1927

HUKUM CHAND v. SITAL PRASAD.

[WALSH, J. concurred, with hesitation, in the order proposed.]

BY THE COURT.—Appeals Nos. 545 and 546 of 1925 are dismissed with costs.

Appeal dismissed.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

1927
June, 9.

KANHAIYA LAL AND OTHERS (OBJECTORS) *v.* GENDO (PETITIONER)*

Costs—Taxation of—Contested application for probate before a District Judge—High Court Rules, 1898, *chapter XVI, rule* 2—*General Rules (Civil), chapter XXI, rules* 22 *and* 26.

Held that the rule applicable to the taxation of costs in a contested application for probate before a District Judge is rule 26 of chapter XXI of the General Rules (Civil) for subordinate civil courts. Such a proceeding is not a "suit" but a "miscellaneous judicial case." *Sundrabai Saheb* v. *The Collector of Belgaum* (1) and *Baijnath Prasad* v. *Sham Sundar Kuar* (2), referred to.

The facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Pandit *Shiam Krishna Dar*, for the appellants.

Munshi *Narain Prasad Ashthana*, for the respondent.

SULAIMAN and BANERJI, JJ. :—This appeal arises out of a probate proceeding and relates to the costs which have been taxed in the decree of the court below. It raises a question of principle affecting the practice in subordinate courts. An application for probate was made on the 18th of January, 1924, and on the 1st of March a caveat was entered. On the 30th of August

*First Appeal No. 479 of 1924, from a decree of A. G. P. Pullan, District Judge of Agra, dated the 30th of August, 1924.

(1) (1908) I.L.R., 33 Bom., 256. (2) (1913) I.L.R., 41 Calc., 637.

evidence was recorded and probate was ordered to be granted to the applicant. The office of the District Judge taxed the costs on the scale fixed for original suits. An objection was raised by the caveator to the amount taxed, but the learned Judge, relying upon chapter XVI, rule 2, of the High Court Rules, dismissed the objection.

In our opinion chapter XVI, rule 2, of the High Court Rules had no direct application to the case at all. The suits and applications spoken of there refer to suits and applications which are tried on the original side by the High Court itself and do not refer to suits tried by subordinate courts. The case had to be decided in accordance with chapter XXI of the General Rules (Civil) for subordinate civil courts. A graduated scale is prescribed for calculating fees in "suits, or appeals from original and appellate decrees in suits for money, effects or other personal property, or for land or other immovable property of any description, when such suits or appeals are decided on the merits after a contest." On the other hand, rule 26 prescribes a different scale for miscellaneous judicial cases. It is conceded that if rule 22 is not applicable then the only other rule which would apply would be rule 26.

Rule 22 refers to suits and to appeals. It does not refer to applications. If therefore the probate proceedings are a suit, rule 22 would apply.

Under the Probate and Administration Act of 1881, which was in force when this case was decided by the court below, applications for probate are throughout the Act called "petitions" and the applicant is called "petitioner." Section 83 of the Act provides that in any case in which there is contention, the proceeding shall take, as nearly as may be, the form of a suit, according to the provisions of the Code of Civil Procedure, in which the petitioner for probate shall be

1927

KANHAIYA LAL v. GENDO.

the plaintiff, and the person who may have appeared as aforesaid to oppose the grant shall be the defendant. In our opinion this section, instead of helping the respondent, is really against him, for it clearly implies that the proceeding is not itself a suit but is to take, as nearly as may be, the form of a suit. If the proceeding were itself a suit, there would be no necessity to say that it should take the form of a suit when there is a contention. In the case of *Sundrabai Saheb* v. *The Collector of Belgaum* (1) a Bench of the Bombay High Court held that the preceedings in an administration case were not a suit. A similar view was expressed in the case of *Baijnath Prasad* v. *Sham Sundar Kuar* (2).

This view is further strengthened by the circumstance that in the corresponding High Court Rules, chapter XVI, rule 2, the language is "in a suit and in an appeal from the original decree in a suit for money, effects or other personal property, or for land and other immovable property, or for specific performance, or for an injunction, or for damages in a suit under section 42 of Act I of 1877, and in a contested application for probate or letters of administration." It is obvious that a contested application for probate is mentioned separately and is not considered to be included in the expression " in a suit." It was apparently considered that in a contested probate proceeding in the High Court the scale of counsel's fee should be the same as that of original suits, and it is on that account that such an application was expressly mentioned in rule 2.

We are therefore of opinion that the rule applicable to the case was rule 26 of chapter XXI, General Rules (Civil) for civil courts and not rule 22, and that the taxation of the costs was not correct.

(1) (1908) I.L.R., 33 Bom., 256 (2) (1913) I.L.R., 41 Calc., 637.

The last ground of appeal is based on the circumstance that the applicant engaged a vakil on the 26th of January, 1924, who filed a certificate of fees on the 1st of March, 1924, on which date caveat was entered. Later on, on the 30th fo August, 1924, he wished to offer himself as a witness and asked the permission of the court to do so. The permission having been granted, he was examined as a witness. He did not however subsequently take any part in the conduct of the proceedings. The contention on behalf of the appellant is that his certificate of fee should not be taken into account.

It is likely that the pleader did not expect that the application would be contested and he would have to appear as a witness because he had been consulted in the preparation of the draft. Had he expected that his evidence would be required, we assume that he would have considered it undesirable to agree to be engaged in the case. Under the circumstances we are of opinion that the certificate filed by him before he was examined as a witness cannot be ignored, especially when permission was granted to him by the Judge to give evidence in the case. The appeal is accordingly allowed and the amount of costs entered in the decree of the court below varied, so as to bring it in harmony with the scale prescribed in rule 26. The appellant will have the costs of this appeal. The costs of this appeal, however, will have to be calculated in accordance with the High Court Rules.

Appeal allowed.