

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1908.

November 17.

SUNDRABAI SAHEB (ORIGINAL OPPONENT No. 8), APPELLANT, v. THE COLLECTOR OF BELGAUM (ORIGINAL PETITIONER), RESPONDENT.*

Practice—Taxation—Pleader's fees—Appeals in Probate Proceedings—Scale of costs—Act I of 1846, sec. 7.

The taxation of pleader's fees in appeals from probate proceedings, should, according to a long standing practice of the High Court of Bombay, be valued at Rs. 30.

APPEAL from an order passed by E. Clements, District Judge of Belgaum.

The Collector of Belgaum as executor of the will of one Lingappa Jayappa, applied to the District Court of Belgaum, for a probate of the will. In this proceeding, Sundrabai (widow of Lingappa) was joined as opponent No. 8. This Sundrabai was a minor; and the Deputy Názir was, therefore, appointed her guardian *ad litem*.

Against this order, Sundrabai, represented by one Dayagowdā as her guardian, appealed to the High Court.

This appeal was dismissed by the High Court; and the respondent's costs were ordered to be paid by Dayagowdā, the guardian of the minor.

In taxing the bill of costs, the office taxed the pleader's fees at Rs. 30, in obedience to a long standing practice in the High Court. The respondent's pleader objected to this taxation and contended that the pleader's fee should be assessed on one-fourth the amount of fees due on the whole subject-matter of the probate petition, *viz.*, Rs. 6,08,024 under the proviso to section 7 of Act I of 1846.

The Taxing Officer was of opinion that pleader's fee was rightly taxed at Rs. 30.

The respondent's pleader thereupon applied to the Court.

D. A. Khare for the appellant.

The Government Pleader for the respondent.

* First Appeal No. 26 of 1908.

CHANDAVARKAR, J. :—The question of law raised in this case by the learned Government Pleader relates to the valuation of Pleader's fees in proceedings for probate. The Collector of Belgaum having applied to the District Judge for probate in respect of the will of Lingappa Jayappa Sir Desai of Navalgund, caveats were entered by or on behalf of several persons, one of whom was the deceased's widow. As she was a minor, the Collector applied to the District Judge for the appointment of a guardian *ad litem*. The Judge having by an order appointed the Deputy Nazir of his Court, an appeal was filed in this Court against that order by Dayagowda Leegowda Patil, who described himself as guardian of the minor. The appeal was heard and the order was confirmed with costs, which were directed to be paid by the guardian. The Registrar's office having valued the Pleader's fees at Rs. 30 as part of the costs, according to a long-standing practice of this Court, the learned Government Pleader, who had appeared in the appeal for the Collector of Belgaum, objected to the valuation, and contended before the Taxing Officer that the Pleader's fees should be calculated in accordance with the last clause of section 7 of Act I of 1846.

The point has been urged before us and its determination depends upon the question whether probate proceedings, both original and appeal, fall within the meaning of a "regular suit" so as to come within the purview of section 7 of Act I of 1846. The learned Government Pleader contends that they are and relies upon section 83 of the Probate Act (V of 1881). The language, however, of that section is far from lending support to the contention. The section does not say that proceedings for probate are "a regular suit" or that they shall be treated as such for all purposes. It provides that "they shall take as nearly as may be the form of a suit, according to the provisions of the Code of Civil Procedure." This would show that probate proceedings do not, under the ordinary law, fall within the description of a "regular suit"; it is by virtue of section 83 that they are brought within that category; and they are so brought, not in point of fact but only in point of *form*, for the limited purpose of applying to them "as nearly as may be" the provisions

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of the Code of Civil Procedure. These restrictions leave still a difference between "a regular suit" and a testamentary suit. That the Legislature intended the difference to exist is apparent from the special provisions in the Court Fees Act (VII of 1870) for the valuation of Court fee in the case of an application for probate, as distinguished from a suit. As section 83 of the Probate Act brings a probate proceeding within the description of a suit by means of a statutory fiction the purposes of which are expressly limited to the provisions of the Code of Civil Procedure, we think we should be extending the scope of that fiction beyond its legitimate limits if we were to allow the argument of the learned Government Pleader. We hold, therefore, that the long standing practice of the Court as regards the valuation of Pleader's fees in probate proceedings should continue.

R. R.

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AMARSANG MAVSANG (ORIGINAL DEFENDANT), APPELLANT, v. JETHA-LAL MAGANLAL AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS*.

Toda Giras Allowance Act (Bom. Act VII of 1887), section 5†—Toda Giras allowance—Attachment and sale of in execution of a decree—"Money likely to become due," interpretation—How far can the allowance be attached and sold.

The plaintiff, who held a money-decree against the defendant, applied for its execution by sale of the *toda giras* allowance which the latter was entitled to receive periodically from the Māmlatdār's Kāsheri. The specific prayer in the application was the attachment and sale of the allowance which was to become payable to the defendant during the twenty years following the application. The lower Courts held that the defendant's life interest in the *toda*

* Second Appeal No. 599 of 1907.

† The section runs as follows:—

"No *toda giras* allowance shall be liable to attachment or sale in execution of a decree:

"Provided that any money due or likely to become due to a judgment-debtor on account of a *toda giras* allowance may be attached in execution of the decree against him, but such attachment shall not affect any money which becomes due on account of such allowance after such judgment-debtor's death."