

that since the lower Court's decree the wife has contracted a second marriage with another man, but that fact appears to us to have no relevance to the only question raised in the appeal, the question, namely, whether she was entitled to divorce her first husband by virtue of the caste-custom.

In the husband's suit for restitution of conjugal rights, the only defence now made is the divorce based on the alleged custom, and, since that fails, the suit must be decreed with costs throughout.

*Decrees reversed.*

J. G. R.

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## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

KHATLIJA, DAUGHTER OF MAHAMADALLI ABDULALLI (ORIGINAL PLAINTIFF), APPELLANT, v. SHEKH ADAM HUSENALLY VASI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

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*Court-Fees Act (VII of 1870), section 7, clause IV (f) and section 11—Suit for accounts and administration—Valuation of the suit for purposes of court fees.*

In a suit for accounts and administration of the estate by the Court, the claim was valued at Rs. 139 for purposes of court fees and at Rs. 30,00,000, for purposes of jurisdiction and pleader's fees. It was contended on behalf of the defendants that the suit had not been properly valued for purposes of court fees inasmuch as the suit was not an administration suit but was in effect a claim by the plaintiff for her share in the estate. This contention found favour with the lower Courts which held that the suit was not for administration and the stamp duty was payable on the value of plaintiff's share in the property which amounted to Rs. 67,968-12-0.

On appeal to the High Court,

\* First Appeal No. 23 of 1914.

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*Held*, that having regard to the statements in the plaint an administration suit was maintainable and that it could be treated as a suit for account. The plaintiff would, therefore, be at liberty to value it at Rs. 130 or any other sum under section 7, clause IV (f) of the Court Fees Act.

In the event of a decree being passed for a larger amount than that covered by the fees already paid, the plaintiff would be precluded by the provisions of section 11 of the said Act from executing such decree until fees liable on the whole amount of the decree had been paid.

APPEAL against the decision of Motiram S. Advani, District Judge of Surat, rejecting the memorandum of appeal against the order made by N. R. Majumdar, First class Subordinate Judge at Surat rejecting the plaintiff's suit.

One Tyebally Sheikh Adam carrying on business at Surat, Aden, Hudeida, Jedda and other places outside India died in the year 1876 leaving considerable moveable and immoveable property. Plaintiff as his heir sued for an order directing the administration through Court of the estate of deceased Tyebally and for ascertainment, separation and delivery to her of her share of the residue of the estate. In paragraph 34 of the plaint plaintiff stated:—

"Since the accounts of the said estate and effects and of the business have not been made up, and many of the heirs of Tyebally Sheik Adam have died leaving heirs behind them, and several out of them have been removed from the property of the firm...I have no means of knowing who the claimants are, who can at present legally get their shares, and which of the heirs now desire to put forward their claims, and what property and claims and liabilities there are, and whose and of what nature the claims and interests in the firm's property there are at present, and what amount of property may be found on taking accounts of the business. Similarly as it is necessary to examine the accounts from the books of the firm, in order to know all this definitely, the value of this claim cannot be ascertained. For this and other reasons I am obliged to file this suit for taking accounts and for getting the estate administered."

The suit was valued at Rs. 130 for purposes of court fees and for purposes of jurisdiction and pleader's fee at Rs. 30,00,000. The defendants contended that the suit

had not been properly valued for the purpose of court fees and that the plaint should, therefore, be rejected.

The Subordinate Judge held that on the facts stated an administration suit was not maintainable. His reasons were as follows:—

“ I think that on the facts stated an administration suit is not maintainable. The administration of the estate of a deceased person consists, first in paying his funeral expenses, next, his debts, and then the legacies under the will (if any). The residue of his estate is then to be divided amongst the residuary legatees, if any, or amongst his heirs if he has left no will. In the present instance, the deceased died intestate more than 35 years ago, and no funeral charges, no legacies and no debts are to be paid or collected. The remarks made in the case of *Prosono Kumari Devi v. Ramchandra Singh and others*, 17 Ind. Cas. 155, apply, therefore, to this case also.”

He was, however, prepared to treat it as a suit for partition provided the plaintiff paid an *ad valorem* court fee on the value of her share and amended the plaint by stating what share she had. He observed:—

“The object of the plaintiff in calling her suit an administration suit is to evade the payment of the proper court fee; but if that was her object that object would not have been saved even if I had held that an administration suit was maintainable. An administration suit is a suit for an account and falls within section 7, paragraph 4, clause (f) of the Court Fees Act—*Ma Ma v. Ma Hinan*, 4 L. B. R. 229.

In the present case the value put for purposes of jurisdiction and value fee is 30 lacs. The plaintiff's share is 29/1280 and so its value is Rs. 67,968-12-0. She would have been directed to pay an *ad valorem* fee on this sum, amounting to Rs. 1,275-0-0 even if she had been permitted to proceed with the suit in its present form. The plaintiff if she amend the plaint as directed will pay court fee not less than Rs. 1,275 minus Rs. 10.”

The plaintiff appealed to the District Judge. The appeal was valued for court fees and pleader's fees at Rs. 130, and bore a stamp of Rs. 10. The learned Judge held that this was not sufficient. He remarked:—

“The appellant has treated her suit as an administration suit. It is not an administration suit. This is clear from the plaint. She claims her share in the property. The value of her share is Rs. 67,968-12-0; stamp duty should be paid on this amount. Deficiency to be made good wit in ten days.”

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As the stamp was not paid, the memorandum of appeal was rejected.

The plaintiff appealed to the High Court.

*Mambhai Nanabhai* for the appellant:—The lower Courts are wrong in holding that an administration-suit is not maintainable. The estate of the deceased has to be ascertained, realized and administered under the directions of the Court. The accounts should be taken, outstandings recovered, the debts and liabilities paid and the business wound up. Till then it is not possible to know what amount is available for distribution among the heirs. The share of the plaintiff has also to be ascertained. The plaintiff may, therefore, treat this as a suit for accounts in which case it is open to her to value the suit at Rs. 130 or at any amount she likes: see *Bai Hiragavri v. Gulabdas*<sup>(1)</sup>; *Manohar Ganesh v. Bawa Ramcharandas*<sup>(2)</sup>; *Govandas Kasandas v. Dayabhai Savaichand*<sup>(3)</sup>; *Sardarsingji v. Ganpat-singji*<sup>(4)</sup>; *Ramiah v. Ramasami*<sup>(5)</sup>; *Barru v. Lachhman*<sup>(6)</sup>.

Section 11 of the Court Fees Act will prevent the execution of the decree for a greater amount until the proper fee has been paid. This is sufficient safeguard for protecting the interest of the revenue.

*G. S. Rao* for the respondent No. 1:—This ought to be treated as a suit for partition and will fall under section 7, clause V of the Court Fees Act as being for possession of immoveable property. Section 7, clause IV (b) will not apply as the suit is to enforce not a right “to share” but “to a share” in the joint family property. The distinction has been pointed out in *Dagdu v. Totaram*<sup>(7)</sup>. Section 11 may not afford a complete answer in this case where immoveable property

(1) (1913) 15 Bom. L. R. 1123.

(4) (1892) 17 Bom. 56.

(2) (1877) 2 Bom. 219 at pp. 226-8.

(5) (1912) 24 Mad. L. J. 233.

(3) (1884) 9 Bom. 22.

(6) (1913) P. R. No. 111 of 1913.

(7) (1909) 33 Bom. 658 at p. 662.

forms the subject matter of the suit. Even if section 11 would ultimately protect the interests of the revenue, the defendants may object to go to trial until a properly stamped plaint is before the Court.

*N. K. Mehta* for respondent No. 4 supported respondent No. 1.

*B. D. Mehta* for respondent Nos. 2, 22, 23 and 24 supported the appellant.

SCOTT, C. J. :—In this suit the plaintiff, a Mahomedan female, prays that accounts may be taken of the properties and business of the deceased Tyebally Sheikh Adam and his firm, and their claims and liabilities may be ascertained, and an order may be passed for its administration by the Court, and the claims of the claimants to the said estate and effects according to Mahomedan Law applicable to the Ismaili Daoodi Shiah Sect and according to the custom of the said Daoodi Bohora community may be ascertained, proper direction may be given for that purpose and her share according to the claim that may be ascertained may be separated from the said properties and handed over to her; and that an order may be passed for the appointment of a receiver for the management of the properties and business of the deceased Tyebally Sheikh Adam and his firm pending this suit.

The suit was valued at Rs. 130 for purposes of Court fees. In the 39th paragraph of the plaint she says that “although it is not possible to fix the exact value of the property of the firm of Tyebally Sheikh Adam or of his any other property, according to my belief it must come to Rs. 30,00,000. For the purpose of the jurisdiction of the Court the claim has, therefore, been valued at Rs. 30,00,000.”

It is argued on behalf of the defendants that the suit has not been properly valued for the purpose of Court fees, and that the plaint should, therefore, be rejected.

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That contention has found favour with the lower Courts in Surat. The learned District Judge from whom this appeal is preferred says that "the appellant has treated her suit as an administration suit. It is not an administration suit. This is clear from the plaint. She claims her share in the property. The value of her share is Rs. 67,968-12-0, and stamp duty should be paid on this amount. Deficiency to be made good within ten days." As the stamp duty was not paid the appeal to the District Court was rejected.

It is not disputed that the plaintiff's ancestor under whom she claims carried on business, and that the firm started by him known as Tyebally Sheikh Adam is still continuing. It is, however, disputed by the defendants that any of the immoveable properties in which it is suggested that plaintiff claims a share belonged to the firm of Tyebally Sheikh Adam or to Tyebally himself, and it is suggested to us in argument by the respondents' pleader that their contention will be that all immoveable properties to which the plaintiff is supposed to lay claim belonged to a firm named Abdul Kadar Hasanally, and that she has no interest in the same. The statement is of value in this appeal, because there is always the possibility that in suits of this nature the plaintiff is professing ignorance as to specific properties where she has certain knowledge and could specify definite properties in which she is entitled to a share of a definite value. But in view of the position taken up by the defendants there is ground for supposing that the statement in paragraph 34 of the plaint represents the true position as far as the plaintiff is concerned. In that paragraph she says:—

"Since the accounts of the said estate and effects and of the business have not been made up, and many of the heirs of Tyebally Sheikh Adam have died leaving heirs behind them, and several out of them have been removed from the property of the firm, I have no means of knowing whether they have come to any understanding with the manager of the said firm. For that

reason also, I have no means of knowing who the claimants are, who can at present legally get their shares, and which of the heirs now desire to put forward their claims, and what property and claims and liabilities there are, and whose and of what nature the claims and interests in the firm's property there are at present, and what amount of property may be found on taking the accounts of the business. Similarly, as it is necessary to examine the accounts from the books of the firm, in order to know all this definitely, the value of this claim cannot be ascertained. For this and other reasons I am obliged to file this suit for taking accounts and for getting the estate administered."

There being then no apparent ground for distrusting the statements in that paragraph, the *dictum* of the learned District Judge that this is not an administration suit cannot be supported. According to the provisions of the Court Fees Act, if the plaintiff succeeds in showing upon the accounts that she is entitled to a share in the property and assets of Tyeballi Sheikh Adam, she will not be able to obtain execution of any decree that may be passed in her favour by reason of the provisions of section 11 of the Court Fees Act until the difference between Rs. 130 and the fee which would have been payable, had the suit comprised the whole of the amount decreed, has been paid to the proper Officer. That being so, there does not appear to be any reason why this should not be treated as a suit for account and for the share which may be found due to the plaintiff upon taking of such account, and if it is a suit for an account falling under section 7, clause IV (*f*) of the Court Fees Act, the plaintiff is at liberty to value it at Rs. 130 or any other sum she pleases.

For these reasons we are unable to accept the decision of the learned District Judge. We set aside the rejection of the plaint and direct that it be taken on the file, and the plaintiff be allowed to proceed with the suit. The plaintiff must have from the defendants her costs in three Courts referable to the question of Court fee.

*Order set aside.*

J. G. R.

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