

(1964) 10 MP CK 0016

In the Madhya Pradesh High Court

Case No : F.A. No"s. 45, 78 and 50 of 1954

Nandkishore

APPELLANT

Vs

Parwati Bai
 Shivnath Vs Laxmibai
 Nandkishore
Vs Parwati Bai

RESPONDENT

Date of Decision : 29-10-1964

Acts Referred:

Hindu Marriage Act, 1955 — Section 19, 28

Citation : (1967) LJ 712

Hon'ble Judges : V.R. Newaskar, J

Bench : Single Bench

Judgement

V.R. Newaskar, J.—Common question which the Taxing Officer has referred with reference to First Appeal No. 45 of 1964 Nandkishore v. Parwatibai, First Appeal No. 78 of 1964, Sobharam v. Anarbai and First Appeal No. 90 of 1964, Shivnath v. Laxmibai, is as to the amount of Court-fee needed for a memorandum of appeal against the decree arising out of a petition under the Hindu Marriage Act. On receipt of the reference counsel for the Appellants as well as the Government Advocate on behalf of the State were heard.

2. It is not disputed that the present appeals are not governed by the Court-fees (Madhya Pradesh Amendment) Act No. 3 of 1964 which came into force on 1-4-1964, Article 20-A whereof has made specific provision regarding petitions and memorandum of appeals in cases arising under the Hindu Marriage Act by requiring the same to be accompanied by fixed Court-fee of Rs. 10. These appeals, no doubt, have been filed subsequent to the coming into force of the aforesaid Act. But in view of the decision of this Court in Arjuna Govinda v. Amrita Keshiba, AIR 1956 Nag 281 as the petitions out of which these appeals arose had been filed before the aforesaid Act came into force that Act had no application to them and they will be governed by the law which was in force when the petitions under the Hindu Marriage Act had been initially filed.

3. Three different positions can be envisaged. Firstly- To treat it as an application

by way of appeal presented to the High Court. In that case Article 1 (f) of the 11 Schedule will apply and fixed Court-fee of Rs. 5 is payable; or Secondly-To treat it as an appeal not from a decree and consequently governed by Article 11 of schedule of II the Court fees Act. In that case Court-fee payable is Rs. 5.30 nP ; or Thirdly- To treat it as a memorandum of appeal in a suit where it is not possible to estimate at a money value the subject matter in dispute and which is not otherwise provided for. In that case Court fee payable would be Rs. 20 4. In order to determine which one of the three positions is appropriate and ought to govern the matter under consideration we shall have to take into consideration the material provisions of the Hindu Marriage Act, and the CPC having a bearing on the question. Sections 10, 11, 12 and 13 dealing with the subjects of judicial separation, void or voidable Marriages and divorce respectively lay down that a proceeding under either of them is to be commenced by means of a petition. But they also provide that the relief which the party seeking redress would get would take the form of a decree after a trial regulated by the CPC Code, 1908. Section 19 of the Hindu Marriage Act lays down-

Every petition under this Act shall be presented to the District Court within local limits of whose ordinary original civil jurisdiction the Marriage was solemnized or the husband and wife reside or last resided together.

Section 21 provides-

All proceedings under this Act shall be regulated as far as may be, by the Code of Civil Procedure, 1908.

Section 28 lays down-

All decrees and orders made by the Court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced, and may be appealed from under any law for the time being in force-

Provided that there shall be no appeal on the subject of costs only .

It is thus clear that the initiation of a proceeding under the Hindu Marriage Act either for judicial separation or for divorce etc. has to be by means of a petition. Can it be said that, for that reason, it cannot be called a suit? There is another reason suggested, apart from the one relating to the method of initiation of the proceeding. That reason is that by Section 28 of the Hindu Marriage Act the decrees and orders made in these proceedings "shall be enforced in like manner as decrees and orders of Court made in exercise of original civil jurisdiction are enforced". Therefore, it is said, it is only by a legal fiction introduced by Section 28 of the Hindu Marriage Act that the decrees and orders in proceedings under that Act acquire the character of enforceability and appealability which the decrees in ordinary civil suit possesses. Had such proceedings be suits there would be no occasion to introduce any such fiction.

5. It is no doubt true that the legislature by providing for initiation of a

proceeding by means of a petition has chosen to treat the document of initiation differently from a plaint. This is also clear from the terms of Section 20(2) of the Hindu Marriage Act which provides for verification of statements contained in a petition under that Act in the manner required by law for verification of plaints.

6. It is therefore clear that the petitions under the Act are not "plaints" as contemplated by the CPC Code. When the question of Court-fee with reference to such petitions arises it would be proper not to treat them as plaints in civil suits and Court-fee payable would be the same as for petitions.

7. Next question is, if the document with which the proceeding is initiated is not a plaint should the proceeding be taken as a suit. The word "suit" is not defined by the CPC Code. Section 26 of the CPC however lays down that every suit shall be instituted by the presentation of a plaint or in such manner as may be prescribed. The phrase "in such manner as may be prescribed" indicates that the initiation of the proceeding by means of document known as "plaint" is not a sine-qua non for making the proceeding a suit. A proceeding can become a suit even where the law provides for its initiation by means of a petition. This question came up for consideration before the Allahabad High Court in a case reported in *Balaram Singh v. Dudh Nath* AIR 1949 AC. 101, in connection with a petition under U.P. Agriculturists' Relief Act. Malik, C. J., delivering the judgment held that the above mentioned phrase in Section 26 is wide enough to include a petition under the U. P. Agriculturists' Relief Act which for that reason is a suit. There are other enactments such as the Arbitration Act, the Land Acquisition Act etc. under which the proceedings are initiated by means of an application and yet the proceeding partakes the character of a suit as between the parties to an arbitration agreement or an award or as between the claimants and the State or as between claimant inter se. But are there other reason apart from the nature of the document needed for the initiation of the proceeding for the proceeding not to have the status of a suit. The petition no doubt has to be verified as a plaint. The procedure as to trial is to be the same as of a suit and ultimately the decree or order passed in a proceeding under the Hindu Marriage Act results in a decree or order which is enforceable as a decree of a Court passed or made in exercise of its original civil jurisdiction and is appealable under the Code of Civil Procedure. It is held by the Bombay High Court in a case reported *Prithvirajsinhji Mansinghji Vs. Bai Shivprabhakumari*, , that the phrase in Section 28 of the Hindu Marriage Act "may be appealed from under any law for the time being in force" brings in the provisions of CPC relating to appeals.

8. If then a proceeding under the Hindu Marriage Act is liable to be initiated in accordance with the special provisions under the Act, by means of the application which has to be verified as a plaint, is to be tried in the same manner as any suit in exercise of Courts' original civil jurisdiction, and is ultimately to result in a decree which has to be appealed against under the Code of Civil Procedure, there does not appear to be. any reason for not calling the proceeding a suit more

especially where the term "suit" is not defined under the Act.

9. The Privy Council decision in *Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63, no doubt indicates that the word suit ordinarily means and apart from some context must be taken to mean a civil proceeding instituted by the presentation of a plaint. But their Lordships were cautious is not excluding the possibility of some other method specially provided by law for the institution of a suit as is indicated in Section 26 of the CPC Code.

10. It therefore seems that there is no legal impediment in calling the proceedings under the Hindu Marriage Act a suit though it may not be a suit referable to original civil jurisdiction. It can be a suit referable to special jurisdiction under a special statute. Section 28 of the Hindu Marriage Act by providing for a legal fiction for the enforceability and appealability may have done so to distinguish them from suits and decrees in exercise of Courts' original civil jurisdiction. But for that it cannot be said that the proceeding cannot be called a suit and the decrees will not acquire the characteristics and status of a decree in any civil suit.

11. One more reasoning in support of the view taken by me may be suggested. That is, that the decision finally adjudicates the rights of the parties so far as the Court dealing with the proceeding is concerned and is statutorily called a decree. In that case on the definition of the term decree given in Section 2(2) C. P. C. the proceeding becomes a suit.

12. Now out of the three possible positions set out above the second namely "to treat the memorandum of appeal as not being from a decree" is clearly not open because of specific provisions contained in various provisions of the Hindu Marriage Act which provide for passing a decree and especially Section 28 of the Act which provides for their appealability under the provisions of CPC barring one exception regarding order as to costs.

13. Now can it be said that the appellate proceeding is an application by way of appeal. The reason suggested for this is that the original proceeding is started on an application. We have already discussed that even where the original proceeding is started on an application the appellate proceeding does not necessarily take the form of an application by way of appeal. This is so more particularly where there is a decree and an appeal lies under the CPC against such a decree. In that case by the provisions of Order 41 Rule 1 C. P. C. "a memorandum of appeal" has to be presented and it is not enough to file an application, may be, way of an appeal. Article 1 (f) of the II Schedule of the Court Fees Act is consequently inapplicable. The terms "application by way of appeal" and "memorandum of appeal" are differently understood under the Court Fees Act and are not synonymous

14. The only remaining provision then is the one under Article 17 Clause (vi) of II Schedule of the Court Fees Act. That would not apply if a proceeding under the Hindu Marriage Act cannot be called a suit. We have already discussed that it can

be so called, because the application has to be verified as a plaint, tried by him same procedure and results in a decree which is appealable under the CPC Code. Absence of provision that it shall be registered as a suit is not sufficient to take it out of category of suits.

15. There are some cases which take a different view. We shall presently consider them.

16. In *Upadhy Thakur v. Persidh Singh* ILR 23 Cal. 723, a proceeding u/s 104(2) of the Bengal Tenancy Act was started as per Rules framed by the Government under the Act by means of a petition. On a decision being given in that proceeding, an appeal was filed, as provided by law. The question for consideration was whether for such an appeal advalorem Court-fee should be paid. It was held by the Full Bench of the Calcutta High Court that advalorem Court'' fee need not be paid in such a case as the proceeding is not a suit and all that Section 107 of the Act provide is that the decision shall have the force of a decree and does not say that it shall be a decree.

17. Thus this decision implies that where the proceedings is not a suit, there cannot be an assumption that the final adjudication of the rights of the parties thereto is a decree and where there is no statutory provision for calling such a decision a decree the appeal therefrom need not be stamped under Article I but is liable to stamped under Schedule II Article I Clause (b) (2) as an application by way of an appeal. The Full Bench also held that Article 17 Clause (vi) of Second Schedule was inapplicable as the proceeding was not a suit though it was liable to be dealt with as a suit.

18. The decision is clearly distinguishable as in the present case there is a statutory provision under the Hindu Marriage Act by which the decision has to take the form of a decree and it is not merely to be treated as a decree. By Order 41 Rule 1 C. P. C. which would apply to such an appeal against the decree, a memorandum of appeal is required to be presented. As regards the reason why the proceeding cannot be called a suit, one of the ground given is that no plaint is required to be presented for its commencement. As to this we have already shown by reference to provision for filing a suit that it is commenced either by filing a plaint or in such other manner as provided by law Since no decree was liable to be passed in such a proceeding, in that case there may be reason for not calling it a suit and in that view Article 17 Clause (vi) or Schedule II could be held to be rightly inapplicable.

19 In *In Re: G.R. Macfarland*, , it was held that though same proceedings might be started in applications, they could still be regarded as suits for the purpose of the enactments to which they relate provided it is especially provided therein and that in the absence such provision, any proceeding except the one started by presentation of a plaint will not be a suit and decree therein will not be a decree for the purpose of Section 96 I. P. C. Their Lordships in that case referred to the proceedings under the Arbitration Act and referred to Clause 20 (2) of the

Arbitration Act which provided for the registration of such a proceeding, though started on an application as a suit.

20. The question which confronted their Lordships in that case was whether the appeal have to be registered as regular appeals or civil miscellaneous appeals, which was principally an administrative question. The decision cannot be treated as an authority deciding any question of Court-fee.

21. The learned Judges in that case noted the cases of proceedings for the grant of probate and those under the Land Acquisition Act and held that those proceedings are called suits because in the case of proceedings for probate Section 295 of the Indian Succession Act provides that the proceedings of contested shall take, as nearly as may be, the form of a suit and in the case of proceedings under the Land Acquisition Act, Section 18 of that Act specially provided for an appeal as against a decree and by Section 26 the decree therein is specifically treated as a decree as defined in Section 2(2) C. P. C.

22. The learned Judges do not seem to have paid due weight to the phrase in Section 295 of the Indian Succession Act, "as nearly as may be" and to the provisions under Hindu Marriage Act which provide for passing of decrees which are decrees and are treated as those under the CPC for their enforcement and appealability.

23. The decision in *Antala Gope @ Antilal Gope Vs. Smt. Sarbo Gopain and Another*, is directly in point. In that case their Lordships of the Patna High Court held that a decree u/s 13 of the Hindu Marriage Act is liable to be stamped under Article II Schedule II. They refused to such decrees as falling within the definition contained in Section 2(2) of the CPC on the ground that Section 28 of the Hindu Marriage Act provided that such decrees shall be enforced in like manner as the decree of the Court made in the exercise of the original civil jurisdiction. The provisions as to decisions under the Provincial Insolvency Act and Guardian and Wards Act and appeals therefrom are taken as instances for the view taken by them that the decrees under the Hindu Marriage Act cannot be regarded as decrees u/s 2(2) C. P. C.

24. I am unable to agree with the view taken in that case. Article II of Schedule II specifically provides for a memorandum of appeal when the appeal is not from a decree. When under the Hindu Marriage Act there is a specific provision for passing of a decree how are we to say that the appeal is not from a decree. There was no reason to introduce any limitations upon the phrase "decree" or order having the force of decree as used in Article 11 of Schedule II by taking the same to mean, a decree or order having the force of a decree, passed in a proceeding commenced by a plaint. When the appeal is from a decree, memorandum of such an appeal cannot fall under Article 11 of Schedule II by the very terms of the provision. The second reasoning as to liability of the initial petition being stamped with Court-fee for a petition, is really not relevant for considering the applicability of Article II of Schedule II

25. This leaves for consideration the Full Bench decision of the Allahabad High Court reported in *P. Fernanda v. M. F. Queoros* 1962 ALJ 115,. The judgment of the Full Bench was delivered by Beg, J. The point there considered was not the one which is under consideration in the present case but it was whether the decision in a proceeding for the grant of letters of administration is a decree. It was held that although such a decision has the force of a decree yet it is not a decree and as such Article 11 of II Schedule would apply.

26. Even in that case the Full Bench did not accept the contention advanced in that case that the term "decree" in Article II of Schedule of the Court fees Act has not to be construed by reference to its definition contained in Section 2(2) of the CPC Code, 1908, but according to the learned Judges that result would follow by reference to the provisions of CPC which were in force at the time of Indian Court Fees Act, 1870 came into force (1st April 1870). The learned Judges were not prepared to call the proceeding for the grant of letters of administration a suit because it is not commenced by means of a plaint. We have already noticed that it is not an indispensable condition for a proceeding to become a suit that it should be commenced by presentation of a plaint. Section 26 C. P. C. indicates that it can commence even otherwise if so provided by law. Moreover there may have been justification for the learned Judge not to call an order in a proceeding for the grant of letters of administration a "decree" in view of the provisions contained in Section 299 of the Indian Succession Act which provides for appeals. In that section the decision which is appealable is described as an order. While considering the the second aspect of the question whether such an order can have the force of a decree the learned Judge drew distinction between the order being executable as a decree and the order having the force of a decree. While dealing with this matter he observed-

If there is an express statutory provision that certain orders would have the force of a decree or would be deemed to be decrees, then such orders are raised to the level of a decree not by virtue of the fact that they possess the inherent strength of a decree, but because the statute itself has directed that it should be so. Such orders, therefore, are considered as decrees not because the orders themselves have the force of a decree, but because of the force of the statute which has dictated that orders of the particular type mentioned therein would be tantamount to decrees irrespective of the question as to whether the said orders themselves possess the characteristics of a decree or not.

27. These observations fully justify the view taken by me above that since under the Hindu Marriage Act decisions under Sections 10, 11, 12 and 13 have to take the form of decrees nothing more is needed to make them decrees. It is not necessary for the purpose of the present case to examine further reasoning of the learned Judge on the basis of which he came to the conclusion that the order granting letters of administration has the force of a decree.

28. The third aspect which he considered was as to the applicability of Article 17 Schedule II in force in Uttar Pradesh which is akin to Article 17 of Schedule II in

the Indian Court-fees Act but for the actual fees provided therein. He held that use of the word "suit" in that provision excludes the applicability of that article to the proceedings for the grant of letters of administration. In that connection he emphasised the words "the proceeding shall take, as nearly as may be, the form of a regular suit" in Section 295 of the Indian Succession Act and held that the said phrase indicated that the proceeding is not a suit. In the present case the provision that the proceeding under the Hindu Marriage Act shall be regulated as far as may be by the Code of Civil Procedure, 1908, is not a provision similarly worded as Section 295 of the Indian Succession Act.

29. I may at the end refer to the decision reported in *Abdul Majid v. Abdul Sattar* 27 MPLC 412 : AIR 1911 Nag 313. Question which came up for consideration in that case was whether in an appeal against an order u/s 144 C. P. C. Advalorem Court fees are payable? It was held by the Division Bench, they are so payable because the appeal is against an order-which is a decree and does not fall u/s 47 C.P.C.

30. I would therefore hold that for appeals against decrees under the Hindu Marriage Act the Court-fees payable are those provided by Article 17 Clause (vi) of II Schedule, of the Court fees Act.