(1964) 07 AHC CK 0004

Allahabad High Court (Lucknow Bench)

Case No: F.A.F.O. No''s. 1 and 59 of 1958 and 12 of 1960

Smt. Rajeshwari Misra and Another		APPELLANT
	Vs	
Markandeshwar Mahadeo Trust and Others		RESPONDENT

Date of Decision: July 21, 1964

Acts Referred:

- Succession Act, 1925 - Section 268, 270, 271, 299

Citation: AIR 1965 All 211

Hon'ble Judges: M.C. Desai, C.J; R.N. Sharma, J

Bench: Division Bench

Advocate: H.D. Srivastava and Umesh Chandra, for the Appellant; B.K. Dhaon, K.L. Saxena and A.P. Nigam, for the Respondent

Final Decision: Dismissed

Judgement

Desai, C.J.
This is an appeal from the decision given by the District Judge, Ducknow on an issue in a suit for grant of letters of administration to the estate of one Rani Kakhan. Ram Kakhan died on 5-11-1955 at Lucknow leaving a daughter Smt. Kajeshwari appellant No. 1, three grandsons named Kamestt, Promod and Kavendra (sons of Kajeshwari) and Kheo Kani Devi widow of the predeceased brother lialak Kani. it is said that he and Balak Kam had executed a will on lli/15-5-1045 bequeathing the property left by the survivor of the two to Markandeshwar Mahadeo Trust, "which had been created by them on 6-1-1942 in respect of some of their properties. On the death of Kam Kakhan the Trust made an application u/s 278 of the Indian Succession Act in the Court of the District Judge, Lucknow for the grant of letters of administration to the estate of the deceased. The property left toy the deceased included money deposited by him in the Allahabad Bank on different occasions.

The relations of the deceased mentioned above were made parties to the application. Out of them appellant No. 1 Kajeshwari filed an objection against the application denying the execution, the attestation and the validity of the will, alleging that if any will was executed, it was vitiated by undue influence practised upon the deceased and contending that on- the true construction the alleged will was not a will disposing of the property of the deceased to the Trust and was in any case confined to the property existing on the date of the alleged execution and did not govern the property subsequently acquired by the deceased. The learned Judge framed eight issues including:

"Issue 4. Whether the will is in respect of all the property left toy the executants at their death or only the property possessed by them at the time of the execution of the will?

Issue 5. Whether issue No. 4 can be raised in this Court? "

He heard issue No. 5 as a preliminary issue and answered it in the negative, that is, against the objector. This appeal is directed against the finding. 2 u/s 19-H of the Court-fees Act the District Judge gave notice of the application for letters of administration to the Collector. The Trust had valued the property at Rs. 1,00,000/- while the Collector valued it at Rs. 2,04,065/5/2 on which court-fee of Rs. 8,503/13/- was payable. The learned District Judge on 5-7-1958 passed an order that the Allahabad Bank should remit to him the amount of Rs. 8,503/13/- out of the money deposited by the deceased. It does not appear that the Collector called upon the Trust to amend the valuation to his satisfaction and on its failure to do so moved the learned District Judge to hold an enquiry into the true value of the property. What the learned District Judge did was to pass an order on 5-7-1958 calling upon the Allahabad Bank to remit to him the sum of Rs. 8,503/13/- out of the money deposited by the deceased. That is the order from which F.a.f.o. No. 59 of 1958 has been filed.

In compliance with the order the Bank remitted the sum of Rs. 8,503/13/- to the District Judge. On receipt of the money toy the learned District Judge Kajeshwari contended that the Trust had not deposited the court-fee and was not entitled to the letters of administration, in F.A.F.O. No. 59 of 1958 this court had passed an interim order staying the operation of the order directing the bank to remit the Amount of Rs. 8,500/- and odd to the District Judge and laying down that the money should remain in deposit in the bank. On the basis of this stay order it was contended by Kajeshwari that nothing had been deposited for payment of the court-fee on the letters of administration. Actually the bank had remitted the money to the learned District Judge and the learned District Judge on 1-3-1960 rejected the objection of Kajeshwari and proceeded to hear arguments in the suit. F. A. O. No. 12 of 1960 is from the order.

3. Ultimately the learned District Judge on 23-5-1960 allowed the Trust''s application and granted to it the letters of administration. f. a. F. O. n0. 27 of 1960 has been filed by Kajeshwari from that order.

4. All the four v. A. F. os. have been listed together for disposal. Sri A. v. Nigam, counsel for the Trust respondent In the F. A. F. Os. has raised a preliminary objection that the first three appeals are not maintainable.

5. A District Judge has jurisdiction In granting letters of administration in an cases within his district, vide Section 264(1) of the Indian Succession Act. In the matter of granting letters of administration and in ail matters connected therewith he has the like power and authority as are by law vested in him in relation to any civil suit or proceeding in his Court, vide Section 266. The proceedings in his court are regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, vide Section 268. The jurisdiction to grant letters of administration vests in the District Judge within whose territorial jurisdiction the deceased had a fixed place of abode or any property (movable or immovable). Thus if the deceased had a fixed place of abode in one district and property in another or other districts, the District Judge of any of these districts had jurisdiction to grant letters of administration. This is laid down in Section 270.

If the deceased had no fixed abode at the time of his death or had the fixed abode in one district and the application for letters of administration is made to the District Judge of another district where the deceased had any property, the District Judge though having jurisdiction to grant letters of administration has been given discretion by Section 271 to refuse to proceed with the application if he in his judgment thinks that it can be disposed of more justly or conveniently in another district. Even when he proceeds with the application Section 271 gives him the discretion to grant letters of administration either absolutely or limited to the property within his own jurisdiction. Thus the effect of Section 271 is that when an application is made to the District Judge of a district where the deceased did not have a fixed place of abode the District Judge may refuse the application or may limit the letters of administration to the property situated within his district. What should be the contents of an application for letters of administration is laid down in Section 278. Section 299 lays down that

"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."

This is the only provision conferring a right of appeal from an order made by a District Judge in a proceeding for letters of administration.

6. The contention of Sri A. p. Nigam was that none of the three orders can be said to be an order made by the learned District Judge by virtue of the powers conferred by any provision of the Indian Succession Act and that consequently none of the three

appeals is competent.

7. The word "every" governs not the word "order" but the phrase "order made by a District Judge by virtue of the powers hereby conferred upon him"; it is not that every order made toy a District Judge is subject to appeal; It is every order made by him by virtue of the powers conferred by the provisions of the Act that is subject to appeal. Any order made by a District Judge Is not appealable it must be an order made by him by virtue of the powers conferred by the Act. in Bhupendra Narain Singh Vs. Ashtabhuja Ratan Kuer, Sulaiman and Young, JJ. doubted very much whether it had been intended to make every order passed by a District Judge necessarily appealable, we have no doubt in this respect because the legislature clearly did not make every order passed by a District Judge appealable, livery order made by a District Judge in a proceeding for letters of administration is not necessarily an order made by virtue of the powers conferred by the Act.

There are many orders made by a District Judge In such a proceeding which cannot be said to have been made by virtue of the powers conferred by the Act and Section 299 clearly does not apply to them. Appealability is a matter of statute and in the absence of a statutory provision there is no right of appeal. Nothing to the contrary was said by Srivastava, .1. in Chheda Lal v. Mt. Ram Dulari AIR 1930 Oudh 424; he did not lay down that every order made by a District Judge in a suit for letters of administration is appealable, what he laid down was that every order made by a District Judge in exercise of the powers conferred upon him by the Act is appealable.

8. There can hardly be any dispute about the meaning of the words "hereby conferred"; they mean "conferred by the provisions of this Act."

9. What is meant by "made by virtue of the powers hereby conferred" is "made by virtue of the powers conferred directly by the provisions of this Act." The authority behind an order, in order that it is appealable, must be traced to one provision of the Act or another. If there Is no provision in the Act which authorises the making of the order it cannot be said to be an order made by virtue of the powers conferred by it. There must be a provision conferring a power to make the order; otherwise no appeal lies from it. If the authority for making it cannot be found in any provision of the Act the order is not one made by virtue of the powers conferred by it. It is not enough that there is some authority behind the making of it; the authority must be found in one provision or another of the Act. The authority must be direct: the provision must itself refer to the making of the order. An order made by virtue of a power conferred not by the Succession Act but by another Act or Code the provisions of which are made applicable in the proceeding, Is not an order made by virtue of the powers conferred by the Succession Act simply because a provision of it makes the other Act or Code applicable; it was made by virtue of the power conferred only by the other Act.

A proceeding for letters of administration is governed by the Code of Civil Procedure, which confers powers for the making of various kinds of orders; any of those orders, when made by a District Judge, can be said to be an order made by the District Judge 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 Act as the Act does not directly authorise the making of it. The power to make It cannot be said to be conferred by any provision of the Act. The provision that the procedure is regulated by the Code is itself no authority for the making of an order authorised by the Code. Section 268 of the Act refers to the proceedings being regulated by the Code; it does not refer to any order to be made by the District Judge and, therefore, cannot be said to be a provision conferring the power to make any order. Section 268 is not a power-conferring provision at all and consequently no order made by a District Judge by applying a provision of the Code can be said to be an order made by virtue of the power conferred by a provision of the Act.

10. The legislature clearly did not intend to make every order made by a District Judge appealable, It itself restricted the right by using the words "made.... by virtue of the powers hereby conferred". Every order validly passed by a District Judge would be by virtue of the power conferred by one Act or another. Since the proceedings before him are regulated by the Code he can pass many orders which are authorised by the Code. Now every order made under the Code even by the lowest civil Court is not appealable and clearly the legislature did not intend that every order passed by the highest Court in the district should he appealable. It was rightly observed by Sulalman, J. in the case of Bhupendra Narain Singh Vs. Ashtabhuja Ratan Kuer, that It would be an intolerable position if even an order made by a District Judge adjourning, or refusing to adjourn a case or summoning, or refusing to summon a witness or issuing notice of an application for letters of administration were appealable.

Consequently an order made in exercise of a power conferred by the Code cannot be said to be an order made by virtue of the powers conferred by Section 268 simply because that provision applied the Code to the proceeding. An order made under a special Act may be said to be an order made under the Code if the Code regulates the proceedings under the special Act, as was held by the Supreme Court in Vidyacharan Shukla Vs. Khubchand Baghel and Others, but the converse is not true. Sri Umesh Chandra relied upon the following statement of Chandra Sekhara Aiyar, J. in Matajog Dobey Vs. H.C. Bhari,

"Where a power is conferred.... by statute.... and there is nothing said expressly inhibiting the exercise of the power.... by any limitations or restrictions, It is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonably necessary for such execution.... This accords with commonsense and does not seem contrary to any principle of law. The true position is neatly stated thus In Broom''s Legal Maxims, 10th Ed., at p. 312; It 13

a rule that when the law commands a thing to be done, it authorises the performance of whatever may be necessary for executing its command"".

We do not consider that the principle laid down by the Supreme Court can be applied when Section 299 requires a specific provision conferring the power to make the order sought to be appealed from. The words "the powers hereby conferred" mean the powers expressly conferred and do not cover the powers implied in the powers expressly conferred. There may be a legal maxim implying the existence of a certain power in a power expressly conferred but the former cannot be said to be a power expressly conferred. The word "hereby" cannot be ignored. Further when there is Section 268 regulating the whole procedure to be followed in a suit for letters of administration implied powers cannot be assumed. The principle laid down by the Supreme Court applied when there is no provision expressly inhibiting the exercise of the powers by limitations or restrictions; when there is a provision such as that of Section 268 laying down that procedure is regulated by the Code a District Judge cannot rely upon Implied powers. When he makes an order under the authority of the Code it cannot be said to be an order made under the implied powers.

Finally the impugned orders made by the learned District Judge in this case cannot be stated to be orders which were reasonably necessary for the execution of the power of grant of letters of administration. The connection between them and the grant of letters of administration is too remote to make them reasonably necessary for the grant of the letters of administration. The question whether the impugned order is final order or interlocutory order is certainly irrelevant as was pointed out by Srivastava, J. in the case of Chheda Lal AlR 1930 Oudh 424. The criterion for deciding whether an order is appealable or not is whether it was made by virtue of the powers conferred by the Succession Act and not whether it is a final order or interlocutory order. Even an Interlocutory order, if its making can be traced to a power conferred by a provision of the Act, would be appealable if an order is held to be not appealable it would be not on the ground that it is a mere Interlocutory order but on the ground that it was not made by virtue of such powers.

When an application is made for letters of administration the District Judge either entertains it and proceeds to hear it in accordance with the provisions of the Code and grants or refuses to grant the letters of administration or refuses the application in exercise of the discretion conferred by Section 271. There is hardly any provision in the Act conferring power for passing any other order. An order u/s 270 granting letters of administration, an order refusing to grant letters of administration u/s 270 and an order refusing an application u/s 271 are all final orders. Each of the orders is made by a District Judge in exercise of the powers conferred upon him by Section 270 or 271 of the Act and is, therefore, appealable. There is no other provision conferring power to pass other orders and they are necessarily interlocutory orders. The final order in a proceeding for letters of

administration is one granting them or refusing them. The final order on an application Is granting or refusing letters of administration or refusing the application itself.

All other orders are interlocutory orders and there Is no provision expressly conferring the power to make any of them. So in practice no appeal would lie from an interlocutory order and this may explain the dictum of B. B. Ghose and S. K. Ghose, JJ. in Monmohini Dassi Vs. Taramoni, to the effect that the order was not appealable because it was not final. It was an order made during the pendency of a suit for probate and or course it was not made by virtue of any provision of the Act; the learned Judges might have expressed the reason in a more direct form by saying that it was not made by virtue of any power conferred by the Act. it was an order for security from an applicant for probate even before the grant of probate, it was not made under any provision of the Act u/s 291 security can be demanded from a person to whom probate as granted; there is no provision authorizing a District Judge to demand security from a petitioner for probate during the pendency of the petition.

11. In Baijnath Das Vs. Mahant Ramdeo Das Chela Mahant Kashi Das deceased, an appeal was preferred from an order made by a District Judge entertaining the application made to him u/s 192 and issuing a notice of it. Malik, C. J. and Gurtu, J. relying upon Bhupendra Narain Singh Vs. Ashtabhuja Ratan Kuer, held that the appeal did not lie. They pointed out that Section 299 does not make every order made by a District Judge appealable and that an order in order to be appealable "must be an adjudication of the rights of the parties and a direction to be '' carried out by them by virtue of any of the powers conferred upon him by the Succession Act". By entertaining the application and issuing a notice of it the District Judge did not snake any order contemplated by Section 192. Another case relied upon by the learned Judges was Fakirji Navroji Tadivala Vs. Maherban Faredoon Alamshaw,

What was appealed from in that case was the decision by a District Judge to entertain an application for letters of administration though the deceased had his fixed place of abode in another district. Beaumont C. J, and Sen, J. observed that if an order Is made by virtue of the powers conferred upon the District Judge by the Act an appeal lies from it taut the decision of the District Judge could not be said to be such an order. The District Judge exercised Jurisdiction conferred upon him by Section 270 and refused to exercise the discretion conferred upon him by Section 271. If he Had exercised the discretion and refused the application, he would have passed an order referred to in Section 271 and an appeal would have lain from it. But when he refused the discretion he simply decided to proceed with the application in exercise of the jurisdiction conferred by Section 270 and so long as he did not pass a final order either granting or refusing to grant letters of administration he could not be said to have made an order contemplated by Section 270.

Section 270 confers jurisdiction and the only order authorized by it is that of granting letters of administration. Exercising the jurisdiction conferred by it does not amount to making an order and certainly does not amount to making an order referred to in Section 270. The appeal, therefore, did not He. Furthermore an appeal does not lie against findings on preliminary issues which do not conclude the case.

12. Sri Umesh Chandra referred to orders made under the Provincial Insolvency Act being appealable but the language of Section 75 of the Provincial Insolvency Act is quite different from that of Section 299 of the Succession Act. There is difference between an order made "by virtue oil the powers.... conferred by the Succession Act" and "a decision come to or an order made in the exercise of insolvency jurisdiction". An order made by a District Judge under the authority of the CPC which applies to a proceeding under the Succession Act may be said to be an order made in the exercise of letters patent jurisdiction but cannot be said to be an order made by virtue of the powers conferred by the Succession Act. An order made in the exercise of a jurisdiction conferred by an Act is not always made by virtue of the powers conferred by any provision of it and includes an order made by virtue of the powers conferred by another Act which is made applicable to the proceeding.

13. We do not agree with Sri A, K. Nigam that the impugned orders in F. A. F. Os. Nos. 12 of 1960 and 59 of 1958 were made u/s 19-H of the Court-fees Act. Section 19-H does not authorize the making of any order; it only prohibits the grant of letters of administration so long as the petitioner has not tiled valuation and has not paid the court-fee payable on such valuation. An order requiring the petitioner to pay the court-fee or an order requiring the bank which has custody of the money belonging to the deceased to remit it so that the court-fee may be paid out of it is not an order contemplated by Section 19-H at all. It is the duty of the petitioner himself to file a valuation and to pay the court-fee on it without any order from the District Judge. If the petitioner does not file the valuation or does not pay the court-fee all that the District Judge has to do is to refuse the letters of administration to him. There is, therefore, no question of any order being made by the District Judge u/s 19-H and it cannot be said that no appeal lies from an order made u/s 19-H of the Act.

14. we, therefore, uphold the preliminary objection in this appeal and in F. A. F. Os. Nos. 58 of 1958 and 12 of 1960 and hold that these appeals are not competent.

15. The appeal is dismissed with costs.