
(1976) 07 PAT CK 0012
In the Patna High Court
Case No : Civil Revision No. 775 of 1973

Bharat Das

APPELLANT

Vs

Kapildeo Prasad Gupta and Others

RESPONDENT

Date of Decision : 12-07-1976

Acts Referred:

Court Fees Act, 1870 — Article 1

Citation : AIR 1977 Patna 3

Hon'ble Judges : Hari Lal Agrawal, J

Bench : Single Bench

Advocate : Parmanand Sharan Sinha and Naresh Kumar Sinha, for the Appellant; K.K. Sinha and Mahendra Prasad Sinha for Opposite Party No. 5, for the Respondent

Final Decision : Dismissed

Judgement

Hari Lal Agrawal, J.—In this application on be-half of the defendant second party, the question that arises for consideration is as to whether the order of the trial court holding that the petitioner cannot be permitted to defend the suit of the plaintiffs-opposite first party for partition with respect to some of the properties on the plea that the same were not the joint family properties, but were his exclusive properties, unless he paid ad valorem court-fee thereon, can be sustained.

2. The short facts of the case are as follows :

The plaintiffs opposite first party instituted a suit for partition of the suit properties claiming one-seventh share therein on the allegations that the plaintiffs and defendants first party formed a joint Hindu Mitakshara family and defendant No. 1 was the Karta of the same. Plaintiffs further stated that defendant No. 1 acquired some agricultural lands (item No. 3, Schedule III of the plaint) jointly with defendants second party in equal share.

The contesting defendants in their written statement seem to have almost

supported the case of the plaintiffs for partition and stated that in case of partition, a separate patti of each of the members of the defendants first party may also be carved out.

The stand of the petitioner (defendant No. 7) with respect to the property of Schedule III however was that the property acquired in the name of defendant No. 6 was not the joint family property of the plaintiffs, rather defendant No. 6 was only a benamidar of Ful Kumari Devi, his wife, with respect to certain other properties, his case was that they were the exclusive properties of the aforesaid Ful Kumari Devi and some other plots were his own exclusive properties and in his possession. The petitioner challenged the maintainability of the plaintiffs' suit on only a fixed court-fee and made an application for directing them to pay ad valorem court-fee.

3. By the impugned order, the learned Additional Subordinate Judge held that the suit for partition on payment of a fixed court-fee only was maintainable and the plaintiffs were not required to pay ad valorem court-fee. He has, however, taken a view that inasmuch as the petitioner had set up a title in his own self in some of the properties in suit, "the same amounted to a counter claim in the nature of a cross action and, therefore, he was liable to pay ad valorem court-fee on the said claim." The petitioner has, therefore, come to this Court against this order.

4. Mr. Parmanand Sharan Sinha appearing for the petitioner contended that inasmuch as the petitioner had not claimed any relief by way of counter claim, but his case was only by way of a defence to the claim of the plaintiffs for partition, the learned Subordinate Judge has committed an apparent error of jurisdiction.

5. Order 8, Rule 2 of the CPC provides that "the defendant must raise by his pleading all matters which show the suit not to be maintainable..... and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise.....". To resist a suit for partition, one of the possible defences of a defendant in a given case may be to state that the properties are not liable for partition for one or the other reason. The Court below has, therefore, acted with material irregularity in exercise of its jurisdiction in holding that raising of such a plea by the petitioner was in the nature of a counter claim or a cross claim which called for the payment of ad valorem court-fee by him.

6. A Bench of this Court in the case of Pramada Prasad Mukherjee Vs. Sagarmal Agarwalla and Others, was considering a claim of a defendant in the nature of his defence to the plaintiff's suit claiming a sum of Rs. 55,000-00 on the basis of certain agreement. One of the pleas taken by the defendant was that should the Court hold that the agreement in question was vitiated, he was entitled to restitution of such benefits which the plaintiff might have received under the contract, and he had specified the various items of the claim. The trial Court had directed the defendant to pay a court-fee on the amount on his specific claim on the ground that it was in the nature of a legal or equitable set-off. It was

contended in the High Court on his behalf that his claim was in the nature of a defence against avoidance of the plaintiff's claim, and not in the nature of a counter claim or set off. Accepting this contention, it was held that the said plea of the defendant was really a claim in the nature of a defence and no court-fee was leviable.

A case more near in point is of the Madras High Court in *Pydipally Jogarao v. Pydipalli Venkatarao* AIR 1949 Mad 471. There in a suit for partition, defendant No. 2 had pleaded in his written statement that some of the family properties were purchased benami by the plaintiff in the names of defendants 4 to 11, with a view to defeat the rights of the members of the family. A prayer was made for bringing the properties into the common hotchpot in which his share would be one-third. The trial Court had demanded payment of court-fee on the one-third share of the defendant No. 2 on the footing that his written statement impliedly contained a prayer for a declaration and partition. It was held that the defence was not in the nature of a counter claim within the meaning of Schedule I, Article 1 of the Court-Fees Act and the order was improper.

7. I find myself in respectful agreement with the view of the Madras High Court and would hold that the order of the learned Additional Subordinate Judge directing the petitioner to pay "requisite court-fee" on his written statement is improper. There is no provision in the Court-Fees Act which requires payment of court-fee in respect of such claim by a defendant in a partition suit.

8. I would, accordingly, allow this application and set aside the direction of the learned Additional Subordinate Judge contained in the impugned order to pay ad valorem court-fee by the petitioner. It is, however, made clear that the other matters decided by the learned Additional Subordinate Judge in the impugned order were not the subject-matter of the present revision application.