

1935

SHEO
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SINGH

(3) In view of the answer given to question No. 2, this question does not arise.

KING, C.J.:—I agree. The question has been very fully discussed by my learned brother and I have nothing to add.

ZIAUL HASAN, J.:—I also agree.

By the Court. (KING, C.J. and SRIVASTAVA and ZIAUL HASAN, JJ.): Our answers to the questions referred to the Full Bench are as follows:

(1) That an execution Court can refuse to execute a decree on the ground of its being a nullity in the sense of its not being a decree at all in the eye of law either for want of inherent jurisdiction to pass it or for any other reason.

(2) The final decree passed on the 22nd of February, 1930, is not a nullity as against the respondents Nos. 1 to 3.

(3) In view of the answer given to question No. 2, this question does not arise.

REVISIONAL CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice E. M. Nanavutty

1935
March, 8

ANANDPAL SINGH AND OTHERS (PLAINTIFFS-APPLICANTS) v. RAM CHARAN, ADVOCATE, RAE SAHEB (DEFENDANT OPPOSITE-PARTY)*

Indian Succession Act (XXXIX of 1925), section 265—Oudh Courts Act (IV of 1925), section 31 and rule 239—Probate, proceedings for—Transfer of probate application by District Judge to Subordinate Judge for disposal—Case becoming contentious after transfer—Jurisdiction of Subordinate Judge, to dispose it of.

The test as to whether a Subordinate Judge has jurisdiction to dispose of an application for grant of probate, which has been transferred to his Court by the District Judge after which a caveat is lodged and the proceedings become contentious, is

*Section 115 Application No. 6 of 1935, against the order of Pandit Brij Kishan Topa, Subordinate Judge of Malihabad at Lucknow, dated the 9th of January, 1935.

whether the Subordinate Judge is acting in his capacity as a district delegate or in the capacity of a Subordinate Judge to whom a case has been transferred by an order of the District Judge. If he is seized of the case in the capacity of a district delegate, his jurisdiction ceases, as soon as the proceedings become contentious. If, on the other hand, he is trying the case as a Subordinate Judge, to whom the case has been transferred by the District Judge, there is no provision either in the Indian Succession Act or in the Oudh Civil Rules confining his jurisdiction to non-contentious cases. It makes no difference in principle, whether the proceedings at the time of the transfer had already become contentious or whether they become contentious afterwards. In the absence of any provision taking away the case from the jurisdiction of the Subordinate Judge, when the proceedings before him become contentious, the Subordinate Judge is entitled to deal with the case, whether contentious or non-contentious. *Kaloo v. Noor Jahan* (1), followed. *Ram Kishore v. Nand Kumar* (2), distinguished.

Mr. *Mohammad Ayub*, for the applicants.

Messrs. *Naziruddin Siddiqi* and *S. D. Singh*, for the opposite party.

SRIVASTAVA and NANAVUTTY, JJ.:—The facts of the case which have given rise to this application for revision are that the learned District Judge of Lucknow transferred an application for grant of probate to the Subordinate Judge of Malihabad for disposal. In the Court of the Subordinate Judge a caveat was lodged whereupon the applicant raised the objection that the proceedings having become contentious the Subordinate Judge had ceased to have jurisdiction to proceed with the case. The learned Subordinate Judge relying upon the decision of a Bench of this Court, to which one of us was a party, in *Kaloo v. Noor Jahan* (1) disallowed the contention. It is this order of the learned Subordinate Judge which is sought to be revised by the present application.

We are of opinion that the decision of the learned Subordinate Judge is correct and ought to be upheld. In *Kaloo v. Noor Jahan* (1) the distinction between proceedings before a district delegate and before the Sub-

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(1) (1934) I.L.R., 10 Luck., 316. (2) (1934) 11 O.W.N., 1301.

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ordinate Judge to whom the proceeding has been transferred by an order of the District Judge has been clearly pointed out. The test in each case must be whether the Subordinate Judge was acting in his capacity as a district delegate or in the capacity of a Subordinate Judge to whom a case has been transferred by an order of the District Judge. If he is seized of the case in the capacity of a district delegate, his jurisdiction ceases, as soon as the proceedings become contentious. If, on the other hand, he is trying the case as a Subordinate Judge, to whom the case has been transferred by the District Judge, there is no provision either in the Indian Succession Act or in the Oudh Civil Rules confining his jurisdiction to non-contentious cases. It has been argued that in *Kaloo v Noor Jahan* (1) the proceedings had already become contentious before the order of transfer was made by the learned District Judge, whereas in the present case no contention had arisen before the order of transfer was passed by the District Judge. We do not think that this difference in the facts of the two cases in any way affects the position. Whereas in the case of district delegates section 265 of the Indian Succession Act and rule 239 of the Oudh Civil Rules clearly show that their powers are confined to non-contentious cases, there is no corresponding provision either in the Indian Succession Act or in the Oudh Civil Rules so limiting the jurisdiction of the Subordinate Judge to whom as such proceedings have been transferred by the District Judge. On the contrary, section 31, clause (1) of the Oudh Courts Act clearly authorises a District Judge to transfer to any Subordinate Judge proceedings under the Indian Succession Act and the Probate and Administration Act, which cannot be disposed of by the district delegate. In our opinion it makes no difference in principle, whether the proceedings at the time of the transfer had already become contentious or whether they become contentious afterwards. In the absence of any provision taking away the

(1) (1934) I.L.R., 10 Luck., 316.

case from the jurisdiction of the Subordinate Judge, when the proceedings before him become contentious, it must be held that the Subordinate Judge is entitled to deal with the case, whether contentious or non-contentious. Reliance has also been placed by the applicants on an earlier decision of another Bench to which also one of us was a party in *Ram Kishore v. Nand Kumar and another* (1). This case was decided on the footing which was rightly or wrongly accepted by counsel for both the parties that the Subordinate Judge was dealing with the case in his capacity as a district delegate. The decision in that case proceeded upon the basis of the provisions contained in section 265 of the Indian Succession Act and rule 239 of the Oudh Civil Rules. No reference was made to the provisions of section 31 of the Oudh Courts Act, because as we have just stated the Subordinate Judge was treated as having been dealing with the case in his capacity of a district delegate. We are, therefore, of opinion that the order of the Subordinate Judge is correct. The application fails and is dismissed with costs.

The *ad interim* order of stay passed on Civil Miscellaneous Application No. 28 of 1935 will be discharged.
Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice C. M. King, Chief Judge and Mr. Justice E. M. Nanavutty

PANDIT KRISHNA BEHARI (PLAINTIFF-APPELLANT) v.
MUSAMMAT AHMADI AND ANOTHER (DEFENDANTS-RESPONDENTS)*

1935
March, 11

Transfer of Property Act (IV of 1882), section 128—Mohamedan law—Gift by a mohamedan of his entire property—Donee made liable to pay donor's debts—Debts not specified

*Second Civil Appeal No. 213 of 1933, against the decree of Pandit Krishna Nand Pande, Additional Subordinate Judge of Unao, dated the 18th of April, 1933, upholding the decree of Babu Gopal Chandra Sinha, Munsif, North, Unao, dated the 12th of May, 1932.

(1) (1934) 11 O.W.N. , 1301.

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