

Court No. - 7

Case :- FIRST APPEAL No. - 922 of 2023

Appellant :- Anil Yadav And Another

Respondent :- Smt. Puttul Devi @ Dulari Devi And 4 Others

Counsel for Appellant :- Arvind Kumar Kushwaha,Pooja

Hon'ble Dr. Yogendra Kumar Srivastava,J.

1. Heard Sri Arvind Kumar Kushwaha, learned counsel for the appellants.

2. This is a first appeal filed under Section 299 of the Succession Act, 1925¹ read with Section 96 of the Code of Civil Procedure, 1908², directed against an order dated 15.07.2023 passed by the Additional District Judge, Court No. 13, Varanasi, in Probate Case No. 73 of 2019, rejecting the application 34C dated 16.05.2022, in terms of which the appellants herein had sought deletion of Issue No. 2, which had been framed earlier.

3. The aforesaid order dated 16.05.2022 rejecting the application for deletion of the issue would be referable to the provisions of Order XIV Rule 5 C.P.C, and in view of the same a question would arise as to whether the said order can be held to be amenable to an appeal under Section 299 of the Act read with Section 96 of the Code.

1 the Act

2 the Code

4. Counsel for the appellants has sought to contend that every order made by a District Judge in probate proceedings would be appealable under Section 299 of the Act.

5. The question which therefore requires consideration is, as to whether every order made by a District Judge during the course of probate proceedings, would be amenable to an appeal before this Court under Section 299. The relevant provisions of the Act, are being extracted below:

“268. Proceedings of District Judge’s Court in relation to probate and administration.—The proceeding of the Court of the District Judge in relation to the granting of probate and letters of administration shall, save as hereinafter otherwise provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908.

295. Procedure in contentious cases.—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 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.

299. Appeals from orders of District Judge.—Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908, applicable to appeals.”

6. There is no dispute with regard to the fact that the Succession Act, 1925 is a special Act and Section 299 of the said Act provides a forum of appeal against every order made by a District Judge by virtue of the powers thereby

conferred upon him, before the High Court, in accordance with provisions of the Code, as applicable to appeals.

7. Section 268 provides that the proceedings of the court of the District Judge in relation to the granting of probate proceedings and letters of administration, shall be regulated by the Code so far as the circumstances of the case permits.

8. The provisions under Section 295 goes to show that in contentious cases, the proceedings shall take as nearly as may be the form of a regular suit, according to the provisions of the Code.

9. In a case where a probate proceeding is registered, and is treated as a suit after it becomes contentious and the Court is required to proceed for settlement of issues, a question would arise as to what would be the procedure to be followed. The Act being silent on the procedure to be followed, as of necessity, and in view of Section 268, the provisions under Order XIV of the Code with regard to settlement of issues, would become applicable.

10. In the case at hand, in terms of the order dated 16.05.2022, passed by the Additional District Judge in the probate proceedings, which is sought to be made subject matter of the present appeal, the application (34C) seeking deletion of issue no.2, as had been framed earlier by the Court, has been rejected.

11. The appellants herein having chosen to invoke the remedy of appeal under Section 299 against the aforesaid order rejecting the application seeking deletion of an issue, it

would be required to be seen as to whether the remedy of appeal under Section 299 would be available in the given circumstances.

12. Counsel for the appellants has sought to lay emphasis on the expression 'every order' under Section 299, to urge that in terms of the section every order made by a District Judge is subject to an appeal, and therefore the order rejecting the application for deletion of an issue would also be appealable under the said provision.

13. The aforesaid contention, would have to be tested in terms of the conditions laid down under Section 299 of the Act for exercise of the appellate powers.

14. A close reading of the language under Section 299 would indicate that the word 'every' does not govern the word 'order', but it qualifies the entire phrase 'order made by a District Judge by virtue of the powers hereby conferred upon him'. The consequence that follows would be that not every order made by a District Judge would be amenable to appeal under Section 299; only an order made by a District Judge by virtue of the powers conferred by the provisions of the Act shall be subject to an appeal under the section.

15. The expression 'hereby conferred' used would have to be understood as meaning 'conferred by the provisions of the Act'. Applying this construction, the words 'made by virtue of the powers hereby conferred', would have to be necessarily held to mean by virtue of the powers conferred by the express provisions under the Act.

16. For testing the appealability of an order under Section 299, the order in question must be traceable to a provision under the Act. Only in a situation where the order can be traced to a specific provision under the Act, it would be held to be appealable under the section. In other words, there must be a provision under the Act conferring power to make the order; otherwise the said order would not be appealable.

17. It would not be sufficient to show that the order which is sought to be appealed against, has some legal sanction or authority; the authority must be traceable to some provision under the Act.

18. An order which has been made not under any provision under the Succession Act, but draws its authority from some other statute, the provisions of which have been made applicable to proceedings under the Succession Act, would not be an order made by virtue of the powers conferred by the Act. It would be an order exercisable under the provisions of another Act, which in a given set of circumstances, have been made applicable to proceedings under the Succession Act.

19. The proceedings for grant of probate or letters of administration is governed by the provisions of Succession Act, and in a situation where the case is contentious, Section 295 gets attracted in terms whereof it is provided that that proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code. The District Judge, in such circumstances, may be called upon to

make various kinds of orders, which may not be traceable to any power under the Succession Act but would be referable to powers under the Code.

20. An order made not in exercise of a power conferred by the Succession Act, but by a power referable to another statute the provisions of which have been made applicable in the proceedings, would not be an order made by virtue of the powers conferred by the Succession Act, simply because a provision under it makes the other statute applicable. The order passed in such a situation would be by virtue of powers conferred only by the other statute.

21. The proceedings for grant of probate and letters of administration being governed by the provisions of the Code, in certain situations, which confer powers for making of various kinds of orders; any of such orders when made by the District Judge may be said to be an order made by virtue of the powers conferred by the Code but cannot be said to be an order made by virtue of the powers conferred by the Succession Act.

22. The Succession Act being a special Act, an order made thereunder may be said to be an order made under the Code, in a situation where the Code regulates the proceedings under the special Act but the converse situation cannot be readily inferred and an order made exercising powers under the Code cannot be held to have been made by virtue of the powers under the Succession Act.

23. Section 268 which provides that the proceedings of the court of the District Judge in relation to granting of probate or letters of administration shall be regulated by the Code, cannot lead to an inference that an order passed by the District Judge, referable to the provisions under the Code, would be appealable under Section 299.

24. The language of the statute makes it clear that the legislature did not intend to make every order made by the District Judge appealable under Section 299, the restriction having been provided by employing the words 'made by a District Judge by virtue of the powers hereby conferred'.

25. The right of an appeal under Section 299 of the Act provided against every order made by District Judge by virtue of powers conferred, would therefore have to be held, to be available only against orders made by the District Judge by virtue of powers conferred under the Act and the said right of an appeal would not be available against an order which has been passed not in exercise of powers conferred by the Succession Act, but in exercise of powers made available under the provisions of the Code.

26. It may also be noted that in a contentious case although the procedural provisions of the Code have been made applicable, the proceedings are not to be treated as a regular suit and upon determination of the issues raised therein, a decree is not to follow. The expression 'in accordance with the provisions of Code of Civil Procedure, 1908' finding place in Section 299 of the Act, is not indicative of

substantive rights of the parties, but only refers to the procedural aspect.

27. Any order of interlocutory nature passed by the District Judge during the course of proceedings in a case seeking grant of Probate or Letters of Administration, cannot be held to be an adjudication of a nature which conclusively determines the rights of the parties and therefore would not be a 'decree', so as to be amenable to an appeal under Section 96 of the Code.

28. The order against which the appeal has been preferred having been passed by the District Judge exercising powers referable to Order 14 Rule 5 of Code, the said order cannot be said to be an order made by the District Judge by virtue of powers conferred upon him under the Succession Act and therefore the same cannot be held to be appealable under Section 299 thereof. The order would also not be covered under the description of the term 'decree' so as to attract the provisions of Section 96 of the Code, and be subject to an appeal under the said provision.

29. The present appeal having therefore been held to be not maintainable, **stands dismissed.**

30. It would be open to the appellants to seek appropriate legal remedy, as they may be advised.

Order Date :- 5.12.2023
Mohini/Arun K. Singh

(Dr. Y. K. Srivastava, J.)