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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.1303 OF 2016
IN
APPEAL NO.26 OF 2011

1 U.R.Acharya
2 Ramadevi R. Acharya ...Applicants

In the matter between
Arvind Sitaram Iyer
C.A.of Harindra Sitaram Iyer ...Appellant
vs.
1. U.Raghvendra Acharya
2. R.R.Acharya
3. State of Maharashtra ...Respondents

Mr.Vaibhav Meta i/b Vaibhav Mehta & Associates for the appellant
Mr.R.M.Nakhwa a/w Mr.Vasant Dhavan for the respondents

CORAM : A.S.OKA, &
M.S.KARNIK,JJ.
DATE : NOVEMBER 21, 2016

P.C.:

1 This Notice of Motion has been taken out by the respondents in the appeal for challenging the order made by the Taxing Master which is at Exhibit-D to the affidavit in support of the Notice of Motion.

2 The present appeal is directed against the order of the learned Single Judge dated 6th September 2010 by which the Testamentary petition/suit filed by the appellant has been dismissed on account of non compliance with the requirement of Rule 394 of

the Bombay High Court Original Side Rules which provides that a petition can be filed for grant of Letters of Administration by a Constituted Attorney of a person residing out of State of Maharashtra provided that such Constituted Attorney resides within the State and that such petition is filed through an Advocate who is entitled to practice in this Court Court.

3 The contention of the applicant in the Notice of Motion (respondents in the appeal) is that the impugned order is a decree and therefore, the provisions of the Maharashtra Court Fees Act,1959 dealing with the appeal against the decree will apply. The view taken by the Taxing Master is that Article 13 of Schedule II of the Maharashtra Court Fees Act,1959 is applicable. The view of the Taxing Master is that the impugned order is not a decree. The learned counsel for the applicant relies upon the decision of the Apex Court in the case of Paramjeet Singh Patheja Vs. ICDS Limited[1]. He also relies upon the decision of a Division Bench of this Court in the case of Maharashtra Industries Development Corporation vs. Govardhani Constructions Company[2].

4 We have carefully considered the submissions. In the case of Paramjeet Singh (supra), the issue was whether an Award made by an Arbitrator is a decree for the purpose of section 9 of the

1 (2006) 13 SCC page 322

2 2007 (2) Bombay Cases Reporter 835

Presidency Towns Insolvency Act,2009. In the case of Maharashtra Industries Development Corporation, the issue was whether such an Award is a decree.

5 Coming back to the facts of the case, following section 395 of the Indian Succession Act,1925, the petition for Letters of Administration filed by the appellant was numbered as a suit. As noted earlier, there is no adjudication made in the impugned order on merits of the petition filed by the appellant. Only adjudication is whether there is a compliance with the procedural rule in the form of Rule 394 of the Bombay High Court Original Side Rules. The petition has been dismissed on account of non compliance with the said Rule by observing that the appellant who is the Constituted Attorney of the petitioner is not a resident of State of Maharashtra.

6 Sub section 2 of section 2 of the Code of Civil Procedure,1908 defines the decree which reads thus:

> “(2) “decree” means the 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 shall be deemed to include the rejection of a plaint and the determination of any question within [***] section 144, but shall not include -

> (a) any adjudication from which an appeal lies as an appeal from an order, or
> (b) any order of dismissal for default.
> Explanation – A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

7 In the present case, there is no formal expression of adjudication with regard to any of the matters in the controversy in the suit. Therefore, the impugned order cannot be a decree and accordingly, we find no error in the view taken by the Taxing Master. Hence, we find no merit in the Notice of Motion and the same is accordingly dismissed.

(M.S.KARNIK,J.) (A.S.OKA,J.)