ALLAHABAD HIGH COURT

Panzy Fernandas

Vs.

M.F. Queoros

Civil Misc. Application No. 36 of 1960, against order of Dist. J. Lucknow
(N.U. Beg, B.N. Nigam and S.D. Singh, JJ.)

07.11.1959. 12.10.1962

JUDGMENT

N. U. Beg, J.

1. The sole question that arises before this Full Bench relates to the amount of court-fee payable on a memorandum of appeal filed under section 299 of the Indian Succession Act (Act XXXIX of 1925). The appeal arises out of a petition for letters of administration made under section 278 of the said Act in respect of the estate of one Mr. H. Johnson, who died on the 19th November, 1958. The petitioners were the sister and the brothers of the deceased. The petition was contested by Mrs. Panzy Fernandas, widow of the deceased. The District Judge, Lucknow, by his order dated the 7th November, 1959, allowed the petition, and ordered that letters of administration be granted to the petitioners on filing an administration bond with one surety as provided in section 291 of the Indian Succession Act. Dissatisfied with the said order, the widow of the deceased, namely Mrs. Panzy Fernandas, filed the present appeal under section 299 of the Indian Succession Act on the 21st December, 1959. The law applicable to the present case would, therefore, be the Court-Fees Act (Act No. VII of 1870) as it stood amended on that date in its application to Uttar Pradesh by various local Acts, and the same shall hereinafter be referred to as the Act. On this memorandum of appeal the appellant paid a court-fee of Rs. 5/- only, which is the amount payable on a memorandum of appeal filed in the High Court under Schedule II Article 11 of the Act. On the same date, i. e., the 21st December, 1959, the Stamp Reporter made a report to the effect that the court-fee on the said memorandum of appeal was payable not under Schedule II Article 11, but under Schedule II Article 17, clause (vii) of the Act. The amount of court-fee payable under Schedule II Article 17 (vii) of the Act, according to the Stamp Reporter, was Rs. 50/-, hence there was a

deficiency of Rs. 45/- in the court-fee. On the 15th May, 1961, the appellant filed objections to this office report, and took up the position that the court-fee on the memorandum of appeal filed by her was payable under Schedule II Article 11, and not under Schedule II Article 17, clause (vii) of the Act. On this objection having been filed, a learned Judge of this Court passed an order on the 25th January, 1960, that the matter be put up before the Taxing Officer. On the 25th July, 1961, the Taxing Officer reported that in view of the decision of the Allahabad High Court in *Miss Eva Mountstephens v. Mr. Hunter Carnett Orme,* [1] a Court-fee of Rs. 50/- was payable on the present memorandum of appeal under clause (vii) of Article 17 of Schedule II of the Act. Thereafter, the Taxing Officer directed that the matter be laid before the Taxing Judge for orders. The matter was, accordingly, put up on the 4th September, 1961, before Nigam, J., who ordered that the question might be referred to a Division Bench. On the 7th December, 1961, the matter was heard by a Division Bench consisting of Nigam and Misra, JJ., and in view of the apparent conflict between the case of ILR 35 All 448 and the case of *Kanhaiya Lal v. Gendo*,[2] the Division Bench directed that a larger Bench might be constituted for a consideration of the matter. The case, accordingly, came up for hearing before us.

2. On behalf of the appellant, the learned counsel argued that the court-fee payable on a memorandum of appeal under section 299 of the Indian Succession Act is governed by Schedule II Article 11, and not by Schedule II Article 17, clause (vii) of the Act. According to Schedule II Article 11 of the Act a court-fee of Rs. 5/- is payable in Uttar Pradesh on a "memorandum of appeal when the appeal is not from a decree, or an order having the force of a decree" and is presented to the High Court. This provision of law would, therefore, be applicable only to a case where the appeal is not from a decree, or an order having the force of a decree. The question that arises for determination in the present case, therefore, is whether the order appealed against can be described as a decree or an order having the force of a decree.

3. The learned Counsel for the appellant argued that the order which is the subject-matter of the appeal in the present case is not a decree, as the order in question was not passed in a suit. We are of opinion that there is force in the contention of the learned counsel for the appellant in this regard. In support of his argument the learned Counsel for the appellant attempted to rely on the definition of the term "decree" in section 2 (2) of the Code of Civil Procedure (Act V of 1908), in the main portion of which the term "decree" is defined as

> "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."

The learned Counsel emphasized the use of the term "suit" in the above definition, and argued that the above definition indicated that a decree under the Code of Civil Procedure could only be passed in a proceeding which could be termed as a "suit". The learned Counsel also cited the case of *Hansraj Gupta v. Dehra Dun-Mussoorie Electric Tramway Co., Ltd.,* [3] in which it was observed that a suit was ordinarily instituted by the presentation of a plaint. The learned Counsel contended that in the present case the proceeding in which the order appealed against was passed could not be described as a suit. Hence the order in question could not be termed as a "decree". We are, however, of opinion that it would not be justifiable to refer to the definition of the term "decree" as contained in the Code of Civil Procedure, 1908, for the purpose of construing the Court Fees Act. The reason is that the Court Fees Act (VII of 1870) came into force on the 1st April, 1870. The Code of Civil Procedure, 1908, was not in existence at that time. On that date the Code of Civil Procedure that was in existence was Act VIII of 1859 as amended by certain Amendment Acts passed thereafter. No doubt the said Act did not contain any definition of the term "decree". The same result would, however, follow from a perusal of the various provisions of the Code of Civil Procedure of 1859, as it stood in the year 1870. Section 189 of the Code of Civil Procedure (Act VIII of 1859) contained provisions relating to the manner in which a decree should be framed. It provided as follows :-

> "The decree shall bear date the day on which the judgment was passed. It shall contain the number of the suit, the names and description of the parties, and particulars of the claim, as stated in the Register of the suit, and shall specify clearly the relief granted or other determination of the suit. It shall also state the amount of costs incurred in the suit and by what parties and in what proportions they are to be paid and shall be signed by the Judge and sealed with the seal of the Court."

The above provision of law, therefore, indicates that under the Code of Civil Procedure, 1859, a decree could only be passed in a proceeding which could be

termed a suit.
Further section 25 of the Code of Civil Procedure , 1859, provided that

> "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."

Section 26 specified the particulars that are to be given in the plaint. Section 27 laid down the manner in which the plaint was to be subscribed and verified. Thus the scheme of the Code of Civil Procedure of 1859 as disclosed by the aforementioned provisions, also points to the conclusion that a decree marks the culmination of a proceeding which is described as a suit, and which, according to the said Code, is initiated by means of a plaint. Proceedings for letters of administration under the Indian Succession Act (Act XXXIX of 1925) are not commenced by the institution of a plaint. On the other hand, as section 278 of the said Act shows, they are commenced by an "application" or a "petition".
4. It may also be noted in this connection that section 299 of the Indian Succession Act (Act XXXIX of 1925), under which appeals are preferred from the orders of the District Judge to the High Court, runs as follows :

> "299. Appeals from orders of District Judge. - Every order made by the 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 (V of 1908), applicable to appeals."

It is significant to note that the decision appealed against is described, in the above provision of law as an "order", and not a decree.

5. For the above reasons we are of opinion that the decision of a Court in proceedings for letters of administration cannot be described as a decree.

6. The next question that arises is whether it can be described as an order having the force of a decree. The learned Counsel on behalf of the appellant argued that it was not an order having the force of a decree, as such an order neither decided the right or title of any party nor was it capable of execution. Reliance in support of this contention was placed on a decision of the Rangoon High Court in the case of *Subhan Khan v. Mohammad Eusoof* [4] In that case it is held that an order granting or refusing

letters of administration or probate is not an order having the force of a decree. The first reason given in the judgment is that if an order could not be executed as if it were a decree, it could not have the force of a decree. According to the view expressed in this case, the question whether an order is tantamount to a decree or not would depend on the question whether it is executable as a decree or not. With due respect, we find it difficult to accept the view that the test for determining the question whether the order is an order having the force of a decree is the excitability of that order as a decree. It is possible to have a declaratory decree which is not executable. The Court Fees Act itself contemplates declaratory suits in its various provisions. Thus, for example, Schedule II Article 17 (iii) prescribes the Court-fee payable in certan suits "to obtain a declaratory decree where no consequential relief is prayed." A person may bring a suit for a bare declaration that he is the adopted son of 'X'. Such a decree merely declares his legal character or status as an adopted son of 'X'. It may not be executable. For that reason it cannot be said that the decision of the Court is not a decree. Further, in so far as costs are awardable in such proceedings, the order of the Court would be executable in that regard. It cannot, therefore, be said that the decree is unexecutable in all respects.

7. The second reason given in support of the above conclusion in the said case is stated by the learned Judge as follows :-

> "It does not, as I have said above, decide the rights or liabilities of anybody. All it decides is as to who should represent the estate of a deceased person and the person in whose favor such an order is passed must still file a suit for recovery of the estate if the estate happens to be in the possession of another person."

The second part of the above observation itself shows that such an order decides the right of a person to represent the estate of a deceased. The right to represent the estate of the deceased is itself a valuable right, and, in this view of the matter, it is difficult to hold that such an order does not adjudicate on the rights of any party.

8. A reference to the various provisions of the Code of Civil Procedure (Act VIII of 1859) also indicates that the term "decree", although not defined in that Code, connotes the final adjudication of the rights of parties which are in controversy in the suit. "Decree" as stated in section 189 of the Code of 1859, cited above, is prepared on the basis of judgment. Section 183 of the Code of 1859 shows that the judgment is

pronounced under the said Code after the exhibits are perused, the witnesses examined, and the parties heard in person or by their respective pleaders. Section 185 states that the judgment shall contain the point or points for determination, the decision thereupon, and the reasons for the decision. Section 186 states that where issues have been framed in a suit, the Court shall state its finding or decision on each separate issue, unless the finding upon any one or more of the issues be sufficient for the decision of the suit. Section 187 lays down that the judgment shall contain a direction regarding the amount of costs, and the party by whom they are to be paid. Section 188 states the items that go to comprise the costs payable by a party. Then follows section 189 (quoted above) which specifies the manner of the preparation of a decree.

Thus, although the Code of Civil Procedure, 1859, did not contain a definition of the word "decree", it contained provisions indicating that, as defined in section 2 (2) of the Code of Civil Procedure of 1908, it was the formal expression of the adjudication which, so far as regards the Court expressing it, conclusively determined the rights of the parties with regard to all or any of the matters in controversy. An order passed in an application for probate or letters of administration does adjudicate on certain rights conclusively. Under section 41 of the Indian Evidence Act, an order granting letters of administration conclusively determines the right of the grantee to represent the estate of the deceased, there by entitling him to file suits on its behalf. Similarly, the grant of probate conclusively determines the question of the genuineness of the will, and the right of the executor to act as such. In *Jagannath Prasad Gupta v. Runjit Singh,* [5] it was held that an order granting letters of administration to a person was conclusive proof of the representative title of a grantee against all debtors of the deceased. The same principle applies to applications for probate (vide *Sheoparsan Singh v. Ramnandan Prasad Narayan Singh,*).[6] From this point of view a final order passed in an application for letters of administration can be described as an order having the force of a decree.

9. The Legislature while enacting the provisions of the law in question seems to have envisaged a distinction between two kinds of orders - one being "orders having the force of a decree", and the other being orders not having the force of a decree. Orders having the force of a decree may be defined as orders that possess the essential characteristics of a decree. Amongst other characteristics of a decree the two essential ones are, first, that it adjudicates on the rights of the parties, and secondly, that such adjudication is final and conclusive. The force of a decree lies not in its executability,

but in its possession of the two characteristics mentioned above. A decree might be executable or inexecutable. Even if it is inexecutable, it does not cease to have force. The reason is that a decree derives its force from the fact that it is the formal determination of a lis by a competent Court, and not from its executability. The question of executability arises subsequent to the passing of a decree. Adjudicability on rights is a feature of decree quite distinct from its executability. The former is an inherent feature of a decree, and is something internal. The latter is merely an extraneous process to which a decree might or might not be capable of being subjected and is something external. The former feature is common to all decrees; the latter is not. Orders which have the force of a decree might, therefore, be said to be orders which, like decrees, possess the aforementioned twin characteristics of all decrees. The stage of execution may follow the passing of a decree, and is, no doubt, a result of it. The force of a decree, however, does not depend on what may follow it, but what it has already achieved at the moment when it is passed. Provisions relating to the definition, constitution and scope of decrees are quite separate from the provisions relating to their execution in both the Codes, and there is nothing to indicate that the former are dependent on the latter. If executability was to be the invariable quality of all decrees, one would expect that the Legislature would incorporate this feature in the provisions which define the nature, scope and contents of a decree. Further, if the Legislature wanted that Schedule II Article 11 should apply only to executable orders it could very easily have added the word "executable" before "order".

10. The view that an "order having the force of a decree" should be executable appears to be based on confusion between an order that has the force of a decree, and an order that is enforceable as a decree. Schedule II Article 11 of the Act clearly states that the order should have the force of a decree. It does not state that the order should be enforceable as a decree. The distinction between the two cases, though fine, is clear.

11. The above distinction was drawn in a Full Bench case of the Lahore High Court in *Official Liquidator, Universal Bank, Ltd. v. M. U. Qureshi*[7] In that case it is laid down that there is a distinction, both real and practical and not merely artificial between an order that has by statute the force of a decree, and an order that may by statute be enforced in the same manner as a decree. An order that is given by statute the force of a decree is an order that proprio vigore stands as a decree whatever the consequences, whereas an order that may by statute be enforced as a decree is an order that may be of little or no effect, proprio vigore, and only becomes effective when executed by the

method by which a decree may be executed. In other words, it is a mere shadow unless and until life is infused into it by an application for execution. In this case the following observations made in a judgment of the Allahabad High Court in a Reference under section 28 of Act No. VII of 1870, ILR 17 All 238 were approved :-

> "The mode in which an order may be enforced is not necessarily an indication or a criterion of the nature of the order. There is a great difference and no inter-connection between the force of a decree and the method of enforcing it."

The crucial test, therefore, for determining the question whether an order has the force of a decree is not whether it is executable as a decree but whether it finally adjudicates on the rights that are in controversy in the proceedings before the Court concerned.

12. The learned Counsel for the appellant also argued that before an order could be said to have the force of a decree there must be an explicit statutory provision to that effect. As there is no provision in the Indian Succession Act laying down that orders passed under section 295 shall have the force of a decree, orders passed there under cannot be considered to be orders that have the force of a decree. Reliance in support of his contention was placed by the learned Counsel on the case of *Satyanarayan v. Murarilal*[8] We are unable to accept this contention. It is no doubt, true that sometimes the statute itself does make a provision that orders of a certain type shall have the force of a decree or shall be deemed to be decrees. From that, however, it does not follow that, in the absence of an express statutory provision to that effect, an order cannot be regarded as an order having the force of a decree. As already observed by us above, the question whether a particular order has the force of a decree or not depends on the inherent strength of the order itself. there is an express statutory provision that certain orders would have the force of a decree or would be deemed to be decrees, then such orders are raised to the level of a decree not by virtue of the fact that they possess the inherent strength of a decree, but because the statute itself has directed that it should be so. Such orders, therefore, are considered as decrees not because the orders themselves have the force of a decree, but because of the force of the statute which has dictated that orders of the particular type mentioned therein would be tantamount to decrees irrespective of the question as to whether the said orders themselves possess the characteristics of a decree or not. If any observations made in AIR 1954 Hyderabad 82 cited above can be construed to lay down a contrary proposition then we would respectfully dissent from them.

13. The learned Counsel for the appellant has also cited *In re B. Venkataratnam,* [9] in which it is held that Schedule II Article 11 applies to cases in which the statute provides that an order shall be subject to an appeal as if it were a decree. A perusal of the judgment of this case, however, shows that the learned Judges in that case based their view on the special amendment of Schedule II Article 11 as made in Madras. In any case, this decision nowhere goes to the length of laying down a negative proposition to the effect that unless there is an express provision in the statute that an order has the force of a decree, it cannot be regarded as such. If the intention of the Legislature was that only those orders are to have the force of decree in respect of which there is an express statutory provision to that effect, then one would expect that the statute should, instead of using the words "order having the force of a decree", have used the words "order having the force of a decree under some statute". The interpretation suggested, therefore, involves the addition of certain words not found in the provision of law in question, and is not warranted by the phraseology of Article 11 as it stands at present. In *British India General Insurance Co. Ltd. v. Captain Itbar Singh,* [10] para 13, their Lordships of the Supreme Court have observed that the rules of interpretation do not permit a Court to add words to a section, unless the section as it stands is meaningless or doubtful. This is not so in the present case. For the above reasons, we are of opinion that an order granting letters of administration should be considered to be an order having the force of a decree. An appeal from such an order would not, therefore, be governed by the provisions of Article 11 of Schedule II of the Act. The next question that arises is whether such an appeal is governed by Article 17 (vii) of Schedule II of the Act. The relevant portion of Article 17 (vii) of Schedule II of the Act, as amended in Uttar Pradesh, runs as follows :

15. This provision was relied on by the learned Counsel for the State as being applicable to the present proceeding. We, however, find it difficult to accept this contention for the simple reason that this is not an appeal arising out of a suit. The opening part of Article 17, which occupies a governing position in the above provision, itself states that it applies only to "plaint or memorandum of appeal in each of the following suits". It, therefore, applies only to suits instituted on plaints or appeals arising out of such suits. In the present case neither the proceedings can be said to be instituted by a plaint nor can the appeal be said to arise out of any such suit. We have already indicated above our reasons in support of our view in this regard.

16. On behalf of the State, however, reliance is placed on Section 295 of the Indian Succession Act which lays down the procedure in contentious cases :

> "295. Procedure in contentious cases : In any case before the District Judge in which there is contention, the proceeding shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908 (V 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."

Reliance by the learned Counsel for the State is placed on the case of ILR 35 All 448. In this case it was held that the proceedings for probate or letters of administration should be considered as suits, and orders passed therein are to be regarded as decrees. We, however, find it difficult to accept this line of reasoning. A perusal of Section 295 of the Indian Succession Act (Act XXXIX of 1925), which corresponds to Section 261 of the Indian Succession Act (Act X of 1865), itself indicates that such a proceeding is not a suit. It is for this reason that it was found necessary in Section 295 of the Indian Succession Act to lay down that such proceeding should, as nearly as possible, take form of a regular suit. The use of the words "as nearly as may be", itself indicates that the proceeding in question was not considered to be exactly the same as a suit. Again, the fact that the section itself also directs that such a proceeding shall take the form of a regular suit further indicates that in substance it is not a suit. It is only because there is an obvious difference in the basic nature of the two proceedings that it was found necessary to direct that one was to take the form of the other. Moreover, the direction regarding the change of the form is given only in cases where there is contention. It follows, therefore, that where there is no contention, i.e. in non-contentious cases, even this change of form does not take place, and the proceedings fully retain their initial complexion. The observations of Sulaiman and Banerji, JJ. contained in the subsequent Bench decision of the Allahabad High Court in ILR 50 All 238 : AIR 1928 Allahabad 51 also run counter to the view taken in ILR 35 All 448 (supra). The relevant extract from the judgment of the learned Judges in the said case is quoted below :

> "If the proceeding were itself a suit, there would be no necessity to say that it should take the form of a suit when there is a contention. In the case of *Sundrabai Saheb v. Collector of Belgaum,* [11] a Bench of the Bombay High Court

held that the proceedings in an administration case were not a suit. A similar view was expressed in the case of *Baijnath Prasad v. Sham Sundar Kuar,*[12] "

In the said case it was held that such a proceeding was not a suit, but a "miscellaneous judicial case". We find ourselves in respectful agreement with the view taken in this case.

17. Moreover, if the Legislature intended that such proceedings should be treated as suits, and not as applications, there was 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, as we find in Section 47 of the Code of Civil Procedure wherein 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. So far as a petition for probate or letters of administration itself is concerned, a fixed court fee of Rs. 25/- is payable in such a petition under Schedule II Article 1 (e) (3) of the Act in all cases whether contentious or non-contentious.

18. The intention of the Legislature in introducing Section 295 in the Succession Act appears to be to make the procedure followed in regular suits applicable also in proceedings under the said section. This provision of law appears to be in line with Section 141 of the Code of Civil Procedure (Act No. V of 1908) which lays down as follows :

"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil jurisdiction."

It cannot be said that because Section 141 extends the procedure applicable in suits to other proceedings it has the effect of converting such other proceedings into actual suits.

19. Further, it can also be argued that the injunction only is that the procedure to be followed in such proceedings would be that of a suit. That, however, does not mean that the Court Fees Act, as applicable to suits, would also become applicable to such proceedings. Section 295 of the Indian Succession Act has merely applied the procedure prescribed in the Civil Procedure Code for suits to proceedings mentioned

therein. It does not state that the Court-fees payable under the Act in suits under the Civil Procedure Code should also be applicable to such proceedings. In other words, the application of the Civil Procedure Code is limited to the procedure to be followed in the course of the proceedings, and does not extend to the matter of court fees payable under the Act on the petition before the proceedings start.

20. On behalf of the State it was also argued that Schedule II Article 17 (vii) of the Act would be applicable to the present case in view of the definition of the word "suit" in the Act which includes an appeal. The word "suit" is defined in Section 2 (iv) of the Act as follows :

> " 'Suit' includes a first or second appeal from a decree in a suit and also a Letters Patent Appeal."

We are of opinion that even if this definition is taken into consideration in construing this section, it is of no avail. Even according to this definition, the word "suit" would include only such appeals as arise from a decree passed in a suit. In the present case we, have already held that the original proceeding was not a suit, nor was the order passed therein a decree.

21. For the above reasons, we are of opinion that Schedule II, Article 17 (vii) of the Act is also inapplicable.

22. In the alternative, the learned Counsel on behalf of the State attempted to rely on Schedule I Article 1 of the Act which relates to court-fee payable on "plaint, written statement pleading, a set off or counter claim or memorandum of appeal (not otherwise provided for in this Act) presented to any Civil or Revenue Court except those mentioned in section 3". Under this provision of law an ad valorem court-fee is payable on a graduated scale, according to the amount or value of the subject-matter in dispute. We are, however, of opinion that this provision of law is also inapplicable to the present case. As already stated above, the subject-matter in dispute in a proceeding relating to letters of administration is the right of the grantee to represent the estate of the deceased. This right is incapable of valuation. A perusal of columns 2 and 3 of this provision of law would indicate that it was meant to apply only to cases where the subject-matter was capable of valuation, and not to cases where it was incapable of

valuation.

23. The learned Counsel for the State suggested that the valuation in such a case should be taken to be the value of the property comprised in the application for letters of administration. It is conceded by the learned Counsel that in the present application this property is not the subject matter in dispute. The subject-matter in dispute in the present application is the right to represent the estate of the deceased, and not the title to the said estate. If the above contention of the learned Counsel for the State is upheld, the Court would be levying court-fee not according to the value of the subject-matter in dispute, but according to the value of a subject-matter which is not in dispute, although it is connected with the subject-matter in dispute. It would, therefore, not be warranted by the strict terms of the statute. It is not permissible for the Court to strain the language of the Statute for the purpose of levying an enhanced court-fee on a party.

24. In the alternative, the learned Counsel for the State suggested that in such a case the appellant should have the option to fix the value at any figure that he chooses, and the court-fee should be levied according to the value put by him on the subject-matter in dispute. We find it difficult to accept this contention also. The provisions of Schedule I Article 1 are to be read in conjunction with Section 7 of the Act. A perusal of Section 7 of the Act shows that where the statute permitted this method, it expressly stated that. Thus Section 7 (iv) (b) lays down that in a suit for accounts the court-fee shall be payable "according to the amount at which the relief sought is valued in the plaint or memorandum of appeal." A similar provision is made in Section 7 (iv-B) (e) of the Act in respect of suits to set aside an award other than an award mentioned in Section 8, and in Section 7 (iv-C) (c) in respect of suits for establishing a right to the custody or guardianship of any person. In the last two cases the Legislature has also set forth the minimum amount at which it is open to a party to fix the valuation. If, therefore, the Legislature intended that such an appeal can be valued arbitrarily at the option of a party, one would have expected some such provision. On the other hand, the provision for a graduated scale of valuation, according to the subject matter of the property in dispute, and of the levy of court-fee according to the said valuation, shows that the Legislature did not want to leave the fixation of value to the choice of a party. In other words, the fixation of valuation under Schedule I Article 1 seems to depend not on the subjective opinion of a party, but on the objective standard set forth therein, namely "the amount or the value of the subject-matter in dispute".

25. It may also be noted in this connection that before an order actually entitling the petitioner to the grant of probate or letters of administration is passed, he has further to pay an ad valorem court fee according to the value of his assets and liabilities as prescribed in Section 19-1 of the Act. The amount of ad valorem court-fee payable at this stage is specified in Schedule I Article 11 of the Act. Further, in case the holder of the letters of administration wants to recover the property comprised within the estate of the deceased, he will again have to pay ad valorem court-fee on the plaint in the suit filed for the recovery of the said property. The application of these provisions of law would, therefore, result in double or even triple payment, of court-fee. This appears to be obviously harsh and could not have been the intention of the Legislature. In this connection the Court should also bear in mind three well-known canons of interpretation of fiscal statutes, namely, first such statutes are to be construed strictly; secondly the subject should not be made liable for payment of enhanced court-fee unless such a step is warranted by the clear provisions of the statute; and thirdly, where there is doubt in the matter, an interpretation favorable to the subject should be preferred. Reference in this connection might be made to two Supreme Court cases *A. V. Fernandez v. State of Kerala,* [13] and *Central India Spinning and Weaving and Manufacturing Co. Ltd. v. Municipal Committee, Wardha* [14]

26. In the end, the learned Counsel for the appellant contended that Schedule II Article 1 (e) (5) of the Act should be applied to the present case. Schedule II, Article 1, relates to "application or petition". The relevant portion of the same is as follows :

> "1. Application or petition-
> .....
> (e) When presented to a High Court-
> .....
> (5) in any other case not otherwise provided for
> (Five rupees)"

We are inclined to accept this submission. While doing it, we are conscious of the fact that in the Act a distinction has been maintained between the words "application" or "petition" and "memorandum of appeal". The Act, however, does not appear to be a well-drafted one. It is full of loopholes, and presents situations which are sometimes confusing and baffling. In the present case, the learned Counsel for the parties have

been unable to point out any specific provision of law in the Act which could clearly govern the particular case. We cannot also persuade ourselves to believe that the Act contemplated that such appeals should be filed without payment of any court-fee. The Act has nowhere defined the term "application" or "petition". There is, therefore, no specific bar in the Act to invoking the aforesaid provision of law in a case like this. In fact, there are a number of cases in which High Courts in India have applied the aforesaid provision to such cases. We would, therefore, hold that an appeal under Section 299 of the Indian Succession Act is at least an application or a petition within the meaning of these terms as broadly used. There is no doubt that, in a wide sense, the word "application" can be construed to include an appeal also. The word "application" is defined in Murray's English Dictionary, Volume I, page 406 at No. 9 as follows :

> "The action of making an appeal (obs), request, or petition to a person; the appeal or request so made."

In the Shorter Oxford English Dictionary prepared by William Little (1933 Edition) the word "application" is defined as follows :

> "The action of making an appeal, request or petition to a person; the request so made."

In Aiyar's Law Lexicon of British India (1940 Edition) the meaning of the word "application" is given as :

> "A petition to Court; a request to a judicial Officer; the act of making or preferring a request." In its wider sense, therefore, the word application would embrace an appeal as well.

27. In *Lee v. Herdy* [15] it is held that court-fee paid on a memorandum of appeal under Section 263 of the Indian Succession Act (Act X of 1865), which corresponds to section 299 of the Indian Succession Act (Act XXXIX of 1925), from an order of the District Judge granting letters of administration is leviable under Schedule II Article 1 of the Act, and Schedule II Article 17 is not applicable to such a memorandum of appeal.

28. In *Jamsang Devabhai v. Goyabhai Kirkabhai*[16] it is held that a second appeal from an order rejecting an application for execution of a partition decree under the Gujarat Talukdar's Act (Bombay Act VI of 1888) is not within the contemplation of Article No. 1 of Schedule I, but is an application falling under Article No. I of Schedule II of the Act.

29. In *Upadhya Thakur v. Persidh Singh,* [17] which is a full Bench case of the Calcutta High Court, a question of court-fee payable on an appeal to the Special Judge by the landlord under Section 108 (2) of the Bengal Tenancy Act (Act VIII of 1885) came up for decision. Dealing with the above case, the learned Judges observed as follows :

> "We can find no Article of the Court Fees Act expressly applicable to the applicants' memorandum of appeal to the Special Judge. But, if the proceeding be not a suit, then the memorandum of appeal is nothing more or less than an application, and, consequently, subject to one fee of eight annas only under Article (1), clause (b), (2), Schedule II, of the Court Fees Act, and we find that this was the Court fee properly payable by the petitioners on their memorandum of appeal to the Special Judge."

30. In *Chhedi v. Mt. Jaikora,* [18] a question arose regarding the amount of court-fee payable in an appeal under Section 75 of the Oudh Land Revenue Act. In this case the learned Judges held that Article 11 of Schedule II of the Act was inapplicable to the case, as an order under Section 74 of the Oudh Land Revenue Act had the force of a decree, although it was not a decree. They further held that Article 1 of Schedule I was also inapplicable to the said case. In this situation, following the above Full Bench case of the Calcutta High Court, they observed as follows :

> "There appears to be no article of the Court Fees Act expressly applicable to the memorandum of appeal. In such a case, and where the proceeding was held not to be a suit, it was decided that the memorandum of appeal was nothing more or less than an application subject to the fee provided in Article I, Schedule II, Court Fees Act, ILR 23 Cal 723 (FB). The memorandum of appeal in this case should be similarly regarded. So regarded no further court-fee is required".

31. The decision given in Chhedi's case 4 Oudh Cas 289 (supra) was subsequently followed by another Bench of the late Court of the Judicial Commissioner of Oudh in

Thakur Baldeo Bakhsh v. Thakur Balbhadar Singh, [19] while dealing with the case of an appeal under Section 112 of the N. W. P. and Oudh Act III of 1901.

32. In *J. M. Rodrigues v. A. M. Mathias,* [20] the Madras High Court had before it the specific question as to what would be the amount of court-fee payable on a memorandum of appeal against an order in probate proceedings. In this case it followed the view of the Bombay High Court in ILR 16 Bom 408 and of the Full Bench of the Calcutta High Court in ILR 23 Cal 723 and observed as follows :

> "We do not think Article II of Schedule II applies, for the order appealed against undoubtedly has the force of a decree, as it decides the representative title, and to this extent we agree with the decisions of this Court in Appeal No. 94 of 1900 and Appeal No. 54 of 1900. In support of the contention that Article I of Schedule II applies we are referred to the case of ILR 16 Bom 408 and ILR 23 Cal 723 (FB). These decisions undoubtedly, support the contention. The question of the applicability of Art. I of Schedule II was not considered in Appeals Nos. 54 and 94 of 1900 already referred to, and we are prepared to follow the Calcutta and Bombay decisions. We also think that on principle an ad valorem stamp should not be levied in such cases. The only title which the order appealed against, gives to the petitioner, is the right to administer the estate, and if he has to sue to recover the estate, he will have to pay stamp duty on its value. We do not think that stamp duty on the value of the estate should be twice exacted."

33. Agreeing with the view taken in the above cases, we are of opinion that the court-fee payable on a memorandum of appeal under Section 299 of the Indian Succession Act is Rs. 5/- as laid down in Schedule II, Article 1 (e) (5) of the Act.

Answer accordingly.

Cases Referred.

1. ILR 35 All 448
2. ILR 50 All 238: AIR 1928 All 51
3. AIR 1933 PC 63
4. AIR 1938 Ran 141

5. ILR 25 Cal 354
6. AIR 1916 PC 78
7. AIR 1945 Lah 146
8. AIR 1954 Hyd 82
9. AIR 1941 Mad 639
10. AIR 1959 SC 1331
11. ILR 33 Bom 256
12. ILR 41 Cal 637: AIR 1914 Cal 523
13. AIR 1957 SC 657
14. AIR 1958 SC 341
15. 1889 All WN 27
16. , ILR 16 Bom 408
17. ILR 23 Cal 723
18. 4 Oudh Cas 289
19. 6 Oudh Cas 372
20. 9 Ind Cas 538 (Mad)