

1939

BACHAN
LAL
v.
GOBARDHAN
AND
OTHERS

Hamilton J.

the balance of the share which is not sold. I know of no authority to the effect that when a person buys part of another person's share in a village the presumption is that he buys a corresponding share in the house of his vendor in the village. I am not, therefore, prepared to hold that because, when a whole share is sold it is presumed that a house on it is sold, one should also hold that when part of a share is sold a similar share in a house in the share must be sold. This being so, there is no force in this appeal which is dismissed with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL

Before Mr. Justice R. L. Yorke

1939
November,
24

MRS. VIOLET PETERSON (APPLICANT) v. MRS. ADELAIDE ELIZABETH FORBES, IN THE MATTER OF THE ESTATE OF THE LATE (OPPOSITE-PARTY)*

Succession Act (XXXIX of 1925), section 295—Civil Procedure Code (Act V of 1908), section 10—Probate application—Section 10, Civil Procedure Code, whether applicable to proceedings under section 295, Indian Succession Act—Date of probate application and not the date when proceedings become contentious to be regarded as date of institution under section 10, Civil Procedure Code.

Section 10 of the Code of Civil Procedure is not strictly applicable to proceedings under section 295 of the Indian Succession Act. But even assuming that it is applicable in principle then as between rival applications for probate it is by no stretch of reasoning possible to treat as the date of institution the date on which the caveator may choose to allow the proceedings to become contentious. The only date which can be regarded as the date of institution with a view to deciding which of the two rival "suits" is "previously instituted" must be the date on which the petition was filed.

Any application which is subsequently converted into a plaint or is to be treated as a plaint and the foundation for a suit, must be considered to date back as a plaint to the date on which it was filed as an application.

*Civil Miscellaneous Application No. 925 of 1939, in Testamentary Case No. 1 of 1939.

Ramani Debi v. Kumud Bandhu Mookerjee (1) *Saroja Sundari Basak v. Abhoy Charan Basak* (2), *Radhashyam Dass and another v. Rangasundari Dassi* (3) *Chotalal Chumilal v. Bai Kabubai* (4), *Venidas Nemchand v. Bai Champavati* (5), *Bhut Nath Pal Mistry v. Chandra Penode Pal Chowdhury and others* (6), *Maung Tun Yin v. Ma Sein Yin and others* (7), *Ko Maung Gyi and others v. Daw Tok* (8), *Kanhaiya Lal and others v. Gendo* (9), *Sundrabai Saheb v. The Collector of Belgaum* (10), and *Nathon, Mr. and others v. Nathon, Mrs.* (11), referred to.

1939

MRS. VIOLET
PETERSON
v.
MRS.
ADELAIDE
ELIZABETH
FORBES

Messrs. *Niamatullah, H. D. Chandra and E. R. Kidwai*, for the applicant.

Mr. *H. G. Walford*, for the opposite party.

YORKE, J.:—On the 26th September, 1939, my learned brother BENNETT, J., declined to take into consideration an application for stay of proceedings in this Court under section 10 of the Civil Procedure Code on the ground that Mr. Forbes and Mr. O'Neill not having filed any caveat or affidavit, had at that time no right to be heard in the case. Subsequently on the 13th October, Mr. O'Neill alone filed a caveat supported by an affidavit, but did not present any fresh application under section 10. The 24th November, being fixed for the evidence on behalf of the caveator, on the 20th November, that is to say only four days ago, Mr. Walford on behalf of Mr. O'Neill presented a fresh application under section 10 of the Civil Procedure Code.

The facts which give rise to the consideration of this application are as follows:

It is common ground between the parties that the late Mrs. Forbes had executed a will on the 23rd January, 1938. She apparently left Lucknow for Mussoorie on the 5th June, 1939, but died at Dehra Dun on the morning of the 6th June. Mr. Forbes returned to Lucknow not long afterwards, but took no immediate action with a view to obtaining probate of his mother's

(1) (1910) 14 C.W.N., 924.

(3) (1920) 24 C.W.N., 541.

(5) (1928) I.L.R., 53 Bom., 829.

(7) (1922) 68 I.C., 671.

(9) (1927) I.L.R., 50 All., 238.

(2) (1914) I.L.R., 41 Cal., 819.

(4) (1897) I.L.R., 22 Bom., 261.

(6) (1911) 16 I.C., 443.

(8) (1928) I.L.R., 6 Ran., 474.

(10) (1908) I.L.R., 33 Bom., 256.

(11) (1930) 7 O.W.N., 373.

1939

MRS. VIOLET
PETERSON
v.
MRS.
ADELAIDE
ELIZABETH
FORBES

York J.

will of which he and the applicant Mrs. Peterson were co-executors. On the 12th July Mrs. Peterson filed the present application for probate as executrix under the will. It is said that prior to her doing so, she had been approached by her brother with a view to their making a joint application in the Calcutta High Court, which was more suited to Mr. Forbes as a forum because he had business in that part of India and is not at the present time ordinarily a resident in India. It is not disputed that on the 4th July, Mr. O'Neill informed counsel for the petitioner that on or about the 22nd June, 1939, Mr. Forbes had discovered among the late Mrs. Forbes's papers a codicil in the terms of which the petitioner Mrs. Peterson ceased to be an executrix. It is said by learned counsel on his behalf that Mr. Forbes after that date instructed his solicitors to file an application in the Calcutta High Court for the probate of the will and codicil. On the 12th July as mentioned above Mrs. Peterson filed her application in this Court, and on the 26th July, having come to know that her brother was intending to file an application at Calcutta, she entered a caveat in the Calcutta High Court, a course of action said to be permissible under the rules of that Court. It was not till the 3rd August that Mr. Forbes filed his application in the Calcutta High Court. On the 9th August, Mrs. Peterson followed up her caveat by filing an affidavit in support of it in the Calcutta High Court with the consequence that the proceedings in that Court became contentious and the provisions of section 295 of the Indian Succession Act XXXIX of 1925) came into effect. Meanwhile citations had been served on Mr. Forbes and Mr. O'Neill who is an executor under the terms of the alleged codicil though not of the original will, on the 17th August, 1939. They did not, however, as mentioned above, enter a caveat or take any action in this Court.

It is important to note that notice to produce the will had been served on Mr. O'Neill and Mr. Forbes on the

14th July, 1939, and that on the 17th July, Mr. Forbes somewhat disingenuously wrote on the back of the summons that the will which he was asked to produce had been sent to Calcutta in connection with his application for probate "made" in the Calcutta High Court, that application in fact not having been made, a fact of which he could not but be aware. It was not indeed until the 28th July, that he himself at Calcutta signed the necessary papers so that the application could be made on the 3rd of August.

Subsequently Mrs. Peterson filed an application in the Calcutta High Court under section 10 of the Civil Procedure Code, asking for the proceedings in that Court to be stayed pending the disposal of the proceedings in this Court. That application was dismissed on the 30th August. I have nothing before me except a copy of the formal order. It appears that several points were argued but the main ground was probably the fact that at the date when this matter was argued at Calcutta, there being no caveat or affidavit filed in this Court, the proceedings in this Court were without any defendant and it could not be said that the proceedings at Calcutta were between the same parties. In fact the application to the Calcutta High Court under section 10 of the Code of Civil Procedure was obviously premature.

The matter came up for hearing again in this Court on the 4th September, and again on the 26th September, when Mr. Forbes and Mr. O'Neill sought to oppose the application in this Court without filing a caveat or affidavit, and it was for that reason that my learned brother on the 26th September, declined to hear them in the case, and in consequence Mr. O'Neill did ultimately file the caveat on the 13th October, on which date, as the will was then before the Court, having been produced from Calcutta, evidence in formal proof of the will was taken and put on the record.

1939

MRS. VIOLET
PETERSON
v.
MRS.
ADELAIDE
ELIZABETH
FORBES

Yorke J.

1939
 MRS. VIOLET
 PETERSON
 v.
 MRS.
 ADELAIDE
 ELIZABETH
 FORBES

York J.

Learned counsel for the caveator Mr. O'Neill has sought to argue before me really only one point. After reciting the sequence of events, he contends that there is a previously instituted suit within the meaning of section 10 of the Code of Civil Procedure between the same parties proceeding in the Calcutta High Court and that therefore this Court should not proceed with the trial of the present suit, the matter in issue here being directly and substantially the same as that which is in issue in the Calcutta High Court. Put in simple words he says that there is a prior suit pending in the Calcutta High Court and that therefore this Court should stay these proceedings until the matter has been finally decided by the Calcutta High Court. He suggests that that Court is already dealing with the whole matter and the application before this Court only relates to half of it. That however is scarcely a correct statement, because the caveat itself brings the second half of the matter into issue before this Court. He suggests that there is a danger of contradictory decisions and he remarks that the petitioner has not again moved the High Court at Calcutta under section 10 of the Code of Civil Procedure, after the proceedings became contentious in this Court. Learned counsel has referred to a number of cases which are reported in *Ramani Debi v. Kumud Bandhu Mookerjee* (1) *Saroja Sundari Basak v. Abhoy Charan Basak*, (2); *Radhashyam Dass and another v. Ranga Sunlari Dassi* (3); *Chotalal Chuniial v. Bai Kabubai* (4); and *Venidas Nemchand v. Bai Champavati* (5). In none of these cases, however, was the question considered at what date an application for probate was to be considered to have become a suit. The use of the term "become a suit" is itself a very loose use of

(1) (1910) 14 C.W.N., 924, at page 926. (2) (1914) I.L.R., 41 Cal., 819.

(3) (1920) 24 C.W.N., 541.

(4) (1897) I.L.R., 22 Bom., 261, at pages 263, 264 and 266.

(5) (1928) I.L.R., 53 Bom., 829.

language and not supported by the terms of section 295 of the Indian Succession Act. In those cases it was merely considered in a general way that an application for probate became contentious only on the filing of a caveat supported by an affidavit, and thus became a suit in the sense that it had to be tried as a suit. The gist of learned counsel's argument is that when a caveat and affidavit are filed the proceedings then become a suit and it is to be taken that the suit is instituted on the date on which the proceedings become contentious. In effect this amounts to saying that the date of institution of such a so-called suit is entirely at the mercy of the caveator, a proposition which is almost absurd when thus baldly stated. One might almost as well say that a suit becomes instituted only when the written statement is filed by the defendant, a proposition which is patently absurd.

To my mind it is clear on the analogy of a pauper application under Order XXXIII, rule 8, of applications under section 47 of the Civil Procedure Code when these proceedings are treated as suits, and of an application under section 95 subsequently treated as a plaint in a suit such as was discussed in *Bhut Nath Pal Mistry v. Chandra Benode Pal Chowdhury and others* (1) that any application which is subsequently converted into a plaint or is to be treated as a plaint and the foundation for a suit, must be considered to date back as a plaint to the date on which it was filed as an application.

In point of fact the conduct of the caveator and the other applicant to the Calcutta High Court, Mr. Forbes, in this case is, to my mind, open to criticism. Section 279(1) of the Indian Succession Act provides that "every person applying to any of the courts mentioned in the proviso to section 273 for probate of a will or letters of administration of an estate intended to have effect throughout British India" (as is the case with reference

1930

MRS. VIOLET
PETERSON
v.
MRS.
ADELAIDE
ELIZABETH
FORBES

Yorke J.

(1) (1911) 16 I.C., 443.

1939
 MRS. VIOLET
 PETERSON
 v.
 MRS.
 ADELAIDE
 ELIZABETH
 FORBES

to the present application), "shall state in his petition, in addition to the matters respectively required by section 276 and section 278, that to the best of his belief no application has been made to any other court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid,

Yorke J.

"or, where any such application has been made, the court to which it was made, the person or persons by whom it was made and the proceedings (if any) had thereon."

Sub-section (2) provides that "the court to which any such application is made under the proviso to section 273 may, if it thinks fit, reject the same."

The clear intention of this section was to prevent from arising the very situation which has arisen in the present case and the courts having to decide a question of priority between competitive applications made to different courts. No copy of the application to the Calcutta High Court is before me and it is not possible to say whether compliance has been made with the provisions of the section, but I am inclined to suppose that it cannot have been complied with because the application to this Court had been made three weeks before the application was made at Calcutta, and the bulk of the property is situated in this province, and if those facts had been brought to the notice of the Calcutta High Court in the application itself, that court would perhaps have declined to take up the application made to it in the light of sub-section (2) of section 279.

As a result of the action taken by the caveator, however, this question, which does not seem ever to have come up for decision before, has now to be decided as to whether the application of the caveator of this case to the Calcutta High Court though later in date does take priority in view of the fact that the proceeding there became contentious before it become so here.

In the first place it is clear that section 10 of the Civil Procedure Code is not in terms applicable to cases of this kind. My attention has been drawn to a long series of cases in which it has been held that proceedings in section 295 of the Indian Succession Act are not suits, as indeed is apparent from the wording of the section. The following cases have been referred to:

Maung Tun Yin v. Ma Sein Yin and others (1);
Ko Maung Gyi and others v. Daw Tok (2); *Kanhaiya Lal and other v. Gendo* (3); *Sundrabai Saheb v. The Collector of Belgaum* (4); and *Nathon, Mr. and others v. Nathon, Mrs. A. S.* (5).

The wording of section 295 is in any case quite clear. It provides that "in any case before the District Judge in which there is contention, the proceedings shall take as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908, in which the petitioner for probate . . . shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant." It is quite clear that the direction here is only that the procedure of a suit shall be followed and not that proceedings, on becoming contentious, shall "become" regular suits instituted on the date of their becoming contentious. Section 10 of the Code of Civil Procedure is therefore not strictly applicable. Even assuming, however, that it is applicable in principle I am clear that as between rival applications for probate it is by no stretch of reasoning possible to treat as the date of institution the date on which the caveator may choose to allow the proceedings to become contentious. The only date which can be regarded as the date of institution with a view to deciding which of the two rival "suits" is "previously instituted" must in my opinion be the date on which the petition was filed. Applying the principles

1939

MRS. VIOLETT
 PETERSON
 v.
 MRS.
 ADELAIDE
 ELIZABETH
 FORBES

Yorke J.

(1) (1922) 68 I.C., 671.

(2) (1928) I.L.R., 6 Ran., 474.

(3) (1927) I.L.R., 50 All., 238.

(4) (1908) I.L.R., 33 Bom., 256.

(5) (1930) 7 O.W.N., 373 at page 375.

1939
 MRS. VIOLET
 PETERSON
 v.
 MRS.
 ADELAIDE
 ELIZABETH
 FORBES

stated in section 10 of the Code of Civil Procedure on that basis, I am not able to hold that the matter in issue in these proceedings before me is also directly and substantially in issue in a previously instituted suit between the same parties litigating under the same title, etc. etc.

Yorke J.

This application accordingly fails and is dismissed.

Application dismissed.

APPELLATE CIVIL

*Before Mr. Justice G. H. Thomas, Chief Judge and
 Mr. Justice Radha Krishna Srivastava*

1939
 November,
 29

THE DEPUTY COMMISSIONER, KHERI, MANAGER, COURT OF WARDS, MAHEWA ESTATE (PETITIONER-APPELLANT) v. KR. KHUSHWAQT RAI (CLAIMANT-RESPONDENT)*

United Provinces Encumbered Estates Act (XXV of 1934), section 14(4)(a), (5) (6)—Principal in section 14, meaning of—Statement or settlement of account within clause 6, whether to be between parties to original transaction only.

The ordinary meaning of the word "principal" is "the capital sum lent as distinguished from interest". By clauses (5) and (6) of the section a rule of law has been laid down by the United Provinces Encumbered Estates Act for the purpose of ascertaining the principal under clause (a) and they lay down that any amount of interest accruing or accumulating after the 31st December, 1916, cannot be treated as part of principal.

The contention that the statement or settlement of accounts and the contract subsequent to December 31, 1916, contemplated by clause (6) of section 14 of the United Provinces Encumbered Estates Act must be between the parties to the original transaction, or their legal representatives, has no force in view of the clear language of the clause.

Mr. H. S. Gupta, Government Advocate, for the appellants.

Messrs. M. Wasim and Ali Hasan, for the respondent.

THOMAS, C.J. and RADHA KRISHNA, J.:—The facts giving rise to these appeals are that Messrs.

*First Civil Appeal No. 82 of 1937, against the order of Mr. Mahabir Praasad Varma, Special Judge of 1st Grade, Kheri, dated the 1st May, 1937.