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The decree will direct that the amount will be realizable from the assets, if any, left by the mortgagor.

The appeal is therfore allowed with costs throughout.

JAMES, J.—I agree.

Appeal allowed.

S. A. K.

APPELLATE CIVIL.

Before Wort and Agarwala, JJ.

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Court-Fees Act, 1870 (*Act VII of* 1870), *section* 19-*D and Schedule* 1, *article* 11—*coparcener of joint Hindu family, whether is a "trustee" for other coparceners— joint family property, whether can be treated as trust property—coparceners applying for letters of administration in respect of joint family property, whether liable to pay court-fee.*

A coparcener of a joint Hindu family interested to the extent of an undivided share in the whole of the property of the joint family is not a trustee for the other coparceners.

Where, therefore, on the death of a coparcener the surviving members of the family apply for letters of administration in respect of the joint family property (whether it is necessary for them to apply or not), they are liable to pay the proper court-fee according to article 11 of Schedule 1 of the Court-Fees Act, 1870. Section 19-D of the Act does not in any way exempt from payment of court-fee letters of administration obtained by a member of a joint family in respect of property which he gets by survivorship.

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* Appeal from Original Order no. 91 of 1937 with Civil Revision no. 257 of 1937, from an order of Rai Bahadur Saudagar Singh, District Judge of Shahabad, dated the 14th of April, 1937.

In the Goods of Madho Prasad (1), followed.

Collector of Kaira v. *Chunilal Hari Lal* (2), *In the Goods of Pokurmull Augarwallah* (3), *Kashinath Parsharam Gadgil* v. *Gouravabai* (4) and *Estate of Ram Kumar Prasad, In re* (5), distinguished.

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Appeal by the applicants.

The facts of the case material to this report are set out in the judgment of Wort, J.

S. M. Mullick and *S. N. Bose*, for the appellants.

Advocate-General and *Government Pleader*, for the respondents.

WORT, J.—This appeal is directed against the order of the District Judge of Shahabad, dated the 14th of April, 1937, in which he has held that the appellants, who were the petitioners before him for Letters of Administration of the estate of one Amir Chandra, were liable to pay court-fee on the total value of the properties, the subject-matter of the application. The property consisted of Government loans to the value of Rs. 2,19,400, money in deposit with the Bank, Rs. 1,00,000, and shares in limited companies valued at Rs. 79,785. The actual figures are not in dispute and are immaterial for the purposes of the decision of the point in issue.

The contention in the court below, and indeed the contention in this Court is that, as these properties were the properties of the joint family of which the applicants were members, the properties must be treated as trust properties and, therefore, not liable to the ad valorem court-fee demanded by the order of the Judge. Reliance was placed upon Schedule III of the Court-Fees Act which, it is contended, by implica-

(1) (1935) I. L. R. 57 All. 881.
(2) (1904) I. L. R. 29 Bom. 161.
(3) (1896) I. L. R. 23 Cal. 980.
(4) (1914) I. L. R. 39 Bom. 245.
(5) (1920) 5 Pat. L. J. 510.

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tion provides that the property of the description which I have stated, that is to say, property of the joint family, is not liable for court-fees. The form Annexure A provided under Schedule III sets out various items of property the description of which is to be given in an application for Letters of Administration. Annexure B is headed "Schedule of Debts etc.," and not only includes debts owing by the estate of the deceased, the funeral expenses and mortgage, but also 'property held in trust not beneficially or with general power to confer a beneficial interest' and 'other property not subject to duty'. It seems to me clear, if I were to decide the matter, although I do not decide it, that the total of items in Annexure B is to be deducted from the total of Annexure A: that much is clear, the duty being payable on the balance. Section 19-I provides that the Court must be satisfied that the fees payable under article no. 11 of the first schedule are paid before entertaining an application for Letters of Administration, so far as the actual valuation is concerned. The provision made in section 19-H gives jurisdiction to the Collector to decide these matters finally, but it seems to be perfectly clear from the provision of section 19-I, to which I have already referred, that the Judge had jurisdiction to enter into the question which he determined by his order and which is the subject-matter of this appeal.

Reliance is placed upon the decision of the Bombay High Court in *The Collector of Kaira* v. *Chunilal Hari Lal*(1), a decision of Sir L. H. Jenkins and Batty, J. Upon this question so far as regards the actual point which comes before us for determination, that is to say, whether Amir Chandra was a trustee for the other members of the joint family, the learned Chief Justice was of the opinion that the matter had been decided in *In the goods of Pokurmull Augurwallah*(2), the main point of decision being the

(1) (1904) I. L. R. 29 Bom. 161.

(2) (1896) I. R. R. 23 Cal. 980.

question whether, although the notification which the Local Government was entitled to make under the Court-Fees Act had been, under section 35 of the Act of 1870, rescinded, the trust property was still exempt from duty. The learned Chief Justice came to the conclusion that in spite of the fact that the notification had been rescinded by reason of the provisions amending the Probate and Administration Act the trust property was still exempt. It seems to me that once the matter is decided that this is trust property, it necessarily follows by reason of the form in Schedule III to which I have referred that the property is held in trust not beneficially or with general power to confer a beneficial interest and is exempt from duty. In this connection, although the section does not deal actually with the point to which I am referring, reference might be made to section 250 of the present Indian Succession Act. The decision upon which the Bombay High Court relied for the proposition that the joint family property in the circumstances and with which the learned Chief Justice was dealing was trust property was the case of *In the goods of Pokurmull Augurwallah*(1), which I have already named. It is just possible, although I do not propose to come to that conclusion, that the case of *In the goods of Pokurmull Augurwallah*(1), can be distinguished by reason of the facts of that case. There four members of a joint family had purchased a property as tenants in common—at least according to the Report of the case the conveyance purported to convey to the brothers as tenants in common not only for themselves but for other members of the family—and in those circumstances Ameer Ali, J. as he then was, held "that the property, though conveyed to the brothers as tenants in common, vested in them as trustees for the benefit of all the coparceners and consequently was not liable to duty". Whatever view might be taken of the authority of that case, it could not be said, having regard to the facts to which I have referred, to apply to the facts of this case.

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Here there is no question of conveyance to Amir Chandra on behalf of the other members of the family. It was property at the Bank which, according to the facts which do not seem to be disputed, was property of the joint family. Incidentally I might mention that the Bank would not recognize the property as the property of any person other than Amir Chandra and therefore would not recognize any trust.

I propose briefly to refer to other cases, one of which was the case of *Kashinath Parsharam Gadgil* v. *Gouravabai*(1). The head-note in the case correctly states the decision at which Beaman, J. arrived. It was an application for probate of will of a person who was admittedly a member of a joint Hindu family and the decision was "where the matter in question was probate, the parties claiming under the will could not go behind its terms, or claim any exemption whatsoever upon allegations utterly inconsistent not only with the fact of the will itself, but with the express statements made therein and that the executors must pay full probate duty upon the will". The decision may be shortly stated in these words—as the duty to be paid was the duty on the property included in the will and as the property was included in the will, there could be no question of its being trust property, nor could the fact of any allegation that it was joint family property affect the incidence or amount of the duty.

There is a decision of this Court of Coutts, J. in the case of *In re Estate of Ram Kumar Prasad*(2) where a Hindu by a will left the residue of his property to his son and the executors. It was held that, although in applying for probate of the will the son claimed the property as by survivorship, "they were not entitled to the exemption", the basis of the decision being similar to that of the decision of the

(1) (1914) I. L. R. 39 Bom. 245.
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Bombay High Court in *Kashinath Parsharam Gadgil* v. *Gouravabai*(1) to which I have just referred. A decision* of the Full Bench of the Bombay High Court in an application for administration by each of the sons of a joint family limited to their shares in the joint family held that no court-fee should be levied on limited Letters of Administration sought by the sons as to the shares belonging to the joint family.

The case, however, which is directly in point is the decision of the Allahabad High Court in the case of *In the Goods of Madho Prasad*(2). Before referring to that case in detail I would like to observe that it is possible so far as this fact is concerned in the cases to which I have already referred, to distinguish at least some of them on the ground that they were applications for probate of the will. For the reasons stated in two of the cases to which I have referred, it might be said that the applicant could not go behind the terms of the will, and that the principle applicable to those cases in which the application was for Letters of Administration might be different. The case to which I am now referring deals with an application for Letters of Administration and the decision by Sir Shah Muhammad Sulaiman, Chief Justice, and Ganga Nath, J. is to the effect that "where a person chooses to apply for letters of administration, whether absolutely necessary or not, and they are granted, he must pay the proper court-fee according to section 6 or article 11 of schedule I of the Court-Fees Act. Section 19-D of that Act does not in any way exempt from payment of court-fee letters of administration obtained by a member of a joint Hindu family in respect of property which he gets by survivorship and not by inheritance as an heir". I do not propose to refer to the reasoning of the learned Chief Justice in that case—reasoning with which I entirely agree. It is, as the learned Chief Justice points out, not a

(1) (1924) I. L. R. 39 Bom. 245.
(2) (1935) I. L. R. 57 All. 881.
* (1923) I. L. R. 48 Bom. 75.

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question for the Hgh Court whether it was necessary to apply for Letters of Administration merely because the Bank demanded it. But when once the application was made, for the reasons therein stated exemption could not be had. In connection with the point as to the necessity of applying for Letters of Administration, I would in passing refer to section 212 of the Indian Succession Act which provides:

"No right to any part of the property of a person who had died intestate can be established in any Court of Justice, unless letters of administration have first been granted by a Court of competent jurisdiction", but it also provides that "this section shall not apply in the case of the intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jain or Indian Christian".

As I said at the commencement of my observation, the only point to be determined in this case was whether Amir Chandra was a trustee for his coparceners. In my judgment, with great respect to the decision of some of the learned Judges to which I have referred, it seems to me impossible to contend that a co-sharer member of a joint family interested to the extent of an undivided share in the whole of the property of the joint family is a trustee for the other co-sharers. I repeat it is impossible to hold that view. In the circumstances whether an application for Letters of Administration was necessary or not, it is a matter not to be determined in this Court; when once an application has been made in order to obtain Letters it is necessary in my judgment to pay the duty according to the provisions of the Act.

In my view, therefore, the decision of the learned Judge was right and must be affirmed and the appeal must be dismissed with costs.

AGARWALA, J.—I agree.

S. A. K.

Appeal dismissed.