

(2014) 09 KAR CK 0011

In the Karnataka High Court

Case No : Writ Petition No. 40996 of 2014 (GM-CPC)

Gajalakshmi

APPELLANT

Vs

N. Nagaraja Reddy

RESPONDENT

Date of Decision : 02-09-2014

Acts Referred:

Constitution of India, 1950 — Article 14
Succession Act, 1925 — Section 295

Citation : AIR 2015 Kar 29 : (2014) 4 AKR 418 : (2015) 1 KarLJ 282 : (2014) 4 KCCR 3786

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : H.N. Shashidhara, Advocate for the Appellant

Judgement

Anand Byrareddy, J.—The facts of the case are as follows:

The petitioner is said to have sought for Letters of Administration in respect of the last will and testament of her paternal uncle, dated 5.5.1980 in a petition filed by her in this regard before the court of the XXII City Civil and Sessions Judge, Bangalore, in case No. P & SC 143/2009.

The testator, Radhakrishna Reddy, is said to have bequeathed immovable property bearing No. 65/1, 65/2 and 65/3, Industrial Suburb, Yeshwanthpur, Bangalore, and also a portion of the land bearing Sy. No. 84 measuring 3 acres and 3 guntas and land bearing Sy. No. 83/1 measuring 12,500 Square feet of Jarakabande Kaval, Yeshwantpur, Bangalore, in favour of his widow, the second respondent herein - with a life interest therein, with no power to alienate or encumber the same during her lifetime and thereafter the property was to devolve on the petitioner, absolutely.

However, the second respondent has set up another will of Radhakrishna Reddy, dated 18.11.1979 and is said to be claiming an absolute right in respect of the very properties. She is said to have filed a civil suit for partition and separate

possession of the properties, in this regard, in case No. OS 26275/2007.

Further, one Nagaraja Reddy, a brother of Radhakrishna Reddy, is also said to have filed a suit for partition and separate possession in case No. OS 2055/2007, in respect of the very properties.

2. It is the case of the petitioner that since the above said respondents were disputing the claim of the petitioner, she had been constrained to file the petition for grant of letters of administration. The second respondent having entered appearance in those proceedings and having strongly resisted the said petition, the court below is said to have clubbed the two suits for partition along with the petition for grant of letters of administration and in view of the petition being a contentious one, the petitioner was called upon to pay court fee in terms of Article 11(I)(ii)(3) of the Karnataka Court Fees and Suits Valuation Act, 1958 (Hereinafter referred to as the "KCFSV Act", for brevity). The petitioner had disputed the liability to pay court fee under the said provision and had challenged the order in a writ petition before this court in WP 48803/2013. The said petition is said to have been rejected, on the ground that the liability had been correctly imposed by the trial court, in the light of the decision in the case of Anthony Swamy Vs. Chowramma, , vide order dated 4.6.2014.

The petitioner is then said to have preferred a Review Petition before the learned single judge, on the ground that the decision in the case of Saraswathi Devi Prathap Vs. State of Karnataka, , was not brought to the attention of the learned single judge. It was contended that the law laid down therein was that the court fee payable in contentious proceedings for probate or letters of administration was under Article 6 of Schedule-I to the KCFSV Act, in addition to any fee already paid under Article 11(I)(ii)(3) of Schedule-II to the KCFSV Act. It was thus contended that the maximum court fee payable in a proceeding for letters of administration, whether contentious or not, was only Rs. 30,000/-. The learned single judge however, is said to have held that the issue decided in Saraswathi Devi had no bearing on the case of the petitioner and that her case was squarely covered by Anthony Swamy's case as already pronounced, and is said to have rejected the review petition.

The petitioner is then said to have filed a fresh valuation slip before the trial court and is said to have paid a court fee of Rs. 30,000/-, in terms of Article 6 of Schedule-I to the KCFSV Act. The trial court having rejected the said valuation and having held that the petitioner was required to pay the court in terms of Article 11(I)(ii)(3) of Schedule II to the KCFSV Act, the present petition is filed.

3. Shri H.N. Shashidara, learned counsel appearing for the petitioner would contend that the maximum ad valorem Court fee payable under Article 6 of Schedule I to the KCFSV Act is only Rs. 30,000/-, whether the proceedings are contentious or not. Hence, the Court fee payable under Article 11(I)(i) of Schedule II is Rs. 25/-, if the proceedings are not contentious and the prescription of payment of "one-half the scale of fee prescribed in Article 1 of

Schedule-I on the market value of the estate less the fee already paid on the application" - being levied, in terms of Article 11(I)(ii)(3) of the said Schedule, if the proceedings are contentious, would have to be read down, in view of the ratio laid down in Saraswathi Devi's case.

The above is the primary proposition that is sought to be urged in support of the petition.

4. The said contention cannot be accepted for the simple reason that the petitioner's endeavour to urge this proposition has already been negated by a learned single judge of this court in holding that the ratio in Saraswathi Devi Prathap's case was not applicable to the petitioner's case.

In any event, since the petition asserts and accuses the learned single judge of not having considered the decision in Saraswathi Devi Prathap's case in its "proper perspective", when this bench is hardly competent to sit in judgment of the correctness or otherwise of the view so expressed by another learned single judge of co-ordinate jurisdiction, the petition is still addressed only in order to examine if the view projected in the present petition is indeed the "proper perspective", or whether it should be termed as brash and unfair claptrap.

We may firstly consider as to what were the issues involved in Saraswathi Devi Prathap's case and what was laid down by this court.

The Division Bench was dealing with two independent petitions before it. In both the petitions, the constitutional validity of the provisions of the KCFSV Act, relating to the prescription of court fees, on petitions seeking probate or letters of administration - was sought to be questioned.

The petitioners therein had contended that:

"(1) The provision of the Court Fees Act in so far it relates to the levy of Court fee for grant of probate and letters of administration are concerned, it is beyond the competence of the State Legislature;

(2) The fee provided under Article 6 is really a fee for doing ministerial work and therefore tantamounts to tax and not fee, and therefore the levy is beyond legislative competence;

(3) The proceedings for grant of probate or letters of administration when contested, is treated as a civil suit and when the maximum Court fee fixed for civil suits is 10 per cent advalorem, the prescription of Court fee at the rate of 15% in respect of matters in which the amount or market value of the property in respect of which probate or letters of administration is issued exceed Rupees three lakhs, on that part of the value which exceeds Rupees three lakhs is violative of Article 14 of the Constitution of India. "

The learned judges of the Division bench expressed divergent opinions on the above contentions. It was held that the Act was within the competence of the State legislature and that the fee levied under the Act is not in the nature of a

tax. In so far as the last contention of the petitioners therein was concerned, it was with reference to Article 6 of Schedule I to the KCFSV Act, before it was amended by Act No. 12 of 2000, and read as follows:

"6. Probate of a will or letters of administration with or without will annexed. When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees, on the part of the amount or value in excess of one thousand rupees, upto three lakhs of rupees

- Five Per Centum

When the amount or value of the property in respect of which the grant of probate or letters is made exceeds three lakhs of rupees, on the part of the amount or value in excess of three lakhs of rupees

- Ten Per Centum"

(By virtue of Act No. 12 of 2000, the said provision now reads as follows:-

"6. Probate of a will or letters of administration with or without will annexed-

(a) When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees, on the part of the amount or value in excess of one thousand rupees, up to three lakhs of rupees.-

(a) Three per cent

(b) When the amount or value of the property in respect of which the grant of probate or letters is made exceeds three lakhs of rupees, on the part of amount or value in excess of three lakhs of rupees.

(b) Five per cent or rupees thirty thousand whichever is less"

It was opined thus by one of the judges comprising the Division bench thus:

"8. It is true that the Legislature has a larger discretion in the matter of classification in respect of enacting legislation on fiscal matters in view of inherent complexity of fiscal adjustments. But at the same time it is well settled that such Legislations are no exception, to Article 14 of the Constitution (See. Khandige Sham Bhat and Others Vs. The Agricultural Income Tax Officer, ; State of Andhra Pradesh and Another Vs. Nalla Raja Reddy and Others, and The State of Kerala Vs. Haji K. Kutty Naha and Others etc.,). In fact, as stated earlier, the, levy of higher rate of Court fee, on proceedings for Letters of Administration and Probates, compared to suits, when the former were treated as suits, by the Maharashtra Act, has been held to be violative of Article 14, by the Supreme Court. In the present case also, as can be seen from the proviso to Article 11(I) of Schedule to the Act, it expressly provides that if a caveat is entered and the application is registered as a suit one-half the scale of fee prescribed in Article 1 of Schedule I on the market value of the estate less the fee already paid on the application is payable. According to this provision, whether the value is below three lakhs or above three lakhs, the Court fee

payable at the rate prescribed for suits has to be computed and a half of it has to be paid. Thus, in this provision there is an implied admission that irrespective of the value of the subject matter, the proceedings where contested are similar to suits, and half the amount of Court fee prescribed for suits has to be paid. But when we come to Entry 6, it prescribes that after the application is granted, a Court fee at the rate of 5% of the market value of the estate, to wit, the balance of 50% of the Court fee should be paid in respect of an application in which the value of the subject matter of the estate exceeds one thousand Rupees but does not exceed Rs. 3 lakhs, and in respect of application in which the subject matter is more than Rupees three lakhs, on the amount exceeding Rupees three lakhs, Court fee at the rate of 10% should be paid. If this levy is regarded as in addition to the 5% Court fee already paid, it means the total Court fee payable in such proceeding is one and a half times the Court fee payable on a suit of similar value. The consequence would be that though applications for grant of probate or letters of administration are treated as suits, while in respect of suits even if the value of the subject matter is above Rupees three lakhs, only 10% ad valorem Court fee has to be paid, but if it were to be an application for grant of probate or letters of administration a Court fee of 15% has to be paid. Therefore, the provision, if construed as above, is liable to be struck down in view of the ratio of the decision of the Supreme Court upholding the decision of the Bombay High Court striking down the provision of the Maharashtra Court Fees Act prescribing a Court fee higher than for the suits, in respect of proceedings for grant of probate or letters of administration. It is also pertinent to point out that the Supreme Court frowned at the levy of Court fee even at 10% ad valorem under the Act in the penultimate paragraph of the Judgment in Ashwathanarayana Shetty's case at page 52 of the Report.

9. However, it appears to me that it is not necessary to strike down the provision as it is possible to read it in such a way that it does not result in discrimination. On a reading of the relevant provision and the entries in the schedule to the Act, it appears to me that the intention of the Legislature is to levy only ad valorem Court fee at 10% and that half of it should be paid in the first instance, and that too only when there is a caveat and the application is contested and the other half should be paid only when the application is granted and that part of the Court fee has to be used for issuing the probate or letters of administration, in that either of the documents must bear the Court fee stamp of that value. It is true that under Entry 11(I) in respect of proceedings in which there is a contest, 50% of the Court fee payable on a suit of similar value is required to be paid and under Entry 6 there is a prescription for payment of 5% Court fee, on the market value of the property in respect of which probate or letters of administration is to be issued if such value exceeds Rs. one thousand and does not exceed Rs. three lakhs and a Court fee of 10% has to be paid in cases in which the market value exceeds Rupees three lakhs on that part of the value which exceeds Rupees three lakhs. In the first category of cases, there is no difficulty. The total comes only to 10%. But it is in the latter category of cases if 10% payable under Article

6 is regarded as in addition to the Court fee payable under Article 11(I), it comes to 15%. In my view, there is a drafting defect in Entry 6 of Schedule-I, but the intention of the Legislature, as is discernible from Entry 11(I) of the First Schedule which treats application for grant of probate or letters of administration as suits when caveat is filed and the matter is registered as suit and prescribes fifty per cent of ad valorem Court fee payable on suits irrespective of the value of the estate, is that the application should be treated as similar to suits and therefore the ad valorem Court fee payable under Entry 6 in cases involving a value of more than Rupees three lakhs must be held to be the balance, i.e., fifty per cent, so as to take the total 10%. Therefore, 10% prescribed under Entry 6 should be interpreted as including the amount of Court fee already paid as required under Entry 11(I) and not in addition to it. If so interpreted, there would be no violation of Article 14. Sri M.R. Achar, learned Government Advocate, also did not seriously contest the correctness of such an interpretation."

The companion judge however, differed on the reasoning adopted to the effect that there was a drafting defect in Article 6 of Schedule I and Article 11(I), Schedule II to the KCFSV Act, which deal with applications for grant of probate or letters of administration, and that the same should be read down to interpret that ad valorem court fee at the rate of 10% is required to be paid thereon.

It was opined that in the Act three sets of court fee are leviable in probate proceedings.

Firstly, Article 11(I) Schedule II refers to payment of court fee on an application for probates and letters of administration or revocation thereof and prescribes a nominal court fee.

Secondly, the proviso to Article 11(I) provides that if a caveat is entered and the application is registered as a suit (in conformity with Section 295 of the Indian Succession Act, 1925) one-half the scale of fee as prescribed in Article 1 Schedule I, on the market value of the estate (less the fee required to be paid on the application) shall be paid.

Thirdly, after the court makes an order granting probate or letters of administration the fee leviable under Article 6 of Schedule I to the Act is attracted.

The Article provides for two graded scales of court fee: one payable upto Rs. 3 lakh, at 5% and another where the value of the property in respect of which grant of probate or letters of administration was sought exceeds Rs. 3 lakh, at 10%. In the event of a probate or letters of administration was not granted the question of payment of a fee under Article 6 Schedule I to the Act does not arise.

It was thus indicated that there was a discernible distinction between the proceedings arising out of an application for grant of probate or letters of administration and a suit arising under any other law.

It was further opined that the contention assumed significance only when the

amount or value of the property in respect of which probate or letters of administration sought for exceeded Rs. 3 lakh and not in regard to property the value of which was less than Rs. 3 lakh. It was held that the provision in Article 11(I) of Second Schedule to the Act clearly relates to the fixing of fee on the market value and Article 6 of First Schedule is an additional fee to be charged on the grant of probates or letters of administration which may be termed as probate fee. Article 6 of Schedule I and Article 11(I) of Schedule II together constitute one scheme for the purpose of levy of Court fee. Therefore, on a reading of the provisions contained in the aforesaid two Articles together, it cannot be said that there is no classification at all given the fact that the provisions with which we are concerned here are fiscal in nature and content. In fiscal statutes it is left to the free will of the Legislature to make such classifications as it thinks fit provided the same are not grossly or patently violative of Article 14 of the Constitution. In the present case, the division of estates as falling into market value of less than Rs. 3 lakhs and those falling into market value of more than Rs. 3 lakhs itself forms a classification and such classification is not unknown to law or to taxing statutes and Courts would not strike down a law merely because there is room for further classification. In most of the enactments on Direct Taxes, graded rates of levy is made depending upon the income or wealth or estate. The larger it is, the higher would be the burden and without any upper limit. All such legislations have stood judicial scrutiny and have passed the muster of equality clause in the Constitution. Such matters in regard to classification or rate of levy or imposition of upper limit should be left to the wisdom of the Legislature.

The crux of the case of the petitioners was addressed thus:

"5. The petitioners in these petitions armed with the decision of the Supreme Court in *Aswathanarayana Setty's* case and drawing a comparison between the provisions of the Bombay Court Fees Act and the Act have built an argument of discrimination in the matter of payment of Court fee on probates or letters of administration to be issued where the market value of the deceased's estate is more than Rs. 3 lakhs. In order to appreciate the contention raised on behalf of the petitioners, it is necessary to consider the nature of controversy before the Supreme Court in that case and the effect of the decision which is the linchpin in the argument of the petitioners.

6. The contention before the Supreme Court in that case was a very limited one confined to the question of validity of Section 29(1) read with Entry 10 of Schedule I to the Bombay Act, which without reference to the upper limit of Court fee of Rs. 15,000/- prescribed for all other suits and proceedings, required payment of ad valorem Court fee on proceedings for grant of probates or letters of administration. This contention was raised on the ground that it was constitutionally impermissible as an unlimited exaction by way of Court fee which is common to other suits and appeals, resulting in discrimination as between proceedings for grant of probates or letters of administration on the one hand,

and all other suits and proceedings respecting which an upper limit of Rs. 15,000/- is fixed under that statute, on the other.

This contention had been upheld by the Bombay High Court stating that:

"There is no answer to this contention except that the legislature has not thought fit to grant relief to seekers of probates whereas plaintiffs in civil suits were thought deserving such an upper limit. The discrimination is a piece of class legislation prohibited by the guarantee of equal protection embodied in Article 14 of the Constitution...."

This reasoning was approved by the Supreme Court. It was also observed that if in respect of all other suits an upper limit of Rs. 15,000/- is fixed on the Court fee there is no logical justification for singling out the proceeding for grant of probates and letters of administration for an ad valorem impost without the benefit of some upper limit prescribed by the same statute respecting other litigants. These observations of the Supreme Court and the Bombay High Court make it clear that the controversy before the Court was only with regard to an upper limit that could have been prescribed in so far as the Court fee for grant of probates and letters of administration are concerned. The issue was not whether there could be a classification, one for probates and letters of administration proceeding and another for ordinary civil suits, or whether separate rates of fee could be prescribed for within each group of such proceeding under such classification. In *Aswathanarayana Shetty's* case Supreme Court did not approve unlimited levy of Court fee on applications for probate and letters of administration proceedings, while such limitation was available for other suits because there was no distinction between suits on the one hand and probate and succession proceedings on the other in so far as limiting the payment of Court fee is concerned. Their Lordships did not deal with the question whether different rates of Court fee should be paid on different classes of litigation. The classification would fail in a matter where a general limitation is applied to all suits and proceedings while probate and succession proceedings are singled out but not if no such general limitation is applicable to all suits and proceedings and different rates of Court fee are to be paid on different classes of litigation. The observation in the Supreme Court decision that there should be some limit on the payment of Court fee in matters of probate and letters of administration will not be applicable to the present case because under the Act no such limitation is prescribed and non-prescription of such limitation cannot invalidate the Act as the Act has been upheld and that argument did not stand the scrutiny in the Supreme Court.

7. Now, to sum up the discussion: when the Act does not prescribe any upper limit in the matter of payment of Court fee unlike the Bombay Act the discrimination is sought to be found by comparison of rates of fee between suits and probate or letters of administration proceedings where the value of the estate exceeds Rs. 3 lakhs. The legislative wisdom that the burden of levy should be heavier on persons holding larger estates cannot be found fault with at all as

there is clear difference between the classes of litigation as discussed earlier in this Order. May be in regard to ordinary suits a different rate of fee is prescribed and in regard to estates the value of which is less than Rs. 3 lakhs the rate of fee may be less, but that again is a matter of legislative policy. Hence, the one and the only answer that could be given on the third question raised by the learned Counsel for the petitioners is that probate fee as levied by the Act is valid. Even on grammatical or literal construction if the impugned provisions are held to be valid, as I have held them to be so and I see no drafting defect, there is no question of entering into an exercise of reading down the provisions to uphold the constitutionality of the same."

In referring the matter to a third judge for his opinion in view of the divergent opinions, the Division bench framed the following two questions of law, on which, they differed:

"(i) Whether the Court fee payable at the rate of 10 per cent ad valorem in respect of proceedings for grant of probate or letters of administration in cases in which the market value of the subject matter exceeds Rupees three lakhs, on that part of the value which exceeds Rupees three lakhs, under Entry 6 of Schedule I to the Act if regarded as in addition to the Court fee already paid under Entry 11(1) of Schedule-II of the Act, it would be violative of Article 14 of the Constitution and, therefore, whether the provision should be read down to mean that it is inclusive of the Court fee already paid under Entry 11(1) of Schedule-II of the Act so as to render the provision constitutionally valid?

(ii) Whether the plea raised in the petitions even after amendment is not sufficient to give rise to the aforesaid question in these petitions?"

The third judge advertent to the opinions expressed by the learned judges of the division bench, has observed that an earlier decision in the case of A.G. Hariharan Vs. A.G. Singaravelu and Others, , was not brought to the attention of the Division Bench, co-incidentally rendered by the very third judge. In the course of providing the reasons for his opinion, which proceeds on a formulation different from the questions of law referred to him, he has not chosen to repeat his findings and observations in A.C. Hariharan's case but has drawn support for his conclusions therefrom. It is hence useful to take note of the opinion expressed therein in fully grasping the conclusions arrived at.

In A.G. Hariharan Vs. A.G. Singaravelu and Others, , which was a decision rendered by the Third judge himself, the question that was considered was as to the court fee payable for issue of probate. This question arose on account of an amendment to the KCFSV Act by the Karnataka Taxation Act & Certain Other Laws Amendment Act, 1982. More particularly the amendment made to Article 6 of Schedule-I to the KCFSV Act as it then stood, by which 5% court fee was payable where the amount of the value of the property in respect of which the grant of probate or letters is made exceeds Rs. 1,000/- but does not exceed Rs. 3 lakh and in all other cases if the amount exceeds Rs. 3 lakh, the probate duty

chargeable was 10% of the value of the estate.

It was observed that the practice of this court and that of the courts of the District Judges or the City Civil Judges followed the practice of calling upon the petitioner to produce the necessary court fee for issue of probate as directed by the court after the petition praying for probate has been allowed and an order made in that behalf.

In the matter under reference, it was observed, the probate having been ordered to be granted on 31.3.1982, that the court fee payable for grant of probate in addition to the court fee on the memorandum of Probate Civil Petition was governed by Article 6, Schedule I as it was before the amendment with effect from 1.4.1982. The question therefore was whether the petitioner was to pay the court fee in accordance with the rate of fee prescribed for grant of probate as on 31.3.1982 or at the rate obtaining after the amendment, which in effect would be the court fee applicable as on the date of actual issue of probate.

It was held after, noticing a decision of a Division bench of the Patna High Court, as follows:

"15. I am certainly in agreement with the view of the Division Bench of the Patna High Court as to the interpretation of Section 54 of the Court-fees Act (corresponding to Section 19(1) of the Act considered by that Bench). But I am unable to agree, with respect, with the order of the four stages of the proceedings arranged by them. The prohibition imposed in Section 54 of the Court-fees Act is only to the extent of not granting the probate unless the prescribed court-fee thereon is paid. That cannot be read so as to mean that an application for grant of probate should not be entertained and heard as has been held by the learned Judges of the Patna High Court in the decision under reference. The very fact that probate fee is more akin, to levy of duty, when a court-fee is separately prescribed as against the fixed court-fee on the memorandum of petition itself, is suggestive of the construction that the legislative intent was to entertain the application on payment of the fixed court-fee on the memorandum of petition and at the appropriate stage direct payment of probate fee or probate duty if I may so refer to it. Therefore, the Court directing payment of probate fee will depend on the facts of each case (sic). One has to be practical in working the Indian Succession Act subject to law relating to court-fees.

16. In this very case after the probate was ordered to be granted, the Court had to issue a direction to the Bank to release part of the funds of the estate of the testator to the executor of the will in order to enable him to pay the probate court-fee as the executor did not have funds. Such circumstances can frequently come up before the Court. Some executors may not have the necessary funds at their disposal to pay huge probate court-fee and they cannot be denied the probate for nonpayment of court-fee if they are otherwise entitled to the grant of probate or letters.

17. Therefore, I am of the view, if pragmatic view is taken of the matter it should be left to the discretion of the Court as to at what stage probate fee should be charged. The present practice appears to be a convenient one which does not put any one in difficulty except when a rise in the probate fee is occasioned by amendment of the Court-fees Act.

It was further held thus:

"20. A similar question arose for consideration before the Travancore-Cochin High Court in the case of P.K. Mundan Vs. The State After considering a number of decided cases of other High Courts including that of the decision of the Bombay High Court to which I have referred, their Lordships of the Full Bench of the erstwhile High Court of Travancore-Cochin came to the conclusion that the relevant date for purpose of calculating the court-fee payable would be date on which the court ordered the grant of probate and not any other. Adopting the reasons of their Lordships I am inclined to agree with that view. The reasons I wish to add are the following:-(1) There may be instances when a probate petition may not be pressed and therefore to charge probate fee even at the stage of petition for granting of probate would be too harsh on the petitioner. (2) A petition for probate may be contested or may not be contested. If contested, as already pointed out the court-fee payable remains nominal. To ask the petitioner to pay probate duty in full even before the contest has begun is to put the cart before the horse: (3) The petitioner as already pointed out may be enabled to pay under directions of the court when he lacks ready funds to pay court-fee on probate: and

(4) Issue of probate is an administrative action to be carried out by the court and though it may be issued at a subsequent date than the order of the court, and in fact and in law takes effect from the date the order for grant is made by the Court and actually is effective by the operation of law from the date of death of the testator and therefore the date of order granting probate is the relevant date for charging the fee or levy.

21. So, for all these reasons. I must hold though it adversely affects the petitioner in the instant case the fee payable by him for issue of probate will be the fee that was obtaining on the date the probate was granted, which in the instant case is 31-3-1982."

In dealing with the questions referred for his opinion, the third judge has opined thus:

"15. A careful understanding of the scheme of the Act as set out, when there is a significant omission to refer to Schedule-11 and particularly Clause (L) of Article 11 of the Schedule-11 to the Court Fees Act, the prescription of Court fee therein is solely for the purpose of initiating the proceedings for grant of letters or probate. Once an application is made and the specified Court fee is paid, the Court is compelled to act in accordance with the High Court Rules, which are made in accordance with the powers conferred on it by the Indian Succession Act

and all other powers incidental thereto and corresponding rules governing the District Courts or other subordinate Courts.

16. This Court has made rules governing probate and administration matters and they have been brought into effect from 30th July 1964 by Notification published in the Karnataka Gazette. It provides under Rule 5 for making an application for grant of probate or letters of administration and Rule 7 provides for grant of probate or letters of administration with Will annexed. The manner in which caveat may be entered, notice of caveat and the order for grant of probate is provided under Rules 8, 9 and 12 and Rule 13 thereof provides that in contested cases, a decree shall be drawn up in Form No. 7 prescribed under the Indian Succession Act. It is of some significance to notice the contents of Clause (b) of Rule 13 of the Rules governing Probate and Administration Matters, which read as follows:-

"(b) After an order for grant of probate is made and in contentious cases the decree is drawn up, the Probate or Letters of administration shall be drawn up in the form prescribed in Schedule VI or VII of the Act, as the case may be, on stamp paper of requisite value produced by the petitioner upon the petitioner filing into Court the Administration Bond of himself and/or his sureties in accordance with the order of the Court."

17. What arose for consideration in Hariharan's case *supra*, was, the stage at which the probate fee was required to be paid under the provisions of the Court Fees Act, the Indian Succession Act and the Rules of this Court in matters relating to grant of probate or letters. It is clear, an application is required to be made in the prescribed form with the necessary documents and valuation of the estate in accordance with Section 52 in the form prescribed in Schedule-III of Court Fees Act. Though the issue of probate is an administrative act of the Court, the grant of probate or letters is a judicial act with or without the Will annexed. On application being received and registered, the Court directs citation in one of the modes prescribed even if there is no caveat entered. After such citation, the Court is bound to examine whether the applicant is entitled to the letters by calling for evidence, in regard to the right of the applicant to seek letters, if it is question of probate of a Will, then the applicant is required to prove the due execution of the Will even in the absence of contest before probate is granted. Different forms of proof may be held sufficient on the facts and circumstances of different cases and I need not deal with that aspect of the case in detail here. The fact is that the Court has to exercise its judicial application of mind and grant or refuse the letters or probate prayed for by the applicant or applicants. It is only when the grant is directed, the fee leviable under Article 6 of the II Schedule read with Section 52 of the Court Fees Act becomes payable. It was in that circumstances that in Hariharan's case this Court in detail examined the various aspects of the stages at which Court fee was required to be paid. It is unnecessary for me to repeat what I have already said in that case, except to advert to an instance in the light of the contentions advanced in the reasoning

adopted by one of the learned Judges of the Division Bench. By and large, an Executor of a Will need not necessarily be in control of the estate, particularly cash of the deceased person in respect of whose estate, letters or probate is prayed for. The Executor may be a stranger in the sense that he may not be a relative of the testator or testatrix. If he has to discharge the pious as well as legal obligation and duties of the office of the Executor under a will and he is called upon to pay the whole of the Court fee at the very first instance as prescribed in Article 6 of Schedule-I, then most of the Executors will be prevented from seeking the probate of the Will at all as they may not be in a position to generate such large funds when large estates are involved. It is in that context, one must view the provision made in Article 11(L) of Schedule-II of the Court Fees Act, where reasonable and the nominal specified amount is prescribed to move the Court. The proviso in that Article in the II Schedule controlling Clause (L) specifically provides for payment of half the ad valorem fee prescribed under Article 1 of Schedule-I relatable to suits and further provides that it shall be deemed to be a suit once a caveat is entered or the Will is contested. In other words, an adjudication process is called for before probate or letters of administration are issued in central distinction to the ex parte judicial examination for grant or non-grant of letters or probate in uncontested matters. Thus contested probate matters, by operation of law become suits. In either of the cases, probate may be refused or may be granted. If it is granted, it should be in the Form prescribed under the Indian Succession Act and shall be drawn up on a stamp paper of the value prescribed by Article 6 of Schedule-I in terms of Section 53 of the Court Fees Act. Therefore, the question really is whether in contested matters, additional Court fee calculated at the rates prescribed in Article 6 should be paid in addition to what is payable under Article 1 in terms of the proviso to Clause (L) of Article 11 of Schedule II of Court Fees Act treating the application as a suit. If that is to be answered in the affirmative, then the Ruling of the Supreme Court, as pointed by Rama Jois, J., in the Bombay Case, will be clearly attracted.

18. As earlier noticed in Ashwathanarayana Setty's case supra, Bombay Court Fees Act and its Constitutionality also fell for consideration and the Ruling of the High Court of Bombay was upheld by the Supreme Court that the different rate of fee prescribed for grant of probate and for granting relief in suits with an upper limit of Court fee of Rs. 15,000/- and without such upper limit for grant of probate would attract Article 14 of the Constitution and be discriminatory and therefore void. In the case of the Court Fees Act with which we are concerned there is no such discrimination made between suits and grant of probate. Ad valorem Court fee on the value of the estate in the case of grant of probate and ad valorem Court fee on the value determined in the manner provided in Chapters III and IV of the Court Fees Act is payable on suits. To that extent, there is no vice of discrimination. If there is vice of discrimination at all, it is in Article 6 of Schedule-I itself, where a smaller estate is taxed at a lesser rate and larger estate is taxed at a higher rate; but both on ad valorem principle. Viewed

that way, as held by the other learned Judge of the Division Bench, the State Legislature has the competence to classify and cast higher burden on the richer class and therefore, his reasoning that there is no discrimination in prescribing the lesser ad valorem rate of fee for a smaller estate cannot be held to be wrong. But unfortunately, this was not the contention raised and arguments addressed before the Division Bench. Even the question referred to me relates only to the payment of Court fee on the grant of probate i.e., whether one set of Court fee at half the rate prescribed under Entry 1 as well as the ad valorem fee prescribed under Article 6 should be paid or not.

19. I have earlier pointed out, probate may be granted with or without contest. In either event, the probate fee cannot exceed what is enjoined by Section 52. Section 52 provides for payment only at the rate prescribed in Entry 6 of Schedule-I. Therefore, whether there is contest or no contest, the probate fee payment is strictly controlled by Section 53 read with Article 6 of Schedule I and not any other provision. If adjudication proceedings in contentious matters result in refusal of grant of letters or probate, nobody is called upon to pay any probate fee under any other Article. An appeal is provided against the Judgment and decree in testamentary original suit to a Division Bench of this Court in accordance with the provisions of the Act and the Rules to which I have referred to earlier, it will be an appeal on a suit and the same Court fee paid as per proviso to Clause (1) of Article 11 of Schedule-II is bound to be paid in terms of the provisions contained in Chapter-III of the Court Fees Act read with the relevant Article in Schedule I of Court Fees Act. If the appeal is allowed, the effect is that the appellant is entitled to refund of Court fee paid on the Memorandum of Appeal. Therefore, what still remains to be paid by way of probate fee is only what is not paid in accordance with the Article 6 of Schedule-I. I have given this example to reinforce the argument that nothing more than what is prescribed in Schedule-I of Article 6 is required to be paid in all circumstances.

20. In my opinion, there is no need to read repugnancy or error of draftsman in Clause (L) of Article 11 of the II Schedule, which is essentially meant as a provision made for procedural purposes and not for purposes for impost of levy on grant of probate. It is obvious by total lack of reference to II Schedule in Chapter VI. If such an interpretation is made, then there is no need to see repugnancy, reconcile it by putting the blame on the draftsman. Thus, I must differ with the observations, with utmost respect to the learned Judge, who has taken that view. I therefore, concur with the conclusion reached by Rama Jois, J., though for different reasons and my reasoning as above must be read as supplemental and in conformity with the view I had already taken in Hariharan's case *supra*."

Thereafter, the matter having been placed before the Division bench, it was ordered thus:

"It is no doubt true that the learned Judge has not furnished his opinion with

reference to the two specific questions referred for his opinion, but has reformulated the questions and had furnished his opinion on the questions so reformulated. However, at paragraph-20 of his opinion, the learned Judge has specifically stated that he concurs with the conclusion reached by one of us (Rama Jois, J). There is expression of such concurrence is not-disputed by - the learned Government Advocate.

3. In the result, we make the following order;

(i) Writ Petitions are partly allowed;

(ii) A declaration shall issue to the effect that the Court fee payable at the rate of 10% ad valorem in respect of proceedings for grant of Probate or Letters of Administration, in cases in which the amount or market value of the subject matter exceeds Rupees three lakhs on that part of the amount or value which exceeds Rupees three lakhs under Entry 6 of Schedule I to the Act, is inclusive of the Court fee already paid under Entry 11(1) of Schedule-I to the Act; and

(iii) The respondents are directed to collect the Court fee only in accordance with the above declaration."

It would follow from the above that a petition for probate or letters of administration is filed on payment of the fixed court fee prescribed under Article 11(I) of Schedule II to the KCFSV Act. If caveat is entered or if the petition is sought to be contested, it shall be treated as a testamentary suit, in terms of Section 295 of the Indian Succession Act, 1925 and court fee as prescribed under Article 11(I)(3) becomes payable. If it is the petitioner's contention that he is exempted from paying the court fee as may be determined in terms of Article 1 of Schedule I to the KCFSV Act, and that the views expressed in *Saraswati Devi Prathap*'s case would require him to pay the duty or fee payable on the probate or letters of administration under Article 6 of Schedule I to the KCFSV Act, is not tenable. It is only if the probate or letters of administration are granted that the question of payment of the fee prescribed under Article 6 of Schedule I to the Act arises. But it may be, in the light of the conclusion drawn in *Saraswati Devi Prathap*, that if the petitioner is called upon to pay the fee on the probate or letters of administration, on the grant of the same, the court fee paid under Article 11(I) of Schedule II would be taken into account in computing the fee payable under Article 6 of Schedule I to the Act. If the court fee paid under Article 1 of Schedule I to the Act is greater than the fee prescribed under Article 6 of Schedule I to the KCFSV Act, the petitioner would be entitled to the court fee so paid, as costs to be imposed on the respondent or the defendant, in the contentious suit.

Hence the writ petition is misconceived and untenable and is hereby rejected.