ORIGINAL CIVIL

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Blackwell.

GANGARAM TILLOCKCHAND, APPELLANT AND PETITIONER *v.* THE CHIEF CONTROLLING REVENUE AUTHORITY.* 1927 *August* 15

Grant of probate—Payment of Court fees—When Court fees payable—High Court Rule 561A†—Court Fees Act (VII of 1870), section 19 I; No. 11 of Schedule I; and section 5—Bombay Act III of 1926—Case referred to High Court Judge—His decision final—No appeal or revision therefrom.

Held by CRUMP J. that the Court fees under Court Fees Act (VII of 1870), Schedule I, No. 11, as amended by Bombay Act III of 1926, are payable upon the grant of probate and not upon the application for probate, and, therefore, the law in force at the date of the grant is the law which must be applied as to the amount of fees payable.

Per CRUMP, J. :—"As far as rule 561A of the High Court Rules is concerned, it is obvious that the rule is not intended to decide what amount is payable on the grant of probate, but is only a rule intended to secure that, as far as may be, whatever may be payable shall be paid at the time when the application first comes to be made."

Held, on appeal, that where a case is referred to the decision of a Judge of the High Court specially designated in that behalf under section 5 of the Court Fees Act, 1870, his decision is "final," and no appeal or revision lies therefrom.

Balkaran Rai v. *Gobind Nath Tiwari*[1] and *In re Bhubaneswar Trigunait*,[2] followed.

Tara Prasanna Chongdar v. *Nrisingha Moorari Pal*,[3] distinguished.

THE petitioner was the executor of the will of one Shamdas Hiranand who died on December 3, 1923. He applied to the Bombay High Court for probate, and paid the sum of Rs. 28,439 for probate duty on February 24, 1924. On April 1, 1926, Bombay Act III of 1926 came into force by virtue of which the amount of the fee payable under No. 11 of Schedule I of the Court Fees Act was increased. If the amending Act of 1926 applied, the petitioner had to pay an additional duty of Rs. 18,861. A difference having arisen between the Testamentary Registrar and the petitioner as to the amount of duty payable by the latter, the question was eventually referred

* O. C. J. Appeal No. 37 of 1927 : Petition No. 119 of 1926.

† Rule 561A runs as follows :—"If the application is for probate of the will of a Hindu, Muhammadan, Buddhist, Sikh, or a Jain, save and except under section 57 of Act XXXIX of 1925, or for letters of administration under section 218 of the said Act, it shall also be accompanied by a certificate of the Registrar that all fees payable have been paid."

(1) (1890) 12 All. 129. (2) (1925) 52 Cal. 871. (3) (1923) 51 Cal. 216.

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by the Chief Justice under section 5 of the Court Fees Act to Mr. Justice Crump. Mr. Justice Crump decided that the amount of duty ought to be calculated in accordance with the amending Act, and that, therefore, the petitioner was bound to pay the additional sum of Rs. 18,861.

On April 12, 1927, Crump J., after hearing the parties, delivered the following judgment :—

CRUMP, J. :—As far as rule 561A of the High Court Rules is concerned, it is obvious that the rule is not intended to decide what amount is payable on the grant of probate, but is only a rule intended to secure that, as far as may be, whatever may be payable shall be paid at the time when the application first comes to be made. The payment so made is only provisional, and it is conceded that, if the grant of probate for one cause or another does not come to be made, the petitioner would be entitled to a refund of the amount so deposited. That being so, I cannot see that rule 561A of the High Court Rules has any bearing on the point before me. That point must, in my judgment, be decided upon the correct interpretation of section 19 I of the Court Fees Act. That section for the present purposes runs as follows :—

"(1) 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."

It seems that the question arises for consideration when the grant comes to be made and not until that date. What I have to decide here and now, no grant having yet been made in the present case, is, whether the fee mentioned in No. 11 of the first schedule has or has not been paid, and seeing what the law is here at the present time as to the fee payable, it appears to me that the answer must clearly be in the negative. I concede that fiscal statutes should be construed so far as is allowable in favour of the subject. But, holding as I do that the fee is payable

upon the grant of probate and not upon the application for probate, it seems to me clear that the law in force at the date of the grant is the law which must be applied in deciding this matter. I have been referred to a decision of the Calcutta High Court, *Thaddeus Nahapiet* v. *Secretary of State*.[1] In that decision it was apparently held, in similar circumstances, that the petitioner was competent to comply with section 19 I at the time when he actually made the payment, and as that payment was before the legislation came into force, whereby the rate of fee was raised, he had complied with the requirements of the statute and was entitled to the grant of probate without further payment. With all possible deference to the learned Judges who decided that case, it appears to me that this is not a correct view of the matter. 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.

The petitioner appealed.

Mulla and *Nadkarni*, for the appellant.

Kanga, Advocate General, for the respondent.

MARTEN, C. J. :—This appeal relates to the amount of duty payable under the Court Fees Act, 1870, Article 11 of Schedule I, as amended by Bombay Act III of 1926, which came into force on April 1, 1926. Stated shortly, the Court fee in question may be described as probate duty.

The point at issue between the parties is whether the amount of the duty ought to be calculated at the rate in force under the law as it stood at the date of the petition

[1] (1923) 39 C. L. J. 209.

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for probate, or whether it should be calculated at the higher rate of duty which came into operation before any grant of probate was made.

The petitioner is the executor of the will of the deceased Shamdas Hiranand who died on December 3, 1923, and he has paid the sum of Rs. 28,439 for duty at or prior to his petition being presented and filed on February 24, 1926. If, however, the amending Act of 1926 applies, then additional duty to the extent of about Rs. 18,861 is payable. A difference having arisen between the Testamentary Registrar and the attorneys for the petitioner as to the payment of this extra amount, the question was eventually referred under section 5 of the Court Fees Act to Mr. Justice Crump by the directions of myself as Chief Justice. Mr. Justice Crump decided that the amount of duty ought to be calculated in accordance with the amending Act, and that therefore the petitioner ought to pay the additional sum of Rs. 18,861. From this decision, the petitioner now appeals.

There is a preliminary question as to whether an appeal lies. That is because section 5 refers to the final decision of the Judge so nominated by the Chief Justice. We have, therefore, to decide whether the dispute in question was one coming within the operation of section 5, and if so whether the decision of Mr. Justice Crump was final under that section within the ordinary meaning of that word, or whether in some way or another, an appeal or revision would lie from his decision.

Now, in the first place, one must get rid of notions of probate duty derived from English law and practice. They have little or nothing to do with the question which we have here before us. In England, for instance, the old probate duty (now included in estate duty) is calculated at the date of the death, and the Courts have jurisdiction to deal with taxation purporting to be levied on His Majesty's

subjects. But, in India, under section 106 (2) of the Government of India Act, 1915, which really embodies the previous law to the same effect :—

"The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

Consequently, in revenue matters the jurisdiction of the Court is confined within the four corners of some legislation on the subject, and we have no inherent jurisdiction to deal generally with the matter.

A further observation, to avoid confusion, is that in India probate duty is not a duty leviable on the death of all persons alike as is the case in England. It is a duty which, speaking generally, is leviable only in the case of those who seek probate or administration. As regards Europeans and, I think, Parsis, the duty may in any event be leviable. But as regards Hindus and Mahomedans, they to a large degree escape the operation of the duty, unless for certain purposes it is incumbent on them to obtain probate or letters of administration from the Court.

Another difference is that unlike the practice in England and unlike the practice on the Original Side, the law under the Court Fees Act as regards the mofussil Courts is that an *ad valorem* fee is payable on the institution of the litigation. On the Original Side, there are also certain fees leviable in an ordinary suit, but they are not at all in the same category as those levied at the start of ordinary suits in the mofussil. The result, then, of the Court Fees Act appears to be that the legislation has treated, what I will shortly call, the probate duty as if it was a duty payable in respect of a law suit. Bearing then these distinctions in mind, I will now turn to the Act itself.

Section 3 provides :—

"The fees payable for the time being to the clerks and officers....of the High Courts established by Letters Patent,....

or chargeable in each of such Courts under No. 11 of the first,....schedule.... shall be collected in manner hereinafter appearing."

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Now, the duty we have to deal with here is No. 11 in the First Schedule. I disregard for the moment the amending Act of 1926. And it is common ground that it is the duty of the Testamentary Registrar on the Original Side,—we are here dealing with a Bombay case,—to collect this duty.

Next turning to section 5 :—

" When any difference arises between the officer whose duty it is to see that any fee is paid under this chapter and any suitor or attorney, as to the necessity of paying a fee or the amount thereof, the question shall, when the difference arises in any of the said High Courts, be referred to the taxing-officer, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the Chief Justice of such High Court, or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf."

The section following has a somewhat similar provision as regards the Small Cause Courts, which says :—

" When any such difference arises in any of the said Courts of Small Causes, the question shall be referred to the Clerk of the Court, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the first Judge of such Court."

Now, in the present case, the matter was referred to the Taxing Officer. He treated it as a matter of general importance and consequently referred it to me, and I, under the section, as I have already stated, appointed Mr. Justice Crump to decide it.

Stopping for a moment at the words " final decision " in section 5, we are of opinion that these words mean what they say. It is the ordinary way of expressing that no further appeal or revision is to lie, and we see no reason why a different meaning should be given to those words here.

In this connection we respectfully agree with the decision of the Full Bench of the Allahabad High Court in *Balkaran Rai* v. *Gobind Nath Tiwari*,[1] where Sir John Edge states (p. 158) :—

" I have consequently come to the conclusion that not only did the Legislature intend that the decision under section 5 of the Court-Fees Act of the taxing officer

[1] (1890) 12 All. 129, F. B.

of the High Court, or of the Chief Justice, or the Judge appointed under section 5, should for all purposes be final, but that the Legislature has been careful to avoid providing or suggesting any means by which such a decision might be questioned. Whether or not such decisions ought to be open to appeal, review or revision is another question as to which I do not feel bound to express an opinion."

So, too, in *In re Bhubaneswar Trigunait*,[1] a decision of the Court of Appeal in Calcutta, Mr. Justice Rankin says (p. 877) :—

"I think this involves that the Taxing Officer's decision is a final decision under section 5 and that in this case the learned Judge had no authority to review it under section 19 I."

And again he says (p. 878) :—

"In my opinion the decision of the Taxing Officer under rule 4 of Chapter XXXV is final by virtue of section 5 of the Act."

The reference to rule 4 of Chapter XXXV is to the Rules of the Calcutta High Court. In that particular case, on an application for letters of administration made by the surviving members of a Mitakshara Hindu joint family regarding properties held by the deceased as the late *karta*, the Taxing Officer certified that the *ad valorem* fee prescribed by Schedule I, clause (2), of the Court Fees Act was not payable. The Chamber Judge overruled that decision. The Appeal Court held that the decision of the Taxing Officer was final and that the Chamber Judge had no authority to review it.

And, indeed, in the present case, we do not understand it to be contended that if the original Act of 1870 had not been amended, and the attorneys had only tendered, say, half the appropriate duty, and that consequently a difference had arisen between them and the Testamentary Registrar on the point, then the decision of the Taxing Officer or the Judge under section 5 would be otherwise than final. So, too, as we understood from the argument of the appellant, it was conceded that if the present amending Act of 1926 had been in operation at the death of the testator, then, too, the larger duty would have been payable, and the decision at any rate under section 5 would be final.

[1] (1925) 52 Cal. 871.

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The argument presented to us, as I understand it, was that the present dispute was not really one as to the amount of the duty, but as to what legislation was in force at the material date, and that the main point between the parties was whether the material date would be the date of the presentation of the petition or the date of the actual grant. One may, indeed, put forward a third date, namely, whether it should be the date of the death as in England. But, however that may be, it seems to us that this in any event involves a difference as to the amount of the duty payable. Those words in section 5 are quite general, and, speaking for myself, I see no reason why they should be cut down and why their ordinary meaning should be confined to differences as to the amount of valuation only.

Consequently, there seems to me a broad distinction between section 5 and section 12, to which we were also referred, because section 12 speaks of "every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter." Questions relating to valuation seem to me to stand on a different footing. Further, in section 12 (2), there is an express power given to the Court, if it thinks the original decision wrong, to require an additional fee to be paid. In this respect, the legislation somewhat resembles sections 36 and 61 of the Indian Stamp Act. This distinction is pointed out in the Full Bench case (*Balkaran Rai* v. *Gobind Nath Tiwari*[1]), to which I have already alluded, where Sir John Edge says (p. 152):—

"I have no doubt that the term 'final' in section 5 of the Court-Fees Act has precisely the same meaning as the term 'final' in section 12 of that Act. But the subject to which that term is applied in section 5 is different from that to which it is applied in section 12. In section 5 it is applied to a decision as 'to the necessity of paying a fee or the amount thereof,' whereas in section 12 it is applied to a decision as 'to every question relating to valuation for the purpose of determining the amount of any fee chargeable under the chapter (chapter iii) on a plaint or memorandum of appeal.' When we come to look into the authorities it will be necessary to keep this distinction in mind."

[1] (1890) 12 All. 129, F. B.

In these circumstances, we are not here called on to consider the decision of Mr. Justice Mookerjee and Mr. Justice Chotzner in *Tara Prasanna Chongdar* v. *Nrisingha Moorari Pal*,[1] where they held that—

"Where the decision involves root questions of principle as to the nature of a suit it is open to appeal notwithstanding the provisions of section 12 of the Court Fees Act."

They said (p. 223):—

"We may add finally that this appeal is competent notwithstanding the provision of section 12 of the Court Fees Act. This is not a case of appraisement of or fixation of value with a view to determine the amount of fee chargeable; the dispute involves root questions of principle as to the nature of the suit and the retrospective operation of statutes."

That, again, was not a question of probate duty, but as to the fees payable in respect of an ordinary suit.

Another decision of the same Bench in *Thaddeus Nahapiet* v. *Secretary of State*[2] was pressed upon us. But there the Bengal Court Fees Act of 1922 which raised the rate of duty expressly provided that:—

"17. Nothing in this Act shall apply to any probate, letters of administration or certificate in respect of which the fee payable under the law for the time being in force has been paid prior to the commencement of this Act, but which have not issued."

In the corresponding Bombay Amending Act III of 1926 we have no such provision. And, indeed, it does not appear from the statement of that case as to whether there had been any decision by the Taxing Officer or by the Judge under section 5 of the Act. The decision, as I understand it, was merely given on the merits of the case as to whether the higher duty should be paid. The latter was precluded by the express provision of the Bengal Act.

We were also referred to *Ram Sekhar Prasad Singh* v. *Sheonandan Dubey*[3] and *Krishna Mohan Sinha* v. *Raghunandan Pandey*.[4] The latter is a Full Bench case, and the former decides that "under section 5 of the Court Fees Act, 1870,

(1) (1923) 51 Cal. 216.
(2) (1923) 39 C. L. J. 209.
(3) (1922) 2 Pat. 198 s. c. L. R. 39 I. A. 197.
(4) (1924) 4 Pat. 336, F. B.

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the decision of the Taxing Officer is final and even if he has done anything which the law does not allow him to do the High Court has no jurisdiction to interfere with his decision as to the amount of the fee." The latter case (*Krishna Mohan Sinha* v. *Raghunandan Pandey*[1]) is much to the same effect on this point.

The result is that the authorities, to which we have been referred, substantially support the view which, apart from the authorities, we should be prepared to take of this section. To summarize, then, we think that the dispute in this case was a dispute as to the amount of the fee, and that consequently the case fell within section 5, and that the decision of the Judge specially appointed in that behalf, namely, Mr. Justice Crump, was final, and that no appeal or revision lies therefrom. Consequently, on that ground alone, it follows that this appeal does not lie.

There is one further observation which may be made, and that is that, if the argument of the appellant was sound, then it would follow that what has been done under section 5, namely, the reference first to the Taxing Officer and then to the special Judge, was erroneous, and that neither of them had any jurisdiction to determine this particular matter. Incidentally, I may say that no objection to the jurisdiction under section 5 was ever taken by the appellant either before the Taxing Officer or before Mr. Justice Crump. It was not until the last decision was given against him that this point was raised. If, then, according to the appellant, the procedure under section 5 was erroneous, it is difficult to see what right of appeal there can be to this Court. As pointed out by their Lordships of the Privy Council in *Rangoon Botatoung Company, Ld.* v. *The Collector, Rangoon*[2] (p. 27):—

"An appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be given by express enactment."

[1] (1924) 4 Pat. 336, F. B.

[2] (1912) 40 Cal. 21 at p. 27.

Their Lordships were here citing what Lord Bramwell observed in the case of the *Sandback Charity Trustees* v. *North Staffordshire Railway Company*.[1]

Nor, if we turn to section 15 of the Letters Patent, would any appeal necessarily lie because the appeal there given is from orders passed in exercise of the original jurisdiction pursuant to section 13 of the recited Act. And when one turns to the corresponding section in the Government of India Act, 1915, section 108 (1) refers to the exercise of the original and appellate jurisdictions vested in the Court. But it may be argued that under section 5 of the Court Fees Act the Court is not really exercising its original or appellate jurisdiction, and that the Judge there appointed by the Chief Justice is more in the nature of *persona designata*, as in the case of the Chief Judge of the Small Cause Court in certain matters arising under Municipal elections. In these circumstances, and apart from the use of the words "final decision" in section 5, we should find great difficulty in any event in dealing with the appeal which is presented to us at this stage. In saying this, I do not overlook the provisions of section 19 I of the Court Fees Act. But I wish to make it quite clear that Mr. Justice Crump was not sitting as the Testamentary Judge or in exercise of the ordinary testamentary jurisdiction of the High Court. He was sitting on this occasion solely as a Judge specially designated to decide this case under section 5 of the Court Fees Act. Consequently, there has been no decision of "the Court," so far as I am aware, under section 19 I. In these circumstances, I need not pursue this particular point.

The result is that this appeal will be dismissed with costs.

Attorneys for appellant: Messrs. *Dabholkar & Jeshtaram*.

Attorney for respondent: Mr. *A. Kirke-Smith*.

Appeal dismissed.

J. S. K.

[1] (1877) 3 Q. B. D. 1.