or words authorising her to alienate, are not in themselves sufficient to show that the widow takes only a restricted estate, as in such cases there is no presumption to be raised under section 82; the words themselves showing that she took an absolute estate. But we may take the circumstances into consideration in construing the other provisions of the will. The recital in the will that his wife should "enjoy" the property is important to indicate the intention of the testator. He does not leave any specific property to his wife and without words of inheritance or words empowering her to alienate which are usually inserted when it is intended to give an absolute estate, he leaves the property to her to 'enjoy.' We are inclined, therefore, to think he did not intend that his widow should have the power to alienate the estate. At the time of the will and of his death, he had a nephew and daughters and it is not likely that he intended to enable the widow to alienate the estate to strangers. We therefore dismiss the appeal and the memorandum of objections with costs.

APPELLATE CIVIL.

Before Sir R. S. Benson, Officiating Chief Justice, Mr. Justice Miller and Mr. Justice Sankaran-Nair.

IN THE MATTER OF DESU MANAVALA CHETTY, APPELLANT.*

1908. July, 16, 19, 1909. August 20.

Court Fees Act VII of 1870, s. 19-I (1) and III schedule—"Property held in trust not beneficially"—Undivided share of deceased coparcener not 'property held in trust not beneficially'—Surviving coparcener applying for Letters of Administration liable to pay court-fees on the value of share of deceased coparcener.

Under the Mitakshara Law as administered in this part of India, an undivided coparcener has power to mortgage or alienate his undivided share and he can at any time enforce partition of his own share. He cannot therefore be said to hold *his own* share of the undivided property "as trust-property," not beneficially or with general power to confer a beneficial interest in it, within the meaning of these words as used in Annexure B of the form for valuation in Schedule III of the Court Fees Act, although, as regards the shares of others, he may be said to so hold them.

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* Original Side Appeal No. 43 of 1908.

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Where a surviving coparcener governed by the Mitakshara Law, applies for Letters of Administration in respect of property standing in the name of a deceased coparcener, which was joint family property of the applicant and the deceased, he is bound to include in the valuation of the property, the value of the share to which the deceased was entitled at the moment of his death and he cannot under section 19-I (1) of the Court Fees Act, obtain Letters of Administration to the joint family property, unless he includes such share in the valuation and pays the proper *ad valorem* court fees upon it.

In the goods of Pokermull Augurwallah, [(1896) I.L.R., 23 Calc., 980], referred to—not followed.

In the goods of Brindbun Ghose, [(1873) 11 B.L.R., App. 39], followed.

APPEAL from the judgment of Boddam, J., dated the 30th day of April 1908, in the original Testamentary jurisdiction of this Court in original petition No. 149 of 1907.

The facts of this case are set out in the judgment.

P. R. Sundara Ayyar and *H. Sitaramaswami* for appellant.

The Hon. The Advocate-General on behalf of Government.

JUDGMENT—THE OFFICATING CHIEF JUSTICE.—In this case one Manavala Chetty prayed for Letters of Administration in respect of property standing in the name of his deceased father, Emberumanar Chetty, but forming the joint ancestral property of the undivided Hindu family of which the petitioner and his late father were the only members. He stated that though his father's share in the property passed to him by survivorship, he was obliged to take out Letters of Administration because part of the property consisted of shares in certain companies which in accordance with their articles of association, refused to recognise his title to the shares unless he obtained such letters. He claimed to be exempt from payment of stamp duty on the letters on the ground that his father was in possession of the property, and held it as manager of, and trustee for, the family. The learned Judge who heard the application decided that Letters of Administration could be granted only on payment of the ordinary duty. Against this decision the petitioner appeals.

Section 19-I (1) of the Court Fees Act, 1870, as amended by Act XI of 1899, provides that "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 proper fee has been paid "on such valuation."

That form consists of an affidavit with two annexures, in one of which, 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." Among these items are "property held in trust not beneficially or with general power to confer a beneficial interest" and "other property not subject to duty." The question is, whether the property for which the petitioner seeks Letters of Administration can be said to come under either of these categories, and, if so, whether wholly or partially. The petitioner contends that the property was trust property in the hands of the deceased, and he relies on the decisions in the cases of *In the goods of Pokurmull Augurwallah*(1) and *The Collector of Kaira* v. *Chunilal*(2), and also on two unreported decisions of this Court. It is to be observed that in the Calcutta cases there was no argument and the decision proceeded on a statement drawn up by the taxing officer in which great stress was laid on the fact that under the Mitakshara Law (as administered in Bengal) "an undivided coparcener cannot dispose of his share in the joint property, unless in case of necessity, without the consent of his coparceners." In neither the note of the taxing officer nor in the order of the Court, is there any reference to the words "not beneficially or with general power to confer a beneficial interest" which follow the words "property held in trust," in annexure B. In the case of *The Collector of Kaira* v. *Chunilal*(2), the chief question considered was whether the limited grant sought for in that case could be granted at all. The character of the property as trust property was not discussed in the judgment, but was held to be concluded by the decision in *In the goods of Pokurmull Augurwallah*(1). In neither of the unreported cases in this Court was the question argued. In the earlier of them (*In re T. Swaminatha Aiyar deceased*), the question was raised by the taxing officer in a "note for orders" in which he referred to *In the goods of Pokurmull Augurwallah*(1), as supporting the petitioner's contention that the ancestral joint property was held by the deceased as trust property and therefore not liable to duty on taking out Letters of Administration, and the learned Chief Justice accepted the suggestion of the taxing officer. In the later case, no "note for orders" is forthcoming but Wallis, J.,

(1) (1896) I.L.R., 23 Calc., 980. (2) (1905) I.L.R., 29 Bom., 161.

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seems to have followed the precedent "*In re Swaminatha Aiyar.*" Thus it would seem that the two precedents in this Court, and also the Bombay case followed the decision in *In the goods of Pokurmull Augurwallah*(1). But in this Presidency, differing from Bengal, it has long been held that under the Mitakshara Law as administered in this part of India an alienation by sale or mortgage by an undivided member of his interest in the joint family property, is valid (*Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*(2)). He can also at any time enforce partition of his own share. That being so, it seems impossible to hold that the property in the present case was held by the deceased, so far at least as his own share in it was concerned, "as trust property, not beneficially or with general power to confer a beneficial interest in it." He could have claimed partition, or he could have sold or mortgaged his undivided share and have applied the proceeds to any purpose he pleased. In my opinion, therefore, the interest of the deceased in the joint family property in the present case, does not come within the category of "property held in trust, not beneficially or with general power to confer a beneficial interest"; nor do I think that it is possible to hold that it comes within the only other category in annexure B which the vakil for the petitioner argues is applicable; viz., "other property not liable to duty." These words must refer to some exemption from liability enacted by the Statute Law, as, for example, under section 19-C, of the Court Fees Act or under an authority conferred by the Statute Law, as, for example, an exemption by Government under the authority conferred by section 35 of the Court Fees Act; but no such exemption is alleged in the present case.

In the goods of *Brindabun Ghose deceased*(3), two brothers were the only coparceners in a joint Hindu family. One of them, Brindabun, died; and the other, *Bristodoss*, applied for and obtained Letters of Administration in respect of Brindaban's half share in the joint family property on payment of *ad valorem* duty on such half share, and Sir R. Couch, C.J., held that Bristodoss' half share "should be treated as trust property and be exempted from the two *per centum ad valorem* fee."

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(1) (1986) I.L.R., 23 Calc., 980. (2) (1902) I.L.R., 25 Mad., 690.
(3) (1873) 11 B.L.R., App. 39; (S.C.) 19 W.R., 230.

A similar view was taken by Petheram, C.J., in the case of property held in common by Europeans with right of survivorship (*In the goods of Froeschman*(1)).

I think that the view taken in these cases is that which we should follow. The deceased, Emberumanar Chetty, cannot be said to have held his own share of the joint family property in trust and not beneficially, though he may be said to have held his son's share in that way. If, therefore, the son desires Letters of Administration to the joint family property he must pay the *ad valorem* duty on so much of the property as was not "property held on trust not beneficially or with general power to confer a beneficial interest"; that is, on the father's share in the property, or to be more exact, on the share which his father was entitled to claim at the moment before his death. This interpretation of the words is not, I think, open to any objection on principle; nor will its adoption entail any practical difficulty, at least in this Presidency.

I would therefore modify the order of the learned Judge, and, with reference to section 19 I (1) of the Court-fees Act (as amended by Act XI of 1899), I would inform the appellant that no order entitling him to Letters of Administration will be made on his application until he shall have filed in Court a valuation of the property corrected in accordance with the view stated above and has paid the proper fee on such valuation. If this is done, an order will issue for the grant of Letters of Administration to the petitioner.

MILLER, J.—I have no doubt that the applicant is a person to whom Letters of Administration may be granted under section 23 of the Probate and Administration Act. He is a person who, by the personal law of the deceased and himself, would be entitled to the whole or part of the estate of the deceased. He would take his father's property if his father died intestate leaving property.

And it seems clear to me that the ancestral joint family property passing to the applicant by survivorship, is "property of the deceased" within the meaning of the Act (section 4), and therefore included in the "Property and Credits" of section 77, that is to say, in the "estate" of the definition of administrator

(1) (1893) I.L.R., 20 Calc., 575.

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in section 3. Inasmuch then as this property does not in the present case "pass by survivorship" to any one other than the applicant, there seems to be no doubt that the applicant is entitled to Letters of Administration which will vest it in him.

As to the question whether he is entitled to deduct this property before valuing the estate for duty, both parties seem to be content to take it that the applicant's share of it is exempt from duty, as being property held by the deceased "in trust not beneficially": the share of the applicant is one half; that is what he would have got, if the property had been divided just before the death of the deceased; and the contest between the Advocate-General and Mr. Sundara Ayyar is as to the other half which on the supposed division would have become the separate property of the deceased. Both sides, as I understood the argument, accepted Annexure B in Schedule III of the Court-fees Act as containing an exhaustive description of the classes of property on which duty is not leviable: it was not suggested that there exists any notification under section 35 of the Court-fees Act, which could affect the decision in this case.

Mr. Sundara Ayyar contends that the share in dispute is either "property held in trust not beneficially" or else other "property not liable to duty."

It is, he argues, other property not liable to duty, because (1) under the Act there is nothing else which that description can properly be made to include, and (2) it will not in all cases vest in the administrator. If it does not vest in the administrator, it is unreasonable to levy duty on it, and if duty is not leviable in that case, uniformity requires that it should not be leviable where it does vest in the administrator.

As to the first argument, even without section 35 which seems to give power to the Government to declare any class of property "property not liable to duty," I do not think we should be justified in reading the heading in Annexure B as declaring the existence of property not described in the other headings, and yet, not liable to duty. The existence of the heading does not involve the existence of any class of property which can fall under it.

As to the second argument; it is Mr. Sundara Ayyar's contention that property of the deceased will vest or will not vest in the administrator according as he is or is not a person to whom the property passes by survivorship. If that is not unreasonable,

I fail to see why it is unreasonable to levy duty on all that vests in the administrator, though that may differ with the person entitled to administer. I accept Mr. Sundara Ayyar's contention that the former proposition is the law, and I fail to see why I should hold that the latter is not.

Then remains the question, whether the property is "property held in trust not beneficially." In the earlier cases in the Calcutta High Court, the share of the deceased seems to have been treated without argument as not exempt (*vide In the goods of Brindabun Ghose*(1)); but later in Calcutta (*In the goods of Pokurmull Augurwallah*(2)) and in Bombay (*The Collector of Kaira* v. *Chunilal*(3)) the whole property seems to have been treated as exempt, no question being argued as to the share of the deceased himself; and in this Court the Chief Justice has decided, apparently without contest, in accordance with this view, and has been followed by Wallis, J., also in a case in which Government was not represented.

I prefer the older view. I take it that one principal reason for the exemption from duty, of property vested in the deceased as a trustee, is that the beneficiary, out of whose pocket the payment would come, acquires nothing by the trustee's death. That consideration certainly does not apply to the applicant in the present case. However, the test laid down by the Act is, whether or not the property was held "beneficially" by the trustee. The deceased could use his share as security on which to borrow money for himself, and could at any time demand that it be carved out of the whole and placed at his disposal by a partition. A trustee cannot as such do these things with trust property, and in so far as the deceased was able to do them, he can, I think, properly be considered to hold "beneficially."

It was suggested that the heading in the annexure should be read as meaning property which, taken as a whole, is held "not beneficially"; for instance if the deceased held land of which $\frac{99}{100}$ths belonged to himself, and $\frac{1}{100}$th was held for the benefit of another, so long as the $\frac{1}{100}$ th is not divided off from the rest, the whole property is held "as a trustee not beneficially." I see nothing in the language of the schedule to require this

(1) (1873) 11 B.L.R., App. 39; 19 W.R., 230. (2) (1886) I.L.R., 23 Calc., 980.
(3) (1905) I.L.R., 29 Bom., 161.

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construction and there is no more difficulty in entering in the annexure "one undivided half share in such and such lands and houses," and in calculating its value for duty, than there is in making a similar entry and calculation in, say a proclamation of sale.

I agree therefore in the order which the learned Chief Justice proposes to make.

SANKARAN-NAIR, J.—I agree with the conclusion that the deceased did not hold the property as a trustee and that the appellant can obtain Letters of Administration only on paying the proper fee on the share of the deceased which he got by survivorship.

APPELLATE CIVIL.

Before Sir R. S. Benson, Officiating Chief Justice, and Mr. Justice Sankaran-Nair.

1909. July 13.

VELAYUDA NAICKER AND OTHERS (DEFENDANTS), APPELLANTS,

v.

HYDER HUSSAN KHAN SAHIB AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Transfer of Property Act IV of 1882, s. 84—Tender, what amounts to.

Under section 84 of the Transfer of Property Act, interest ceases to run on the principal amount from the date of tender; it is not necessary that the mortgagor should, after such tender, always keep the money ready for payment.

APPEAL presented against the decree of C. V. Kumaraswami Sastri, City Civil Judge of Madras, in Original Suit No. 73 of 1907.

The plaintiffs effected a usufructuary mortgage of plaint house in favour of the defendants on the 15th May 1903 for Rs. 300 carrying interest at 21 per cent. per annum. On the 27th September 1904, the plaintiffs again borrowed of the defendants Rs. 200 on a pro-note which carried interest at 30 per cent. per annum and created a further charge on the said house for the said amount. On the 21st September 1905, the second plaintiff tendered the sum of Rs. 520-8-0 which was then due to the defendants

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* City Civil Court Appeal No. 26 of 1907.