

IN THE HIGH COURT OF JUDICATURE AT PATNA

FIRST APPEAL No.39 of 2022

- =====
1. Vinod Kumar @ Binod Kumar Sahi Son of Late Ganesh Prasad Sahi Resident of Village-Chainpur, P.O.-Chainpur, P.S.-Siswan District-Siwan, Presently residing at Mohalla-Paul Bhawan Lah Bazar, Salempur, P.O. and P.S.-Chapra Town, District-Saran at Chapra.
 2. Smt. Pushpa Devi Wife of Vinod Kuamr @ Binod Kumar Sahi Resident of Village-Chainpur, P.O.-Chainpur, P.S.-Siswan District-Siwan, Presently residing at Mohalla-Paul Bhawan Lah Bazar, Salempur, P.O. and P.S.- Chapra Town, District-Saran at Chapra.
 3. Bipul Kumar Son of Vinod Kuamr @ Binod Kuamr Sahi Resident of Village-Chainpur, P.O.-Chainpur, P.S.-Siswan District-Siwan, Presently residing at Mohalla-Paul Bhawan Lah Bazar, Salempur, P.O. and P.S.- Chapra Town, District-Saran at Chapra.
 4. Vivek Kumar Son of Vinod Kumar @ Binod Kumar Sahi Resident of Village-Chainpur, P.O.-Chainpur, P.S.-Siswan District-Siwan, Presently residing at Mohalla-Paul Bhawan Lah Bazar, Salempur, P.O. and P.S.- Chapra Town, District-Saran at Chapra.

... .. Appellants

=====

Indian Succession Act, 1925—Section 299—Appellant filed First Appeal against Final Order in Probate Case—no one appeared in probate proceeding to lodge any objection; and, hence, proceeding was non-contentious—a probate proceeding becomes contentious if someone appears to oppose the grant of probate/letter of administration—learned Division Bench in case of Kusheshwar held that appeal filed against final order passed in contentious probate proceeding would be treated as Regular First Appeal to be regulated under Section 96 read with Order XLI of Code of Civil Procedure, 1908—final order passed in non-contentious probate proceeding is not like a Decree—probate case was dismissed by learned Court below because WILL was not found to be genuine and free from suspicious circumstances—final order is appealable order under Section 299 of Indian Succession Act, hence, such appeal is required to be treated as Miscellaneous Appeal to be regulated under Section 104 read with Order XLIII of code of civil procedure, just like appeal under Section 384 of Indian Succession Act, 1925 against final order in regard to succession certificate—office/Stamp Reporter has raised objection regarding the maintainability of First Appeal noting that proper remedy of Appellant lies in filing Miscellaneous Appeal—objection raised by Office/Stamp Reporter upheld—appellant at liberty to convert the First Appeal as Miscellaneous Appeal. **(Paras 22 to 25)**

2017 (3) PLJR 791; 2009 (3) PLJR 990 (FB); 2013 (1) PLJR 176; 2008 SCC Online Ker. 409—**Referred to.**

IN THE HIGH COURT OF JUDICATURE AT PATNA
FIRST APPEAL No.39 of 2022

1. Vinod Kumar @ Binod Kumar Sahi Son of Late Ganesh Prasad Sahi Resident of Village-Chainpur, P.O.-Chainpur, P.S.-Siswan District-Siwan, Presently residing at Mohalla-Paul Bhawan Lah Bazar, Salempur, P.O. and P.S.-Chapra Town, District-Saran at Chapra.
2. Smt. Pushpa Devi Wife of Vinod Kuamr @ Binod Kumar Sahi Resident of Village-Chainpur, P.O.-Chainpur, P.S.-Siswan District-Siwan, Presently residing at Mohalla-Paul Bhawan Lah Bazar, Salempur, P.O. and P.S.-Chapra Town, District-Saran at Chapra.
3. Bipul Kumar Son of Vinod Kuamr @ Binod Kuamr Sahi Resident of Village-Chainpur, P.O.-Chainpur, P.S.-Siswan District-Siwan, Presently residing at Mohalla-Paul Bhawan Lah Bazar, Salempur, P.O. and P.S.-Chapra Town, District-Saran at Chapra.
4. Vivek Kumar Son of Vinod Kumar @ Binod Kumar Sahi Resident of Village-Chainpur, P.O.-Chainpur, P.S.-Siswan District-Siwan, Presently residing at Mohalla-Paul Bhawan Lah Bazar, Salempur, P.O. and P.S.-Chapra Town, District-Saran at Chapra.

... .. Appellants

Appearance :

For the Appellants : Mr. Rajesh Kumar Singh, Adv.
: Mr. Santosh Kumar Verma, Adv.

CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE JITENDRA KUMAR
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE JITENDRA KUMAR)

Date : 19-02-2024

The matter has been received by this Bench upon reference by Ld. Single Judge. The reference has been made in the background of the fact that the present appeal has been filed by the Appellants under Section 299 of the Indian Succession Act, 1925, impugning the final order dated 22.02.2022 passed by Ld. Additional District and Sessions Judge-V, Saran at



Chhapra in non-contentious probate proceeding bearing Probate Case No. 37 of 2017 whereby probate petition filed by the Appellant has been dismissed. The office has raised objection regarding maintainability of the present appeal noting that against the impugned order, proper remedy seems to lie by way of filing Miscellaneous Appeal under Section 299 of the Indian Succession Act, 1925 in view of the ruling of Ld. Division Bench in **Kusheshwar Purbey vs. Shri. Shri. 108 Ram Janki Jee. S and Ors. (First Appeal- 633 of 1998)** as reported in **2017 (3) PLJR 791**.

2. Ld. Single Judge is of the view that Ld. Division Bench in **Kusheshwar Purbey case** (supra), has not thrown light on the procedure of appeal filed against an order passed in non-contentious probate proceeding. Hence, the reference has been made for clarification regarding the procedure.

3. In view of the aforesaid facts and circumstances, the following question arises for our consideration:-

i) Whether the appeal filed under Section 299 of the Indian Succession Act against the final order passed in non-contentious probate proceeding should be treated as regular First Appeal under Section 96 read with Order XLI or as Miscellaneous Appeal under Section 104 read with Order XLIII of the Civil Procedure Code.

4. We heard Ld. counsel for the Appellants.

5. Ld. counsel for the Appellants submits that in view of the statutory provisions of the Indian Succession Act,



1925 and Civil Procedure Code, 1908 the appeal under Section 299 of the Indian Succession Act against final order passed in non-contentious probate proceeding should also be treated as regular First Appeal. He also refers to **Kusheshwar Purbey case** (supra) whereby Ld. Division Bench has not given any ruling regarding procedure which is to be followed in case of such appeal filed under Section 299 of the Indian Succession Act against the final order passed in non-contentious probate proceeding.

6. We considered the submissions advanced by Ld. counsel for the Appellants and perused the material on record.

7. We find that the matter was referred to Ld. Division Bench in **Kusheshwar Purbey case** (supra) in the light of doubt expressed by Ld. Single Judge in **Most. Kewala Devi and Anr. vs. Sri Krishna Devi and Anr. [2013 (1) PLJR 176]**, in regard to classification of appeal filed before this Court under Section 299 of the Indian Succession Act and under Section 384(2) of the Act.

8. The aforesaid doubt was expressed by Ld. Single Judge in **Most. Kewala Devi Case** (Supra) in the light of ruling of Full Bench of this Court in **Sunita Kumari Vs. Prem Kumar [2009 (3) PLJR 990]** wherein Ld. Full Bench, after discussing the Family Courts Act and the procedure provided therein and the provision of appeal under Section 19 of the Family Courts Act, held that the appeal filed under Section 19 of the Family Courts should not be treated as appeals against the decree. Hence, they should be registered as Miscellaneous Appeal and not First Appeal. However, Ld. Single Judge, in view of the ruling of **Sunita Kumari Case** (Supra) expressed



his view that appeals filed under Section 299 of the Indian Succession Act should also be treated as Miscellaneous Appeal. After perusal of the **Kusheshwar Purbey** case, we find that Ld. Division Bench after discussing the statutory provisions and case laws including **Miss. Pressy Pinto vs. Rony Maxim Pinto and Ors. (2008 SCC Online Kar 409)** held as follows:

“14. It is manifest, however, that the controversy which came up for consideration by the Full Bench in **Sunita Kumari** related to the nature of an order passed under the Family Courts Act, 1984 which has been enacted for adjudication of specified disputes mentioned therein and also prescribing the procedure for determination of such dispute/matter. We, therefore, find it difficult to subscribe to the proposition that the law laid down in **Sunita Kumari** (supra) shall have general application to all the statutory provisions providing for the appeal against an order.

.....

18. We have not been persuaded to take a different view than that taken in **Pressy Pinto** (supra). We respectfully agree to the view expressed by the Bench in the said case. Thus we come to the conclusion that the issue in **Most. Kewala Devi** (supra) regarding classification of an appeal under Section 299 of the Indian Succession Act has not been correctly decided. Accordingly, we answer the reference by holding that an appeal under Section 299 of the Indian Succession Act finally disposing of a contentious proceeding, as envisaged under Section 295, shall be treated as Regular First Appeal and would be governed by the procedure prescribed for such an appeal. It is further held that an appeal filed under Section 384(2) of the Indian Succession Act shall be treated as Misc. Appeal and would be governed by the procedure prescribed for such an appeal.”

9. As such, it manifests that in **Kusheshwar Purbey case** (supra), no ruling has been given regarding procedure in case of appeal under Section 299 of the Indian



Succession Act against final order in non-contentious probate proceeding. As far as ruling regarding procedure in case of appeal against final order in contentious probate proceeding is concerned, the ruling given by Ld. Division Bench is crystal clear that such Appeal would be treated as Regular First Appeal. Even the ruling regarding the procedure of the Appeal filed under Section 384 of the Indian Succession Act is clear that such Appeal would be treated as Misc. Appeal.

10. Hence, Ld. Single Judge has referred the matter for clarification regarding the procedure in case of appeal filed under Section 299 of the Indian Succession Act against final order passed in non-contentious probate proceeding. However, before we express our opinion regarding procedure in appeal against final order in non-contentious probate proceeding, it would be relevant to refer to the relevant statutory provisions and case laws.

11. There is no dispute that the Indian Succession Act is a special legislation. However, in view of Section 4 of the Civil Procedure Code as well as Section 268 of the Indian Succession Act, the provision of Civil Procedure Code is applicable to proceeding under the Indian Succession Act to the extent there is no specific provision in the Indian Succession Act contrary to the provisions provided in the Civil Procedure Code.

12. Section 4 of the Civil Procedure Code reads as follows:

“4. Savings- (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time in force.”



13. Section 268 of the Indian Succession Act reads 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)”.

14. In the light of Section 299 of the Indian Succession Act, we further find that there is provision for appeal from every orders of District Judge to the High Court in accordance with the provisions of the Civil Procedure Code. Section 299 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.”

15. We further find that in the Civil Procedure Code there are two types of appeal – Regular First Appeal under Section 96 read with Order 41 CPC against original decrees and Miscellaneous Appeal under Section 104 read with Order 43 CPC, against specified appealable orders. Section 96 reads as follows:

“96. Appeal from original decree .- (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of



Small Causes, when the amount or value of the subject-matter of the original suit does not exceed ten thousand rupees.”

16. Section 104 of the Civil Procedure Code reads as follows:

“104. Orders from which appeal lies.- (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:

(ff) an order under section 35A;

(ffa) and order under section 91 or section 92 refusing leave to institute a suit of the nature referred to in section 91 or section 92, as the case may be;

(g) an order under section 95;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules:

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section.”

(Emphasis Supplied)

17. Order 43 Rule 1, 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 for an 13 of Order IX rejecting an application (in a case open to appeal) 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 of Order XXXIII rejecting an application for permission to sue as an indigent person;

(p) orders in inter pleader-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 8[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 of 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.”

18. Here it is pertinent to point out that under Section 104 CPC, appeal lies not only against the orders as specified under this Section, but also against such orders against which appeal has been provided “by any law for time being in force”. We have already seen that Section 299 of the Indian Succession Act provides for appeals against every order to the High Court



in accordance with the provisions of Civil Procedure Code applicable to appeals. On account of this general provisions of appeal under Section 299 of the Indian Succession Act, controversy has arisen regarding the nature of the appeals- whether such appeals should be treated as Regular First Appeal regulated under Section 96 read with order 41 of CPC or as Miscellaneous Appeal regulated under Section 104 read with order 43 CPC.

19. We have already found that Ld. Division Bench in **Kusheshwar Purbey** case (supra) has already ruled that final order passed in contentious probate proceeding should be treated as Regular First Appeal regulated under Section 96 read with order 41 CPC and the appeals against final orders under Section 384 of the Indian Succession Act, should be treated as Miscellaneous Appeal regulated under Section 104 of CPC read with Order 43 of CPC.

20. Now the question is whether the appeals filed under Section 299 of the Indian Succession Act against the final orders passed in non-contentious probate proceedings should also be treated as Regular First Appeals or Miscellaneous Appeals. Here, Section 295 of the Indian Succession Act becomes relevant, holding key to the answer. It reads as follows :

“295. Procedure in contentious cases .- In any case before the District Judge in which there is contention, the



proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908 (5 of 1908) in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant.”

21. It clearly manifests from the statutory provisions of Section 295 of the Indian Succession Act that if probate proceeding becomes contentious, it shall take, as nearly as may be, the form of regular suit, according to the provisions of the CPC in which the Petitioner shall be the Plaintiff and the person who appeared to oppose the grant shall be the Defendant. As per the explanation to Section 286 of the Indian Succession Act, a Probate Proceeding becomes contentious if someone appears to oppose the grant of probate/Letter of Administration. As such, final order passed in contentious Probate Proceeding is treated like a decree, though it is not a decree in strict sense of the term. Hence. Ld. Division Bench in **Kusheshwar Purbey** case (supra) has held that appeal filed against final order passed in contentious Probate Proceeding would be treated as Regular First Appeal to be regulated under Section 96 read with Order 41 CPC.

22. In case of non-contentious Probate Proceeding, the same is not required to take form of a regular suit. Hence, the final order passed in non-contentious Probate Proceeding is not like a decree. It is simply an appealable order under Section 299 of the Indian Succession Act, and hence such appeal is required to be treated as Miscellaneous Appeal to be regulated under Section 104 read with order 43 CPC, just like the appeal as provided under Section 384 of the Indian Succession Act against the final order in regard to succession certificates. Ld.



Division bench of this court in **Kusheshwar Purbey** case (supra) has already held, as we have seen, that the appeal filed under Section 384 of the Indian Succession Act should be treated as Miscellaneous Appeal. The proceeding relating to Succession Certificate also never takes a form of Regular suit. Such proceedings are summary in nature as per Section 373 which clearly provides that the District Judge is required to decide the application for Succession Certificate in a summary manner. Sections 373 and 384 of the Indian Succession Act read as follows:

“ 373. Procedure on application .- (1) If the District Judge is satisfied that there is ground for entertaining the application, he shall fix a day for the hearing thereof and cause notice of the application and of the day fixed for the hearing(a) to be served on any person to whom, in the opinion of the Judge, special notice of the application should be given, and

(b) to be posted on some conspicuous part of the court-house and published in such other manner, if any, as the Judge, subject to any rules made by the High Court in this behalf, thinks fit, and upon the day fixed, or as soon thereafter as may be practicable, shall proceed to decide in a summary manner the right to the certificate.

(2) When the Judge decides the right thereto to belong to the applicant, the Judge shall make an order for the grant of the certificate to him.

(3) If the Judge cannot decide the right to the certificate without determining questions of law or fact which seem to be too intricate and difficult for determination in a summary proceeding, he may nevertheless grant a certificate to the applicant if he appears to be the person having prima facie the best title thereto.

(4)When there are more applicants than one for a certificate, and it appears to the Judge that more than one of such applicants are interested in the estate of the deceased, the Judge may, in deciding to whom the certificate is to be granted, have regard to the extent of interest and the fitness in other respects of the applicants.

.....



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 (5 of 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 (5 of 1908), as applied by section 141 of that Code, an order of a District Judge under this Part shall be final.”

(Emphasis Supplied)

23. In the case on hand, we find that the Appellant has filed First Appeal No. 39 of 2022 against the Final Order dated 22.02.2022 passed by Ld. Additional District Judge-V, Saran at Chhapra in Probate Case No. 37 of 2017. In this Probate Proceeding, despite general citations, no one appeared to lodge any objection and hence the proceeding was non-contentious. However, by the impugned order, the probate case of the Appellant was dismissed because the WILL was not found by the Ld. Court below to be genuine and free from suspicious circumstances. As the Appeal has been filed as First Appeal, the office has raised objection regarding the maintainability of the Appeal noting that proper remedy of the Appellant lies in filing Miscellaneous Appeal. Hence, the reference has been made by Ld. Single Judge for clarification regarding the procedure in case of such appeal.

24. In view of the aforesaid statutory provisions and discussions, we answer the reference holding that Appeal



filed under Section 299 of the Indian Succession Act against final order passed in non-contentious probate proceeding should be treated as Miscellaneous Appeal, subject to the procedure as provided under Section 104 read with order 43 CPC.

25.Accordingly, we uphold the objection raised by Office/ Stamp Reporter that in the present Appeal, the Appellant should have filed Appeal as Miscellaneous Appeal and not First Appeal. The Appellant is still at liberty to convert the First Appeal as Miscellaneous Appeal. Office is directed to send back the record to Ld. Single Judge to proceed as held above.

(Jitendra Kumar, J)

I agree.

(P. B. Bajanthri, J)

S.Ali/Chandan/
Ramesh-

AFR/NAFR	AFR
CAV DATE	02.08.2023
Uploading Date	19.2.2024
Transmission Date	NA

