

(1989) 11 KAR CK 0039

In the Karnataka High Court

Case No : Writ Petition No's. 20757 and 20758 of 1986

Saraswathi Devi Prathap

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 16-11-1989

Acts Referred:

Constitution of India, 1950 — Article 14

Mysore Court-fees and Suits Valuation Act, 1958 — Section 52, 53

Citation : (1990) ILR (Kar) 289

Hon'ble Judges : Rama Jois, J;Rajendra Babu, J

Bench : Division Bench

Advocate : S.P. Shankar and N.S. Prasad, for the Appellant; M.R. Achar, Government Advocate, for the Respondent

Judgement

Rama Jois, J.—In these two petitions, the petitioners have questioned the constitutional validity of the provisions of the Karnataka Court Fees and Suits Valuation Act 1958 ("the Act" for short) in so far it relates to the prescription of Court fees on petitions seeking probate or letters of administration.

2. The facts of the case, in brief, are as follow:

(i) The husband of the petitioner in W.P.No. 20757/ 1986 died in March 1986. She has sought for probate of the last will and testament left by her husband in separate proceedings under the Indian Succession Act.

(ii) The petitioners in W.P.No. 20758/1986 are joint executors of a will executed by one late Rajoo Naidu. They proposed to file an application for grant of Probate of the will, in the City Civil Court.

In both the petitions, the petitioners have challenged the constitutional validity of the provision prescribing the Court fee payable on such applications.

3. The Court fee payable on the petition is regulated by Article 11(1) of Schedule-II and Article 6 of Schedule-I of the Act. Article 11(1) reads:

Article

Particulars

Proper fee

11(1)(i)

Application for probate or letters of administration or for revocation thereof to have effect throughout India

Twenty-five rupees

(ii)

Application for probate or letters of administration or for revocation thereof not falling under clause (i) or an application for a Certificate under Part X of the Indian Succession Act, 1925 or Bombay Regulation VIII of 1927-

(1) if the amount or value of the estate does not exceed Rs.2,000.

Five Rupees

(2) If the value exceeds Rs.2,000 but does not exceed Rs.10,000.

Ten Rupees

(3) If the amount or value exceeds ten thousand rupees

Twenty Rupees

Provided that if a caveat is entered and the application is registered as a suit, one half of the scale of fee prescribed in Article I of Schedule I on the market value of the estate less the fee already paid on the application shall be levied."

According to the above provision, in the first instance fixed Court fee as specified should be paid. If however the matter is contested and is registered as a suit, half the ad valorem Court fee prescribed in Article 1 on the market value of the estate less the fee already paid on the application, becomes leviable. But after the probate or letters of administration is granted and before its issue, Section 53 read with Article 6 requires the payment of further Court fee. The relevant provision reads:

"53. LEVY OF FEE - (1) The fee chargeable for the grant of probate or letters of administration shall comprise -

A fee at the rate or rates prescribed in Article 6 of Schedule I, computed -

(a) where the application is made within one year of the date of death of the deceased, on the market value of the estate on such date; or

(b) where the application is made after the expiry of one year from such date, on the market value of the estate on the date of the application;

Provided that property held in trust not beneficially or with general power to confer a beneficial interest shall not be liable to any fee under this chapter.

XXX XXX XXX

SCHEDULE-I

Article

Particulars

Proper fee

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."

According to the above provision, in all cases where the amount or market value of the property in respect of which the grant of probate or letters of administration is sought, exceeds one thousand Rupees but does not exceed three lakhs Rupees the party concerned has to pay five per cent as Court fee, but in cases where the amount or market value of the property exceeds three lakhs of Rupees, the party concerned is required to pay ten per cent as Court fee on that part of the amount or value which is in excess of three lakhs of Rupees. The petitioner points out that in cases in which the amount or market value of the properties in respect of which probate or letters of administration is issued,

exceeds three lakhs rupees, if the Court fee payable under Article 11(1) and on that part of the value which exceeds three lakhs under Article 6 are taken together, it works out to 15%. The petitioner has pleaded that the provision in so far it relates to the latter categories of cases is concerned, the same is unconstitutional. The learned Counsel for the petitioners urged the following contentions:

(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 ad valorem, 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.

4. I proceed to consider the first and the second contentions together. In support of the first contention, the learned Counsel relied on Entries 87 and 88 of the Union List and Entries 47 and 48 of the State List. They read:

UNION LIST

"87. Estate duty in respect of property other than agricultural land.

88. Duties in respect of succession to property other than agricultural land.

STATE LIST

47. Duties in respect of succession to agricultural land.

48. Estate duty in respect of agricultural land."

The learned Counsel submitted that the levy of Court fee on proceedings for grant of probate or letters of administration is in the nature of an estate duty or duty in respect of succession of property other than agricultural land and therefore squarely falls within the competence of the Parliament in view of Entries 87 and 88 of List-I. Further, as the properties with reference to which the petitioners are seeking probate are all urban properties even on the basis that the Court fee is in the nature of duty in respect of succession or estate duty, it is beyond the competence of the State Legislature in view of Entries 47 and 48 of the State List as that legislative power of the State is available only in respect of agricultural lands and not urban properties.

5. The contention of the petitioners, in my opinion, is totally misconceived. The relevant entry is Entry 3 of State List, which reads:

"3. Officers and servants of the High Court; procedure in rent and revenue Courts; fees taken in all Courts except the Supreme Court."

Under the above Entry it is competent for the State Legislature to regulate the payment of fee in all the Courts except the Supreme Court. The levy of fee under the Act is only fee to be taken in various Courts within the State including the High Court. Therefore, the Act is within the competence of the State Legislature.

6. There is also no substance in the second contention of the petitioners that the fee payable under Article-6 is in respect of any ministerial act. A combined reading of Article 6 and 11(1) would show that in respect of applications for

grant of probate or letters of administration, in the first instance a fixed Court fee is payable at the rate prescribed and when contested it should be treated as suit and 50% of the ad valorem Court fee payable in respect of suits of similar value minus the fixed Court fee already paid, has to be paid and ultimately when the application is granted, before issuing the probate or letters of administration, the balance of the Court fee has got to be paid. Therefore, the contention of the petitioners that the levy is for ministerial act and not a fee payable into the Court is untenable.

7. As far as the last contention is concerned, the learned Counsel pointed out that while generally the maximum Court fee payable in respect of suits is 10% ad valorem on the market value of the subject matter computed in the manner provided in the Act, in respect of probate and letters of administration Issued, after contest, in respect of an amount or property, the market value of which exceeds three lakhs rupees, the Court fee payable on that part of the value which exceeds Rupees three lakhs works out to 15% and therefore to that extent it is violative of Article 14 of the Constitution of India. In support of this contention, the learned Counsel relied on the Judgment of the Supreme Court in ASHWATHANARAYANA SHETTY v. STATE OF KARNATAKA ILR 1989 KAR 1. The Judgment of the Supreme Court aforesaid was a common Judgment in number of connected appeals. One such appeal was, by the State of Maharashtra against the Judgment of the Bombay High Court striking down the provision of the Bombay Court Fees Act in so far it related to the Court fee on proceedings for grant of probate and letters of administration. According to the provisions of the Bombay Act, while the maximum Court fee payable was Rs. 15,000-00 on suits, as far as proceedings for grant of probate and letters of administration was concerned, it was 10% ad valorem. The Bombay High Court held that when proceedings for grant of probate and letters of administration were under the provisions of the Bombay Act, treated as suits, there was no justification for charging unlimited Court fee at the rate of 10% ad valorem on such matters when a maximum Court fee of Rs. 15,000-00 was fixed for suits. The said decision of the Bombay High Court was confirmed by the Supreme Court. The relevant portion of the Judgment reads:

"36. Re: Contention (d):

In the appeal of the State of Maharashtra arising out of the Bombay Court Fees Act 1959, the High Court has struck down the impugned provisions on the ground that the levy of Court fee on proceedings for grant of Probate and Letters of Administration ad valorem without the upper limit prescribed for all other litigants - the Court fee in the present case amounts to Rs. 6,14,814/- is discriminatory. The High Court has also held that, there is no intelligible or rational differentia between the two class of litigations and that having regard to the fact that what is recovered is a fee, the purported classification has no rational nexus to the object. The argument was noticed by the learned Single Judge thus:

"Petitioners next contend that the impugned clause discriminates as between different types of suitors and that there is no justification for this discrimination. Plaintiffs who go to Civil Courts claiming decrees are not required to pay Court-fees in excess of Rs. 15,000/- This is irrespective of the amounts claimed over and above Rs. 14 lakhs. As against this, persons claiming probates have no such relief in the form of an upper limit to fee payable."

This contention was accepted by the learned Single Judge who has upheld the appeal. Indeed, where a proceeding for grant of Probate and Letters of Administration becomes a contentious matter, it is registered as a suit and proceeded with accordingly. If in respect of all other suits of whatever nature and complexity an upper limit of Rs. 15,000/- on the Court fee is fixed there is no logical justification for singling out this proceeding for an ad valorem impost without the benefit of some upper limit prescribed by the same statute respecting all other litigants. Neither before the High Court - nor before us here - was the impost sought to be supported or justified as something other than a mere fee, levy of which is otherwise within the State's power or as separate "fee" for another distinct source. It is purported to be collected and sought to be justified only as Court fee and nothing else.

The discrimination brought about by the statute, in our opinion, fails to pass the constitutional muster as rightly pointed out by the High Court. The High Court in our opinion rightly, held:

"There is no answer to this contention, except that the legislature has not thought it fit to grant relief to the seekers of probates, whereas plaintiffs in Civil Suits were thought deserving of such an upper limit. The discrimination is a piece of class legislation prohibited by the guarantee of equal protection of laws embodied in Article 14 of the Constitution. On this ground also Item 10 cannot be sustained."

We approve this reasoning of the High Court and the decision of the High Court is sustained on this ground alone. In view of this any other ground urged against the constitutionality of the levy is unnecessary to be examined.

Contention (d) is accordingly held an answer against the appellant and the appeals preferred by the State of Maharashtra are liable to be and are hereby dismissed".

The ratio of the above decision is that when proceedings for grant of Probate and Letters of Administration were treated by the Bombay Act as suits, prescription of ad valorem Court fee at the rate 10% of the value of the estate on such proceedings compared to the maximum Court fee of Rs. 15,000/- prescribed for suits was violative of Article 14. The additional plea of the petitioner raised on the basis of the above Judgment rendered during the pendency of this petition reads:-

"3. In the present case, the Court fee payable under the Karnataka Act for suits

in general is 10% under Article 1 read with Section 20. However, for probate proceedings a Court fee at 15% is made payable in that under proviso to Sub-clause (1) of Article 11 of Schedule II, 5% Court fee is to be paid when the probate is contested and over and above this when the probate is to be engrossed on Court fee stamp papers the applicant is required to pay ad valorem Court fee of 5% if the value of the estate is below Rs. 3 lakhs and in excess thereof at 10%. This amounts to double levy which is impermissible. In view of the law declared by the Hon"ble Supreme Court the levy of 15% is arbitrary and unconstitutional and is liable to be struck down."

"4. Alternatively, it is submitted that either Article 6 or Article 11(1) is to be read down so as to bring uniformity in the matter of levy of Court fee for even in probate proceedings."

Learned Counsel submits that the Act treats application for grant of probate or letters of administration when contested as suits, and therefore when the Act fixes maximum Court fee at the rate of 10% ad valorem for the suits, irrespective of the value of the subject matter, prescription of Court fee at the rate of 15% ad valorem for proceedings for grant of probate or letters of administration in cases where the value of the estate exceeds three lakhs Rupees, the provision should be struck down in view of the ratio of the decision of the Supreme Court or it should be so interpreted that it does not come into conflict with Article 14.

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(1) 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 values 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 60% 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(1) 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(1), 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(1) 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(1) 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. It is a well recognised rule of construction that if two interpretations of a provision are plausible, the one which does not come into conflict with the provisions of the Constitution, has to be accepted. In this behalf, what the Supreme Court has said in the case of K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, is apposite. It reads:

"17.

xxx xxx xxx It is a well settled rule of interpretation that the Court should as far as possible avoid that construction which attributes irrationality to the legislature.

xxx xxx xxx The Court must obviously prefer a construction which renders the statutory provision constitutionally valid rather than that which makes it void."

(Underlining by me)

Applying the above principle, I take the view that the second part of Entry-6 must be interpreted as providing for payment of 10% Court fee inclusive of the amount already paid under Entry 11(1) and not in addition to, and if that is so, the Court fee payable even in such proceedings would be 10% only.

10. In the result, I make the following order:

(i) The 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 Rs. 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;

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

Rajendra Babu, J

1. I have carefully gone through the order prepared by my learned brother M. Rama Jois, J. The facts leading to the petitions are fully set out therein and I need not repeat the same. While I agree with the reasoning adopted and conclusions reached by him on the questions regarding the legislative competence of the State to levy Court fee for grant of probate or letters of

administration and such fee is not in the nature of tax, with very great respect to him I regret I cannot agree with the reasoning adopted by him in holding that there is a drafting defect in Article 6 of Schedule I and Article 11(1) Schedule II of the Karnataka Court Fees & Suits Valuation Act, 1958 (hereinafter referred to as the Act) which deal with applications for grant of probates or letters of administration, which should be treated similar to suits and read down to interpret that ad valorem Court fee at the rate of 10 per cent is required to be paid thereon to uphold the vires thereof.

2. I shall now analyse the various provisions of the Act in relation to probate and allied matters, in order to understand the scheme of levy of fee before appreciating the contentions raised by the parties. In the Act three sets of Court fee are leviable in probate proceedings. Firstly, Article 11(1) of Second Schedule to the Act refers to payment of Court fee on an application for probates and letters of administration or revocation thereof and it prescribes a nominal Court fee. Secondly, proviso to Article 11(1) of Second Schedule provides that if caveat is entered and the application is registered as a suit (in conformity with Section 295 of the Succession Act) 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 First Schedule to the Act is attracted. The Article provides for two graded scales of Court fee: one payable up to Rs. 3 lakhs at five per centum and another where the value of the property in respect of which grant of probate or letters of administration was sought exceeds Rs 3 lakhs at ten per centum. In the event of a probate or letters of administration was not granted the question of payment of fee under Article 6 of First Schedule to the Act does not arise. If the grant of probate or letters of administration has been made in respect of whole of the property of the deceased, and Court fee thereon has been paid, no fee shall be payable when a like grant is made in respect of whole or any part of the property of the same deceased. On the revocation of the probate and in the event of grant of a fresh probate, no fresh fee need be paid as provided in Section 55 of the Act. On the Memorandum of appeal against an order in any proceeding under the Indian Succession Act, only half the fee prescribed in Article 1 on the amount or value of the subject matter need be paid. Whereas in an appeal arising out of a suit Court fee will have to be paid at the same rate at which it was paid in the trial Court on the subject matter of dispute. The petitioner is enabled to pay probate fee under the directions of the Court at a later date when he is not in a position to pay Court fee on probates or letters of administration proceedings. Thus, there is a discernible distinction between the proceedings arising out of an application for grant off probates or letters of administration and a suit arising under any other law. These aspects make it clear that under the Act, the proceedings arising in succession matters are treated as a separate class or category of cases possibly because the fee that has to be paid by the applicant comes from the estate of the deceased or possibly because of the nature and

complexities of the matters involved in such cases. It is said that the provisions contained in Article 11(1) of Schedule II to the Act do not make any difference in payment of fee between those estates the value of which is less than Rs. 3 lakhs and those the value of which exceeds Rs. 3 lakhs and there is a tacit recognition of the same. It is trite saying that in matters of levy and collection of fee the Legislature has freedom to choose subject and objects of levy, rate and also at what stages the same should be collected at what rate. Hence when the Legislature levies at two different stages the fee, but at one stage if the rate of fee is the same, it does not mean the fee cannot be collected at later stage at a higher rate from an economically superior class. To split a unitary scheme in an enactment into different compartments and thereafter read into it an unconstitutionality on the ground of discrimination is impermissible and entirely opposed to all known canons of interpretation.

3. It is only when the amount or value of the property in respect of which probates or letters of administration sought for exceeds Rs. 3 lakhs the contention urged at the bar gains relevancy and not in regard to property the value of which is less than Rs. 3 lakhs. The contention that just because the proviso states that if caveat is entered and the application is registered as a suit, one half of 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 shall be levied, does not follow that it does not make any classification of applications for probate on the basis of the market value of the subject matter. In my view, the provision in Article 11(1) 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 probated or letters of administration which may be termed as probate fee. Article 6 of Schedule I and Article 11(1) 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.

4. The only question that arises for consideration is whether for the purposes of

levying different rates of fee such a distinction can be made and on this aspect in the very decision in *ASWATHANARAYANA SETTY v. STATE OF KARNATAKA* on which the learned Counsel for the petitioners relied, this is what is stated while dealing with an argument coming under Article 14 of the Constitution:

"The problem is indeed a complex one not free from its own peculiar difficulties. Though other legislative measures dealing with economic regulation are not outside Article 14, it is well recognised that the State enjoys the widest latitude where measures of economic regulation are concerned. These measures for fiscal and economic regulation involve an evaluation of diverse and quite often conflicting economic criteria and adjustment and balancing of various conflicting social and economic values and interests. It is for the State to decide what economic and social policy it should pursue and what discriminations advance those social and economic policies. In view of the inherent complexity of these fiscal adjustments, Courts give a larger discretion to the legislature in the matter of its preferences of economic and social policies and effectuate the chosen system in all possible and reasonable ways. If two or more methods of adjustments of an economic measure are available, the legislative preference in favour of one of them cannot be questioned on the ground of lack of legislative wisdom or that there were better ways of adjusting the competing interests and claims. The Legislature possesses the greatest freedom in such areas. The analogy of principles of the burden of tax may not also be inapposite in dealing with validity of the distribution of the burden of a "fee" as well."

Their Lordships referred to the decision in *ITO v. N. TAKIM ROY RAYBI*, AIR 1976 SC 670 after observing that in dealing with the validity of distribution of burden of fee under the Act it would be appropriate to draw the analogy of the principle of burden of tax and stated that the mere fact that a burden of levy falls more heavily on some in the same category is not by itself a ground to render the law invalid. Again in *Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others*, a Constitution Bench of the Supreme Court reiterated this position in law in the following words:

"It is now well settled that though taxing laws are not outside Article 14, however, having regard to the wide variety of diverse economic criteria that go into the formulation of a fiscal policy, the Legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events, etc., for taxation. The tests of the vice of discrimination in a taxing law are, accordingly, less rigorous. In examining the allegations of a hostile, discriminatory treatment, what is looked into is not its phraseology, but the real effect of its provisions. A Legislature does not, as an old saying goes, have to tax everything in order to be able to tax something. If there is equality and uniformity within each group, the law would not be discriminatory. Decisions of this Court on the matter have permitted the Legislatures to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes.

But, with all this latitude, certain irreducible desiderata of equality shall govern classifications for differential treatment in taxation laws as well. The classification must be rational and based on some qualities and characteristics which are to be found in all the persons grouped together and absent in the others left out of the class. But this alone is not sufficient. Differentia must have a rational nexus with the object sought to be achieved by the law. The State, in the exercise of its Governmental power, has, of necessity, to make laws operating differently in relation to different groups or class of persons to attain certain ends and must, therefore, possess the power to distinguish and classify persons or things. It is also recognised that no precise or set formulae or doctrinaire tests or precise scientific principles of exclusion or inclusion are to be applied. The test could only be one of palpable arbitrariness applied in the context of the felt needs of the times and societal exigencies informed by experience.

Classifications based on differences in value of articles or the economic superiority of the persons of incidence are well recognised. A reasonable classification is one which includes all who are similarly situated and none who are not. In order to ascertain whether persons are similarly placed, one must look beyond the classification and to the purposes of the law."

.....

In the present case, the bases of classification cannot be said to be arbitrary or unintelligible nor as being without a rational nexus with the object of the law. A hotel where a unit of residential accommodation is priced at over Rs. 400/- per day per individual is, in the legislative wisdom, considered a class apart by virtue of the economic superiority of those who might enjoy its custom, comforts and services. This legislative assumption cannot be condemned as irrational. It is equally well recognised that judicial veto is to be exercised only in cases that leave no room for reasonable doubt. Constitutionality is presumed...."

This enunciation of law on the matter makes it clear that the Impugned provisions on the analysis made earlier cannot be attacked at all on the ground of discrimination.

5. The petitioners in these petitions armed with the decision of the Supreme Court in Aswathanarayana Shetty'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 linch pin 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.

8. Although I have considered this point, a perusal of the petition averments even after amendment will disclose that sufficient foundation in the nature of a plea has not been laid to contest the constitutionality of the impugned provisions as violative of equality clause of the Constitution and therefore in my view it is wholly unnecessary for me to examine the question raised before the Court in the form in which it is now sought to be advanced. Therefore, these petitions are liable to be dismissed.

Order of the Court

Rama Jois, J.

On the plea of the petitioners regarding the constitutional validity and/or interpretation of Entry 6 of Schedule I to the Karnataka Court Fees and Suits Valuation Act ("the Act" for short), we have differed in our conclusions. The two questions of law on which we have differed are:

(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?

2. Following the procedure adopted in the decision in *SRINAND TALKIES v. STATE*

OF KARNATAKA, ILR 1984(2) KAR 1231 @ 1279 we refer these cases for the opinion of another Hon"ble Judge of this Court on the aforesaid two questions of law.

ORDER

Chandrakantaraj Urs, J.

I have heard Mr. Achar, learned Government Advocate, Mr. S.P. Shankar and Mr. Prasad for the parties and I am grateful for the assistance rendered by them.

2. This matter has come up before me by the order of the Hon"ble Chief Justice in the light of the difference of opinion expressed by the learned Judges, who constituted the Division Bench while disposing Writ Petition Nos. 20757 and 20758/1986. In the light of the difference of opinion, the learned Judges of the Division Bench have formulated two questions for my consideration and decision and they are as follows:

"(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-I 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-I 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?

3. Though Rama Jois, J, has summarised the facts of the case, I feel it necessary to reiterate briefly the case of the petitioners so that such narration may add clarity to what I have to say in answering the questions referred to me.

4. Petitioner in the first of the petitions to the widow of one M.V. Prathap - since deceased. The said Prathap left behind him a Will, of which the petitioners in the second of the petitions, namely, Smt. A.M. Rajoo Naidu and Mr. T.S. Michael are the executors. They presented the Writ Petitions seeking relief inter alia that this Court should strike down Article 6 in Schedule I of Karnataka Court Fees and Suits Valuation Act, 1958 (the Court Fees Act for short) as being beyond the legislative competence of the State of Karnataka and therefore void and unenforceable (prayer in Writ Petition No. 20757/86) and in Writ Petition No. 20758/86, in addition to striking down Article 6 of Schedule-I of the Karnataka Court Fees and Suits Valuation Act, they have prayed for quashing of Article 1 of the Karnataka Court Fees and Suits Valuation Act. However, in the interim relief prayed for, it has been stated that the City Civil Court should not insist upon payment of Court fee under Articles 1 and 6 of Schedule-I of the Karnataka Court Fees and Suits Valuation Act. Then again, while advancing the arguments before

the Division Bench, as noticed by Rama Jois, J, in the course of his order, the following contentions appear to have been canvassed:-

(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 ad valorem, 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 exceeds Rupees three lakhs, on that part of the value which exceeds Rupees three lakhs is violative of Article 14 of the Constitution of India.

5. In so far as the question of legislative competence is concerned, I need not go beyond what the Supreme Court has already stated in the case of P.M. ASHWATHANARAYANA SETTY v. STATE OF KARNATAKA while considering the challenge made to the Karnataka Court Fees and Suits Valuation Act as being ultra vires. The Court Fees Act of the State of Rajasthan as well as Maharashtra also fell for consideration and they were disposed of by the common Judgment rendered by the Supreme Court in the above cited decision. But in the light of certain contentions noticed by the Division Bench, I feel it my duty to point out certain distinctions that patently exist between a tax, a fee and the Court fee, having regard to the provisions contained in the Constitution.

6. Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. In other words, all fiscal imposts are covered by that entry as it falls in Chapter dealing with finance. In the scheme of our Constitution, the Founding Fathers chose to distribute the legislative powers between the Union Government and the Governments of States of which the Union is comprised. List-I of Schedule VII to the Constitution at Entry-96 provides that fees in respect of any of the matters in that list, but not including fees taken in any Court may be levied by the Union Legislature. Similarly, in List-II pertaining to the States, at Entry-66 it is provided that fees in respect of any of the matters in that list, but not including fees taken in any Court, may be levied by the State Legislature. In List-II pertaining to the States and referred to as the State List, Entry-3 provides that Officers and servants of the High Court, procedure in rent and revenue Courts; fees taken in all Courts except the Supreme Court, may be levied by the State Legislature. Therefore, the reference made to the three Entries in the two lists, clearly establishes that there is a distinction between the fee simpliciter provided for any purpose in respect of the matters covered by List-I or List-II and Court fee. Therefore, what is normally

applicable to validity of fees with reference to the service rendered by the State to the person, who is called upon to pay the fee need not necessarily be applied in determining the same question in regard to Court Fees, and the facts stated above also put beyond the pale of doubt whatsoever that the State Legislature alone has the competence to levy Court fees except in regard to Court fee in Supreme Court. On this question, the Division Bench is of unanimous opinion that the State has legislative competence. Therefore, contentions-1 and 2 have been repelled by the Division Bench and it is only in regard to contention 3 that there is a difference of opinion.

7. Divergence occurs on account of the fact that the petitioners before the Division Bench contended that ad valorem Court fee of 10% of the value of the estate, where the value of the estate exceeds Rs. 3 lakhs was collected in addition to half the ad valorem fee paid in contested probate and letters matters having regard to the proviso to Clause (L) of Article 11 of Schedule-II to the Court Fees Act.

8. One of the learned Judges has taken the view that Court fee payable 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 Rs. 3 lakhs on that part of the amount or value, which exceeds Rs. 3 lakhs under Article 6 of Schedule-I to the Court Fees Act, is inclusive of the Court fee already paid under proviso to Entry 11(L) of Schedule-I to the Act. While the other learned Judge in his separate Judgment while unequivocally concurring in regard to the legislative competence, has however, found it proper to hold that the Legislature in fiscal measures may rightly classify the litigants and impose levy on them in such manner so that they pay different rates of Court fee as provided under Article 6 of the I Schedule i.e., at the rate of 5% ad valorem in respect of estates valued at Rs. 3 lakhs and less and at 10% ad valorem if the value of the estate is over Rs. 3 lakhs. In that view, he has not chosen to express any opinion as to whether Court fee is payable both under Article 6 of Schedule-I and what is prescribed by the proviso to Clause (L) of Article 11 of the II Schedule.

It is in this background, I have to express my view on the questions referred to me.

9. I feel compelled to refer to the scheme of the Act with particular reference to probate matters. The Court Fees Act, 1958 was enacted by the Karnataka Legislature having regard to the historical compulsions subsequent to the re-organization of the States. Areas comprised in the erstwhile princely State of Mysore, areas of the princely State of Hyderabad and areas of the then State of Madras and Bombay were integrated to form Karnataka. Therefore, to consolidate the different provisions of law then applicable the Court Fees Act was passed by the Karnataka Legislature, Section 4 provides for levy of fee in Courts and public offices and may be taken as the general charging Section and it occurs in Chapter-II. In Chapter-III determination of Court fee is provided for in Sections 10 to 19. In Chapter-IV manner of computation of Court fee is provided

for in Sections 20 to 49 and they relate to suits of various types enumerated in that Chapter. Similarly, Sections 50 and 51 provide for valuation of suits, which is not provided in the preceding Sections in Chapter-IV. Section 51 of the Act provides for procedure where objection is taken on appeal or revision that a suit or appeal was not properly valued for jurisdictional purposes. Chapter-VI specifically provides for matters concerning Certificates of administration and grant of probate and letters of administration. Section 52 does no more than prescribe the form in which an application for grant of Probate or Letters must be accompanied with in regard to the value of estate in respect of which probate or letters is sought. The important Section in Chapter V is Section 53, which provides for levy of fee and it reads as follows:

"53. Levy of fee - (1) The fee chargeable for the grant of probate or letters of administration shall comprise -

A fee at the rate or rates prescribed in Article 6 of Schedule I, computed -

(a) where the application is made within one year of the date of death of the deceased, on the market value of the estate on such date; or

(b) where the application is made after the expiry of one year from such date, on the market value of the estate on the date of the application:

Provided that property held in trust not beneficially or with general power to confer a beneficial interest shall not be liable to any fee under this Chapter.

Explanation.....

....."

(2) For the purpose of the computation of fee.

(a) the value of the items mentioned in Annexure-B to Part I of Schedule III shall be deducted from the value of the estate:

Provided that, when an application is made for probate or letters of administration in respect of part only of an estate, no debt, no expenses connected with any funeral rites or ceremonies and no mortgage encumbrance on any part of the estate other than that in respect of which the application is made shall be deducted:

Provided further that when, after the grant of a certificate under Part X of the Indian Succession Act, 1925 (Central Act XXXIX of 1925) or under Bombay Regulation VIII of 1827 in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of the fee paid in respect of the former grant.

(b) the power of appointment which the deceased had over a property or which was created under a will shall be taken into account, the value being taken to be the value of the property forming the subject matter of the power."

10. For purpose of answering the questions referred a detailed examination of the Proviso in the Explanation may not be relevant for my purpose. The important thing to notice is a fee at the rate prescribed in Article 6 of Schedule-I shall be computed on the market value of the estate as on the date of the death of the person in respect of whose estate letters of administration or probate of his or her will is sought if the application is made after more than one year from the date of death, It shall be computed on the market value as on the date of the application if the application is made before lapse of one year after the death of the testator or the deceased in respect of whose estate letters are sought on the market value as on the date of death. In other words, the impost of Court fee on grant of probate or letters if granted is expressly covered only by Section 53 read with Article 6 of Schedule-I.

11. I may then refer to the general scheme of Chapter-VI, Section 54 provides, grant of probate or letters of administration may not be delayed even if the reference made to the Deputy Commissioner regarding valuation of immovable property is not received by the Court in time. Section 55 provides for cases, where grant is in respect of the part or whole of the estate. Section 56 provides for an Inquiry to be caused to be made by the Deputy Commissioner in ascertaining the valuation. Section 57 provides for Court adjudicating on the valuation if the Deputy Commissioner disputes the valuation. Section 58 provides for manner in which the Court fee may be recovered by the State when the estate has been valued too low or how the applicant may recover the excess Court fee paid if the valuation has been excessive. Section 59 provides for security being furnished by the applicant to whom letters or probate has been issued. Section 60 provides for relief when too high fee has been paid. Section 61 provides for recovery of penalties and other connected matters. Section 62 provides for the powers of the Chief Controlling Revenue Authority in the State in regard to matters in that Chapter, namely Chapter-VI.

12. That Schedules are part of the Act does not require citation of any decided authority. The provisions contained in the Schedule must have the same force as the provisions contained in the main body of the enactment of which it or they form part. They should be given effect to as if it is part of the Act. I must in this context, point out the significant omission of any reference to Schedule-II in Chapter-VI. Reference made is only to Schedule-III and Schedule-I and not to Schedule-II.

13. While I am at it, it is useful to refer to a particular provision, namely Section 379 of the Indian Succession Act, to which my attention was drawn by the learned Counsel Sri Prasad appearing for one of the Petitioners in one of the Petitions. It reads as follows:

"379. Mode of collecting Court fees on certificates - (1) Every application for a certificate or for the extension of a certificate shall be accompanied by a deposit of a sum equal to the fee payable under the Court Fees Act, 1870, in respect of the certificate or extension applied for.

(2) If the application is allowed, the sum deposited by the applicant shall be expended, under the direction of the Judge, in the purchase of the stamp to be used for denoting the fee payable as aforesaid,

(3) Any sum received under Sub-section (1) and not expended under Sub-section (2) shall be refunded to the person who deposited it."

It is most unfortunate that no suitable amendment has been made to this provision after this Country became independent and this Country adopted its own Constitution on 26th January, 1950. The reference to 1870 Act, in that Section is no longer of any relevance as Court fee now should be paid in accordance with the enactments of the various States in the Union. Question of there being a Central enactment for the purpose of grant of probate does not appear to be a necessity as Supreme Court is not conferred with original jurisdiction to grant probate or letters. Therefore, what is contained in Section 379 may be ignored by me till suitable amendment is made bringing it in conformity with what in reality exists to day. However, a person or persons may seek grant of probate or letters only in terms of the Indian Succession Act and not outside that Act. To what extent, the provisions of the Indian Succession Act shall always have relevance.

14. I had occasion to consider extensively certain questions relating to payment of Court fees in probate matters in the case of A.G. Hariharan Vs. A.G. Singaravelu and Others, and I think there is something useful said in the decision by me which has definite bearing on one of the contentions raised before the Division Bench. Unfortunately, it was not brought to the notice of the Division Bench.

15. A careful understanding of the scheme of the Act as set out, when there is a significant omission to refer to Schedule-II and particularly Clause (L) of Article 11 of the Schedule-II 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."

(Underlining is mine)

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 Shetty'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*.

21. In the view I have taken in answering question 1 no answer is called for on question 2.

22. The matter may be posted before the Division Bench for final orders in the light of the answer given by me to the questions referred.

ORDER

Rama Jois, J.—In these petitions, in view of the divergent opinion between us, we referred the following two questions of law for the opinion of another Hon'ble Judge of this Court. The two questions are:

"(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-I 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-I 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 matter was placed before the Hon"ble Mr. Justice M.P. Chandrakantaraj Urs. He has furnished his opinion.

2. 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.