fitably have been made, of a very great deal of the evidence, oral or documentary, which now forms the bulky record.

I find then that the railway company is liable for the origin of the fire and the entire resulting loss. I find that the defendant-company has entirely failed to show that in dealing with these goods it exercised all the care that an ordinary man would have exercised, had the goods been his own, and the whole machinery of transport under his own control. And I find that the defendant-company is not liable in respect of negligence or carelessness in dealing with the fire after it was discovered.

Attorneys for the plaintiffs: Messrs. *Captain and Vaidya.*

Attorneys for the defendants: Messrs. *Crawford, Brown & Co.*

Suit decreed.

H. S. C.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

KASHINATH PARSHARAM GADGIL AND OTHERS (ORIGINAL PETITIONERS), APPELLANTS, *v.* GOURAVABAI AND ANOTHER (ORIGINAL OPPONENTS), RESPONDENTS.*

1914. *June* 29, *October* 3.

Joint Hindu family—Ancestral property—Will—Probate—Payment of full probate duty.

In a case where there was admittedly a joint Hindu family consisting of a father and a minor son, the father made a will in effect bequeathing the whole property to his minor son. It was not disputed that the property covered by the will was joint family property. The executors contended that the deceased testator had no beneficial interest in any part of the property devised, and therefore they were exempted from the payment of any probate duty:—

* First Appeal No. 177 of 1913.

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Held, that 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.

Collector of Kaira v. *Chunilal*[1], distinguished.

APPEAL against the decision of F. X. DeSouza District Judge of Sholapur, in miscellaneous application No. 239 of 1912 for probate.

The petitioners prayed for probate of the will of the deceased Rao Bahadur Malappa Basappa Warad. The will was executed at Bombay on the 12th January 1911 and the testator died at Sholapur on the 19th January 1911. The petitioners claimed exemption from the payment of the stamp duty leviable under section 191 clause (1) of the Court-Fees Act (VII of 1870) as amended by Act II of 1899. The petitioners' case was that as the testator and his minor son Chandbasappa *alias* Balasaheb were members of an undivided Hindu family, the estate was in the hands of the former "property held in trust not beneficially" and as such exempt from the payment of stamp duty under Annexure B to Schedule III to Act VII of 1870. They relied upon the decision in *Collector of Kaira* v. *Chunilal*[1].

The District Judge decided "that a stamp duty should be levied on a moiety of the estate situated within British India." In support of his decision the Judge made the following observations :—

There is however conflict of authority on this point in the reported decisions of the Bombay High Court. For while the decision just cited (*Collector of Kaira* v. *Chunilal*[1]) supports the contention of the applicants there is the decision in *Collector of Ahmedabad* v. *Savchand*, I. L. R. 27 Bom., p. 140, which has a contrary effect. For, it lays down that the exemption from payment of stamp duty in respect of trust property only applies where probate or letters of administration having already been granted on which the Court-fee has been paid. In such case no further duty is payable

[1] (1904) 29 Bom. 161.

in respect of the property held by the deceased as trustee. But where no duty has been paid the exemption does not apply.

This conflict of authority has not been set at rest by a reference to a Full Bench. And it seems to me that it is open to Courts in this Presidency to follow one or other of these reported decisions according as it may seem to be more in consonance with general principles or with reported decisions of other Courts.

The point came on for consideration before a Full Bench of the Madras High Court *In the matter of Desu Manavala Chetty*, I. L. R. XXXIII Mad., p. 93. All the reported decisions of the several High Courts including *Collector of Kaira* v. *Chunilal*, I. L. R. XXIX Bom. 161 were there reviewed. It was pointed out that the decision in the last mentioned Bombay case, proceeded on a misapprehension of the *ratio decidendi* of the Calcutta case *In the goods of Pokurmull Augurwallah*, I. L. R. XXIII Cal. 980 on which it professes to be based. The tenure of undivided property by co-parceners in Bengal is regulated by the Dayabhaga; whereas in Madras and Bombay it is regulated by the Mitakshara. Under the former system the co-parceners' undivided share is no doubt held as trust property not beneficiary or with general power to confer a beneficiary interest in it. On the other hand, under the latter system the undivided co-parcener has undoubtedly a beneficial interest in his undivided share: for, he can claim partition or he can sell or mortgage it and apply the proceeds to any purpose he pleases. For these reasons the Full Bench held that the undivided co-parcener's share in the joint property at the time of his death held under the Mitakshara school of Hindu law could not claim exemption from the payment of stamp duty.

That case is on all fours with the present case.

The petitioners appealed.

Setalvad, with *Dinshaw* of *Payne & Co.*, for the appellants (petitioners):—We submit that the property devised under the will is liable to exemption from payment of stamp duty under section 19D of the Court-Fees Act: *Collector of Kaira* v. *Chunilal*[1]. This case, though apparently differing from the earlier one in *Collector of Ahmedabad* v. *Savchand*[2], is now in agreement with it as shown in the judgment in the former case. The Calcutta Court also holds the same view: *In the goods of Pokurmull Augurwallah*[3],

[1] (1904) 29 Bom. 161. [2] (1902) 27 Bom. 140.
[3] (1896) 23 Cal. 980.

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In Calcutta where the Dayabhaga prevails, there is no doubt, the property vests in the father who has "a general power to confer beneficial interest in it to his sons". In Bombay, under the Mitakshara, each co-parcener only holds an inchoate and undetermined interest in the whole of the joint family estate, and no one of the co-parceners can, at any given time, say what his share in the estate would be. Therefore in the hands of each co-parcener it must be taken as being in trust not beneficially for the whole body of the co-parceners.

The theory of survivorship proceeds on the supposition that as soon as one co-parcener dies, the interest held by him *ipso facto* vests in the survivor. If the estate of the deceased co-parcener was beneficial and in his own right, the law would have required some act on his part to convey his interest in favour of the survivor. Hence we submit that on the theory of the Hindu Law the exemption clause is applicable to the present case.

Besides, from the history of the question as stated in *Collector of Kaira* v. *Chunilal*[1], it would appear that joint family estates among Hindus have been treated in this manner.

The necessity of a probate or letters of administration is felt owing to the demands of Banks and Registered Companies who refuse, under their rules, to transfer securities without them. The Bombay and Calcutta Courts have, therefore, put a liberal construction on the Statute to avoid the entailment of hardship in the case of large estates.

If the view we contend for be not acceptable, the order of the lower Court should be confirmed in so far as it requires the payment of stamp duty after exempting it on the share of the minor son in the hands of the father: *In the matter of Desu Manavala Chetty*[2].

[1] (1904) 29 Bom. 161. [2] (1909) 33 Mad. 93.

The point is not definitely settled, therefore, a reference may be made to a Full Bench.

There is no difference between probate and letters of administration with regard to the payment of stamp duty as section 19D of the Court-Fees Act, which contains the exemption clause, applies to both.

D. G. Dalvi for respondent 2 (opponent 2).

BEAMAN, J. :—Owing to the position taken up by Banks and Limited liability Companies difficulties were experienced in cases in which joint Hindu families had invested part of their joint funds in the shares of such Banks and Companies. Shares had to stand in the name of one member of the family. He might or might not be the general manager. But, on his death, these portions of the joint family wealth could not be realized by the survivors without either getting probate of a will or letters of administration to the deceased member in whose name they stood. This has led in practice to a great deal of theoretical absurdity. Wills admittedly made by members of a joint Hindu family purporting to dispose, as of self-acquired property, of joint family property in favour of the survivors, have been solemnly propounded. Probate has seemingly been given as a matter of course. In this way the funds of the joint family invested in the shares of Companies have been obtained by the survivors. But the question early arose whether survivors thus seeking to obtain their own property under the fiction of a devise, should be called on to pay the full duty. The Court-Fees Act exempts from payment of duty any such part of the estate of the deceased testator or person to whom letters of administration are sought, as could be shown to have been held by him as bare trustee without himself having any beneficial interest therein or any power of beneficial disposition. In the class of cases I have

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described executors or survivors (calling themselves here next of kin) have contended, and on the whole, successfully, that the portion of joint family property, they are thus seeking to obtain, falls within the exemption. A bench of this High Court appears to have held in the case of *Collector of Kaira* v. *Chunilal*[1] that a member of a joint Hindu family had no beneficial interest in any part of the joint estate, and, therefore, that survivors propounding his will in order to be able to obtain shares standing in his name, were entitled to claim exemption on the ground that the deceased in his life-time had had no beneficial interest in the said shares, etc. This part of the judgment is not reasoned, but is professedly based on the decision *In the goods of Pokurmull Augurwallah*[2] which Jenkins C. J. said he thought had been rightly decided. If that decision implies the general proposition (which it appears to imply) that no member of a joint Hindu family governed by the Mitakshara has any beneficial interest, during his life, in any part of the joint family property, we feel unable to assent to it. And if the decision does not imply that proposition, it appears to rest on no reason at all.

The case has come before us in this wise. There was admittedly a joint Hindu family consisting of a father and a minor son. The father made a will in effect bequeathing the whole property to his minor son. No one has disputed that the family was joint and that the property covered by the will was joint family property. On the authority of *Collector of Kaira* v. *Chunilal*[1] the executors require us to say that the deceased testator had no beneficial interest in any part of the property devised, and, therefore, that they are exempt from the payment of any duty. In our opinion this contention is unsustainable.

(1) (1904) 29 Bom. 161 (2) (1896) 23 Cal. 980.

Those who propound a will and claim under it can hardly be heard to say that the testator had no powers of beneficial disposition. When *ex concessis*, the alleged testator was a member of a joint Hindu family and the whole property covered by the will was joint family property one would have thought that there was no legal foundation for the will, no need of probate. It is not a satisfactory answer, that in probate proceedings the Court has no further concern in the matter than to see whether in fact the will was made, and whether in all other respects it was a valid will. That is of course true, but it does not exhaust the question. If those seeking probate mean to include the whole of the property devised under the exemption clauses, it does become the duty of the Court to enquire so far, at least, as to satisfy itself that the conditions upon which exemption is granted have been fulfilled. Where, in the circumstances mentioned, the whole property is given to the sole survivor, who, again *ex concessis*, would take it in his own right, will or no will, the will propounded is on the face of it a mere nullity to which no effect could be given. Had it been necessitated owing to the testator having invested the joint family funds in the shares of Banks and other Companies, then it appears to us that however anomalous the position, which is thus reached, may be, it cannot be contended that since a will is necessary under which the nominal testator hands on this part of the joint family property to the survivor, he had not at the date of his death any beneficial interest in that property, and was never more than a bare trustee of it for the survivor or survivors. The reason for the exemption is clear. But neither that reason nor any consideration of policy, which occurs to us, would warrant its extension this length. Although the devisee under the will takes but what is his own, if he needs a will to get it we do not see why he should

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not pay the ordinary duty. He cannot be allowed to blow hot and cold, and say, in one breath, that a will was, and was not necessary. It is only by adopting the general proposition, which we find ourselves entirely unable to adopt, that no member of an undivided Hindu family has any beneficial interest in any part of the joint family property during his life-time, that the decision upon which the cross-appellants here rely could be supported. Were it merely a question of policy we should be disposed to take an exactly opposite line, and say that all Hindus taking by survivorship ought to pay duty on the value of the estates so taken, just as all other subjects not governed by the Hindu law of the joint family have to pay duty to the State on property devised or coming to them as heirs.

In our opinion the cross-appellants ought to pay duty on the whole estate covered by the will.

HAYWARD, J. :—The petitioners obtained probate of a will purporting to dispose of property held jointly between the testator and his minor son as members of a joint family under Hindu law. The petitioners, thereupon, claimed exemption from probate duty on the ground that the property was "property whereof the deceased was possessed as trustee" under section 191 and was not liable to Court-fee being "property held in trust not beneficially" within the meaning of Annexure B of Schedule III, Court-Fees Act, 1870, relying on the cases of *In the goods of Pokurmull Augurwallah*[1] and *Collector of Kaira* v. *Chunilal*[2].

The District Judge decided that the testator's undivided half share in the joint family property could not, but that the minor son's undivided half share in the property could, be regarded as "property held in trust not beneficially" within the meaning of Annexure B of

[1] (1896) 23 Cal. 980.

[2] (1904) 29 Bom. 161.

Schedule III of the Court-Fees Act, 1870, relying on the cases of *Collector of Ahmedabad* v. *Savchand*[1] and *In the matter of Desu Manavala Chetty*[2].

This Court has been asked, on first appeal, to decide that the whole of the joint family property was "property held in trust not beneficially" by the testator within the meaning of Annexure B of Schedule III of the Court-Fees Act, 1870, on the strength of the last four lines of the judgment in the case of *Collector of Kaira* v. *Chunilal*.[3] It appears to me, however, with due deference that that judgment conflicts with the views of joint-family property theretofore accepted. It was said in *Apporier's* case[4] that "According to the true notion of an undivided family...no individual member... can predicate of the joint and undivided property, that he...has a certain definite share" and it was observed in the case of *Ramchandra* v. *Damodhar*[5] that each "co-parcener is entitled to a joint benefit in every part of the undivided estate". It could not, therefore, be said that even the least part of the joint family property was held "in trust not beneficially" at his death by the testator as prescribed in Annexure B of Schedule III of the Court-Fees Act, 1870.

It appears to me what has to be looked at in such cases is the estate actually specified in the will and not the estate which could legally be disposed of by the will. It is an accepted principle that the legal effect of the will is not a matter for consideration. The factum of the will alone can be established by proceedings in probate. The estate here specified was the whole joint property. It would not be admissible to consider whether the testator had or had not power to dispose of such property by will. He purported to do so and

(1) (1902) 27 Bom. 140.
(2) (1909) 33 Mad. 93.
(3) (1904) 29 Bom. 161.
(4) (1866) 11 Moo. I. A. 75 at p. 89.
(5) (1895) 20 Bom. 467.

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those desiring to establish the factum of the will must pay the full duty leviable on such property in the necessary proceedings in probate. The case might, no doubt, have been different if the estate specified had been not the whole joint property but only a limited interest in the joint property—if, for instance, the estate specified had excluded the beneficial interests of the members of the family in the property and had strictly been limited to the legal right to parade as proprietor under such statutory provisions as sections 22 and 23 of the Presidency Banks Act, 1876, or sections 30 (2), 33 and clauses 21 and 22 of Table A of the 1st Schedule of the Companies Act, 1913. The possibility of such a case would appear from the remarks in the case of *Bank of Bombay* v. *Ambalal Sarabhai*[1]. That would perhaps have been the appropriate manner of meeting the difficulties presented by such statutory provisions as those of the Presidency Banks and Companies Acts.

Before the said judgments were delivered, it was thought desirable by the Court to hear what the Revenue Authorities, who had not appealed against the decision of the lower Court, had to say on the point and they appeared before the Court through

Jardine (Acting Advocate-General), with *S. S. Patkar* (Government Pleader).

BEAMAN, J. :—When we dealt with this case we were under the impression that the view which commended itself to us was in direct conflict with the decision of a Division Bench in *Collector of Kaira* v. *Chunilal*[2]. Furthermore at that time the Revenue Authorities were not represented before us. We have, therefore, reconsidered the matter after hearing the Advocate-General for the Revenue. While adhering to the view we expressed in our former judgment, and dissenting

(1) (1900) 24 Bom. 350 at p. 359. (2) (1904) 29 Bom. 161.

from what we conceived to be the principle underlying the decision in *Collector of Kaira* v. *Chunilal*[1] as well as in that of *In the goods of Pokurmull Augurwallah*[2], which appears to have been approved by the Judges who decided *Chunilal's case*, we think that there is a sufficient ground of distinction, namely, that in *Chunilal's case* the application had been for letters of administration, here we are dealing with probate. Possibly different arguments may be drawn from those premises, but we are clearly of opinion that where the matter in question is probate, the parties claiming under the will cannot 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, nor do we conceive that there is any difficulty created by the fact that we have ourselves been obliged to call upon the Advocate-General to protect the interests of the Revenue. When the cross-appeal was before us the Collector was not a party to it. The matter, therefore, so far as the only substantial counter-interest was concerned, was entirely *ex parte* and it is the business of Courts to see that the revenue is not defrauded. Now, however, having called upon the Advocate-General and heard his representations in the matter which are in the nature of an appeal against the order made by the Court below, we are clearly of opinion that the executors must pay full probate duty upon the will, and we decree accordingly. Costs of Government and the executors to come out of the estate.

Full probate duty to be paid.

G. B. R.

(1) (1904) 29 Bom. 161. (2) (1896) 23 Cal. 980.