

In Re: Jerbai B. Kapadia

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Court : Mumbai

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Judge : Leonard Stone, Kt., C.J. and ;Chagla, J.

Appeal No. : O.C.J.T.I.J. Nos. 500 and 509 of 1943

Appellant : In Re: Jerbai B. Kapadia

Judgement :

Leonard Stone, Kt., C.J.

1. The question which we have to determine, though raising a short point, is not free from difficulty, and arises by reason of the fact that the Governor of Bombay, who has now assumed all the powers vested by or under the Government of India Act, 1935, in the Provincial Government, has been pleased to make the Increase of Court-fees Act, 1943.

2. That Act, which possesses the merit of brevity, in Section 1 states its name, and that it extends to the whole of the Province of Bombay, and provides that it shall come into force on January 1, 1944, and shall cease to have effect on such date as shall be appointed.

3. Sections 2 and 3 are as follows :

2. Notwithstanding anything contained in the Court-fees Act, 1870, (VII of 1870), in its application to the Province of Bombay (hereinafter called the principal Act)?, all fees leviable under the principal Act shall be increased by a surcharge at the rates specified in the schedule annexed hereto.

3. The provisions of the principal Act shall, save in so far as they are inconsistent with anything herein contained, apply for the purposes' of this Act.

4. There then follows the schedule of increases which, in effect, provides for an increase of twenty-five per cent, on the fees laid down by the principal Act.

5. The question at issue concerns the probate court-fee, and comes before this Court by my direction on two references made to me by the Taxing Master under Section 5 of the principal Act, that is to say, the Court-fees Act, 1870, as amended by Acts of 1875 and 1899, Act VII of 1910 and Act III of 1926, the question arising upon each of the references being in the opinion of the Taxing Master of general importance.

6. The cases referred are, in effect, test cases, and the result of our decision in each case will affect a number of other probate matters pending in the Testamentary Registry.

7. Section 3 of the principal Act is the charging section and so far as it is material, it provides that the fees chargeable in the High Courts established by Letters Patent, under Item No. 11 of the first schedule to the Act, that is to say the Probate fee, ' shall be collected in the manner hereinafter appearing.'

8. By Section 4, no document of any of the kinds specified in the first or second schedules to the Act, as chargeable with fees, shall be filed, exhibited or recorded in the High Court in the exercise of its jurisdictions therein mentioned ; ' 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.' The words 'unless in respect of such document there be paid a fee' should be noted. The importance 'of these words is that it is payment of the fee which is made the test. The section does not say 'unless such document has been stamped.'

9. Section 5 is the section under which these references are made, and the next material group of sections are those contained in Chapter IIIA and numbered 19A to 19K, both inclusive.

10. Section 19A provides for relief in cases in which it is ultimately discovered that the estimate of the value of the property was too great and that consequently too high court-fees have been paid. The only relevance of this section is that it refers to : ' a greater fee was paid on the probate or letters than the law required ', and that it provides that the Authority may : ' cancel the stamp on the probate or letters if such stamp has not been already cancelled ', and substitute another stamp for denoting the court fee.

11. Section 19C is a provision against double charges, and the expression is used : ' the full fee chargeable under this Act has been or is paid thereon.'

12. Section 19E is the section which makes provision for cases in which too low a court-fee has been paid, and it provides that the Chief Controlling Revenue-authority, not, be it noted, the High Court,

may, on the value of the estate of the deceased being verified by affidavit or affirmation, cause the probate or letters of administration to be duly stamped on payment of the full court-fee which ought to have been originally paid thereon in respect of such value....

and the section goes on to provide for certain penalties which may have to be paid. Section 19F, which applies to letters of administration only, is as follows :

In case of letters of administration on which too low a court-fee has been paid at first, the said Authority shall not cause the same to be duly stamped in manner aforesaid until the administrator has given such security to the Court by which the letters of administration have been granted as ought by law to have been given on the granting thereof in case the full value of the estate of the deceased had been then ascertained.

13. Section 19-I is the section around which much discussion has ranged in this Court and it is as follows :-

(l) No order entitling the petitioner to the grant of probate or letters of administration shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule, and the Court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid on such valuation.

14. Chapter IV is not relevant; and then we come to Chapter V, the heading of which is :

Of the Mode of Levying Fees ' ; and it provides by Section 25 that

all fees referred to in Section 3 or chargeable under this Act shall be collected by stamps', and by Section 26 :

The stamps used to denote any fees chargeable under this Act shall be impressed or adhesive, or partly impressed and partly adhesive, as the Appropriate Government may, by notification in the Official Gazette from time to time direct.

It appears from a foot-note in the official copy of the Unrepealed Central Acts of 1834 to 1871, both inclusive, Vol. I, p. 574, that rules as to levy of court-fees by adhesive and impressed stamps were made and published in the Gazette of India, 1883, part 1 p. 189. But these rules do not appear to be material to the present references.

15. Section 30 is as follows :

No document requiring a Stamp under this Act shall be filed or acted upon in any proceeding in any Court or office until the stamp has been cancelled.

Such officer as the Court or the head of the office may from time to time appoint shall, on receiving any such document, forthwith effect such cancellation by punching out the figurehead so as to leave the amount designated on the stamp untouched, and the part removed by punching shall be burnt or otherwise destroyed.

16. Turning to the First Schedule, item No. 11, which is the relevant subject-matter charged with a fee by Section 3, is as follows : ' Probate of a will or letters of

administration with or without will annexed ' ; and in the second and third columns are set out the varying rates of the fee dependent upon the value of the estate. The third schedule contains forms, and under the heading : ' See Section 19 I ' is the relevant form of valuation in Testamentary matters. It is in the form of an affidavit or affirmation, and paragraph 3 of it is as follows :

I further say that the said assets, exclusive only of such last-mentioned items, but inclusive of all rents, interest, dividends and increased values since the date of the death of the said deceased, are under the value of....

17. And from the Annexure marked ' A ' two things appear : In the first place, the valuation is to be made as at the date of making the application for probate or letters of administration, and, secondly, there is to be included separately arrears due at the date of death and all rents received or due since that date to the time of making the application.'

18. Rule 607 of the rules of this High Court, in its present form, is as follows :

Every application for probate or for letters of administration with or without the will annexed or for succession certificate shall be accompanied by a certificate of the Prothonotary and Senior Master that duty payable has been paid, unless the Honourable the Chief Justice or the Judge hearing Testamentary Matters' shall otherwise direct.

19. What we have to do is to construe the 1943 Act in its relation to the principal Act of 1870 as subsequently amended, and the practice in the Testamentary Registry, even if it is dependent upon rules made by this Court, cannot detract from the law made by Acts of the Legislature. Nevertheless before approaching the facts of these two particular references, it will be convenient to say something about the practice, which in fact prevails in the Testamentary Registry upon petitions for probate or letters of administration being presented, in order to understand how the present problem has arisen.

20. The solicitor to the executor or the prospective administrator or, I suppose, the executor or administrator in person, goes to the Registry with a petition asking for

probate or letters of administration, and to this is annexed the valuation which is deposed to as at the date of the application in accordance with the form in the Third Schedule to the principal Act. There is also annexed, and marked A, the original will, though this is not in fact bound up with the petition and the valuation. Provided that this petition is made within three years from the date of death, or even later upon explanation of the delay, it does not appear to matter at what date the application for probate is made, and consequently there is considerable freedom of choice exercisable by executors or administrators as to the day on which the values are computed. There is nothing inconsistent with the principal Act in the procedure. On production of these documents to the Registry, the petitioner or his solicitor is given a statement headed 'Memorandum of fees and duty', and this contains a list of such court-fees as drawing and engrossing probate, registering oath etc., as well as the major item, the Probate court-fee, which is incorrectly called ' Probate duty.' It is necessary, I think, at this stage, to point out that court-fees chargeable on probate under item No. 11 of the first schedule to the principal Act are in no sense a death duty, and are only payable if probate is taken out : so that if an estate can be administered without the necessity of a grant of probate, no probate fee in fact becomes payable at all.

21. Having received the memorandum of ' court-fees and duty ' ; the petitioner then takes away his petition and the original will and repairs to the Collector where he purchases sufficient stamps to provide for the total sum made up of the items above mentioned. The higher denominations of these stamps are impressed on blank sheets of paper, whilst the lower denominations are loose adhesive stamps. In the case of the impressed stamps the back of the paper is endorsed with the date of issue and the name of the person purchasing them, who is generally the solicitor. In the case of the adhesive stamps a similar endorsement is made on the face of the stamp. But such endorsements are not, in fact or in practice, a cancellation of the stamps, see Section 30 of the principal Act.

22. The petitioner then returns to the Registry, hands over the petition containing the schedule of valuation, and the original will in cases in which there is one, and also all stamps. The petition is then filed and receives an endorsement on it to that effect, which contains the date, and the petitioner or his solicitor is given a receipt,

which is in the following form :

In the High Court of Judicature at Bombay

Testamentary and Intestate Judication Petition for

Petitioner

' I, Suleman Jafferbhai Rahimtoola, Prothonotary and Senior Master of the High Court of Judicature at Bombay, do hereby certify that the sum of Rupees has been paid on the day of 194 in the above matter for Court-fees and Probate Duty, on

the property mentioned in the Schedule to the petition herein, such duty being charged in accordance with the provisions of Act VII of 1870, as amended by Act VII of 1910 and Act III of 1926. Dated this day of 194' Prothonotary and Senior Master. Messrs Attorneys-at-Law.

In the normal case the application for probate or letters of administration then proceeds in the Registry, and the valuation is checked by officials of this Court. At a later date the Prothonotary and Senior Master, in cases in which the grant is not challenged and no caveat is filed, makes an order for the grant of probate or letters of administration to issue; and at a still later date; depending partly on how long it takes to engross the probate copy of the will on the blank sheets, which contain the impressed stamps ; the solicitor or the party is summoned to the Registry and handed the probate. On that date it appears that the stamps are actually cancelled by defacement pursuant to Section 30 of the principal Act.

23. Now, it appears, though by what right I do not know, that the practice has grown up in the Testamentary Registry, which enables a petitioner for probate or letters of administration to recant at any time up to the actual cancellation of the stamps, that is to say, he may change his mind and say : ' I do not want probate after all, give me back my stamps.' But in cases in which this is done, and we are informed that it is not infrequently done, the Testamentary Registry retains the petition which has been taken on the file and also the original will which is considered to be part of it. The stamps, thus returned, are either used by the solicitor in some other matter, or else they can be taken back to the Collector and

cashed at a discount of one anna in the rupee : see rules framed under the Court-fees Act corresponding to Section 54 of the Indian Stamp Act, 1899.

24. No one has been able to suggest to us by what authority or right the Testamentary Registry hands back the stamps once the petition has been taken on the file in the cases of persons who change their minds.

25. When the principal Act wants to provide for security which is not payment, it does so by precise words : see Section 19F. We express no opinion about this practice, which appears to have gone on for many years, and which, we must assume, has the implied assent of Government; but it is an indulgence supported by long usage only, and does not appear to owe its origin to any enforceable right. In any event, the return of the stamps, whilst retaining the original will in the Registry, seems to me to be quite illogical : since, unless at a subsequent date a fresh application for probate is made, the will remains unproved in the Registry and inaccessible to the executors and beneficiaries of the testator. The rules I have already referred to, which provide for the recashing of court-fee stamps at a discount, are not equivocal so far as the probate court-fee is concerned : since there are many other court-fee stamps used for other purposes than the payment of probate fees.

26. The facts in these two references before us are as follows : The first reference, which concerns a testatrix of the name of Kapadia, is No. 509 of 1943. In that case the will is dated July 28, 1939 ; the testatrix died on August 22, 1943 ; the original application for probate was made on October 13, 1943 ; stamps of the value of Rs. 6,171-10-0 were handed over to the Testamentary Registry and the petition taken on the file on November 5, 1943 ; and on November 26, 1943, the Prothonotary made an order for the grant of probate to issue; but before this order had been complied with, the amending Act had come into force.

27. The second reference, which concerns the estate of Boman Behram, is No. 500 of 1943. The will of the testator is dated September 1, 19'38 ; the testator died on May 21, 1943 ; the original application to the Testamentary Registry was made on October 18, 1943 ; and on October 27, 1943', stamps of the value of Rs. 38,625-11-0 were handed in to the Registry and the petition taken on the file. In

this case the estate being a large one involving no doubt considerable enquiries as to its valuation, the order for the grant to issue had not been made before January 1, 1944, when the new Act came into operation. In both cases a receipt in the form indicated above was given for the amount of the stamps.

28. I will now proceed to consider Section 19 I of the principal Act; which provides that no order entitling the petitioner to a grant of probate or letters of administration shall be made until two things have happened : First, the petitioner has filed in Court a valuation of the property in the form set forth in the third schedule ; and, secondly, the Court is satisfied that the fee mentioned in item No. 11 of the first schedule ' has been paid on such valuation.' The order for the grant of probate ought, therefore, never to be made, unless and until the fee is paid on the valuation : and, as it is provided that the fee shall be collected by stamps, it, in my judgment, necessarily follows that payment of the fee by stamp must take place when the stamps are handed into the Registry : since there is no other act between handing over the stamps and the making of the order for the grant of probate to issue, which could amount to payment. We have been referred to the case of *Gangaram v. Chief Controlling Revenue Authority* : AIR1927 Bom643 in which Mr. Justice Crump had to decide whether the increase in court-fees, which came into force on April 1, 1926, under Bombay Act III of 1926, was an increase, which the applicant in that case was bound to pay, or whether the payment already made by him was sufficient to entitle him to the grant of probate. Mr. Justice Crump, referring to Section 19 I, said (p. 1513):-

I do not see how the petitioner can be said to be competent to comply with the requirements of the section until the time when the obligation imposed by that section comes into effect, that is, when the grant of probate comes to be made. This being my view of the matter, I must hold that the Testamentary Registrar was correct in this case, and that no grant of probate can be made until the additional Court-fee has been paid.' In holding the applicant liable to pay the increased fee, the learned Judge appears to have assumed that the handing over of the court-fee stamps to the Registry was only a provisional payment.

29. With great respect to the learned Judge who decided that case, I find myself unable to agree with that decision : since Section 19 I deals with payment on the valuation annexed to the petition and not with the right to receive a grant.

30. It is now necessary to consider how the amending Act of 1843, which came into operation on January 1, 1944, affects the position. The relevant words appear in Section 2. They are :

all fees leviable under the principal Act shall be increased by a surcharge at the rates specified in the schedule annexed thereto.

And the question is, in my opinion, dependent upon the ascertainment of the point of time at which this probate fee became leviable.

31. The learned Advocate General has submitted that the fee is chargeable on the probate, meaning thereby the actual document by which the grant is made, and that, therefore, the fee is levied on the grant itself, which has not yet come into existence in either of the references before us. In support of this argument, the language of item No. 11 in the first schedule and Sections 4, 19A and 19E of the principal Act are relied upon. But, in my judgment, a fee becomes leviable on the date when it is liable to be collected : To levy a fee connotes its collection and its payment rather than the conception of its charge on some document which evidences its payment. Chapter V of the principal Act, which provides for ' the mode of levying fees ', contrasts in Sections 25 and 30 the difference between the collection of fees by stamps and the fact that the document cannot be used in any Court until the stamp has been cancelled. The cancellation of the stamp cannot, in my opinion, affect the liability to pay, and cannot be said to be the levy of the fee.

32. Section 19 I is decisive of the fact, that payment of the fee must be made not only before the grant itself is issued : but before any order for the grant to issue is made. In my opinion, the fees become leviable at the time when the previously purchased stamps are handed over to the Registry, and the petition for probate is taken on the file. This is a Stamp Act imposing an additional fee, and in construing it the benefit of any doubt is the right of the subject. In my judgment, for the reasons I have stated, we must answer these references by declaring that the

increased court-fees, which came into operation on January 1, 1944, do not apply to the valuations made in either of these references.

Chagla, J.

33. I agree. These two references raise the question as to the rate at which court-fee is to be paid on the grant of probate. The question shortly put is whether the court-fee is to be paid at the rate prevailing at the date when the payment is made under Section 19I of the Court-fees Act (VII of 1870) or at the rate prevailing at the date when the grant of probate is actually made. In both the cases before us the payment was made prior to January 1, 1944, when Bombay Act XV of 1943 came into force by which all fees leviable under the Court-fees Act were increased by a surcharge at the rate specified in the schedule annexed to that Act.

34. There is no doubt that the charging section, as far as probate is concerned, is Section 3 of the Court-fees Act; and what is charged is neither the application for probate nor the order entitling the petitioner to grant of probate but the probate itself. Section 19 I of the Court-fees Act provides that no order entitling the petitioner to the grant of probate shall be made unless two conditions are satisfied : first that the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule and second that the Court is satisfied that the fee mentioned in Item No. 11 of the first schedule has been paid on such valuation. To my mind Section 19 I sets up a machinery for calculating the amount of court-fee to be paid on the probate and also lays down the time when the court-fee is to be collected. The court-fee is to be collected at a point of time anterior to the making of the order entitling the petitioner to the grant of probate. It will be noticed that Section 19 I does not indicate when exactly, prior to the making of the order, such payment is to be made. This lacuna in the statute is filled up by our High Court Rule 607 which provides that every application for probate shall be accompanied by a certificate of the Prothonotary and Senior Master that duty payable has been paid unless the Honourable the Chief Justice or the Judge hearing Testamentary Matters shall otherwise direct. Therefore under High Court Rule 607 no application for probate can be made unless the petitioner produces a certificate from the Prothonotary and Senior Master to the effect that the duty payable under Section

19 I has been paid. Under Section 25 of the Court-fees Act all fees have to be collected by stamps, and our attention has been drawn to the practice in the Prothonotary's Office which to my mind is in conformity with the law that payment under Section 19 I is made by court-fee stamps of the appropriate value. It has been contended by the Advocate General that the payment made under Section 19 I is only an interim or provisional payment and not the payment contemplated by Item No. 11 in Schedule I. In support of this contention it is urged that the payment under Section 19 I has to be made on the valuation of the property made by the petitioner in the Form set forth in Schedule III, and this valuation does not become final till the grant is made. There is no doubt that after the payment is made under Section 19 I, the Prothonotary very often administers requisitions to the petitioner which have got to be complied with before the grant is made. It may be that one of the debts mentioned in the schedule may not be proved or the valuation of a property might be increased by the Prothonotary. In such a case additional court-fee would have to be paid before the grant is made. But it is to be borne in mind that the whole basis of valuation of the property left by the deceased is as set out in the third schedule. Alterations are made and further court-fee is demanded because the valuation was not properly made on that basis, and it is instructive to note that when the valuation of the property is amended or altered, the schedule annexed to the petition which contains that valuation is also amended so that the schedule is corrected as of the date when the petition was filed and the payment under Section 19 I was made. Considerable emphasis has been placed on the fact that the court-fee on probate is charged on the amount or value of the property in respect of which the grant of probate is made. That is undoubtedly so. But the amount or value of that property is to be ascertained in the manner laid down in the third schedule to the Act.

35. There can be no doubt, on a true construction of Section 19 I, that it is the fee mentioned in item No. 11 of Schedule I that is paid prior to the making of the order. I see no warrant for holding that such payment is merely interim or provisional payment. The language of the section is clear and unambiguous, and it is contrary to all canons of construction to import words into that section in order to give it a construction which the Advocate General contends for. It has also been suggested by the Advocate General that the payment under Section 19 I is merely a deposit

against the final payment which is made at the date of the grant. The distinction between a payment and a deposit is much too clear to require any elaboration. When the Legislature intends to use the expression ' deposit' it does so in clear and unequivocal language. One has only to turn to Section 379 of the Indian Succession Act (XXXIX of 1925) which deals with a cognate matter to see the language used when a deposit is to be made and not a payment of the fee under the Court-fees Act of 1870. Section 379, Sub-section (i), provides that every application for a certificate or for the extension of a certificate shall be accompanied by a deposit of a sum equal to the fee payable under the Court-fees Act in respect of the certificate or extension applied for. Then under Sub-section (2) it is only if the application is allowed that the sum deposited by the applicant is to be expended, under the direction of a Judge, in the purchase of a stamp to be used for denoting the fee payable ; and under Sub-section (3) any sum received under Sub-section (1) and not expended under Sub-section (2) is to be refunded to the person who deposited it. The judgment of Mr. Justice Crump reported in *Gangaram v. The Chief Controlling Revenue Authority* : AIR1927 Bom643 proceeded on the assumption that the payment under Rule 561A of the High Court Rules, which corresponded to our Rule 607, was only provisional. The learned Judge with great respect overlooked the fact that the payment was really made under Section 19 I and the payment under that section was certainly not provisional. It is difficult to avoid coming to the same conclusion as the learned Judge in that case if one were to hold that the payment under Section 19 I was provisional ; but, as I have pointed out, that would be putting on that section a construction unwarranted by the language used.

36. It has been urged upon us by the Advocate General that if we hold that it was the court-fee under item No. 11 of the first schedule that was paid under Section 19 I and it was not merely a deposit, then we would be making the order entitling the petitioner to the grant of probate or the application for probate chargeable and not the probate itself. I do not think that that conclusion necessarily follows. It is open to the Legislature, after providing that what is chargeable is the probate, to lay down at what time and in what manner the fee to be paid is to be collected. Under the Court-fees Act the fee on probate is not made payable at the time the grant is made but is made payable before the order entitling the petitioner to the

grant of probate is made.

37. Our attention has been drawn to the practice prevailing in the Prothonotary's Office with regard to the payment of court-fees on probate. When the payment is made under Section 19 I by means of stamps of the appropriate value, a certificate is issued signed by the Prothonotary certifying that the amount mentioned therein has been paid for court-fees and probate duty on the property mentioned in the schedule to the petition, such duty being charged in accordance with the provisions of the Act. This certificate is entirely in conformity with Section 19 I. But a receipt is also passed by the Prothonotary's Office where the amount paid is described as lodged as deposit. I fail to see under what provision of the Court-fees Act or the rules of the High Court the Prothonotary's Office is justified in treating the payment under Section 19 I as merely a deposit. In my opinion this practice is entirely erroneous, and the receipt should be for payment of court-fee and not for a mere deposit. Similarly when the amount is paid there is endorsed on the petition ' Probate duty paid in advance '. The words ' in advance ' are again clearly unjustified.

38. Under Bombay Act XV of 1943 it is only the fees still leviable under the Court-fees Act which are increased by the surcharge. It is not disputed that the Act is not retrospective in character and, therefore, it cannot apply to the fees which have already been paid under the Act; and in the view which I have taken both the petitioners before us have paid the fees mentioned in item No. 11 of the first schedule and, therefore, there is no fee which they are liable to pay to which the surcharge can apply. Bombay Act XV of 1943 cannot apply to any probate in respect of which the fee payable under the law for the time being in force has been paid prior to the coming into force of that Act although the probate might not in fact have been issued.

39. I, therefore, hold- that the rate at which the petitioner for probate has to pay the court-fee is the rate prevailing on the date on which he makes the payment under Section 19 I of the Court-fees Act and not the one prevailing on the date on which the grant for probate is made.

