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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :09.07.2021

Pronounced on :30.07.2021

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

C.R.P.No.144 of 2021

B.Nitish Harihar

...Petitioner/Petitioner

Vs.

1.P.Sivanandam
2.B.Jayashree
3.B.Latha
4.M.Pranuthi
5.N.Santhanakrishnan
6.K.R.Ramanujam

...Respondents /Respondents

Prayer:- This petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order in Probate O.P.No.258 of 2019 dated 29.09.2020 passed by the learned I Additional District Judge, Salem.

For Petitioner : Mr.T.R.Rajagopalan
Senior Counsel
for Mr.T.R.Rajaraman

For Respondents: Mr.P.Wilson, Senior Counsel
for Mr.I.Arokiasamy

ORDER

This Civil Revision Petition has been filed under Article 227 of the Constitution of India by the petitioner in Probate O.P.No.258 of 2019 questioning the order dated 29.09.2020 passed by the I Additional District Court, Salem.

2.Probate O.P.No.258 of 2019 had been filed by the revision petitioner herein under Sections 232, 235 and 276 of the Indian Succession Act, 1925, seeking to prove the Will dated 16.07.2014 and the Codicil dated 14.11.2018 in common form and to grant Letters of Administration attaching the Will and Codicil with respect to the properties described in the schedule to the petition in favour of the petitioner.



3.It is the contention of the revision petitioner that under a Will executed by R.P.Sarathy son of K.V.Radhakrishnan Chettiar on 16.07.2014 and under a Codicil on 14.11.2018, the properties which had been described in Schedule A to the petition had been bequeathed to the petitioner and the properties described in Schedule B to the petition had been bequeathed to the 2nd and 3rd respondents.

4.It must be pointed out that the petitioner is the son of the 2nd respondent and the 3rd respondent is the sister of the 2nd respondent. The 1st, 2nd and 3rd respondents are the son and daughters of R.P.Sarathy. The 5th and 6th respondents are the executors mentioned in the said Will.

5.Let me not enter into any further discussion on the genuineness or otherwise of the Will or even about the mental and physical health condition of R.P.Sarathy at the time when he is said to have executed the Will and Codicil. The order converting the petition into a suit is not seriously challenged and I uphold that part of the order.

6.The short point which arises for consideration in the Civil Revision Petition is with respect to the Court fees payable in the said petition, particularly, since the 1st respondent had entered a caveat and had stated that the petition should be converted into a suit and court fee be paid accordingly. The order converting the petition into a suit is not seriously challenged and I uphold that part of the order.

7.In this connection, a memo had been filed by the 1st respondent in Probate O.P.No.258 of 2019 and in the said memo, it had been stated that a Caveat Original Petition No.645 of 2019 had been filed and was pending on the date of presentation of the Probate Original Petition. It was therefore sought that the Probate Original Petition should be converted as a suit. The logical extension of such a request was placing an obligation on the petitioner to pay court fees in accordance with the value of the properties for which Probate or Letters of Administration was sought. That was the only issue on which the learned I Additional District Judge, Salem, passed an order on 29.09.2020, which order is now questioned by the revision petitioner.

8.In the said order, the learned I Additional District Judge, Salem, after examining the various precedents cited particularly pronouncement of the Division Bench of this Court, reported in AIR 1989 Mad 111, Philo Peter & Arputhasamy Vs. Divyanathan & others, had come to a conclusion that the Probate Original Petition should be converted into an Original Suit after payment of necessary court fees.



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9. This order, naturally requires an examination of the reasonings given by the Division Bench in the judgment reported in AIR 1989 Mad 111, Philo Peter & Arputhasamy Vs. Divyanathan & others.

10. In AIR 1989 Mad 111, Philo Peter referred above, the Division Bench was tasked to answer a reference 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, 1960 as amended, for grant of probate regarding a Will when the matter becomes contentious. Even before examining the said ratio laid down in the said judgment, it would be appropriate to examine Section 295 of the Indian Succession Act, 1925.

11. Section 295 of the Indian Succession Act, 1925 is as follows:-

"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 (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."

12. It must be kept in mind that under Order XXV of the Original Side Rules of the Madras High Court which relates to Testamentary and Intestate matters a procedure has been prescribed for granting Probate or Letters of Administration or Succession Certificate containing separate provisions for contentious and non contentious matters relating to Wills. If a caveat is entered under Rule 51 of Order 25 of the Original Side Rules and an affidavit is filed under Rule 52, the proceedings which was originated by the filing of an Original Petition would be converted into a Testamentary and Original Suit. In that case, the plaintiff / petitioner was bound to pay the required court fee as provided in Article 11(k) of Schedule II of the Tamil Nadu Court Fees and Suit Valuation Act, 1955. Therefore, a definite procedure had been prescribed in the Original Side Rules for converting a Original Petition into a regular suit with automatic attraction for payment of court fee.

13. While construing the real scope of Section 295 of the Indian Succession Act, 1925, when a caveat is filed raising an opposition for grant of Probate or Letters of Administration, two separate views were expressed as to whether the proceedings can be treated as a suit or not.



14. In T.O.S.No.8 of 1972, Nattorajan Vs. Parthasarathi and others, Justice C.J.R. Paul of the Madras High Court by order dated 06.02.1973 held that there was no need to pay Ad valorem court fee under the proviso to sub clause (2) of Article 11(k) (ii) of Schedule II of the Tamil Nadu Court Fees and Suits Valuation Act, 1955.

15. A different opinion had been given by Justice K.Veerasingam (as his Lordship then was) in 1966 (II) MLJ 33, Flarnce Chelliah V. Soundararaj Peter and others, wherein the learned Judge had directed the petition to be registered as a suit since the respondents therein opposed grant of probate and the learned Judge held that 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.

16. This decision was followed by Justice Sengottuvelan in Krishna Iyer V. Krishnamachari reported in AIR 1985 Mad 346 wherein, the learned Judge also held that whenever there is a contest, whether a caveat is entered or not, a petition seeking Probate or Letters of Administration should be converted into a suit and court fees must be paid according to the provisions of Tamil Nadu Court Fees and Suits Valuation Act, 1955.

17. It must also be kept in mind that the decisions of C.J.R.Paul J., and Sengottuvelan J., related to proceedings in the Original Side of the Madras High Court. Whereas, the case decided by Veeraswami J., arose out of proceedings before the District Court.

18. In AIR 1989 Mad 111, Philo Peter & Arputhasamy Vs. Divyanathan & others, the Division Bench proceeded to answer the reference as follows:

"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 S. 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 S. 295 of the Succession Act, which came to be passed in 1925, we have to see the provisions relating to suits in the old Civil Procedure Code of the year 1859. S. 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."



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Further, S. 26 specified the particulars that are to be furnished in the plaint. S. 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 S. 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 hold 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 S. 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 S. 199 of the Indian Succession Act relating to the filing of appeals and it reads as follows:-

" 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 (5 of 1908), applicable to appeals".

Under the said section, every order including the order passed at the final stage granting the probate made by the District Judge shall, be subject to



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appeal to the High Court. Even for the final judgment granting the probate, the word that has been used is "order". This provision also shows that the proceedings, even if they had become contentious, did not become proceedings in the suit, and unless there is a suit as provided under the Civil Procedure Code, there can be no decree, except in cases of certain orders which are expressly included in the definition of decree.

12. The question relating to the meaning of the words "as nearly as may be" used in S. 295 of the Indian Succession Act has to be understood in the context in which it is used in the Act. A perusal of S. 295 of the Indian Succession Act, 1925, which corresponds to S. 261 of the Indian Succession Act of 1865, itself indicates that such a proceeding is not a suit. Since the Legislature did not treat the proceeding itself as a suit, it was found necessary in S. 295 of the Act to lay down that such proceeding should, as nearly as possible, take the form of a regular suit. In this connection, we have to give special meaning to the words "as nearly as may be" in the section. The use of the said words itself indicates that the proceeding in question was not considered to be exactly the same as a suit. Again we have to notice that the fact that the section itself directs that such a proceeding shall take the form of a regular suit indicates that in substance it is not a suit. It is evident that the Legislature thought fit to make a distinction between a regular suit and the proceedings under S. 295 of the Act. As there is a basic difference in the two proceedings, it was found necessary to direct that one was to take the form of the other. It is also significant to note that such a direction regarding the change of the form is to be adopted only in cases where there is contention. Therefore, when there is no contention, the change of form contemplated in S. 295 of the Act does not come into operation and the proceedings fully retain their initial form. These principles have been elaborately considered by a Full Bench of the Allahabad High Court in Panzy Fernandas v. M.F. Queoros AIR 1963 All 153 and the learned Judges came to the same conclusion. We are in respectful agreement with the



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reasonings of the learned Judges who decided the said case.

13. We have bestowed our anxious consideration to the meaning of the words "as nearly as may be" and we are unable to persuade ourselves to come to a conclusion that the proceeding under S. 295 can be termed to be a regular suit. The main reason is that if the Legislature had intended that such proceedings should be treated as suits and not as applications, there is nothing to prevent the Legislature from making a simple and clear provision to the effect that such proceedings might be converted into a suit and treated as such. This inference is strengthened by the fact that in S. 47 of the Code of Civil Procedure, it is laid down that it is open to a Court to treat a proceeding under that section as a suit and order payment of additional court fee. The fact that such a specific provision was not made in S. 295 of the Indian Succession Act demonstrates the intention of the Legislature in clear terms.

14. In this context, we have to consider as to the proper court fee payable in a proceeding under S. 295 of the Indian Succession Act. We have already seen that the petition filed under the said Act does not become a suit on a contention being raised by the opposite party. The proceedings are treated as a regular suit in form only and not in substance. Court fee is now demanded on the basis of the provision contained in Article 11, sub-clause (k) of Schedule II of the Tamil Nadu Court-fees and Suits Valuation Act 1955, which provides as follows:-

Particulars	Proper fee
Application for probate or Letters of administration to have effect throughout India.	Twenty-five rupees.
Application for probate or Letters of Administration not falling under clause (i)...	Twenty-five paise.
If the value of the estate does not exceed Rs. 1,000/	Seventy-five paise.



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If the value exceeds Rs. 1,000/-

Five rupees be levied.

Provided that if a caveat is entered and the application is registered as a suit, one half the scale of fee prescribed in Article-1 of Sch. I on the market value of the Estate less the fee already paid on the application shall be levied.

It is seen that sub-Cl.(2) of Cl.(ii) provides for payment of one-half the scale of fee prescribed in Art. 1 of Sch. I on the market value of the estate when a caveat is entered and the application is registered as a suit. Therefore, before a party is called upon to pay court fee under this provision, two conditions must be satisfied, namely, that a caveat must have been entered and that the application must have been registered as a suit. Unless and until these conditions are satisfied, there is no warrant for demanding court fee as if it is a regular suit. We have already seen that when the proceeding becomes contentious, it does not become a suit as such as contemplated under the Civil Procedure Code and that it is considered to be a suit only in form and not in substance. Therefore, as long as there is no suit in the eye of law, this provision for payment of court fee cannot be invoked. We have also noticed that there is no provision anywhere in the Indian Succession Act or in the Court Fees Act to register a petition under the Indian Succession Act as a suit. When, there is no such specific provision in any of these Acts, it is not open to the State to demand court fee as if it is a regular suit, on such a petition at any stage of the proceedings.

15. There is one other reason for holding that the said provision under the Court Fees Act cannot be made applicable to a case of this nature. It is seen that Article 11(k) of Schedule II provides that one-half the scale of fee prescribed in Article 1 of Sch. I or the market value of the estate is payable in the proceedings under the Indian Succession Act, as



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and when a caveat is entered and the application is registered as a suit. Article 1 in Schedule 1 provides for payment of court fee on the value of the subject-matter of the suit. This provision of law cannot be made applicable since the subject matter in dispute in a proceeding relating to probate or letters of administration is the right of the grantee to represent the estate of the deceased and as such it is incapable of valuation. The said provisions contained in the Court Fees Act contemplate payment of court fee in cases where the subject-matter is capable of valuation and not otherwise. It cannot be disputed that the value of the properties comprised in such applications cannot be taken to be the value for purposes of payment of court-fee in such applications. The properties as such are not the subject matter in dispute here and on the other hand the subject matter in dispute is the right to represent the estate of the deceased and not the title to the said estate. It has to be noted that before an order actually entitling the petitioner to the grant of probate or letters of administration is passed, he is required to pay court fee on the probate or Letters of Administration on the value of the estate under Sch. I of the Court Fees Act. Apart from this payment of Court fee, when the petitioner wants to recover the property comprised within the estate of the deceased, he is again required to pay Ad Valorem court-fee on the plaint in the suit filed for recovery of the property. It is, therefore, clearly seen that it would result in payment of court fee more than once. It is a well established principle of law that such fiscal statutes should be construed strictly and whenever there is a doubt in the matter, an interpretation favourable to the litigants should be preferred. These principles have been clearly laid down in the above said decision of the Allahabad High Court following the decisions reported in A.V. Fernandez v. State of Kerala, AIR 1957 SC 657, and Central India Spinning and Weaving and Manufacturing Co Ltd. v. Municipal Committee, Wardha, AIR 1958 SC 341. We, therefore, hold that a proceeding referred to in S. 295 of the Indian Succession Act does not become a suit in the strict sense of the term even after it becomes contentious and as such court



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fee is not payable as a suit under Art. 11 (k) of Schedule II to the Tamil Nadu Court Fees Act.

16. In so far as the decisions rendered by Paul, J. in *R. Natarajan v. N. Parthasarathy and others*, T.O.S.No.8 of 1972, dated 06.02.1973 and *Sengottuvelan J. in Kanni R. Krishna Iyer v. K.L. Krishnamachari*, 98 Mad LW 80 ; (AIR 1985 Mad 346) are concerned, they related to the proceedings in the Original Side of the High Court and as such it cannot be stated that they have taken a different view in so far as the proceedings taken before the Courts outside the original jurisdiction of the High Court. As regards the decision of *Veeraswami, J.*, as he then was, in *Flarance Chelliah v. Soundararaj Peter and others* (1965) 2 Mad LJ 33, it is seen that the question was not raised in the form in which it is raised in these proceedings and, therefore, the learned Judge had no opportunity to consider the matter from this angle. The only question that was raised before the learned Judge was whether the filing of a caveat is a condition precedent for treating the proceedings as a suit. It was a case where the objectors were impleaded as respondents in the original petition itself, and, therefore it was contended that in the absence of a caveat being entered on their behalf, court fees was not payable. In dealing with this question, the learned Judge came to the conclusion that merely because there was no formal entry of a caveat, it does not mean that the proviso is none the less applicable. Even if it is to be construed that the Judge has taken a different view, we hold that it is no longer a good law.

17. In the result, we answer the reference in the following terms: -

When the proceeding initiated on a petition before a District Judge for grant of probate or letters of administration becomes contentious and is required to be tried in the form of a regular suit according to the provisions of the Code of Civil Procedure, it cannot be considered as a suit in the strict sense of the term and as such Ad Valorem court fee is not payable on such application under Art. 11(k) (ii) sub clause (2) of Schedule II of the Tamil Nadu Court Fees and Suits Valuation Act, 1955. Since this is the



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only question to be decided in these two revision petitions, it is unnecessary to send them back to be disposed of by a learned Single Judge of this Court on merits. Therefore, these Revision Petitions are allowed and the orders of the lower Court are set aside. No costs.

(Emphasis supplied)

19.This Judgment had been cited before the I Additional District Judge, Salem, but the learned I Additional District Judge was of the opinion that the said judgment would not apply to the facts of the case.

20.This opinion of the learned I Additional District Judge, is very strongly questioned by Mr.T.R.Rajagopalan, learned Senior Counsel who appeared on behalf of the revision petitioner. It is the contention of the learned Senior Counsel that the Judgment is binding not only on the learned I Additional District Judge, but also on this Court since a binding ratio has been laid down.

21.The learned Senior Counsel also pointed out that the dictum was subsequently followed by another learned Single Judge of this Court in AIR 1991 Madras 284, Dr.(Mrs.) Ruth Annamalai Vs. Mrs. Valliammai Achi, wherein Justice A.R.Lakshmanan (as his Lordship then was) stated in paragraph 18 as follows:

"18.In my opinion, though the Bench was not concerned with a matter arising on the Original Side, the clear distinction in the language of the two provisions, viz., Section 295 of the Succession Act on the one hand and Order XXV Rule 55 of the Original Side Rules on the other, is referred to and relied on for holding that by reason of the difference in language employed in Section 295, Succession Act, a contentious proceeding before the District Court does not become a suit and a higher court-fee is therefore not attracted, whereas by reason of the specific language employed in Order XXV Rule 55, Original Side Rules, wherein a contentious proceeding has to be registered as a suit, the higher court-fee automatically becomes payable. This is the part of the reasoning of the Bench decision and cannot be brushed aside as a mere obiter observation." (Emphasis Supplied)



22. Thus the position of law as enunciated by the Division Bench has to be followed to uphold the dignity of the Court.

23. Mr. P. Wilson, learned Senior Counsel who appeared on behalf of the 1st respondent, however, urged that this Court should re-examine the entire position and draw a parallel to the Original Side Rules of the Madras High Court as opposed to Section 295 of the Indian Succession Act, 1925 and stated that the Ad valorem court fees should be paid.

24. The learned Senior Counsel relied on a judgment reported in 2019 (1) CTC 857 : 2019 (1) LW 954 : Manu/TN/5665/2018, Dharmaselvi V. Minor Sangeetha and another, wherein, a learned Single Judge had examined an order passed by the Principal District Judge, Nagapattinam, who returned an unregistered appeal against a judgment and decree in O.P.No.211 of 2000 passed under the Indian Succession Act, 1925 by the Subordinate Judge, Thiruvavur.

25. In that case, an Original Petition was filed before the Principal District Judge, Nagapattinam, for issuance of succession certificate. A court fees of Rs.10/- was paid and succession certificate was also granted. The revision petitioner filed an appeal before the Principal District Judge, Nagapattinam and also paid a court fee of Rs.10/- as provided under Section 16 of the Tamil Nadu Court Fees and Suits Valuation Act, 1955. The District Court, returned the papers calling upon the appellant / revision petitioner to pay court fees as per Schedule 1 Article 4 of the Court Fees Act. Questioning that particular order of the Principal District Court, Nagapattinam, a Revision Petition was filed. The facts are clearly in variance with the facts which relate to the present case.

26. In the instant case, it is not an Appeal against any order granting Succession Certificate, rather it is with respect to Section 295 of the Indian Succession Act, 1925 when the matter becomes contentious and with respect to that particular provision, an authoritative judgment had been given by the Division Bench of this Court on a reference of the very aspect with respect to payment of the Court fees which judgment is binding on this Court.

27. Mr. P. Wilson, learned Senior Counsel appearing for the respondent also relied on ILR 2019 KAR 2035, Laxman V. Basavanni and Another, wherein, a learned Single Judge had opined that once proceedings become contentious, it cannot be disposed of in a summary manner and the proceedings shall take as nearly as possible in the form of a regular suit. Even in that judgment, the learned Single Judge also stated that the section does not



require that when the petition becomes contentious, it should be registered as a suit. The learned Single Judge was more concerned with the procedure to be adopted in disposing the petition.

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28.Mr.P.Wilson, learned Senior Counsel, also relied on 2008 (4) SCC 300, Krishna Kumar Birla V. Rajendra Singh Lodha & others. The Hon'ble Supreme Court in that particular case examined the Calcutta High Court Rules with respect to lodging of caveat and the contours of a caveatable interest. The issue before the Hon'ble Supreme Court was "What is a caveatable interest within the meaning of the Indian Succession Act, 1925 (1925 Act) vis-a-vis the Rules framed by the Calcutta High Court in the year 1940".

29.In the instant case, the issue surrounds payment of court fees under Section 295 of the Indian Succession Act, 1925, which provides that an Original Petition is to be tried as regular suit and the answer for that issue has been given on reference by a Division Bench of this Court in AIR 1989 Mad 111, Philo Peter & Arputhasamy Vs. Divyanathan & others, which judgment is binding on this Court.

30.I would therefore, set aside the order of the learned I Additional District Judge, Salem dated 29.09.2020 passed in the Memo in Probate O.P.No.258 of 2019 only with respect to payment of Court Fees and I hold that Ad valorem court fees is not payable on the application under Article 11(k) of Schedule II of the Tamil Nadu Court Fees and Suit Valuation Act, 1955. That portion of the order directing conversion of the O.P.No.258 of 2019 into a suit is not interfered with.

31.With the above observations, the Civil Revision Petition is allowed. No costs.

s/d-
Assistant Registrar(CS VII)

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Sub-Assistant Registrar

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To

The I Additional District Judge, Salem.

+1 CC to Mr.T.R.Rajaraman, Advocate sr 36786
+2 CCs to Mr.I. Arokiasamy, Advocate sr 36872.

C.R.P.No.144 of 2021

AJS(CO)
SP(19/08/2021)