on their behalf, Court-fees was not payable. In dealing with this question, the learned Judge came to the conclusion that merely because there was no formal entry of a caveat, it does not mean that the proviso is none the less

applicable. Even if it is to be construed that the Judge has taken a different view, we hold that it is no longer a good law.

Thus, it is seen from the above, that even a proceeding initiated otherwise than by a plaint can well be registered or treated as a suit and the petition

or affidavit may be treated as the plaint. Likewise, under the Proviso to An. 11(k) of the Schedule II of the Court-fees Act, ad valorem court-fee is

made payable, not on the value of the subject-matter of the suit but on the market value of the estate, for the reasons mentioned supra.

31. Reference may also usefully be made to the following decisions cited by Mr. T. R. Mani, learned Senior Advocate for cavea-tors :--

a) Phanindra Chandra Vs. Nagendra Chandra and Others, in which a Division Bench of Calcutta High Court held as follows (at pp. 76 and 77) :--

A probate in common form is issued where the validity of the will is not contested or questioned. The executor proves the will either before the

District Judge or the District Delegate competent to grant it, in the absence of the parties interested, upon his oath or upon such further evidence as

may be required. Probate in solemn form is obtained by the executor in an action in which the persons prejudiced by it have been made parties and

the Court on hearing the evidence pronounces for the validity of the will.

b) Hukomal Lakhmichand v. Tarachand Topandas AIR 1938 Sind 37 in which Full Bench held as follows :--

An appeal filed against an order passed in a contentious proceeding is an appeal filed under O. 41, R. 1, and not under S. 104 of the Code.

Hence an appeal against an order in a contentious proceeding granting probate or letters of administration with the will annexed is incompetent

without the production of a copy of a formal decree prepared in terms of such order. Such contentious proceeding should be registered as a suit

and the form in which a decree should be prepared in such a proceeding should be that adopted by the Calcutta High Court.

c) In Mrs. Panzy Fernandas Vs. Mrs. M.F. Queoros and Others, Full Bench of Allahabad High Court held as follows :--

The decision of a Court in proceedings for letters of administration cannot be described as decree.

The original proceeding was not a suit, nor was the order passed therein a decree. The subject-matter in dispute in a proceeding relating to letters

of administration is the right of the grantee to represent the estate of the deceased. This right is incapable of valuation.

An order granting letters of administration should be considered to be an order having the force of a decree. An appeal from such an order would

not, therefore be governed by the provisions of Art. 11 of Sch. II of the Act. The Court-fees payable on a memorandum of appeal under S. 299

of the Indian Succession Act is Rs. 5, as laid down in Sch. II.

Article 1(e) (5) of the Court-fees Act.

The question before the Full Bench related to the amount of court-fee payable on a memorandum of appeal under S. 299 of the Succession Act,

arising out of a petition for letters of administration filed before the District Court, Lucknow, and it was held that under S. 295 of the Succession

Act, the application of the CPC is limited to the procedure to be followed in the course of the proceedings and does not extend to the matter of

court-fees payable under the Act on a petition before the proceedings start. This Full Bench decision is relied on by a Division Bench of our High

Court in 1988(2) LW 181 (cited supra). In my view, this ruling will have no application to a proceeding under O. XXV, R. 55, Original Side

Rules, as pointed out by the Bench in 1988 (2) LW 181.

32. AIR 1984 Cal 34, it is held in the case of an application for letters of administration simpliciter, that the Court is not called upon to decide any

question of title to property as in the case of an application for probate or letters of administration with a copy of the will annexed. This is based on

sound principles. Once the Will is probated, the terms of the Will will govern the title to property. It is therefore not correct to say that no relief is

sought against a defendant in a T.O.S. It is also not correct on the part of the counsel for the plaintiff, to say that no decree is passed in a T.O.S. as

in a non-contested matter. The practice on the Original Side is to pass a decree in terms of the judgment in the T.O.S. and in addition, under O.

XXV, R. 63. O.S. Rules, if the Court directs the grant of probate or letters of administration, the Registrar will act in accordance with the Rules

relating to non-contentious proceedings in the matter of issuing the probate or letters of administration. But for this provision, only a decree will be

issued as in a suit, when the matter becomes contentious and probate or letters of administration would not be granted. Thus, the special provision

is made with a purpose. In *Bai Zabu Khima Vs. Amardas Balakdas*, P. N. Bhagwati, J. held as follows :--

It is elementary that in a suit evidence of witnesses must be taken viva voce and affidavits cannot take the place of oral evidence.

In the circumstances, the contention of the learned counsel for the plaintiff that unless the proceeding is commenced by the institution of a plaint and culminates in a decree it cannot be treated as a suit requiring payment of ad valorem court-fee is unsustainable.

33. Learned counsel for the plaintiff next relied on a decision reported in *Balai Lall Banerjee and Others Vs. Debaki Kumar Ganguly and Others*,

in which the Calcutta High Court held that proceedings is treated as a suit only for purpose of classification, (at page 19 of AIR):--

A proceedings for grant of Probate of Letters of Administration is not strictly a suit though in some cases where the grant is opposed it is deemed

as such. That 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, a formal decree does not seem to be required

to be drawn up following an order of grant and the failure to supply a copy of a decree along with the Memorandum of Appeal cannot render the

appeal itself incompetent. What follows from the order is the grant in the form set out in Sch. 6 or 7 of the Act.

The counsel for the plaintiff relied on a decision reported in *Diwan Bros. Vs. Central Bank of India, Bombay and Others*, which in my opinion,

does not help the petitioner. Under O. 25, R. 55, Original Side Rules, the decree is passed by a Civil Court in a civil suit adjudicating the rights

between parties thereto. In *Balai Lall Banerjee and Others Vs. Debaki Kumar Ganguly and Others*, , it was held that an order in a proceeding for

grant of probate or letters of administration before the District Court is not a decree and a formal decree is not required to be drawn for the

purpose of appeal, and this decision has no application to the case on hand falling under O. XXV, R. 55, Original Side Rules, as pointed out by

the Bench in 1988 (1) LW 181.

34. Reference to Art. 4 of Schedule I of the Court-fees Act is, again, misleading, since ad valorem court-fee is made payable in a memorandum of

appeal against an order itself. Arts. 1 and 4 of Schedule T of the Court-fees Act will have to be read in the light of the Proviso to Art. 11(k) of

Schedule II. The submission that the words, "numbered and registered as a suit" in O. XXV, R. 55, Original Side Rules, should be taken to have

the same meaning as in S. 295 of the Succession Act, is without substance. As stated above, under the Original Side Rules, a contentious petition

becomes a suit while, under S. 295 of the Succession Act, it is to be treated, to the extent possible, as a suit. The provision of O. XXV, R. 55,

Original Side Rules, cannot be challenged as being inconsistent with S. 295, Succession Act. The Original Side Rules are framed, not under the

Indian Succession Act simpliciter, but under several Enactments set out in Appendix I including the Constitution of India. The contention of

inconsistency between S. 295, Succession Act and O. XXV, R. 55, Original Side Rules, is therefore, unsustainable. It is equally wrong to say that

the character of a proceeding should be determined at the commencement, and not a later stage, and this submission is contrary to the specific

provision in the CPC and other Enactments which provide for conversion of one proceeding as another.

35. According to Mr. Radhakrishnan, the High Court has to follow the provisions contained in the Indian Succession Act, and the Rules shall be

not inconsistent with the provisions of Civil Procedure Code. According to him, Letters Patent does not exclude operation of S. 295 of the Indian

Succession Act.

36. Referring to a decision reported in *The Central Bank of India Vs. Their Workmen*, learned counsel for the plaintiff submits that the words

numbered and registered as a suit" is O. XXV, R. 55 of Original Side shall be taken taken to have the same meaning as in S. 295 of the Indian

Succession Act. According to the learned counsel for the plaintiff that the character of a proceeding is determined at its commencement, that is to

say, at the time of institution and not at a later stage when it is called as something else for a collateral purpose (O. XXV, R. 60 of Original Side

Rules) is to be examined in the light of the definition of suit as defined by O. 1, R. 4(17) of the Original Side Rules, which is extracted above.

According the learned counsel for the plaintiff it is treated as plaint even as per R. 60 only for a limited purpose. At no stage right or interest of

parties is involved when the proceeding becomes contentious. Adjudication of rights between the parties is the soul of a suit proceeding. The

contentious proceeding does not culminate either in a decree. It is further argued at no stage there is conversion of petition to a suit. The meaning of

the word "convert" is -- "Apply to another purpose, change, transform", and for the aforesaid reasons, it is argued that there is no suit in the eye of

law for reasons of O. XXV, R.55 of Original Side Rules. According to the learned counsel unless there is a suit there is no liability to pay court-fee

under the proviso to Art. 11(k), Sch. 2 of the Tamil Nadu Court-fees and Suits Valuation Act, 1955. Even if it is a suit, it is not possible to

calculate the fees as required by the proviso. The proviso refers to Art. I, Sch. to the Court-fees Act which corresponds to Serial No. 1 Appendix

1-A to the High Court-fees Rules. The calculation of the court-fee is based on the "value of the subject matter in dispute" in the proceeding.

Therefore, to comply with the proviso to Art. 11(k) it is first necessary to find out what is the value of the subject matter in dispute in a contentious

proceeding. In other words, there is no basis for calculating court-fees. It is based on the value of the subject matter in dispute in the proceedings.

The value shown in the O.P. is only for the purpose of numbering the proceedings.

37. I am unable to countenance the arguments advanced by the learned counsel for the petitioner for the reasons stated supra. As stated above the

Original Side Rules are framed not under the Indian Succession Act simpliciter, but under several Enactments set out in Appendix I including the

Constitution of India. Learned counsel's contention of inconsistency between S. 295 of the Succession Act and O. XXV, R. 55, of the Original

Side Rules, is therefore, unsustainable. It is also equally wrong to say that the character of a proceeding should be determined at the

commencement, and not at a later stage. In my opinion, the submissions made by the learned counsel for the plaintiff is contrary to the specific

provision in the CPC and other Enactments and other provisions referred to supra which provide for conversion of the proceeding as another.

Under these circumstances, I am not inclined to accept the contention made by the learned counsel for the petitioner both on principle and on

authority, In my view, ad valorem court-fee is payable at half the scale prescribed on the plaint in the T.O.S.

38. In this case, I was called upon to decide only with regard to the question of payment of court-fees on conversion of this O.P. into a T.O.S.

39. In the result, ad valorem court-fee is payable at half the scale prescribed on the plaint in the T.O.S. Time for payment of balance court-fees

one month from today. On payment of court-fees, the matter will be placed before the Court for further hearing of the T.O.S. on merits.

40. Before parting with this case, I should not fail to express my deep sense of appreciation at the invaluable help I received from Mr.

Radhakrishnan of Messrs. D. Souza and Radhakrishnan, counsel for the petitioner/ plaintiff and Mr. T. R. Mani, Senior Advocate, appearing for

the Caveators/Defendants in projecting their respective contentions in a lucid and persuasive manner rendering my task at once easy and

exhilarating.

41. Order accordingly.