

APPELLATE CIVIL.

1895
March 23.*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*UMRAO CHAND (PETITIONER) *v.* BINDRABAN CHAND AND ANOTHER
(OBJECTORS).**Letters Patent, s. 10—Act No. V of 1881 (Probate and Administration Act), Ch. V—
Probate—"Order"—"Decree"—Civil Procedure Code, ss. 2, 591—Appeal.*

An appeal will lie under s. 10 of the Letters Patent of the High Court of Judicature for the North-Western Provinces from the judgment of a single Judge of the Court in appeal from an order of a District Judge granting probate of a will under Chapter V of Act No. V of 1881, and the Bench hearing such an appeal under s. 10 of the Letters Patent is not debarred from reconsidering the findings of fact arrived at in the judgment under appeal.

THIS was an appeal under s. 10 of the Letters Patent from a judgment of Knox J., setting aside a grant of probate made by the District Judge of Agra.

The facts of the case are thus given in the judgment under appeal:—

"This is an appeal from an order dated the 7th March 1894, passed by the District Judge of Agra on an application made to him by one Umrao Chand for probate of the will of Ghansham Chand, or for letters of administration with a copy of the will annexed. The case was a contentious case: therefore, as provided by s. 83 of Act No. V of 1881, the proceedings before the Judge had to take the form as nearly as might be of a suit according to the provisions of the Code of Civil Procedure. The petitioner for probate had to take the place of plaintiff and the persons who opposed the grant of probate had to appear as defendants. The burden of proving that the will was such a will that probate could be granted lay upon the plaintiff, in other words, upon the applicant for probate. He had to prove, to the satisfaction of the Judge, that the writing for the probate of which he asked was the last will and testament of Ghansham Chand and that it had been duly executed. In support of these facts three witnesses were produced, and

* Appeal No. I of 1895, under s. 10 of the Letters Patent from a judgment of Knox, J., dated the 26th November 1894.

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the only comment that the learned Judge makes upon their evidence is as follows:—‘The genuineness of Ghansham Chand’s will and the *mala fides* of the objectors are clearly shown.’

“It is little wonder that in the face of such a perfunctory judgment the learned counsel who appeared for the appellants before me has objected that there has been virtually no trial of the case in the Court below. The objection is certainly a sound one and entails upon me the necessity of doing what the lower Court has left undone, *i.e.*, of weighing and examining the evidence which has been put forward for grant of probate.”

The Court then proceeded to deal with the evidence tendered in the Court below and came to the conclusion that it was not sufficient to warrant the granting of probate of the will of Ghansham Chand, and accordingly set aside the order of the District Judge.

The applicant preferred an appeal under s. 10 of the Letters Patent.

Mr. *D. N. Banerji* for the appellant.

The Hon’ble Mr. *Colvin* and *Munshi Ram Prasad* for the respondents.

EDGE, C. J., and BANERJI, J.—This is an appeal brought under s. 10 of the Letters Patent from the judgment or decree of our brother Knox. Our brother Knox had before him an appeal from an order made by the District Judge of Agra under Act No. V of 1881 granting probate of a will propounded before him.

A preliminary objection was taken that an appeal did not lie under s. 10 of the Letters Patent in this case. It was contended that the order of the District Judge of Agra, granting probate was not a decree, but was simply an order, to which s. 591 of Act No. XIV of 1882 applied. That contention was based on the fact that s. 86 of Act No. V of 1881 gives an appeal to the High Court from a District Judge from an order made by him by virtue of the powers conferred on him by Act No. V of 1881, and to the fact that, in that Act, the orders of the District Judge are referred to as

“orders,” not as “decrees.” The contention was also supported by a reference to s. 83 of Act No. V of 1881. It appears to us that, although the term used to express the operative decision of the District Judge in cases arising under Chapter V of Act No. V of 1881 is “order,” still, when applying Act No. XIV of 1882, we must see whether the order of Chapter V of Act No. V of 1881 would be an order or would be a decree, as those terms are defined in s. 2 of Act No. XIV of 1882. Section 591, as was decided in Letters Patent Appeal No. 31 of 1894, in the case of *Richard Wall v. J. E. Howard* on the 18th instant (1), must be read with s. 588, and should be construed as if the words “under this Code” were inserted between the words “by any court” and the words “in the exercise of.” That being so, if the order from which the appeal was brought to this court in this case was not an order as defined by Act No. XIV of 1882, but was a decree, Chapter XLIII of Act No. XIV of 1882 would not apply to it, or to any subsequent appeal arising out of it. An order, as defined in s. 2 of Act No. XIV of 1882 means—“the formal expression of any decision of a Civil Court which is not a decree, as above defined.” For present purposes a decree, as defined in that section, means—“the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the court expressing it, decides the suit or appeal.”

There can be no doubt that the order of the District Judge granting probate did decide, so far as his court was concerned, not only a right to have the probate granted, but the defence which was set up to the granting of the application for the probate; consequently it must be a decree within the definition of s. 2 of Act No. XIV of 1882, and, as such, Chapter XLIII of Act No. XIV of 1882 did not apply.

It was also suggested, although the point was not pressed, that in this Letters Patent Appeal we were bound by the findings of fact of our brother Knox, and that the appeal before us could not be dealt with in the same way in which a first appeal to this Court

(1) *Supra*, p. 438.

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might be dealt with. That contention would place an appeal under s. 10 of the Letters Patent in the same position as an appeal to which Chapter XLII of Act No. XIV of 1882 applies. Chapter XLII limits the right of appeal from a decree passed in appeal by a court subordinate to the High Court, and only applies when the appeal is one from a decree passed in appeal by a court subordinate to the High Court. The appeal to this High Court having been a first appeal, and not an appeal to which Chapter XLII of Act No. XIV of 1882 applies, the parties to the appeal are entitled to question not only the law, but the findings of fact of the Judge of this court from whose judgment or decree this appeal has been brought under s. 10 of our Letters Patent. It would be otherwise if the appeal to this court had been an appeal to which Chapter XLII of Act No. XIV of 1882 applied. Then the Bench sitting in the Letters Patent appeal would be bound by the same rule which bound the single Judge from whose decree or order the appeal was brought. We hold that an appeal lay from the judgment or order of our brother Knox, and that the parties were entitled to have this Bench consider not only the law, but the evidence in the case.

[The court then proceeded to consider the case on the merits, and arriving at the same estimate of the evidence as that taken in the judgment under appeal, dismissed the appeal. The remainder of the judgment, consisting solely of a discussion of the evidence, is unnecessary for the purposes of this present report.—Ed.]

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

IMDAD ALI (JUDGMENT-DEBTOR) v. JAGAN LAL AND ANOTHER (DECREE-HOLDERS).*

Execution of decree—Civil Procedure Code, s. 244—Objection by representative of party to the suit to the jurisdiction of the court which passed the decree.

Section 244 of the Code of Civil Procedure applies as well to a dispute arising between the parties contemplated by that section in relation to the execution of a

* Appeal No. 57 of 1894, under s. 10 of the Letters Patent from a judgment of Burkitt, J., dated the 8th November 1894.

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