

in this case the present application was made after the suit had been actually filed and summons served on the defendant. I also agree that in this case there is no decision in the Court below and that the case does not come within section 115 of the Civil Procedure Code.

O. M.

Rule discharged.

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THAKUR.

CIVIL RULE.

Before Coxe and D. Chatterjee JJ.

BAIJNATH PROSAD SINGH

v.

SHAM SUNDAR KUAR.*

1913
Nov. 25.

Pleader's Fee—Practice—Costs, scale of—Taxation — Probate proceedings — Probate and Administration Act (V of 1881), s. 83—General Rules and Circular Orders of the High Court, Chapter VI, Rules 36 (a) and 42 (a), and Chapter X, Rule 26.

In a contested probate proceeding in which letters of administration and costs are granted, the pleader's fee can only be assessed under Chapter VI, Rule 42 (a) of the General Rules and Circular Orders of the High Court. Rule 36 (a), Chapter VI of the Rules and Orders has no application.

RULE obtained by Baijnath Prosad Singh and another the judgment-debtors, objectors.

In a certain probate proceeding in the Court of the District Judge of Muzaffarpore the opposite party, Musammatt Sham Sundar Kuar, applied for grant of letters of administration. Against this the petitioners filed their objection. On the 10th December 1912, their objection was rejected and the District Judge

* Civil Rule No. 928 of 1913, against the order of R. Sheepshanks, District Judge of Muzaffarpore, dated June 9, 1913.

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ordered grant of letters of administration with costs. In the decree the amount of costs was mentioned as Rs. 832, including Rs. 777 as pleader's fee. On the 11th April 1913, the petitioners applied for amendment of this decree on the ground that the amount of costs decreed was in contravention of the provisions of Rule 42 (a), Chapter VI of the General Rules and Circular Orders of the High Court, under which the sum of Rs. 80 was the maximum fee payable to pleaders appearing in the Court of a Judge. On the 9th June 1913, this application was rejected on the ground that the probate proceeding should be regarded as a suit, for the purpose of awarding pleaders' fees. The opposite party then applied for execution of the decree passed in the probate proceeding and the petitioners again put in their objection to the execution of the decree, but their objection was disallowed and the execution was directed to proceed. The petitioners, thereupon, moved the High Court and obtained this rule.

Babu D. L. Kastgir, for the petitioners. This was a proceeding for letters of administration and did not fall within the description of a "regular suit" for the purpose of taxation of the pleader's fee. For such purpose it must be viewed as a "miscellaneous proceeding" and the provisions of Chapter VI, Rule 42 (a) of the General Rules and Circular Orders of the High Court were applicable to it. I rely on the case of *Sundrabai Saheb v. The Collector of Belgaum* (1).

Babu Buldeo Narain Singh, for the opposite party. As soon as this proceeding for letters of administration was contested by the petitioners it became a "regular suit" and ceased to be a "miscellaneous proceeding." This contention of mine is

supported by the Probate and Administration Act and by Chapter X, Rule 26 of the General Rules and Circular Orders of the High Court. Under section 83 of that Act probate cases must be regarded as regular suits: see also *Sheikh Azim v. Chandra Nath Namdas* (1) and *Ramnandan Pershad v. Sheoparsan Singh* (2), and all appeals in probate proceedings are always styled "regular appeals." The practice in Bombay as laid down in *Sundrabai Saheb v. The Collector of Belgaum* (3) is, however, different, but it is not the practice here to treat probate proceedings as miscellaneous. I claim, therefore, costs under Chapter VI, Rule 36 (a) of the General Rules and Circular Orders.

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COXE AND D. CHATTERJEE JJ. This application arises out of a probate case. Probate was granted and the petitioners were directed to pay the costs of the opposite party. Subsequently a decree was prepared and the pleader's fee of the opposite party was assessed at Rs. 777 according to the value of the property in respect of which probate was given. This is said to be in accordance with the practice of the Muzaffarpore District Judge's Court. The petitioners then applied to have the decree amended, alleging that a fee of Rs. 80 only could be allowed under Rule 42(a), Chapter VI of the Rules and Orders. This application was refused by the District Judge and it has now come up to this Court in revision.

It is contended by the learned pleader for the petitioners that a proceeding under the Probate and Administration Act, 1881, is a miscellaneous proceeding and that Rule 42(a) which we have cited will apply. It is argued, however, on the other side, that this proceeding is a regular suit and reference is made

(1) (1904) 8 C. W. N. 748.

(2) (1910) 11 C. L. J. 623.

(3) (1908) 1 L. R. 33 Bom. 256.

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to Rule 26, Chapter X of the Rules and Orders, which lays down that for the purposes of the returns these applications should be treated as Miscellaneous cases until they are contested, and as suits thereafter. This rule was, however, framed for administrative convenience and is intended to assist subordinate Courts in drawing up their statements and returns, but it does not throw any light on the present difficulty.

It is also contended that under section 83 of the Probate and Administration Act, 1881, which lays down that in contested probate cases the proceedings shall take as nearly as may be, the form of a suit, according to the provisions of the Code of Civil Procedure, this proceeding must be regarded as a regular suit. But these provisions appear to us to tell rather against the opposite party than in his favour. If these proceedings are suits it would be unnecessary to enact that they should take the form of a suit. Even if the proceeding is a suit, the only rule under which an *ad valorem* pleader's fee can be assessed is Rule 36(a) of Chapter VI of the Rules and Orders. That rule provides that "generally in all suits not included in Rule 35, if the plaintiff succeed, the Court may order the fee of the pleader for the plaintiff to be calculated with reference either to the amount decreed or according to the valuation of the suit or according to such a sum, not exceeding the valuation, as the Court shall think reasonable." Here no amount has been decreed and it appears to us that the valuation of the property covered by the probate cannot reasonably be regarded as the valuation of the suit. The extent or value of the property, and the rights of the testator therein, are irrelevant in probate proceedings, which are confined entirely to the question whether the petitioner is or is not entitled to probate of the document executed by the

testator, irrespective entirely of the property which that document covers. Rule 36(a) seems to us, therefore, to have no application and no other rule authorizes assessment of *ad valorem* fees.

In our opinion, therefore, the fee can only be assessed under Rule 42(a).

That there is a distinction between this proceeding and a regular suit will appear from the practice of this Court. In regular appeals valued at over Rs. 5,000 pleaders' fees are assessed *ad valorem* automatically, whereas in probate cases above that value, hearing fees are assessed by the Judges themselves in each case.

In our opinion, therefore, the pleader's fee in the Court below should be reduced to the sum of Rs. 80. The Rule is made absolute to that extent. We pass no order as to costs.

O. M.

Rule absolute.

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