

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Heaton.

LAXMI KOM TATYA (ORIGINAL OPPONENT), APPELLANT, V. ABA BIN
APAJI AND ANOTHER (ORIGINAL APPLICANTS), RESPONDENTS.*

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July 23.

Bombay Civil Courts Act (XIV of 1869), section 16—Amending Act (Bombay Act I of 1900), section 2—Probate and Administration Act (V of 1881), sections 51, 52 and 86—Indian Councils Act, 1892, section 5; 55 and 56 Vic., c. 14—Application for probate—Value of the subject-matter not exceeding Rs. 5,000—Order of the Assistant—Judge—Appeal—District Judge—Jurisdiction.

The Probate and Administration Act (V of 1881) being made by an authority in India is subject to the powers of repeal and amendment granted to the Local Legislature by section 5 of the Indian Councils Act, 1892, 55 and 56 Vic., c. 14. Therefore the provision of the Bombay Civil Courts Act (XIV of 1869) by which a probate matter can be tried in the first instance by the Assistant Judge and by which the appeal in cases where the amount of the subject-matter does not exceed Rs. 5,000 will lie to the District Court is one which the Local Legislature was competent to make. In so far as the provisions of the Probate and Administration Act are inconsistent with those of the amendments introduced into the Bombay Civil Courts Act by Bombay Act I of 1900, the provisions of the first mentioned Act must be taken to have been impliedly repealed for this Presidency.

SECOND appeal from an order passed by S. J. Murphy, Assistant Judge of Sátára, in a proceeding for probate.

One Tatia bin Apaji Patil died on the 20th November 1905 after having made a will dated the 15th November 1905. The deceased left him surviving his widow Laxmi. The property of the deceased consisted of some lands, a house and some moveables and was in all worth about Rs. 500. In the year 1906 Aba bin Apaji Patil and Nanu bin Patlu Patil, brother and nephew respectively of the deceased Tatia, applied for probate of his will alleging that out of the property left by the testator, the house and the moveables worth about Rs. 100 were in the possession of his widow Laxmi for whose maintenance a provision had been made in the will, that the testator left no issue, male or female, and that the applicants were the executors named in the will.

* Appeal No. 163 of 1906.

The opponent Laxmi contended that the deceased left no will and that the will produced by the applicants was a forgery, that she on the 3rd January 1906 adopted one Sakharam, she being authorized by her husband to make an adoption, and that the applicants had no right to the property of the deceased under the forged will.

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The Assistant Judge found that the will produced by the applicants was proved and granted their application for probate.

Against the said order the opponent Laxmi preferred an appeal to the High Court.

K. H. Kelkar appeared for the appellant (opponent).

K. N. Koyaji appeared for the respondents (applicants):—We raise a preliminary objection, namely, that the appeal cannot lie to this Court in the first instance. The order appealed against was passed by the Assistant Judge at Sátara and under section 16 of the Bombay Civil Courts Act of 1869, as amended by section 2 of Bombay Act I of 1900, an appeal would lie to the District Judge and not to the High Court as the value of the subject matter does not exceed Rs. 5,000.

K. H. Kelkar for the appellant (opponent):—Section 86 of the Probate and Administration Act requires that an appeal like the present should be preferred to the High Court. Section 51 of the same Act vests in the District Judge alone the jurisdiction to grant probates or letters of administration and section 52 empowers the High Court to appoint delegates to act for the District Judge in such matters; and from the District Judge or the Delegates an appeal lies only to the High Court. Besides, the Local Legislature could not alter an enactment passed by the Imperial Legislature, nor could the Local Legislature affect or curtail the power of the High Court.

[Scott, C. J.:—Referred to *Premshankar Raghunathji v. The Government of Bombay*⁽¹⁾ and *The Collector of Thána v. Bhaskar Mahadev Sheth*⁽²⁾.]

We submit that these authorities are in our favour.

⁽¹⁾ (1871) 8 Bom. II. C. B., A. C. J., 195.

⁽²⁾ (1884) 8 Bom. 264.

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Koyaji, in reply :—The above rulings support our contention. Here no imperial statute is affected by the Local Legislature. The Probate and Administration Act of 1881 does not make any provision for appeals from orders of Assistant Judges. The Local Legislature has made such a provision. The ruling in *Premshankar Raghunathji v. The Government of Bombay*⁽¹⁾ shows that the possibility of the appellate powers of the High Court being curtailed cannot be held to “affect the provisions” of the Statute constituting the High Court. The Local Legislature besides has the right to repeal or to amend the Acts passed by the Governor General in Council, see section 5 of the Indian Councils Acts, 1892, 55 and 56 Vic, c. 14.

SCOTT, C. J. :—This is an appeal from a decision in a probate matter come to by the Assistant Judge of Sátara.

The appeal is brought directly to this Court from that Judge and the preliminary objection has been taken on behalf of the respondent that no appeal lies to this Court in the first instance by reason of the provisions of section 16 of the Bombay Civil Courts Act XIV of 1869, as amended by Bombay Act I of 1900, section 2. That section as amended runs as follows:—“The District Judge may refer to any Assistant Judge subordinate to him original suits of which the subject-matter does not amount to ten thousand rupees in amount or value, applications or references under special Acts and miscellaneous applications not being of the nature of appeals. The Assistant Judge shall have jurisdiction to try such suits and to dispose of such applications or references. Where the Assistant Judge’s decrees and orders in such cases are appealable, the appeal shall lie to the District Judge or to the High Court according as the amount or value of the subject-matter does not exceed or exceeds five thousand rupees.”

It is admitted that the value of the subject-matter, that is, of the estate which is the subject of the probate application in this case, does not exceed Rs. 5,000, so that if the provisions of section 16 of the Bombay Civil Courts Act have to be applied, the appeal lies from the Assistant Judge to the District Judge and not to the High Court.

(1) (1871) 8 Bom. H. C. R., A. C. J., 195.

For the appellant it has been argued that under the Probate and Administration Act V of 1881, section 86, "Every order made by a District Judge or District Delegate by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals"; and reference is also made to sections 51 and 52 of that Act to establish that the District Judge alone had jurisdiction in the granting of probate in this case.

We think however that the amendment of section 16 of the Bombay Civil Courts Act which applied the provisions of that section to applications or references under special Acts, of which the Probate and Administration Act is one, was within the competence of the Local Legislature; for, it is provided by section 5 of the Indian Councils Act of 1892, 55 and 56 Victoria, chapter 14, that the Local Legislature of any Province in India may, with the previous sanction of the Governor-General, repeal or amend as for that Province any law made either before or after the passing of that Act by any authority in India other than that Local Legislature. Therefore, the Probate and Administration Act being a law made by an authority in India, was subject to the powers of repeal or amendment granted to the Local Legislature by the section which we have referred to; and the provision of the Bombay Civil Courts Act by which a probate matter can be tried in the first instance by the Assistant Judge and by which the appeal in cases where the amount of the subject-matter does not exceed Rs. 5,000, will lie to the District Court, is one which the Local Legislature was competent to make. In so far as the provisions of the Probate and Administration Act are inconsistent with those of the amendments introduced into the Bombay Civil Courts Act by Bombay Act I of 1900, the provisions of the first mentioned Act must be taken to have been impliedly repealed for this Presidency.

We, therefore, think that the preliminary objection is a good one, that the appeal in this case lies to the District Judge and not to the High Court in the first instance, and that we must, therefore, return the appeal to be presented to the proper Court.

The appellant must pay the costs of this appeal.

Appeal returned for presentation to proper Court.