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subsequently set aside and later restored. If between the date of the original decree and the restoration in revision a period of more than three years has expired, it would follow that, as there is no allowance for the intervening period according to the Act or any of the clauses of article 182, his application for execution would be barred before he succeeded in getting his decree restored. A construction which leads to such results could not have been contemplated by the legislature. We think, therefore, that the date of the decree appealed from must be taken as the date when the decree was restored in revision by this Court. On this footing, we hold that the appeal was presented in time, and it will be admitted.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

1930, February 4.

AMMANI AMMAL (RESPONDENT), APPELLANT,

v.

M. NARAYANASWAMI NAIDU (PETITIONER—APPLICANT), RESPONDENT.*

Original Side Rules, High Court, Madras, O. XXXIV, r. 57 (*Form No.* 124) *and r.* 62—*Application for calling in of letters of administration granted on footing of intestacy—Citation—Issue of—Appropriate rule.*

On an application for the calling in of a grant of letters of administration which has been made upon the footing of an intestacy, citation ought to be issued only under Order XXXIV, rule 57 (Form No. 124) of the Madras High Court Original Side Rules, and not under rule 62 of the said Order.

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* Original Side Appeal No. 87 of 1929.

APPEAL from the orders of EDDY J., dated 27th September and 3rd October 1929, and passed in the exercise of the Original Testamentary and Intestate Jurisdiction in Application No. 2919 of 1929 in Original Petition No. 106 of 1924 (Testamentary Original Suit No. 9 of 1929).

Rules of the High Court (Original Side), Madras:

Order XXXIV, *rule* 57.—If subsequent to the grant of probate or letters of administration with the will annexed any person interested in the property of the testator, other than the grantee, desires that the will may be proved, in solemn form, or that the said grant may be revoked, he shall file an affidavit setting forth the grounds therefor, and applying for the issue of a citation to the grantee. The Registrar shall appoint a day for the hearing of the petition, and shall issue a citation in Form No. 123 or 124; and the petition for probate or letters of administration with the will annexed, shall be registered and numbered as a suit in which the petitioner shall be the plaintiff, and the person issuing the citation shall be the defendant. The case shall be posted for first hearing on the day so appointed, and the petition and the said affidavit shall be taken as the plaint and the written statement of the defendant respectively.

Rule 62.—In cases not provided for by this order, or by the rules of procedure laid down in the Indian Succession Act, or by the Civil Procedure Code, the practice and procedure of the Probate Division of the High Court of Justice in England shall be followed so far as they are applicable and not inconsistent with this Order and the said Acts.

G. Ramakrishna Ayyar and *C. Srinivasachari* for appellant.

P. Tiruvengadaswami Mudaliar for respondent.

JUDGMENT.

RAMESAM J.—This appeal raises an important question of procedure. The facts out of which the matter arises may be stated. One Perumal Naidu died in Madras in 1924, leaving his sister Ammani Ammal. A brother of his named Ramaswami Naidu predeceased him. One M. Narayanaswami Naidu, who is a brother

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of Govindammal, widow of Ramaswami Naidu, applied for letters of administration to the estate of Perumal Naidu. The application was Original Petition No. 106 of 1924. Letters of Administration were granted to him on the 5th of February 1925 after notice to Ammani Ammal and to Govindammal.

The present application was filed on the 17th of August 1929 praying that the letters of administration granted to Narayanaswami Naidu should be recalled. The grounds disclosed in the affidavit accompanying this application are that Narayanaswami Naidu in his application of 1924 claimed to be the adopted son of Ammani Ammal but as a matter of fact he was not the adopted son, that Ammani Ammal was made to appear to consent to the former order by being induced to put her mark to certain papers the contents of which she was not able to understand clearly, and that, in short, her consent was procured fraudulently. This application was filed under section 263 of the Indian Succession Act and Order XXXIV, rule 54 of the Original Side Rules by means of a Judge's summons and a citation. Narayanaswami Naidu appeared on the Judge's summons and filed an application with an affidavit on the 27th of August 1929 and opposed the application on the merits, and also contended that the application by way of Judge's summons and citation under rule 54 did not lie. The matter came on before our brother KRISHNAN PANDALAI J. on the 6th of September and he passed an order to this effect: "Issue citation under Order XXXIV, rule 62. Number as a T.O.S." And on the defendant's application, he passed the following order: "The applicant has now taken out a citation under Order XXXIV, rule 62, and does not press this Judge's summons. Costs to be provided for in costs in the T.O.S. in citation." The matter again came on before

our brother EDDY J. on the 27th of September, when he passed the following order: "Leave to amend and reserve citation. Adjourned until October 3rd." On the 3rd of October further orders were passed as follows: "citation having been amended by consent, no order except that the applicant do have the costs of this application." It is against this last order that the present appeal is filed.

The learned Advocate for the respondent takes a preliminary objection that this appeal does not lie. As the order of the learned Judge finally disposes of the application of Narayanaswami Naidu and awards costs, we think that this is a final order and an appeal lies. We overrule the preliminary objection.

The amendment ordered by EDDY J. and made pursuant to his order amends the citation into a form similar to No. 99 at page 923 of the 16th edition of Tristram and Coote's Probate Practice. This order was passed apparently on the ground that there is no form in the Original Side Rules expressly providing for a matter of this kind and that therefore Order XXXIV, rule 62, applies. This brings in the practice and procedure of the Probate Division of the High Court of Justice in England. That is why Form No. 99 already mentioned has been adopted. It is now contended before us that there is no need for bringing in the English practice and for relying on rule 62. Rule 54 applies to a case where a person to whom the grant of probate or letters of administration has been made desires to have the same revoked. The case where a person other than the grantee of the probate or letters of administration desires that the grant may be revoked has got to be provided for, and, as I will presently show, rule 57 was intended to provide for such a case. Reading the opening words of the rule, "If,

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RAMESAM J.

subsequent to the grant of probate or letters of administration with the will annexed any person interested in the property of the testator, other than the grantee, etc.", one would think that rule 57 was intended to apply only to cases where probate or letters of administration *with the will annexed* has been granted and a person other than the grantee desires revocation of the grant. But, continuing to read the rule, we find it contains a provision that the Registrar shall issue a citation in Form No. 123 or 124. Form No. 123 refers to a case where probate was granted and where it is desired that the grant should be revoked. Form No. 124 refers to a case where letters of administration were granted, but a will had been discovered afterwards or some other reason existed why the letters of administration should not be granted and it was desired that the grant should be revoked. It does not refer to a case where letters of administration without a will were granted. Thus it appears to directly conflict with the rule referring to it. Reading rule 57 with Form No. 124, we have only two alternatives before us so far as letters of administration are concerned: (1) the rule and the form contradict each other, which is meaningless, or (2) the rule was intended to apply to cases of all letters of administration either with the will annexed or without the will, and the form illustrates one of the cases where letters of administration were granted without any will. The latter mode of construction commends itself to us. The omission of the case of a grant of mere letters of administration without a will in rule 57 seems to be a slip. Rule 54 provides for the grant of probate or letters of administration, but, where the grantee desires revocation of the grant, rule 57 was obviously intended to apply to cases of

grant of probate or letters of administration but where a person other than the grantee desires revocation of the grant. That this was the general object of rule 57 is shown by Form No. 124 and we ought to construe the rule in the light thrown by the Form. So read, we think that rule 57 of Order XXXIV taken with Form No. 124 applies to this case, and there is no need to bring in Order XXXIV, rule 62. We invite the attention of the Registrar to this fact so that proper steps might be taken to make the language of rule 57 clear.*

The learned Advocate for the respondent does not object to the citation. His anxiety seems to be that if the citation is issued under rule 57 the burden of proof would be on him, but if the citation is issued under the English form the burden of proof will be upon the appellant, and he wants to avoid the onus on himself. I do not think that the burden of proof necessarily changes with the form adopted. On this matter, I agree with the observations of my learned brother, and the respondent's burden may be lightened by the conduct of the appellant in the former proceedings and other considerations and may be even shifted, and I do not propose to say anything further on this matter. At present we hold that the citation ought to be issued under Order XXXIV, rule 57. The order of EDDY J. is set aside and a citation in Form No. 124 with the necessary changes will now issue.

Having regard to the considerable doubt resting in the matter and the way in which the rules are drafted, we do not think this is a matter in which Narayanaswami Naidu ought to have costs of the application.

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* The rule has since been amended.

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CORNISH J.

Costs of the parties including court-fee will abide the result of the enquiry.

CORNISH J.—I do not think that there was any need to have had recourse to rule 62, Order XXXIV. Form No. 124, which is the form of citation directed to be used by rule 57, specifically applies to the calling in of a grant of letters of administration which has been made upon the footing of an intestacy. Reading the rule with the form, therefore, it appears that the rule was intended to embrace proceedings to revoke grants of letters of administration, although in terms the rule mentions probate and letters of administration with the will annexed only. There is no reason why a different procedure should be followed in the case of revoking a grant of letters of administration to that which is prescribed by the rule for the revocation of a grant of probate. In the one case, the object is to compel the party who has obtained the probate to propound the will, and, in the result, the suit becomes one for proving the will in solemn form of law. And in the other case, the object is to compel the party who has obtained the grant of administration to establish such a degree of relationship with the deceased as will entitle him to the grant, and, in the result, it becomes an interest suit. (See Tristram and Coote's Probate Practice, 16th edition, page 427.) As there was some discussion by the learned Counsel upon the question of the onus of proof in the testamentary suit which follows upon the issue of a citation under the rule, it may be pointed out that where a will has to be proved in solemn form "the *onus probandi* lies upon the party propounding a will, who must satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator"; *Barry* v. *Butlin*(1). But when, as

(1) (1838) 2 Moore P.C.C. 480.

here, the deceased died intestate and was a Hindu, the party whose grant of administration has been called in must satisfy the Court that a grant can be made to him under section 218 (1), Indian Succession Act, that he is, in the words of the section, "a person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the estate or any part of such deceased's estate".

B.C.S.

APPELLATE CIVIL.

Before Mr. Justice Anantakrishna Ayyar and Mr. Justice Sundaram Chetti.

MUTHYALA NARAYANAPPA (PLAINTIFF), APPELLANT,

v.

MUTHYALA RAMACHANDRAPPA (DEFENDANT), RESPONDENT.*

1930, August 28.

Code of Civil Procedure (Act V of 1908), sch. II, paras. 17, 18 and 19—Arbitration by named persons—Reference to—Agreement outside Court as to—Death of one of named persons pending arbitration proceedings and prior to matter being brought before Court—Suit ignoring agreement in case of—Maintainability—No provision in agreement for filling up vacancy.

In a case where parties privately agreed to refer their disputes to certain named arbitrators and to abide by their unanimous decision, but the agreement did not contain any provision as to what should be done in case any of the arbitrators died in the course of the arbitration proceedings, and one of them died in the course of such proceedings and prior to the matter being brought before the Court,

Held, that the agreement became inoperative and came to an end on the death of the arbitrator and that it could not thereafter be filed in Court under paragraph 17 of Schedule II of

*Appeal against Order No. 272 of 1930, and Civil Revision Petition No. 1034 of 1930.