

**IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH**

THE HON'BLE MR.JUSTICE M.I.ARUN

CRP No.100028/2015
DATED: 16-10-2019

SHRI NINGAPPA S/O DATTATRAYAA KOLKAR AND OTHERS
VS. SHRI RAMACHANDRA S/O SHRIMANT KOLKAR

ORDER

Aggrieved by the order dated 10.03.2015 passed by the Principal Senior Civil Judge, Belagavi on I.A.No.4 in M.A.No.91/2013, this revision petition is filed by the respondents therein.

2. Heard the learned counsel for the parties.
3. P & SC No.25/2008 was filed by the petitioners herein under Section 276 of the Indian Succession Act, 1925 (hereinafter referred to as 'the Succession Act') in the Court of I Additional Civil Judge (Jr.Dn.), Belagavi for issue of probate in respect of a will dated 15.02.1980. The same having not been contested was allowed by an order dated 25.10.2008 and a probate was directed to be issued in favour of the petitioners herein. Feeling aggrieved, the respondent herein, who

was not a party in P & SC No.25/2008, filed M.A.No.20/2009 under Order XLIII Rule 1 of CPC in the Court of II Additional Senior Civil Judge, Belagavi. Since there was a delay of 142 days in filing the appeal, an application was filed seeking condonation of delay. Since statement of objections was filed to the application seeking condonation of delay, while considering the said application, the learned Senior Civil Judge, Belagavi having noted the contentions urged with regard to maintainability of the appeal held that the appeal itself is not maintainable. However, the Appellate Court did not decide the application filed seeking condonation of delay and the appeal was dismissed as not maintainable. Challenging the said order, the respondent herein filed W.P.No.63619/2010 before this Court.

4. During the course of the hearing, the learned counsel for the petitioner in the said writ petition submitted that the First Appellate Court committed an error in holding that the appeal was not maintainable and that the court below failed to follow the ratio laid down in ***B.R.JAYANTHI AND OTHERS vs. RADAMMA AND OTHERS*** reported in **ILR 2008 KAR 4612** and ***MISS PRESSY PINTO v. MR. RONY MAXIM PINTO AND OTHERS*** reported in **(2010)1 KCCR 536**. Per contra,

the learned counsel appearing for the respondents in the said writ petition contended that the impugned order of the First Appellate Court does not call for interference in view of the ratio laid down by the Apex Court in ***SUBAL PAUL v. MALINO PAUL*** reported in **AIR 2003 SC 1928**. In view of the above, the learned Single Judge referring to the decisions reported in ***MISS PRESSY PINTO*** supra (rendered by the Division Bench of this Court) and in ***SUBAL PAUL*** supra (rendered by the Apex Court) observed that the decision of the Apex Court in ***SUBAL PAUL*** supra was not brought to the notice of the Division Bench of this Court in ***MISS PRESSY PINTO*** and expressed doubt as to which of the decisions has to be followed. Hence, His Lordship formulated a question for consideration to a larger Bench. The question reads as under:

*"Whether the law laid down in **MISS PRESSY PINTO vs. RONY MAXIM PINTO AND OTHERS - 2010(1) KCCR 536 (DB)** requires reconsideration in view of pronouncement of the Hon'ble Supreme Court in the case of **SUBAL PAUL v. MALINO PAUL AND ANOTHER - AIR 2003 SC 1928**?"*

The learned Single Judge by an order dated 16.04.2012 placed the matter before the Hon'ble Chief Justice for constitution of an appropriate bench to

consider and decide the said question. The Full Bench having been constituted, the question has been answered by holding that the decision of the Division Bench in the case of **MISS PRESSY PINTO vs. MR. RONY MAXIM PINTO AND OTHERS** reported in **(2010)1 KCCR 536** does not require reconsideration. The Full Bench view in the case of **SRI RAMACHANDRA vs. NINGAPPA DATTATRAYA KOLKAR AND OTHERS** is reported in **ILR 2013 KAR 17**. Therefore, the respondent herein who was the petitioner in the writ petition sought permission to withdraw the writ petition and file an appeal. The submission of the learned counsel was placed on record and the petition was disposed accordingly leaving open all the contentions of the parties. Further, the time spent in prosecuting the writ petition was also excluded, if an appeal were to be filed within a period of four weeks.

5. The respondent herein subsequently preferred M.A.No.91/2013 before the Principal Senior Civil Judge and CJM, Belagavi. Petitioner nos.1 & 2 herein preferred the application-I.A.No.4 under Section 151 of CPC seeking to dismiss M.A.No.91/2013 as not

maintainable. The First Appellate Court, after hearing both the parties, dismissed the said application. Aggrieved by the same, the respondents in M.A.No.91/2013 have preferred this civil revision petition.

6. It is the contention of the learned counsel for the petitioners that in the light of the law laid down by this Court in **MISS PRESSY PINTO vs. MR.RONY MAXIM PINTO AND OTHERS** reported in **(2010)1 KCCR 536**, the Full Bench decision of this Court in **SRI RAMACHANDRA vs. NINGAPPA DATTATRAYA KOLKAR AND OTHERS** reported in **ILR 2013 KAR 17** and the decision of this Court in **B.R.JAYANTHI AND OTHERS vs. RADAMMA AND OTHERS** reported in **ILR 2008 KAR 4612** and a reading of Section 299 of the Succession Act, an appeal to the Principal Senior Civil Judge is not maintainable. It is further contended that even otherwise, the order of the Civil Judge (Sr.Dn.), Belagavi in M.A.No.20/2009 has attained finality and consequently, M.A.No.91/2013 ought to have been dismissed by allowing the application filed by the petitioners herein.

7. Learned counsel for the respondent justifies the order passed by the Principal Senior Civil Judge, Belgaum. He contends that in the writ petition liberty was granted to the respondent herein to file an appeal and the appeal had to be filed before the Principal Senior Civil Judge, Belagavi as per the provisions of Section 23-A of the Karnataka Civil Courts Act, 1964.

8. The short point that arises for consideration in this revision petition is where does an appeal lie on the order of probate passed by a Civil Judge (Jr.Dn.).

9. Section 276 of the Succession Act deals with filing of a petition for probate, which reads as under:

"276. Petition for probate.—(1) *Application for probate or for letters of administration, with the Will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the Will or, in the cases mentioned in Sections 237, 238 and 239, a copy, draft, or statement of the contents thereof, annexed, and stating—*

(a) the time of the testator's death,

(b) that the writing annexed is his last Will and testament,

(c) that it was duly executed,

(d) the amount of assets which are likely to come to the petitioner's hands, and

(e) when the application is for probate, that the petitioner is the executor named in the Will.

(2) *In addition to these particulars, the petition shall further state,—*

(a) *when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and*

(b) *when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.*

(3) *Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate."*

10. Sections 384 and 388 of the Succession Act read as under:

"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.*

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 (5 of 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 himself 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."

11. Section 299 of the Succession Act deals with appeals from orders of District Judges, which reads as under:

"299. Appeals from orders of District Judge.—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 (5 of 1908), applicable to appeals."

12. Section 23-A of the Karnataka Civil Courts Act, 1964 reads as under:

"23-A. Investiture of subordinate courts with jurisdiction of District Court under the Indian Succession Act, 1925.—(1) The High Court may, by notification, invest any Senior Civil Judge or Civil Judge, within such local limits and subject to such pecuniary and other limitations as may be specified in such notification, with all or any of the powers of a District Judge under the Indian Succession Act, 1925 (Central Act 39 of 1925).

(2) Any Senior Civil Judge or Civil Judge invested with powers under sub-section (1) shall have concurrent jurisdiction with the District Judge in the exercise of the powers conferred by the said Act upon the District Judge, and the provisions of the said Act relating to the District Judge shall apply to such Senior Civil Judge or Civil Judge, as the case may be, as if he were the District Judge:

Provided that every order made by the Senior Civil Judge or the Civil Judge by virtue of the powers conferred upon him under sub-section (1) shall be subject to appeal,-

(i) to the Court of Senior Civil Judge when the order is passed by the Civil Judge;

(ii) to the District Court where the order is passed by a Senior Civil Judge.

(3) Every order passed on appeal under the proviso to sub-section (2) shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure, 1908, applicable to appeals from appellate decrees."

Thus, a bare reading of the above provisions makes it clear that District Court is having the jurisdiction to deal with probate matters. However, the

High Court may by notification, invest any Senior Civil Judge or Civil Judge with all or any powers of a District Judge under the Indian Succession Act. The High Court by a notification published in the gazette dated 29.03.1979 has so invested the powers. This has been examined by this Court in **B.R.JAYANTHI AND OTHERS vs. RADAMMA AND OTHERS** reported in **ILR 2008 KAR 4612**. Paragraphs 11 & 15 of the said judgment read as under:

"11. Pursuant to the above powers conferred on the High Court under the newly inserted S.23-A of the Civil Courts Act, the High Court has issued a Notification, published in the gazette dt. 29.3.1979 which reads as under.

"No. GOB 460/78. In exercise of the powers conferred under sub-Sec. (1) of S.23A of the Karnataka Civil Courts Act, 1964. (Karnataka Act 28 of 1978), the High Court of Karnataka hereby invests all the Officers Presiding over the Courts of Civil Judges and Munsiffs in the State, with all or any of the powers of a District Judge, under s. 388 of the Indian succession Act, 1925, within the limits of their respective territorial jurisdiction and respective pecuniary jurisdiction."

15. Thus, it is clear that by virtue of powers exercised U/S 23-A of the Karnataka Civil Courts Act 1964 Notification has been issued and in pursuance of the said Notification, the District Judge having considered the office note with regard to the pecuniary and territorial jurisdiction of the property, by an order dated 12.12.2003, has transferred the petition filed U/S 276 of the Act, which was converted into a suit, for being tried and disposed of by Civil Judge (Junior Division), Madikeri."

13. Thus, in the instant case, the Civil Judge (Jr.Dn.) had the power to entertain P & SC No.25/2008 filed by the petitioners herein at the first instance. The same is not disputed by either of the parties. If P & SC were to have been filed by the petitioners herein before the District Judge and the said District Judge were to have decided the same then as per the contention of the petitioners herein in a contested matter the aggrieved party ought to have filed a regular first appeal before this Court or if the case was not contested, in that event, a miscellaneous first appeal would have laid. However, in the instant case, the same is preferred before a Civil Judge (Jr.Dn.) and as per Section 23-A of the Karnataka Civil Courts Act, 1964, an appeal shall lie to a Senior Civil Judge.

14. This Court in ***MISS PRESSY PINTO vs. MR. RONY MAXIM PINTO AND OTHERS*** reported in **(2010)1 KCCR 536** has dealt only with appeals from orders of District Judge. It has not dealt with a situation wherein the petition for probate was filed before a Civil Judge (Jr.Dn.) and accordingly has held that an appeal lies to the High Court. This Court in ***SRI RAMACHANDRA vs.***

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reported in **ILR 2013 KAR 17** has only examined whether the law laid down in **MISS PRESSY PINTO's** case requires reconsideration in view of pronouncement of the judgment of the Hon'ble Supreme Court in the case of **SUBAL PAUL v. MALINO PAUL** reported in **AIR 2003 SC 1928** and answered that there is no conflict between the same and that the law laid down in **MISS PRESSY PINTO's** case does not require reconsideration. It also did not touch upon the situation where an appeal would lay if the petition for probate at the first instance was filed before the Civil Judge (Jr.Dn.). Thus, the rulings in the above cases do not help the cause of the petitioners herein.

15. It is further contended by the petitioners herein that the order passed in M.A.No.20/2009 has not been set aside and the same is binding between the parties. The respondent herein challenged the order passed in P & SC No.25/2008 in M.A.No.20/2009. The said appeal was preferred under Order XLIII Rule 1 of CPC. Order XLIII Rule 1 of CPC reads as under:

"1. Appeal from orders.-*An appeal shall lie from the following orders under the provisions of section 104, namely:—*

(a) an order under rule 10 of Order VII returning a plaint to be presented to the proper court except where the procedure specified in rule 10A of Order

VII has been followed;

(c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an Order to set aside a decree passed ex parte;

(f) an order under rule 21 of Order XI;

(i) an order under rule 34 of order XXI on an objection to the draft of a document or of an endorsement;

(j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale;

(ja) an order rejecting an application made under sub-rule (1) of rule 106 of order XXI, provided that an order on the original application, that is to say, the application referred to in sub-rule (1) of rule 105 of that order is appealable;

(k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;

(l) an order under rule 10 of Order XXII giving or refusing to give leave;

(n) an order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(na) an order under rule 5 or rule 7 or Order XXXIII rejecting an application for permission to sue as an indigent person;

(p) order in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXV;

(q) an order under Rule 2, Rule 3 or Rule 6 of Order XXXVIII;

(r) an order under Rule 1, Rule 2, Rule 2A Rule 4 or Rule 10 of Order XXXIX;

(s) an order under Rule 1 or Rule 4 of Order XL;

(t) an order of refusal under Rule 19 of Order XLI to re-admit, or under Rule 21 of Order XLI to re-hear, an appeal;

(u) an order under Rule 23 or Rule 23A or Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;

(w) an order under Rule 4 of Order XLVII granting an application for review."

16. Any appeal under Order XLIII Rule 1 of CPC can be preferred only against the orders mentioned therein specifically and not from any other order. Thus, an appeal against P & SC No.25/2008 could not have been filed under Order XLIII Rule 1 CPC. The same was filed erroneously. Hence, the Civil Judge (Sr.Dn.), Belagavi dismissed M.A.No.20/2009 as not maintainable. Against the said dismissal, the respondent herein preferred W.P.No.63619/2010. The said writ petition was sought to be withdrawn with liberty to file an appeal. The learned Single Judge while disposing of the above said writ petition has observed as under:

"In view of the above, Sri S.S. Katageri seeks permission to withdraw the writ petition and file an appeal. Submission of the learned counsel is recorded and the petition is disposed of accordingly, leaving open all the contentions of both the parties.

The time spent in prosecuting this writ petition shall stand excluded if an appeal is filed within a period of four weeks."

17. Thus, the respondent herein has been granted liberty to prefer an appropriate appeal and accordingly, the respondent herein has preferred M.A.No.91/2013 before the Principal Senior Civil Judge and CJM, Belagavi. Thus, it cannot be held that the issue has already been settled finally in M.A.No.20/2009 and the present M.A.No.91/2013 is not maintainable.

18. For the aforementioned reasons, the civil revision petition is hereby dismissed. No order as to cost.