

(1954) 09 PAT CK 0004

In the Patna High Court

Case No : Letters Patent Appeal No. 12 of 1954

Gobind Lal Nakphopha

APPELLANT

Vs

The Administrator-General of Bihar and Others

RESPONDENT

Date of Decision : 15-09-1954

Acts Referred:

Administrator Generals Act, 1913 — Section 56, 6, 7, 8
Civil Procedure Code, 1908 (CPC) — Section 2(2)
Succession Act, 1925 — Section 247

Citation : AIR 1955 Patna 56 : (1955) 3 BLJR 60

Hon'ble Judges : Imam, C.J; Narayan, J

Bench : Division Bench

Advocate : Girish Nandan Sahay Sinha and J.P. Choudhury, for the Appellant;
Administrator General, Government Advocate and L.M. Sharma, for the
Respondent

Final Decision : Dismissed

Judgement

Narayan, J.—This is a Letters Patent Appeal against an order of Ramaswami J. passed in Testamentary Case No. 1 of 1954, by which he refused to recall his order dated 22-1-1954, under which order he had appointed the Administrator-General, Bihar, as administrator pendente lite. The facts are briefly as follows. One Janki Dal Gayawalin died on 7-9-1953 leaving certain valuable properties, and after her death Damodar Upadhyas and Dwarka Upadhyas, who will be referred to in this judgment as the Upadhyas, filed a suit in the Court of the Subordinate Judge of Gaya for declaration of their title with regard to the properties left by the deceased, and this suit was instituted against Gobind Lal Nakphopha and Shyam Lal Nakphopha who had propounded a will alleged to have been executed by Janki Das on 6-9-1953. The Upadhyas claimed to be nearest reversionary heirs of Janki Dai's husband, and a dispute arose between them and the Nakphophas. There was a proceeding u/s 144, Criminal P. C., in which the notice was ultimately made absolute against the Upadhyas.

On 13-1-1954 the Administrator-General of Bihar filed an application in this Court for the grant of letters of administration to him in respect of the estate, properties and credits of the late Janki Dai, and on 19-1-1954 the said Administrator-General moved this Court for the grant of ad interim letters of administration. On 22-1-1954, Ramaswami J. ordered that the application for the appointment of administrator pendente lite will be heard, and in the meantime he appointed the Administrator-General, Bihar, as administrator pendente lite u/s 247, Succession Act read with Section 7, Administrator-General's Act (Act 3 of 1913). On 39-1-1954 Gobind Lal Nakphopha appeared in this testamentary case and filed a rejoinder to the grant of letters of administration to the Administrator-General of Bihar. This rejoinder was disposed of by Ramaswami J. by the order under appeal, and he dismissed the application made by Gobind Lal Nakphopha.

2. Gobind Lal Nakphopha has, therefore, preferred this appeal, and the learned Advocate-General who has appeared before us on his behalf has contended that the appointment of the Administrator-General, Bihar, as administrator pendente lite in this case is illegal and that the provisions of the Administrator-General's Act do not justify any such appointment.

3. The learned Government Advocate who has appeared before us on behalf of the respondents has raised a preliminary objection, and it is this that no appeal under the Letters Patent lies against the order of Ramaswami J. refusing to recall his previous order appointing the Administrator-General, Bihar, as administrator pendente lite. I have given my most anxious consideration to the preliminary objection raised by the learned Government Advocate, and my opinion is that this objection must succeed. It is important to note that no appeal has been preferred against the order of Ramaswami J. dated 22-1-1954 appointing the Administrator-General as administrator pendente lite. The present appeal is directed against the order refusing to recall the order dated 22-1-1954 which was passed on 26-3-1954. This appeal has not been and could not be treated as an appeal against the order dated 22-1-1954, because thirty days from 22-1-1954 had already expired (vide Chapter VII, Rule 2, at page 31 of the Rules of this High Court).

The present appeal will, however, lie if it is to be regarded as an appeal under Clause 10 of the Letters Patent from a "judgment". What is to be regarded as a judgment within the meaning of the expression as it has been used in Clause 10 of the Letters Patent has been considered in -- several cases, and the weight of authority seems to be in favour of the opinion that an order of the nature passed by Ramaswami J. cannot be regarded as a judgment. As early as in the year 1872 it was ruled in -- "Justices of the Peace for the Town of Calcutta v. Oriental Gas Co. Ltd." 17 SWR 364 (A) that the order for the Issuing of a mandamus within the meaning of Clause 15 of the Letters Patent of 1865 of Calcutta was not a judgment against which an appeal could lie.

This question was considered at great length by a Full Bench of the Rangoon High Court in -- "Dayabhai Jiwandas v. Murugappa" AIR 1935 Rang 267 and I

respectfully agree with the view of Page C. J. that the Privy Council has held at least in three cases that the term "judgment" in the Letters Patent of the High Courts means "decree" and not "order". Undoubtedly, an appeal is the creature of a statute and does not exist in the nature of things. Unless there is an express enactment giving a right of appeal from any decision of a tribunal, no appeal can lie. As Page, C. J., pointed out:

"a final Judgment is a decree in a suit by which all the matters at issue therein are decided. A preliminary or interlocutory judgment is a decree in a suit by which the right to the relief claimed in the suit is decided, but under which further proceedings are necessary before the suit in its entirety can be determined."

All other decisions should be regarded as orders and cannot be regarded as judgments within the meaning of the expression as it has been used in the Letters Patent. The Privy Council clearly pointed out in -- AIR 1925 155 (Privy Council) that the term "judgment" in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense.

The word "decree" has been defined in Section 2(2), Civil P. C., and according to the Civil P. C., 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. Section 2(2) further says that "decree" shall be deemed to include the rejection of a plaint and the determination of any question within Section 47 or Section 144, but shall not include (a) any adjudication from which an appeal lies as an appeal from an order, or (b) any order of dismissal for default.

This definition appears to me to be important for our present purpose. And I respectfully agree with the view expressed by the Nagpur High Court in -- AIR 1947 159 (Nagpur) that the mere fact that a particular order is one from which an appeal lies as an appeal from an order does not make that order a decree which is the meaning attached to the word "judgment" as used in Clause 10 of the Letters Patent.

If this is how the word "decree" has been defined and if the Courts have consistently followed the dictum of their Lordships of the Judicial Committee that the word "judgment" in Clause 10 means a decree in civil cases, it will be impossible to regard the present order of Ramaswami, J. as a judgment within the meaning of the expression as it has been used in Clause 10 of the Letters Patent. There is a direct authority of our own High Court reported in -- Banwari Lal and Others Vs. Shukrullah and Others, to the effect that if one of the parties comes and asks the Judge to recall the order either under his power of review or under his inherent power and the Judge merely refuses to take any steps in the matter, such an order is not a "judgment" within the meaning of Clause 10 of the Letters Patent. Nakphopha may have appeared after Ramaswami J. had passed

his order dated 22-1-1954 and may have a genuine grievance that that order was passed in his absence and materially affects him, but still the order of Ramaswami J. refusing to recall the previous order cannot be regarded as a judgment within the meaning of the expression as it has been used in Clause 10 of the Letters Patent. The preliminary objection, therefore, succeeds, and this appeal is incompetent.

4. Though I have held that this appeal does not lie, I think, I ought to express my opinion even on the merits of this case, for it is possible that the case may be taken to the highest Court of the land. The decision of Ramaswami J. has been attacked substantially on the ground that because there is no section in the Administrator-General's Act under which the Administrator-General is competent to make an application for the grant of letters of administration in respect of the estate of exempted persons, and Ramaswami J. having himself held that an administrator pendente lite could not be appointed under the provisions of this Act, it was not open to him to make the appointment u/s 247 Succession Act. In order to appreciate the contentions it is necessary to refer to the following observations of Ramaswami J.:

"It is true that there is no section in the Administrator General's Act which expressly states that the Administrator-General is competent to make an application for the grant of letters of administration in respect of the estate of exempted persons. But the right of obtaining grant of letters of administration in such a case is given to the Administrator-General by Sections 6, 7 and 8 of the Act and as a matter of necessary implication the Administrator-General would have the right of making an application to the High Court for that purpose.....

It is true that Section 11, Administrator-General's Act, does not apply to this case and the High Court has no power to appoint an administrator "pendente lite" under the provisions of this section. But apart from the provisions of Section 11 the High Court has jurisdiction to appoint an administrator "pendente lite" under the provisions of Section 247 Succession Act, which provides "Pending any suit touching the validity of the will of a deceased person or for obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court and shall act under its direction".

Neither party could place before us any authority in which the provisions of this Act might have been construed, except the decision of the Allahabad High Court which has been referred to in the judgment of Ramaswami J. Personally also I tried to search for authorities with regard to the provisions of this Act, but I could not lay my hands on any decision which may help us in construing the provisions of this Act. But after having examined and considered as carefully as I could the provisions of this Act, I have no hesitation in agreeing with the learned Government Advocate that this Act is not a complete Act so far as procedure is

concerned, and that even the Administrator-General has to follow the procedure laid down in the Succession Act.

That this Act did not intend to lay down any procedure independently of what is contained in the Succession Act would be clear if one examines the preamble to the Act. The Act is an Act to consolidate and amend the law relating to the office and the duties of the Administrator-General, and the preamble runs as follows:

"Whereas it is expedient to consolidate and amend the law relating to the office and duties of Administrator General; It is hereby enacted as follows."

part I of the Act contains definitions, and Part II lays down as to who can be appointed to the office of Administrator-General. Part III deals with the rights, powers, duties and liabilities of the Administrator-General, and Part IV deals with fees. Part V deals with the audit of the Administrator-General's accounts, and Part VI contains certain miscellaneous provisions.

The scheme of the Act to my mind leaves no room for doubt that it does not provide any special procedure which has to be adopted by the Administrator-General when he applies for the grant of probate or letters of administration. In fact Section 6 lays down that so far as regards the Administrator-General of any Division, the High Court shall be deemed to be a Court of competent jurisdiction for the purpose of granting probate or letters of administration under any law for the time being in force wheresoever within the Division the estate to be administered is situate. The words "under any law for the time being in force" are to be noted especially, and they unmistakably go to show that the High Court is competent to grant probate or letters of administration to the Administrator-General under any law for the time being in force. It cannot, therefore, be urged that for the sake of procedure we have not to take help from, the Succession Act.

The troublesome sections are no doubt Sections 9, 10 and 11. Section 9 refers to the estate of an un-exempted person, and according to the definition of "exempted person" as given in the Act, it means an Indian Christian, a Hindu, Muhammadan, Parsi or Buddhist. Section 10 refers to the estate of a person who has died leaving assets within the local limits of the ordinary original civil jurisdiction of the High Court at a Presidency town, and Section 11, which empowers the High Court to direct the Administrator-General to collect and to take possession of the assets of the deceased, is applicable whenever a person has died leaving assets within the local limits of the "ordinary original civil jurisdiction of the High Court". It is therefore that Uamaswami J. said that this Court has no power to appoint an administrator pendente lite under the provisions of this section.

But the question is whether Sections 6, 7 and 8 can apply in the case of an exempted person. Section 6, which has already been referred to by me, is in quite general terms, and it makes no distinction between an exempted person and an unexempted person. Section 7 appears to be very important, because it lays down that any letters of administration, which are granted after the

commencement of this Act by the High Court, shall be granted to the Administrator-General of the Division unless they are granted to the next-of-kin of the deceased. The expression "next-of-kin" has been explained in Section 2 (6) of the Act, and it includes a widower or a widow of a deceased person, or any other person who by law would be entitled to letters of administration in preference to a creditor or legatee of the deceased.

Section 218, Succession Act, lays down that if the deceased has died intestate "and was a Hindu, Mahammadan, Buddhist, Sikh or Jaina or an exempted person", administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate. Section 234 is to be found in the very chapter and part in which Section 218 occurs, and Section 234 is in these terms:

"When there is no executor and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly."

This section undoubtedly shows that if the next-of-kin declines, the letters of administration may be granted even to a creditor. In the Allahabad case, -- Mt. Ram Kali and Another Vs. Administrator-General, Allsop J., has said that if the provisions of Section 7 of the Act were not read to mean that letters of administration could be issued to the Administrator-General of the Division even in respect of the estate of an exempted person, then for such an estate no letters of administration could be issued except to next-of-kin and that would have been contrary to the provisions of Section 234, Succession Act. In the Letters Patent Appeal against the decision of Allsop J. their Lordships did not deliver any judgment and merely said that they were satisfied that the judgment of the learned Judge was perfectly correct.

The Allahabad case has been followed by Shearer J. as well as by Ramaswami J. in some other cases, and I see no reason to take any different view in this case. Sections 6 and 7 cannot be construed to refer only to unexempted person. These sections are independent of Sections 9, 10 and 11, and Section 8 is also independent of Sections 9, 10 and 11.

The wordings of Section 8 appear to me to be important, because this section lays down that the Administrator-General of the Division shall be deemed by all the Courts in the Division to have a right to letters of administration other than letters pendente lite in preference to that of (a) a creditor; or (b) a legatee other than a universal legatee; or (c) a friend of the deceased. It does contemplate the appointment of an administrator pendente lite, and the meaning which I am inclined to give to this section is that both in the case of an exempted person as

well as of an unexempted person the Administrator-General will have a right to letters of administration in preference to a creditor, a legatee other than a universal legatee, or a friend of the deceased.

The section means that while the Administrator-General will have a preference over these persons, he will not have preference over others, but it excludes the case of an administrator pendente lite. In other words, it creates no bar to and lays down no rule for the appointment of an administrator pendente lite, although it contemplates the appointment of an administrator pendente lite. It cannot reasonably be asserted that when it excludes from consideration the administration pendente lite, it does not contemplate that an administrator pendente lite may have to be appointed; the reasonable inference should rather be otherwise. And if it does contemplate the appointment of an administrator pendente lite, then for the appointment we shall have to look to the provisions of the Succession Act, there being a distinct section in the Succession Act sanctioning the appointment of an administrator pendente lite.

There is another important section in the Act, namely Section 14, which lays down that nothing in this Act shall be deemed to preclude the Administrator-General from applying to the Court for letters of administration in any case within the period of one month from the death of the deceased. Section 18 thinks of an executor or next-of-kin of the deceased, who has not been personally served with a citation or who has not had notice thereof in time to appear pursuant thereto. Certainly, there is no provision in this Act with regard to citation. It, therefore, seems manifest that this is not a complete Act, and it also seems to be quite clear that Sections 6, 7 and 8 will not apply only to unexempted persons.

The Act has no doubt consolidated the law relating to the office and duties of the Administrator-General, but the procedure contemplated by the Succession Act has still to be followed. If this is the position, then there is no reason why u/s 247 an administrator pendente lite should not be appointed. Though Nakphopha has not yet applied for the probate of the will, the Administrator-General has filed an application for the grant of letters of administration, and the application has to be considered on the merits. There is undoubtedly a scramble for possession between the Upadhyas and the Nakphophas, and the property is in the danger of being wasted or destroyed. Such being the position, the order of Ramaswami J., appointing the Administrator-General as the administrator pendente lite appears to me to be unassailable.

5. I have already held that the question for determination on merits does not really arise in this case, because this appeal is wholly incompetent. I should like to add that Section 56 of the Administrator-General's Act cannot give the order under appeal the effect of a decree. It is an order refusing to recall a previous order, and even the appointment of the administrator pendente lite is an order u/s 247 Succession Act.

6. In the result, therefore, I would dismiss this appeal, but, in the circumstances

of this case, without any costs.

Imam, C.J.

7. I agree.