

A.F.R.

Neutral Citation No. - 2023:AHC:225713

Court No. - 7

Case :- FIRST APPEAL DEFECTIVE No. - 366 of 2023

Appellant :- Smt. Monika Yadav

Respondent :- Aakash Singh And 3 Others

Counsel for Appellant :- Rajesh Yadav

Hon'ble Dr. Yogendra Kumar Srivastava,J.

1. Heard Sri Rajesh Yadav, learned counsel for the appellant.
2. The present first appeal filed under Section 384(1) of the Succession act, 1925, is directed against the judgment and order dated 05.01.2023 passed by the Civil Judge (Senior Division), Bhadohi Gyanpur in Succession Case No. 81 of 2020 (Monika Yadav Vs. Akash and Others), whereby the Application (Paper 4Ga) preferred under Section 372 for obtaining the Succession Certificate, has been rejected.
3. A question has arisen with regard to the maintainability of the appeal in view of the provisions contained in Section 388(2) of the Succession Act, 1925¹.
4. Counsel for the appellant has drawn the attention of the Court to Section 384(1) of the Act to contend that an order passed by the District Judge granting, refusing or revoking the certificate under Part X, which relates to Succession Certificate, would be amenable to an appeal before the High Court. It is contended that the Civil Judge (Senior Division) while passing the order on the application seeking Succession Certificate, was acting as a District Judge and accordingly the

¹ the Act

appeal would lie before the High Court.

5. In order to appreciate the controversy at hand, the provisions relating to grant of Succession Certificates under Part X of the Succession Act, would be required to be adverted.

6. The jurisdiction to grant a Succession Certificate and the manner of making an application for the purpose, are provided under Sections 371 and 372 of the Act, respectively, which are as follows:-

"371. Court having jurisdiction to grant certificate.--

The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death, or, if at that time he had no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant a certificate under this Part.

372. Application for certificate.--(1) Application for such a certificate shall be made to the District Judge by a petition signed and verified by or on behalf of the applicant in the manner prescribed by the Code of Civil Procedure, 1908, for the signing and verification of a plaint by or on behalf of a plaintiff, and setting forth the following particulars, namely:--

- (a) the time of the death of the deceased;
- (b) the ordinary residence of the deceased at the time of his death and, if such residence was not within the local limits of the jurisdiction of the Judge to whom the application is made, then the property of the deceased within those limits;
- (c) the family or other near relatives of the deceased and their respective residences;
- (d) the right in which the petitioner claims;
- (e) the absence of any impediment under Section 370 or under any other provision of this Act or any other enactment, to the grant of the certificate or to the validity thereof if it were granted; and
- (f) the debts and securities in respect of which the

certificate is applied for.

(2) If the petition contains any averment which the person verifying it knows or believes to be false, or does not believe to be true, that person shall be deemed to have committed an offence under Section 198 of the Indian Penal Code.

(3) Application for such a certificate may be made in respect of any debt or debts due to the deceased creditor or in respect of portions thereof."

7. The provision relating to an appeal against an order granting, refusing or revoking a certificate under Part X, is provided under Section 384, which is being reproduced below:-

"384. Appeal.—(1) Subject to the other provisions of this Part, an appeal shall lie to the High Court from an order of a District Judge granting, refusing or revoking a certificate under this Part, and the High Court may, if it thinks fit, by its order on the appeal, declare the person to whom the certificate should be granted and direct the District judge, on application being made therefor, to grant it accordingly, in supersession of the certificate, if any, already granted.

(2) An appeal under sub-section (1) must be preferred within the time allowed for an appeal under the Code of Civil Procedure, 1908.

(3) Subject to the provisions of sub-section (1) and to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by section 141 of that Code, an order of a District Judge under this Part shall be final."

8. It would also be appropriate to take notice of the provisions contained in Section 388, on the basis of which a question has arisen with regard to maintainability of the appeal.

9. Section 388 of the Act reads as follows:-

"388. Investiture of inferior Courts with jurisdiction of District Court for purpose of this Act.—(1) The State Government may, by notification in the Official Gazette, invest any Court inferior in grade to a District

Judge with power to exercise the functions of a District Judge under this Part.

(2) Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by this Part upon the District Judge, and the provisions of this Part relating to the District Judge shall apply to such an inferior Court as if it were a District Judge:

Provided that an appeal from any such order of an inferior Court as is mentioned in sub-section (1) of Section 384 shall lie to the District Judge, and not to the High Court, and that the District Judge may, if he thinks fit, by his order on the appeal, make any such declaration and direction as that sub-section authorises the High Court to make by its order on an appeal from an order of a District Judge.

(3) An order of a District Judge on an appeal from an order of an inferior Court under the last foregoing sub-section shall, subject to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by section 141 of that Code, be final.

(4) The District Judge may withdraw any proceedings under this Part from an inferior Court, and may either dispose of them or transfer them to another such Court established within the local limits of the jurisdiction of the District Judge and having authority to dispose of the proceedings.

(5) A notification under sub-section (1) may specify any inferior Court specially or any class of such Courts in any local area.

(6) Any Civil Court which for any of the purposes of any enactment is subordinate to, or subject to the control of, a District Judge shall, for the purposes of this section, be deemed to be a Court inferior in grade to a District Judge."

10. A plain reading of Section 388 would indicate that it provides for investiture of inferior courts with jurisdiction of District Court for purposes of the Act. Sub-section (1) provides that the State Government may invest any Court inferior in grade to a District Judge with power to exercise the

functions of a District Judge under this Part.

11. The State Government, in exercise of powers under sub-section (1) of Section 388 of the Act, issued a notification investing all Civil Judges in the State with power to exercise the functions of the District Judge under Part X of the Act.

12. The aforesaid Notification published in the U.P. Gazette, dated March 19, 1955, reads as follows:-

Judicial Deptt. no. 4516(i)/VII-900(8)-53, dated March 11, 1955] 33 [Published in the U.P. Gazette, dated March 19, 1955, Part I, p. 341:

"In supersession of all previous notifications on the subject, and in exercise of the powers conferred by sub-section (1) of Section 388 of the Indian Succession Act, 1925 (Act XXXIX of 1925), the Governor of Uttar Pradesh is pleased to invest all Civil Judges in the State with power to exercise the functions of a District Judge under Part X of the said Act, within the local limits of their respective jurisdiction as Civil Judges."

13. Section 371 under Part X of the Succession Act, confers jurisdiction upon the District Judge for grant of a Succession Certificate, and against an order of the District Judge granting, refusing or revoking a certificate under Part X, a forum for an appeal before the High Court is provided under Section 384.

14. Section 388 of the Act provides for investiture of inferior courts with jurisdiction of District Court for the purposes of the Act, and in terms thereof the State Government may, by notification in the official gazette invest any court inferior in grade to a District Judge with power to exercise the functions of a District Judge under Part X.

15. The phrase 'as if it were' used in sub-section (2) of

Section 388 is of considerable significance. It is a deeming provision and creates a legal fiction.

16. The legal fiction created by a deeming clause has been subject matter of consideration in a number of judicial precedents. In an oft-quoted passage from **East End Dwellings Co. Ltd. v. Finsbury Borough Council**², Lord **Asquith** stated:-

"If you are bidden to treat an imaginary state of affairs as real you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had, in fact, existed must inevitably have flowed from or accompanied it. ... The statute states that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

17. Lord **Radcliffe** in **St. Aubyn (L.M.) v. Attorney-General (No. 2)**³, observed as follows:-

"The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

18. The use of the word "deemed" in statutory definitions was explained by **Windener, J.**, in **Hunter Douglas Australia Pty. v. Perma Blinds**⁴, by stating:-

"Deemed", as used in statutory definitions "to extend the denotation of the defined term to things it would

² (1951) 2 All ER 587 (HL)

³ (1951) 2 All ER 473 ; 1952 AC 15 (HL)

⁴ (1970) 44 Aust LJR 257

not in ordinary parlance denote, is often a convenient device for reducing the verbiage of an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words "deem" and "deemed" when used in a statute thus simply state the effect or meaning which some matter or thing has -- the way in which it is to be adjudged; this need not import artificiality or fiction; it may simply be the statement of an undisputable conclusion."

19. Cave, J. in R. v. Norfolk County Court⁵, has explained the term "deemed" in the following manner:-

"When a thing is to be "deemed" something else, it is to be treated as that something else with the attendant consequences, but it is not that something else"

20. The use of the word "deemed" in a definition clause has been explained by **Lord President Cooper in Ferguson v. Mcmillan⁶**, by stating:-

"When a statute gives a definition and then adds that certain things shall be "deemed" to be covered by the definition, it matters not whether without that addition the definition would have covered them or not."

21. Having regard to the forgoing discussion, the use of the deeming clause under sub-section (2) of Section 388 would mean that any inferior Court invested with power to exercise the functions of a District Judge under Part X shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Judge in exercise of all the powers conferred upon the District Judge, and the provisions of Part X relating to the District Judge shall apply to such an inferior Court as if it were a District Judge.

22. The proviso to sub section (2) of Section 388, states in explicit terms that an appeal from such order from inferior

⁵ (1891) 60 LJ QB 379 : 65 LT 22

⁶ 1954 SLT 109

court as mentioned in sub section (1) of Section 384, shall lie to the District Judge, and not to the High Court.

23. In **Craies on Statute of Law**⁷, referring to the rules regarding construction of a proviso, it has been observed as follows:-

"9.1. The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect."

24. Again, as has been pointed out by **Craies** in the treatise on Statute Law:-

"The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it."

25. **Odgers in Construction of Deeds and Statutes**⁸, while referring to the scope of a proviso, mentioned the following ingredients:-

"p. 317. Provisos--These are clauses of exception or qualification in an Act, excepting something out of, or qualifying something in, the enactment which, but for the proviso, would be within it.

p. 318. Though framed as a proviso, such a clause may exceptionally have the effect of a substantive enactment."

26. It was stated in **Mullins v. Treasurer of Surrey**⁹ that when one finds a proviso to a section the natural presumption is that but for the proviso the enacting part of the section

⁷ Craies on Statute of Law, 7th Edition

⁸ Odgers in Construction of Deeds and Statutes (5th Edn.)

⁹ (1880) LR 5 QBD 170 at p. 173 (DC)

would have included the subject-matter of the proviso.

27. In "**The Construction and Interpretation of Law**" by **Henry Campbell Black**¹⁰, while considering the manner of construction of provisos it has been stated that the natural and appropriate effect of a proviso to a statute, or to a section thereof, is to restrain or qualify the provisions immediately preceding it.

28. It is therefore seen that the function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule.

29. The use of a proviso after sub-section (2) of Section 388 of the Act has the effect of qualifying or creating an exception by providing that an appeal or any order of an inferior court, as is mentioned in sub-section (1) of Section 384, shall lie to the District Judge.

30. The legislative intent in providing for an appeal before a District Judge in case of an order passed by an inferior court upon investiture of jurisdiction under sub-section (1) of Section 388, is also clear from the emphasis in the language of the proviso where it states '**and not to the High Court**'.

10 The Construction and Interpretation of Law by Henry Campbell Black, Edn. 2011

31. A controversy of a similar nature had arisen in the case of **Prem Chand Vs. Sunil Kumar and Others**¹¹, wherein a Division Bench of this Court, upon noticing that Section 384, which deals with the forum where the appeal arising out of an order passed under Part X of the Succession Act, granting, refusing or revoking a certificate would lie, is prefaced with the words '**subject to other provisions of this part**'. This phraseology used in the section, was interpreted to mean that though in ordinary circumstances an appeal against an order passed in proceedings under Chapter X would lie to the High Court, but this would be subject to the condition that there is no other provision contrary to this or which may provide otherwise.

32. It was noticed that Section 388 lays down somewhat a different provision and in its terms where powers of a District Judge are conferred upon an inferior court by a notification of the State Government, such court shall exercise the powers of the District Judge so far as Part X of the Act is concerned, and in such a case an appeal instead of being filed before the High Court would lie before the District Judge.

33. Section 388 thus creates a special jurisdiction on a Court subordinate to the District Judge through investiture of power. Once such power is invested to a Court inferior to the District Judge, under sub-section (1), in that event by virtue of the deeming clause under sub-section (2), such Court would discharge the function of the District Judge by reason of such investiture, and have concurrent jurisdiction in

11 1990 AWC 593 All

exercise of all the powers conferred by Part X upon the District Judge. The proviso to sub-section (2) creates an exception by providing that an appeal from any order of an inferior court falling within the scope of Section 384 would in such circumstance, lie to the District Judge and 'not to the High Court'.

34. In the case at hand, the order having been passed by the Civil Judge (Senior Division) having been invested with the power to exercise the function of a District Judge under Part X, the proviso to sub-section (2) of Section 388 would be attracted and an appeal from the order passed by the Civil Judge (Senior Division), which is the inferior Court, would lie to the District Judge, and not to the High Court.

35. The appeal, which has been preferred, would therefore not lie before the High Court.

36. Counsel for the appellant, at this stage, submits that he may be permitted to withdraw the appeal with liberty to approach the appropriate forum i.e. the District Judge concerned.

37. The appeal is accordingly permitted to be withdrawn with the liberty as prayed.

38. Office to return the certified copies of the orders to the counsel for the appellant after retaining photo copies of the same.

Order Date :- 29.11.2023
Arun K. Singh

[Dr. Y.K. Srivastava, J.]