

*Before Augustine George Masih, J.*

**KULWANT SINGH SHERGILL THROUGH LRs BALJIT  
SINGH AND OTHERS —Appellants**

*versus*

**COL. RAGHBIR SINGH SHERGILL—Respondents**

**FAO No.6365 of 2015**

July 25, 2016

*Successions Act, 1925—Ss. 268 and 299—Code of Civil Procedure, 1908—O.6, R.17 read with Section 151 and Order 43, Rule 1—Probate and letters of administration—Dismissal of application for amendment in written statement—Maintainability of Appeal under Succession Act—Held, since proceeding before District Judge is regulated by CPC, he passes orders which are authorised by CPC but would not be such order which could be said to be passed by virtue of powers conferred on him under Succession Act—Such orders passed by District Judge in exercise of power conferred by CPC cannot be said to be a order made by virtue of powers conferred by section 268 of Succession Act, which would make it appealable — Thus, it cannot be said that all orders passed by District Judge in relation to proceedings to grant of probate or letters of administration would be appealable under section 299 of Succession Act.*

*Held* that a perusal of the above Section would show that it is an enabling section where the proceedings and the procedure, which can be adopted by the District Judge so far as the circumstances of the case permit, would be governed by the provisions of CPC. The order passed in such proceedings would be by virtue of and shall trace its origin to the provisions of the CPC and thus, it cannot be said that the order so passed by the District Judge is by virtue of the powers conferred by any of the provisions of the Succession Act. Meaning thereby, since the proceedings before the District Judge is regulated by the CPC, he passes orders which are authorised by the CPC but would not be such order which could be said to be passed by virtue of powers conferred on him under the Succession Act. Such orders which have been passed by the District Judge in exercise of power conferred by the CPC cannot be said to be an order made by virtue of powers conferred by section 268 of the Succession Act, which would make it appealable. Accordingly, it cannot be said that all the orders passed by the District Judge in relation to proceedings to the grant of probate or letters of

administration would be appealable under section 299 of the Succession Act.

(Para 9)

M.S. Khaira, Senior Advocate with B.S. Sewak, Advocate,  
*for the appellants.*

Manmaohan Singh, Senior Advocate with Harsimran Kaur,  
Advocate and M.P. Gupta, Advocate, for respondent No.4.

### **AUGUSTINE GEORGE MASIH, J.**

#### **CM No.20026-CII of 2015**

Application is allowed, as prayed for.

Photocopy of Annexure A-8 and typed copies of Annexures A-1 to A-7 are taken on record, subject to all just exceptions.

#### **CM No.1481-CII of 2016 & CM No.1482-CII of 2016**

Applications are allowed, as prayed for.

Exemption is granted from filing the certified copies of Annexurs R-4/3 to R-4/5 and the same are taken on record, subject to all just exceptions.

#### **FAO No. 6365 of 2015**

(1) This appeal has been preferred under Section 299 of the Indian Succession Act, 1925 (hereinafter referred to as 'the Succession Act') by the legal representatives of Shri Kulwant Singh Shergill, original respondent No.7, in Probate case No.RT-1/09.06.2009, titled as 'Col. Raghbir Singh Shergil Vs. General Public & others, whereby, an application under Order 6 Rule 17 of the Code of Civil Procedure (hereinafter referred to as 'CPC') read with Section 151 CPC, for amendment of the written statement filed by respondent No.7, has been dismissed by the District Judge, vide order dated 14.09.2015, which is under challenge before this Court.

(2) Upon notice having been issued to the respondents, a preliminary objection has been raised by the learned senior counsel Mr. Manmohan Singh, Advocate, appearing for respondent No.4, that the present appeal is not maintainable as the impugned order would not be appealable under the Succession Act nor would it be appealable under Order 43 Rule 1 of the CPC. He contends that under Section 299, only those orders which have been made by the District Judge by virtue of the powers conferred under the Succession Act would be subject to

appeal to the High Court and not all orders which may be passed by the District Judge in any proceedings before it. In support of this contention, he places reliance upon the Division Bench judgment of the Allahabad High Court (Lucknow Bench) passed in *Smt. Rajeshwari Misra & another versus Markandeshwar Mahadeo Trust & others*<sup>1</sup>. Reliance has been placed upon the Full Bench judgment of the Gauhati High Court in *Nira Kanta Chutia versus Smt. Bedoi Chutiani & another*<sup>2</sup> in support of his contention that an order passed under the CPC would only be appealable if it is covered under the provisions of Order 43 Rule 1 of the CPC, which is not so in the present case. He, accordingly, contends that the appeal deserves to be dismissed.

(3) Learned senior counsel for the appellants, Mr. M.S. Khaira, Advocate, submits that the present appeal is maintainable as is apparent from the language of Section 299 of the Succession Act, which clearly depicts that the first portion of the Section deals with the appeal, whereas, the second portion of the Section deals with the procedure. Reference has also been made to the provisions of Section 268 of the Succession Act to contend that the proceedings of the Court in relation to the grant of probate is regulated by the CPC. He, therefore, contends that the appeal would be maintainable under Section 299 of the Succession Act.

(4) I have considered the submissions made by the learned senior counsel for the parties and with their assistance, have gone through the provisions referred to as also the judgments relied upon.

(5) The right of appeal under Section 299 of the Succession Act which is required to be determined would flow from this Section and thus, reference thereto would be necessary at the very outset which reads as follows:-

**“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.”

(6) A Division Bench of the Allahabad High Court (Lucknow Bench), while dealing with the provisions of Sections 299 and 268 of

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<sup>1</sup> AIR 1965 Allahabad 211

<sup>2</sup> AIR (1977) Gauhati 70

the Succession Act, in paras 7 to 10 of the judgment in *Smt. Rajeshwari Misra's case* (*supra*) has held as follows:-

“7. The word "every" governs not the word "order" but the phrase "order made by a District Judge by virtue of the powers hereby conferred upon him"; it is not that every order made by a District Judge is subject to appeal; It is every order made by him by virtue of the powers conferred by the provisions of the Act that is subject to appeal. Any order made by a District Judge is not appealable; it must be an order made by him by virtue of the powers conferred by the Act. In *Bhupendra Narain Singh v. Ashtabhuja Ratan Kuer*, AIR 1932 All 379 Sulaiman and Young, JJ. doubted very much whether it had been intended to make every order passed by a District Judge necessarily appealable; we have no doubt in this respect because the legislature clearly did not make every order passed by a District Judge appealable. Every order made by a District Judge in a proceeding for letters of administration is not necessarily an order made by virtue of the powers conferred by the Act.

There are many orders made by a District Judge in such a proceeding which cannot be said to have been made by virtue of the powers conferred by the Act and Section 299 clearly does not apply to them. Appealability is a matter of statute and in the absence of a statutory provision there is no right of appeal. Nothing to the contrary was said by *Srivastava, J. in Chheda Lal v. Mt. Ram Dulari*, AIR 1930 Oudh 424; he did not lay down that every order made by a District Judge in a suit for letters of administration is appealable; what he laid down was that every order made by a District Judge in exercise of the powers conferred upon him by the Act is appealable.

a. There can hardly be any dispute about the meaning of the words "hereby conferred"; they mean "conferred by the provisions of this Act."

b. What is meant by "made by virtue of the powers hereby conferred" is "made by virtue of the powers conferred directly by the provisions of this Act." The authority behind an order, in order that it is appealable, must be traced to one provision of the Act or another. If there is no provision in the Act which authorises the making of the order it cannot

be said to be an order made by virtue of the powers conferred by it. There must be a provision conferring a power to make the order; otherwise no appeal lies from it. If the authority for making it cannot be found in any provision of the Act the order is not one made by virtue of the powers conferred by it. It is not enough that there is some authority behind the making of it; the authority must be found in one provision or another of the Act. The authority must be direct: the provision must itself refer to the making of the order. An order made by virtue of a power conferred not by the Succession Act but by another Act or Code the provisions of which are made applicable in the proceeding, is not an order made by virtue of the powers conferred by the Succession Act simply because a provision of it makes the other Act or Code applicable; it was made by virtue of the power conferred only by the other Act.

A proceeding for letters of administration is governed by the Code of Civil Procedure, which confers powers for the making of various kinds of orders; any of those orders, when made by a District Judge, can be said to be an order made by the District Judge by virtue of the powers conferred by the Code but cannot be said to be an order made by virtue of the powers conferred by the Act as the Act does not directly authorise the making of it. The power to make it cannot be said to be conferred by any provision of the Act. The provision that the procedure is regulated by the Code is itself no authority for the making of an order authorised by the Code. Section 268 of the Act refers to the proceedings being regulated by the Code; it does not refer to any order to be made by the District Judge and, therefore, cannot be said to be a provision conferring the power to make any order. Section 268 is not a power-conferring provision at all and consequently no order made by a District Judge by applying a provision of the Code can be said to be an order made by virtue of the power conferred by a provision of the Act.

c. The legislature clearly did not intend to make every order made by a District Judge appealable; it itself restricted the right by using the words "made by virtue of the powers hereby conferred". Every order validly passed by a

District Judge would be by virtue of the power conferred by one Act or another. Since the proceedings before him are regulated by the Code he can pass many orders which are authorised by the Code. Now every order made under the Code even by the lowest civil Court is not appealable and clearly the legislature did not intend that every order passed by the highest Court in the district should be appealable. It was rightly observed by Sulaiman, J. in the case of Bhupendra Narain Singh, AIR 1932 All 379 that it would be an intolerable position if even an order made by a District Judge adjourning, or refusing to adjourn a case or summoning, or refusing to summon a witness or issuing notice of an application for letters of administration were appealable.

Consequently an order made in exercise of a power conferred by the Code cannot be said to be an order made by virtue of the powers conferred by Section 268 simply because that provision applied the Code to the proceeding. An order made under a special Act may be said to be an order made under the Code if the Code regulates the proceedings under the special Act, as was held by the Supreme Court in *Vidyacharan v. Khubchand*, AIR 1964 SC 1099 but the converse is not true. Sri Umesh Chandra relied upon the following statement of Chandra Sekhara Aiyar, J. in *Matajog Dobey v. H.C. Bhari*, (1955) 2 SCR 925 at p. 936: (S) AIR 1956 SC 44 at p. 50):

"Where a power is conferred... by statute and there is nothing said expressly inhibiting the exercise of the power... by any limitations or restrictions, it is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonably necessary for such execution... This accords with commonsense and does not seem contrary to any principle of law. The true position is neatly stated thus in Broom's Legal Maxims, 10th Ed., at p. 312; It is a rule that when the law commands a thing to be done, it authorises the performance of whatever may be necessary for executing its command' ".

We do not consider that the principle laid down by the Supreme Court can be applied when Section 299 requires a

specific provision conferring the power to make the order sought to be appealed from. The words "the powers hereby conferred" mean the powers expressly conferred and do not cover the powers implied in the powers expressly conferred. There may be a legal maxim implying the existence of a certain power in a power expressly conferred but the former cannot be said to be a power expressly conferred. The word "hereby" cannot be ignored. Further when there is Section 268 regulating the whole procedure to be followed in a suit for letters of administration implied powers cannot be assumed. The principle laid down by the Supreme Court applied when there is no provision expressly inhibiting the exercise of the powers by limitations or restrictions; when there is a provision such as that of Section 268 laying down that procedure is regulated by the Code a District Judge cannot rely upon Implied powers. When he makes an order under the authority of the Code it cannot be said to be an order made under the implied powers.

Finally the impugned orders made by the learned District Judge in this case cannot be said to be orders which were reasonably necessary for the execution of the power of grant of letters of administration. The connection between them and the grant of letters of administration is too remote to make them reasonably necessary for the grant of the letters of administration. The question whether the impugned order is final order or interlocutory order is certainly irrelevant as was pointed out by Srivastava, J. in the case of Chheda Lal, AIR 1930 Oudh 424. The criterion for deciding whether an order is appealable or not is whether it was made by virtue of the powers conferred by the Succession Act and not whether it is a final order or interlocutory order. Even an interlocutory order, if its making can be traced to a power conferred by a provision of the Act, would be appealable; if an order is held to be not appealable it would be not on the ground that it is a mere interlocutory order but on the ground that it was not made by virtue of such powers.

When an application is made for letters of administration the District Judge either entertains it and

proceeds to hear it in accordance with the provisions of the Code and grants or refuses to grant the letters of administration or refuses the application in exercise of the discretion conferred by Section 271. There is hardly any provision in the Act conferring power for passing any other order. An order under Section 270 granting letters of administration, an order refusing to grant letters of administration under Section 270 and an order refusing an application under Section 271 are all final orders. Each of the orders is made by a District Judge in exercise of the powers conferred upon him by Section 270 or 271 of the Act and is, therefore, appealable. There is no other provision conferring power to pass other orders and they are necessarily interlocutory orders. The final order in a proceeding for letters of administration is one granting them or refusing them. The final order on an application is granting or refusing letters of administration or refusing the application itself.”

(7) This Court is in full agreement with the above observations and conclusions reached at by the Division Bench in *Smt. Rajeshwari Misra's case (supra)* that not every order passed by the District Judge would be appealable under Section 299 of the Succession Act but only those orders, which have been passed by virtue of the powers conferred directly under the Succession Act itself. The words 'hereby conferred' qualifies the powers which the District Judge exercises under the Succession Act and these are the only orders which are appealable under Section 299. It would not be enough that there is some authority behind the making of an order rather the authority must be found in one provision or another of the Act i.e. the authority must be direct. Every order to be validly passed by the District Judge would have the authority of one Act or the another but that would not make all the orders appealable.

(8) Section 268 of the Succession Act regulates the proceedings of the District Judge's Court in relation to probate and letters of administration and according to the said Act, CPC would apply so far as the circumstances of the case permit. Section 268 of the Succession Act reproduced as follows:-

“268. Proceedings of District Judge’s Court in relation to probate and administration.—The proceedings of the Court of the District Judge in relation to the granting of probate



and letters of administration shall, save as hereinafter otherwise provided; be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908 (5 of 1908).”

(9) A perusal of the above Section would show that it is an enabling section where the proceedings and the procedure, which can be adopted by the District Judge so far as the circumstances of the case permit, would be governed by the provisions of CPC. The order passed in such proceedings would be by virtue of and shall trace its origin to the provisions of the CPC and thus, it cannot be said that the order so passed by the District Judge is by virtue of the powers conferred by any of the provisions of the Succession Act. Meaning thereby, since the proceedings before the District Judge is regulated by the CPC, he passes orders which are authorised by the CPC but would not be such order which could be said to be passed by virtue of powers conferred on him under the Succession Act. Such orders which have been passed by the District Judge in exercise of power conferred by the CPC cannot be said to be an order made by virtue of powers conferred by Section 268 of the Succession Act, which would make it appealable. Accordingly, it cannot be said that all the orders passed by the District Judge in relation to proceedings to the grant of probate or letters of administration would be appealable under Section 299 of the Succession Act.

(10) In the light of the above, it cannot be said that the order dated 14.09.2015 passed by the District Judge which is impugned in the present appeal, dismissing the application for amendment of the written statement, would be one which has been passed under the Succession Act. It would, at the most, be an order passed under the provisions of the CPC and the provisions of Section 268 of the Succession Act which makes applicable the CPC.

(11) Even if the impugned order is treated to have been passed under the CPC, the appeal thereof would lie as per the provisions contained under Order 43 Rule 1 of the CPC, but for an order which has been passed under Order 6 Rule 17 of the CPC, no appeal is maintainable.

(12) In view of the above, it is held that the present appeal is not maintainable and therefore, the same is dismissed accordingly.

**CM No.20027-CII of 2015**

In view of the order passed in the main appeal, no order is

required to be passed in the present application for stay of further proceedings as the same has been rendered infructuous.

(13) Disposed of as such.

**CM No.24275-CII of 2015**

Prayer in this application is for vacation of interim stay orderdated 23.09.2015 passed by this Court.

In view of the order passed in the main appeal by this Court,the interim stay granted vide order dated 23.09.2015, is hereby vacated.

Application stands disposed of accordingly.

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*Rajiv Vij*