
(1943) 06 BOM CK 0012
In the Bombay High Court

Bai Madhukanta

APPELLANT

Vs

Kantilal Mohanlal

RESPONDENT

Date of Decision : 22-06-1943

Acts Referred:

Citation : AIR 1944 Bom 58 : (1943) 45 BOMLR 1052

Hon'ble Judges : Lokur, J

Bench : Single Bench

Judgement

Lokur, J.—This is an application in revision against an order passed by the First Class Subordinate Judge of Ahmedabad calling upon the petitioner to pay court-fees on the amount of her share before she could recover its possession from the receiver. The plaintiff Kantilal filed suit No. 883 of 1930 for partition and obtained a preliminary decree. When cross appeals were pending against that decree in this Court, the dispute was referred to arbitrators and ultimately a decree for partition was passed in terms of the award given by them. By that decree the plaintiff and the defendants were given specific shares in the property in suit. During the pendency of the litigation a receiver had been appointed, and after the award decree the plaintiff recovered the share allotted to him from the receiver. The decree was duly stamped as a deed of partition and registered. But when the petitioner, who was defendant No. 2 in the suit, made an application to be put into possession of her share, the learned First Class Subordinate Judge ordered that on payment of the requisite court-fees she should be handed over her share by the receivers within fifteen days of payment of stamp. It is now contended on her behalf that as the partition decree was duly stamped as a deed of partition and registered and as there was no provision in the decree for the payment of court-fees by any of the defendants, the learned First Class Subordinate Judge acted without jurisdiction in calling upon the petitioner to pay court-fees on the amount of her share. I think this contention must be upheld. In *Nawab Mir Sadrudin v. Nawab Nurudin* ILR (1904) 29 Bom. 79 this question arose in the stage of the execution of a decree for partition when one of the defendants asked to have his share separated and put into his possession. It was

held that he could not be called upon to pay court-fees when there was no such condition in the decree itself. It is true that in *Shivmurteppa v. Virappa* ILR (1899) 24 Bom. 128 there is an observation that (p. 130) "a defendant claiming a share on partition is, qua that claim, in the position of a plaintiff and may be called on to pay court-fees on the value of his claim."

2. That case arose before the present Stamp Act (II of 1899) was passed. But now as held in *Venkatasubbamma v. Ramanadhayya* ILR (1932) Mad. 975 when, in a suit for partition, a defendant asks for his share to be given, the Court can order his share to be separated and given, and the right of the Crown to some revenue on the claim of the defendant is satisfied by the direction in the Indian Stamp Act that the final decree should be stamped as an instrument of partition and except that stamp duty no other duty as court-fee is payable by the defendant in such a suit. The same view was taken in *Maqbul Ahmad v. Mst. Afzal-ul-Nisa* ILR (1935) 16 Lah. 901. The principle of these rulings was followed by a division bench of this Court (to which I was a party) in *Shriniwas Vishnu Naik v. Ramabai* (1942) First Appeal No. 311 of 1940, decided by N.J. Wadia and Lokur JJ., on September 2, 1942 (Unrep.). In that case in a suit for partition the trial Court had ordered that defendants Nos. 1, 2 and 3 should pay court-fees in execution proceedings in respect of the shares allotted to them, and it was held that it was not necessary to require them to pay court-fees in execution proceedings in respect of their shares. The petitioner is, therefore, entitled to recover possession of her share from the receiver in accordance with the terms of the decree and the learned Judge was wrong in calling upon her to pay any additional court-fees.

3. The rule is, therefore, made absolute, and the receiver is directed to hand over the petitioner's share to her. I pass no order about costs.