

(1979) 07 CAL CK 0018
In the Calcutta High Court
Case No : Civil Rule No. 825 of 1978

Promode Kumar Ghosh and Others	Vs	APPELLANT
The Calcutta Electric Supply Corporation Ltd. and Others		RESPONDENT

Date of Decision : 19-07-1979

Acts Referred:

Citation : AIR 1979 Cal 380

Hon'ble Judges : Sudhindra Mohan Guha, J;Nirmal Chandra Mukherji, J

Bench : Division Bench

Advocate : Saktinath Mukherjee and R.M. Rai Chaudhary, for the Appellant;
Banamali Das and Hari Narayan Mukherjee, for the Respondent

Judgement

Sudhindra Mohan Guha, J.—This Rule at the instance of the plaintiff-petitioner arises out of order No. 77, dated 22nd February, 1978 passed by Shri A.K. Das Gupta, the learned Subordinate Judge, 4th Court, Alipore in T. S. No. 121 of 1968, whereby he held that the suit should be valued u/s 7(vi) of the Court-fees Act.

2. Earlier the plaintiff-petitioner came to this Court in revision being Civil Rule No. 628 of 1970 against certain orders of the learned Subordinate Judge. While discharging the revision a Division Bench of this Court gave out certain directions to decide the issue as to the value and court-fees namely, the issue No. 1. It was further observed by their Lordships that in their view the suit was governed by the provision of Section 7(vi) of the Court-fees Act.

3. The petitioner then went in appeal by special leave to the Supreme Court.

4. Their Lordships of the Supreme Court while disposing the appeal observe that they refrain from making any observations on the merits of the nature of the suit. It will, however, be open to the Subordinate Judge to make an enquiry apart from Section 7(vi) also on the question whether or not, Section 7(iv)(c) and Section 7(x) are applicable to the facts of the present case on the basis of the allegations made in the plaint and in coming to his decision he would not be

influenced by the observations made by the High Court on the question of real nature of the suit and the section which would apply. The other directions given by the High Court to the Sub-Judge would, however, stand. With these observations the appeal was dismissed.

5. Thereafter the learned Subordinate Judge disposed of the matter regarding court-fees by the order dated 22nd February, 1978 stated above, which has now been challenged.

6. The plaintiff prayed for the reliefs inter alia (a) a declaration that the Deed of Conveyance dated 21st July 1965 by the defendants Nos. 2 to 5 in favour of defendant No. 1 is illegal, null and void, inoperative and not binding on the plaintiff.

(b) for declaration that the defendant No. 1 has not acquired any right, title and interest in the suit property on the basis of the alleged Deed of Conveyance.

(c) a declaration that the plaintiff has a right of option to purchase the suit property being portion No. 25-C Harish Mukherjee Road, P. S. Bhowanipur as per the terms of the Deed of Partition dated 8th May, 1921.

(d) for permanent injunction, On the following averments:--The premises at 25 Harish Mukherjee Road originally belonged to Sri Chandra Madhab Ghosh. On his death the aforesaid premises along with other properties devolved on his three sons -- Jogendra, Satish and Surendra (since deceased) who partitioned all the properties by a registered deed of partition dated May 8, 1921. Lot No. 1 in the deed of partition being the North Western portion of the said premises was allotted to Jogendra, the predecessor of the plaintiff, while the other portion of the said premises was allotted to Surendra, predecessor of the defendants Nos. 2 to 5, this was renumbered as 25-C Harish Mukherjee Road and this portion is the subject-matter of the suit. The plaintiff-petitioner is the co-owner of the North Western portion being premises No. 25-B Harish Mukherjee Road. The deed of partition dated May 8, 1921 inter alia provided that, if any of the said three brothers or their heirs intended to sell his or her respective share in the property allotted respectively to them, then in the event he or she or they would be bound to inform the other two brothers or their heirs about the intention to sell and that if the other co-sharers or their heirs were agreeable to purchase the property then the brothers or their heirs intending to sell his or their share would be bound to sell the same to them, at or for a price that might be offered by a stranger purchaser or that might be estimated by a qualified Engineer on the valuation of the property.

7. On or about March 31, 1968 while the building on the suit property was being demolished the plaintiff-petitioner for the first time came to know that the defendants opposite parties Nos. 2 to 5 had transferred the same that is premises No. 25-C Harish Mukherjee Road to opposite party No. 1 without any prior intimation or serving any notice upon the petitioner. Thereafter the petitioner served a notice upon opposite party No. 1 intimating it about the right

of pre-emption of the petitioner and requesting it to stop the demolition of the premises. The opposite party No. 1 not having acceded to the request, the petitioner was obliged to commence the present suit.

8. The plaintiff alleged that the suit should be valued u/s 7(iv)(c) of the Court-fees Act. According to the learned Judge the prayer (b) is incompetent and prayer (a) is superfluous or introductory. According to him the substantial relief claimed by the plaintiff is prayer (c) and injunction. It is also observed that the main prayer i.e.. directing for retransfer does not flow from other declarations. So the plaintiff's prayer is overruled.

9. The next contention of the plaintiff was that the suit as well might be valued u/s 7(x) of the Act. But according to the learned Judge the right claimed by the plaintiff to prior purchase was not based upon the agreement alleged to be embodied in the deed of partition but upon the sale in favour of defendant No. 1 and it was the sale which gave the cause of action so that contention of the plaintiff was also rejected. According to the learned Judge the suit is governed by Section 7(vi) of the Court-fees Act under which the court-fees are to be paid on the market value of the land, building or garden in respect of which the right is claimed.

10. In assailing the impugned order it is contended by Mr. Saktinath Mukherjee, the learned Advocate for the petitioner that the amount of court-fee payable is to be ascertained from the allegations made in the plaint and the nature of the reliefs sought for and the determination of such amount can in no way be influenced either by the answers to the plaint or by the final decision of the suit on merits. The Court is to look to the substance and nature of the claim. The form in which the relief claimed, plays no part. But if the real claim is in disguised form or is something different from apparent one, the Court should ignore the apparent form. The choice is with the plaintiff, it is for none else to suggest in which form he would bring the suit. Mr. Mukherjee in support of his arguments cited the decision of the Lahore High Court in the case of Harkishan Lal v. Barkat AH reported in AIR 1942 Lah 209. Mr. Mukherjee argues that it is not for the Court to import into the plaint anything which it does not really contain, either actually or by necessary implication. For the authority on the point he also relies on the decision of the Patna High Court in the case of Mt. Rupia Vs. Bhatu Mahton and Others, Similarly, it is observed by the Rajasthan High Court in Sukh Lal and Others Vs. Devi Lal and Others, , that in order to determine the proper Court-fee payable on a plaint in a particular case, the true principle is that the plaint as a whole should be looked at and that it is the substance of the plaint and not its ostensible form which really matters. The court must take the plaint as it is while in construing the plaint, and not as it ought to have been.

11. It is rightly held by the different High Courts that it is not permissible for the Court to import something in the plaint for the purpose of ascertaining the amount of court-fee payable on a plaint. For the purpose the plaint should be

read as a whole and it is the substance and not the form which is the criterion. A relief not sought for cannot be imported, so as to charge court-fee thereon. It should be noted that the court-fee is payable on the real substance of the relief claimed, but at the same time it should not be overlooked that the choice is with the plaintiff how to frame his suit and it is not for the Court to dictate how the plaint ought to be drafted.

12. Next to the observation of the learned Judge that prayer (a) is superfluous or introductory it is pointed out by Mr. Mukherjee, that opposite parties Nos. 2 to 5 in contravention of the contract or agreement embodied in the deed of partition had transferred the suit premises to opposite party No. 1, or in other words without making any offer to the plaintiff for exercising the option of purchase. As the plaintiff is not a party to such a transaction, the plaintiff has no other alternative but to have a declaration that such transfer is illegal, null and void, inoperative and not binding on the plaintiff. He refers to the decision in the case of Ganesh Chandra v. Rukmani Mohanty reported in AIR 1971 Orissa 65, wherein it is held that u/s 22 of the Hindu Succession Act the transferor must give notice of intention of transfer and on failure of notice class I co-heirs can challenge the transfer even after the transfer is effected. The Kerala High Court in the case of Valliyil Sreedevi Amma Vs. Subhadra Devi and Others, lays down that the remedy of the other co-heirs in such a case is to enforce their preferential right u/s 22(1) to acquire the transferred interest by way of a regular civil suit before a competent Civil Court. The alienation of his interest by a co-heir in violation of Section 22(1) is not void but is voidable at the instance of other non-alienating co-heir. According to Mr. Mukherjee the transfer in favour of opposite party No. 1 in this case is not void but voidable and as such declaration in prayer (a) is a must.

13. Next to the observation of the learned Judge that the terms regarding transfer in the deed of a partition could not be termed as an agreement, Mr. Mukherjee refers to us the decision of a Division Bench of this Court in the case of Ram Baran Prosad and Another Vs. Ram Mohit Hazra and Another, . In this case it is held that pre-emption clause in the partition award was in the nature of contract and was binding not only on the parties but their assignees also. It was a contract because of the express mention of the parties' consent to the same. The pre-emption clause in question suffered from no infirmity either on account of any uncertainty in its terms or as being contrary to or offending any law. The plaintiffs instituted the suit for enforcing the pre-emption clause incorporated in decree for partition upon award.

14. Lastly, Mr. Mukherjee contends that the sale deed in favour of opposite party No. 1 is not void but voidable at the instance of the plaintiff-petitioner by reason of the contract entered into by the predecessors-in-interest of the parties as incorporated in the partition deed, though the sale between opposite parties nos. 2 to 5 and opposite party no. 1 was valid and binding, subject to the right of purchase conferred upon the plaintiff by virtue of the terms and conditions in the

partition deed. He also relies on paragraphs 9 to 11 of the report in the case of Soni Lalji Jetha and Others Vs. Soni Kalidas Devchand and Others, .

15. In conclusion Mr. Mukherjee argues that there is a distinction between a suit for the cancellation of a document and for a declaration that the document is not binding on the plaintiff. When the plaintiff is a party to the document but he wants to avoid the same, he must get the document cancelled. But when the document between third parties stands in the way of plaintiff's establishment of right or title, he must file a suit for a declaration that the document is invalid so far as he himself is concerned. Thus according to him prayer (a), in the plaint is the main prayer and other prayers are ancilliary in nature which flow from it. So, he asserts this is a suit for declaration with consequential reliefs governed by Section 7(iv)(c) of the Act.

16. It is further contended by Mr, Mukherjee that the agreement or contract embodied in the partition deed was the basis for the cause of action and not the sale in favour of opposite party No. 1 and as such the suit can also be governed by Section 7(x) of the Act.

17. Mr. Banamali Das, the learned Advocate for the opposite parties is good enough to concede that the clause for exercising option to purchase is founded upon a contract amongst the parties to the partition. While supporting the impugned order he submits that the petitioner's suit is a suit in the nature of a suit for pre-emption and as such the court-fee would be payable on the market value of the suit property u/s 7(vi) of the Court-fees Act. It is also contended by him that the payment of court-fees is a fiscal matter concerning the revenue of the State and as such this is a matter between the plaintiff who commenced the suit and the Court and the defendants-opposite parties could have little say in the matter.

18. A right of pre-emption is a right which an owner of immovable property possesses to acquire by purchase another immovable property or any share of suit property which has been sold to a third person. A right of pre-emption may be conferred by statute or it may be created by contract or recognised by custom. But it transpires that the petitioner's suit is not a suit for pre-emption, in the strict sense of the term, the right to purchase did not accrue to the petitioner on the transfer in favour of the opposite party No. 1 but under the contract the petitioner acquired the right of prior purchase, and the petitioner's suit is for exercising prior right of purchase as per the deed of partition, which is enforceable not only against the parties to the deed of partition but also against their heirs, transferees and assignees. Again, when the plaintiff is not a party to the deed which was executed by opposite parties Nos. 2 to 5 in favour of opposite party No. 1 the plaintiff need not pray for cancellation of the document, though it is not void. In a suit for cancellation of a document, the suit be valued on the value of the subject-matter in dispute.

19. Thus on the materials on record we hold that the learned Judge committed

an error in adjudging the suit as one for pre-emption and calling upon the plaintiff to pay court-fee u/s 7(vi) of the Act. We further hold that the court-fee was payable on the plaint in accordance with the provisions of Section 7(x) of the Court-fees Act, as the suit was based on a contract entered into by the parties to the partition. It should be remembered that this is not a suit for pre-emption but to enforce the right of prior purchase.

20. The Rule is accordingly made absolute and the impugned order is set aside. We, however, propose to make no order as to costs.

N.C. Mukherjee J.

21. I agree.