substantially succeeded in their defence. Plaintiffs must, therefore, pay the defendants' costs of the suit.

Suit dismissed with costs.

Attorneys for plaintiffs: Messrs. *Ardeshir, Hormusji, Dinshaw & Co.*

Attorneys for defendants: Messrs. *Madhavji & Co.*

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ANGLO-INDIAN DRUG AND CHEMICAL CO. v. SWASTIK OIL MILLS CO. LTD.

B. J. Wadia J.

Suit dismissed.

B. K. D.

ORIGINAL CIVIL.

Before Mr. Justice Tyabji.

ISMAIL ABDUL LATIF *v.* HAJI IBRAHIM HAJI JAN MAHOMED KARACHIVALA.*

1934
July 3

Practice—Administration suit—Costs—Successful plaintiff—Executors—Advocate General—Principles on which costs in administration suits to be awarded discussed.

Plaintiffs who filed a suit against the executors of the estate of a deceased person and claim a general administration of the said estate, will not, as a matter of right, get their costs out of the estate. In order to claim their costs out of the estate they must satisfy the Court, first, that the executor was not administering the estate properly and the intervention of the Court was necessary for the purpose of safeguarding the plaintiff's rights in the estate; secondly, that it was necessary that the directions of the Court should be given to the executors not only in respect of the specific rights of the plaintiffs but in regard to the entire administration of the estate; and, thirdly, that it was in the circumstances of the case necessary that not only the executors but the legatees or beneficiaries and the Advocate General as representing the charity interested in the estate, should be brought before the Court.

The practice of filing general administration suits, in cases where the disputes are small or restricted, criticised.

Croggan v. *Allen*,[1] *Bartlett* v. *Wood*,[2] *Hertford* v. *Zichi*,[3] *Brown* v. *Dowthwaite*,[4] *May* v. *Newton*,[5] *Jesse* v. *Bennett*,[6] and *In re Blake: Jones* v. *Blake*,[7] referred to.

* O. C. J. Suit No. 743 of 1933.

(1) (1882) 22 Ch. D. 101.
(2) (1861) 9 W. R. (Eng.) 817.
(3) (1845) 9 Beav. 11.
(4) (1816) 1 Madd. 446.
(5) (1887) 34 Ch. D. 347.
(6) (1856) 6 De G. M. & G. 609.
(7) (1885) 29 Ch. D. 913.

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In a properly instituted administration action, the costs of the executors are considered as proper expenses in administering the estate. Such costs are a first charge on the estate. If the estate is insufficient for the payment of all the costs, the costs of the legal personal representatives as between attorney and client are a first charge, then the costs and expenses of the plaintiff and the other parties may be provided for. Where no misconduct on the part of the legal representative is made out, his costs are allowed as between attorney and client, in priority to the costs of all the other parties.

In re Love : Hill v. *Spurgeon*,[1] followed.

Although the Court looks with a certain amount of indulgence on the costs of the Advocate General, there is no absolute rule that in all cases he must have his costs. He may be deprived of his costs where an ordinary party would be made to pay them.

Hunter v. *Attorney-General*[2] and *The Attorney-General* v. *The Corporation of London*,[3] referred to.

SUIT for the administration of a deceased Mahomedan who died leaving a will.

One Haji Cassum Abba died on February, 4, 1931, in Bombay leaving a will dated January 9, 1931. The executors obtained probate of the will on February 1, 1932, and the estate was represented to be worth about Rs. 7,501. By his will he left the bequeathable third to charity and directed that the rest of his estate should be administered according to Mahomedan law. The plaintiffs were nephews of the deceased; defendants Nos. 1 and 2 were the executors appointed by the will; defendant No. 3 was the widow of the deceased; and defendant No. 4 was the Advocate General as representing the charity. The suit was filed for a general administration of the estate of the said deceased on the ground that the executors had failed to render a true account of the estate to the plaintiffs.

The usual preliminary administration decree was passed and the suit was referred to the Commissioner for taking the administration accounts. The Commissioner made his report. Plaintiffs filed exceptions to the report.

[1] (1885) 29 Ch. D. 348. [2] [1899] A. C. 309 at p. 325.
[3] (1849) 2 Mac. & G. 247 at p. 271.

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The suit was placed before Tyabji J. for hearing the said exceptions and for further directions and costs.

H. D. Banaji, with *R. J. Colah*, for the plaintiffs.

Purshottum Tricumdas, for defendants Nos. 1 and 2.

F. B. Vachha, for defendant No. 3.

TYABJI J. This is a very unfortunate suit. The testator died leaving an estate which he considered worth Rs. 7,000 or Rs. 8,000. Probate to his will was obtained. Afterwards two of his nephews, the plaintiffs in this suit, addressed the executors charging them with neglect of their duties as executors. Lengthy correspondence ensued. In the end this suit was brought for the general administration of the estate by the Court. Not only the executors, but the widow and the Advocate General, as representing the charity, are made parties. The Advocate General is made a party because the will leaves one-third of the estate to charity.

My substantive order is very simple. The report is confirmed, and the exceptions are dismissed with the costs of defendants Nos. 1 to 4. Defendant No. 3 will hand over to the executors the property found by the Commissioner to be in her possession.

The real questions I have to decide refer to the costs of the suit. The costs of the parties exceed the whole of the estate. I am informed the estate will be insufficient to pay the costs even of the executors.

As a preliminary I cannot help citing some observations of Fry J. in *Croggan* v. *Allen*[1] (p. 103) :—

"Now I ask myself whether there was any good reason for instituting this action at all, ... No good having been gained by it, the question arises, what ought I to do with the costs under these circumstances ? I am very glad to have had my attention called to the language of Lord *Westbury* used in a case of *Bartlett* v. *Wood*,[2]

[1] (1882) 22 Ch. D. 101. [2] (1861) 9 W. R. (Eng.) 817.

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because *no person can sit in this Court and not be aware of the enormous amount of costs which are incurred in administration actions which confer no real benefit upon any human being except the solicitors concerned.* Oftentimes when there is nothing but one simple question to be determined the whole accounts of the estate are taken from the very moment when the testator died. Often when there is no question at all the accounts are taken, and the only thing that makes such a course of practice bearable is this, that the Court visits with such extreme rigour any breach of trust in a trustee or executor, that it is bound to keep its doors open to executors and trustees for their protection."

Lord Westbury's remarks in *Bartlett* v. *Wood*,[1] to which Fry J. alludes, are as follows (p. 817) :—

"I must say that I have heard this suit, and the proceedings connected with it, with feelings of very great pain. This is one of those suits, by the institution of which discredit is brought upon the practice of the Court of Chancery and the administration of justice, and these proceedings are justly exposed to the severe censure of the suitors and the public, but at the same time the fault does not lie in the rules of the Court itself. From my long experience in this Court I have observed that nothing requires to be more carefully directed or attended to than the mode in which the costs of litigation should be dealt with by this Court in ordinary cases. Nor is there anything which opens the doors of the Court so widely, and induce persons to come up with unfounded litigation more than the unfortunate degree of uncertainty which exists upon the subject of the payment of costs....There can be no doubt that, as a general rule, in cases of administration, it is, above all things, the bounden duty of the Court to attend to the subject of the payment of costs, and that no costs ought to be given out of an estate, except for those proceedings only that are in their origin directed, with some show of reason and a proper foundation, for the benefit of the estate, or which have in their result conduced to that benefit."

Coming to the case before me, the parties must be considered under three categories, the plaintiffs, the executors, and the beneficiaries under the will.

Where there is a will the executors represent the estate. In such a case, therefore, a suit in reference to the estate or its administration must be considered under two aspects : the parties to the suit and the reliefs sought. It is not necessary in all cases where a legatee or a creditor of the estate desires to have his rights in the estate given effect to, that any parties other than the claimant and the legal representatives should be before the Court. Nor is it ordinarily necessary that there should be prayers or an order for the general administration of the estate by the Court. The

[1] (1861) 9 W. R. (Eng.) 817.

questions of the parties and the reliefs are obviously interdependent. The executor is already authorised by the will of the testator to administer the estate. Where probate has been obtained, the Court has in a sense confirmed the authority of the executor; the matter having come before the Court in its testamentary jurisdiction it has given the only directions proper in the circumstances for the administration of the estate, viz., that the executor should undertake the duties imposed upon him by the facts that he is named as executor and has accepted the executorship. There may no doubt be special circumstances in which the Court in a sense and to a certain degree retraces its steps; the administration of the estate may be taken away either partially or entirely from the executor. Thus there may be cases where, in spite of the fact that the testator has appointed an executor to carry out his will, the duties of administering the estate may be altogether taken away from him and the estate in its entirety administered by the Court. In other cases, the executor may be left in charge of the estate generally, notwithstanding that he is proved to have been remiss in discharging his duties towards a particular legatee (or in the case of the estate of a Muslim testator) towards one of those heirs who take irrespective of the will,—the accounts, inquiries and orders being restricted to certain specific questions. In such cases, if the executor is sued by the legatee or the heir, the other beneficiaries in the estate need not be made parties. On the other hand, it may be that persons other than the executor, whether heirs or legatee or even third parties, are necessary parties in order that the rights of the plaintiff may be dealt with,—in which case they must of course be brought before the Court.

These general principles are laid down in cases which will be found collected in the texts of authority. The forms given in Appendix A to the Civil Procedure Code relating to administration suits (see Forms 41-43) proceed

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on a similar basis. See Williams on Executors, 12th Edn., p. 1266, where it is stated :—

"A personal representative may sue or be sued as representing the estate of the deceased. As a general rule, and in the absence of special circumstances, it is not necessary or proper to join beneficiaries as parties in an action against a personal representative for an account."

The cases of *Hertford* v. *Zichi*,[1] *Brown* v. *Dowthwaite*[2] and *May* v. *Newton*[3] are cited. Again at p. 1235 it is stated :—

"As a general rule, however, in actions brought against personal representatives as representing the estate, beneficiaries should not be joined as parties."—

though where the beneficiary has participated in a breach of trust he is a necessary party : *Jesse* v. *Bennett*.[4] At the same time Order XVI, rule 8, of the rules of the Supreme Court in England, provides that the Court or a Judge may, at any stage of the proceedings, order any person beneficially interested in the estate to be made parties, either in addition to or in lieu of the previously existing parties. Where it is objected that all the necessary parties are not present, in proper cases an inquiry is ordered into the persons interested, and ordered that if any of the persons interested are not parties they should be at liberty to apply or be served with notices : see *Howard* v. *Jalland* reported in Seton's Judgments and Orders, (7th ed., 1912), Volume II, p. 1791 ; and also *Gilbert* v. *Smith*[5] and *Sykes* v. *Schofield*.[6]

In *In re Blake : Jones* v. *Blake*[7] Lord Justice Cotton explained the position in this way (p. 916) :—

"Formerly, if any one interested in a residuary estate instituted a suit to administer the estate, he had the right to require, and as a matter of course obtained, the full decree for the administration of the estate ; and the Court, even if it thought that, although there were really questions which required decision, those questions might be decided upon some only of the accounts and inquiries which formed part of the decree, found itself fettered and unable to restrict the accounts and inquiries to such only as were necessary in order to work out the question . . . Where there are questions which cannot properly be determined without some accounts and inquiries or directions

(1) (1845) 9 Beav. 11.
(2) (1816) 1 Madd. 446.
(3) (1887) 34 Ch. D. 347 at p. 349.
(4) (1856) 6 De G. M. & G. 609.
(5) (1876) 2 Ch. D. 686.
(6) (1880) 14 Ch. D. 629.
(7) (1885) 29 Ch. D. 913.

which would form part of an ordinary administration decree, then the right of the party to have the decree or order is not taken away, but the Court may restrict the order simply to those points which will enable the question which requires to be adjudicated upon to be settled."

Lindley L. J. said (p. 918) :—

"Care must be taken not to give countenance to the notion that by seeking out an infant plaintiff who may be a residuary legatee, or interested, perhaps, in a very small portion of the estate, an administration judgment may be obtained at the expense of the estate as a matter of course as it used to be obtained. I hope that state of things is gone, and gone for ever : it was one of the greatest scandals of the profession."

Then he proceeded (p. 919) :—

"There will therefore be certain modified inquiries, but at the risk of those who insist upon them, though this need not be expressed in the order. Those inquiries ought then to be directed : if they turn out to have been necessary, beneficial and proper, then those who asked for them will get the costs."

The plaintiffs before me, therefore, in order to justify their suit in the form in which it is brought and to be able to claim their costs out of the estate must satisfy the Court, first, that the executor was not administering the estate properly and the intervention of the Court was necessary for the purpose of safeguarding the plaintiffs' rights in the estate ; secondly, that it was necessary that the directions of the Court should be given to the executors not only in respect of the specific rights of the plaintiffs but in regard to the entire administration of the estate ; and, thirdly, that it was in the circumstances of the case necessary that not only the executors but the legatees or beneficiaries and the Advocate General should be brought before the Court.

Considering the case in the light of these principles I have no doubt that the plaintiffs should not have their costs out of the estate.

As regards the costs of the executors, the costs of an action properly instituted for the administration of an estate are considered as expenses in administering the estate. They are, therefore, a first charge upon the estate, if the estate is insufficient for the payment of all the costs, the costs of the legal personal representatives as between solicitor

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and client are a first charge, then the costs and expenses of the plaintiff and the other parties may be provided for in accordance with principles laid down in the cases. For the present it is sufficient to say that the costs of the representative, where no misconduct on his part is made out, are allowed as between solicitor and client and in priority to the costs of all other parties. See *In re Love: Hill* v. *Spurgeon*,[1] and the case cited in Daniell's Chancery Practice, 8th Edn., p. 1067, and Halsbury, Vol. XIV, p. 352, paragraph 838.

The executors in this case submitted themselves to the orders of the Court. They might well have directed the attention of the Court to the question whether on the allegations of the plaintiffs a general administration was necessary and whether the Advocate General need have been made a party. They might perhaps in other ways have saved some unnecessary proceedings and costs. But considering their conduct and the proceedings as a whole I have come to the conclusion that they ought to be allowed their costs as between attorney and client from the estate.

I am not at all sure that I ought not to make the plaintiffs bear the costs of the executors. Perhaps I am too lenient in not making such an order, but as the plaintiffs would have been entitled to the residue of the estate if any had been left instead of its being wasted in costs, this part of my order need not detain me further.

With reference to defendant No. 3, the widow, there is no doubt that she has suffered most from this litigation. But in regard to costs I cannot help her. The Commissioner rightly made every presumption in her favour. Still he was forced to make the order against her for return of the ornaments. She must bear her own costs.

On behalf of the Advocate General it is urged that his costs should stand on the same footing as the costs of the legal representatives. No authority is cited for that

[1] (1885) 29 Ch. D. 348.

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proposition. Although the Court always looks with a certain amount of indulgence on the costs of the Advocate General there is no absolute rule that in all cases he must have his costs : *Hunter* v. *Attorney-General.*[1] He may be deprived of his costs where an ordinary party would be made to pay them : *The Attorney-General* v. *The Corporation of London.*[2]

The plaintiffs will bear their own costs and pay the costs of the exceptions and the general costs of the Advocate General till the first hearing in Court. The plaintiffs need not pay any costs of the Advocate General after the first hearing in Court except of the exceptions. The executors will be entitled to their costs as between attorney and client from the estate. Defendant No. 3 will bear her own costs except her costs of the exceptions which will be paid to her by the plaintiffs.

Attorneys for plaintiffs : Messrs. *Lala & Co.*

Attorneys for defendants Nos. 1 and 2 : Messrs. *Mulgaokar, Mody & Co.*

Attorneys for defendant No. 3 : Messrs. *Manubhai & Co.*

Attorneys for defendant No. 4 : Messrs. *Little & Co.*

Order accordingly.

B. K. D.

[1] [1899] A. C. 309 at p. 325. [2] (1849) 2 Mac. & G. 247 at p. 271.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Rangnekar.

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September 11

VADILAL LALLUBHAI MEHTA, APPLICANT *v.* THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY AND ADEN AT BOMBAY, OPPONENT.*

Indian Income-tax Act (XI of 1922), section 66—Application under sub-section (3)—Reference—High Court to indicate questions of law—Actual framing of questions rests with Commissioner—Sub-sections (2) and (3), construction of.

Where the Commissioner refuses to state a case under section 66, sub-section (2) of the Indian Income-tax Act, 1922, on the ground that no point of law arises, the

* Civil Application No. 169 of 1934.