

(1970) 02 GUJ CK 0007

In the Gujarat High Court

Case No : Civil Revision Application No. 679 of 1965

Chandrakant Ratanshi Kothari

APPELLANT

Vs

Ratanshi Damji Kothari and Others

RESPONDENT

Date of Decision : 19-02-1970

Acts Referred:

Bombay Court Fees Act, 1959 — Article 5, 5 , 6
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 115
Court Fees Act, 1870 — Section 7

Citation : AIR 1971 Guj 55 : (1971) 12 GLR 174

Hon'ble Judges : J.M. Sheth, J

Bench : Single Bench

Advocate : G.M. Vidyarth, Asst. Govt. Pleader, Y.S. Mankad, for the Appellant;
K.N. Mankad and S.B. Vakil, for the Respondent

Judgement

1. This is a revision petition filed u/s 115 of the Civil P.C against the order passed by learned. Civil Judge, Senior Division, Mr. P. M. Desai, in

Special Civil Suit No. 20 of 1963, that the court-fees paid by the petitioner (original plaintiff) on the plaint were inadequate and he was directed to

pay an additional court-fee of Rs. 2,705/- on or before 21st September, 1965. The costs of the hearing on the question of court-fees, so far as

defendants Nos. 10, 14 and 15 were concerned, were ordered to be borne by the plaintiff.

2. Mr. Y. State. Mankad, appearing for the petitioner, urged that the plaintiff had filed the present suit for a declaration that the two English

mortgages executed by defendant No. 1 (opponent No. 1), the father of the present petitioner, was not binding on him as the mortgages related to

the ancestral properties or the joint family properties and the mortgage transactions were not entered into, for the purposes of legal necessity and

furthermore, they were not binding on him even though they were executed by his father, as those dues were tainted with illegality and immorality.

He had one-tenth share in the suit properties which were joint family properties and he claimed partition and prayed that he be allotted the

property coming to his share. He further claimed a relief regarding accounts. He also claimed a relief for injunction. He valued the entire suit

properties at Rs. 1,50,000/-. His share in the suit property being one-tenth according to him, he valued the suit properties at Rupees 15,000/- so

far as his share was concerned. The first English mortgage was executed in favour of defendants Nos. 10 to 14 who are opponents Nos. 10 to 14

in this revision petition. Defendant No. 2 was the second mortgagee in whose favour the additional mortgage was executed by defendant No.1. He

is opponent No. 15. The first mortgage was for Rs.1,10,000/-. Additional mortgage was for Rs.35,000/-. The total encumbrance created, therefore,

was for an amount of Rs. 1,45,000/-.

3. The learned trial Judge, while deciding this question of court-fees, as a preliminary issue, observed in para 7 of his judgment that defendants

Nos. 4, 6, 7, 8 and 9 were the sisters of the plaintiff. In view of certain provisions of Hindu Law, these female heirs could not be called

coparceners and so they were not entitled to partition and were not entitled to any share at the time of partition. They were entitled only to

maintenance and residence so far as the joint family properties were concerned. The plaintiff has not deducted any amount for their maintenance or

marriage charges, etc. In the opinion of the learned trial Judge, the plaintiff had, therefore, 1/5th share and not 1/10th Share and accordingly,

according to the plaintiff's own valuation, his share being 1/5th and not 1/10th, it should have been valued at Rs. 30,000/- instead of Rupees

15,000/-. The learned trial Judge further found that as in para 13 (a) of the plaint, the plaintiff had sought for a declaration regarding the aforesaid

mortgage transactions, the plaintiff had to value that relief at Rs. 1,45,000/- and his share being 1/5th he should have valued that relief on that basis

in view of the provisions of Section 18, read with Article 3 of the Schedule I of the Bombay Court-fees Act, 1959 (which will be hereinafter

referred to as the Act). He further found that in regard to the relief (c) regarding accounts, the plaintiff has to pay court-fees of Rs. 20/- in the first

instance in view of the provisions of Section 18, read with Section 6(i) of the Act. In regard to the relief of injunction, in para 13(d), he has to pay

court-fees of Rs.30/-, in view of the provisions of Section 18, read with Sch. II, Art. 23 of the Act. The plaintiff having paid in all court-fees of Rs.

1,100/- and the court-fees payable according to the learned trial Judge being Rs. 3,805/-, the plaintiff had to pay an additional amount of Rs.

2,705/.

4. It is this order that is being challenged by the original plaintiff. The learned Assistant Government pleader, appearing for the State, did not raise

any preliminary objection regarding the maintainability of this revision petition u/s 115 of the Civil P. C.(which will be hereinafter referred to as the Code.)

5. Mr. S.B. Vakil, appearing for defendant No. 12, raised a preliminary objection that the question regarding inadequacy of court-fees was not a

question relating to jurisdiction and hence this Court had no jurisdiction to interfere with that order in exercise of its revisional jurisdiction u/s 115 or

the Code. In support of his argument, he invited my attention to three decisions of this Court and one decision of the Supreme Court.

6. The first decision relied upon by Mr. Vakil was a decision of this Court given by Sarela, J., in Sanatkumar Bhikhabhai Patel v. State of Gujarat

(1967) 8 Guj LR 946. Mr. Vakil took me through the relevant portions of this judgment in extenso. I find nothing in that decision which lends

support to the argument advanced by him. It has been distinctly observed* in this decision:

When in the decision relating to the proper court-fees, the question of jurisdiction of Court to try the suit is involved, the party affected by the

decision would be an aggrieved party and would be entitled to approach the High Court in revision u/s 115 of the Civil P.C.

It is specifically provided under CI. (d) of Section 6(iv) of the Bombay Court-fees Act that the amount of fee payable in suits falling under that

clause shall be ""one-fourth of the ad valorem fee leviable for a suit for possession on the basis of title of the subject-matter subject to a minimum of

Rs. 18-75 petitioners."" Therefore, the valuation is required to be on the footing of a suit for possession on the basis of the subject-matter. A suit for

possession of a house falls under sub-section (v) of S. 6 and under that provision

the value has to be according to the market value of the house.

It was held that in the instant case, even if the ad valorem valuation was taken into consideration the Court had necessary territorial and pecuniary

jurisdiction to try the suit. This being the position even if a suit falling under CI. (d) of sub-section (iv) the decision of the lower Court that it fell

under CI. (j), would not affect the jurisdiction of the lower court to try the suit and, therefore, the petitioners cannot be said to be aggrieved party

u/s 115 of the Civil P.C.

7. The question for consideration before Sarela, J., was whether the defendants could be said to be ""aggrieved party"" when the court has taken a

particular view regarding payment of court-fees so as to entitle them to file a revision petition u/s 115 of the Code.

8. At page 948, in para 4, the material observations made are:

At the outset Mr. Bakshi appearing for the plaintiff-opponent No. 1, raised the contention that the petitioners have no right to come in revision as

they are not an aggrieved party. His submission was that this is a matter affecting revenue and, therefore, it is a matter between the State and the

plaintiff. In the present case the Government of Gujarat being itself the plaintiff even on that footing there was hardly any matter between the State

and the plaintiff. The decision relating to court-fees, therefore, is not a decision with which the petitioners can be said to be aggrieved and unless a

person is aggrieved by the decision he has no right to invoke the revisional jurisdiction of the High Court u/s 115 of the Civil P.C. In support of his

argument he relied on the decision of the Supreme Court in Sri Ratnavaramaraja Vs. Smt. Vimla, (This is the decision of the Supreme Court on

which Mr. Vakil also placed reliance in support of his argument). He particularly relied on the following observations at page 1300.(on these very

observations Mr. Vakil has also placed reliance):

"Whether proper court-fee is paid on a plaint is primarily a question between the plaintiff and the State. How by an order relating to the adequacy

of the court-fee paid by the plaintiff, the defendant may feel aggrieved, it is difficult to appreciate. Again, the jurisdiction in revision exercised by the

High Court u/s 115 of the CPC is strictly conditioned by Cls. (a) to (c) thereof and may be invoked on the ground of refusal to exercise jurisdiction

vested in the subordinate Court or assumption of jurisdiction which the Court

does not possess or on the ground that the Court has acted illegally or with material irregularity in the exercise of its jurisdiction. The defendant who may believe and even honestly that proper court-fee has not been paid by the plaintiff has still no right to move the superior courts by appeal in revision against the order adjudging payment or court-fee payable on the plaint".

Even at page 950, para 5, Sarela, J., has considered the question from the point of view, whether the defendants can be said to be the persons

aggrieved so as to entitle them to raise the question of adequacy of court-fees by moving this Court u/s 115 of the Code. That is made quite clear if

we refer to the relevant observations made by him in this behalf:

The other reason advanced by Mr. Bakshi is that even if the valuation for the purpose of court-fee were to be made on the basis of the market

value of the property covered by the gift-deed, which property is valued in the gift-deed, which property is valued in the gift-deed at Rs.25,000/-,

even then as under CI. (d) one-fourth of that valuation would on that basis have to be taken for the purpose of calculating ad valorem fee, the value

of the subject-matter would be Rs. 6,250/- and the suit would still be within the jurisdiction of the lower Court. He argued that even if the case fell

under the last proviso to Cl.(d) which requires that when consequential relief other than possession is prayed, half the ad valorem fee be paid and

when possession is sought, full ad valorem fee be paid as leviable on a suit for possession on the basis of the title of the subject-matter, even then

the lower Court being the Court of the Civil Judge, Senior Division, had jurisdiction to proceed with the suit. On these two grounds Mr. Bakshi

says that no error affecting the jurisdiction of the Court to try the suit has been committed by the decision of the lower Court and, therefore, also

the petitioners cannot be said to be aggrieved persons.

It is thus evident that that decision only deals with the question as to when the defendant can be said to be an aggrieved party when the question

relating to adequacy or inadequacy of court-fee had been decided by the trial Court. Even in the Supreme Court decision referred to earlier, the

Supreme Court had to deal with that very question. In none of these decisions, it has been laid down that the plaintiff cannot move this Court u/s

115 of the Code, if the trial Court ignoring the correct provisions of the Court-

fees Act, decides that the court-fees paid are inadequate. One has to take into account the consequences which the plaintiff will have to face, if this order cannot be interfered with by this Court. If the plaintiff does not pay the deficit court-fees ordered by the trial Court under O.7, R.11, CI. (c) of the Civil P.C., the plaint can be rejected. In a case like the instant case, where the plaint was not rejected on that ground and the Court had proceeded to a further stage and had framed the issues, if the proper court-fees are not paid, the suit will be liable to be dismissed. The consequence would be that by such a wrong decision of the Court, the plaintiff will not get the relief to which he may be entitled. The net result would, therefore, be that by such an order, the Court would be refusing to exercise jurisdiction vested in it. This conclusion of mine gets support from the various decisions to which I will make reference at an appropriate stage.

9. Before I advert to those authorities, I will first refer to the other authorities relied upon by Mr. Vakil.

10. Mr. Vakil referred to the decision of this Court given by Divan, J., in *Ambubhai Somabhai Patel v. Kapilaben Mulshanker Vyas*. (1964) 5 Guj

LR 1035. The relevant observations made are:

It is clear that illegality contemplated by Section 115 (c) of the CPC is a procedural illegality and so far as the material irregularity is concerned, it

must also be a material irregularity relating to procedure and as has been pointed out by the Supreme Court in *Keshardeo Chamria Vs. Radha*

Kissen Chamria and Others, , CI.(c) of Section 115, Civil P.C. cannot be invoked by the High Court if the procedure laid down by the law has

been followed by the subordinate Court without committing a breach of the procedural provision or without committing any material irregularity in

those procedural provisions." That decision has no bearing on the question involved in the present petition.

11. In *Shah Prabhudas Ishwardas Vs. Coprarceners of a joint Hindu family of Shah Bhogilal Nathalal and Others*, a Division Bench of this Court,

after reviewing several authorities and taking into account the ratio laid down by the Supreme Court in several cases, observed:

If a subordinate Court has jurisdiction to decide a question before it, it may decide it rightly or wrongly, whether the question be one of law or

fact, that would not bring the case within S. 115. It is only where the error of law or fact has relation to the jurisdiction of the subordinate Court to

try the dispute that the section would be attracted. A plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of

the Court trying the proceeding. If the erroneous decision is in favour of the party raising the pleas, the Court would be refusing to exercise

jurisdiction vested in it and if on the other hand the erroneous decision is against the party raising the pleas, the Court would be clutching at

jurisdiction it does not possess. In either case the section would be attracted: Clause (building) in the former case and CI. (a) in the latter.

The position would be the same where there is an error of fact having relation to the jurisdiction of the Court. Such a case would arise where the

jurisdiction of the Court depends on the existence or non-existence of a collateral fact and by an erroneous decision of the fact the Court assumes

jurisdiction not vested in it or deprives itself of jurisdiction so vested. In such a case the High Court would be entitled to revise the erroneous

decision under CI. (a) or CI. (b) of Section 115"".

In my opinion, this decision really does not lend support to the argument advanced by Mr. Vakil, on the contrary, it lends support to the conclusion

that I propose to arrive at.

12. Mr. Vakil laid stress on the observations made by Bhagwati, J. (as he then was) speaking for the Division Bench, in para 9, at page 657. The

relevant observations are:

The question whether the document Ex. 4/1 was a promissory note and was, therefore, by reason of inadequacy of stamp inadmissible in

evidence was clearly a question within the jurisdiction of the trial Court and the decision of this question one way or the other did not have any

relation to the jurisdiction of the trial Court. It cannot be said that by erroneous decision of this question the trial Court clutched at jurisdiction it did

not possess or refused to exercise jurisdiction vested in it by law. Nor can it be said that the trial Court in arriving at the decision acted in breach of

any provision of law or committed any error of procedure in the course of the trial which could be regarded as material, of course it must be

conceded that if the decision of the trial Court was erroneous, the error committed by the trial Court was undoubtedly an error of law, for the

decision turned on the question whether the document Ex. 4/1 was a promissory note within the meaning of Section 2(22) of the Stamp Act which

would be clearly a question of law but this error of law did not have relation to and was not concerned with the jurisdiction of the subordinate court

and, therefore, none of the three clauses of Section 115 was attracted in the present case. The revision application was, therefore,

incompetent.....

Relying upon these observations, Mr. Vakil intended to equate the plaint which is not properly stamped with the promissory note which was not

sufficiently stamped, and eventually, was not admissible into evidence. In my opinion, this submission is not a valid submission.

13. Section 26 of the Code enjoins that every suit shall be instituted by the presentation of plaint or in such other manner as may be prescribed.

14. Order IV, Rule 1 further enjoins that every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

It is, therefore, evident that a suit can be instituted by presenting a plaint to the trial Court or in such other manner as may be prescribed. We are, in

the instant case, concerned with the first position, as the suit has been instituted by the presentation of the plaint.

Order VII, Rule 11, CI (c) of the Code states:

The plaint shall be rejected in the following cases: -

(c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the

Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so".

Clause (b) of it deals with the contingencies where the relief claimed is under-valued and the court directs the plaintiff to correct the valuation within

the specified time and if the plaintiff fails to do so, the plaint has to be rejected. In the instant case, no doubt, such a stage has already passed, but

the Court can dismiss the suit for non-payment of the requisite court-fees.

15. Section 5 of the Act reads :

(1) No document of any of the kinds specified as chargeable in the first or Second Schedule to this Act annexed shall be filed, exhibited or

recorded in any court of justice, or shall be received or furnished by any public officer, unless in respect of such document there has been paid a

fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

A plaint is one of such documents which has been made chargeable in the First Schedule. In view of this provision of the Act, it is evident that a

plaint which is chargeable in the first Schedule, if on such a plaint proper court-fees as contemplated by that Schedule, are not paid, such a plaint

cannot be filed or exhibited or recorded in any Court of justice. It is only when such a properly stamped plaint has been presented to the Court,

there will be valid presentation of the plaint and the Court will be in a position to proceed further with the suit. It is such a question that is involved

for the determination when one has to decide whether the adequate court-fees have been paid by the plaintiff or not. If the decision of the Court is

that adequate court-fees are not paid, the plaintiff would be undoubtedly an aggrieved person. If he does not pay the court-fees ordered to be paid

by the Court it will entail either rejection of the plaint or dismissal of the suit as the case may be. The aforesaid observations made by the Division

Bench of this Court, in my opinion, do not, therefore, indicate that when such a question is decided and when the plaintiff comes to this Court and

prays for the exercise of the revisional jurisdiction of this Court u/s 115 of the Code, such a revision petition is incompetent.

16. A Full Bench of the Madras High Court had to deal with a similar question in *Chintalapati Murthiraju Vs. Chintalapati Subbaraju and Others*, .

The relevant observations made are:

A revision petition lies when a Court subordinate to the High Court has held that the plaintiff has inadequately stamped his plaint but a petition for

revision does not lie when a defendant has unsuccessfully challenged the adequacy of the stamp affixed by the plaintiff, unless a further question of

jurisdiction is involved".

The previous decision of the Madras High Court which had taken a contrary view, reported in AIR 1939 Mad 380, has been overruled by the Full

Bench. The decision taken by the Madras High Court in ILR Mad 664 : (AIR 1928 Mad 416) (*Kulandaivelu Nachiar v. Ramaswami*) has been

approved by the Full Bench, observing as under at pages 316 and 317:

Moreover, the opinion expressed by this Court in 51 Mad 664 : (AIR 1928 Mad 416) is shared by the High Courts of Calcutta, Bombay,

Lahore and Patna. In (1910) 14 CWN 932 (Ramrup Das v. Sujaramdas) the Calcutta High Court held that a plaintiff against whom an adverse

order had been passed with regard to the court-fee payable on the plaint could move the High Court in revision without waiting for the dismissal of

the suit for non-compliance with the order. This judgment was considered in ILR Mad 664 : (AIR 1928 Mad 416) (supra). The Calcutta High

Court interfered at the instance of a plaintiff in Sailendra Nath Kundu Vs. Surendra Nath Sarkar and Others, (Shailendranath Kundu v.

Surendranath 1925 Cal 814) (G.M. Falkner v. Miraza Mohamed Sayed Ali), it held that an application for revision did not lie at the instance of a

defendant. The Bombay, Lahore and Patna cases are. ILR (1886) Bom 610 (Vithal Krishna v. Balkrishna Janardan) ILR (1943) Lah 257 : (AIR

1943 Lah 65) (FB); (Gurdevi Bibi v. Mohamed Baksh) which overruled ILR Lah 288 : (AIR 1924 Lah 425) (FB), Ramkhelawan Sahu Vs. Bir

Surendra Sahi and Others, . (Ramkhelavansahu v. Bir Surendrasahi) respectively. The only High Court which has expressed an opinion contrary to

ILR Mad 664 : (AIR 1928 Mad 416) (Supra) and adhered to it, is the Allahabad High Court: See Gupta and Co. Vs. Kripa Ram Brothers

(Gupta and Co. v. Kirparam Bros.)"".

17. The relevant observations made by the Madras High Court in ILR Mad 664 : (AIR 1928 Mad 416) (supra) were:

An application lay to the High Court for the revision of an order passed by a lower Court where that Court had erroneously directed the plaintiff

to pay an additional court-fee. The insistence on the payment of the additional court-fee amounted, in the circumstances, to a refusal to exercise

jurisdiction. The mere fact that an appeal would lie later from the consequential order passed by the subordinate judge if the stamp fee were not

paid was no ground for refusing to entertain the petition"".

18. In Baldeo Gulabrao v. Abdul Hafiz. AIR 1950 Nag 249, in para 11, at p. 250, the Nagpur High Court has expressed the following view,

observing:

It is argued on behalf of the non-applicant that no revision lies but that has been settled by the Full Bench in AIR 1938 122 (Nagpur) . If

additional court-fees are demanded as here the matter is revisable.

19. In Basuki Prasad Singh Vs. Satya Kinkar Sahana, , a Division Bench of the

Patna High Court observed:

Where the lower Court demanded deficit court-fee on the basis of Act 25 of 1948 which came into force after the institution of the suit:

It was held that the Court acted illegally and with material irregularity in the exercise of its jurisdiction as the court-fee ought to be calculated on the

plaint by a reference to the law as it stood on the date of the institution of the suit:

It was further held that a decision upon court-fee which is adverse to the plaintiff amounts to a decision of the Court refusing to exercise its

jurisdiction to try the issues as between the plaintiff and the defendant; and in such a case the decision is subject to the revisional jurisdiction of the

Court"".

20. In Mahadeo Gopal Pendse Vs. Hari Waman Bhate, , a Division Bench of the Bombay High Court, after reviewing several authorities, including

the aforesaid Madras decision and Nagpur decision and other decisions, observed:

An application in revision, u/s 115 of the Civil P.C., 1908, lies against an order passed by the Court that the court-fees paid by the plaintiff on his

plaint are insufficient, as it is tantamount to a finding that the Court will not proceed with the trial unless the court-fees demanded are paid and is

thus a refusal to exercise jurisdiction."" Some of the decisions to which I have referred to, have been followed and the decision of the Madras High

Court in K. M. Desikar v. Gopala Chettiar AIR 1939 Mad 380, has been dissented from.

21. In Shankar Maruti Girme v. Bhagwant Gunaji Girme 49 Bom LR 72 , a Full Bench of the Bombay High Court, at prosecution. 77 = Shankar

Maruti Girme Vs. Bhagwant Gunaji Girme, , had taken a similar view, observing:

It was held as long ago as ILR 1886 Bom 610 (FB), and as recently as a year ago Mahadeo Gopal Pendse Vs. Hari Waman Bhate, , that this

Court has power to interfere in revision u/s 115 of the CPC in proper cases where the trial Court has placed a suit under a wrong provision of the

Court-fees Act, and the competence of the present revision application, therefore, calls for no further discussion.

22. It thus appears that the consensus of opinion amongst the various High Courts except the Allahabad High Court and one decision of the Oudh

Judicial Commissioner, is that in a case like the present case where the Court has

wrongly decided that the plaintiff has not paid adequate court-fees, the plaintiff can move this Court and this Court can interfere in exercise of its revisional jurisdiction u/s 115 of the Code. The argument is advanced by Mr. Vakil that the decision of the Supreme Court referred to by me earlier, by necessary implication, lays down law which runs counter to the aforesaid decisions referred to by me in detail. This argument is, in my opinion, not well founded. There is nothing in the aforesaid decision of the Supreme Court which runs counter to the view taken by the most of the High Courts. I, therefore, hold that this revision petition is competent and overrule the preliminary objection taken by Mr. Vakil.

23. Coming next to the merits of this revision petition, it is evident that the learned trial Judge has committed several errors in coming to his conclusion regarding the determination of the necessary court-fee payable. The plaintiff has claimed only one-tenth share in the suit properties. It was not open the learned trial Judge at this stage that certain persons had no right according to the Hindu Law, in the suit properties and eventually, the plaintiff had one-fifth share and in view of it, plaintiff must pay the court-fee on the basis of his one-fifth share. One has to look to the claim made by the plaintiff at this stage. The learned trial Judge has, therefore, clearly committed an error in coming to the conclusion that the plaintiff should value his share at Rs. 30,000 and not at Rs.15,000 as has been done by him.

24. The second important question for consideration is as regards the court-fee payable for the relief claimed in regard to the two mortgage transactions. The total mortgage amount undoubtedly comes to Rs. 1,45,000/-. The learned trial Judge is of the view that for this relief claimed in para 13(a) of the plaint, the plaintiff has to pay the court-fee of Rs. 1,855/- as per Section 18 read with Art. 5 of the Schedule 1 of the Act.

25. Mr. Vidyarthi, learned Assistant Government pleader, appearing for the State, has vehemently urged before me that this Art. 5, being a Special Article applicable, it would govern the payment of court-fee in regard to this relief. That Article deals with plaint in a suit, application or petition (including memorandum of appeal), to set aside alienation to which the plaintiff, applicant to which the plaintiff, applicant or appellant, as the case may be, was a party either directly or through a legal guardian other than de

facto or ad hoc guardian, manager or partner or Court. In case of such a plaint, proper court-fee payable as per column (3) of Schedule I, Art 5, is a fee to the extent of the value of alienation to be set aside according to the scale prescribed under Art. 1. Admittedly, the plaintiff is not a party to these two mortgage documents. Mr. Vidyarthi urged that in spite of it, this Article would govern the case as the alienation is made by the father who would be, according to the provisions of the Hindu Law, the Karta (Manager) of the Undivided Hindu Family.

26. Mr. Y. S. Mankad, appearing for the plaintiff, urged that the amount of court-fees payable in regard to this relief should be computed on the basis of Section 6. Clause (j) of the Act. It reads;

(j) In suits where declaration is sought, with or without injunction or other consequential relief and the subject-matter in dispute is not susceptible of monetary evaluation and which are not otherwise provided for by this Act - thirty rupees.

He urged that the present case would fall within that clause as such declarations are not otherwise provided for, by this Act. In support of his argument, he invited my attention to several decisions to which I will make reference at an appropriate stage.

27. Prior to that, I would like to refer to the relevant averments made in the plaint. It is significant to note that the plaintiff being a son and the alienation having been made by a Hindu father, the share of the son in a joint undivided Hindu family will be liable for these debts, even if those transactions were not entered into, for the legal necessity. A son can challenge them only if he is able to show that those debts are tainted with illegality and immorality.

28. In para 2 of the plaint, after stating that the properties covered by those mortgages are ancestral properties he has made an averment that defendants Nos. 1 and 2 incurred expenses in illegal and immoral ways, spending and employing moneys in illegal transactions and losing therein and were compelled to mortgage the properties with the help of defendant No. 2 in the Schedules "B" and "C" to this plaint to the tune of Rs. 1,10,000/- with defendants Nos. 10 to 14. Similar averment is made in regard to this additional mortgage.

29. In para 3 of the plaint, an attempt has been made to reiterate that these

debts were tainted with illegality and immorality. It is true that therein it has been stated as under:

The plaintiff, therefore, submits that he is not bound by the mortgages entered into by defendant No.1 with the help of defendant No. 2 with the defendants Nos. 10 to 14 and 15 for illegal and immoral purposes without any legal necessity or benefit to the joint family and the plaintiff is entitled to have the said mortgages declared void and illegal and to have the said alienation set aside, as it is purely and simply a transaction for illegal and immoral purpose, without legal necessity to the knowledge of the mortgages themselves"".

30. In para 13 of the plaint, which is a relief clause, the plaintiff has averred as under:

This Hon"ble Court will be pleased to declare that the English mortgages executed by defendant No. 1, dated 19th January, 1962, in favour of defendants Nos. 10 to 14 for a sum of Rs. 1,00,000/- and the second mortgage with defendant No. 15 to the tune of Rs. 35,000/- are illegal and not binding on the plaintiff and were executed for illegal and immoral consideration and purposes.

It thus appears that if we look to the substance of the plaint, the plaintiff has stated as to why these transactions are not binding on him. He can challenge them only if these debts are tainted with illegality and immorality. There is no specific prayer made in the relief clause that these mortgages be set aside. What he really prays for is that these debts having been tainted with illegality or immorality, even though he happens to be a son, he is not bound by those transactions and those properties will be available to him without any encumbrance in a suit for general partition that he has brought.

31. It is significant to note that the suit is a general suit for partition wherein he has challenged the validity of these transactions on the ground that the debts were tainted with illegality and immorality and that is why those transactions are not binding on him. The subject-matter of the suit is the entire suit property. He has valued the entire suit properties at Rs. 1,15,000/-. As he has claimed one-tenth share therein, he has valued his share at Rs. 15,000/- for the purposes of court-fees and Rupees 1,15,000/- for the purposes of jurisdiction. The plaintiff cannot be asked to pay the

court-fees in regard to this declaratory relief on the basis of the mortgage amount. In my opinion, this relief will be covered by CI. (j) of Section 6

of the Act, as contended by Mr. Mankad.

32. This conclusion of mine gets support from the decision of a Division Bench of this Court in Thakkar Kalyanji and Others Vs. Thakkar Liladhar

Chhanganlal and Others, wherein Mehta, J., speaking for the Division Bench, observed:

Before Art. 5 of Sch. 1 of the Bombay Court-fees Act would be applicable, it must be borne in mind that a suit or a memorandum of appeal must

be one (1) to set aside the alienation, and (2) to such alienation the plaintiff or the appellant, as the case may be, must be a party, either directly or

through the legal guardian or the manager.

A suit for declaration that the mortgage of the property was not binding on one-eighth share of the properties, as only one of the reliefs in a general

suit for partition, could not be considered to be a suit for setting aside the alienation.

Besides, in the instant case, the present plaintiffs were not parties to the mortgage in question through their legal guardian or manager, Respondent

No. 1 had signed the mortgage in question as a guardian but he is not shown to be a legal guardian or the manager of the minor plaintiffs and he has

not purported to act as a manager of the joint family. Therefore, in any view of the matter, Art. 5 would be entirely out of question".

In the instant case, it could be said that the plaintiff has sought for a declaration that particular mortgages are not binding on him and that is one of

the reliefs claimed in a general suit for partition. It cannot be considered to be a suit for setting aside the alienations as has been contended by Mr.

Vidyarthi.

33. In Civil Revn. Appln. No. 1164 of 1966, D/-30-9-1969 (Guj) by Divan, J., after referring to Section 6(iv)(j) and Art. 5 of the First Schedule

of the Act, and also referring Art. 7 of the First Schedule, made the following observations:

It is clear from the very wording of Section 6(iv)(j) of the Act that that clause will apply if there is no other provision under the Act for a particular

case before the Court. If any other provision of the Act applies, then Section 6(iv)(j) cannot have any operation. It is also obvious that Art. 5 and

Art. 7 of the First Schedule are other provisions of the Act and if either of these two articles apply, then Section 6(iv)(j) cannot apply at all. Article

5 of the First Schedule has obviously no application to the instant case because there is no alienation by the plaintiff in favour of the defendant. It is

not the case of the plaintiff that any alienation of shop No. 59-A has already taken place. According to the averments in the plaint, he has been

compelled to enter into an agreement to sell the shop to defendant No.1 and he wants to set aside the agreement of sale. Hence, the present suit is

not a suit to set aside an alienation to which the plaintiff is a party but is a suit for a declaration that the agreement to sell the shop is not binding on

the plaintiff". This decision relied upon by Mr. Mankad has, in my opinion, no application to the facts of the case.

34. Mr. Vidyarthi, in support of his argument, invited my attention to a decision of a Division Bench of the Bombay High Court in Bai Lilavanti Vs.

Vadilal Purshottamdas, . The relevant observations are:

A suit for declaration that a decree for Rs. 5,366/- odd is void and ineffective is governed not by Section 7(iv)(c), but by Art. 17 (v) of the Court-

fees Act, 1870, as amended by Bombay Finance Act, 1932. The plaint in such a suit must bear a court-fee stamp of Rs. 15/-".

At page Bom LR 387 = (at p. 474 of AIR) the relevant observations made are:

Mr. Shah for the petitioners, however, points out that the suit is really one for setting aside two decrees, and such a suit is now governed by Art.

17, CI. (v) of the Court-fees Act as amended by the Bombay Finance Act (Bom. Act II of 1932). That clause prescribes for a plaint or

memorandum of appeal to set aside a decree or award a court-fee of Rs. 10, where the amount or value of the property involved does not exceed

five hundred rupees, and a court-fee of Rs. 15/- where such amount or value exceeds five hundred rupees. Such a suit having been specifically

provided for by this clause, it is urged that the present suit cannot be brought u/s 7(iv)(c) of the Court-fees Act. On the other hand, Mr. Chundrigar

contends that the suit as framed is not to have the decrees set aside, but to have them declared as void and ineffective, with an injunction as a

consequential relief. It is not the mere wording or the form of the prayer clause which determines the nature of the suit and the court-fees to be paid

by the plaintiff. In substance what the plaintiff wants is to have the decrees set

aside, whether it is worded as a suit for a declaration or as a suit for setting aside the decrees. It is further contended by Mr. Chundrigar that looking to the contents of the plaint it cannot be said that the plaintiff wants the entire decrees to be set aside. He says that the parties had agreed before the decrees were passed that he should pay Rs. 2,425/- in full satisfaction of the defendants' claim, so that he really wanted to have the decrees modified by reducing the decretal amount to Rupees 2,425/-, and although he has actually prayed that the decrees should be declared as unenforceable, void and ineffective, what he actually meant was that the decrees were binding to the extent of Rs. 2,425/- only, and that they could not be executed against him for any amount in excess thereof. It appears, however, from paragraph 6 of the plaint that the plaintiff claimed that even the amount of Rs. 2,424/- had been fully satisfied before the decrees were passed, so that the entire decrees were unenforceable when they were passed and, therefore, he really intends to have the decrees wholly set aside. Moreover, whatever may be the recitals in the body of the plaint, in the prayer clause the plaintiff has clearly asked for a declaration that the decrees are void and ineffective wholly, and not merely to the extent of the amount in excess of Rupees 2,425/-. The plaint is to be valued according to the relief claimed, and not according to the recitals in the body of the plaint. It is thus obvious that the suit is one for setting aside the decrees passed against the plaintiff. The appropriate provision in the Court-fees Act for such a suit is Art. 17 (v) of the second schedule as amended by the Bombay Finance Act (II of 1932). The plaintiff must, therefore, state whether the value of the subject-matter is Rs. 500/- or more in order to see whether the fixed fee payable under that Art. is Rs. 10/- or Rs. 15/-. The subject-matter is obviously the amounts due under the two decrees, namely, Rs. 5,366-4-6. As the plaintiff wants to have himself relieved of the liability to pay those amounts under the decrees, he must value the plaint accordingly and pay court-fee of Rs. 15/- for the relief of having the decrees set aside, and a separate court-fee on Rs. 5/- at which he has valued his claim for the injunction".

Bearing in mind the principle enunciated in the decision of the Division Bench, we find that in substance, the instant suit is a suit for a declaration that these mortgage transactions are not binding on the plaintiff as those

transactions are illegal, they being tainted with illegality and immorality. On that ground, the plaintiff has claimed in the relief clause that they are not binding on him. It is the relief clause which has got to be considered for deciding the question regarding the court-fee that would be payable. Some of the recitals found in para 3 of the plaint, which I have referred to earlier, cannot be pressed into service as has been sought to be done by Mr. Vidarthi. The learned trial Judge has, therefore, in my opinion, committed an error in holding that in view of this relief claimed in para 13 (a) of the plaint, the plaintiff has to pay the court-fee on the basis of one-fifth share in regard to these mortgage properties, taking into consideration the total mortgage amount.

35. Mr. Mankad conceded, and rightly, in my opinion, that the plaintiff has to pay the court-fee of Rs. 20/- in the first instance for the relief

regarding accounts and has also to pay the court-fee of Rs.30/- for the relief in question claimed in para 3.

36. The net result is that the plaintiff is liable to pay the total court-fees amounting to Rs. 30+1.100+20+30 = Rs. 1.180/. The plaintiff has paid Rs.

1,100/. The deficit court-fees that are to be paid by the plaintiff come to Rs.80/. The plaintiff is directed to pay those deficit court-fees in the trial

Court within four weeks from to-day.

37. It may be noted that Mr. Vakil appearing for opponent No. 12, did not make any submission in regard to the merits of this revision petition.

Mr. Vakil only had raised a preliminary objection about the competence of this revision petition. It will be proper and just to order that these

opponents Nos.10 to 15 should pay the costs of the petitioner in this revision petition.

38. The revision petition is allowed. The order passed by the trial Court, dated 26th August, 1965 regarding the determination of court-fees and

the payment of costs is set aside and the petitioner is directed to pay the additional court-fee of Rs. 80/- within four weeks from to-day on the

plaint. Opponents Nos.10 to 15 are ordered to pay the costs of the petitioner in this revision petition and bear their own. Other opponents are

ordered to bear their own costs in this revision petition. Rule is made absolute.

39. Rule absolute.