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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. *Pestaji, 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., 86 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.

* 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 ;

sch. I. We are willing to give a [238] bond for the payment of the proper fees if we are successful in suit No. 407 of 1891, and recover the property which we claim.

Lang (Acting Advocate General), for Government, contended that the Court had no power to direct its officers to issue probate without payment of fees.

JUDGMENT.

STARLING, J.—This is an application by one Haji Khan Hubib Khan, the executor appointed by the will of Dawubai, a native Christian, for leave to prosecute a petition for and to obtain probate of the said will in *forma pauperis*. I had on a previous occasion refused to accept such a petition, as no precedent was in existence for such a course being pursued, but in the present instance the matter was pressed upon me as being one of great hardship, as the deceased had during her life-time filed a suit to recover the property in question, and as she was a Christian that suit must now be dismissed unless the applicant could obtain probate of her will. I, therefore, allowed the petition to be interpreted and affirmed *gratis*, so that the matter might be set down as a pauper petition and the point at issue be fully discussed.

The first question is whether a petition for grant of probate falls under chap. XXVI of the Civil Procedure Code. It is not a suit in the ordinary acceptation of the term, though, if a caveat were entered, it would be changed into a suit; but I am of opinion that s. 647, which provides that the procedure for suits prescribed by the Civil Procedure Code "shall be followed, so far as it can be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals," makes the provisions of the Code applicable to all miscellaneous civil proceedings. Further, by ss. 238 and 261 of the Indian Succession Act (X of 1865) the procedure in granting probate is to be [239] regulated, except as is otherwise provided, by the Civil Procedure Code so far as the circumstances of the case will admit. Consequently, I see no reason why chap. XXVI should not be applicable to petitions for probate, if a proper case be made out, and if no other enactments than those before referred to stand in the way. Of course no proper case could be made out except where the executor was not in, and could not get, possession of the property of his testator so as to be able to pay the necessary fees; nor yet, I should think, where he himself had money wherewith he could take the necessary steps.

It was then argued by the Acting Advocate General that whatever the Court could do with regard to those fees which might be regarded strictly as fees payable to the Court, it could not make any order relieving the executor from payment of the duty which was payable to Government, and that the only thing to be done would be for the petitioner to petition Government to lend him the stamp necessary to be affixed to the probate, and he relied upon the terms of the Court Fees Act, 1870. The first remark to be made is that all the fees imposed under that Act are called "Court Fees." Among those fees are what are called institution fees, as well as fees leviable on the issue of probates. Section 410

or in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence;

or in the exercise of its jurisdiction as a Court of reference or revision;

unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

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of the Civil Procedure Code provides that when an application to sue in *forma pauperis* is granted, the plaintiff shall not be liable to any Court-fee (except process fees) in any proceeding connected with the suit. Under this section a pauper plaintiff is exempted from institution fees; consequently, it seems to me to be difficult to say that he cannot be also exempted (unless exemption be otherwise prohibited) from all the fees payable under the schedules to that Act. Looking at the sections of the Act applicable to the matter in hand, we find that s. 3 provides (*inter alia*) that, in the High Court, fees chargeable under No. 11 of the first schedule to the Act (relating to probates and letters of administration) shall be collected in manner hereinafter appearing, and s. 25 provides that such fees shall be collected by stamps; therefore, as regards the High Court in its original civil jurisdiction, there is nothing to prohibit the exemption from stamp of probate to a pauper. Section 28, however, provides that no document which ought to bear a stamp shall be [240] of any validity unless and until it is properly stamped; and the question is whether, if a pauper executor got probate without its being stamped, it would be of any use to him. Turning to s. 6, there is a prohibition to certain Courts against receiving documents chargeable under the Act until they are stamped; among those documents are plaints; yet a plaint presented by a pauper can be received and filed without an institution fee stamp. Consequently, it is evident that the provisions of s. 410 of the Civil Procedure Code, so far set aside and control the provisions of the Court Fees Act, and I can see no reason why, if a probate were granted without payment of fees under s. 110, that section should not exempt it from being a "document which ought to bear a stamp," the fact of its having been so issued, of course, appearing on its face, and thus prevent the previous act of the Court in granting it without payment of stamp duty being rendered nugatory by s. 28 of the Court Fees Act. The Acting Advocate-General wanted to know how Government could recover the amount of the stamps due to them if probate was issued in *forma pauperis*. Section 411 provides that Court-fees in a pauper suit shall be a first charge upon the subject-matter of the suit, and that has been acted upon in *Ganpat v. Collector of Kanara* (1), *Collector of Muradabad v. Muhammad* (2) and *Janki v. Collector of Allahabad* (3). I have already held in *Yeshwant Bhagwant v. Shankar Ramchandra* (4) that in a testamentary proceeding the "subject-matter of the suit" is the property of which the executor is the legal owner under the will of the testator, and of which the probate by declaring him to be executor recognises him before the Court as legal owner. Consequently, I am of opinion that all the Court-fees due to Government for grant of a probate in *forma pauperis* will be a first charge upon the property covered by the probate, and in the case of immovable property, which could not be transferred without the use of that document, such charge would undoubtedly continue in the hands of a purchaser who would have notice, from the probate itself, of the manner in which it was granted.

[241] Under these circumstances, being satisfied that the petitioner is a pauper, and that there is none of his testatrix's estate available to enable him to take out probate, I grant him leave to petition for and, if entitled thereto, to obtain probate in *forma pauperis*.

(1) 1 B. 7.

(2) 2 A. 196.

(3) 9 A. 64.

(4) 17 B. 388 (391).