APPELLATE CIVIL.

Before Fazl Ali and Chatterji, JJ.

SUFAL CHANDRA SAHU

v.

SAILA BALA DASI.*

1929.

June, 25

Santal Parganas Justice Regulation, 1893 (Reg. V of 1893), section 15 (1)—Santal Parganas Act, 1855 (Beng. Act XXXVII of 1855), section 2, proviso—" Suit ", Significance of—Probate proceeding, whether is a " suit "—order rejecting application for probate—subject-matter in dispute, value of, exceeding Rs. 1,000—appeal, whether lies to High Court at Patna.

Section 15 (*1*), Santal Parganas Justice Regulation, 1893, provides :

" Subject to the provisions of the first proviso to section 2 of Act XXXVII of 1855 and of section 10 of this Regulation with respect to the jurisdiction of the High Court of Judicature at Fort William in Bengal in relation to suits cognizable of Courts established under the Bengal, Agra and Assam Civil Courts Act, 1887..... the court of the Commissioner shall, for the purposes of all enactments relating to civil jurisdiction for the time being in force, be deemed to be the High Court for the Santal Parganas."

Proviso (*1*) to section 2, Santal Parganas Act, 1855, lays down :

" Provided that all civil suits in which the matter in dispute was exceeding the value of Rs. 1,000 shall be tried and determined according to the general laws and regulations in the same manner as if this Act has not been passed."

Held, that a proceeding under the Probate and Administration Act is a " suit " within the meaning of the first proviso to section 2, Santal Parganas Act, 1855, and that, therefore, an appeal from an order of the District Judge of the Santal Parganas rejecting an application for probate, the value of the subject-matter in dispute exceeding rupees one thousand, lay to the High Court at Patna.

* First Appeal no. 28 of 1929.—In the matter of admission.

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Hurro Chunder Roy Chowdhry v. *Shoorodhonee Debia*(1), and *Bhupendro Narain Dutt* v. *Baroda Prosad Roy Chowdhry* (2), followed.

Arunmoyi Dasi v. *Mohendra Nath Wadadar* (3), *Sundrabai Saheb* v. *The Collector of Belgaum* (4), *Baijulal Marwari* v. *Thakur Prasad Marwari* (5) and *Upendra Chandra Singh* v. *Sardar Chiranjit Singh* (6), distinguished.

The facts of the case material to this report are stated in the judgment of Fazl Ali and Chatterji, JJ.

S. C. Mazumdar, for the appellant.

S. N. Banerjee, for the respondent.

FAZL ALI AND CHATTERJI, JJ.—The only question which we are called upon to decide at this stage is whether the present appeal is entertainable by the Commissioner of the Bhagalpur Division or by the High Court and the question has arisen in this way.

The appellant applied for the probate of a will to the District Judge of the Santal Parganas and his application was rejected. He thereupon appealed to this Court and his appeal was admitted on the 8th February, 1929. On the 10th April, 1929, the District Judge of the Santal Parganas in the letter with which he forwarded the record of the case to this Court raised the point that under section 15 of Regulation V of 1893 the Commissioner of the Bhagalpur Division and not the High Court at Patna would appear to be the High Court of the Santal Parganas in probate proceedings. The view taken by the learned District Judge was also supported by the learned Advocate for the respondent before the Registrar and so the matter has been placed before the Bench.

(1) (1868) 9 W. R. 402 (406). F. B.
(2) (1891) I. L. R. 18 Cal. 500.
(3) (1893) I. L. R. 20 Cal. 888.
(4) (1909) I. L. R. 33 Bom. 256.
(5) (1926) 7 Pat. L. T. 153.
(6) (1927) 8 Pat. L. T. 292.

Now, section 15 clause (*1*) of Regulation V of 1893, on which the learned District Judge as well as the learned Advocate for the respondent rely, runs as follows—

"Subject to the provisions of the first proviso to section 2 of Act XXXVII of 1855 and of section 10 of this Regulation with respect to the jurisdiction of the High Court of Judicature at Fort William in Bengal in relation to suits cognizible of Courts established under the Bengal, Agra and Assam Civil Courts Act, 1887, and subject also to the provisions of sub-section (3) and of any other enactment for the time being in force, the Court of the Commissioner shall, for the purposes of all enactments relating to civil jurisdiction for the time being in force, be deemed to be the High Court for the Santal Parganas."

It is clear from the language of the section itself, that it is to be read along with the first proviso to section 2 of Act XXXVII of 1855 which runs as follows—

"Provided that all civil suits in which the matter in dispute was exceeding the value of Rs. 1,000 shall be tried and determined according to the general laws and regulations in the same manner as if this Act has not been passed."

Thus the only question which has to be decided by us is whether a proceeding under the Probate and Administration Act is or is not a civil suit in the sense in which the expression is used in section 2 of Act XXXVII of 1855 because it is not disputed that this word "suit" as used in that Act would include an "appeal" and it is also not seriously questioned that if the proceeding is held to be a suit, it is a suit in which the matter in dispute exceeds the value of Rs. 1,000.

Now, the word "suit" has not been defined, so far as we are aware, in any Indian statute or enactment. In Wharton's Law Lexicon it is said to mean "an action in the Supreme Court or a proceeding by petition in the divorce branch of that Court; a prosecution; a petition to a court.....". This is hardly a definition of the term; but it shows at any rate that the word "suit" is wider in meaning than "action"

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and may include applications of a certain character. In Murray's New English Dictionary there is a note (which is apparently quoted from the Encyclopædia of Laws of England) to the effect that "suit" is a term of wider signification than "action" and it may include proceeding on a petition. In Halsbury's Laws of England again (Vol. I, page 3, note h) we find it noted that a "suit" is an original proceeding between a plaintiff and a defendant and the term is a wider one than "action". Similarly in *Hurro Chunder Roy Chowdhry* v. *Shoorodhonee Debia* (1) Sir Barnes Peacock, C.J., has pointed out that the word "suit" does not necessarily mean an action nor do the words "cause of action" and "defendant" necessarily mean a cause upon which an action has been brought or a person against whom an action has been brought in the ordinary restricted sense of the words. "Any proceeding in a Court of Justice" adds his Lordship "to enforce a demand is a suit; the person who applies to the Court is a suitor for relief; the person who defends himself against the enforcement of the relief sought is a defendant and the claim if recoverable is a cause of action". It may be observed here that when Sir Barnes Peacock said that any proceeding in a Court of Justice to enforce a demand is a suit, he did not evidently mean to give an exhaustive definition of the word "suit" because it is doubtful whether most of what are known as declaratory suits can strictly speaking be considered to be suits for the enforcement of a demand. It is, however, sufficient for our purposes to point out that it has been held even in this country by no less an eminent Judge than Sir Barnes Peacock that the word "suit" should not be taken to be synonymous with an "action" but is a term of much wider significance. In *Bhoopendro Narain Dutt* v. *Baroda Prosad Roy Chowdhry* (2), it was again very clearly pointed out that the word

(1) (1868) 9 W. R. 402 (406), F. B.
(2) (1891) I. L. R. 18 Cal. 500.

"suit" under sections 51 to 55 of Bengal Act IX of 1879 is not to be limited to what is usually called "regular suit", and the learned Judges who decided that case observed—"It has been argued before us by the Counsel for the respondent that the word "suit" in that part, i.e., Part VII of Bengal Act IX of 1879, must mean what is usually called a "regular suit", and cannot refer to proceedings of the nature now before us, in which the ward seeks to have his name substituted for that of his mother, and the decree obtained by his father executed. We regret that we are unable to accept this argument. The word "suit" in this Act has not the narrow significance attached to the word "action" in English Law; and, as Sir Barnes Peacock pointed in a Full Bench decision of this Court (*Hurro Chunder Roy Chowdhry* v. *Shoorodhonee Debia*(1), it embraces all contentious proceedings of an ordinary civil kind, whether they arise in a suit or miscellaneous proceedings."

Now, there is nothing in the proviso to section 2 of Act XXXVII of 1855 to suggest that the word "suit" as used there was intended to be used in the restricted sense in which "action" is used in English Law or the expression "regular suit" is used in this country. The probate proceedings are generally conducted on the same lines as a regular suit and the same procedure more or less applies to them. This is so because section 141 of the Civil Procedure Code provides generally that the procedure of a regular suit shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction; and section 83 of the Probate and Administration Act specifically 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 suit according to the provisions of the Code of Civil Procedure in which the petitioner for a probate

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or letters of administration, as the case may be, shall be the plaintiff and the person who may have appeared as aforesaid to oppose the grant shall be the defendant. In fact we find that in the present case the decree of the subordinate court refers to the proceedings as "Probate Suit no. 5 of 1928" and the operative portion of the decree runs thus—

"This *suit* coming on this the eleventh day of September, 1928, for final disposal..... it is ordered and decreed that the application for probate is rejected."

We do not think, therefore, that we will be justified in holding that a probate proceeding is not a "suit" in the sense in which the word has been used in Act XXXVII of 1855 or Regulation V of 1893.

The learned Advocate for the respondent, however, relies principally on three decisions which according to him support the view that a proceeding under the Probate and Administration Act is not a suit. One of these is a decision given by the Calcutta High Court in *Arunmoyi Dasi* v. *Mohendra Nath Wadadar*(1) in which the question arose as to whether a certain will having been construed in a particular way in a proceeding for letters of administration by the Court of North-Western Provinces, the decision of that Court in the administration proceedings would operate as *res judicata* and bar a suit which was subsequently filed and in which amongst other things there was also a prayer for the construction of that particular will. In that case it was observed by the learned Judges of the Calcutta High Court that a proceeding under the Probate and Administration Act was not a suit properly so called but took the form of a suit according to the provisions of the Civil Procedure Code. Again in *Sundrabai Saheb* v. *The Collector of Belgaum*(2) a question arose as to the valuation of the pleader's fee in a proceeding for

(1) (1893) I. L. R. 20 Cal. 888.
(2) (1909) I. L. R. 33 Bom. 256.

probate and Chandavarkar, J., in dealing with the matter observed as follows—

"The point has been urged before us and its determination depends upon the question whether probate proceedings, both original and appeal, fall within the meaning of a 'regular suit', so as to come within the purview of section 7 of Act I of 1846. The learned Government Pleader contends that they are and relies upon section 83 of the Probate Act (V of 1881). The language, however, of that section is far from lending support to the contention. The section does not say that proceedings for probate are a 'regular suit' or that they shall be treated as such for all purposes. It provides that 'they shall take as nearly as may be the form of a suit, according to the provisions of the Code of Civil Procedure'. This would show that probate proceedings do not, under the ordinary law, fall within the description of a 'regular suit'; it is by virtue of section 83 that they are brought within that category; and they are so brought, not in point of fact but only in point of form, for the limited purpose of applying to them 'as nearly as may be' the provisions of the Code of Civil Procedure. These restrictions leave still a difference between 'regular suit' and a testamentary suit."

Now, in our opinion neither of these two decisions really help the respondent as all that has been emphasised there is that there is difference between a proceeding in probate and a regular suit. But this is not the same thing as saying that a probate proceeding cannot be described generally as a suit. In fact Chandavakar, J., himself has referred in his decision to the probate proceeding as a testamentary suit.

The third case relied upon by the learned Advocate for the respondent is that of *Upendra Chandra Singh* v. *Sardar Chiranjit Singh*(1). That was a

(1) (1927) 8 Pat. L. T. 292.

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miscellaneous appeal against the order of the Subordinate Judge of Bhagalpur and it came up before a Bench of this Court consisting of Das and Foster, JJ. The judgment in the case was delivered by Das, J., and Foster, J., merely concurred in the final order. One of the questions which was argued before the Court was whether the word " suit " in section 5 of the Santal Parganas Settlement Regulation of 1872 included proceedings in execution of the decree made in a suit and the question was answered in the negative by Das, J. It has been pointed out by the learned Advocate for the appellant that in another case *Baijulal Marwari* v. *Thakur Prasad Marwari*(1) it was held by Adami and Kulwant Sahay, JJ. that an application in a pending execution proceeding is a suit within the meaning of section 5 of the Santal Parganas Regulation III of 1872 and that the view of Das, J., cannot be easily reconciled with that decision. However that may be, a proceeding in execution, which is a continuation of the suit, is quite different in character from a proceeding under the Probate and Administration Act and this was recognised as early as in the year 1894 in the case of *Thakur Prasad* v. *Fakirulla*(2). There the question arose as to whether section 647 of the old Civil Procedure Code did or did not apply to proceedings in execution and the Judicial Committee in answering the question in the negative made the following observation—

" Their Lordships think that the proceedings spoken of in section 647 include original matters in the nature of suits such as proceedings in Probates and guardianships and so forth and do not include executions ".

We are thus unable to hold that the word " suit " as used in section 15 of Regulation 5 of 1893 and section 2 of Act 37 of 1855 does not include a proceeding under the Probate and Administration Act.

(1) (1926) 7 Pat. L. T. 153.
(2) (1895) I. L. R. 17 All. 106.

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This being our view, we must hold that the present appeal is entertainable by this Court and not by the Commissioner of the Bhagalpur Division.

We may mention that the view we have taken is in consonance with the long established practice which has not been questioned so far and according to which all appeals arising out of Probate proceedings in the Santal Parganas in which the subject-matter of the dispute exceeds the value of Rs. 1,000 have been instituted in and disposed of by this Court.

APPELLATE CIVIL.

Before Das and James, JJ.

1929.

June, 26, 27.

PRASAD NATH JOGI

v.

AMBICA PRASAD SINGH.*

Landlord and Tenant—tenant dying without heir—holding, whether reverts to landlord—limited owner, mortgage by—mortgagee, right of, to retain possession—landlord, right of, to question alienation on ground of legal necessity.

The holding of a tenant dying intestate without any heir reverts to the landlord whose right to resume possession cannot be defeated by a limited owner executing a conveyance in respect of the holding, the landlord having got the right to question the alienation on the ground of justifying legal necessity.

Garbhu Mahto v. *Bibi Khudaijatunnissa*(1), *The Collector of Muslipatam* v. *Cavaly Vencata Narrainapah*(2) and *Cavaly Vencata Narrainapah* v. *The Collector of Muslipatam*(3), followed.

*Appeal from Appellate Decree no. 1371 of 1926, from a decision of Maulvi Amir Hamza, Subordinate Judge of Saran, dated the 16th August, 1926, reversing a decision of Maulvi Saiyid Ahmad, Munsif of Chapra, dated the 27th June, 1927.

(1) (1925) I. L. R. 4 Pat. 774. (2) (1859-61) 8 M. I. A. 500.
(3) (1866-67) 11 M. I. A. 619.