1937

M.K. ROWTHER v. O.T. MEERA SAHIB.

BAGULEY, J.

For these reasons I would dismiss this appeal with costs, advocate's fee two gold mohurs.

SHARPE, J.—An application for leave to sue as a pauper is entirely a matter of procedure. I agree with my brother Baguley that the preliminary objection taken in this case succeeds. We are not at liberty to entertain this appeal.

COURT FEES ACT REFERENCE.

Before Mr. Justice Ba U.

1937

Sep. 14.

SUBHAN KHAN AND ANOTHER

v.

MOHAMED EUSOOF.*

Court-fees—Order refusing or granting letters of administration — Appeal from order to the High Court—Court-fee on memorandum of appeal—Subject matter of letters or probate—Memorandum, application or petition —Order not a decree—Right of appeal—Burma Succession Act, s. 299—Court Fees Act, art. 1, Sch. I, arts. 1, 11, 17 (vi), Sch. II.

The court-fee payable on a memorandum of appeal presented to the High Court from an order of the District Court refusing or granting letters of administration or probate of a will is Rs. 2 under art. 11, Sch. II of the Court Fees Act.

The subject matter in dispute in a proceeding for either letters of administration or probate of will is the right to represent the estate of the deceased. No money value can be placed on it and so art. 1, Sch. I of the Court Fees Act does not apply, and moreover fees are chargeable on the estate on grant of letters or probate. A memorandum of appeal is different from an application or petition and so art. 1 of Sch. II cannot apply.

An order granting or refusing letters or probate is appealable not because it has the force of a decree, so as to make art. 17 (vi) of Sch. II applicable, but because there is a special provision, *viz.*, s. 299 of the Burma Succession Act, which confers the right of appeal.

Eva Mountstephens v. *Orme*, I.L.R. 35 All. 448; *Lee* v. *Hardy*, 9 W.N., H.C. Cases, N.W.P. 27; *Rodrigues* v. *Mathias*, 21 M.L.J. 481, dissented from.

J. C. Ray for the appellant. The court-fee payable on an appeal from an order granting or refusing letters of administration is Rs. 2 either under article 1 or article

* Court Fees Act reference arising in Civil First Appeal No. 57 of 1937 of this Court.

11 of Schedule II of the Court Fees Act. The Taxing Master was in error in holding that the case was governed by article 17 (vi) and that the court fee payable is Rs. 10. *J. M. Rodrigues* v. *A. M. Mathias* (1); *Jamsang* v. *Goyabhai* (2); *Upadhya Thakur* v. *Pershdi Singh* (3).

Miss Eva Mountstephens v. *Mr. Hunter Garnett Orme* (4) does not state the law correctly.

A. Eggar (Advocate-General) for the Crown. This is an appeal under s. 299 of the Burma Succession Act from an *order* of a District Judge, and therefore it should be stamped under art. 1 of Schedule I (*ad valorem*) unless the money value cannot be estimated, in which case art. 17 (vi) of Schedule II would apply.

The Allahabad case proceeded on the ground that the proceedings take the form of a suit. The contended right to administration is decided, and the order has the effect of a decree. The definition of " decree " in s. 2 of the Civil Procedure Code was adopted, although it is not relevant, directly, to the Court Fees Act.

If this order does not have the force of a decree art. 11 of Sch. II operates ; on the other hand if it has the force of a decree, there is no reason why art. 17 (vi) of Sch. II or art. 1 of Sch. I should not operate. It is, perhaps not equitable to bring the case within art. 1 of Sch. I because full duty has to be paid on the estate subsequently.

But the Madras High Court in *J. M. Rodrigues*' case held that art. 11 of Sch. II does not operate because the order has the force of a decree, and concluded that it was an " application " citing *Jamsang*'s case as authority though no reasons are given in the latter case.

Civil Rev. 323 of 1936 of this Court held that though s. 45 of the Lower Burma Land and Revenue

(1) 21 M.L.J. 481.
(2) I.L.R. 16 Bom. 408.
(3) I.L.R. 23 Cal. 720.
(4) I.L.R. 35 All. 448.

1937

SUBHAN KHAN v. MOHAMED EUSOOF.

Act makes a certificate executable as if it were a decree, that does not make it a decree for all purposes, *e.g.* for the purpose of s. 73 of the Civil Procedure Code. Consequently an order under s. 299 is not a decree, and is not declared to have the force of a decree.

BA U, J.—This is a reference made by the Taxing Master under section 5 of the Court Fees Act.

The facts giving rise to this reference are these :

The appellants in this case applied in the District Court of Insein for letters to administer the estate of one Hafiz Abdul Sattar Khan. Their application was opposed by the respondent. In spite of this opposition the appellants were granted letters with certain conditions attached thereto. Being dissatisfied with the conditions attached to the grant they came up to this Court on appeal. They stamped the memorandum of appeal with a two-rupee stamp. The Office, following the decision of the Taxing Master in Civil Miscellaneous Appeal No. 212 of 1932, held that the fee payable on an appeal from an order granting or refusing to grant letters was Rs. 10 under article 17 (vi), Schedule II, of the Court Fees Act, and demanded the payment of the deficit Rs. 8. The learned Counsel for the appellants contended that the decision of the Taxing Master was incorrect and asked for a reference. The matter was accordingly referred to the Taxing Master and he in turn referred it to me.

Though the matter is, in my opinion, of general importance, there is, strangely enough, a dearth of authorities directly bearing on this point. Only two cases have been brought to my notice, namely, *Miss Eva Mountstephens* v. *Mr. Hunter Garnett Orme* (1) and *J. M. Rodrigues* v. *A. M. Mathias and another* (2).

(1) (1913) I.L.R. 35 All. 448. (2) 21 M.L.J. 481.

I have also made a search but have not been able to find any except a very old case, *Lee* v. *Hardy* (1). In this case it was held that

"the court fee payable on a memorandum of appeal presented to the High Court under s. 263 of the Succession Act from an order of the District Judge granting letters of administration, is Rs. 2, under Act VII of 1870 (Court Fees Act), sch. II, art. 1 (*d*). Sch. II, art. 17 is not applicable to such a memorandum of appeal."

The Madras High Court held a similar view in the case quoted above where Sankaran Nair and Munro JJ. said :

"We do not think Article 11 of Sch. II applies, for the order appealed against undoubtedly has the force of a decree as it decides the representative title and to this extent we agree with the decisions of this Court in Appeal No. 94 of 1900 and Appeal 54 of 1900. In support of the contention that Article 1 of Sch. II applies, we are referred to the case of *Jumsang Devabhai* v. *Goyabhai Kikkabhai* (2) and *Upadhya Thakur* v. *Pershdi Singh* (3). These decisions undoubtedly support the contention. The question of the applicability of Article 1 of Sch. II was not considered in Appeals Nos. 54 and 94 of 1900 already referred to, and we are prepared to follow the Calcutta and Bombay decisions."

The case decided by the Calcutta and Bombay High Courts were decided under special Codes and so they do not, in my opinion, afford safe guides for the purpose of deciding the point now under discussion.

The decisions of the Madras High Court given in appeal Nos. 54 and 94 of 1900 have not been reported either officially or unofficially anywhere, but the learned author of the Court Fees and the Suits

(1) 9 W.N., H.C. Cases, N.W.P. 27. (2) (1891) I.L.R. 16 Bom. 408.
(3) (1896) I.L.R. 23 Cal. 723.

1937

SUBHAN KHAN v. MOHAMED EUSOOF.

BA U, J.

Valuation Acts by R. Satyamurti Aiyar refers to these cases in his book, third edition, page 550, where he says :

" In Appeal No. 94 of 1900 (unreported—Benson and Bhashyam Ayyangar JJ.) it was held that the order of the District Judge under the Probate and Administration Act had the force of a decree, that therefore Sch. II Art. 11 was inapplicable, and that the appeal should be stamped *ad valorem* under Sch. I Art. 1."

At page 551 the learned author referring to Appeal No. 54 of 1900 says :

" The Court (Sir Charles Arnold White C.J. and Benson J.) held that the case was distinguishable from the above appeals Nos. 94 and 194 of 1900, that only an application for probate but not one for revocation was a suit according to the concluding words of s. 83 (present s. 295), that the order appealed from was therefore not a decree as defined in s. 2 Civil Procedure Code and that Sch. II Art. 17 (6) of the Court Fees Act was inapplicable to the appeal as that Article applied only in the case of suits and a proceeding to revoke a grant of probate was not a suit. The Court however observed that when the Court Fees Act was passed, the Civil Procedure Code of 1859 was in force and did not contain any definition of decree corresponding to that contained in s. 2 of the present Code, that the order therefore though not technically a decree for the purpose of the present Civil Procedure Code had the force of a decree, that is to say, in the words of s. 2 of the Civil Procedure Code it was 'a formal expression of an adjudication upon a right claimed' and that Sch. II Art. 11 of the Court Fees Act was therefore inapplicable. In the end the Court held that *ad valorem* stamp was payable under Sch. I Art. 1."

The Allahabad High Court differs from all these views in *Miss Eva Mountstephens* v. *Mr. Hunter Garnett Orme* (1), where the learned Judges, Tudball and Muhammad Rafiq, say :

" The point is really covered by decisions. Section 261 of the Succession Act says as follows :

' In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as

(1) (1913) I.L.R. 35 All. 448.

may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, in which the petitioner for probate 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.'

So that it is quite clear that the proceeding in the court below was actually in the form of a civil suit in which under the above section the person applying for the letters of administration was the plaintiff and the person who opposed the grant was the defendant. In the case of *Umrao Chand* v. *Bindraban Chand* (1) the point was decided, though for another purpose, and it was clearly laid down that the order contemplated under section 86 of the Probate and Administration Act was a decree. Section 86 of the Probate Act corresponds in every way with section 263 of the Succession Act, just as section 83 of the Probate Act corresponds with section 261 of the Succession Act . . . . . In so far as the practice of this Court is concerned, appeals from decisions of a single Judge of this Court under the Probate and Administration Act have been treated as appeals from decrees, whatever may have been the practice in respect to appeals in similar cases from the decisions of the District Judges. We have, therefore, no hesitation in holding that the present appeal is a first appeal from decree.

As regards court fees, we have little hesitation in holding that the court fee payable is rupees ten under article 17, clause vi, Schedule II, of the Court Fees Act. The subject matter in dispute is in our opinion impossible to estimate at a money value. Therefore the above article will apply."

The views thus expressed are so contradictory that it is almost impossible to know which one is to follow with any degree of confidence. We get these divergent views as, in my opinion, the approach to the decision of this question has been made from wrong angles.

What must always be borne in mind in interpreting a fiscal statute is that it should be construed strictly and that where there is a doubt about the language of the statute, it should be decided in favour of the subject

(1) (1895) I.L.R. 17 All. 475.

1937

SUBHAN KHAN v. MOHAMED EUSOOF.

BA U, J.

as the subject cannot be taxed except by clear and unambiguous language. [*Empress* v. *Soddanund Mahanty* (1) ; *Manindra Chandra Nandi* v. *Secretary of State for India* (2) ; *Mylapore Hindu Permanent Fund (Limited)* v. *The Corporation of Madras* (3) ; *Muhammad Salim* v. *Nabian Bibi* (4) ; *Lumsden* v. *Commissioners of Inland Revenue* (5) ; *Anonymous Case* (6) ; *Dayachand Nemchand* v. *Hemchand Dharamchand* (7) ; *The Deputy Commissioner of Singhbhum* v. *Jagadish Chandra Deo Dhabal Deb* (8).]

I propose to consider this question from this standpoint.

Under Article 1, Schedule I, court-fee is payable on the value of the subject matter in dispute according to the scale set out in the third column of the said article. The subject matter in dispute in a proceeding for either letters of administration or probate of a will is the right to represent the estate of the deceased. *Nirod Barani Debi* v. *Chamatkarini Debi* (9). It is impossible to place a money value on such a subject matter and consequently this article does not, in my opinion, apply to a proceeding for letters of administration or probate of a will. In fact, it cannot apply because of Article 11 of Schedule I under which fees according to the scale set out in the third column have to be paid on the grant of either letters or probate, as the case may be. If Article 1 were to apply it would mean taxing a subject twice over in respect of the same estate. This no legislature would, in my opinion, have ever done. This aspect of the case was not considered in both the Madras cases (Appeal Nos. 54 and 94 of 1900).

(1) (1881) I.L.R. 8 Cal. 259.
(2) (1907) I.L.R. 34 Cal. 257.
(3) (1908) I.L.R. 31 Mad. 408.
(4) (1886) I.L.R. 8 All. 282.
(5) (1914) A.C. 877, 897.
(6) (1884) I.L.R. 10 Cal. 274, 282.
(7) (1880) I.L.R. 4 Bom. 515.
(8) 6 Pat. L.J. 411.
(9) 9 C.W.N. 205.

Article 1, Schedule II, does not also, in my opinion, apply to the proceeding for letters of administration or probate of a will when it reaches the stage of an appeal. It applies when the proceeding is at the initial stage because the proceeding has to be initiated with an application. *In the matter of Judoonath Shadhookhan* (1). When an appeal is preferred from an order granting or refusing letters or probate of a will it must be in the form of a memorandum. See section 299 of the Burma Succession Act and Order XLI, rule 1 of the Code of Civil Procedure.

A memorandum is entirely a different document from an application or petition. Application means a request, a motion to a Court or Judge, and a petition means a supplication made by an inferior to a superior having jurisdiction to grant the request. (Wharton's Law Lexicon.) Application and petition thus bear more or less the same meaning; whereas a memorandum, according to Murray's Oxford Dictionary, means, amongst others, a note to help the memory, or a mark, or sign, serving to identify.

An application or a petition has therefore to be drawn up quite differently from a memorandum of appeal. Take, for instance, an application for letters. It has to contain all the particulars as set out in section 278 of the Burma Succession Act and winds up with a prayer for grant; whereas a memorandum of appeal from an order refusing or granting letters contains only the grounds of attack. Further, if a memorandum of appeal is used in the same sense as an application or a petition as held by the Madras High Court in *J. M. Rodrigues* v. *A. M. Mathias and another* (2), the legislature would not have, in my opinion, used the words "application or petition" in this article and

(1) 15 W.R. 40. (2) 21 M.L.J. 481.

1937

SUBHAN KHAN v. MOHAMED EUSOOF.

BA U, J.

"the memorandum of appeal" in Article 11. All these words would have been used in both the articles. I am therefore of opinion that these words bear their natural meaning when used in these two articles, and that consequently this article does not apply to this case.

Article 17 (vi) of Schedule II does not also, in my opinion, apply. Where the Allahabad High Court has gone wrong in *Miss Eva Mountstephens* v. *Mr. Hunter Garnett Orme* (1) is in misconstruing section 261 of the Succession Act (now section 295). The said High Court construed the expression "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," as meaning that the proceeding shall become a suit. If the legislature intended that the proceeding, when once it became contentious, should become a suit, it would, in my opinion say so in clear and unmistakable language. And, besides, what the word "suit" meant was explained in section 25 of the Code of Civil Procedure 1865, which was the Code that was in existence at the time the Court Fees Act was enacted in 1870.

Section 25 said "All suits shall be commenced by a plaint."

A proceeding for letters of administration or probate of a will was, and is, not commenced by a plaint. For that reason the legislature said "the proceedings shall take, as nearly as may be, the form of a regular suit." In other words, what the legislature meant was that when once a proceeding for letters or probate of a will became contentious it should be tried for the sake of convenience as if it were a suit. If this construction is wrong but that of the Allahabad High Court is correct what it will mean is this: A person can apply for letters

(1) (1913) I.L.R. 35 All. 448.

of administration or probate of a will on payment of a court-fee of Rs. 2, but if he wants to appeal from an order refusing or granting letters or probate he must pay a court-fee of Rs. 10. This means denying justice to poor litigants. I do not think that this could have been the intention of the legislature when they enacted article 17 (vi) of Schedule II. This article, in my opinion, applies only to properly constituted suits ; *i.e.*, proceedings commenced by plaints, such as a suit instituted under section 92 of the Code of Civil Procedure.

That being so, the only article that is in my opinion applicable is article 11 of Schedule II which says in column one as follows :

" Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree."

Does an order passed on an application for letters of administration or probate of a will have the force of a decree ? The Allahabad High Court answers this question in the case cited above in the affirmative. In doing so, it refers to the definition of the decree as given in the present Code of Civil Procedure. That is where the said High Court has, with due respect, again gone wrong. The Code of Civil Procedure that was in existence, as I have pointed out above, at the time the Court Fees Act was enacted was the Code of 1865. In that Code the word " decree " was not defined. All it explained in section 189 was how it should be drawn up, and in Chapter IV it set out the various methods of executing decrees. Therefore, if an order could not be executed as if it were a decree, it could not have the force of a decree. In that light the word " decree " as used in this article should, in my opinion, be considered.

1937

SUBHAN KHAN v. MOHAMED EUSOOF.

BA U, J.

Now, can an order passed on an application for letters or probate be executed? I have no doubt in my mind that it cannot. It does not, as I have said above, decide the rights or liabilities of anybody. All it decides is as to who should represent the estate of a deceased person and the person in whose favour such an order is passed must still file a suit for recovery of the estate if the estate happens to be in the possession of another person. Therefore, in my opinion, this article was specially designed and enacted to meet a case of this kind.

An order granting or refusing letters of administration or probate of a will is appealable not because it has got the force of a decree, but because there is a special provision, namely, section 299 of the Burma Succession Act, which confers the right of appeal.

For all these reasons I hold that the court-fee payable on a memorandum of appeal from an order refusing or granting letters of administration or probate of a will is Rs. 2 under Article 11, Schedule II, of the Court Fees Act.