

**Philo Peter and anr. Vs. Divyanathan and ors.**

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**Court :** Chennai

**Decided On :** Jan-29-1988

**Reported in :** (1988)2MLJ1

**Appellant :** Philo Peter and anr.

**Respondent :** Divyanathan and ors.

**Judgement :**

ORDER

**Sivasubramaniam, J.**

1. These two civil revision petitions are coming before us on a reference being made by one of us, namely, Sathiadev, J., to decide the question as to whether court-fees is payable on one half of the value of the properties, on an application filed under Sections 276 and 222 of the Indian Succession Act for grant of probate regarding a Will when the matter becomes contentious.

2. The petitioner in C.R.P. No. 1878 of 1987 filed the petition in O.P. No. 5 of 1985 on the file of the learned Principal District Judge, Tiruchirappalli under Sections 276 and 222 of the Indian Succession Act praying for the grant of probate of the Will of the deceased Ignatious dated 22.7.1981. Similarly, the petitioner in C.R.P. No. 2052 of 1987 filed the petition in O.P. No. 323 of 1983 praying for the grant of Letters of Administration in respect of the estate of the deceased T. Arokiaswami Odayar with his Will dated 22.11.1982. In both these petitions, the respondents

contested and, therefore, the matter became contentious before the learned District Judge. The question arose whether court-fees is payable under Article 11(k) of the Court-Fees Act treating the petitions as suits. It was contended by the petitioners that in spite of the fact that the matter has become contentious, there is no necessity to register the petitions as suits, but only the procedure as laid down for trial of a suit has to be followed and that the petitions should remain in the same form in which they have chosen to file the same in Court. However, the learned Judge, following the decision of K. Veeraswami, J., as he then was in *F. Chelliah v. S. Peter* : (1966)2MLJ33 and another ruling of Sengottuvelan, J., in *Kanni R. Krishna Iyer v. K.L. Krishnamachari* 98 L.W. 80 came to the conclusion that the petitions have to be registered as suits and consequently he directed the petitioners to pay necessary court-fees under the Madras Court-Fees Act treating the petitions as suits. Therefore, the petitioners preferred the above two civil revision petitions which came up for orders before one of us, namely Sathiadev, J. Before my learned brother, Sathiadev, J., it was argued that Paul, J., has taken a different view in *R. Natarajan v. N. Parthasarathy and Ors.*, T.O.S. No. 8 of 1972 dated 6.2.1973 holding that since no caveat had been entered, AD VALOREM Court-fee on one half of the market value of the estate is not payable. It was found to be contrary to the decision of K. Veeraswami, J., as he then was, in *F. Chelliah v. S. Peter* : (1966)2MLJ33 , who had taken a view that whether caveat has been filed or not where an application for probate becomes contentious and is tried as a suit, it should be assumed for the purpose of the proviso that a caveat is impliedly entered. Finding that there is an apparent conflict between these decisions, the present reference was made to solve the said conflict. That is how the matter comes before us.

3. Before considering the legal position emerging out of the above said decisions, it is necessary to take notice of the relevant provisions in the Indian Succession Act (1925), Section 226 of the Act provides that the District Judge shall have, in relation to the granting of Probate and Letters of Administration, all the powers and authority as are vested in him in relation to any civil suit. Section 288 lays down that the proceedings of the Court of the District Judge shall, save as otherwise provided, be regulated, so far as the circumstances of the case permit, by the Civil Procedure Code. A proceeding for probate is initiated by the presentation of an

application in that behalf. What are the matters which should be mentioned in such an application, is provided in Section 276. Similarly, a proceeding for Letters of Administration is initiated by an application as provided in Section 278. Section 295, which is the important section to be considered in these proceedings reads as follows:

If 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 (5 of 1908), in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant.

Section 299 provides for an appeal against every order made by the District Judge.

4, Before construing the scope of Section 295 of the Indian Succession Act, it is better to refer Order 25 of the Rules of the Original Side of the High Court, Madras of 1956. It relates to the Testamentary and Intestate matters and prescribes a procedure for granting Probate or Letters of Administration or succession certificate. It contains separate provisions for contentious and non-contentious matters, relating to Wills. A Will may be proved either in common form or in solemn form. In a case where the petitioner wants to prove the Will in common form, it is enough if he files the Will along with the affidavit of attesting witness. There is a provision for issuing public notice and also notice to the interested parties. In such cases, anybody intending to oppose the issue of Probate or Letters of Administration, may enter caveat under Rule 51 of Order 25 of the Original Side Rules and file an affidavit in support of the caveat under Rule 52 within eight days of entering the caveat stating the grounds of objection to the grant of Probate or Letters of Administration. On such contest being made, the proceeding, which was originated by the original petition, is converted into T.O.S. In such a case, the plaintiff is bound to pay the required court-fee as provided in Article 11 (k) of Schedule II of the Tamil Nadu Court-Fees and Suits Valuation Act, 1955. Therefore, here, we find that there is a definite procedure prescribed for converting the petition into a regular suit, in which case the liability for payment of

court-fee is automatically attracted.

5. A difficulty was felt in construing the real scope of Section 295 of the Indian Succession Act. There is no difficulty, as long as the Petition is not opposed by anybody. But when somebody files a caveat and opposes the grant of Probate or Letters of Administration, the question arose whether it should be treated as a suit and payment of court-fee can be insisted on that basis. Two contentions were raised in such matters. One was whether the proceeding can be treated as a suit when it is not opposed by means of a caveat filed by the opposing parties even though such opposing parties are respondents in the petition. In considering this petition, Paul, J. in *R. Natarajan v. N. Parthasarathy and Ors.*, T.O.S. No. 8 of 1972, dated 6.2.1973 held as follows:

In this case the petitioner himself chooses to prove the Will in solemn form so that all interested persons may come in, watch and participate in the proceedings when he can as well apply for probate on proving the will in common form to avoid contest. If the Proviso to Clause (2) is extended to cases where a petitioner applying for Probate or Letters of Administration with a Will annexed wants to prove the Will in the solemn form, it would encourage such persons to apply for probate on proving the Will in the common form and avoid any contest in order to avoid payment of AD VALOREM court-fee. It is perhaps this aspect that has led to no provision being made for payment of AD VALOREM court-fee, in cases coming under Rule 58 of Order 25 of the Original Side Rules. In these circumstances, I am of the opinion that the petitioner need not pay AD VALOREM court-fee under the Proviso to Sub-clause (2) of Article 11(k)(ii) of Schedule II of the Court Fees and Suits Valuation Act.

In *Flarance Chelliah v. Soundararaj Peter and Ors.* : (1966)2MLJ33 , Veeraswami, J., as he then was, had to consider a similar position. In that case, the petitioner herself had impleaded certain persons as respondents who are likely to oppose the petitioner in the original petition. The learned Judge directed the petition to be registered as a suit. Regarding the payment of court-fee on AD VALORAM basis, the learned Judge held as follows:

But the question is whether for the purpose of the Proviso to Article 11(k) of the Court Fees and Suits Valuation Act, there should be a formal entry of caveat in order to attract the proviso, for, there is contention and the application is, therefore, to be tried as a suit. Merely because there is no formal entry of caveat, it does not appear that the proviso is nonetheless applicable. It is true Article 18 of Schedule II prescribes a separate court-fee of Rs. 10 on caveat. But merely because a caveat does not bear stamp, it cannot be said that it is not a caveat, any more than a plaint which bears less than the required court-fee ceases to be a plaint on that account. Where an application for probate becomes contentious and is tried as a suit, it should be assumed for the purpose of the proviso that a caveat is impliedly entered.

This decision was followed by Sengottuvelan, J., in *KANNI R. KRISHNA IYER v. K.L. KRISHNAMACHARI* 98 L.W. 80. The learned Judge, after considering the other decisions, came to the following conclusion.

A reading of Schedule II, Article 11(k) of the Tamil Nadu Court-Fees and Suits Valuation Act, 1955 clearly shows that in case of Wills not disputed a fixed court-fee is made payable and where the Wills are disputed and the matter becomes contentious, a court-fee of one-half of the AD VALOREM value is made payable in view of the procedure for such matters as laid down by the Original Side Rules, 1956, by which if an objection is taken by means of a caveat an enhanced court-fee is made payable. It is also seen that the enhanced Court-fee is made payable 'if a caveat is entered and the application is registered as a suit. In cases where the contesting respondents were already made parties, the original petition is registered as a suit straightaway as per Order 25, Rule 58 of the Original Side Rules, 1956. Perhaps if the respondents cited in the original petition do not enter contest, the petitioner may contend that in view of the fact that there is no contest no enhanced court-fee is payable. But whenever there is contest, whether a caveat is entered or not, according to the provisions of the Tamil Nadu Court-Fees and Suits Valuation Act, 1955 enhanced court-fee is payable.

6. It must be borne in mind that the decisions of Paul, J., and Sengottuvelan, J., relate to the proceedings before the Original Side of this Court and Whereas the

case decided by Veeraswami, J., as he then was, arose out of the proceedings before the District Judge. In so far as the proceedings relating to Testamentary and Intestate matters covered under Order 25 of the Original Side Rules are concerned, we have already seen that there are specific provisions providing for registering a petition as a suit as and when the application is resisted by means of a caveat. In such a case, the payment of court-fee is automatically payable under the Court-Fees Act as it stands. We are not concerned with such matters in this case as the validity of such a procedure is not being challenged before us. Therefore, we confine ourselves to the short question relating to the original petitions filed before a District Judge under Section 295 of the Indian Succession Act only. Viewing from this angle, there cannot be a real conflict between these decisions. But however, Sengottuvelan, J., has chosen to differ from the view expressed by Veeraswami, J., as he then was, in so far as the payment of court-fee is concerned, as it has become necessary to resolve this apparent conflict. It is significant to note that the points now raised before us to the effect that when there is no provision for registering a petition as a suit by the District Judge in the Indian Succession Act and as long as the petition is not registered as a suit, no Court fee is payable on AD VALOREM basis, have not been taken in the earlier decisions.

7. Mr. R. Arunagirinathan and Miss. M.B. Dominique learned Counsels appearing for the petitioners in these Revision Petitions contended that there is absolutely no provision in the Indian Succession Act to convert the original petition as a suit whenever a caveat is entered by the opposing party. According to them, what is provided under Section 295 of the Indian Succession Act is the procedure to be followed when the proceedings become contested. The use of the words 'as nearly as may be' in the said section itself indicates that the proceeding in question was not considered to be exactly the same as, a suit. It was further contended that even if such an extreme interpretation could be given, the proceeding cannot be treated as a suit in the absence of a Caveat being filed by the opposing party. Learned Counsels submitted that the Court-Fees Act being a taxing statute, it has to be strictly construed as it has always been held that liberal construction in favour of the litigant has to be adopted. Learned Counsels have relied on the decisions reported in Panzy Fernandas v. M.F. Queoros : AIR1963 All153 (F.B.) and B.L. Banerjee v. D.K. Ganguly : AIR1984 Cal16 . The other decisions may not

be relevant for the purpose of this case.

8. Per contra, Mr. R. Srinivasan, who is appearing for the respondents in C.R.P. No. 2052 of 1987 and Mr. T.N. Vallinayagam, learned Government Pleader, submitted that the language of Section 295- of the Indian Succession Act is clear and mandatory that a petition filed for grant of Probate or Letters of Administration should be treated as a suit as soon as it is opposed by a contesting party either by filing a caveat or otherwise. The words found in Section 295 that the proceedings shall take the form of a regular suit and that the petitioner in such a case is termed as the plaintiff and the persons, who have appeared to oppose the grant, shall be the defendants, denote that for all practical purposes the proceeding is nothing but a suit. According to them, if that is not the intention, such positive terms would not have been used in the section. Mr. R. Srinivasan, in support of his contentions, relied on the decisions reported in *Kalyanchand Lalchand v. Sita Bai*, I.L.R. 38 Bom. 309 *Ganga Bai v. Jaikishindas*, A.I.R. 1938 Sindh 36, *In Re Seethalakshmi and Ors.* I.L.R. (1980) Ker. 348 and *Zabu Khima v. Amardas* : AIR1967 Guj214 , wherein it was held that contentious probate proceedings must take the form of a suit and that they constitute a suit within the meaning of the Code of Civil Procedure. Further reliance was placed on the decision in *Chotalal v. Bai Kabubai* I.L.R. 22 Bom. 261, wherein it was held that since the proceeding becomes contentious, it must be treated as a plaint in a suit and that the suit is governed as far as practicable by the procedure prescribed in the Civil Procedure Code. It is a case relating to the original side of the Bombay High Court. Reliance was also placed on the decision reported in *Dr. Mrs. I.S. Bose v. Mrs. H.N. Judah*, : AIR1958 All672 , which held that contested applications for Probate and Letters of Administration have been classed along with first appeal for the matter of taxation. We are presently going to see that the same High Court has taken a different view in a later decision.

9. Learned Government Pleader relied on the decision of this Court in *Noor Mohammed v. Mohammed Kareem* A.I.R. 1938 Mad. 502, in which it was held as follows:

Under Section 295, where there is contention, the proceeding must take the form of a regular suit according to the Civil Procedure Code and in such a case it is not open to the Court to refuse to make full inquiry and to proceed to decide the matter in a summary fashion leaving his decision subject to modification in a suit to be filed afterwards.

They have also relied upon the view expressed by Veeraswami, J. as he then was, and Sengottuvelan, J., in the above-said case in support of their contentions. They urged that whether there is caveat or not, it matters little because what is intended under the Act is that once there is contest in such proceedings, it should be treated as a suit. Therefore, according to them, even if there is no formal caveat, it is enough if the contesting parties are impleaded as respondents in the petition and they raised a contention opposing the Will. We feel that the principles laid down in the said rulings are of no help to the respondents as they have not directly considered the points that are being projected now in these proceedings. Moreover, we are unable to agree with the reasonings expressed in those decisions.

10. Since the question raised before us is of some importance relating to payment of court-fee, we have to carefully analyse the various views in this connection to find out the actual scope of Section 295 of the Indian Succession Act in so far as payment of court-fee is concerned. In order to find out the meaning of 'suit' found in Section 295 of the Succession Act, which came to be passed in 1925, we have to see the provisions relating to suits in old Civil Procedure Code of the year 1859. Section 25 of the old Civil Procedure Code provided as follows:

all suits shall be commenced by a plaint which shall be presented to the Court by the plaintiff in person, or by his recognised agent or by a pleader duly appointed to act on his behalf.

Further, Section 26 specified the particulars that are to be furnished in the plaint. Section 27 provided the manner in which the plaint was to be signed and verified. The provisions of the old and new Code of Civil Procedure disclose that a decree marks the culmination of a proceeding which is described as a suit and which, according to the Code, is initiated by means of a plaint. But in so far as the

proceedings under the Indian Succession Act are concerned, they are not commenced by the institution of a plaint. But on the other hand, as Sections 278 to 281 of the said Act show, they are commenced by an 'application' or a 'petition'.

11. There is another angle from which we have to test the intention of the Legislature in prescribing the procedure as if it is a suit. Once we held that the proceeding under the Act is not a suit, the orders passed in such a petition cannot be termed as a decree. Though the term 'decree' was not defined in the old Civil Procedure Code of 1859, it was defined in Section 2(2) of the Code of Civil Procedure, 1908 as follows:

a formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and may be either preliminary or final.

It is, therefore, possible to hold that the use of the term 'suit' in the above definition indicates that a decree under the Code of Civil Procedure could only be passed in a proceeding which could be termed as a 'suit'. In this connection, we have to notice the provisions in Section 299 of the Indian Succession Act relating to the filing of appeals and it reads as follows:

299. APPEALS FROM

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