APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar.

1896.
March 12, 17,
September 14.

PAKIAM PILLAI (PETITIONER), APPELLANT,

v.

INNASI FERNAND (COUNTER-PETITIONER), RESPONDENT.*

Indian Succession Act—Act X of 1865, ss. 246, 261—Application for letters of administration—Caveator propounding a will—Effect of withdrawal of previous application for probate of same will without leave to apply again—Civil Procedure Code, s. 373.

Where a person applied for probate of a will but withdrew the application before the proceedings became contentious:

Held, that he was entitled as caveator to propound the same will in opposition to an application for grant of letters of administration to the estate of the deceased:

Held, further, that though the provisions of the Civil Procedure Code are applicable to suits under Act X of 1865, section 261, still in the present case, the application for probate had been withdrawn before the proceedings became contentious and that, therefore, section 373, Civil Procedure Code, was not applicable.

APPEAL against the order of B. Macleod, Acting District Judge of Tinnevelly, passed on certificate petition No. 15 of 1895.

The facts of this case were as follows:—

The petitioner, the husband of one Santhai Kurusal, who died on 16th December 1893, applied for a grant of letters of administration to her estate under section 246 of Act X of 1865. The counter-petitioner entered a caveat and claimed probate of a will alleged to have been executed by the deceased on the day of her death. Probate of this will had been applied for a month after her death, but the petition was withdrawn without obtaining the leave of the Court to apply again. On the present petition, the District Judge ordered that probate of the will do issue to the counter-petitioner with costs.

The petitioner appealed.

Sundara Ayyar for appellant.

Ramakrishna Ayyar and *Seshachariar* for respondent.

---

* Appeal against Order No. 166 of 1895.

PAKIAM PILLAI *v.* INNASI FERNAND.

ORDER.—The first objection urged on behalf of the appellant was that, as the respondent (caveator) to whom probate of the will propounded by him was granted by the District Court had withdrawn without the leave of the Court to apply again a previous petition for probate of the same will, he was precluded from making the present application. That the respondent did apply once before is not disputed, though the application itself has not been put on the record of this case. In the order of the District Court, dated the 20th September 1894, allowing that application to be withdrawn, it was described as one for letters of administration; whereas, in the order under appeal, it is referred to as an application for probate. However this may be, it is admitted that the application had reference to the will in dispute and taking that it is immaterial whether the application was for probate or for letters of administration, the question is whether the appellant's objection is good. Now, section 261 of the Indian Succession Act lays down that when in proceedings relating to applications for probate or letters of administration contention arises, "the proceeding shall take, as nearly as may be, the form of a regular suit according to the provisions of the Code of Civil Procedure."

This being so, the argument on behalf of the appellant was that section 373 of that code, which is based on the rule of public policy that it is the interest of the state that there should be an end to litigation, is as applicable to such proceedings as to other suits. In *Trower and Smedley* v. *Cox*(1), which is the only case I have been able to find as bearing on the point, Sir John Nicholl, referring to a similar argument urged before him, admitted that "in ordinary cases, where the parties, being present, declare they proceed no further, or duly authorize a practitioner to take that step for them, the Court, as far as it legally can, will hold them bound." The actual decision there that the executrix was not barred from calling upon the next-of-kin to bring in the administration and re-propounding the alleged will, though her attorney had previously withdrawn from the suit after propounding it and suffered the next-of-kin to take administration, was rested on the peculiar circumstances of the case. The argument on behalf of the appellant would seem, therefore, to be not without authority. But

(1) 1 Addams, 225.

PAKIAM PILLAI v. INNASI FERNAND.

assuming the rule of law to be as stated on his behalf, it is clear that the facts necessary to warrant its application were not shown to have existed here. For it is only when contention arises that proceedings in connection with probate or letters of administration can take the form of suits; but that the proceedings had become contentious when the respondent withdrew his former application, there is nothing to prove. The objection in question must therefore be held to fail.

The second objection urged was that the evidence adduced on behalf of the respondent did not establish the genuineness of the will. But I am unable to accede to it, as I see no reason to differ from the District Judge who believed the testimony adduced on behalf of the respondent to the effect that the will was signed by the deceased when she was of sound and disposing mind. On the one hand the ill-feeling which had existed between the appellant and the deceased, who was his wife, and on the other the friendly terms on which the respondent, who was her grandson, had lived with her tend to show that the probabilities are in favour of the view that the will is true.

The third and last objection was that it did not appear that the attesting witnesses signed the will in the manner required by section 50 of the Indian Succession Act. As the evidence stands now this contention must prevail; but there is no reason to think that the omission to question the attesting witnesses on the point was wilful and intentional. I, therefore, direct the District Judge to take fresh evidence on the point and submit a finding on it within a month from the receipt of this order and objections may be filed within seven days from the date on which the receipt of such finding is notified in Court."

In compliance with the above order, the District Judge submitted the following

FINDING :—With reference to the above order of the High Court, "I have the honour to re-submit the records in the case "and to state that, from the depositions of two of the attesting "witnesses now examined by me, I am of opinion that they attested "the will in the presence of the testatrix, after the latter had put "her mark to it in their presence. The provisions of section 50 "of the Indian Succession Act appear thus to have been complied "with in this case."

On receipt of the above finding the Court delivered the following

PAKIAM PILLAI v. INNASI FERNAND.

JUDGMENT :—Accepting the finding, I dismiss the appeal with costs.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KARIYADAN POKKAR,

1895. December 13.

v.

KAYAT BEERAN KUTTI.*

Criminal Procedure Code, s. 488—Maintenance of children—Moplahs—Personal law.

The right of children to be maintained by their actual father is a statutory right, and the duty is created by express enactment independent of the personal law of the parties. If the children are illegitimate, the refusal of the mother to surrender them to the father is no ground for refusing maintenance. If the children are legitimate, the question of the mother's right to their custody would depend on the question whether the parties are governed by Muhammadan or Marumakkatayam law; because (1) if they are governed by Muhammadan law, the mother may have the right to custody until the children attain the age of seven years; (2) if by the Marumakkatayam law, it is doubtful if the father could be held to have neglected his duty to maintain his children if they were actually maintained by the karnavan of their mother's tarwad who is bound by law to maintain them.

CRIMINAL REVISION PETITION under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the order of A. F. Pinhey, Acting Joint Magistrate of Malabar, in maintenance case No. 1 of 1895.

The facts of this case appear from the Joint Magistrate's order, which was as follows :—

"The complainant, Kariyadan Pokkar, claims maintenance for "the three children of his sister aged, respectively, 5, 3½ and 1½ "years. Defendant is willing to maintain the mother and chil- "dren if they live with him. It appears he has married again "and is living in the new wife's house, and complainant urges

---

* Criminal Revision Case No. 453 of 1895.