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Consequently, after looking at other cases in which the rule of *damdupat* is discussed, I hold that the rule of *damdupat* only applies to cases where the debtor is a Hindu.

In the present case, the debtor is a Mahomedan, and as, in my opinion, the rule of *damdupat*, as interpreted by the Courts, does not apply to any case where the debtor is not a Hindu, there is no law applicable to the defendant in this case which renders it necessary to interfere with the report of the Commissioner as to the amount of interest legally claimable by the defendant.

Attorney for the plaintiff :—Mr. *K. D. Shroff.*

Attorneys for the defendant :—Messrs. *Little, Smith, Frere and Nicholson.*

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[231] ORIGINAL CIVIL.

Before Mr. Justice Parsons.

BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY (*Plaintiffs*) *v.* JACOB ELLAS SASSOON AND OTHERS (*Defendants.*)*

[12th September, 1893.]

Interpleader—Civil Procedure Code (*XIV of* 1882), *ss.* 470-473—*Costs of plaintiffs—Claims by plaintiffs against goods in respect of which suit brought.*

In May, 1893, one Sadanand Ramsarmall (defendant No. 4), a resident at Hissar in the Punjab, consigned 600 bags of rapeseed to one Khimji Kanji of Bombay and delivered them to the plaintiffs for carriage to Bombay. While the goods were in transit to Bombay, Sadanand the consignor ordered the plaintiffs to deliver them to his agent Ramgopal Fulchand, instead of to the consignee, and on the 18th May, Ramgopal requested delivery from the plaintiffs. Before the goods could be delivered, however, the firm of E. D. Sassoon & Co. (defendants Nos. 1, 2 and 3) claimed them, alleging that they had been assigned to them by Khimji Kanji for valuable consideration. The plaintiffs thereupon filed this suit praying that the defendants should be required to interplead, and that they should be restrained from suing them (the plaintiffs) in respect of the said goods. The plaintiffs claimed to charge the goods with payment of freight, wharfage and demurrage and their costs of suit.

Held:—

(1) that the suit was properly instituted by the plaintiffs as an interpleader suit so as to entitle them to their costs ;

(2) that the fourth defendant was entitled to the goods, subject to the plaintiffs' charge for freight and costs ;

(3) that the plaintiffs' charge for wharfage and demurrage could not be allowed. The goods remained in the plaintiffs' possession not by reason of any neglect or default of the owner to take delivery of them, but by the act of the plaintiffs themselves, who kept and refused to deliver them for their own protection and benefit. All that they could presumably be entitled to, was a reasonable warehouse rent, which, however, they had not claimed.

INTERPLEADER suit. The plaint prayed for an injunction restraining the defendants and each of them from taking proceedings against the plaintiffs in respect of certain goods which had been delivered to them for carriage, and that the defendants should be directed to interplead together concerning their respective claims to the said goods, &c.

The first three defendants were partners in the firm of E. D. Sassoon & Co., which carried on business in Bombay. The fourth defendant

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was one Sadanand Ramsarmall, who resided [232] at Hissar in the Punjab and carried on business in Bombay by his *munim*.

The plaint stated that in May, 1893, the fourth defendant (Sadanand) at Hissar, in the Punjab, consigned 600 bags of rapeseed to one Khimji Kanji at Bombay in three lots, and delivered the same to the plaintiffs for carriage to Bombay. The plaintiffs passed three railway receipts, in the usual form, to the consignor (Sadanand), dated, respectively, the 9th, 11th, and 12th May, 1893.

While the goods were in transit to Bombay the consignor (defendant No. 4, ordered the plaintiffs to deliver them to one Ramgopal Fulchand instead of to the consignee Khimji Kanji. The order was conveyed to the plaintiffs' traffic manager at Bombay by a telegraphic message dated the 15th May. On the 18th May, Ramgopal Fulchand requested delivery of the goods from the plaintiffs.

Before the goods could be delivered, the firm of E. D. Sassoon & Co. (defendants Nos. 1, 2 and 3) claimed them, alleging that they had been assigned to them by Khimji Kanji for valuable consideration, and shortly afterwards the fourth defendant, the consignor (Sadanand), claimed them, alleging that Ramgopal Fulchand was his agent to receive them.

The following are the concluding paragraphs of the plaint:—

"6. The plaintiffs have given the usual directions for detaining the said rapeseed (whereon they will rely) and the same is now in the keeping of the plaintiffs, and demurrage and other charges are daily being incurred in respect thereof. The plaintiffs fear that a suit will be filed against them in respect of the said rapeseed.

"7. The plaintiff company is ignorant of the respective rights of the parties claiming the said goods.

"8. The plaintiff company has no interest in the goods so claimed as aforesaid otherwise than their due and proper charges for freight, demurrage, &c., and subject thereto is ready and willing to deliver the same to such person or persons as this Honourable Court shall direct.

"9. This suit is not brought by collusion with the defendants or any of them."

The plaint prayed (*a*) for an injunction restraining the defendants from suing the plaintiffs; (*b*) that the defendants should be required to interplead; (*c*) that upon delivering the [233] said goods to such person or persons as the Court should direct, subject to the plaintiffs' claim thereon for freight, demurrage and charges and the costs incurred by the plaintiffs in this suit, the plaintiffs should be discharged from all liability to the defendants, or any of them, in respect of the same; (*d*) that the said rapeseed should be directed to be sold by the plaintiffs, and the net proceeds thereof, less freight, demurrage, charges and costs, as afore said, be paid into Court to await the decision of this suit.

The fourth defendant (Sadanand Ramsarmall) was the only one who filed a written statement. He stated that he sold the said 600 bags of rapeseed (with other goods) to Khimji Kanji, but that Khimji having dishonoured the *hundis* drawn against the said goods while the said goods were in transit, he (Sadanand) had given notice to the plaintiffs not to deliver the goods to Khimji Kanji, but to deliver them to his (Sadanand's) agent, *viz.*, Ramgopal Fulchand. He claimed the goods and denied that the firm of E. D. Sassoon & Co. had any title to them, and prayed for his costs either against the plaintiffs or the other defendants.

Before the trial came on, the goods had been sold, and the proceeds were lodged in Court subject to the decision of this suit.

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The following issues were raised at the hearing :—

1. Whether the suit was properly instituted as an interpleader suit so as to entitle the plaintiffs to their costs ?

2. Whether the fourth defendant (Sadanand) was entitled to the proceeds of the sale of the 600 bags of rapeseed free of any charges on the part of the plaintiffs ?

3. Whether the fourth defendant was entitled to his costs from the plaintiffs or the other defendants, or both of them ?

4. Whether plaintiffs were entitled to recover any and what charges in respect of the said goods, and if so, whether from the first three defendants or the fourth defendant ?

Macpherson and *Scott*, for plaintiffs, argued that they were entitled to their costs and charges in respect of the carriage of the said goods. They referred to s. 470 of the Civil [234] Procedure Code (XIV of 1882); *Martinius* v. *Helmuth* (1); *Mason* v. *Hamilton* (2); *Cotter* v. *Bank of England* (3); *Attenborough* v. *St. Katharine's Dock Company* (4); *Dadoba* v. *Krishna* (5); *Martin* v. *Lawrence* (6). They claimed Rs. 1,672-5 for freight, and alleged a lien on the proceeds to that extent. They referred to the Indian Contract Act (IX of 1872), s. 170, and s. 55 of Act IX of 1890. They also claimed wharfage and demurrage amounting to Rs. 6,698 4.

Lang (Acting Advocate General), for defendants Nos. 1, 2 and 3 (E. D. Sassoon & Co.).—The cases cited for the plaintiffs do not apply. The Court is bound by the Code of Civil Procedure (XIV of 1882). Under ss. 470-473 a person filing an interpleader suit must be a mere stakeholder and must hand the property over unreservedly. See also the form 104 in sch. IV. The plaintiffs have kept the goods, and now make enormous charges against them, which amount to more than the value of the goods. The suit should be dismissed with costs.

Inverarity and *Russell*, for the fourth defendant.—This is not a proper interpleader suit. See paragraphs 6 and 8 of the plaint. Paragraph (*a*) of the plaint asks for personal relief—*Mitchell* v. *Hayne* (7); *Bignold* v. *Audland* (8). The plaintiffs have not complied with s. 472 of the Civil Procedure Code, and are, therefore, not entitled to any order. We asked for the goods and offered an indemnity. The value of the goods is Rs. 5,800. The plaintiffs' charges now amount to Rs. 7,770-9. The plaintiffs are entitled to charge for freight, but are not entitled to demurrage or wharfage, and we should be allowed to set off our costs against their charge for freight.

JUDGMENT.

PARSONS, J.—I think that, on the authorities, cited by the learned counsel for the plaintiffs, this is a properly constituted interpleader suit. In *Mason* v. *Hamilton* (2) the bill filed stated that the plaintiff had no interest in the goods except his lien for wharfage and warehouse rent, and Sir L. Shadwell, the Vice-Chancellor, said that the bill stated a plain case of interpleader. [235] The case of *Mitchell* v. *Hayne* (7) is discussed in *Bignold* v. *Audland* (8), and the result is said to be this: "Where a plaintiff represents not merely that he has a lien with respect to which two other persons have adverse rights, but that there is a further

(1) Cooper's Rep. 245. (2) 5 Sim. 19. (3) 3 Moore and Scott 180.
(4) 3 C. P. D. 466. (5) 7 B. 34 (36). (6) 4 C. 655.
(7) 5 Sim. and St. 63. (8) 11 Sim. 23.

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question to be litigated adversely between himself and one of them, that is not a case of interpleader." In *Cotter* v. *Bank of England* (1) it was held that the bank, who retained a lien on certain bullion in respect of freight and charges, had no interest in the subject-matter of the suit within the meaning of those words in Statute 1 and 2 William IV, c. 58. In *Attenborough* v. *St. Katherine's Dock Co.* (2) the defendants claimed no interest in the wines, the subject-matter of the suit, other than the usual dock rents and charges; Bramwell, L.J., said: "Defendants do not claim any interest in the subject-matter of the suit, for their alleged right of lien is not an interest in the wine," and it was held that the case fell within the Interpleader Act, and the defendants' costs and charges were made a first charge on the fund. The language of ss. 470 and 471 of the Code of Civil Procedure (XIV of 1882) is almost identical with that of Statute 1 and 2 William IV, c. 58, and the above rulings clearly apply. The personal relief asked for is nothing more than an injunction restraining the defendants from suing the plaintiffs, and that is contained in the form of plaint in an interpleader suit given in the form No. 104 of the 4th schedule to the Civil Procedure Code. I find the first issue in the affirmative.

Strictly speaking, in my opinion, so much of the second and fourth issues as relates to the amount of the charges has been improperly raised in this suit, in which the title only to the thing claimed has to be adjudicated. No doubt a lien can be declared for charges, but the amount of those charges, if disputed, ought, I think, to form the subject of a separate proceeding between the adjudicated owner and the person who seeks to make the goods liable. As, however, here the parties interested have gone to trial on those issues without an objection on the part of any of them, I will proceed to determine them.

The charge for freight comes to Rs. 1,072-5, and this is admitted to be correct and due. The plaintiffs, however, seek, further, to [236] charge the goods with the sum of Rs. 6,698-4 for wharfage and demurrage, and this charge is disputed. The rules of the said company allow of such a charge being made when goods are not taken delivery of by their owners within a certain time after notice of arrival; the rates charged being exceedingly high that they may act as a kind of penalty so as to ensure the speedy removal of goods. The present is not a case of that kind. The goods remained on the plaintiffs' premises, not by reason of any neglect or default of their owner to take delivery of them, but by the act of the plaintiffs themselves, who kept and refused to deliver them for their own protection and benefit. They did not even place them in the custody of the Court, as they could have done under the provisions of s. 472. All that they could possibly be entitled to, would be a reasonable warehouse rent for the time the goods remained with them, and I might have been able to have awarded them that had they claimed it, and given evidence in proof of the amount. They do not, however, do this, and, I think, the claim they have made is inadmissible and unproved.

I find on the second and fourth issues that the fourth defendant is entitled to the proceeds of the sale of the 600 bags, and that the plaintiffs are entitled to recover the freight claimed only from him.

I find on the third issue that the fourth defendant is entitled to his costs from the defendants Nos. 1 to 3, since it is their action that has caused the whole litigation.

(1) 3 Moo. and Se. 180. (2) 3 C.P.D. 450.

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I decree as asked for in paragraph (*a*) of the prayer of the plaint, and declare that the fourth defendant is entitled to the fund in Court, and that he be paid the same after deducting therefrom the plaintiffs' charge for freight, *viz.*, Rs. 1,072-5, and their costs, which are made a first charge on the fund and are to be paid to them out of it, and I order that the defendants Nos. 1 to 3 pay the defendant No. 4 his costs, and reimburse him the costs of the plaintiffs that he may have to pay.

Attorneys for the plaintiffs :—Messrs. *Crawford, Burder and Co.*

Attorneys for the defendants :—Messrs. *Pestanji, Rustim and Kola*, and Messrs. *Payne, Gilbert and Sayani.*

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[237] TESTAMENTARY AND INTESTATE JURISDICTION.

Before Mr. Justice Starling.

IN THE MATTER OF THE WILL OF DAWUBAI HAJI KHAN HUBIB KHAN, *Petitioner.** [9th October, 1893.]

Will—Executor—Probate—Application by executor for probate in forma pauperis—Civil Procedure Code (XIV *of* 1882), *ch.* 26, *s.* 647—*Practice—Procedure.*

Where an executor is not in possession of the property of his testator and cannot get possession of it, and where he has not himself the means of paying the necessary fees, he may be allowed to petition for, and, if entitled thereto, to obtain probate in *forma pauperis.*

[R., 36 B. 279=13 Bom. L.R. 577=11 Ind. Cas 724; 12 C.L.J. 185 (188)=14 C.W.N. 924=7 Ind. Cas. 126 ; 19 C.W.N. 205.]

APPLICATION in *forma pauperis* for probate.

One Dawubai, of the Nakva caste and a Christian by faith, died on the 10th June, 1892. By her will, dated 6th June, 1892, she appointed the petitioner sole executor.

At the time of her death, Dawubai was plaintiff in a suit (No. 407 of 1891) which she had filed in *forma pauperis* against certain persons to recover from them a sum of money, ornaments and two houses situate at Dharavi. In her will she directed her executor to prosecute this suit and recover this property, which she bequeathed upon certain trusts set forth in her will.

On the 23rd August the petitioner applied in *forma pauperis* to the High Court for probate of the said will. He stated the value of the assets to which the testatrix was entitled, but which, as above stated, were in dispute in suit No. 407 of 1891 to be under the value Rs. 9,075. He did not pay the usual stamp or probate duty, and prayed to obtain probate in *forma pauperis.*

Vicaji, in support of the petition :—The Court Fees Act (VII of 1870) contains no clause which forbids such an application. See s. 4 (1), cl. 11,

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* Application No. 1 of 1893.

(1) Section 4, Court Fees Act (VII of 1870) :—

No document of any of the kinds specified in the first or second schedule to this Act annexed, as chargeable with fees, shall be filed, exhibited or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction ;

or in the exercise of its extraordinary original criminal jurisdiction ;

[238] or in the exercise of its jurisdiction as regards appeals from the judgment of two or more judges of the said Court, or of a Division Court ;