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Parties will be at liberty to adduce evidence and the return must be within three months.

Both the lower Courts having found both the issues in the affirmative,

Desai, for the appellants (plaintiffs), in support of the findings.

Rao, for the respondent (defendant), against the findings:—The findings are against us. This is not a fit case for an injunction as suggested. The ruling in *Colls.* v. *Home and Colonial Stores, Limited*,(1) is in point.

On hearing arguments the Court granted an injunction restraining the defendant from permitting the buildings raised by him to remain so as to cause such a privation of light or air to the plaintiffs' house as renders the occupation of the same uncomfortable, and gave the parties liberty to apply to the District Court for the appointment of a Commissioner to decide the extent to which the buildings should be removed or altered so as to give effect to this injunction.

G. B. R. *Decree reversed.*

(1) (1904) A. C., 179.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

THE COLLECTOR OF KAIRA, APPLICANT, *v.* CHUNILAL HARILAL AND OTHERS, OPPONENTS.*

1904. *July 12.*

Court-fees Act (VII of 1870), section 19 D—Court-fees Amendment Act (XI of 1899), section 19 I—Letters of administration—Limited grant—Trust property—Exemption from probate duty.

One Harilal died possessed of certain shares in Joint Stock Companies and in the Bank of Bombay valued at Rs. 11,980 standing in his name as their registered holder. He left three sons. The sons applied for letters of administration limited to one share only valued at Rs. 275 and their application was granted. Subsequently they applied for letters of administration with respect to all the shares except the one for which limited letters of administration had already

* Application under extraordinary jurisdiction No. 196 of 1903.

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been granted and claimed exemption from stamp duty. The question arose as to whether they were entitled to the exemption.

Held, that the property with respect to which the letters of administration were sought being property held in trust by the deceased for the joint family, the property was entitled to exemption from the court-fee.

Held, further, that the exemption of trust estates from the payment of *ad valorem* court-fee is not conditional on the circumstance that there had been a previous grant of probate or letters of administration on which a court-fee had been paid. The exemption has reference to the character of the property and not to the procedure adopted.

The Collector of Ahmadabad v. *Savchand*(1), disapproved.

In the Goods of Pokurmull Augurwallah(2), followed.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of S. L. Batchelor, District Judge of Ahmedabad, in the matter of an application for letters of administration.

One Harilal Damodar died leaving him surviving three sons, Chunilal, Manilal, and Manecklal. The deceased had certain shares valued at Rs. 11,980 in Joint Stock Companies and in the Bank of Bombay, and they were registered in his name as holder. His sons, therefore, applied to the District Court for letters of administration with respect to the said shares. Subsequently they presented a supplemental application on the strength of the ruling in *The Collector of Ahmadabad* v. *Savchand*(1) praying for letters of administration with respect to one particular share only valued at Rs. 275 and not with respect to all the shares mentioned in their first application. In accordance with the said prayer, letters of administration were granted with respect to the one share. Some time after the said grant, the sons applied again for letters of administration with respect to the remaining shares which were excluded under the supplemental application, representing that the application was urgent as the fluctuating state of the share market would lead to serious loss. The Judge, therefore, passed the following order on the 17th March 1903:—

In these circumstances and as citations have once issued already on the withdrawn application I make the following order:—

Let the limited letters prayed for be granted to the applicants subject to the issue of citations and to the applicants depositing a sufficient sum to cover

(1) (1902) 27 Bom. 140.

(2) (1896) 23 Cal. 980.

all court-fees which may be leviable. Notice to Government Pleader as to the applicants' prayer for exemption.

Against the said order, the Collector of Ahmedabad presented an application, No. 196 of 1903, under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) urging, *inter alia*, that the Judge improperly omitted to give notice to the Collector of the District or the Government Pleader, before making the said order; that in making the limited grant, the Judge exercised a jurisdiction not vested in him by law; that the Judge ignored the provisions of the Court-fees Amendment Act (XI of 1899), which read with the Probate Act (V of 1881) clearly showed that except in the particular cases provided for in Chapter III of the latter Act, every application for letters of administration ought to be in respect of the whole estate of the deceased and was subject to payment of court-fees under article II, schedule I, of the Court-fees Act in respect of the entire estate; that procedure adopted by the applicants was obviously an evasion of the duty cast on them by law, and the Judge erred in acquiescing in that procedure by passing *ex parte* orders in their favour, and that section 19 D of the Court-fees Act had no application.

After the Court had passed the order granting limited letters of administration on the 17th March, 1903, the applicants presented a fresh application for the return of the court-fees deposited by them under protest with their application for the said grant. The Judge rejected the application with all costs on the applicants on the following grounds:—

> It is not disputed that deceased and his sons, the petitioners, were joint; but that circumstance is, I understand, no ground for exemption. It is true that I formerly considered myself bound to adopt a different opinion in deference to the Calcutta ruling in *In the Goods of Pokurmull* (I. L. R. 23 Cal. 980), but that decision has not been followed by the Bombay High Court in *Collector of Ahmadabad* v. *Savchand*. This last ruling appears to me to dispose of petitioners' case for a general exemption for it is there laid down that "for the operation of this section (section 19 D of the Court-fees Act) it is an essential condition that there must be a previous probate or letters of administration on which the court-fee has been paid. That is the basis of the exemption from payment of court-fees allowed by the section. But where no such duty has been paid, there is no case for the section to apply."

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In this case there is no previous probate or letters of administration on which duty has been paid, no fee being leviable on the old application for letters in respect of the single share. Therefore exemption claimed under section 19 D must be refused.

Against the said order, the applicants presented an application, No. 256 of 1903, under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) contending, *inter alia*, that the Judge did not properly construe section 19 D of the Court-fees Act, that under that section the applicants were entitled to complete exemption from payment of court-fees, and that the order as to costs was wrong.

Rules *nisi* having been issued under both the applications, No. 196 of 1903 and No. 256 of 1903, requiring the opponents to show cause why the said orders should not be set aside,

Scott (Advocate General) with *Ráo Bahádur V. J. Kirtikar*, Government Pleader, appeared for the applicant in support of the rule in application No. 196, and for the opponent to show cause in application No. 256:—We contend that the first limited grant of the letters of administration was illegal because we had no notice of the application under section 19 H of the Court-fees Act. Further, the Judge had no power to issue a limited grant. The whole property of the deceased ought to have been brought to the notice of the Court and the court-fees ought to have been paid thereon. There was no evidence to show that the property was the joint family property of the deceased. The ruling in *The Collector of Ahmadabad* v. *Savchand*[1] lays down that the manager of a family is not a trustee, and therefore no exemption from stamp duty could be given. The opponents claim the exemption, but the point is concluded by the said ruling.

[JENKINS, C. J.:—That ruling does not seem to be sound.]

The point is decided by the Court, and we rely on the decision.

Krishnálál M. Jhaveri appeared for the opponents to show cause in application No. 196, and for applicants in support of the rule in application No. 256:—It was competent to the Judge to grant limited letters of administration. It was discretionary with the

(1) (1902) 27 Bom. 140.

Judge to grant letters with respect to the whole estate or limited letters with respect to a portion of it; sections 43 and 44 of the Probate and Administration Act, *In the Goods of Cowar Suttya Krishna Ghosaul*(1), *In the Goods of Grish Chunder Mitter*(2). Even the rulings in *In re Thaker Madhavji Dharamsi*(3) and *In the Goods of Ram Chand Seal*(4) do not exclude the jurisdiction of the Court to do so. See also section 19 C of the Court-fees Act.

The record shows that citations were issued, therefore, the Collector had notice under section 19 H of the Court-fees Act.

The deceased had, in fact, no property of his own; the estate was the joint-property of the family and he was merely a trustee. Even according to the ruling in *The Collector of Ahmadabad* v. *Savchand*(5) only those shares which have been admitted by us to stand in the name of the deceased should be considered to be his property and no more until the contrary is shown by the Collector: *Nittyo Kali Dabea* v. *Kedar Nauth*(6). The whole of the joint family property cannot be liable to the payment of the court-fees. The ruling in *The Collector of Ahmadabad* v. *Savchand*(5) did not take notice of *In the Goods Froeschman*(7), *In the Goods of Bindabun-Ghose*(8), *In the Goods of Olivia Hovenden George*(9), *In the Goods of Joymoney Dossee*(10).

The Judge was wrong in saddling us with costs.

JENKINS, C. J.:—We are asked to annul the proceedings of the District Court in an application for Probate and to direct that Court to take fresh proceedings.

The facts are these: Mr. Harilal Damodar died, having in his name as their registered holder certain shares in Joint Stock Companies and in the Bank of Bombay. His sons, the present opponents, applied to the District Court at Ahmedabad for letters of administration to their deceased father's estate so far only as it relates to those shares valued at Rs 11,980. As a result, however, of the decision of the High Court in the

(1) (1884) 10 Cal. 554.
(2) (1880) 6 Cal. 483.
(3) (1880) 6 Bom. 460.
(4) (1879) 5 Cal. 2.
(5) (1902) 27 Bom. 140.
(6) (1879) 5 Cal. L. R. 368.
(7) (1883) 20 Cal. 575.
(8) (1873) 19 W. R. 230.
(9) (1870) 15 W. R. 457 (foot note).
(10) (1875) 14 Ben. L. R. 184.

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case of *Collector of Ahmedabad* v. *Savchand Laduchand*[1], a supplemental application was presented to the District Court on the 9th February, 1903, for letters of administration limited only to one share in the David Sassoon Spinning and Weaving Company valued at Rs. 275, alleging that the applicants did not want letters of administration for the whole of the property mentioned in their first application.

Letters were on the next day granted in accordance with the prayer in this supplemental application.

The sons then on the 16th of March presented a fresh application, No. 55 of 1903, whereby they prayed for letters of administration in respect of the entire property comprised in their original application except the one share in the supplemental application claiming on the strength of the High Court decision, to which we have referred, exemption from duty. The application, being represented to be urgent, the District Court on the 17th of March directed a limited grant to issue "subject to the issue of citations and to applicants depositing a sufficient sum to cover all court-fees which may be leviable; notice to the Government Pleader as to the applicants' prayer for exemption." It is on these facts that the applicants' objection is based.

The Probate and Administration Act provides in Chapter III for limited grants of Letters of Administration. They fall under several heads, the third of which deals with grants for special purposes, and by section 37 it is provided that where a person dies leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account and leaves no general representative or one who is unable or unwilling to act as such, letters of administration limited to such property may be granted to the beneficiary or to some other person on his behalf.

Then the question arises what court-fee is payable in respect of a limited grant. Under the Indian Court-fees Act, 1870, schedule I, article 11, a two per cent. *ad valorem* fee was imposed on probates and letters of administration, and in the case of *In the Goods of H. B. Beresford*[2] it was held that this fee was payable in respect of trust property. The hardship of

(1) (1902) 27 Bom. 140. (2) (1871) 7 Ben. L. R., O. C. J., 57.

this is apparent, for it practically meant that the same property might become burdened with two sets of court-fees, one in respect of the beneficial and the other in respect of the bare trust interest therein.

This decision was given on the 3rd of May, 1871, and on the following 14th of July Financial Resolution No. 2004 was passed in these terms:—

"In the exercise of the power vested in him by section 35 of the Court-fees Act, 1870, the Governor General is pleased to remit in the whole of British India the fees chargeable under schedule I, article 11, of the said Act in respect of probate of wills or letters of administration in so far as such wills or letters of administration relate to property which a deceased person was possessed of or entitled to not beneficially but as a trustee for any other person or persons, provided that this remission shall not extend to cases in which a trustee has the power of appointing or otherwise conferring a beneficial interest in the said property." Retrospective effect was given to this order from the 1st April, 1870, by Notification No. 2135 of the 22nd March, 1872.

On the 31st of March, 1873, the case of *In the Goods of Brindabun Ghose*(1) was decided by Sir Richard Couch where the facts were as follows:—One of two brothers joint in estate died unmarried and leaving no relative but the surviving brother, who applied for letters of administration of the property of the deceased brother consisting of a half share in certain specified items of property. The other half share was beneficially vested in the survivor. Certain of these items stood in the sole name of the deceased. It was held that the half share of the surviving brother should be treated as trust property and be exempted from the two per centum *ad valorem* fee.

It is not stated whether the brothers were governed by the Mitakshara or the Dayabhaga.

By Act XIII of 1875, section 6, Chapter III A, of the Court-fees Act, 1870, as it at present stands, was inserted, and therein section 19 D runs as follows:—

(1) (1873) 11 Ben. L. R. Appx. 39.

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"The probate of the will, or the letters of administration of the effects, of any person deceased, heretofore or hereafter granted, shall be deemed valid and available by his executors or administrators for recovering, transferring or assigning any moveable or immoveable property whereof or whereto the deceased was possessed or entitled, either wholly or partially as a trustee, notwithstanding the amount or value of such property is not included in the amount or value of the estate in respect of which a court-fee was paid on such probate or letters of administration."

By Notification No. 4650, 10th September, 1889, under section 35 of the Court-fees Act and in supersession of all previous notifications, the reductions and remissions therein set forth were made. No mention is made of probate or letters of administration.

By Act XI of 1899 the Court-fees Act was further amended and it was thereby in section 19 I provided that a valuation form should be filed.

That form consists of an affidavit with two annexures, in one of which, denoted Annexure A, is to be specified the property and credits of the deceased, and in Annexure B is to be set forth the items which the applicant is "by law allowed to deduct." In Annexure B are the following (among other) items: "Property held in trust not beneficially or with general power to confer a beneficial interest."

"Other property not subject to duty."

It would therefore seem to be clear that notwithstanding the supersession of the Financial Resolution No. 2004 property held in trust as above described is still regarded as exempt from the *ad valorem* fee.

This view is in accordance with the unbroken practice on the Original Side of this Court and also apparently of the Calcutta High Court: see *In the Goods of Froeschman*[1] and *In the Goods of Pokurmull Augurwallah*[2].

It has however been recently decided by this High Court in the *Collector of Ahmedabad* v. *Savchand*[3] that the exemption of trust estates from the payment of *ad valorem* court-fee was conditional on the circumstance that there had been a pre-

(1) (1883) 20 Cal. 575. (2) (1896) 23 Cal. 980.
(3) (1902) 27 Bom. 140.

vious grant of probate or letters of administration on which a court-fee had been paid.

But the attention of the learned Judges was not drawn to the history of this subject, which appears to us to point to the conclusion that trust estates are not liable to the court-fee. That they are not so liable when included in a general grant is clear, and is not disputed in the case to which we have referred; and this exemption must be referable to the character of the property and not to the procedure adopted.

But if that be so, we can see no reason why the same property should become liable when it is made the subject of the limited application, which section 37 of the Probate and Administration Act permits.

Ordinarily it would have been proper to refer this point to a Full Bench for reconsideration of the decision in *Collector of Ahmedabad* v. *Savchand*[1], but this under the circumstances is unnecessary, as we have consulted the learned Judges who heard that case and they agree with our view.

It only remains to consider whether the property here is entitled to this exemption. This point is covered by the decision of *In the goods of Pokurmull Augurwallah*[2] which we think we should follow.

The rule discharged with costs in application No. 196 and confirmed with costs in application No. 256.

Order accordingly.

G. B. R.

(1) (1902) 27 Bom. 140.

(2) (1896) 2 Cal. 980.