

1934

JWALA
SAHAI
AND SONS

v.

HARI
NANDAN
DUTT

The parties will pay and receive costs in this Court proportionate to their success and failure. The cross-objections are dismissed with costs.

Appeal partly allowed.

REVISIONAL CIVIL

*Before Mr. Justice C. M. King, Chief Judge and
Mr. Justice Bisheshwar Nath Srivastava*

SHEIKH KALLOO (APPLICANT) v. MUSAMMAT NOOR
JAHAN (OPPOSITE PARTY)*

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October, 22

Indian Succession Act (XXXIX of 1925), sections 265, 272 and 286—Oudh Courts Act (IV of 1925), section 31—Oudh Civil Rules 239 and 240—Probate—Contentious cases—District Judge transferring contentious probate case to Subordinate Judge—Subordinate Judge being District Delegate, effect of.

There is nothing in the Indian Succession Act which renders the Subordinate Judge, as such, incompetent to dispose of contentious proceedings under that Act. The fact that one and the same officer is both a Subordinate Judge and a District Delegate is immaterial. Although as District Delegate he cannot dispose of a contentious proceeding nevertheless he can do so as Subordinate Judge, if the proceeding is transferred to him by order of the District Judge.

Mr. *Naim Ullah*, for the applicant.

Mr. *Faiyaz Ali*, for the opposite party.

KING, C. J. and SRIVASTAVA, J.:—This is an application in revision against an order passed by the learned District Judge of Fyzabad, dated the 31st of May, 1933, empowering the Subordinate Judge of Fyzabad to dispose of certain probate proceedings.

The order arose out of an application for grant of probate. The application was opposed by Musammat Noor Jahan who lodged a *caveat*. The proceedings thus became "contentious" and the learned Subordinate Judge (in whose court the proceedings had been instituted as District Delegate under the Indian Succession Act) referred the case to the District Judge stating that he had no power to try the case after

*Section 115 Application No. 92 of 1933, against the order of Mr. K. N. Wanchoo, I.C.S., District Judge of Fyzabad, dated the 31st of May, 1933.

Musammat Noor Jahan had filed a caveat and could only do so if the District Judge empowered him. The District Judge, by the order which is the subject matter of this application, empowered the learned Subordinate Judge to decide the matter of the caveat.

It has been strenuously contended by the learned Advocate for the applicant that the order of the District Judge transferring the proceedings to the Subordinate Judge is illegal because the Subordinate Judge, as a District Delegate under the Indian Succession Act, is incompetent to dispose of contentious cases.

It is clear that the Indian Succession Act, 1925, does draw a distinction between contentious and non-contentious cases under Chapter IV of the Act, which deals with the practice in granting and revoking probate and letters of administration.

Under section 265 of the Indian Succession Act the High Court is authorized to appoint judicial officers to act for the District Judge as delegates to grant probate and letters of administration in *non-contentious* cases.

Section 272 of the same Act lays down that probate and letters of administration may, upon application for that purpose to any District Delegate, be granted by him *in any case in which there is no contention*. Lastly we have section 286 which is very emphatic on the point of restricting the District Delegate's power to dealing with non-contentious cases only. This section lays down that a District Delegate *shall not* grant probate or letters of administration *in any case in which there is contention* as to the grant . . . An explanation has also been added explaining that "contention" means the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding.

The Indian Succession Act, therefore, makes it clear that District Delegates can dispose of non-contentious cases only and have no jurisdiction to grant probate in any case in which there is contention as to the grant.

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Under Rule 239 of the Oudh Civil Rules the Chief Court has appointed Subordinate Judges in Oudh as "District Delegates" under section 265 of the Indian Succession Act to grant probate and letters of administration in *non-contentious cases* within the local limits of their territorial jurisdiction. This rule is in accordance with the provisions of the Indian Succession Act in confining the jurisdiction of District Delegates to non-contentious cases.

We now have to consider the effect of Rule 240 of the Oudh Civil Rules read with section 31 of the Oudh Courts Act. Under Rule 240 all District Judges in Oudh have been authorized under section 31(1) of the Oudh Courts Act to transfer, by general or special order, any of the proceedings mentioned in Part IX of Act 39 of 1925 in which they have jurisdiction to the Courts of the Subordinate Judges under their control.

It will be seen that the language of this rule is very wide and empowers District Judges to transfer *any* proceedings falling within the scope of Part IX of the Indian Succession Act. Any proceedings for the grant of probate, whether contentious or non-contentious, would be included. The learned Advocate for the applicant urges that this rule should be construed so as not to conflict with the provision of the Indian Succession Act and it must, therefore, be interpreted as meaning that District Judges are authorized to transfer to District Delegates only non-contentious cases which the latter have jurisdiction to deal with under the provisions of the Indian Succession Act.

If the rule purported to authorize District Judges to transfer any of the proceedings mentioned in Part IX of Act 39 to *District Delegates* for disposal then there would be much force in the contention. But it must be noted that transfer is authorized, not to District Delegates but to Subordinate Judges. Although the Subordinate Judge is also a District Delegate the

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transfer is made to him in his capacity as Subordinate Judge and not in his capacity as District Delegate. Bearing this distinction in mind, it appears that there is no real inconsistency between the provisions of the Indian Succession Act and Rule 240. Moreover, Rule 240 can be completely justified by the language of section 31 of the Oudh Courts Act, under which it has been made. Section 31(1) empowers the Chief Court, by general or special order, to authorize any Subordinate Judge to take cognizance of, or any District Judge to transfer to a Subordinate Judge under his control, "any of the proceedings next hereinafter mentioned or any class of those proceedings specified in such order." Sub-section (2) reads as follows: "The proceedings referred to in sub-section (1) are the following, namely:

"(a) Proceedings under the Indian Succession Act, 1865, and the Probate and Administration Act, 1881, which cannot be disposed of by District Delegates."

These last words are very significant. It appears to us that in empowering the District Judge to transfer proceedings to a Subordinate Judge which cannot be disposed of by District Delegates" it was intended that proceedings could be transferred to the Subordinate Judge which he could not dispose of as a District Delegate under the provisions of the Succession Act or the Probate and Administration Act. The language of section 31(2) which we have quoted in full and in particular the words "which cannot be disposed of by District Delegates" appear to us to indicate clearly that the legislature deliberately empowered the Chief Court to authorize District Judges to transfer to Subordinate Judges contentious proceedings which could not be disposed of by District Delegates. We do not see what other meaning can be given to the language of section 31(2) of the Oudh Courts Act. We think that there is no real conflict between that Act and the Indian

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Succession Act because the transfer made under section 31 of the Oudh Courts Act is made not to the District Delegate but to the Subordinate Judge. There is nothing in the Indian Succession Act which renders the Subordinate Judge, as such, incompetent to dispose of contentious proceedings under that Act. The fact that one and the same officer is both a Subordinate Judge and a District Delegate lends some colour to the argument that he cannot dispose of a contentious proceeding. The position however appears to be that although as District Delegate he cannot dispose of a contentious proceeding nevertheless he can do so as Subordinate Judge, if the proceeding is transferred to him by order of the District Judge.

In our view, therefore, there is nothing illegal in the order which forms the subject of this application and we dismiss the application with costs.

Application dismissed.

APPELLATE CRIMINAL

*Before Mr. Justice E. M. Nanavutty and Mr. Justice
Ziaul Hasan*

1934
October, 22

RAGHUNANDAN *alias* NANDAN AND OTHERS (APPELLANTS)
v. KING-EMPEROR (COMPLAINANT-RESPONDENT)*

*Indian Penal Code (Act XLV of 1860), sections 149 and 302—
“In prosecution of the common object of the unlawful
assembly” in section 149, meaning of—Offence, whether
should be immediately connected with the common object—
Unlawful assembly—Common object of unlawful assembly
to beat—Some members armed with spears—One member
without premeditation thrusting spear and killing a person
—Other members of assembly, whether guilty of murder.*

The phrase “in the prosecution of the common object” in section 149 of the Indian Penal Code does not mean the same as the phrase “during the prosecution of the common object of the assembly.” That phrase must mean “that the offence committed was *immediately* connected with the common object

*Criminal Appeal No. 255 of 1934, against the order of Mr. G. C. Badhwar, I.C.S., Sessions Judge of Fyzabad dated the 1st of September, 1934.