(1942) 01 BOM CK 0002

In the Bombay High Court

Case No : Civil Application No. 782 of 1941

Rama Kalinga Mahar — APPELLANT

Vs

Balapa Kalinga Mahar — RESPONDENT

Date of Decision : 30-01-1942

Acts Referred:
Court Fees Act, 1870 — Section 7(iv)(d), 7(v)

Citation : AIR 1942 Bom 203 : (1942) 44 BOMLR 459

Hon'ble Judges : Wassoodew, J;Sen, J;John Beaumont, J

Bench : Full Bench

Judgement

Baumont, C.J.—This is an application to the Court under Rule 132 of the Appellate Side Rules. The question relates to the amount allowed by the Taxing Officer for the advocate''s fee, and the application raises an important question of principle.

2. The suit is a suit for an injunction, in which the plaintiff asks that the defendants may be restrained from interfering with his possession of the suit property. The plaintiff''s case was that he was the absolute owner of the suit property as his separate estate, and the defence was that the property was joint family property and vested in the plaintiff and the defendants, the plaintiff''s share being an undivided third. The plaintiff''s suit failed at the trial, and his appeal to the Assistant Judge and a second appeal to this Court were dismissed. In the result, therefore, the finding is that the property is not the separate property of the plaintiff.

3. It is plain that although this is in form a suit for an injunction, it is really a suit which raises the question as to the plaintiff''s title to the suit land. If the plaintiff had sued for possession of the suit land, he would have had to pay court-fee on the value of the land ascertained under Sections 7 (v) of the Court-fees Act. No doubt, he did not require an order for possession, because he was in possession, and we do not suggest that he was not entitled to file this suit for an injunction. Where a suit is for an injunction, the amount of the court-fee is fixed by the

plaintiff arbitrarily in his plaint, in accordance with Sections 7(iv)(d) of the Court-fees Act, and the plaintiff in the case assessed the court-fee at Rs. 5. Under Sections 8 of the Suits Valuation Act of 1887, in a suit for an injunction the value as determinable for the computation of court-fees and the value for purposes of jurisdiction are the same. That being so, the value for purposes of jurisdiction being less than Rs. 5,000, the case was triable by a Second Class Subordinate Judge.

4. We think that the question of the valuation of suits for an injunction and some other suits of the classes referred to in Sections 7(iv) of the Court-fees Act is a matter which might well engage the attention of the Legislature. It frequently happens that in the course of the trial of a suit, where the court-fee is a nominal one, it transpires that the actual value of the subject-matter of the suit can be ascertained at a much higher figure. In this particular case the real subject-matter of the suit is the plaintiff''s right to an undivided two-thirds share of the suit property, which is worth very much more than Rs. 5. It might be desirable to give the Court jurisdiction in cases of this sort to revise the valuation of the court-fee stamp as a result of evidence given at the trial and thus save loss of revenue to Government, and we are told that that practice has been adopted in other Provinces. However, in this particular case there is no doubt that the plaintiff was entitled to value the suit for purposes of court-fee at Rs.5. and that determined the value for purposes of jurisdiction.

5. What we have to deal with is the question of the advocate''s fee. That subject is dealt with in matters in the High Court by Appendix E of the Appellate Side Rules. The provisions of Appendix E follow the terms of the Pleaders Act, which relates to litigation in the mofussil. Rule I of Appendix E provides that in suits which decide on the merits the real dispute between the parties, and in, among other things, appeals from decrees (including preliminary decrees) other than appeals from execution proceedings which decide on the merits the real dispute between the parties, the amount of the advocate''s fee shall be computed on the amount or value of the subject-matter in dispute in the suit, appeal or proceeding at the rates therein specified. The learned Government Pleader on behalf of the plaintiff contends that the value of the advocate''s fee under that rule should be the same as the value for purposes of the court-fee and for jurisdiction, and that on that basis the value of the subject-matter being Rs. 5, only the minimum advocate''s fee should be allowed under Appendix E, Rule VI. But it is to be noticed that Appendix E does not refer to the value for purposes of the court-fee or jurisdiction. It bases the amount of the advocate''s fee on the amount or value of the subject-matter in dispute in the suit.

6. It was held in Bai Meherbai v. Maganchand (1904) ILR 29 Bom. 229 which was a suit for possession of land, that in such: a suit the advocate''s fee should be calculated on the actual value of the property, and not on the value estimated for purposes of court-fee under the Court-fees Act. That principle has been applied in two cases of suits for an injunction. Those two cases are Nur Mahomed v.

Secretary of State (1925) 28 Bom. L.R. 582 and Kasanji Kuverji Vs. The Surat Municipality, : In the first of those cases the injunction asked for was to restrain Government from taking possession of land acquired compulsorily under the Land Acquisition Act, and the Court held that the advocate''s fee should be based on the value of the land. Whether that valuation was right may perhaps be open to question, because the subject-matter of the suit was not really the value of the land, but the difference between the value of the land and the sum which Government was going to pay for it under the Land Acquisition Act. However, the principle was adopted that in a suit for an injunction, where it is possible to ascertain the value of the subject-matter, that value should be the basis for determining the advocate''s fee. In Kasanji v. Surat Municipality (supra) the suit was for a declaration and an injunction to restrain a Municipality from spending a sum of Rs. 20,000 contrary to law, as the plaintiff alleged, and there the advocate''s fee was based on the sum in dispute, that is to say, Rs. 20,000. In both those cases there were materials on record, which enabled the Court to ascertain what was the real value of the subject-matter in dispute. In Parshottam Jethalal Soni Vs. The Secretary of State for India, that was not possible, and in that case the Court allowed only the minimum advocate''s fee under Appendix E, Rule VI.

7. We think the true rule to be derived from the terms of Appendix E and the decisions upon it, is that the advocate''s fee should be computed on the value of the subject-matter in dispute, where that value can be ascertained by the Taxing Officer from materials on the. record. In the case of an injunction it may frequently be quite impossible to ascertain that value, for example, in a suit for an injunction to restrain interference with a right of way. In such a suit the value of the right of way may bear little relation to the value either of the dominant tenement or of the servient tenement, and the value of the benefit to the dominant tenement and the burden to the servient tenement may not be the same. In such a case it is impossible for the Taxing Officer to say what is the value of the right of way which is in dispute, and in such a case his proper course is to allow the minimum fee. But if the materials on record enable the Taxing Officer to say what is the value of the subject-matter in dispute, he should base the advocate''s fee on that value, subject however to this qualification, that the value of the subject-matter of the suit should never be regarded as greater than the amount necessary for ascertaining the pecuniary jurisdiction of the Court. It may, no doubt, sometimes happen, as was noticed in Jamnadas v. Chandulal (1936) 39 Bom. L.R. 138, that a Second Class Subordinate Judge, whose jurisdiction is limited to Rs. 5,000, may be justified in trying a suit, where the subject-matter really exceeds that value, the suit being one in which the plaintiff has fixed arbitrarily the value for court-fees, which determines the value for jurisdiction. But however that may be, it seems to us that it would be illogical in a suit tried by a Court on the basis that the value of the subject-matter does not exceed Rs. 5,000, to allow a higher figure for the advocate''s fee. The whole procedure would be different, if the value of the subject-matter for jurisdiction

exceeded Rs. 5,000. We are dealing in this case with a second appeal, but if the value of the subject-matter had exceeded Rs. 5,000, there would have been no second appeal; there would have been only a first appeal to this Court. Therefore, we think that the Taxing Officer should never base the advocate''s fee on an amount in excess of the pecuniary jurisdiction of the Court which tried the suit.

8. Now, in this case, as we have already indicated, we think the real subject-matter in dispute is the plaintiff''s right or interest in two-thirds of the suit property. Evidence was given that the suit property had been acquired for sums amounting to Rs. 8,000. In the course of the trial the plaintiff had alleged that the value had risen to Rs. 50,000, and the Taxing Officer has held him to that allegation, and has based the advocate''s fee on that value. Apart from the fact that that exceeds the pecuniary jurisdiction of the Court, we think that it would be hardly fair in ascertaining value for pleader''s fee to hold a party to an allegation as to value made alio intuitu. But we see no reason why the Court should not act on the evidence that the property was acquired for Rs. 8,000, and, at any rate, has not deteriorated in value according to the plaintiff''s own case.

9. We think, therefore, that the advocate''s fee should be based on two-thirds of Rs, 8,000, not exceeding Rs. 5,000. As two-thirds of Rs. 8,000 does exceed Rs. 5,000, the proper order to make is that the advocate''s fee should be based on a value of Rs. 5,000.

10. The applicant must pay the costs of the application.

